



COMMISSION OF THE EUROPEAN COMMUNITIES

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COMMUNICATION FROM THE COMMISSION

**Clarification of the Commission recommendations on the application  
of the competition rules to new transport infrastructure projects**

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**Introduction**

1. Accelerating the implementation of the trans-European transport network is one of the Community's objectives for developing competitiveness and growth in Europe. The High-Level Group on Public-Private Partnership Financing of Trans-European Network Transport Projects has stressed the need to create a legal environment that facilitates public-private partnerships.
2. Application of the competition rules is often seen as a factor of uncertainty that impedes the investment of private capital into trans-European network transport projects at an early stage. This is because, in applying the competition rules, the specific features of each project have to be taken into consideration and a case-by-case analysis carried out, in particular where individual exemptions are to be granted under Article 85(3).
3. So as to ensure that all the parties involved in creating such infrastructures are better informed, the Commission has already presented to the Council and the European Parliament recommendations on the application of the competition rules to transport infrastructure projects (see the annual report drawn up in December 1995, COM(95) 571, published on 30 May 1996, and in particular Annex II to the chapter on the trans-European transport network).
4. As a follow-up to the conclusions of the High-Level Group, which underlined the usefulness of clarifying those recommendations, the Commission in this Communication further explains the application of the competition rules, in particular as regards to:
  - the general objectives that are being pursued in this field,
  - the procedure for examining Trans-European network transport projects,
  - the conditions for exemption of capacity reservation agreements,

and attempts to reconcile the need to maximise the financial viability of rail projects with the provision of free and non-discriminatory access to infrastructure.

## **The objectives that are being pursued**

5. In order to promote competitiveness and job-creation, the Commission's policy is to ensure effective competition and the development of intra-Community trade, while at the same time ensuring that the measures proposed or adopted are compatible with the tasks in the general economic interest performed by public services.
6. The various Community policies relating to the development of competition in the transport sector are interrelated, in particular through implementation of the principle of freedom to provide services, application of the competition rules laid down in the Treaty and the rules governing the award of contracts.
7. Public-private partnership projects must in all cases take account of the general framework provided by the common transport policy and, as regards rail projects in particular, the Commission's White Paper published in December 1992 (COM(92) 494).
8. The integration process involved in the establishment of the single market shapes the economic context in which competition policy is applied. The principle of freedom to provide transport services, laid down in the Treaty, is implemented through the establishment of the common transport policy.
9. For example, with regard to railways, Directive 91/440/EEC gives railway undertakings and international groupings of railway undertakings, subject to certain conditions, right of access to Member States' railway networks in providing international rail transport services. Directive 91/440/EEC establishes a legal framework within which the rules on competition between undertakings can operate. Within this legal framework, undertakings can conclude agreements, whose lawfulness has to be assessed in the light of the competition rules.
10. A distinction should be made here between the competition rules and the rules governing public procurement, which are often confused: the Community's competition rules as laid down in the Treaty, particularly Articles 85 and 86, do not contain any specific provisions on procedures for calls for tenders in public procurement.
11. As pointed out in the Commission's December 1995 annual report and the final report of the High-Level Group on Public-Private Partnership Financing of Trans-European Network Transport Projects, two distinct sets of rules governing public procurement apply at Community level to transport infrastructure work, namely Directive 93/37/EEC, which concerns the award of public works contracts, and Directive 93/38/EEC, which concerns entities operating in the water, electricity, transport and telecommunications sectors.
12. This Communication does not set out to deal with the application of the rules governing the award of public works contracts to trans-European network transport projects. It sets out only to clarify the Commission's recommendations regarding the application of the competition rules laid down in Articles 85 and 86 of the Treaty to trans-European network transport projects.

