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Antitrust law and regulation in the railway transport market. Analysis of the FS/SCNF case

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INTRODUCTION

The objective of this thesis is to analyze in-depth the aspects of antitrust enforcement in the rail transport sector. The first chapter seeks to analyze and provide insightful and different academic stances about the relationship between competition law and regulatory framework in the rail transport sector. The liberalisation process is presented in light of the legislatory and regulatory reform that occurred since the 1990s in the European Union and Italy. An analysis of the opportunities to exploit is made with regard to the main goal of boosting the liberalization process. On the other hand, an acknowledgement of important barriers that might potentially hinder the process of liberalization, especially within the national context. Significant evidence is brought by the study of the experiences of relevant competition and privatisation experiences in the EU, and the related challenges that arose. The UK liberalisation experience is deeply analyzed through the privatisation of British Rail in the late 1990s. Critical aspects to ensure the effective balancing between market efficiency and protection of competition are assessed by considering the antitrust and regulatory enforcement together. In this regard, it is necessary to make an overview of the essential facility doctrine and its rights of access to competitors, the separation between infrastructure management and the provision of rail transport services. Regulations concerning the efficiency of transport services and specific-sector investments are taken into account as well. Chapter 2 seeks to provide a detailed investigation of the most significant cases in the antitrust history of Italy and Europe in the new millennium. The cases are classified based on the different anticompetitive conduct exerted by the infringing party. Concerning the abuses of dominant position, the cases involving Ferrovie dello Stato with GVG and Arenaways, respectively, represent relevant instances of the application of the essential facility doctrine. Concentration cases include the recent proceedings that occurred in 2019 involving Alstom and Siemens. The Rail Cargo case is considered particularly significant and recent (2021) to examine cartels and restrictive agreements. Eventually, Chapter 3 integrates a case study regarding the alleged abuse of dominant position held by Ferrovie dello Stato against the French competitor SNCF. A forecast of a potential decision of the Italian antitrust authority is carried out in relation to the case.

Chapter 1: The relationship between antitrust law and regulation in the rail transport sector

1.1 LIBERALISATION PROCESS

1.1.1 FOUNDATIONS OF EU ANTITRUST LAW: INTRODUCTION TO ARTICLES 101 AND 102 TFEU

The enforcement of antitrust law within the European Union (EU) is carried out by the European Commission and the member states' antitrust national authorities, whose intervention is based on both EU and national regulations. Along with these entities, the national judge can intervene, within the scope of its competencies, to enforce the appropriate national and EU laws in case of anticompetitive infringements by some economic organizations. In a scenario where different entities can enforce EU competition rules, it is essential to ensure that each enforcement is consistent and not discretionary, in order to avoid eventual distortions against the competitive market.[1] Art. 101 of the Treaty on the Functioning of the European Union prohibits anticompetitive agreements and coordinations, thus those kinds of agreements potentially aiming and/or leading to competition restrictions. As stated by art. 101.3, a coordination can be eligible for exemption from the prohibition stated by art.101 itself if that coordination contributes to the creation of overall positive market efficiencies, concerning the production and distribution of goods or the promotion of technical or economic improvements. While generating these efficiencies, the coordination must not lead to restrictions against the involved firm unless they are deemed as unavoidable for accomplishing the same efficiencies. Moreover, to be exempted, the coordination must also avoid offering involved firms the viable conditions to eliminate or hinder competition for a substantial part of the involved products or services. Art. 102 of the TFEU prohibits the abuse of dominant position by any organization.[2] One potential pitfall common to articles 101 and 102 of the TFEU is the lack of a clear distinction between the field of harmful coordination and the scope of abuse of dominance. The previous limit may hinder homogeneity in the antitrust enforcement by the different entities. The intervention of the

[1] Pennisi, Riccardo. *L'Antitrust in Italia tra diritto dell'Unione europea e diritto nazionale* (2015-2.2). **Fogli di lavoro per il Diritto Internazionale**, Pg. 5

[2] Pennisi, Riccardo. *L'Antitrust in Italia tra diritto dell'Unione europea e diritto nazionale* (2015-2.2). **Fogli di lavoro per il Diritto Internazionale**, Pg. 6

Commission and the judge within the EU contributed to compensating for the lack of specificity of the treaties.[3] Within the TFEU, the protection of competition was driven, from the beginning, by a strong sense of community identity, particularly concerning the willingness to foster the EU internal market process and, in this regard, overcome economic, political, and structural barriers to the enhancement of free trade among member states. Specifically, these barriers include cartels, excessively high market concentration leading to an overall increase in price, and a decrease in the products or services quality standards. The rationale of antitrust enforcement lies in the evidence that an effectively competitive market, where the companies desirably act without being subordinated to other companies, and exert an appreciable competitive pressure on each other, is likely beneficial to the final consumers, by generating efficiencies, fostering innovation and technological development, and driving prices down. A potential threat to the competitive asset of the market was identified in concentrations among firms. In 1989, *ex ante* antitrust scrutiny of market concentrations was introduced and, over the years, acted as a prevention measure to ensure the pursuit of correct competitive behaviours by economic players. The scrutiny assesses whether a specific firm may be able to pose a threat against competition by expanding itself via mergers or acquisitions, and reach excessive advantages with respect to its own merits. The Council Regulation (EC) No. 139/2004 introduced the obligation for companies to send a notification letter to the European Commission concerning their eventual involvement in concentrations exceeding specific thresholds for total turnovers.[4] In Italy, a competition law on a national basis was first introduced in 1990, thanks to the "legge n. 287" which established the institution of the Italian antitrust authority, the Autorità Garante della Concorrenza e del Mercato (AGCM). "Legge 287/90" applies in case of non-application of the EU legislation. Inspired by art. 101 and 102 of the TFEU, it draws the discipline for restrictive agreements, abuses of dominant position, and mandates compulsory notification to the antitrust authority in case of concentrations exceeding certain turnover thresholds.[5] The AGCM holds the power to both carry out investigations on antitrust cases and eventually

[3] Pennisi, Riccardo. *L'Antitrust in Italia tra diritto dell'Unione europea e diritto nazionale* (2015-2.2). **Fogli di lavoro per il Diritto Internazionale**, Pg. 8

[4] Pennisi, Riccardo. *L'Antitrust in Italia tra diritto dell'Unione europea e diritto nazionale* (2015-2.2). **Fogli di lavoro per il Diritto Internazionale**, Pg. 7

[5] Pennisi, Riccardo. *L'Antitrust in Italia tra diritto dell'Unione europea e diritto nazionale* (2015-2.2). **Fogli di lavoro per il Diritto Internazionale**, Pg. 10

impose legally binding decisions resulting from those investigations. The administrative court is liable for supervising the AGCM's decisions. Particularly, the TAR of the Lazio region represents the court of first instance, while the Council of State serves as the appellate body.[6]

1.1.2 REFORMS IN ITALY AND THE EU: RAILWAY PACKAGES

The liberalisation process of the Italian rail transport sector began in the late 1990s, with the transposition of numerous EU measures on the opening of the rail markets to competition, through "d.P.R. n. 277/98" and "n. 146/99", and subsequently "d.l. n. 188/03" and "d.lgs. n. 15/2010" (which integrated and updated "d.l. n. 188/03). In particular, it was following the adoption of "d.l. n. 188/03" that the governance structure of the public incumbent Ferrovie dello Stato (FS) was reorganised through a functional and accounting, but not ownership, unbundling between the management of rail infrastructure and the provision of both passenger and freight transport services.

Nowadays, these functions are performed respectively by Rete Ferroviaria Italiana (RFI), Trenitalia, and Trenitalia Cargo. However, the liberalisation approach remained cautious at the time, and the legislator decided to retain public ownership of the entire FS group. Indeed, the share capital of FS, which holds 100% ownership of RFI, Trenitalia, and Trenitalia Cargo, is fully owned by the Italian Ministry of Economy and Finance. According to the national legislation referred to above, the passenger rail transport sector is divided into the regional or local transport service segment and the medium-and-long service segment.[7] The liberalisation and reforms process of the European rail transport sector began in the 1990s, thanks to the Council Directive 91/440/EEC of 1991 on the development of the Community's railways.[8] That directive aimed at providing homogeneity of the EU legislation across the various member states in order to implement an effective integration of an internal EU market with increased efficiencies and a degree of competitiveness in the rail sector. Directive 91/440 was repealed by Directive 2012/34/EU, which placed a stronger emphasis on the vertical unbundling between infrastructure management and rail transport services. Moreover, Directive 2012/34's

[6] Pennisi, Riccardo. *L'Antitrust in Italia tra diritto dell'Unione europea e diritto nazionale* (2015-2.2). **Fogli di lavoro per il Diritto Internazionale**, Pg. 11

[7] Benedettini, Simona; Stagnaro, Carlo. *Il trasporto ferroviario regionale in Italia: tracce di concorrenza?* (2014). **Mercato Concorrenza Regole**, Pg 351

[8] Boitani, Andrea. *Ferrovie: il lato oscuro delle riforme* (2010). **Mercato Concorrenza Regole**, Pg. 221

main goal was originally the promotion of railway companies' operational autonomy, the accounting separation between management-related operations and the provision of railway services, and ensuring the financial sustainability of railway companies. By not accounting for urban, local, and regional transport, the scope of its application remains limited to the rail transport services operated on a national and transnational basis within the European territory. Anyway, the Directive 2012/34 shows several limits, such as the excessively broad autonomy and independence granted to member states in the development and implementation of their policies, as well as the absence of a clear and well-defined framework to deal with antitrust cases. Directive 95/18/EC introduced the licensing in the railway sector, and Directive 95/19/EC focused on the definition of charges for operators willing to get access and make continuous exploitation of the railway infrastructure.[9] In 1996, the European Commission formulated three important objectives to enhance in the context of the railway market. The first strategy focused on the economic and financial sustainability of railway companies and the reduction of public debt. The second concerned the level of openness of the railway market to newcomers and new investments to foster innovation in the sector. The third one dealt with creating and building a great railway network across the EU, according to homogeneous and common technical standards to foster interoperability of the services across different countries.

From the very beginning of the third millennium, the EU Commission adopted a series of railway packages, intended to operationalize the aforementioned strategies. Adopted in 2001, the first EU railway package emphasizes the need to have railway companies grant fair access to the essential facilities, preferably if these firms hold the least possible conflict of interest and with minimal vertical integration within the rail market (namely, the companies owning and/or managing the infrastructure but not operating the services in there). Practically, this condition is unlikely to occur and be effectively implemented, since often the infrastructure management company also holds extensive market shares on rail transport services. An example is FS, the parent company of the FS holding group, which provides, via its subsidiaries, both the management of the infrastructure and the provision of passenger and freight transport services through RFI, Trenitalia, and

[9] Rossi Dal pozzo, Francesco; Rinoldi, Dino. *Il trasporto ferroviario nell'Unione Europea all'alba del terzo millennio* (2020), Pg. 11

Mercitalia Rail, respectively. The first package also clarified the accounting separation by specifically providing the distinction of both total profits and total costs calculations, and concerning the balance sheets among the different companies' businesses. A licensing system was introduced for the undertakings operating in the freight transport market, easing access to facilities in the sector. In order to grant the principle of impartiality and avoid conflicts of interest, it was prohibited for the entities entitled by the member states to release the licenses for operating the rail transport services or contribute to defining the rights of access to facilities. The EU Commission was entitled to control and supervision over eventual cases leading to uncertainties regarding the disposition of licensing measures. To ensure an increased quality level of rail transport services through the enhancement of a more developed competitive system, the implementation of fair and non-discriminatory access conditions to essential facilities for each operator in the market was deemed critical, as well as fair opportunities for the operators to enjoy equal charge conditions. According to the directives of the first package, the member states were entitled to define on a general basis the enforcement of the rights concerning the exploitation of infrastructure by the operators. Each member state was considered liable for the establishment of a national regulatory authority. The key functions of the antitrust authority focus on the surveillance of the competitiveness degree within the railway market. In particular, the authority supervises the allocation of infrastructure capacity, together with the definition of the access charges amount and the costs related to operating the commercial services. Other technical aspects, subject to regulatory supervision, regarded the conditions to provide sufficient guarantees for the operators to be released with a license and the compliance with safety standards rules and legislation.[10] Besides exerting surveillance control, the antitrust administrative and independent body holds the power to apply legally binding enforcement in dealing with disputes involving providers of commercial services and final consumers. Finally, the first package covered the discipline of interoperability in the railway market. The second EU railway package entered into force in 2004. By aiming at enhancing and improving the provisions included in the first package, it aimed at modernizing the freight transport sector by making it more adaptable and sensitive to the substantial process of market

[10] Rossi Dal pozzo, Francesco; Rinoldi, Dino. *Il trasporto ferroviario nell'Unione Europea all'alba del terzo millennio* (2020), Pg. 12

liberalisation. Moreover, the second package further defines the regulatory framework of the safety standards and the rail market interoperability. In this regard, the European Union Agency for Railways was created in order to ensure common and homogenous application of measures across member states concerning safety and interoperability issues. The third EU railway package (2007) introduced regulatory stimulus for the benefits of a greater liberalisation of the EU rail passenger transport market and the interoperability of railway lines across the member states in the perspective of the development of a common European network. However, the enforcement of these measures is significantly restricted by the broad operational margins granted to member states to enjoy exemptions from implementing effective pro-competitive policies. The third package extended its focus on public service obligations (PSO). It strengthened the significance of single railway companies' liabilities and the need to further clarify and standardize them. Thus, a strong emphasis was put on the protection of consumers, particularly passengers relying on the railway commercial services on a daily basis. Some first evidence of a common willingness to set up an integrated European railway system emerged through a formal publication on the matter by the Commission in 2010. The Commission still had to deal with significant barriers to the effective implementation of a competitive system and favourable policies. Many important limitations were (and actually are) posed primarily by most of the national incumbents and their monopolistic behaviours within the rail market. In many cases, the incumbent's inclination to act based exclusively on its own interests implied substantial impediments to competitors' access to the market.

The Commission adopted a broader and forward-looking perspective by considering innovation and technological development as functional to enhance improved rail transport services, and, generally, critical to the development of a consistent EU economic policy. The creation and subsequent expansion of the single European railway area (SERA) was deemed necessary by the commission to promote market competition and boost the attractiveness of the railway market for public and private potential investors. As a consequence, the single European railway area was actually instituted by Directive 2012/34 (recast).[11] The rationale was the enhancement of market interoperability,

[11] Rossi Dal pozzo, Francesco; Rinoldi, Dino. *Il trasporto ferroviario nell'Unione Europea all'alba del terzo millennio* (2020), Pg. 13

competition, and free circulation of passengers and goods. The prerequisites to ensure the effectiveness of the Directive were identified with the national presence of independent and administrative regulatory authorities. Additionally, other key elements included an optimal framework granting rules harmonization for sector-specific investments and a level playing field for each market operator. A harmonization process not only prevents discriminatory and overly opportunistic behaviours (mainly by the incumbent), but also facilitates a long-term and coordinated strategic planning on the investments across different EU countries. Finally, the fourth railway package, adopted in 2016, was driven towards the liberalisation of rail passenger transport (being at a maturity stage). The functions and powers of the European Union Agency for Railways were further reshaped as well. In recent years, sector-specific implementation of policies was particularly fostered by an increased awareness of environmental issues and climate change. In this regard, the railway transport represents a sustainable alternative to the traditional road transport, which has considerable negative externalities for the environment.[12]

Although the evolution of the EU regulatory framework has been particularly slow throughout the years, the reform process in the rail transport sector has been carried on in many different EU countries. Specifically, Sweden was one of the first countries to stimulate the liberalisation process through the separation of the rail transport service management and the infrastructure management, which occurred in 1989, together with the competitive tendering of subsidised services. In the mid-1990s, Great Britain decided to apply a radical structural change to its rail transport sector, through the full privatization of both the companies involved in the production of the rail transport services and those involved in the infrastructure management. Later on, the infrastructure management was returned to the hands of public institutions due to the bankruptcy of the involved private company. Moreover, Great Britain adopted a competition-based structure, allowing for competition over specific segments of the railway network market. One interesting aspect of the UK railway network before nationalization was that the infrastructure was conceived in line with the assumption that the management of infrastructure and the transport services were automatically separated. This means that no transport service operations were originally taken into consideration when building a new

[12] Rossi Dal pozzo, Francesco; Rinoldi, Dino. *Il trasporto ferroviario nell'Unione Europea all'alba del terzo millennio* (2020), Pg. 14

railway. The staple of British railway legislation at the time was represented by the assimilation of railways to roads, which were available for common use by the public. Indeed, it was the common belief that assimilation would foster competition between different operators, thus impeding the creation of monopolies. One of the first British laws concerning the railway sector allowed the owners of the portions of land, adjacent to the railway line, to build connecting lines to the main network, so as to exercise the right to transit with their own locomotives and wagons. Despite this opportunity not being much exploited, the principle of separating infrastructures from operations remained unchanged in British legislation until nationalization. Interestingly, there were some registered cases of owners of the railway lines imposing tolls on third-party trainsets.[13]

In the other EU countries, a limited-reforms approach allowed the former public monopolist to maintain a largely dominant position in the market. Indeed, at the time, the European directives did not impose any obligations for privatization or competitive tendering concerning the allocation of rail transport services to competitors. Despite this lack of obligations for privatization, the main objective of the directives was still to ensure the unbundling of infrastructure and services management. In particular, the aim was to distinguish between the government's function, consisting of the planning and investment decisions for the maintenance and extension of the railway network, and the provision of transport operations. The latter should be carried out on a commercial basis (with time schedules and fares set independently by companies) or with a subsidy charged by the state or local authorities (defined on a contractual basis and predetermined by the public contracting authority). In practice, the problem was that, in many countries, including France, Italy, and Germany, a single public company had control both over the network and the production of services. This raised perplexities over the actual transparency and impartiality of the company in determining the network capacity, as well as the amount of track access charges.

