The role of the Federal Network Agency

The German rail market is – due to its size of infrastructure and number of customers and its central transit position within Europe – a very interesting target for domestic and foreign train operators. Both the European legal framework and the German Railway reform programme of 1994 encouraged liberalisation of – in 2010 – about 180 railway infrastructures on a network of approximately 75,000 kilometres of rail tracks and 500 service facilities like harbours, shunting yards, terminals and maintenance facilities (the infrastructure managers), enforcing their open access to hundreds of railway undertakings (RUs). Since many of them do both, altogether we count more than 500 infrastructure managers (IMs).

As a result, in 2010, private freight train operators gained a market share of 25% of 107 billion tonne-kilometres and the market share of regional passenger operators competing with DB grew up to 13% of 47 billion passenger-kilometres. Just the competing long range passenger traffic – in Germany open to foreign RUs – stagnated with a market share of less than 1% of 36 billion passenger-kilometres.

The law calls for symmetrical regulation of all infrastructures, the big and the small. This requires the regulator to develop comparable standards and a balanced regulation matching the situation of regulated infrastructures, being far from concentration only on IMs by matter of size. However, undoubtedly most issues dealt with in the past and still crucial in the present affect the incumbent and other large infrastructure managers.

The EU directives call for a national safety authority and a regulator supervising access to the infrastructures. Regulation in Germany has taken place since 1994. Three periods can roughly be defined: between 1994 and 2005, the Federal Railway Authority (Eisenbahn-Bundesamt, EBA) dealt with both tasks. In this period, from 1994 to 2002, the EBA had ex-post regulatory powers and investigation of IMs measures upon complaint of entities entitled to access. From 2002 to 2005, the EBA gained additionally ex-ante regulatory powers (review of IMs measures or regulations) ex-officio to prevent imminent violations of railway law and the right to charge control. Since 1 January 2006, those regulatory powers where shifted to the Federal Network Agency (Bundesnetzagentur (BNetzA)), which since then initiated hundreds of proceedings, some important subject to judicial control. Besides, it needs to be noted, that the Federal Antitrust Agency (Bundeskartellamt) has to deal with all residual situations of market dominance that do not primarily result from the infrastructure monopoly. Comparing regulatory powers throughout Europe, the BNetzA is considered to be a fairly strong regulator after the British ORR. However, experience with the key issues described to follow, revealed potential to make regulation more efficient, well notified by the governing parties mentioning consolidation of regulation in their coalition agreement by the end of 2009.

The BNetzA deals with regulation of the markets of telecommunication, post, energy (electricity, gas) and railway infrastructure, i.e. controlling and regulating a discrimination-free access of railway operators. Hence, downstream consumer markets are not regulated.

The BNetzA’s regulatory activity mainly takes place under the aegis of a President and two Vice Presidents, in four departments regulating said markets and ruling chambers,
deciding most of the conflicts in access issues as well as determining and establishing charges and other relevant details as to access to infrastructures. Ruling chambers decide in judicial proceedings relatively independently, subject to concentrated judicial control by civil or administrative courts. In railway regulation, such ruling chambers are not yet installed. Here, the railway regulation department itself issues administrative acts which can be taken to the administrative courts. Staff of currently 55 is organised in five sections, three of them dealing with operative questions of access to tracks and related services, to service facilities and related services and charges thereof, and two of them scrutinizing fundamental legal and economical questions, the latter including market surveys.

Over the past years, and beyond initial mere access problems, several key issues were discovered and pushed by the BNetzA. Strong standards of regulation thereby could be established, since the legal framework does not describe all the rights and duties of IMs in a comprehensive way.

In a couple of annual control procedures, BNetzA initially established rigid standards as to form and content of network statements and as to the design of contractual relationships. From the regulators standpoint, those have to be clear and transparent and must not contain open, hidden or even potentials of discrimination. BNetzA hereby focused on those clauses having the most significance for competition in the rail market. Especially, the meaning of common technical and general terms and potentials of discrimination should in our view be – after a thorough analysis of probable negative effects on railway undertakings and other holders of access rights – sufficient grounds for a formal objection. However, some of BNetzA’s requests were still contested in court, and on appeal the higher administrative court found that established railway undertakings have ‘relevant insider knowledge’ and therefore need less regulatory protection.