13. Competition policy comprises three main areas, namely restrictive agreements and practices (anti-trust), the regulated or monopoly sectors and state aid. The Commission has a whole range of interdependent instruments at its disposal in implementing competition policy. The rules governing restrictive agreements and abuses of dominant positions, the provisions on merger control and state aid and the rules on market liberalisation all have the same objective: preventing distortions of competition within the single market.
14. In implementing the Community competition rules, the Commission is particularly vigilant to ensure that firms do not try to neutralise the pro-competitive effects of the single market through agreements that introduce or maintain market partitioning. Such practices include certain types of vertical agreements and/or distribution systems and unjustified refusals to allow third parties non-discriminatory access to essential infrastructure.
15. The Commission pursues its policy here through application of the rules governing restrictive agreements and abuses of dominant positions, i.e. Articles 85 and 86 of the Treaty.
16. Article 85 of the Treaty prohibits anti-competitive agreements between firms which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market.
17. However, this prohibition may be declared inapplicable to agreements which fulfil each of the following four conditions:
  - they contribute to improving the production or distribution of goods or to promoting technical or economic progress;
  - they allow consumers a fair share of the resulting benefit;
  - they do not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
  - they do not afford the undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.
18. Article 86 of the Treaty prohibits any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it insofar as it may affect trade between Member States. In contrast to Article 85 of the Treaty, Article 86 does not provide for any exemption from this prohibition.
19. The Commission is prepared to help make more information available to all parties involved in infrastructure projects (the public authorities, transport companies, banks and private investors). Project promoters are therefore invited to contact the Commission if they require any information and advice. The Commission will examine the projects in full confidentiality. If they wish to obtain any information on the competition rules, project leaders may contact Directorate-General IV in the Commission or the Commission's "One-Stop Help Desk" (fax 32 2 295 65 04).
20. Project promoters should also contact their national competition authorities who will be able to provide them with all necessary information on the competition rules.

#### **The procedure for examining projects**

21. In the conclusions to its report, the High-Level Group on Public-Private Partnership Financing of Trans-European Network Transport Projects stressed the importance of a legal environment that encourages the development of public-private partnerships.
22. In this perspective and in respecting the application of the competition rules, the Commission takes account of the specific features of each project on the basis of a case-by-case assessment.
23. A large number of trans-European network transport projects require participation agreements from the outset that bring together a large number of operators. Projects involving new railway infrastructure call for particular attention because of developments in the railways sector and the financing difficulties associated with projects having a low level of profitability.
24. Participants in any project requiring large amounts of investment require particular legal certainty regarding their commitments as from the very outset of the project. This is why project promoters would like to have the Commission's formal position on the eligibility of their project within a reasonable period of time.
25. The Commission departments, and in particular Directorate-General IV, which is responsible for competition policy, encourage parties to contact them early on, when the project is at the discussion and planning stage and before any agreements are signed. This should prevent difficulties arising after the notification of the agreements and thereby slowing down the processing of applications. It will also ensure that the Commission departments are fully informed about projects from the very start and are therefore able to process the applications more rapidly, in particular with a view to an exemption under Article 85 (3) of the Treaty.
26. So that parties are able to predict when they can expect to receive a reply from the Commission, the latter in its December 1995 recommendations stated that it would do its utmost to take a final decision within a maximum period of six months of the notification of agreements, provided the parties had contacted it before finalising the agreements and provided that it had all the necessary information for assessing the project.

#### **Reconciling financial profitability and freedom of access to infrastructure**

27. The information obtained by the Commission from railway infrastructure project promoters indicates a number of issues regarding the application of the competition rules and the financial profitability of projects. The main issues are taking account of the different competing modes of transport, the question of infrastructure access, and the prices charged for such access.
  - (a) Taking account of the different competing modes of transport
28. The in-depth analysis of a project requires a definition of the relevant market. Such a definition naturally means that the different modes of transport are taken into account to establish their substitutability or their complementarity (see in particular the Night Services Decision of 21 September 1994, OJ No L 259, 7.10.1994, p. 20, points 19 et seq.).

(b) Access to infrastructure

29. Application of the competition rules, taking due account of the specific rules applicable to the rail transport sector, is intended to prevent market partitioning through anti-competitive practices such as unjustified refusals to allow third parties non-discriminatory access to facilities which they need in order to carry on their activity.
30. A clear distinction should be drawn between two concepts: firstly, the concept of freedom of access deriving from the principle of freedom to provide services and, secondly, the concept of capacity reservation agreement for operational requirements planned over a reasonable period.
31. The issuing of access rights to railway companies is the responsibility of the public authorities, which act in accordance with the Community and national rules in force (in particular, as regards railways, Article 10 of Directive 91/440/EEC and Directive 95/19/EC). One of the objectives of these provisions is to ensure competition and the development of intra-Community trade without jeopardising the public services' performance of their tasks in the general economic interest.
32. The reservation of infrastructure capacity for an operator providing transport services planned in advance represents an agreement concluded between the infrastructure manager or the entity responsible for capacity allocation and the transport undertaking. Any such agreement differs from the issuing of a right of access by the competent public authority. Moreover, it may be caught by Article 85 or Article 86 of the Treaty.
33. In the consultations carried out in drawing up the Commission's December 1995 recommendations and the report of the High-Level Group on Public-Private Partnership Financing of Trans-European Network Transport Projects, the participants stressed that the infrastructure manager must be able, if he so wishes, to reserve at least part of the capacity for transport companies, which contribute to the financial equilibrium of the project. There is also the question of the use of the transport equipment purchased by companies which are also project promoters.
34. The infrastructure in question requires a high level of investment, repayable over very long periods, and with a generally low level of profitability. Project promoters should therefore be able to obtain certain guarantees as regards the utilisation of the new infrastructure and the payment of user charges.
35. Project promoters nevertheless recognise that the reservation of capacity over a long period is contrary to the principles of freedom of access to infrastructure and of competition.
36. Where there is congestion on the infrastructure, capacity reservation agreements that are not essential to the operation of transport services may become a means of prohibiting access to other transport companies that have the necessary rights of access. The competition rules do not allow such practices. It must be ensured that specific agreements concluded by participants in an infrastructure project do not prevent infrastructure access for transport services authorised to have such access under the provisions of Directive 91/440/EEC and Directive 95/19/EC.