However, the overall outcomes in the most-prone-to-liberalization countries are quite satisfying. In this regard, both the increase in demand met by rail transport and the

[13] Boitani, Andrea; Ramella, Francesco. *Arenaways e altre storie ferroviarie (poco edificanti)* (2012). **Mercato Concorrenza Regole**, Pg 98

positive trend in labor productivity suggest significant improvements in the rail transport sector.[14]

1.1.3 STRENGTHENING OF LIBERALISATION: THE NATIONAL FRAMEWORK AND AN OVERVIEW OF THE POWERS OF PUBLIC AUTHORITIES

Right then, for the rail transport sector, the EU directives liberalised international freight and passenger services while leaving infrastructure and networks under state control. On the other hand, Italian legislation liberalised all types of rail transport services, both freight and passenger, and both at national and international levels.[15] It is important to note that public services are defined as those segments of economic activities which are not subject to liberalisation according to the EU legislation. A clear example of public service is the management of the railway infrastructure. Whereas the economic activities subject to liberalization (according to the EU law) become free market activities, such as rail transport services. Free market activities may exceptionally be considered public services only if specific provisions allow it, based on EU rules and principles. This holds for rail transport services subject to public service obligations, that is, those obligations which the undertaking presumably would not assume if it were solely considering its own commercial interest. Generally, the public service obligations are more intensely regulated by public authorities. This kind of regulation is often contained in specific service contracts, and it is also applied to the determination of prices and tariffs. Regarding free market activities, regulation is more limited, but still applies to the controls over security, fairness, transparency, and antitrust compliance.

Complying with EU liberalization regulations for services is not necessarily enough to ensure a satisfactory level of market competition on a national basis. Liberalisation is an essential and necessary prerequisite for competition, but it cannot stand alone. Considering the national rail transport sector, the market competition level could be considered quite insufficient; only the rail freight sector shows a moderate degree of openness to new market entrants.[16] Guaranteeing a certain level of services liberalisation

[14] Boitani, Andrea; Ramella, Francesco. *Arenaways e altre storie ferroviarie (poco edificanti)* (2012). **Mercato Concorrenza Regole**, Pg 99

[15] D'Alberti, Marco. *La liberalizzazione dei servizi. Passi successivi* (2007). **Economia dei Servizi**, Pg. 10

[16] D'Alberti, Marco. *La liberalizzazione dei servizi. Passi successivi* (2007). **Economia dei Servizi**, Pg. 11

should be of great interest, as it is demonstrated to have a positive impact on the overall economic growth due to the central role of services in today's economies. Indeed, liberalising services, by reducing or removing the barriers to entry for new operators in the market, fosters stronger competition while driving up quality and driving down prices. This ultimately benefits all service users, from businesses to end consumers.[17]

Considering the public authorities and their functions to protect liberalisation and market competition, the independent regulators play a key role: their area of intervention should then be expanded and strengthened. Moreover, the need to ensure the regulators' independence should be applied not only toward regulated companies, but also to governments and politics. Indeed, independent regulation has proven to be particularly effective in removing obstacles and constraints to market opening, which may otherwise be hindered due to political interests and pressures. The strengthening of liberalization, competition, and consumer protection is rooted in the EC treaty and the Italian Constitution. It is also supported by the advocacy, recommendation, and reporting activities carried out by the European Commission.[18]

On a national level, the idea of liberalisation, as proposed by the "Decreto Bersani (DL n. 233/2006)", appears to be more focused on the compliance with and implementation of EU rules concerning the internal market and competition. In addition, greater emphasis is placed on constitutional principles and advocacy activities. The latter consists of proposals, reports, and recommendations made by antitrust and regulatory authorities in order to boost liberalisation and competition. The legislator does not directly implement EU sector-specific regulations, but rather complies with the EU general principles and the Italian constitution, while transforming into law the outcomes of non-binding advocacy activities.[19]

The Italian Competition Authority holds many powers to ensure antitrust compliance. In particular, the "AGCM" can adopt urgent measures, and the non-compliance with these by the companies leads to severe sanctions. Most importantly, in cases of commitments made by companies in situations of suspected restrictive agreements or abuse of dominance, the "AGCM" can make those commitments binding, whether it considers them suitable to eliminate the anticompetitive concerns. The authority can close the

[17] D'Alberti, Marco. *La liberalizzazione dei servizi. Passi successivi* (2007). **Economia dei Servizi**, Pg. 14
[18] D'Alberti, Marco. *La liberalizzazione dei servizi. Passi successivi* (2007). **Economia dei Servizi**, Pg. 14
[19] D'Alberti, Marco. *La liberalizzazione dei servizi. Passi successivi* (2007). **Economia dei Servizi**, Pg. 12

previous proceedings without the need to determine or sanction the violation. As well, the authority can make use of the leniency power, that is, allowing the reduction or even the non-application of sanctions to companies in case the latter agrees to collaborate with the authorities in ascertaining eventual anticompetitive practices. The leniency measures definitely help make antitrust enforcement more effective by strengthening the public authorities' powers and giving companies an incentive to collaborate.[20]

In conclusion, it would be beneficial to initiate, even before the formal transposition of the EU directives, a process that effectively ensures market liberalization in practice, relying on the rules already established by those directives. For this purpose, all the discriminatory measures carried out by public institutions should be abolished (because they are prohibited) in order to ensure free access to the market and its related operations. An example of a discriminatory measure could be denying access to the infrastructure because of one operator's nationality. In addition, all measures that, although not discriminatory, may still hinder access to services and their operations, should be modified or abolished: an example could be those kinds of regulations restricting market entry through overly discretionary decisions by public authorities, as well as regulations that interfere with service operations by directly or indirectly setting minimum or maximum prices. Such non-discriminatory yet restrictive measures should be maintained only if public authorities can demonstrate their necessity, their proportionality to the public interest pursued, or the lack of less restrictive alternatives for economic operators and market exchanges.[21]

1.1.4 CRITICISM OF THE NATIONAL FRAMEWORK

The national framework is characterized by two main critical issues. First, a need for legislation that contains the necessary conditions to effectively ensure liberalisation in the rail transport market. Secondly, the unbundling of certain competences between the state and local institutions, in the complex semi-federal structure outlined by the constitutional reform of 2001. For example, regions should be entitled with the responsibility to program and finance the regional and local rail transport services.

[20] D'Alberti, Marco. *La liberalizzazione dei servizi. Passi successivi* (2007). **Economia dei Servizi**, Pg. 14

[21] D'Alberti, Marco. *La liberalizzazione dei servizi. Passi successivi* (2007). **Economia dei Servizi**, Pg. 14

However, there's a widespread objection to those who advocate stronger liberalization of Italy's railway sector. In line with this, the main concern is that strictly applying EU directives and fostering more competition could actually weaken Italy's "national champion" (also known as Trenitalia). Meanwhile, the other European countries, like France and Germany, appear to do the opposite: their objective is rather to ensure protection to their national rail companies (especially the biggest and strongest ones) on a domestic level while helping them expand abroad at the same time. According to this view, the core issue stems from the "nature" of competition, which tends to focus exclusively on the most profitable market segments (such as high-speed services and regional lines in the richest and urban areas). Thus, competition could potentially erode the profitability of the national champion at a moment when other European champions are instead expanding themselves throughout foreign countries (due to favourable protection within the home market). This objection may appear logically significant, but in reality, it has been used primarily for political purposes over the years due to its strong appeal to the main idea of protecting the national interests. Indeed, it is common to associate the "national interest" with that of the bigger Italian corporations, which are perceived as the main symbol of national pride and thus considered worth defending. This rationale is reflected in the FS's organizational structure, where no private shareholder is involved, therefore preserving the public interest "unspoiled" from private intrusions. On the one hand, it's certainly true that, in many cases, it is often difficult to reconcile big private companies' profitability interests with the need to provide adequate public services. On the other hand, there's no logical foundation to state that the public monopolist is always a guarantee of welfare maximiser. As evidence, Trenitalia surely did not act as a welfare maximiser by effectively hindering Arenaways' possibility to access the market and providing high-quality rail transport services for the benefit of the collectivity.

Rather than fiercely defending the national champion from a regulatory standpoint, thereby leading to a concrete risk of minimizing domestic market competition, a credible alternative would be to push it to test its competitiveness abroad as well. On the contrary, allowing the main operator to remain complacent within the domestic market is likely to lead to a decline in the overall quality of the services provided on a national basis. Perhaps the most effective way to boost the monopolist's attractiveness is to push it toward

extending its operations internationally. This process was carried out particularly in Germany toward Deutsche Bahn (DB), allowing liberalization to make significant improvements, especially compared to other EU countries such as France, Spain, and Italy (in the field of freight and regional rail transport). The opportunities of internationalization can be greatly exploited by those companies that are least protected by domestic regulations and, thus, more incentivized to seek growth in foreign markets.[22] Although not operating in the railway sector, ENEL followed a similar strategy: it decided to intensify international expansion following antitrust constraints, which required the company to divest several national power generation plants.

In the quality of FS and Trenitalia's sole shareholder, the Minister of Economy and Finance holds the power to adopt and implement a dynamic international strategy for its national champion. The state's role, exercised through the Ministry of Economy, should remain limited to owner and industrial strategist. Indeed, it should not have any interference with market laws and regulations, nor influence Trenitalia/FS decisions in a discretionary manner, potentially aiming to bypass the regulations applying to all market players. A reduction in the market shares held by the dominant firm in the domestic market, that is, a reduction in its dominant position, would be highly beneficial to promote internal competition, just as a pro-competitive regulatory framework would. Similar to ENEL, Trenitalia could be required to divest some of its national assets, including rolling stock, depots, and logistic terminals.[23] On the one side, the assets divestment would generate liquidity for Trenitalia. On the other side, it would boost market competition by favoring the entry of new and smaller competitors in the market, allowing them to secure high-quality rolling stock and offer competitive services to consumers. Moreover, given that the monolist would possess fewer assets, its dominant position would be reduced to the benefit of competition.

Rather than obstructing liberalization and regulatory reform, the legislator's primary role should be to support both the public shareholder (the State) and the national champion by opting for a liberalization process acceleration strategy. As long as FS and Trenitalia remain publicly owned and no substantial privatization occurs, the Ministry of Economy and Finance must fully embrace its role as an active shareholder. This implies guiding

[22] Boitani, Andrea. *Ferrovie: il lato oscuro delle riforme* (2010). **Mercato Concorrenza Regole**, Pg 238

[23] Boitani, Andrea. *Ferrovie: il lato oscuro delle riforme* (2010). **Mercato Concorrenza Regole**, Pg 239

FS's and Trenitalia's strategies in fulfilling the public interest and with a long-term, strategic vision rather than a clientelist approach. A major obstacle to complying with this goal is the tendency to view public ownership as an inconvenient burden, or even worse, as an opportunity for political favoritism and the discretionary allocation of positions within the company.[24]

1.1.5 EXPERIENCES OF COMPETITION AND PRIVATISATION IN THE EU: ISSUES AND CHALLENGES

The railway sector generally shows less liberalization and privatisation than the other utilities. The European rail networks are mostly organized within national boundaries and characterized by a scarce interconnection between different countries. This further makes it more difficult to meet the increasing demand for cross-border transport of both freight and passengers. The main causes are the continuous delays of the liberalization process of the rail industry, together with the fact that the railway systems of the various EU countries are often technically incompatible (leading to low interoperability). Moreover, the investments in the railway industry (specifically in infrastructure, locomotives, and train personnel) are highly costly and hard to recover in case of failure or demand shifts within the national market. The low degree of competition in the market makes it more challenging to provide incentives to the few operators to improve the overall quality of the commercial services provided. Competition is needed to address the previous problem, which is further exacerbated by the excessive dominance of the monopolistic powers, along with the poor management driven by political interference.[25] In this sense, empirical studies underlined a direct correlation between cost-to-revenue efficiency and the degree of autonomy and independence of railway companies from the State, particularly for tariff decisions and the quality level of services.[26] Among the others, the market shares of new entrants are still not satisfactory to promote an appreciable competition level towards the established operators.

Sweden and Germany were the first countries in the EU to implement market reforms (in 1989 and 1994, respectively), allowing the entry of new operators. From a regulatory

[24] Boitani, Andrea. *Ferrovie: il lato oscuro delle riforme* (2010). **Mercato Concorrenza Regole**, Pg 238

[25] Macchiati, Alfredo; Cesarini, Andrea; Mallus, Arianna; Massimiano, Marco. *Concorrenza e privatizzazione nel settore ferroviario in Europa. Problemi aperti e prospettive* (2007). **Mercato Concorrenza Regole**, Pg. 33

[26] Macchiati, Alfredo; Cesarini, Andrea; Mallus, Arianna; Massimiano, Marco. *Concorrenza e privatizzazione nel settore ferroviario in Europa. Problemi aperti e prospettive* (2007). **Mercato Concorrenza Regole**, Pg. 33

standpoint, the liberalization of the Italian rail sector began in 2001, when FS was no longer granted the concession to operate transport services. These services are now carried out by Trenitalia under a licensing regime. The market shares, related to the national market, do not provide enough accuracy of competition intensity in the cross-border routes, where profits are larger and incumbent operators are not necessarily competitive. Starting in the early 2000s, the most important operators in the EU began to implement an internationalization strategy by creating joint ventures with foreign partners. The main goal was to get access to foreign networks and foster international trade. One example: between 1999 and 2001, Deutsche Bahn merged with a Dutch and Danish company, giving rise to Rail Union, 98% controlled by DB.[27] The following depicts some of the factors contributing to the difference in competition level between the freight market and the passenger rail transport, especially referring to the medium and long-distance services. First, the initial investment required to enter the freight market is often limited to the purchase of locomotives; sometimes, those are provided even by customers themselves. Furthermore, sourcing rolling stock from the second-hand market is a viable option, while in the case of passenger services, the situation is more problematic due to the strong correlation between the age of coaches and perceived service performance. The customer base is much broader in the passenger services, and it is not possible to formalize contractual relationships before making the necessary investment. Not least, the timeframe required for accessing the market plays in favor of the freight services rather than the passenger ones.[28]

A correlation has been observed between the separation of infrastructure management and service operations (this primarily occurred in Sweden and the UK) and the development of competition in the sector. By contrast, FS and DB Holding are both managers of the respective national networks and providers of commercial services.[29] In any case, the competition for providing the service is still secured and mainly concerns the railway track allocation and the track access charges.[30]

[27] Macchiati, Alfredo; Cesarini, Andrea; Mallus, Arianna; Massimiano, Marco. *Concorrenza e privatizzazione nel settore ferroviario in Europa. Problemi aperti e prospettive* (2007). **Mercato Concorrenza Regole**, Pg. 35
[28] Macchiati, Alfredo; Cesarini, Andrea; Mallus, Arianna; Massimiano, Marco. *Concorrenza e privatizzazione nel settore ferroviario in Europa. Problemi aperti e prospettive* (2007). **Mercato Concorrenza Regole**, Pg. 36
[29] Macchiati, Alfredo; Cesarini, Andrea; Mallus, Arianna; Massimiano, Marco. *Concorrenza e privatizzazione nel settore ferroviario in Europa. Problemi aperti e prospettive* (2007). **Mercato Concorrenza Regole**, Pg. 37
[30] Macchiati, Alfredo; Cesarini, Andrea; Mallus, Arianna; Massimiano, Marco. *Concorrenza e privatizzazione nel settore ferroviario in Europa. Problemi aperti e prospettive* (2007). **Mercato Concorrenza Regole**, Pg. 38

The EU experience with subsidies shows evidence that the rail transport sector often struggles to reach economic sustainability. The amount of subsidies has remained substantial over the years, even in the most liberalized systems, such as those of Sweden and the UK.[31] Neither is there evidence that high tariffs necessarily lead to a low level of subsidies.

Cases of incumbents' privatization are quite rare in Europe, except for the UK. Beyond considering the pros and cons regarding the unbundling in the rail sector, it is important to note that, in any case, the network must be sustained by substantial subsidies.[32]

PRIVATISATION OF BRITISH RAIL

The privatisation of British Rail (BR), which occurred in 1996, ultimately led to a vertical unbundling between the infrastructure manager and the train operating companies in the UK, and between the latter and the rolling stock companies. By assigning 25 franchising contracts through a public tendering, the rationale behind the privatisation was to introduce competition in the passenger rail sector. The problem was that franchising could not entirely eradicate the possibility of monopolistic positions in limited territory segments. This could undermine the competitor's access rights to that portion of territory, thus preventing them from providing uniform services throughout the country. Another key limitation was that the minimization of subsidies was chosen as the criterion for assigning franchising contracts. The operators requiring the lower amount of subsidies were assigned the contracts, while in the case of remunerative franchises, those securing the state the maximum amount of payments. In this way, one operator could originally offer extremely low tariffs to win the tender. Due to the unsustainable bids they submitted, the same operators would minimize the costs (causing a deterioration in the services), then ask the state for more funds to operate the services. Hence, no measures to prevent failures, nor a full risk transfer from the state to the private operators, were implemented. A reduction of market competition was subsequently implemented so as to avoid the risk that franchisers would ask for additional increases in subsidies. In the end, the transport operators were allowed to compete with one another when multiple routes were available

[31] Macchiati, Alfredo; Cesarini, Andrea; Mallus, Arianna; Massimiano, Marco. *Concorrenza e privatizzazione nel settore ferroviario in Europa. Problemi aperti e prospettive* (2007). **Mercato Concorrenza Regole**, Pg. 39

[32] Macchiati, Alfredo; Cesarini, Andrea; Mallus, Arianna; Massimiano, Marco. *Concorrenza e privatizzazione nel settore ferroviario in Europa. Problemi aperti e prospettive* (2007). **Mercato Concorrenza Regole**, Pg. 40

to reach the same destination.[33] However, the amount of subsidies granted to private operators significantly increased. This outcome actually derived from the gap between the cost reduction for the private operators, due to the strong competitive pressure at the time of the tenders, and the greater amount of investments due to the increasing need for both structural and rolling stock renewal over time. Moreover, the increase in subsidies was fostered by a further increase in tariffs, along with the growth in consumers' demand for service extension.[34] Since the regulatory framework did not outline any remuneration for the operators given the amount of their investments, Railtrack (the UK infrastructure manager at that time) was not incentivized to invest in the development of the railway network. Rather, its investments were limited to the maintenance of the already existing lines, even in an inadequate way, taking into account the ongoing increase in rail traffic.[35] The privatisation experience in the UK could be generally considered as negative for market competition and consumer protection. The undesirable aspects were notably a weak development of competition, the distribution of an excessive amount of subsidies by the state, a lack of regulation capable of balancing the market externalities with the need for economic sustainability, and medium-high tariffs. The only positive aspect was the demand increase for transportation services, suggesting that private entities comply better with the market needs.[36]

1.2 BALANCING MARKET EFFICIENCY AND COMPETITION PROTECTION

1.2.1 RIGHT OF ACCESS TO ESSENTIAL FACILITIES

In 1989, the well-known American entrepreneur Jay Gould took control of the railway lines connecting the city of Saint Louis and East Saint Louis through the Mississippi River. Being already the owner of many of the major railway companies operating in that area, Gould would have also gained access to essential facilities to cross the river. By