Another issue was the qualification of IM’s operational and technical regulations as access-relevant. BNetzA pursued – till now unsuccessfully – a general qualification of such regulations as network statement or at least a thorough access-relevance test. As a consequence, BNetzA continues collecting data from market experience supporting the objection against said potentials and intransparencies.

Besides, BNetzA supports developing templates of network statements together with large traffic associations, suitable for the vast number of IMs who are legally obliged to issue such statements, hopefully enhancing the acceptance of standards set by these templates.

Other areas meriting scrutiny are the preparation of the annual working time timetable, the treatment of ad hoc path requests and the rules of capacity allocation, including priority rules for resolving conflicting applications. Here, availability and accessibility of data which the IMs use to coordinate conflicting track access applications is lacking and an appropriate amendment of the railway law should be discussed.

On the other hand, framework contracts are negotiated between IMs and RUs to reserve capacity on specific routes for five years or more in order to have long-term investment of either side (e.g. in infrastructure or in rolling stock) amortized. The regulators aim is to prevent the establishment of grandfather rights and to make this kind of capacity reservation equally accessible. Application for framework contracts need to be made before a specific date published by the IMs in order to facilitate the distribution of reserved capacity. In this context, three issues occurred:

- BNetzA succeed in imposing on DN specific duties to inform train operators about all framework contracts already agreed upon. Thus, RUs gain a clearer view of the line capacity that has already been taken.
- However, it was less successful to oblige the incumbent IM to enter into framework contracts for a five years period but enter into force two years after the conclusion of contract. The idea of this legal construction was to enable the contracting entrants to solicitate and secure long-term funding to buy rolling stock showing the long-term capacity reservation agreement to potential investors. On appeal, the higher administrative tribunal denied prospective entrants this legal construction since they were not yet capable to enter the market and reduced the right of access rigidly to entrants capable to offer railway services when contracting. Also here, the dispute might trigger future changes railway legislation.
- Finally, BNetzA succeeded in obliging DB Netz to enter into framework contracts for residual capacity left after initial applications have been served or were cancelled. Such agreements can be concluded at any time.

An important and well-solved issue was the treatment of construction sites. RUs had complained about badly communicated track possessions and line closures by reason of maintenance and renewal work, being forced to halt their services or to use more expensive deviations. BNetzA obliged DB Netz to timely inform about those works and their effects enabling the railway undertakings to amend their timetables and to coordinate service diversions. Consultations between DB Netz and BNetzA over almost a year clarified complicated planning processes. Timely communication of construction sites and their effects on line use will facilitate planning processes for both IMs and RUs. Works not timely communicated will – in addition to abatement of contracted track access charges – not impose higher track access charges for the deviations to be taken. BNetzA finally inserted this compromise in an administrative act. A resulting judicial procedure on the issue of DB Netz’s legal duty to perform this duty could be suspended recently, for the compromise seemed to work well in practice. However, whether it really does or not will have to be carefully scrutinized by BNetzA in the future.

A similar success was reached in making the IMs Operational Control Centres (OCC) more accessible for RUs. DB Netz runs seven regional control centres wherein the railway undertakings legally affiliated to the incumbent under the umbrella of the DB group are present. This triggered criticisms of failed unbundling of DB daughters within the DB group as well as potentials of discrimination in dispatching and coordinating the railway traffic on the lines. The latter criterion is subject to the jurisdiction of BNetzA, the first that of EBA. Both agencies undertook careful observation, visiting the control centres and scrutinizing the dispatching process and related guidelines in daily use. Finally, they both issued acts imposing the duty to provide access to non-affiliated RUs wishing to have staff in the OCCs, and to supply

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other RUs remaining to stay outside with relevant dispatching data in an electronic format. The right to visits of OCCs without prior notice was ascertained.

German railway law subjects service facilities (maintenance facilities, marshalling yards, terminals, fuelling stations) to regulation as well. Likewise network statement, the conditions for access to service facilities are under the regulators scrutiny. German law does not follow the market alternative concept of Art. 5 Dir. 2001/14/EC. As a result, the view of BNetzA is that maintenance facilities are part of the regulated railway infrastructure was challenged in a dispute over the nature of essential facilities. However, the regulators view was approved by the courts so that service facilities need to edit written conditions of use, which are under regulatory control. This obligation still needs to be performed by numerous service facilities. BNetzA will keep track of this due to its task of symmetrical regulation. Whether service facilities need to give access in a concrete case was still left open and will have to be observed in practice.