37. In addition, allowing infrastructure access to various users providing competing transport services or services on separate markets can facilitate the financing of the infrastructure by ensuring greater revenue from its use. For example, if several transport companies providing freight transport services on one and the same line or different transport services such as freight and passenger services are allowed access to one and the same rail infrastructure, this will mean that a larger number of user charges will be paid.
38. For these reasons, the recommendations put forward by the Commission in December 1995 are based on the following general criteria:
- (i) If an infrastructure operator wishes to give transport companies the opportunity of reserving capacity from the very start of the project, this opportunity should be offered to all Community undertakings that may be interested.
  - (ii) The capacity reserved for a company should be proportional to the direct or indirect financial commitments entered into by that company and should correspond to the operational requirements planned over a reasonable period.
  - (iii) A new infrastructure is generally not congested as soon as it is put into service. A company, or a group of companies within the meaning of Article 3 of Directive 91/440/EEC, should therefore not have all the capacity available reserved for it. Some of the capacity should remain available so as to allow competing services to be operated by other companies.
  - (iv) The companies awarded user rights may not object to these rights being withdrawn if they are not used.
  - (v) The duration of capacity reservation agreements must not exceed a reasonable period of time, to be agreed in each particular instance.
39. These recommendations do not take the place of case-by-case assessment of projects, in accordance with the procedural rules laid down for this purpose.
40. So as to clarify the scope of the December 1995 recommendations, it is none the less useful to make the following specific points:
- The recommendations are without prejudice to the rules applicable to the award of contracts, and in particular the provisions of Directives 93/37/EEC and 93/38/EEC. Consequently, they do not create any new obligation as regards tendering, but are simply intended to make project promoters aware of the advantages of providing prior information to potential users. Such an approach makes it possible to attract the largest number of infrastructure users and to decrease the risk of complaints on the part of transport operators, who might feel discriminated against if sufficient information were not provided.
  - In principle, capacity reservation agreements that are justified by operational requirements do not pose any difficulty under the competition rules as long as the infrastructure is not congested, since no entry barrier is created.
  - If there is congestion, an agreement reserving capacity that is essential for the effective operation of transport services planned over a reasonable period may

justify the granting of an exemption pursuant to Article 85(3), where all the conditions laid down therein are fulfilled.

41. The purpose of the recommendations is to inform infrastructure project promoters of the need to provide for capacity allocation systems that are sufficiently flexible over time and do not create distortions of competition between users, while at the same time safeguarding over a reasonable period the legitimate interests of each of the users, and in particular those who have supported the project from the outset.
42. A clear separation of responsibilities for the allocation of capacity may facilitate examination of notified projects. For example, the following separations may prevent conflicts of interest as regards capacity allocation:
  - the infrastructure manager is responsible for allocating capacity on a non-discriminatory basis and does not himself operate transport services on the infrastructure;
  - the manager operates transport services on the infrastructure (or controls users), but an independent body is responsible for allocating capacity on a non-discriminatory basis.

(c) The prices charged for access to infrastructure

43. As regards the prices charged for access to infrastructure, the infrastructure manager may pursue the aim of attracting the largest possible number of users from the outset by charging low prices during an initial period. In principle, the competition rules do not oppose any such commercial policy on the part of the infrastructure manager provided that the prices charged apply, over one and the same period, in a non-discriminatory manner to all competing users. The competition rules laid down in the Treaty do not allow the application of dissimilar conditions to equivalent transactions, since this creates distortions of competition that may affect trade between Member States.
44. If project promoters require any further information on these questions, they should contact the Commission and, in particular, Directorate-General IV, which is responsible for competition policy (see point 19).