[33] Macchiati, Alfredo; Cesarini, Andrea; Mallus, Arianna; Massimiano, Marco. *Concorrenza e privatizzazione nel settore ferroviario in Europa. Problemi aperti e prospettive* (2007). **Mercato Concorrenza Regole**, Pg. 41
[34] Macchiati, Alfredo; Cesarini, Andrea; Mallus, Arianna; Massimiano, Marco. *Concorrenza e privatizzazione nel settore ferroviario in Europa. Problemi aperti e prospettive* (2007). **Mercato Concorrenza Regole**, Pg. 42
[35] Macchiati, Alfredo; Cesarini, Andrea; Mallus, Arianna; Massimiano, Marco. *Concorrenza e privatizzazione nel settore ferroviario in Europa. Problemi aperti e prospettive* (2007). **Mercato Concorrenza Regole**, Pg. 43
[36] Macchiati, Alfredo; Cesarini, Andrea; Mallus, Arianna; Massimiano, Marco. *Concorrenza e privatizzazione nel settore ferroviario in Europa. Problemi aperti e prospettive* (2007). **Mercato Concorrenza Regole**, Pg. 45

bringing together the Terminal Railroad Association (the facility management company) and the enterprises operating the services, this operation could have substantially weakened the competitors by hindering their access to the Saint Louis area's junctions.[37] The US Supreme Court intervened in the case by stating Gould's operation was legitimate. On its own, Gould believed that a centralized and unique management of the network in the area could have strengthened economies of scale and, thus, reduced the operating costs for the operators while boosting the efficiency of the services for both operators and consumers. At the same time, the Supreme Court ordered that competitors of the Terminal Railroad Association were offered viable conditions to make use of the network lines owned by the association. The competitors could then enjoy access to railway infrastructures under a fee payment and the same conditions as Gould's companies. This is a representative case of application of the essential facility doctrine, which represents one of the staples of antitrust law both in the US and, as later introduced, in Europe and Italy.[38] The EU Commission defined the essential facilities as those infrastructures or networks that are essential to serve the service users, enable the competitors to carry out their activities, and cannot be adequately and easily replicated. According to the EU Court of Justice, a facility is essential if the refusal to grant its access would make the proposed services unfeasible to implement for the operators. It is important to clarify that the essentiality of a facility relies on the possibility to serve a significant percentage of users, rather than the access to minor niches within the market. The doctrine significantly applies to the rail transport sector due to the latter's main characteristics. In terms of public utility, the rail market is often considered to be among the so-called "natural monopolies". Indeed, the replicability of the railway network is technically and economically very difficult to implement, and not even feasible in many cases. So, since the facilities are characterized by scarcity and "uniqueness", the owners (a single company in most cases) hold significant market power, often leveraged to the detriment of effective competition. Since the 1980s, the EU laws and regulations have identified the vertical unbundling between facilities and service markets as the solution to make the railway sector more sensitive to competition dynamics. While maintaining

[37] Conticelli, Martina. *I diritti di accesso e di interconnessione nella nuova disciplina dei pubblici servizi a rete* (2001). **Mercato Concorrenza Regole**, Pg. 369.
[38] Conticelli, Martina. *I diritti di accesso e di interconnessione nella nuova disciplina dei pubblici servizi a rete* (2001). **Mercato Concorrenza Regole**, Pg. 370.

exclusive rights on railway networks, the liberalization of the services occurred thanks to the elimination of legal barriers concerning market entry. Hence, the vertical separation between network and services partially led to the liberalization of network industries. However, there is still the problem of ensuring that this liberalization becomes effectively sustainable and accessible for all market operators. A condition is to guarantee the operators (mainly the new entrants) freedom of accessing the market at viable conditions to implement their commercial or public interests. Major risks arise when the capability to meet the access demand for services is hindered by the inaccessibility to the main facilities for many operators. Although the rail services provision could be potentially offered by various competitors, only the established ones are potentially able to exploit the networks. Even if all operators managed to obtain the operating license, a bottleneck phenomenon is likely to occur. In other words, if the capacity of the facility is not enough, many operators could not manage to offer their activities throughout an appreciable area. In this sense, eliminating entry legal barriers is a necessary but not a sufficient action to ensure operational viability in the sector. Reasonably, the principle of liberalization of public utilities should push regulations towards guaranteeing the rights of access and interconnection to main networks.[39] The main goal behind the essential facilities doctrine is to ensure the sharing of essential resources, such as a particular type of locomotive or specific networks, whenever those resources are not sufficiently available to many providers within the market. A duty to share can be imposed on the rail network owner in order to guarantee the right of access and interconnection to competitors as well. It allows providers to overcome the incompatibility between the freedom of each company to implement their initiatives and the scarcity of available networks.[40]

The right of access to the network (or any other resource) is defined as the right of the competitors to exploit a facility; this right is exercised towards the owner or the manager of the infrastructure. The promotion of market competition on a large scale between multiple operators on the same facility is a necessary prerequisite for access and interoperability rights to have a positive impact on the liberalization of the services.[41] In

[39] Conticelli, Martina. *I diritti di accesso e di interconnessione nella nuova disciplina dei pubblici servizi a rete* (2001). **Mercato Concorrenza Regole**, Pg. 371.
[40] Conticelli, Martina. *I diritti di accesso e di interconnessione nella nuova disciplina dei pubblici servizi a rete* (2001). **Mercato Concorrenza Regole**, Pg. 372.
[41] Conticelli, Martina. *I diritti di accesso e di interconnessione nella nuova disciplina dei pubblici servizi a rete* (2001). **Mercato Concorrenza Regole**, Pg. 373.

Italy, FS holds a monopolistic power over the facilities' ownership and management, and the same holds for many other European countries. Given these circumstances, it is not enough just to ensure the elimination of the legal barriers to market entry. It is also necessary to provide effective solutions to deal with structural issues within the rail sector; for instance, the high amount of investments for newcomers and the difficulties in securing technically valuable rolling stock. The right of access itself is particularly relevant in the initial phase of market opening to competition, and subsequently, partial liberalization, but then it can no longer stand alone in implementing an effective liberalization.[42] There is an absolute need for guarantees against situations where the incumbent might show itself unwilling to provide interoperability between different technical and geographical networks. In this case, newcomers would be cut off the market due to the impossibility of adequately serving their customers (either passengers or companies) and interacting with the incumbent's main networks, usually the richest and trafficked ones. The right of interconnection is defined as the right of one operator to connect its network (or the one to get access to) with that of another operator. Defined as the connection between multiple networks, interoperability indeed requires several existing networks in the train map to be implemented. The main limitation is not the limited number of railway lines across the territory but rather the isolation of many of them from the mainstream network. Without the connection to it, many lines essentially become unusable and useless. The interoperability plays a significant role given the condition that each provider, on a national level, can build its own infrastructure on the map. Thus, the problem concerns the modalities of enforcing the right of interconnection, rather than the existence of the right itself. On an international level, the right of interoperability presents few competition concerns, as it is more oriented to ensure technical conformity among the systems of the various countries (and there is not such an effective competition between multiple operators as there is on a national basis).[43] Indeed, interconnection among cross-border networks constitutes a key tool for the different monopolists to gain an advantage from international cooperation agreements with other monopolists. Otherwise, it could be challenging for a monopolist to gain access

[42] Conticelli, Martina. *I diritti di accesso e di interconnessione nella nuova disciplina dei pubblici servizi a rete* (2001). **Mercato Concorrenza Regole**, Pg. 374.
[43] Conticelli, Martina. *I diritti di accesso e di interconnessione nella nuova disciplina dei pubblici servizi a rete* (2001). **Mercato Concorrenza Regole**, Pg. 375.

to operate in an area subject to another monopolist's control. The essential facility doctrine should be assessed by taking into account whether a resource is effectively available on the market or not. Considering the Italian case, FS is both the owner of the railway network in Italy and the key provider of commercial passenger services. Therefore, the risk is that Trenitalia uses its position of power in the market to pursue exclusively its interests and gain advantages by excluding newcomers from the rail transport market and creating substantial risks to market competition. From a structural standpoint, it is possible to implement alternative solutions, such as the corporate and structural unbundling between the service provider and the facilities owner, or just the accounting unbundling of the different activities. Specifically, the first solution is undoubtedly more disruptive, as it requires two separate entities, each with distinct proprietorship, management, and financial autonomy, to manage the network and the services, respectively.[44] Although unlikely to be implemented, the most effective solution could be to assign network management to an independent entity, separate from any national transport services provider, so as to minimize the risks of conflicts of interest. By now, it is necessary to enforce the role and control of the antitrust authority, Autorità Garante della Concorrenza sul Mercato (AGCM), particularly towards the national incumbent, Trenitalia, which faced several antitrust investigations for anticompetitive behaviours during its life.[45]

1.2.2 RELATIONSHIP BETWEEN ANTITRUST AND REGULATION: ESSENTIAL FACILITIES

In order to guarantee the right of access to essential facilities, various kinds of solutions can be implemented. First, opting for a regulation-oriented remedy allows the enforcement of measures defining *ex ante* obligations for the incumbent to ensure effective access and interoperability for competitors, along with specific rights of the providers. If certain obligations or rights are not fully respected, there must be room for *ex post* intervention by the antitrust authority, which should act as a deterrent in the event of the incumbent's refusal to comply with the regulation. However, antitrust cannot stand

[44] Conticelli, Martina. *I diritti di accesso e di interconnessione nella nuova disciplina dei pubblici servizi a rete* (2001). **Mercato Concorrenza Regole**, Pg. 376.
[45] Conticelli, Martina. *I diritti di accesso e di interconnessione nella nuova disciplina dei pubblici servizi a rete* (2001). **Mercato Concorrenza Regole**, Pg. 387.

alone as a guarantee for effective market competition. In any case, the established companies hold a solid competitive advantage compared to new entrants, which often have to struggle to secure essential resources to operate proactively in the market.[46] At this point, it is of particular interest to define the relationship between the application of the essential facility doctrine (in the context of a liberalization process) and the sector-specific regulation. In doing this, it is necessary to establish whether there is an actual need to make the antitrust law consistently complementary to sector-specific regulation. Practically, the antitrust law is beneficial to apply in the following situations: first, when some public utilities, including the rail sector, do not benefit from an official right of access to essential facilities and interoperability. Moreover, antitrust laws can work as an effective remedy in case the application of regulation is not providing the expected outcomes (in terms of actual enhancement of competitive conditions in the market). Once the failure of sector-specific regulation to comply with the previous goal is ascertained, antitrust enforcement aims to act as a guarantee for each provider to enjoy access to the market and connection of its services to the main network. Moreover, antitrust enforcement is further enhanced by the "l.n. 287/1990" which states that the existence of a sector-specific regulation (specific to the right of access to essential facilities in public utilities) does not hinder in any way the antitrust's capacity to enforce its intervention against both possible abuses of dominant position by the incumbents and regulation's violation. According to the " l.n. 481/1995", the Autorità di Regolazione dei Trasporti (ART), in the quality of independent sector-specific authority, is obliged to communicate to the AGCM any violations against antitrust and competition laws.

Vice versa, the question is posed on the effectiveness of a regulation concerning the access to facilities, given that the antitrust itself already qualifies the refusal to grant access to the same facilities as an abuse of dominant position.[47] Again, it is necessary to assess whether antitrust laws can substitute for sector-specific regulation in network public services. In the initial phase, the opening of the rail market implied a prevalence of the regulatory framework over competition laws. Indeed, referring to the right of access to facilities and interoperability, a greater need for regulation was assessed in the areas

[46] Conticelli, Martina. *I diritti di accesso e di interconnessione nella nuova disciplina dei pubblici servizi a rete* (2001). **Mercato Concorrenza Regole**, Pg. 372.

[47] Conticelli, Martina. *I diritti di accesso e di interconnessione nella nuova disciplina dei pubblici servizi a rete* (2001). **Mercato Concorrenza Regole**, Pg. 399.

where liberalization was more developed. The competition among different operators providing rail transport services is not sufficient to ensure that these services are offered by each operator under parity conditions. Although operators are formally free to enter the market, they are still strictly dependent on the facilities controlled by the monopolist to operate the services. The monopolist could leverage its market position to manage the network exclusively to pursue its own interests and discourage competitors from offering competitive performance. Assuming that a competitive mechanism for allocating infrastructure usage rights is established, the intervention of regulation theoretically may no longer be necessary, as the right of access to facilities and interoperability has been ensured, along with a level playing field. In such a context, sector-specific regulation would shift its goal towards ensuring consumers' protection through public service obligations, rather than specifically regulating the sector. Concerning the universal service, it can be stated that the private interest serves as the primary objective for regulatory intervention by public authorities. Once parity market conditions are established, it could be valuable to leave room primarily for antitrust enforcement, with the ultimate goal of favorising a competitive system and not exclusively the competitors as a single, individual entity.

Frankly speaking, the full contestability of public services still remains a highly challenging goal to achieve.[48] The market opening to competition of public network services could require the application of an asymmetric regulation, necessary to foster competitive conditions, at least in an initial phase. This would enable newcomers to enjoy more favourable competitive conditions compared to the established operators, by acknowledging the evidence that the latter do possess non-negligible and objective competitive advantages (such as the first-mover advantage). Indeed, it is essential to grant newcomers the operability of the services they aim to offer (at least on a theoretical basis). Access to essential facilities represents a critical right, particularly in the Italian rail transport sector, where FS exerts both one of the most competitive rail transport services on the national market and a dominant control over the national network. Given this condition of objective dominance in the market, eventual new entrants could be discouraged from entering the market in principle, even in the absence of actual abuses

[48] Conticelli, Martina. *I diritti di accesso e di interconnessione nella nuova disciplina dei pubblici servizi a rete* (2001). **Mercato Concorrenza Regole**, Pg. 400.

of dominance perpetrated by the incumbent. Moreover, competition protection, exercised by the AGCM through *ex post* interventions, could not be sufficient to ensure a progressive market liberalization. Indeed, the core issue does not lie primarily in the institution of a repressive system against anticompetitive behaviours, but rather in the introduction of effective competitive mechanisms. It might happen that antitrust intervention is not enforced on time to secure its effectiveness, causing significant competitive damages to the market structure.[49] The FS and Arenaway case is representative in this sense.

In the quality of non-replicable facilities, the railway network assumes public importance. Given the presence in the market of entities acting as facility owners and service providers at the same time, a genuine access market for competitors is unlikely to occur spontaneously. Hence, it must be promoted via regulatory reforms. The prospect of regulatory obligations, tied to holding a dominant position, might lead some incumbents to shift their operational strategy towards economically inefficient approaches, just to safeguard their own activities.[50] In practice, some facility owners, in dealing with eventual property limitation risks imposed by regulation, may choose to drastically reduce investments in their infrastructure, causing negative externalities on the overall service performance to the final consumer. In such a case, antitrust enforcement on property rights might end up hindering the achievement of the goal they actually seek to achieve, namely, economic efficiency. At this point, regulatory intervention is essential in order to ensure the right balance between competition protection and efficiency of the services. Another critical element concerns the charges related to access to facilities and interoperability. According to the EU and national legislation, the charge for providers must be proportionate to the costs that the network manager faces in sharing its infrastructure with third-party providers, allowing them to effectively operate the services. Within a competitive environment, it is not unlikely that a monopolistic network management, such as in the case of FS, might lead to an increase in access to facilities and interoperability-related charges, with negative impacts on the likelihood of new entrants on the market. The presence of an independent authority (the ART in Italy),

[49] Conticelli, Martina. *I diritti di accesso e di interconnessione nella nuova disciplina dei pubblici servizi a rete* (2001). **Mercato Concorrenza Regole**, Pg. 401.

[50] Conticelli, Martina. *I diritti di accesso e di interconnessione nella nuova disciplina dei pubblici servizi a rete* (2001). **Mercato Concorrenza Regole**, Pg. 402.

controlling the fairness of access and interoperability charges for providers, enables new entrants in the market, along with fair remunerations to investors for the facilities. Moreover, setting high-level access and low-level interoperability charges fosters investments in the construction of new railway lines.

In the view of a progressive liberalization process, the ideal solution is the adoption of both regulation and antitrust enforcement. Indeed, the role of regulation should be complementary to antitrust laws, concerning the elimination of exclusive and special rights (reserved only to a minor niche of market operators), and thus granting fair access to essential facilities. On the one side, regulation mainly acts *ex ante* as a promoter of a competitive system, while also promoting economic and social efficiency objectives.[51] On the other side, antitrust and competition law act *ex post* as a guarantor protecting the competitive system against eventual harmful behaviours like refusal to grant access to facilities. Accordingly, antitrust plays a safeguarding role and cannot be subject to the promotion of any other purposes, except for market protection. Regulation should be theoretically conceived as a necessary but still temporary solution to the achievement of an appreciable degree of market competition. In reality, without "external" regulatory support, markets alone are not capable of autonomously achieving full and effective contestability. Despite promoting different purposes, regulatory and antitrust interventions managed to coexist harmoniously over the years. The AGCM, therefore, secured invaluable support in adjusting regulatory failures to provide competitive market conditions. For example, antitrust provisions assessing the abuse of dominant position may successfully balance the eventual absence of specific regulation granting access to facilities. The optimal regulatory application should ideally be oriented towards the elimination of the necessity to implement competition rules. Moreover, regulation should be tailored to the promotion of competition, as long as it does not impose any kind of market distortion on competition. Access to facilities and networks' interoperability rights are assessed as both an integral part of the liberalization process and a means to the

[51] Conticelli, Martina. *I diritti di accesso e di interconnessione nella nuova disciplina dei pubblici servizi a rete* (2001). **Mercato Concorrenza Regole**, Pg. 403.

freedom of economic initiative.[52] These rights are critical to ensure the effectiveness of liberalization, which cannot occur in the absence of them. [53]

1.2.3 SEPARATION BETWEEN NETWORK MANAGEMENT AND TRANSPORT SERVICE OPERATIONS

The core matter about redefining the rail transport sector towards a vertically integrated market structure is to determine the optimal degree of unbundling between network management and transport service operations. The rationale behind the unbundling of the railway sector lies in promoting transport service competition and, subsequently, enabling a reduction of the commercial service-related prices. This ultimately allows final consumers to enjoy an overall improvement of their experience, thus raising their reliance on the sector's performance and credibility. The critical issue remains that a structural unbundling, especially in the case of ownership unbundling, may hinder the incentives of the network's owner to facilitate access to its own department or some parent or affiliated company operating the services. [54] In evaluating the critical issues of the unbundling process, the network management company might have a lower interest in fostering the investments in the network for the benefit of the operators. The "separated" company would not operate the commercial transport services, and thus it would be less sensitive to ensuring both the economic efficiency (cost and profitability performance) for the operators in the network. In evaluating the amount of investments, the same network management company might just consider the amount reflecting the demand and willingness to pay to access the facility, rather than the optimal amount that effectively ensures profitability for the operators as well as substantial benefits to the final consumer. The previous problem specifically applies to the public utilities, like the railway sector, where the demand to access facilities is inelastic with respect to the quality of the facility itself. The low elasticity of demand stems from the fact that, even in the case of poor quality standards of the facilities, these still hold an essential feature, meaning that, in

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[52] Conticelli, Martina. *I diritti di accesso e di interconnessione nella nuova disciplina dei pubblici servizi a rete* (2001). **Mercato Concorrenza Regole**, Pg. 404.