Access to marshalling yards is especially a challenge where the responsible owner and IM entered into long-term leases with a major RU running the yards and consuming most of the capacity. To secure and improve proper administration of access to other applicants, the process of running the infrastructure was scrutinized in a consultation of the all parties affected and documented in a report, formulating a workable compromise of qualifying track as to their proper function and identifying residual capacity. The same method will be pursued with maintenance facilities, and, later, with the last mile issue of access to terminals. As to terminals, multifunctional logistic centres (‘railports’) and new concepts like ‘gateways’ and ‘cargobeamers’ regulation follows an innovation-friendly approach but needs to prevent the creation of new monopoly structures.

Furthermore, BNetzA has to control, whether track access charges are reasonable and non-discriminatory, and it has to prevent misuse of pricing levels for access of service facilities. The approach of non-discrimination has taken primary concern over the past years, both in terms of individual components of the track access charges being declared void as well as relating to the whole station price system being declared void totally.

A couple of price components were declared void in the past because they were considered as discriminating or lacking legal grounds: a 10%-surcharge on occasional traffics; a discount on parking charges mostly affecting RUs of DB group; cancellation charges; additional factor on less frequented regional lines. The introduction of penalty charges due to violation of a performance regime was enforced; likewise the abatement of charges due to disturbances in railway infrastructure.

The track access price system as a whole is still subject to scrutiny. Likewise, the prices need to be controlled according to their levels and according to cost allocation to different users.

Here the pattern of full costs plus rate of return governs presently. A proper rate of return will have to be computed which will adequately compensate the IM and reflect its risks incurred without pricing train operators out of the market. The full cost base needs to be verified
along the proper railway services rendered. However, it does not allow applying efficiency tests. Therefore, the introduction of an incentive regulation is discussed openly.

An important second issue will be the allocation of incremental costs plus surcharges (amounting in the costs incurred) to the different types of railway operators according to the intensity of their use, and the utilisation of market bearance, i.e. shifting cost allocation to different traffic types or market segments in line with their ability to pay.

Charges control measures affecting regional passenger traffic (station charges and regional factors) have had deep impact on the Laender and smaller regional entities as principal of long-term regional traffic contracts since they are financially geared with tax money according a special allocation formula set by law (Regionalisierungsgesetz). Thus, regulatory changes of charges require reallocation of public subsidies in this respect.

In sharp contrast to its regulatory powers, BNetzA is lacking the legal right of market monitoring. In addition, the IMs and RUs obligation to produce information to the regulator cannot be enforced adequately. To partially fill the gap, BNetzA is successfully conducting market surveys on a voluntary basis, giving insight how many railway undertakings rank a number of problem areas that have to be addressed by the regulator.

Germany’s location as a transit country with interfaces to numerous other infrastructures and the growing traffic in the European rail market, both call for international harmonisation of regulatory regimes to ensure comparable market conditions. The EU-Commission tries to enforce harmonisation in its actions for failing to apply the First Railway Package measures correctly. Interesting to note that regulation herein plays an important role. Likewise, the Recast is driven by the aim to harmonise and to promote the European Railway market by bold centralistic action. However, the European authorities need to determine how much leeway to give member states to interpret and transpose directives, and accordingly, how much freedom to leave national authorities to interpret and construe the transposed national law without readjusting centrally.

In the ‘Working Group of Rail Regulatory Bodies’ the regulators exchange their experiences and report to the EU Commission pursuant to art. 31 of Dir. 2001/14. The IQ-C Group of the Dutch, German, Swiss and Italian Regulator dealing with practical problems along the A-Corridor provide another valuable platform to compare regulatory standards and to develop new approaches. Thus, similar working groups may emerge along other pan-European corridors according to EC Regulation No. 913/2010, or regulators even independently find together promoting the idea of impartial and efficient regulation soon, in turn being fruitful for the discussion in the Working Group.

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**German Profile: BNETZA**

With background studies in Law, and visiting and assistant Professor posts at the Universities of Cologne, Leipzig, Heidelberg, Munich and Frankfurt/Main, Prof. Dr. Karsten Otte became a Professor in 2001 at the University of Mannheim where, since 2006, he has been Associate Professor of the Institute for Transport Law.