[43] Conticelli, Martina. *I diritti di accesso e di interconnessione nella nuova disciplina dei pubblici servizi a rete* (2001). **Mercato Concorrenza Regole**, Pg. 405.

[44] Macchiati, Alfredo; Cesarini, Andrea; Mallus, Arianna; Massimiano, Marco. *Concorrenza e privatizzazione nel settore ferroviario in Europa. Problemi aperti e prospettive* (2007). **Mercato Concorrenza Regole**, Pg. 14.

[44] Macchiati, Alfredo; Cesarini, Andrea; Mallus, Arianna; Massimiano, Marco. *Concorrenza e privatizzazione nel settore ferroviario in Europa. Problemi aperti e prospettive* (2007). **Mercato Concorrenza Regole**, Pg. 14.

order to operate the services, operators must make use of those, because, as it often occurs in the railway sector, they have no feasible alternatives.

The reduction of the investments may result from regulatory decisions on access to facilities charges and which may not adequately take into account the actual performance fostered by new investments. Considering the case of excessively low charges on access to facilities imposed by regulation, investing in new and/or better facilities will unlikely generate sufficient returns for the infrastructure management company because of the too low charges. As a consequence, that company will not be incentivized to make new investments. For the unbundling process to be efficient, coordination among different market players (not an anticompetitive one, strategic only) is necessary to grant continuity of the investments provided. On the one hand, the rail infrastructure manager should assess the demand for the services to make sure that the amount of investments is well-balanced. On the other hand, the service providers should acknowledge eventual technological and technical innovations made by the infrastructure manager on the network, to decide upon investments for rolling stock provision.[55]

1.2.4 GUARANTEES OF TRANSPORT OPERATIONS EFFICIENCY: REGULATORY ASPECTS

One of the key issues of the regulatory framework concerns ensuring the quality of the services provided to final consumers. In the absence of an efficient pro-competitive mechanism in the market, the regulatory responsibility should be focused on protecting the consumers against possible deterioration of the quality of the commercial services, which are often caused by anti-competitive, opportunistic, and lazy monopolistic behaviours. The complexities tied to applying regulation to address this issue stem from the evidence that quality itself can be measured in different ways and has impacts on various fields and aspects. There exist quality aspects that are strictly connected to the resource endowment available to providers, and subsequently, the tariffs level and/or public funding. A company having narrow profitability margins finds it extremely difficult to provide the financial resources to purchase new rolling stock and conduct necessary maintenance work on the existing ones. The company's margins might also be

[55] Macchiati, Alfredo; Cesarini, Andrea; Mallus, Arianna; Massimiano, Marco. *Concorrenza e privatizzazione nel settore ferroviario in Europa. Problemi aperti e prospettive* (2007). **Mercato Concorrenza Regole**, Pg. 15.

narrow because of the excessively high amount of costs that hinder its ability to exploit the available resources. In such a case, increasing the resources available to the operators, through higher tariffs or public funding, does not always guarantee a concrete improvement in the quality of the services. For this reason, the amount of resources made available to rail companies should be decided based on the effective quality-related improvements obtained by those companies. The qualitative improvements should be ascertained in an objective way and measured via specific indicators that should be clearly defined *ex ante* to ensure impartiality and avoid confusion. The goal of a service's quality enhancement should be considered as a form of investment by the rail companies. The latter should employ their own resources first, and only afterwards, by assessing their performance, they could ask for an increase in the tariffs and/or enjoy public funding benefits (this appears to be a more effective and merit-based approach). In many cases, assuring the quality of the rail transport services does not depend exclusively on the rail transport providers' strategies and decisions, but also on the rail infrastructure manager and, sometimes, even on policymakers' "intrusions" and interests.[56] The previous evidence can raise doubts on the vertical unbundling of infrastructure management and rail transport services provision. For instance, by taking into consideration train punctuality, it is acknowledged that overall adherence to the train schedule depends only partially on transport service providers, which nonetheless need to account for an optimal choice of rolling stock, maintenance work, and driving performance. Indeed, the timeliness of transport services is also strongly influenced by the organization and planning of rail traffic, along with infrastructure capacity. A widespread and frequent obstacle is the so-called bottleneck, which mainly occurs close to junctions and causes train service to slow down, thus substantially increasing the likelihood of delays. "Bottlenecks" are likely to occur, especially in the proximity of major rail junctions whose physical capacity is more constrained than the capacity of the majority of railway lines. The slower the trains pass through railway nodes, the more the effective capacity is reduced, thereby increasing the probability of sequential delays without any significant improvement in safety standards.

In the presence of a vertical unbundling, eventual delays and system inefficiencies, caused by non-optimal rail traffic and railway network management, cannot be imputable to

[56] Boitani, Andrea. *Ferrovie: il lato oscuro delle riforme* (2010). **Mercato Concorrenza Regole**, Pg. 233

service providers. Therefore, the regulatory decision on service tariffs should be unbiased and not penalize service operators for the inefficiencies that do not concern service provisions (no operator's "fault"). The non-imputability principle should apply particularly in the circumstances of rail transport services provided by private entities or shareholders distinct from the infrastructure manager. From a regulatory standpoint, ensuring that the rail infrastructure manager complies with appreciable quality standards proves to be quite a challenging task and also requires complex technical knowledge and competencies. Moreover, the risk of a deterioration in overall efficiency could arise when the infrastructure manager is a public entity. As in Italy, RFI may have few incentives to improve its performance, given that it is backed by the State, and thus significantly shielded from the risk of bankruptcy. In the role of shareholder, the state can cover eventual losses resulting from sanctions imposed by regulatory institutions, such as the ART or the AGCM.[57]

1.2.5 REGULATION OF SECTOR INVESTMENTS

One of the key regulatory elements in the railway sector is the extent to which traffic revenues should cover the investment costs of railway companies. In this regard, it is necessary to distinguish between infrastructure investments, which are implemented by the infrastructure manager operating under a concession, and investments in the rolling stock, which are implemented by the service provider companies.[58] Another kind of investment concerns improvements in the safety standards and requires the involvement of both the infrastructure manager and the service providers. Desirably, the costs related to rolling stock purchases should be fully, autonomously evaluated and decided by the operators, except for the safety standard obligations. The latter should be agreed upon between the infrastructure manager and the ART. Obligations to comply with safety standards surely contribute to increasing the costs for the market players, as well as hindering the quality of the rail services through rigid requests for compliance. However, regulation itself can influence, also negatively, the decision on the safety of the railway sector. There could be the risk that, in aiming for a substantial reduction of operating costs, operators are tempted to overly save (or even neglect in the worst case) costs

[57] Boitani, Andrea. *Ferrovie: il lato oscuro delle riforme* (2010). **Mercato Concorrenza Regole**, Pg. 234
[58] Boitani, Andrea. *Ferrovie: il lato oscuro delle riforme* (2010). **Mercato Concorrenza Regole**, Pg. 234

concerning maintenance works or safety investments. Still, a substantial part of infrastructure investments depends on the decision of the political authority. Some share of the investments is expected to be remunerated by the market, and thus capable of generating an economic return through, for instance, tariffs and track access charges paid by railway operators (and indirectly paid by the users). Some other share of the same infrastructure investments is to be considered as a public good, thus financed through general taxation and not requiring a direct remuneration. At this point, the question concerns what share of infrastructure investments should be subject to remuneration and what falls under general public interest.

Assuming that the shares of infrastructure investments to be remunerated by tariffs are established, it must be taken into account that some services are operated under market conditions, while others are provided under public service obligations. Theoretically, it would be beneficial to attribute all the related investments' costs to the operators providing services under market conditions. Practically, the issue is that a major fraction of the entire railway network, mainly including nodes, is subject to the provision of both market and public services, and thus, the attribution of investment costs becomes more complicated. Concerning the universal service obligations, it should be assessed whether service providers should be directly entrusted with the burden of paying the entire costs of their investment share, and then receive public funding afterwards. Alternatively, it should be considered whether to allocate public funding resources among rail transport service providers and the infrastructure manager.[59]

[59] Boitani, Andrea. *Ferrovie: il lato oscuro delle riforme* (2010). **Mercato Concorrenza Regole**, Pg. 235

Chapter 2: Application of antitrust in the rail transport sector in Italy and the EU

2.1 ABUSE OF DOMINANT POSITION

2.1.1 ESSENTIAL FACILITY DOCTRINE

THE GVG/FS CASE

The examined case represents a critical instance of the application of the essential facility doctrine. Specifically, it originated with a complaint lodged by GVG, a German railway undertaking, against Ferrovie dello Stato. According to GVG's complaint, FS repeatedly refused to grant GVG access to the Italian railway infrastructure, to constitute an international grouping with it, and to guarantee traction services. Since 1991, the goal of GVG was to get access to the Italian railway market in order to channel passengers arriving from different cities in southern Germany, including Mannheim, Koblenz, and Karlsruhe, towards Basel, and from there, operate a non-stop railway passenger service directly to Milan. GVG's service would have competed with Cisalpino, a joint venture entity between FS and Swiss Railway operators. On the Basle–Milan segment, the German company would have offered a non-stop connection that would have been one hour faster than any other existing links, which contemplated up to 14 stops between the two cities. The attractiveness of such a service significantly relies on the proposed rail timetable. In this regard, the departure and arrival schedules should be matched with those of the intercity trains operated by Deutsche Bahn (through which channeling passengers coming from or going to other destinations). The same should apply for passengers passing through Milan, and according to Trenitalia's timetable. [60] [61]

To be able to operate a cross-border rail transport service between Switzerland and Italy, GVG was required to obtain a license, a safety certificate, along with providing traction services. Furthermore, it was necessary to form an international grouping (association of at least two railway undertakings established in different member states), and to dispose of an infrastructure capacity (to secure the specific time slot when the service can be carried out by the provider). In 1991, GVG lodged a complaint against FS, which was

[60] 2004/33/CE: Decisione della Commissione, del 27 agosto 2003, relativa a un procedimento ai sensi dell'articolo 82 del trattato CE (COMP/37.685 GVG/FS), Pg 2-3

[61] Castaldo, Angelo; Nicita, Antonio. *Essential Facility Access in US and EU: Drawing a Test for Antitrust Policy*, Pg. 16

accused of abuse of dominant position, and thus violating art. 82 of the TFEU and Directive 91/440. It was claimed that FS refused to provide access to the Italian railway infrastructure and traction services to GVG, and refused to negotiate the constitution of an international grouping with them. GVG's willingness to operate in the Italian railway market was formally notified to FS since 1992. However, the first reply of FS to GVG occurred only in 1998, 6 years after the first notification by GVG. The national incumbent argued that, from the very beginning, GVG would have to show evidence that it was already part of an international grouping, so as to be able to enter the national market and obtain relevant information like timetables and infrastructure charges. By assessing the FS non-negligible presence also in the Swiss market through participation in Cisalpino, GVG complained about an abuse of dominance in the supply of essential railway resources (upstream market) to avoid new entrants in the rail service transport (downstream market) between the countries considered. The aforementioned violation was acknowledged to be carried out at least from August 1999 until June 2003.

Concerning the refusal to grant access to the Italian railway infrastructure, GVG underlined that FS leveraged its network, in the quality of an essential facility, as a means to exclude potential competitors from operating the services in competition with the incumbent.[62] Furthermore, it was claimed that FS did not make necessary information available to GVG, thus hindering its ability to gain access to the infrastructure. Concerning the refusal to provide traction services, GVG pointed out that the provision of traction was essential to operate the rail transport services in the segment. For this purpose, it requested FS to negotiate the provision of rolling stock, including locomotives, drivers, and the critical backup (operational resources including spare locomotives, reserve drivers, and technical support or maintenance teams) to ensure punctuality, reliability, and continuity of the service. According to GVG, it was since 1998 that FS had awareness of the German operator requesting the provision of the traction service, and exercised abuse of dominance by eliminating competition in the passenger transport service market. While admitting reticence to provide the technical information requested by GVG, FS also states that, in any case, it was unable to fulfill GVG's demand. Given the continuous evolution of governance and organizational structure of the national framework and the regulatory development, FS justified its conduct as a cautious measure

[62] Castaldo, Angelo; Nicita, Antonio. *Essential Facility Access in US and EU: Drawing a Test for Antitrust Policy*, Pg. 17

to avoid applying in a discretionary manner the newly adopted rules of the EU Directives. Based on the EU regulations, FS stated that it was not legally obliged to form an international grouping with GVG for the provision of traction services. Moreover, the incumbent asserted that labelling traction assets and services as essential facilities would be detrimental to the company itself, as it might substantially reduce incentives for newcomers to invest in the long-term horizon.[63] In particular, the definition of traction assets as essential facilities would require the dominant operator to make the traction available to new entrants, therefore discouraging them from providing resources directly on their own, and creating unsustainable economic inefficiencies. FS blamed the Commission for not appropriately assessing that, in case of limited incumbents' ability to provide traction services due to resource shortages, the obligation to provide a wholesale offer to competitors, and the duty to share the capacity, would be counter-productive as it would constrain FS's ability to satisfy consumers' demand. FS then argued that the traction assets were not to be considered as essential facilities because of the existence of feasible alternative options of supply for the newcomers.

The Commission gave credit to GVG's complaint in implementing the final decision on the case. Particularly, it stated that FS was actually responsible for the abuse of dominant position in the relevant upstream and downstream markets, thus causing a substantial reduction, if not elimination, of competition in the international rail passenger transportation (infringement of art. 82 TFEU). The Commission confirmed the three forms of abuse subject to GVG's complaint.

On the refusal to grant access to the Italian network, the Commission acknowledged FS (RFI) monopoly position on the network and on the allocation of infrastructure capacity. Hence, the responsibility to assign the train paths to competing operators in Italy was upon FS (RFI). In addition, the network was sentenced to be representing an essential facility, as it was deemed indispensable for obtaining access, and the impossibility of duplication. Consequently, FS abused of dominant position by refusing to grant access to an essential facility to competitors. Concerning the refusal to join in an international grouping, the refusal to negotiate the formation of an international grouping with GVG represented an abuse of dominance by FS, in view of the EU Directive 91/440. In this

[63] Castaldo, Angelo; Nicita, Antonio. *Essential Facility Access in US and EU: Drawing a Test for Antitrust Policy*, Pg. 18

regard, FS was deemed the sole viable entity for GVG in order to be able to operate the international passenger service from Domodossola to Milan.[64] Concerning the refusal to provide traction, the Commission carried out an in-depth assessment of the existence of any European railway undertaking capable of having a concrete and feasible alternative to rent the traction from undertakings distinct from FS on the segment Domodossola–Milan. The Commission came to the conclusion that there were no feasible alternatives available to GVG at the time, except for FS. FS was claimed to be dominant in both markets for traction services and for the provision of railway services. Thus, it abused of dominant position by refusing to provide traction services to GVG and negatively impacting the passenger transportation market's competition.

In order to improve its position in the meantime, FS committed itself to entering into an international grouping agreement and stipulating a traction contract with GVG, along with securing train paths on the segment of interest. In the end, by acknowledging FS's contribution to stop the infringements and enhance competition in the sector, the commission decided not to impose a fine.[65]

CRITIQUES ON THE COMMISSION'S APPLICATION OF THE EF DOCTRINE

Some experts, like Professors Angelo Castaldo and Antonio Nicita, argued that, in the GVG/FS case, the commission exaggerated in defining FS's locomotives a essential facilities for GVG to enter the Italian market. According to this view, the application of the essential facility doctrine in the case was excessive, and a simple sanction of the refusal to deal was more appropriate (hence it was enough to assess the potential to reduce consumers' welfare.[66] Access to the Italian infrastructure network and the international grouping were assessed as bottlenecks in the EU Directives related to the railway sector liberalization process. However, the experts pointed out that the Commission went too far in promoting competition by "overcoming" the conception that all operators, dominant and non-dominant, would own and control their locomotives in an exclusive and integral manner. Surely, the railway network represents an essential facility by itself, given the fact that it is impossible to duplicate, and sharing its access to other operators does not introduce any risk to operators' right to enjoy competition (mainly in the case of

[64] Castaldo, Angelo; Nicita, Antonio. *Essential Facility Access in US and EU: Drawing a Test for Antitrust Policy*, Pg. 19
[65] Castaldo, Angelo; Nicita, Antonio. *Essential Facility Access in US and EU: Drawing a Test for Antitrust Policy*, Pg. 19
[66] Castaldo, Angelo; Nicita, Antonio. *Essential Facility Access in US and EU: Drawing a Test for Antitrust Policy*, Pg. 1

an unbundling between the company owning and/or managing the network and the railway transport services provider company). The duty for GVG to join an international grouping with FS in order to introduce the services to Italy holds essential features as well. The issue to address, in order to assess if tractions were actually qualifyable as essential facilities, is whether the rolling stocks and the backup resources (those necessary to grant the rail service) could be easily and continuously shared with other competitors. The critical point here concerns the rationale behind thinking that no operators, neither incumbents, could possess any excess supply of unused and dated rolling stock that GVG could purchase. In case of availability, a duty to sell the supply of stock in excess to the market, through a divestiture obligation, would be sufficient to ensure the possibility of obtaining the critical traction for GVG. Anyway, to operate in the Italian territory, the German operator stood in need of a specific locomotive model compatible with the type of railway infrastructure in the segment between Domodossola and Milan. Therefore, the previous technical criticality would have made alignment among the incumbent's excess supply (presumably Trenitalia) and GVG's specific demand for the appropriate locomotive model necessary.[67] In case the alignment was unfeasible, the divestiture measure towards the dominant company would have produced significant inefficiencies in the railway economic system. Indeed, the incumbent's duty to sell the equipment would cause significant damages to the incumbent itself due to the shortage that would occur and the consequent necessity for the incumbent to recover from the loss of the rolling stock sold to the competitors. In the case at hand, the essential facility doctrine would lead to undesirable effects and act against the staple of legitimate refusal to deal by FS in case of shortages. In addition, even the necessary backup to provide the railway transport services, including the drivers and the technical and maintenance work teams, was declared mandatory for FS to provide for the benefit of GVG. Hence, it could be the case that shortages would also affect FS's human labor force, which could not be generally considered as a resource in excess. FS would then be negatively affected by the application of the essential facility doctrine against its right both to enjoy the freedom to use and organize proprietary assets and to make autonomous decisions upon the organizational structure and the division of activities within the company. Concerning the case, Trenitalia was required to establish within the firm a specific department for the

[67] Castaldo, Angelo; Nicita, Antonio. *Essential Facility Access in US and EU: Drawing a Test for Antitrust Policy*, Pg. 21

provision of traction services to third-party operators. On the one hand, it is critical to assess the damage to market competition caused by the eventual incumbent's refusal to grant other operators the traction services. On the other hand, it is necessary to take into account the damage to the incumbent due to the transaction costs stemming from the obligation to divest some of its assets, together with a substantial shift in the governance and internal organization of the firm. Given a divestiture measure, the opportunity cost of newcomers is the cost associated with the lack of opportunity to buy new and unused pieces of equipment. For the incumbent, the cost of sharing its traction is the additional cost of purchasing new assets to meet its own demand and to compensate the sharing with newcomers. If the expansion of the existing assets is less costly than building a completely new set of assets, then that expansion cost is what essentially matters. On the opposite case, then the incumbent's costs are equal to the new entrant's costs to build its own resources from zero.[68]

The obligation to divest would be detrimental to the incumbent, particularly in circumstances where the latter is fully exploiting its available capacity. In that case, the incumbent cannot dispose of an excess supply of stock to share with other providers, and thus, a divestiture measure forces it to be deprived of essential resources to operate the rail service. Requiring the company to give access to its resources, primarily locomotives, to competitors could lead to supporting less efficient companies. This could lessen the incumbent's incentives to make investments aimed at improving the quality of its services, such as purchasing new locomotives, thus leading to a deterioration of the competitive advantage, which might result from investments fostering technological innovation. The Commission seemed to take the incumbent's excess of supply for granted, without appropriately considering the long-term effect on the overall efficiency of a divestiture imposition towards, potentially, the most performant and efficient operator in the market. Several doubts are also raised by Castaldo and Nicita in regards of the Commission's final decision on the non-duplicability issue. The duplicability condition refers to the feasibility of duplicating a specific traction, traction service, or facility by a competitor. Generally speaking, the assessment of the duplicability condition (as part of the assessment of the essentiality feature of a facility) should focus on identifying the true origins of the cost of duplicating the facility. This does not always

[68] Castaldo, Angelo; Nicita, Antonio. *Essential Facility Access in US and EU: Drawing a Test for Antitrust Policy*, Pg. 22

depend exclusively on the facility's intrinsic characteristics. Indeed, it could be the case that a competitor decides to enter the market by opting to operate its services on a non-profitable route (meaning that the route does not provide the operator enough profitability to cover its costs). In the specific case, the cost of duplicating the considered segment does not necessarily depend on the physical features of the facility, but rather on the size and financial resources of the competitor. A small-sized competitor, in particular, could find it too burdensome to duplicate the facility, even if the latter is, on average, not so expensive to implement. Instead, a competitor with large dimensions and able to gain appreciable economies of scale may find it easier to cover the costs of duplicating the facility because it enjoys greater financial resources.[69] In case the competitor is actually able to duplicate a specific asset, this one cannot be deemed as an essential facility. A sustainable competitor, thus capable of fully covering its costs with revenues, will be interested in entering the market. Therefore, by trying to hinder access to the asset, the incumbent would still not be fully exempted from facing competition, given that a sustainable competitor might be able to build the asset on its own. For an asset to be qualified as an essential facility, it is required that the social costs (representing the public interest) of furnishing the services via the existing asset are cheaper than the amount required to build a new asset for a competitor. In other words, if the construction of a new asset is deemed to be impractical or excessively onerous for society due to, for instance, high costs or environmental impact, it makes sense to impose on the asset owner to grant access to competitors, enabling them to operate competitive services. An essential facility scenario can occur in the case of a natural monopoly or in the presence of sunk costs. In the first circumstance, the facility is characterized by structural features that make it intrinsically efficient for a single operator to conduct its service operation, due to the presence of economies of scale and scope. The second circumstance implies that some operator has already made investments in the asset. At this point, the costs related to providing access to the facility for external competitors are much lower compared to the expenses for the same competitor to build a new facility from scratch. It would be socially inefficient to obstruct the enjoyment of the facility by other competitors when the fixed costs have already been sustained, and thus the asset is fully available.

[69] Castaldo, Angelo; Nicita, Antonio. *Essential Facility Access in US and EU: Drawing a Test for Antitrust Policy*, Pg. 23

The main issue potentially lies in the scarce competitiveness of a competitor. Even though the necessary traction to operate the service (presumably a set of locomotives) is made available by the incumbent for that competitor, this still would not overcome the fact that the competitor is not able to sustain the cost of the new locomotive because it is inefficient and cannot gain a break-even position. The underlying risk is that imposing an obligation on the incumbent to share its assets through a divestiture measure might lead to unfairly subsidizing a failing business. The aforementioned condition clearly does not provide a justification for the abuse of dominance committed by FS. The abuse of dominant position by FS mostly stems from the imposition by the incumbent of discriminatory conditions among different operators. Indeed, it was acknowledged that FS previously granted services to past competitors, while providing no sufficient justification for not extending the same and fair treatment to GVG. Hence, the abuse lies in the disparity of the treatment reserved for various competitors, and not necessarily in the refusal to grant access to an essential facility. To assess an abuse of dominance in the GVG/FS case, it was sufficient to prove the unfair and discriminatory conduct by FS and not the denial itself.[70] It is suggested, then, to pay attention when implementing the essential facility doctrine as it potentially leads to negative market externalities. In particular, it may hinder the incumbent's incentive to foster innovation and technological development through investments within the railway market. Specifically, the incumbent's awareness of the duty to share its assets with third parties does not generally lead to great incentive to improve the quality of the traction services, knowing that the investments in a part of its assets will not provide a direct utility or economic return to the company itself. The GVG/FS case underlines the evidence that competition policy represents a complementary measure with respect to the regulatory framework, and not a substitute. If competition rules and regulations are not well implemented in an integrative manner, the consequent overlap between the two frameworks might induce negative effects on society within the process of liberalization. Concerning the case, the Commission introduced for the first time the idea of a wholesale market for traction services in order to foster the liberalization process, raising concerns about the related risks previously analyzed.[71]

[70] Castaldo, Angelo; Nicita, Antonio. *Essential Facility Access in US and EU: Drawing a Test for Antitrust Policy*, Pg. 24
[71] Castaldo, Angelo; Nicita, Antonio. *Essential Facility Access in US and EU: Drawing a Test for Antitrust Policy*, Pg. 24

Similarly to Castaldo and Nicita's considerations on the decision of the EU Commission, the AGCM also took a different position on the definition of an essential facility. Concerning the case, the rolling stock was not classified as an essential facility by the authority.[72] Indeed, it assessed the feasibility of the locomotives' duplicability conditions at reasonable costs for the competitors, including GVG. The definition of locomotives as essential facilities would likely produce negative results, including, for instance, free riding situations where many competitors enjoy benefits from the investments made by the incumbent, basically without contributing to them. To be efficient and competitive, the newcomers would be constrained to adapt their rolling stock to the incumbent's technical standards, practically impeding them from designing and implementing tailored models of locomotives. AGCM criticized the Commission's evaluation of the effects that a divestiture measure would have produced in the railway industry. The Commission assessed on its own that, due to the incumbent's obligation to share, competition would be intensified, thus leading to an overall improvement of the consumers' enjoyment of the services at least in the short-term horizon.[73] The Commission was harshly criticized for having disregarded the proprietary interests of FS in its assets, while focusing on the safeguard of the GVG company itself rather than the market competition on a general basis. The Commission's evaluation collides with the staple of article 102 of the TFEU: protecting the level of market competition as a whole and not the private interests of a specific competitor in the market. On the one hand, the key question concerns the lack of incentives for the incumbent to make further investments, given that its benefits will be mostly enjoyed by other competitors without any substantial effort. On the other hand, the competitor itself will not be incentivized to develop its train fleet, given the availability to rent locomotives from the incumbent. [74]

2.1.2 HISTORY OF AN ANTITRUST FAILURE: THE ARENAWAYS/FS CASE

Founded in 2006 by Giuseppe Arena, Arenaways was a fully privately held company operating in the Italian railway passenger transport service. The company began

[72] Giannino, Michele. *The Abuse of Dominant Position in the Rail Sector: The View of the Italian Competition Authority* (2010), Pg. 9

[73] Giannino, Michele. *The Abuse of Dominant Position in the Rail Sector: The View of the Italian Competition Authority* (2010), Pg. 10

[74] Giannino, Michele. *The Abuse of Dominant Position in the Rail Sector: The View of the Italian Competition Authority* (2010), Pg. 11

conducting its commercial services in 2010, under the same contractual terms of Trenitalia, plus a specific clause to comply with higher quality standards in the commercial service offering compared to the main incumbent. Indeed, the private company was able to provide passenger trains of superior quality, compared to the standards of the local public transport and comparable to an "Intercity" or "Eurostar" level. [75]

In November 2010, AGCM received a complaint from Arenaways warning about an anticompetitive behaviour carried out by FS in support of Trenitalia's interests. Arenaways argued that its access to the railway network was practically impeded by RFI, thus leading to substantial economic damages to Trenitalia's potential first and main competitor. According to Arenaways, RFI received, already in April 2008, a formal request to get access to the infrastructure. In particular, Arenaways shared its willingness to provide rail passenger services on the route between Turin and Milan, also passing through Alessandria in Piemonte, according to a circular or loop path. The original demand, advanced by the newcomer in 2008, was sent twice in April 2009, due to the lack of responsiveness by the addressee. Arenaways was made available with the necessary tracks to be operative with a significant delay, namely, only in November 2010, more than two years after the first notification. Precisely, not all the railway paths requested were granted to Arenaways, but only the Turin-Milan segment, without the opportunity to make intermediate stops between the two cities. In addition, some national consumer protection organizations, including Altroconsumo and Codacons, emphasized a widespread presence of significant regulatory barriers to entry in the national railway passenger transport market. Based on these premises, a preliminary investigation was opened by the AGCM in December 2010. The goal of the antitrust investigation was to assess whether FS and RFI's conduct actually produced a substantial impediment to access to the facilities and the Italian railway market by the newcomer. Negative impacts on the final consumers' enjoyment of the service, potentially stemming from the incumbent's conduct, were to be assessed as well. Additionally, the investigation focused on the major potential conflicts of interest by FS towards securing unfair advantages to the benefit of its subsidiary, RFI. Some of the anticompetitive conduct by FS would take

[75] Boitani, Andrea; Ramella, Francesco. *Arenaways e altre storie ferroviarie (poco edificanti)* (2012). **Mercato Concorrenza Regole**, Pg. 103-104

the form of inducing administrative and bureaucratic delays to the detriment of the competitor's market entry, ultimately leading to the exclusion of Arenaways from the market of passenger transport services. The anticompetitive conduct by FS was assessed to last from the moment when Arenaways sent the first notification back in April 2008 until the contract between the parties was signed in November 2010. In this interval of time, the conduct specifically took the form of a discretionary recourse by RFI of consultation with the main institutional bodies on behalf of the Piemonte and Lombardia regions, along with the Ministero dei Trasporti (MIT) and the Ufficio per la Regolazione dei Servizi Ferroviari (URSF). The continuous resort to consultations by the incumbent was alleged to aim at causing considerable delays to the process of the newcomer entering the railway market. Particularly, the delays in the allocation of the train paths mainly resulted from the incumbent's *modus operandi*. Moreover, Trenitalia actively contributed to misleading the URSF concerning the latter's evaluation of the incidence of Arenaways' entry to the market on the ability of the incumbent to comply with its public service obligations. Trenitaria appeared to hinder the URSF's proceeding to assess the previous original evaluation on the impact, dated 2010. Another harmful conduct by the incumbent concerned the strategic decision to increase the number of daily train services in order to get the route packed with Trenitalia's trains. In this way, Arenaways would have to face increased difficulties to offer a competitive performance in the market, given the impossibility of finding "available spots" to operate its services on the interested route. Thus, Trenitalia carried out several anticompetitive behaviours with the core and clear intent to implement economic, political, and institutional barriers to entry against Arenaways's willingness to provide superior quality services to the consumers in the north-west Italian route.[76] Indeed, in April 2012, the AGCM acknowledged an intentionally detrimental strategy against market competition, implemented by Trenitalia to exclude Arenaways from the rail passenger transport services market. As mentioned before, RFI granted Arenaways just the availability to operate a non-stop railway passenger service on the Turin–Milan route. The contractual terms also provided that Arenaways operated through four locomotives on a daily basis, which was then reduced to only one couple of trains per week. The reduction of the services provided by

[76] A436 – ARENAWAYS–OSTACOLI ALL'ACCESSO NEL MERCATO DEI SERVIZI DI TRASPORTO FERROVIARIO PASSEGGERI. *Provvedimento AGCM n. 23770* (2012), Pg. 3

Arenaways was a direct consequence of the incumbent's exclusionary strategy, which did everything possible to foreclose any feasible opportunity for the newcomer to ensure a competitive performance. The situation got more and more complicated for Arenaways, ultimately leading to the declaration of the company's bankruptcy by the Court of Turin in August 2011.[77]

Yet, the initial premises concerning the planning of service implementation by Arenaways appeared to offer an attractive alternative to the incumbent's offerings for the final consumer. By tailoring its supply of services on the Turin–Milan–Alessandria-Turin route, Arenaways' main objective was the satisfaction of the demand for railway services by a large number of passengers, specifically those who frequently opted for medium-distance travel (around 50 to 100 kilometres long). In addition, the wide offering of Arenaways would have limited many passengers' reliance on other forms of transport, primarily the car, or, more generally, road transport. By serving as a boost to increase the attractiveness of the railway sector, Arenaways also provided onboard extra services to passengers during the journey, including sales of tickets for events or public transport, laundry service, and restaurants. Thus, the newcomer gained a competitive position as the unique competitor of Trenitalia in the medium-distance rail market, by offering customer care and services of superior quality. The original plan contemplated the provision of passenger transport services in both directions. This means that some trains departed from Turin to Milan following the same path of the high-speed line and, from Milan, went back to Turin via Alessandria, while, the other way around, other trains travelled from Turin to Milan via Alessandria and, from Milan, went back to Turin, parallel to the high-speed line. The intermediate stops, originally requested by Arenaways, include, based on a clockwise direction along the ring route, Turin (Lingotto, Porta Susa, Dora), Vercelli, Novara, Milan (Garibaldi, Centrale, Lambrate, Rogoredo), Pavia, Voghera, Tortona, Alessandria, Asti. Concerning the initial request made in April 2008, Arenaways expressed the intention to have 51 of its trains circulating on the network, granting service with hourly frequency during each day of the week, including Sunday. For the first year of operations, Arenaways agreed to set the ticket price at 19 euros for a long-distance travel (around 150 km long, like travelling from Turin to Milan or vice versa), 17 euros

[77] A436 – ARENAWAYS–OSTACOLI ALL'ACCESSO NEL MERCATO DEI SERVIZI DI TRASPORTO FERROVIARIO PASSEGGERI. *Provvedimento AGCM n. 23770* (2012), Pg. 4

for a medium-distance travel (around 110 km long, like travelling from Alessandria to Turin), 10,5 euros for short-distance travel (around 80 km long, like travelling from Alessandria to Milan). Arenaways aimed to offer a more standardized system of ticket pricing compared to the incumbent. Indeed, the price of Trenitalia tickets ranged, at the time, from 10 euros for the Intercity trains, 22,5 and 30 euros for Frecciabianca's first and second class respectively, up to the 45 euros required to travel with Frecciarossa high-speed trains. Considering the same travel distance, Arenaways planned to offer a lower price compared to the average ticket cost between the first and second classes of Intercity trains. Thus, Arenaways' passenger transport services should have been competitive also regarding charges to final consumers. At the time, Arenaways' entry to the railway market was suitable to meet the need to comply with the increasing demand in the market and the greater number of passengers, especially in the urban areas of the major cities of northern Italy, Turin and Milan. [78]

To conceal the lack of responsiveness and collaboration, RFI implemented a consultation process involving various institutions. Since a similar procedure was not explicitly provided by the national legal framework, some doubts were raised concerning the actual need and effectiveness of a consultation, thus leading to the conclusion that RFI used it exclusively as an obstructive tool against Arenaways. On its own, RFI stated the essentiality of assessing Arenaways' services as regional or national transport in order to decide on the legitimacy of Arenaways' request. According to RFI, it should then be assessed whether to provide or not the eventual obligation to grant access to the facilities for the newcomer by the incumbent. Anyway, Trenitalia provided the URSF with misleading and biased information by intentionally overestimating the economic impact of the new entrant on the sustainability of the incumbent. As a result, URSF was induced to perceive the entry of Arenaways in the market as a potential harmful risk for the incumbent, rather than an effective enhancement of pro-competitive market dynamics. Indeed, the URSF decided to prevent Arenaways from the opportunity to make intermediate stops between Turin and Milan. Yet, that decision presented a violation of the legislation concerning the correct analysis to carry out in case of a new entry in a market subject to public service contracts. The URSF should have assessed the impact of

[78] A436 – ARENAWAYS–OSTACOLI ALL'ACCESSO NEL MERCATO DEI SERVIZI DI TRASPORTO FERROVIARIO PASSEGGERI. *Provvedimento AGCM n. 23770* (2012), Pg. 11–12

Arenaways' entry based on the full public service obligations of Trenitalia, and not just the single Turin-Milan route. Moreover, the URSF disregarded the procedure for a well-balanced estimate of the profits of the involved companies, which is critical to finding the economic equilibrium where the incumbent might no longer be able to comply with public service obligations. Largely favoured by the sister company RFI, Trenitalia tried to obstruct Arenaways by offering additional passenger transport services on the Turin-Milan-Alessandria route. The routes and time slots desired by Arenaways were packed in order to reach a saturation level in the market. At the same time, the institutions involved in the case received many notification letters from the incumbent, reinforcing the idea that Arenaways was offering regional services. In that case, RFI would not have been subject to the obligation to grant access to facilities for Arenaways.[79] RFI argued that its conduct was justifiable by the specific circumstances surrounding the case, rejecting the accusation of adopting a spurious approach aiming at obstructing the newcomer. According to the incumbent, the reasons why Arenaways dealt with significant delays and problems accessing the route stemmed from the inability of the newcomer to comply with the time and technical requirements to gain infrastructure access. From RFI's standpoint, no serious impediment to market competition was caused by the incumbent's action in the case.[80] Trenitalia specifically challenged the decision of the AGCM to define the relevant market for the case as both the regional and the medium-long distance train services together. Trenitalia emphasized that the two types of services significantly differ in terms of prices, the number of routes and users, the time coverage and the travel time. By inducing the authority to classify the Arenaways service as a regional passenger transport service, Trenitalia was looking to gain substantial benefits. Indeed, the regional transports in Italy were implemented by Trenitalia under public service obligations towards the state. This means that regional railway services are not deemed as commercial services, meaning that they are not subject to market dynamics. Hence, a new entrant, Arenaways, in that market segment for regional services would not pose any competitive pressure on the incumbent, given that the provision of regional services is ensured through a direct relationship between the company and the state, and, in most cases, even subject

[79] A436 – ARENAWAYS–OSTACOLI ALL'ACCESSO NEL MERCATO DEI SERVIZI DI TRASPORTO FERROVIARIO PASSEGGERI. *Provvedimento AGCM n. 23770* (2012), Pg. 34
[80] A436 – ARENAWAYS–OSTACOLI ALL'ACCESSO NEL MERCATO DEI SERVIZI DI TRASPORTO FERROVIARIO PASSEGGERI. *Provvedimento AGCM n. 23770* (2012), Pg. 36

to subsidies. To the contrary, an increase in competition level in the market segment for commercial transport services, namely the medium-long distance train services, would potentially challenge the undisputed dominant position and profitability of Trenitalia in such a strategic market segment. Due to the unjustified dilatory approach adopted by RFI, Arenaways had to patiently wait for one and a half years before getting access to the essential facility. The disputed delay caused several damages to the newcomer, which was ready to operate its service, but still could not implement any offering to the final consumer due to external constraints. In contrast, a favourable treatment by RFI was reserved exclusively for the benefit of Trenitalia, with the strategic goal to provide the sister company with an unfair market advantage against Arenaways. Trenitalia intentionally requested, and received almost immediately, the opportunity to operate its commercial services on the same routes that were previously demanded by the newcomer. The URSF mistakenly conducted its market analysis concerning the case due to the incorrect and discretionary pieces of information brought by the incumbent. Furthermore, the main operator strategically influenced the various institutional players involved in the case, including not only the URSF but also the MIT and the regions of Lombardia and Piemonte. In order to block the access of Arenaways in the market, Trenitalia tried to saturate the Turin-Milan route, where it was already operating, by increasing, without an essential market need, both the commercial and subsidized daily train services. No objection was raised about the risk that Trenitalia's commercial service itself could jeopardize the financial sustainability of the public service contracts. Yet, just when Arenaways intended to enter into competition with the incumbent, the matter of the economic equilibrium of the PSOs was raised with excuses by the incumbent, and exclusively against Arenaways. This double standard underlined that the incumbent's conduct was totally instrumental.[81] The defensive position of the incumbent was further demolished by the evidence that the delayed access of Arenaways to the essential facility resulted from some objective impediment, including the lengthening of the consultation process, and not due to alleged inefficiencies of the newcomer. Thus, the incumbent unfairly contributed to slowing down the train path allocation.[82] The assessment of RFI

[81] A436 – ARENAWAYS–OSTACOLI ALL'ACCESSO NEL MERCATO DEI SERVIZI DI TRASPORTO FERROVIARIO PASSEGGERI. *Provvedimento AGCM n. 23770* (2012), Pg. 43-44

[82] A436 – ARENAWAYS–OSTACOLI ALL'ACCESSO NEL MERCATO DEI SERVIZI DI TRASPORTO FERROVIARIO PASSEGGERI. *Provvedimento AGCM n. 23770* (2012), Pg. 48

on the alleged lack of compliance with the technical requirements to operate the service was proved wrong by the antitrust authority. In particular, Arenaways did actually comply with the critical requirement to gain access to the railway infrastructure, including adequate planning for the provision of its services and the necessary rolling stock. The basis on which RFI's objected to the lack of rolling stock by Arenaways was flawed. Without any knowledge of the eventual available time slots, the newcomer could not find a viable way to develop a solid strategy to organize the service provision. The AGCM acknowledged the high attractiveness for the final user of Arenaways' competitive market position, especially due to the above-average quality of the commercial services provided, along with competitive prices.[83] Trenitalia induced the URSF to underestimate the amount of profits resulting from the provision of services in the involved routes. This ultimately led the URSF to assume erroneously that the profitability of the company would have been reduced by half following Arenaways' market entry. Indeed, at the time when Trenitalia's assessment was presented to the URSF, Arenaways was still missing the train paths and the time slots during which it intended to operate. There was no way for the newcomer to implement a commercial strategy without any access to essential facilities. These estimates were proved to be significantly misleading and unfounded. Trenitalia should have committed itself to including the competitor in the evaluation process. As provided by the legislation, it should have just limited to providing reliable quantitative data about the threshold above which the company might have faced issues in ensuring the compliance and effectiveness of PSO contracts. Precisely, Trenitalia should have left to the URSF the evaluation of the models of locomotives, along with the number of train services per period and intermediate stops along the Milan-Turin corridor that could potentially undermine the profits of the main operator. It was proven that the market share that Arenaways would have acquired in the segment of passenger transport services was quite limited and could not substantially damage the financial sustainability of the main operator. The initial planning provided that the newcomer would offer the railway service through a couple of locomotives, each with a maximum capacity of less than 200 seats. Once granted the authorisation to operate on the Turin-Milan corridor, the total capacity of the Arenaways trains amounted to 184 passengers. In the analysis to

[83] A436 – ARENAWAYS–OSTACOLI ALL'ACCESSO NEL MERCATO DEI SERVIZI DI TRASPORTO FERROVIARIO PASSEGGERI. *Provvedimento AGCM n. 23770* (2012), Pg. 52

assess the impact on public service contracts, Trenitalia intentionally omitted that it was already operating commercial services on the same route, subject to public service contracts. Thus, Trenitalia itself was imposing a reduction of the revenues related to its own PSO services by additionally providing more performant and faster transport of passengers via commercial services. The decrease in the traffic revenues was not directly imputable to Arenaways, but rather to the incumbent's commercial strategy itself. Even though representing an efficient competitor, Arenaways would have secured just a "negligible" fraction of the total annual provision of the services under the public service contract.[84] The most evident outcome of the incumbent's conduct was the creation of administrative barriers against any possible enhancement of competition in the relevant market for Trenitalia. As mentioned before, Arenaways' competitiveness was strongly hindered by the market saturation strategy carried out by the main operator. The additional offering of subsidized trains strategically concerned the peak hours and the most important intermediate stops, which were included in the Arenaways' project.

Through the expansion of commercial services, Trenitalia would be able to secure higher profit margins due to the switching costs that the users have to bear in order to shift from regional to a more comfortable and competitive transport service (commercial service). Given the higher ticket price that consumers pay to travel with the Intercity or Eurostar trains, Trenitalia would boost its ticket revenues. At the same time, this strategy would further reduce the profitability of public services, as a considerable portion of users, especially the individuals willing to pay more to enjoy a better service, decide to benefit from commercial services. Taking into account the low profitability of regional services, it would be easier for the incumbent to demonstrate that a new market entry would likely jeopardize the weak economic equilibrium of the PSOs, thus hampering the access of new operators in the market.

Finally, the AGCM acknowledged the abuse of dominant position implemented by the incumbent. Thanks to the monopolistic position of both RFI and Trenitalia in the respective railway market segments, Trenitalia was able to maintain its absolute dominant position in both the commercial and subsidized rail transport services, thus postponing the effective enhancement of liberalization process. Arenaways potentially represented

[84] A436 – ARENAWAYS–OSTACOLI ALL'ACCESSO NEL MERCATO DEI SERVIZI DI TRASPORTO FERROVIARIO PASSEGGERI. *Provvedimento AGCM n. 23770* (2012), Pg. 56-57

an efficient source of competition to the unchallenged supremacy of Trenitalia. FS was sanctioned with a 100'000 euros fine due to the conduct of RFI, while it received an additional sanction of 200'000 euros concerning the conduct of Trenitalia.[85] The bankruptcy of Arenaways mainly resulted from the dilatory behaviour of the incumbent regarding the permission of the train paths, which caused drastic changes to the original strategy of the newcomer and reduced its market competitiveness.[86] It is interesting to note that the incumbent successfully leveraged for its exclusive interests the national legislation itself, in particular the Legge n. 99/2009. The latter provided that the institution of competitive tendering for the regional rail services was no longer mandatory. It also granted to the public service provider, that is Trenitalia, the power to refuse to grant access to competitors concerning the intermediate stops within a specific region. Theoretically, the operation of intermediate stops is granted to operators based exclusively on compliance with purely technical requirements. According to the law, the rationale behind a denial to grant access concerns the protection of the incumbent's economic sustainability, which may be undermined by new market entry. As a consequence, privately held competitors were worse off, as restricted from making multiple intermediate stops within the same region in case it was deemed that their service attracted too many customers away from the incumbent. The Arenaways/FS case underlined the powerful vertical integration of Trenitalia within the railway sector, along with its successful inducement strategy to get the MIT (the regulatory institutional body) aligned with the incumbent "private" interests. Hence, the case raised serious concerns about the effective impartiality of regulatory institutions, like the URSF and the MIT. Most importantly, the case represented a failure of antitrust enforcement. Indeed, AGCM's intervention against FS was ineffective, belated, and did not manage to sufficiently protect Arenaways, which ultimately declared its bankruptcy in 2011.[87]

2.2 CONCENTRATIONS

[85] A436 – ARENAWAYS–OSTACOLI ALL'ACCESSO NEL MERCATO DEI SERVIZI DI TRASPORTO FERROVIARIO PASSEGGERI. *Provvedimento AGCM n. 23770* (2012), Pg. 59-62

[86] Benedettini, Simona; Stagnaro, Carlo. *Il trasporto ferroviario regionale in Italia: tracce di concorrenza?* (2014). **Mercato Concorrenza Regole**, Pg. 333

[87] Benedettini, Simona; Stagnaro, Carlo. *Il trasporto ferroviario regionale in Italia: tracce di concorrenza?* (2014). **Mercato Concorrenza Regole**, Pg. 335-336

2.2.1 THE ALSTOM/SIEMENS CASE

Siemens and Alstom represent two of the most important and biggest European corporations active in the rail transport industry. In particular, Siemens is a German company offering a wide range of rolling stock models, rail automation and signalling solutions, and rail electrification systems. On the other hand, Alstom is a French company providing products and services tailored to passengers and facilities, including digital mobility, signalling solutions, provision of high-speed trains, metros, and trams. In June 2018, Alstom and Siemens formally notified their intent to form a concentration to the European Commission. In this way, Siemens intended to transfer its mobility business, including trains, rail traction systems, and related services, to Alstom. In exchange, Alstom would have issued new shares to Siemens, which would have become the main shareholder of Alstom. Thus, the case concerned the full acquisition of Alstom by Siemens. Specifically, the transaction involved the integration of both companies' mobility business, with Siemens contributing the central system powering trains (making them move), and the related service, such as maintenance and repair of locomotives. The ultimate goal was to create a unique European big operator. By increasing the size of the company, the two combined entities could gain increased efficiencies and likely exploit significant economies of scale and scope. Sharing the common pool of resources would have granted operating power to further implement the railway services on a larger scale. Both Siemens and Alstom were estimated to generate a combined aggregate turnover greater than 5 billion euros, and each was capable of generating a turnover of more than 250 million euros within the European Union market. At the same time, no more than two-thirds of the total turnover of Siemens and Alstom within the EU market was achieved in just one specific EU country. The previous thresholds, the last according to which more than two-thirds of the total EU-wide merged company's turnover is not earned within only one specific member state, define whether the concentration is subject to the jurisdiction of the Commission. So, the satisfaction of the other two thresholds concerns the global total turnover of the involved undertaking and the EU-wide turnover for each of at least two companies, which must be 5'000 million and 250 million respectively. Otherwise, if just one condition is not satisfied, the concentration holds national significance and thus should be managed by the national authority. Referring to the case, the undertaking proposed by Alstom and Siemens was of interest to the Commission. Concerning the definition of the relevant markets in the case, the

commission initially did not include high-speed trains (with a speed capacity between 250 and 299 km/h), and assessed that they rather represent a distinct product market. The reason behind this decision resided in the non-substitutability of high-speed trains for the very high-speed trains (capable of travelling at a speed greater than 300 km/h), on both technical and economic terms. However, since the transaction was likely to cause competition concerns regardless of the definition of the relevant market, it is necessary to examine both scenarios, namely, both the hypothesis of a unique market for high and very-high speed rolling stock and the alternative hypothesis of a separate market only for very high-speed rolling stock. The relevant geographic area included all the European Economic Area (EEA), formed by the 27 EU member states, plus Norway, Iceland, and Liechtenstein. Also, Switzerland was included as a relevant country because of its similar rules concerning the operability within the railway sector and the opportunity to enter its market without facing significant barriers. Moreover, the potential relevant market was assessed to hold a global scale, but without including China, Japan, and South Korea, due to the practical impossibility for European corporations to get access to those markets. The relevant market product included both the high-speed trains and, to a lesser extent, the very high-speed trains within the same extension previously defined by the Commission's definition of the geographic scope of the market. The commission also decided to split mainline signalling and urban signalling into distinct markets. Based on the calculation of the market shares of Siemens and Alstom from 2008 to 2018, the Commission could estimate the impact of the merger on total market share. In particular, the new undertaking would have held a firmly dominant position in both the total market for both high and very-high speed trains and the specific market for very-high speed trains only. In these market segments, the merged company would have accounted for around 60% or 70% of the global market share (except for China, Japan, and South Korea) and 70-80% within the EEA and Switzerland. Alstom and Siemens were assessed to share very similar features in the market, including a common range of products and services (including, for instance, high-speed trains and signalling solutions), and geographic areas. Thus, the Commission assessed a significant closeness of competition between the two corporations, also based on the significant number of times when the two corporations participated in the same tenders, along with evidence in the parties' internal documentation, which confirmed the Commission's assessment. Both companies

operated in the international market. On the one hand, Siemens was active in Belgium, France, the Netherlands, and the UK, in partnerships with Eurostar, while collaborating with Russian and Turkish operators as well. On the other hand, Alstom had a strong commercial partnership with Nuovo Trasporto Viaggiatori (NTV, also known as Italo) in Italy, and Amtrak in the US, plus some activities in Finland, Poland, and Morocco. The assessment of the Commission about the closeness of competition between Alstom and Siemens was further confirmed by a market survey involving a large portion of significant customers. The latter claimed that the two companies offered high and similar quality standards in their commercial services, thus representing the best alternative services to one another. As mentioned before, tenders were subject to frequent participation of both Alstom and Siemens, strongly indicating a reciprocal competitive pressure. Moreover, that competitive pressure had overall stronger effects on the market due to the fact that tender participants were few, often no more than two entities on average in the case of EEA and worldwide tenders involving high and very-high speed rolling stock. The internal document not only stated the reciprocal competitive pressure exerted by the two parties but also revealed a substantial competitive distance from all the other competitors operating in the market. A substantial part of the barriers to entry for the high and very high-speed trains market generally belonged to the expenses associated with the purchase and development of the necessary rolling stock. Additionally, the operators needed to demonstrate solid past experiences and reliability in the railway sector in order to gain credibility for competitive tendering. Besides high operating costs and a strong reputation, other barriers, specific to the EEA, concerned the compliance with strict technical mandatory requirements and certifications. These included technical authorisation required for the circulation of rolling stock in the EEA railways, and a track record demonstrating previous operational activities of the company in the EEA. At the informal level, a subtle but still critical competitive advantage for tenders favored those EEA suppliers that had privileged commercial partnerships with historical and rooted national operators in their home countries. Furthermore, the operators relying on EEA-based or national production plants and/or operational strategic centres were privileged compared to foreign operators without any local support.

The Commission assessed that the merged entity raised substantial anticompetitive concerns in the mainline signalling market, as the concentration would have subtracted a

competitor, namely Alstom, in the specific market segment. The market share of the new undertaking in the mainline signalling market would have been largely superior to any other operator, and estimated at 70-80%. Apart from being close competitors, a common feature of both Alstom and Siemens was the innovation in the development of signalling solutions. The market would have been deprived of an important innovator through the transaction. The new undertaking would have strengthened its control and exploitation of both the traditional signalling systems and cross-border high-capacity routes, which represent the arterial line of the EEA network and the strategic key to foster rail mobility on the old continent. According to the Commission's evaluation, even the most influential global suppliers, like the Chinese, would have faced significant barriers to entry in the EEA market for signalling after the transaction.[88] Alstom and Siemens committed themselves to carrying out structural remedies against the competitive concerns identified by the Commission via the adoption of two alternative packages concerning very high-speed trains. The first package, named Velaro, referred to transferring the right to produce, develop, and sell the third-generation model of Velaro platforms (very high-speed trains, among the most innovative and performant models in the market at the time) from Siemens to a third-party operator. Alternatively, the Pendolino package required Alstom to divest its Pendolino platform for the benefit of a third-party purchaser. However, both packages were deemed not functional to solve or lessen the competitive concerns regarding the very high-speed trains segment. The same decision held for the commitments proposed by Siemens and Alstom concerning the mainline signalling. Due to the evident insufficiency and proven lack of effectiveness of the proposed commitments, the Commission ultimately declared the incompatibility of the concentration with the internal market and the functioning of the EEA agreement. According to the Commission's final decision on the case, the concentration would have sparked significant damages to competition in the railway sector within the EU internal market, but also on an EEA-wide level.[89] The Commission's decision fostered public discussion concerning the EU competition law. On the one hand, competition law must clearly protect market competition. But, on the other hand, it is true that, in protecting

[88] *Summary of Commission Decision of 6 February 2019 (Case M. 887 – Siemens/Alstom)*. Official journal of the European Union, Pg. 1-4
[89] *Summary of Commission Decision of 6 February 2019 (Case M. 887 – Siemens/Alstom)*. Official journal of the European Union, Pg. 6-7

competition, institutions should also take into account the implications of antitrust decisions on the European industrial competitiveness. This need is becoming more and more compelling given the increasing process of globalization. Mainly due to high production costs and cumbersome bureaucracy, European markets are increasingly losing attractiveness compared to global dominant players and new emerging markets, including the USA, China, but also India and Vietnam. An inefficient competition law could further undermine the competitiveness of European firms and organizations in the global market. The dream of Alstom and Siemens to boost efficiency through the establishment of a big European champion in mobility was dashed by the unresolved competitive concerns raised by the Commission. Yet, the premises for a successful merger operation seemed to be initially reassuring for both corporations. Indeed, the operation was strongly supported by both the French and German governments. The main interest of the governments was to foster the respective national incumbents' market power. Both Alstom and Siemens represented the industry leaders in the railway sector, specifically in the provision of rolling stock and mainline signalling. According to the estimate, the merged undertaking would have been able to generate 15 billion euros of yearly revenues. The risk of market penetration in the EEA market by big Chinese suppliers of rolling stock pushed both Alstom and Siemens towards the decision to merge. Particular attention was directed towards CRRC, which was one of the most performing Chinese companies in the railway sector, generating, at the time, more or less double the projected revenues of the potential merged entity. The Commission's final decision strengthened the perceived idea that merger control rules tend to limit the creation of big merged entities, namely the European champions. It is argued that rules on mergers should be reshaped in order to comply with the need to provide European firms with favourable conditions to effectively compete with the Asian corporate giants, not only in the railway sector. Evidence of a high degree of the German government's involvement in the Siemens/Alstom case was underlined by political pressures towards the Commission and exerted by individuals referable to the German political elites. The member states' interference goes against the EU competition law principles, stating that member states or any political institutions must not significantly influence merger control proceedings. The Advisory Committee, which is formed by the representatives of all member states' antitrust authorities, holds consultation power and, thus, its decision is not legally binding. According to the EU

Merger Regulations, the Commission is required to have a consultation with the Committee during the proceedings. The Advisory Committee represents the unique institutional channel through which political influence can be exerted by member states. The independence of merger control proceedings from political interference aims at ensuring the maximum possible objectivity and impartiality in the final decision.

The Commission's final decision attests to the capability of the Commission to show an appreciable level of independence from political influence and frequent calls for granting space for freedom in favour of a more interventionist approach by the member states. In the Siemens/Alstom case, France and Germany, even though exerting significant political influence, obtained the opposite desired goals. Indeed, the aggressive interference of the member states themselves induced the Commission to adopt a further careful approach in assessing the effects of the concentration on competition. Put under substantial pressure, the Commission did not consider with adequate trust and seriousness the statements proposed by the political players. On the other hand, an indirect effect of the political support to Alstom and Siemens could be the fact that the parties might have overestimated their ability to strategically influence the Commission by refusing any concessions.

An *ex ante* discussion of the remedies, to be implemented by the involved parties, could have played an important role in resolving eventual competitive issues and strengthening their position in front of the Commission. On the contrary, the parties decided to commit themselves to implementing remedies with an excessive delay (precisely the last day available to submit them) that hindered their effectiveness. In any case, the proposed remedies were not sufficient to convince the Commission to approve the transaction. The transaction also had to deal with opposition from institutions like the UK's Competition and Markets Authority and the Office of Rail and Road. Evidence from the case is the time flexibility shown by the Commission about assessing the modifications to the original Velaro and Pendolino package. The second and third proposals of remedy were subject to the Commission's analysis, even if the deadlines for submission were not respected (12 and 24 days of delay, respectively).

The French and German governments did not really swallow the outcomes of the Alstom/Siemens failed transaction. Following the termination of the case, an increased perceived need to change the EU competition law towards greater attention for industrial policies emerged. This common feeling was represented by the Franco-German

Manifesto (for a European industrial policy fit for the 21st century). In particular, the Manifesto conveys the basic idea that the anachronistic EU set of competition rules is undermining the competitiveness of the European economic system because of neglecting the continuous competitive development occurring on a global scale. Practical solutions were proposed via the Manifesto, including the extension of the time frame within which the Commission assesses the likelihood of future market entry as a measure for potential competition post-transaction. The Commission currently applies the principle of timeliness to market entry if the latter occurs within two years. By broadening the time frame, the Commission would also be able to better define the worldwide level of competition. The EUMR and Guidelines already accept the possibility of enlarging the time frame to assess potential competition. The Manifesto additionally suggests equipping the EU Council with a veto power over the decisions of the Commission in specific merger cases. Hence, the EU Council would have the power to overturn the decisions of the Commission. The main issue does not lie in the EU regulation itself, which might be considered an efficient measure to deal with a dynamic market approach, but rather in the inconsistency between the Commission's evaluation of potential competition resulting from the involved entities and from third parties. The Commission considers a two-to-ten-year and a two-to-three-year time frame, respectively. Thus, the Commission differs in its analysis of the threat of new entrants according to the kind of potential new entrant. By applying a shorter time frame for third parties' entry, the Commission tends to show less optimism and flexibility about the idea that third parties could actually be able to enter and compete in the market. The underlying risk is that the Commission might underestimate the potential competition of third-party entities, and thus impose too restrictive conditions on the transaction's feasibility. A solution may be extending the time frame to define third-party competition, particularly in markets with a high HHI index. Based on the Manifesto, one factor hindering the creation of European champions is the definition of the geographic market adopted by the Commission, which is argued to be excessively narrow. The consequent risk is that the Commission might assess the competitive concerns of a merger in an artificial way, and overestimate it by considering a restricted territory rather than a more expanded relevant market. In recent years, the Commission has increasingly adopted the global market as a definition for the relevant market. The same holds in the case of EEA-wide markets by also considering, if

existing, the third-party imports. Given the evidence of the Alstom/Siemens case (where the Commission actually took into account the global market, excluding China, Japan, and South Korea), a wider definition of the relevant market does not necessarily lead to significant modifications in the concentration's epilogue. Attention should be focused rather on providing sufficient remedies to the competitive concerns. Another factor obstructing the pursuit of overall performance and competitiveness by European companies is argued by some critics to be the enforcement of the EUMR. While it is true that CRRC had larger total turnovers compared to the two European corporations together, Alstom and Siemens still held supremacy in the turnovers generated in the global market. Indeed, CRRC was capable of generating just 9% of its turnover outside China, underlining that European corporations still can compete even with Chinese giants. According to some economists, there is no way to think that competitiveness could be fostered by concentrations like the Alstom/Siemens. They stated that benefits to competition can be achieved without mergers. A credible alternative to mergers is joint ventures, which would be equally or even more efficient compared to concentrations. Generally speaking, the Commission would be more inclined to grant the authorisation to joint ventures, given their negligible effects on market competition in comparison with mergers. The ideas of these economists go against the main principle stated in the Manifesto. The latter advocates the rise and the development of large companies capable of enjoying economies of scale and scope and uses them as a leverage to compete against foreign giants. However, the Manifesto overlooks the risk of rising monopolistic behaviours, which might be able to increase prices, decrease production, or reduce technological or innovation investments to the detriment of the final consumer.[90] The success of the Manifesto resides in the feeling of isolation of many European companies in facing an increasingly competitive market and the rising number of state-supported foreign firms.[91]

[90] Amory, Bernard; de la Barre, Henry; de Navacelle, Charles. *Beyond Alstom-Siemens: Is there a need to revise competition law goals?* (2019), Pg. 1-6

[91] Amory, Bernard; de la Barre, Henry; de Navacelle, Charles. *Beyond Alstom-Siemens: Is there a need to revise competition law goals?* (2019), Pg. 7

2.3 CARTELS AND RESTRICTIVE AGREEMENTS

2.3.1 THE RAIL CARGO CASE

The EU Commission is the institution that managed the Rail Cargo case. The infringements regarded the cross-border rail cargo transport services within the EU countries. The services were implemented through the adoption of the freight-sharing model. It consists of an agreement between two or more railway companies to offer customers a single overall price concerning the provision of a full service under a single multilateral contract (the three parties are jointly and equally liable for the same set of obligations). The infringement occurred in the context of block trains, consisting of cargo locomotives that go all the way from the point of origin to the final destination. They are used to transport a large volume of goods, usually of a single kind, and do not often change the route on which they operate the transportation service. The conduct regarded the Austrian operator ÖBB, the German operator Deutsche Bahn (DB), and the Belgian operator SNCB. All these undertakings represented the incumbent in the respective national countries for the rail freight transport sector. The accusation referred to the 6-year period between December 2008 and April 2014, in which the three companies carried out anti-competitive customer allocation. ÖBB, DB, and SNCB operate in the provision of rail cargo transport services in Europe along the most critical arterial lines within the Old Continent.[92] According to the leniency notice, the undertakings that participated or contributed to a cartel are provided with the possibility to ask for immunity or a reduction of fines if they actively cooperate with the EU Commission in the cartel procedure. In applying for a marker, an involved company seeks to obtain the total exemption from fines through the immunity. To be granted immunity by the Commission, the company must be the first entity to disclose, apart from its participation, useful information and evidence. Useful means to enable the Commission both to proceed with an inspection specific to the alleged cartel and to assess an infringement of Article 81 EC referable to the alleged cartel. In particular, the information provided by the company requesting a market must include its name and address, the parties contributing to the alleged cartel, the involved scope of products and geographic area, along with the

[92] European Commission. *COMMISSION DECISION of 20.4.2021 relating to proceedings under Article 101 of the Treaty on the functioning of the European Union (AT.40330 – RAIL CARGO),* Pg. 4-6

duration of the cartel and the nature of the conduct.[93] Concerning the Rail Cargo case, the first undertaking requesting a marker was ÖBB in April 2015, after which it was granted conditional immunity by the Commission. Following an unexpected inspection by the Commission at its offices, DB applied for marker and completed it with an immunity application from or a reduction of fines under the Leniency Notice. Following the Commission's formal request for purposeful information and evidence, SNCB also submitted the application aiming for a reduced amount of the fine. The three undertakings agreed to adopt market positions that would avoid competing for each other's customers. The implicit agreement was made in order to protect the firm's respective position as the main service provider for their existing customer base. The freight sharing model implies that the lead carriers, including all three undertakings, manage both the commercial relationship with customers and the transport operations. Yet, all the involved undertakings formally participate in the transport contract. To maintain their respective favourable market position and their stable relationship with clients, ÖBB, DB, and SNCB coordinated their respective estimated commercial offers to customers, thus avoiding exerting an appreciable competitive pressure on each other. Moreover, they granted each other cover quotes, namely fictitious and intentionally non-competitive offers, in order to unfairly favorize the actual lead carrier in maintaining its customers. The cover quotes were provided specifically when there was a significant risk for a lead carrier to lose its position towards a client, who could potentially assess different offers from other providers. The implementation of the agreement was facilitated by the vertically integrated structure of all the involved undertakings, active both in the railway transport service and the entire logistics chain. Concerning the joint agreement on the conditions of the services, the agreed single price was computed according to global tariffs. The latter consists of a common tariff system set by different cross-border railway cargo transport operators, and depending on the calculation of the distances run by each operator.

The Commission assessed that the key factor of the collusion was indeed the reciprocal recognition and the protection of the advantageous role of the lead carrier in a specific business. Notably, the involved undertakings jointly defined the extent of the existing

[93] *Commission Notice on Immunity from fines and reduction of fines in cartel cases* (2006). Official Journal of the European Union, Pg. 1-3

business in which they were operating, creating a sort of detailed mapping of the market, in such a way that no one could exert competitive influence on the others. They identified the existing business based on the point of departure or final destination of the transport operations, the kind of goods, and the features of the final customer. The parties extended the definition of existing business not only to existing services under contracts, but also to those services where there had been even just a single past commercial partnership of one of the parties with a customer. Precisely, it was considered an existing business any transport relation where a contract to share the proceeds with a customer had already taken place, and one of the parties operated as the lead carrier. In most cases, even the tenders for contract renewal and the re-tendering for existing customers were integrated as part of the existing business. In other words, even if a customer got involved in a new competitive tender, the parties avoided exerting competitive behaviour to reach that customer if this had already been served by one specific involved party. Concerning cover quotes practice, the parties voluntarily offered a markup over the price already proposed to the client by the lead carrier for the same service. That markup was artificially high in such a way that the offer was disadvantageous, and thus could facilitate the lead carrier in maintaining its customer. In this way, the undertaking could deliberately offer a higher quote or abstain from making an offer and just let the lead carrier make its own.

About the geographic area, ÖBB and DB implemented their collusive scheme with reference to the transport services operated on routes departing, arriving, or passing through Germany, Austria, but also Hungary and the Netherlands. While SNCB's operations concerned the routes in Belgium. Concerning the duration of the collusive agreement, the Commission assessed that DB and ÖBB maintained a continuous pattern of collusive bilateral contacts from December 2008 to April 2014. SNCB got involved in collusive trilateral contacts later, precisely since November 2011. DB was the most involved company among the three, given that it carried out collusive conduct with ÖBB bilaterally for the entire duration of the infringement, and with both ÖBB and SNCB trilaterally. AT the same time, SNCB was exempted from the bilateral collusive agreement between only DB and ÖBB. Under Article 101 of the TFEU, the Commission assessed that the strategic coordination among the involved undertakings constituted an agreement between undertakings or a concerted practice, or both. Unlike agreements, a concerted practice can be implemented at an informal level, which means that it is

sufficient to asses whether some undertakings show a consistent pattern of behaviour, even without reaching a formal agreement (contracts or written documents). DB and ÖBB were deemed fully liable for the continuous infringement, while SNCB was only liable for its participation in the trilateral conduct. Under Article 101 of the TFEU, the collusive scheme was acknowledged to aim to cause a restriction of market competition, regardless of the fact that the restrictive strategy eventually succeeded or not. Furthermore, the conduct would have potentially hindered the competition level over trades among EU member states. As it happened in the case, the subsidiaries of the controlling company were held jointly and severally liable for the infringements, given the evidence that the respective parent company had exercised a decisive influence on them (they could not decide independently). In these cases, the evidence that the entire or almost the entire subsidiary's capital is held by the parent company is a sufficient condition for the Commission to demonstrate that the parent company itself is co-responsible for the infringement.[94] All three undertakings enjoyed both a reduction of fines for leniency application and for settlement. The first was granted on condition of the undertakings' commitments to cooperate with the Commission by providing it with crucial proofs or useful information to assess the cartel infringement. The second reduction was ensured through the involved undertaking's voluntary admission of their participation and liability in the cartel. The settlement mechanism allows for a significant time and resource saving to the benefit of the Commission, as the concerned companies accept its decision without further challenges. Concerning the Rail Cargo case, all undertakings benefited from a 10% reduction of the total fine that would have been imposed without the settlement practice. Due to the fact that it was the first to apply for leniency, ÖBB received a 100% reduction from fines, thus avoiding paying a €37 million fine. DB was charged with a €48 million fine, while it received a 30% reduction for leniency application. DB's fine was increased by 50% by the Commission for having repeatedly participated in past cartels in the rail cargo transport market over the recent decade. One case dates back to 2012 when DB, along with its subsidiary Schenker, received a 35 million euros fine for their involvement in four separate cartels within the arrangements for the transportation of goods by plane on behalf of third-party shippers. Even though DB and ÖBB

[94] European Commission. *COMMISSION DECISION of 20.4.2021 relating to proceedings under Article 101 of the Treaty on the functioning of the European Union (AT.40330 – RAIL CARGO),* Pg. 6-19

participated in a cartel within the rail freight sector in the Union from 2004 to 2012 and were fined 49 million euros, the Commission could not consider this case as evidence of repeated offences by DB for increasing the aggravating factor. Indeed, it is required that the notification of the Commission's decision must occur before the repeated offence in order for the latter to represent an aggravating factor, and thus increase the fine for the involved undertaking. The decision on the 2004-2012 infringement by DB was notified in 2015, when the second infringement by the same DB had already ended (2008-2014). As confirmed in the Rail Cargo case, the leniency application system is widely adopted by the companies subject to cartel procedure despite the increasing risk that the same companies may be sued *ex post* by private parties harmed by the cartel and, thus, asking for compensation. In this regard, the 2014 Damages Directive facilitated private nd civil actions by parties harmed by the cartel against the cartel members, even if the latter had previously cooperated with the Commission. By trying to avoid follow-on claims by private entities, ÖBB argued that its conduct did not harm customers in any way. According to the undertaking, the prices offered truly aimed to be competitive (no high markup), and the profit margins were poor due to rising competitive pressure exerted by truck transport and privately-held rail cargo operators.[95]

Chapter 3: Analysis of the SCNF/FS case

3.1 INTRODUCTION TO THE CASE

In March 2025, the AGCM initiated a preliminary investigation against FS and its subsidiary RFI in order to assess a possible violation of Article 102 of the TFEU. The conduct of RFI, subject to the antitrust investigation, regards an alleged abuse of dominant position and adoption of behaviours aiming to hinder the entry into the Italian railway network of a foreign competitor, namely SNCF. SNCF is the French incumbent operator in the rail passenger transport service. It also operates in Italy, exclusively serving Milan and Turin in the context of the cross-border Milan-Turin-Paris route. In June 2024, the French incumbent formally notified its intention to expand the passenger transport service in the Turin-Milan-Venice and Turin-Milan-Rome-Naples high-speed

[95] Allegre, Ségolène; Buzatu, Bianca; D'Andrea, Giuliana; Kunnari, Antti; Lévi-Bruhl, Jeanne; Schiffer, Thorsten; Zagoriti, Theodora. *EU Competition Law Newsletter April 2021*. Cleary Gottlieb. Pg. 5-7

arterial lines. The undertaking assured that the service offering would be characterised by the compliance with high-quality standards and highly attractive ticket prices compared to Trenitalia and Italo's existing offerings. The company planned to begin the implementation of the commercial services in Italy within the year 2026. Specifically, it intends to operate 4 and 9 round-trip train services in the Turin-Venice and Turin-Naples high-speed corridors, respectively. The number of services it intends to offer is not casual, but rather represents the critical threshold granting the financial sustainability for the providers and, thus, a concrete opportunity to make profits. In July 2023, SNCF made a formal request to RFI for access to the essential facilities and the necessary train path to implement the intended services. In this regard, RFI was asked to stipulate a 15-year long-term contract enforceable starting from 2025. Similarly to what happened with the Arenways case, RFI is accused by the requesting party of adopting an anticompetitive approach aiming to obstruct the potential competitor's market entry. In practice, RFI strategically delayed the procedure of the allocation of the infrastructure capacity. RFI allegedly used the ongoing proceedings of the ART against it as a pretext for delaying the response to SNCF's request. The ART accused RFI of non-compliance with the obligation to maintain at least 15% of the total infrastructure capacity available to other competitors. The 85% cap on reserved infrastructure capacity is set to prevent a unique or only a few operators from excessive exploitation of the railway network. The previous conduct further hinders the opportunity for new competitors to enter the market. Moreover, RFI allegedly favoured the existing operators (already operating on the high-speed routes) to the detriment of newcomers. By regularly prioritizing the undertakings offering homologous transport services, whose frequency is assessed on a weekly basis, for allocating infrastructure capacity, RFI tended to benefit the incumbent, that is, in most cases, the operator requesting the greatest amount of capacity to implement identical train paths. The latter shows commonality of features in terms of departure and arrival geographic location, intermediate stops, and the time required to complete the train service on the considered corridor. SNCF blamed RFI for implementing a commercially unattractive contractual proposal. The national infrastructure manager made available only up to 5 out of a maximum of 15 round-trip train services on the high-speed line requested by the French. Additionally, SNCF was provided with time slots dealing with scarce passenger traffic and, thus, low market demand and potential profitability.

Anyway, SNCF accepted and signed the contract with RFI in April 2024. Despite the agreement between the parties, SNCF acknowledged the evidence that the stipulated contract is totally inadequate to reach financial sustainability. In September 2024, RFI was notified of another request by SNCF to integrate additional train paths to the contract for the year 2025/2026. The definitive proposal of February 2025 by RFI not only excluded SCNF's request to integrate the additional train paths, but also many paths previously agreed in the contract. A significant fraction of the paths proposed by RFI implied that the competitors could only operate the transport service one-way on many routes. In the end, the train paths subject to acceptance by SNCF were up to five on each Turin-Venice and Turin-Milan-Rome corridor.[96] Given that Trenitalia is entirely held by FS, the potential abuse of a dominant position exerted by Trenitalia would be fully imputable to FS as well. The AGCM set the deadline for the preliminary investigation on the case at the end of July 2026.[97]

3.2 A FORECAST OF THE AUTHORITY'S DECISION ON THE CASE

To assess the dominant position of an undertaking on the relevant market, it is first necessary to consider its market share.[98] Concerning the FS/SNCF case, the relevant market is the Italian high-speed rail passenger transport market, in which Trenitalia is assessed to have a 60-70% market share (equivalent to a passenger share of 42 million).[99] [100] A market share superior to 50% is evidence of a dominant position, but other factors still need to be considered. Trenitalia shows a continuously dominant market share over time in the high-speed segment. Before the market entry of Italo (NTV) in 2012, Trenitalia benefited from an absolute position of dominance, holding a 100% market share. Even with the presence of a competitor, Trenitalia still holds the majority of the market share in the relevant market. Concerning the economic features of the market, the relevant market is characterised by highly intensive capital requirements, high investments, high entrepreneurial risks, and significant economies of scale. Considering

[96] Autorità Garante della Concorrenza e del Mercato. *A575 – OSTACOLI ALL'ACCESSO AL MERCATO DEL TRASPORTO FERROVIARIO PASSEGGERI RETE AV.* **Provvedimento n. 31490** (2025), Pg. 1-2

[97] Autorità Garante della Concorrenza e del Mercato. *A575 – OSTACOLI ALL'ACCESSO AL MERCATO DEL TRASPORTO FERROVIARIO PASSEGGERI RETE AV.* **Provvedimento n. 31490** (2025), Pg. 10

[98] Clifford Chance. *Manuale Antitrust per O-I Italy* (2024), Pg. 34

[99] Autorità Garante della Concorrenza e del Mercato. *A575 – OSTACOLI ALL'ACCESSO AL MERCATO DEL TRASPORTO FERROVIARIO PASSEGGERI RETE AV.* **Provvedimento n. 31490** (2025), Pg. 6

[100] Morino, Marco. Alta velocità: 400 chilometri di nuove linee e la sfida di Sncf (2025). **Il Sole 24 Ore**

the presence of institutional barriers, the relevant market is known for the presence of long, extremely bureaucratic procedures regarding the allocation of infrastructure capacity and the provision of rolling stock. The number of competitors in the relevant market is extremely low, and the threat of new entrants to the incumbent is quite remote and unlikely to occur. Indeed, Italo is currently the unique Trenitalia's competitor operating in the high-speed segment on a national scale. Even though a new market entry is unlikely in the railway sector, an exception is made by SNCF, which, as seen before, is planning to extend the commercial offering on a national basis. The size of the competitor Italo is large, but yet largely inferior compared to the incumbent. Besides holding a larger market share, Trenitalia is able to offer consumers more than 250 daily train connections on the high-speed network, compared to over 100 connections granted by Italo.[101] Moreover, the competitor or potential competitor's countervailing power towards the incumbent is very limited in the relevant market. Most importantly, Trenitalia, through the sister company RFI, enjoys indirect control over the infrastructure capacity, and thus it is frequently and unfairly favoured by RFI in providing or refusing access to essential facilities to it and its competitors, respectively. For instance, Arenaways was not able in any way to effectively challenge the anticompetitive conduct by the incumbent, as it held significantly less market, bargaining, technical, and scale power. Concerning regulatory barriers, the ART and AGCM's surveillance over the relevant market requires operators to comply with articulated regulatory standards, given the strategic and public importance of the railway sector to society. Among all, operators shall also comply with a critical aspect of the sector, namely, antitrust and competition law. Problems with the coordination among different regulatory institutions, like the ART, the AGCM, and the MIT, may arise, hindering the timeliness and effectiveness of antitrust enforcement, especially concerning the prevention of infringements. Concerning the economic barriers, operators must deal with considerable investment requirements for up-to-date rolling stock, along with elevated costs of access to the high-speed network infrastructure. The historical operators enjoy significant economies of scale, meaning that they have the capacity to spread their fixed costs over a wider volume of trains and passengers, and thus lower the average costs. Furthermore, major operators benefit from

[101] Autorità Garante della Concorrenza e del Mercato. *A575 – OSTACOLI ALL'ACCESSO AL MERCATO DEL TRASPORTO FERROVIARIO PASSEGGERI RETE AV.* **Provvedimento n. 31490** (2025), Pg. 6

powerful bargaining power with suppliers, which helps them gain better contractual conditions and, sometimes, price reductions. They also operate by exploiting more efficient logistics and organizational structures. Concerning the technical barriers, the critical elements concern the rolling stock's compatibility with the national network infrastructure, the licensing to operate the services, and the certificates attesting compliance with safety standards. These barriers might facilitate the incumbent in hindering or delaying the development of competitors in the market.

In the SCNF/FS case, the AGCM might assess the imposition of excessive and unfair prices by the incumbent towards SCNF, whether it is demonstrated that FS imposed economic conditions that were too burdensome without an objective justification. To constitute an abuse of dominant position, the price offered has to show a significant discrepancy with the real market value of the product or service, similar products or services provided by other operators in the same relevant market, or by the same operator in other markets. It is unlikely that FS implemented this strategy, as it is more effective and subtle to hinder the competitor's access to infrastructure capacity without the need for the incumbent to artificially raise prices, given that it already holds indirect control over infrastructure through RFI. The same concept might hold true for the application of predatory pricing as well.[102] Discriminatory practices occur when the infringing party imposes different contractual conditions in negotiating with different buyers for the same product or service, exclusively aiming at providing an unfair advantage to a specific buyer. Similarly to the Arenaways/FS case, the AGCM might assess a discriminatory practice, whether, for instance, it is proven that the incumbent had penalized SNCF by refusing to cooperate with the latter to provide the required infrastructure capacity. A credible scenario could be that, at the same time, the RFI unfairly favours the sister company Trenitalia by providing it with the best conditions to operate the services on the interested route. In this way, Trenitalia might have the opportunity to intensify its train service operations on the same routes for which SNCF had made the request to operate. Hence, Trenitalia may strategically saturate the market by intensifying, for instance, the high-speed Frecciarossa daily connections within the Turin-Venice or Turin-Naples arterial lines. Trenitalia is likely to implement such a strategy, given its privileged relationship with the national infrastructure management, namely RFI. Another

[102] Clifford Chance. *Manuale Antitrust per O-I Italy* (2024), Pg. 35-38

significant anticompetitive conduct, which the incumbent might have carried out, consists of the refusal to deal. In relation to the case, the refusal to deal might constitute an abuse of dominant position, given that the good, the railway infrastructure network, whose access to the competitor is being restricted by the incumbent, is essential to operate in the market contiguous to that in which RFI operates. In other words, access to railway facilities is necessary for SNCF to compete in the Italian high-speed passenger transport services. Moreover, the Italian high-speed infrastructure network, which is 100% controlled by RFI, cannot be feasibly duplicable by SNCF in any way. According to SNCF's complaints to the authority, the incumbent offered unfair and discriminatory conditions within the contract. SNCF only received partial access to the infrastructure capacity, including up to 5 train paths, in each Turin-Venice and Turin-Milan-Rome corridor, respectively. These conditions were not deemed by the competitor as sufficient to grant its financial sustainability. RFI will probably be considered liable for carrying out a refusal to deal with SNCF.

Based on these presumptions, the AGCM will likely assess the abuse of dominant position against RFI and Trenitalia. In order to avoid economic fines, the incumbents will probably propose some remedies sufficient to restore an appreciable level of competition in the market. FS has already notified the antitrust authority that it will engage in full cooperation with the AGCM through commitments. A possible scenario is that the incumbents will succeed in avoiding paying the economic fines, and that more room will be left for SNCF to be able to compete in the Italian railway sector.[103]

CONCLUSIONS

To assess the true significance of effective antitrust enforcement, it is quite important to remember the detrimental destiny that Arenaways had to face following the case with FS and Trenitalia. In that case, the late intervention of the AGCM was insufficient to avoid that Arenaways ultimately ended in bankruptcy. It is clear that the SNCF/FS case shows significant differences compared to the Arenaways case. For instance, SNCF, in the quality of the incumbent in the rail passenger transport services in France, enjoys a strong market position, strengthened by a market presence at the European level, and stable

[103] Clifford Chance. *Manuale Antitrust per O-I Italy* (2024), Pg. 41-42

financial support. To the contrary, Arenaways held a vulnerable position as it was essentially a newborn undertaking, only active in the Turin-Milan corridor. Furthermore, it was the absolute first privately held operator to compete with Trenitalia within the Italian rail passenger transport market. As demonstrated by the Arenaways/FS case, timeliness is a key factor ensuring the effectiveness of antitrust enforcement. The longer the antitrust proceedings and the delays, the higher the risk of harmful effects for the market competition level and the consumers. The earlier the competitors are granted market access, the greater the benefits for the consumers, who are likely to enjoy both lower fares and better service quality thanks to the presence of more operators in the market. By considering the past antitrust cases involving FS (and subsequently Trenitalia and/or RFI), it is possible to acknowledge that the incumbent rarely receives a fine at the end of the proceedings. Indeed, it is often the case that the authority's final decision orders the incumbent's compliance with the commitments agreed upon throughout the proceedings. While it is true that this mechanism helps to shorten the time necessary to restore competition without further disputes, remedies that avoid imposing a fine could create some precedents with low deterrence against the infringing party. Trenitalia can unfairly exploit this by replicating anticompetitive conduct, knowing that, by submitting *ex post* the required commitments, it will probably avoid getting fined. On the one hand, it is critical to provide the infringing party with the opportunity to provide an adequate solution with the authority to restore an appreciable market competition level during the proceedings. On the other hand, too much flexibility risks leading to a high degree of perceived impunity toward the same infringing party. Hence, the issue could lie in the weak deterrence of antitrust measures towards Trenitalia. As evidence of the cases analyzed, it would not be the first time that FS, through its subsidiaries, tends to obstruct the entry of a competitor in the national rail passenger transport market. SNCF would not be the first competitor targeted by anticompetitive conduct by the incumbent, especially abuses of dominance (often including refusal to grant access to essential facilities) towards, for instance, GVG and Arenaways itself. The reiteration of anticompetitive conduct by the incumbent leads to considering that the antitrust measures enforced by the authority throughout the different cases might not be sufficiently dissuasive for the incumbent. The final decision on the case towards the infringing party, including the definition of the fine's amount, must be assessed not only according to the criteria

established by the relevant legislation. It should also be assessed based on the precise estimate of the tangible damages caused by the anticompetitive conduct on the market. Hence, the economic harm to the detriment of the final consumers, the market competitors, the commercial partners, and suppliers should be adequately reflected by a fair definition of the fines (or, in general, any counter-measure aimed at tackling anticompetitive conduct). While the recognition of the potential commitments in the cases is not questionable, it should be taken into account that, anyway, the damages produced until the commitments' adoption against involved competitors remain and are often substantial. Assuming no intention to contest the AGCM's decision in the Arenways case or to claim superior technical competencies, it is nonetheless interesting to note the relationship between the fine imposed on Trenitalia and RFI and the detrimental economic effects of the conduct. A 300'000 euros total fine surely had a significant impact on the incumbent's finances. But the amount seems not to fairly reflect the damages that Arenaways actually had to deal with during the case. Indeed, the newcomer faced severe financial losses, which eventually led to the company's bankruptcy, that seem to go well beyond the amount of 300'000 euros.

It is noteworthy to stress the importance of a comprehensive assessment of antitrust violations.

The latter should be considered not only given relevant legislation, but also aware of the dominant position of the incumbent in the market, and thus, its concrete possibility to implement anticompetitive conduct, likely to have a large negative impact. Concerning the reiteration of the incumbent's anticompetitive conduct, the role of the aggravating factor, as regards the punishment of repeated infringements in the definition of fines' amount, should be emphasized.

BIBLIOGRAPHY

Allegre, Ségolène; Buzatu, Bianca; D'Andrea, Giuliana; Kunnari, Antti; Lévi-Bruhl, Jeanne; Schiffer, Thorsten; Zagoriti, Theodora (2021). *EU Competition Law Newsletter April 2021*. Cleary Gottlieb.

https://www.clearygottlieb.com/-/media/files/eu-competition-newsletters/eu-competition-law-newsletter--april-2021-pdf.pdf

Amory, Bernard; de la Barre, Henry; de Navacelle, Charles (2019). *Beyond Alstom-Siemens: Is there a need to revise competition law goals?*

https://www.jonesday.com/-/media/files/publications/2020/09/beyond-alstomsiemens--is-there-a-need-to-revise-competition-law-goals.pdf

Autorità Garante della Concorrenza e del Mercato (2012). *A436 – ARENAWAYS– Ostacoli all'accesso nel mercato dei servizi di trasporto ferroviario passeggeri. Provvedimento n. 23770*.

https://www.agcm.it/dotcmsCustom/getDominoAttach?urlStr=192.168.14.10:8080/41256297003874BD/0/562738E0EFD3E2D4C1257A5A002F08E2/$File/p23770.pdf

Autorità Garante della Concorrenza e del Mercato (2025). *A575 – Ostacoli all'accesso al mercato del trasporto ferroviario passeggeri rete AV. Provvedimento n. 31490*.

https://www.agcm.it/dotcmsCustom/getDominoAttach?urlStr=192.168.14.10:8080/41256297003874BD/0/558F9A53B2B763D3C1258C5700331D1C/$File/p31490.pdf

Benedettini, Simona; Stagnaro, Carlo (2014). *Il trasporto ferroviario regionale in Italia: tracce di concorrenza?* Mercato Concorrenza Regole. Rivisteweb

https://rivisteweb-it.eu1.proxy.openathens.net/doi/10.1434/78085

Boitani, Andrea (2010). *Ferrovie: il lato oscuro delle riforme*. Mercato Concorrenza Regole. Rivisteweb

https://rivisteweb-it.eu1.proxy.openathens.net/doi/10.1434/32937

Boitani, Andrea; Ramella, Francesco (2012). *Arenaways e altre storie ferroviarie (poco edificanti)*. Mercato Concorrenza Regole. Rivisteweb

https://rivisteweb-it.eu1.proxy.openathens.net/doi/10.1434/36774

Castaldo, Angelo; Nicita, Antonio (n.d.). *Essential Facility Access in US and EU: Drawing a Test for Antitrust Policy*.

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=877135

Clifford Chance (2024). *Manuale Antitrust per O-I Italy*.

https://www.o-i.com/wp-content/uploads/2024/05/O-I-Italy-_-Antitrust-Manual.pdf

Commission of the European Communities (2004). *Commission Decision of 27 August 2003 relating to a proceeding under Article 82 of the EC Treaty (COMP/37.685 GVG/FS)*.

https://ec.europa.eu/competition/antitrust/cases/dec_docs/37685/37685_70_1.pdf

Conticelli, Martina (2001). *I diritti di accesso e di interconnessione nella nuova disciplina dei pubblici servizi a rete*. Mercato Concorrenza Regole. Rivisteweb

https://rivisteweb-it.eu1.proxy.openathens.net/doi/10.1434/132

D'Alberti, Marco (2007). *La liberalizzazione dei servizi. Passi successivi*. Economia dei Servizi. Rivisteweb

https://rivisteweb-it.eu1.proxy.openathens.net/doi/10.2382/23743

European Commission (2006). *Commission Notice on Immunity from fines and reduction of fines in cartel cases*. Official Journal of the European Union.

https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52006XC1208(04)

European Commission (2019). *Summary of Commission Decision of 6 February 2019 (Case M.8677 – Siemens/Alstom)*. Official Journal of the European Union.

https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=uriserv:OJ.C_.2019.300.01.0014.01.ENG

European Commission (2021). *Commission Decision of 20 April 2021 relating to proceedings under Article 101 of the Treaty on the Functioning of the European Union (AT.40330 – RAIL CARGO)*.

https://ec.europa.eu/competition/antitrust/cases1/202141/AT_40330_7947754_1178_9.pdf

Giannino, Michele (2010). *The Abuse of Dominant Position in the Rail Sector: The View of the Italian Competition Authority*.

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1685889

Macchiati, Alfredo; Cesarini, Andrea; Mallus, Arianna; Massimiano, Marco (2007). *Concorrenza e privatizzazione nel settore ferroviario in Europa. Problemi aperti e prospettive*. Mercato Concorrenza Regole.

https://rivisteweb-it.eu1.proxy.openathens.net/doi/10.1434/24264

Pennisi, Riccardo (2015). *L'Antitrust in Italia tra diritto dell'Unione europea e diritto nazionale*. Fogli di lavoro per il Diritto Internazionale.

https://www.lex.unict.it/sites/default/files/files/Crio/FogliLavoro/2015-2/FLADI_2015_2-2.pdf

Rossi Dal Pozzo, Francesco; Rinoldi, Dino (2020). *Il trasporto ferroviario nell'Unione Europea all'alba del terzo millennio*.

https://ec.europa.eu/programmes/erasmus-plus/project-result-content/c03ddd01-87cf-44bf-b1be-27e84488b645/Volume_intero_con_copertina.pdf

WEB REFERENCES

Morino, Marco (2025). *Alta velocità: 400 chilometri di nuove linee e la sfida di Sncf*. Il Sole 24 Ore.

https://www.ilsole24ore.com/art/alta-velocita-400-chilometri-nuove-linee-e-sfida-sncf-AHFnWdV