ICN Advocacy Working Group

Teleseminar on Competition Advocacy in the Transportation Sector

7 February 2011
Welcome and agenda (1)

• Agenda:
  – Introduction
  – Case studies by Spanish, Bulgarian, US and Russian agencies
  – Cross-cutting questions
  – Q&A
  – Concluding remarks

• Please note that speakers are speaking in a personal capacity and the views expressed do not necessarily represent those of their agency
Welcome and agenda (2)

- Panellists and participants please note:
  - Participants will be muted by the operator until the Q&A in order to minimise background noise
  - This teleseminar will be recorded and posted on the ICN website
Today’s speakers (1)

• Panellists:
  – Comisión Nacional de la Competencia, Spain
    • Rafael Coloma Ojeda, Deputy Head of the International Affairs Unit
    • Marcos García Alfonso, Member of the Relations with Public Administrations Unit
  – Commission on Protection of Competition, Bulgaria
    • Ralitsa Kyoseva, Senior expert, Legal analysis and Competition Policy Directorate
    • Nadejda Tzvetkova, Senior expert, Legal analysis and Competition Policy Directorate
Today’s speakers (2)

– US Department of Justice
  • Russell Pittman, Director of Economic Research in the Economic Analysis Group, Antitrust Division
– Russian Federal Antimonopoly Service
  • Vladimir Kachalin, Advisor to the Chairman

• Moderator:
  – James Macbeth, Team leader, Infrastructure Group, UK Office of Fair Trading
Introduction

• Today’s speakers primarily discussing rail and bus services
  – Opportunity to compare and contrast
• UK experience with both sectors troubled – buses deregulated and privatized; rail privatized but still largely regulated
  – Both industries have in part or in their entirety been the subject of market studies and references to the Competition Commission
  – Rail recommendations (rolling stock) not initially well-received by the transport ministry; CC recommendations on buses (if any) due in summer 2011
Competition advocacy in the intercity
passenger transport sector

Rafael Coloma Ojeda
Marcos García Alfonso

Comisión Nacional de la Competencia
Spain
Outlook of events

- Merger file (C106/07 National Express / Continental Auto / Movelia)
- 2007 Agreement to regulate tender system
- Regulation CE 1370/2007 approved in 2007, in force in December 2009
- 2008 Report on competition in the intercity passenger transport sector
- 2010 Follow up report on the sector at national level
- 2010 Report on extensions of the intercity passenger transport sector at regional level
- 2010 Challenge of extensions in two regions
Problems in the sector (1)

- Public administrations entitled to draft and implement tender conditions with ample scope of discretion
- Extensions:
  - Extensions granted to incumbents at national level (90’s)
  - 2007 to 2009, most regions passed regulations to extend concessions, favouring the incumbent
  - Regional extensions could reach 10, 15 years and beyond. A concession could then last for up to 30 years or even more
• Right of preference of the previous holder of the concession:
  – whenever the difference between the incumbent’s score and his best competitor’s score is below 5% of total score of the tender

• Tender criteria:
  – Requirement of previous experience to compete in the tender
  – Little weight of price and frequency criteria in the final score (10% and 5% respectively)
  – Limitations to increase the frequency and price of the service (5%)
  – Technical, infrastructure and other criteria were preeminent
  – Subrogation of employees determined the outcome of the tender (20%)
Concluding remarks and recommendations

• Changes introduced after the 2008 Report, not enough:
  – Small number of effective competitors
  – Little margin of competition among effective offers
  – Incumbent always renews his concession
  – Right of preference in favour of the incumbent is decisive

• Recommendations:
  – Forbid extensions for incumbents, except to avoid interruption of service
  – Eliminate right of preference for the incumbent
  – Improve conditions set in the tender:
    • Upgrade price and frequency in the weight on the final tender score
    • Criteria related to cost and key quality parameters always more important than other criteria
  – Remove limitations to offer improvements, especially in price and frequency
  – Limit the timespan of concessions and link it to depreciation of assets
Power to challenge administrative acts and regulations

- The CNC’s statute grants the CNC functional autonomy and independence from other public administrations.
- The CNC is legally authorized to bring actions before the competent jurisdiction against any administrative acts and regulations from which obstacles to the maintenance of effective competition in the markets may be derived (article 12.3 of Competition Act).
- The CNC sent cease-and-desist order to some regions with the most serious restrictions to competition: Galicia and Valencia.
- Lacking a satisfactory response by the regional Governments, the CNC challenged the regional regulations governing the granting of extensions before the competent Courts.
- Deterrent effect: no Government has developed such scheme since...
Competitive tendering for selecting local bus service providers in Bulgaria – a case study

Ralitsa Kyoseva
Nadia Tzvetkova

Commission on Protection of Competition
Bulgaria
The provision of local bus services in Bulgaria

- **History** – deregulation of the sector in the 1990s as a result of a transition to market-based economy

- **Current situation** – competitive tendering model for the provision of local bus services:
  - **Advantages** – preserved integrated timetable; coordination with other modes of transport; minimum level of subsidies
  - **Disadvantages** – inability to initiate new services to meet customer demand

- **Application of competition rules** – no sectoral exceptions

- **Competence of the CPC**
  - Competition enforcement, advocacy and sector inquiries
  - Public procurement procedures and concessions
CPC Bulgaria – case study (part 1)

- **Competition advocacy** – power to give opinions on draft and effective regulatory acts
- **Practice** – number of complaints against local authorities’ decisions setting the criteria for competition tendering procedure between bus operators
- **Competition problem** – the discretion of the local authority to define evaluation criteria for the competitive award procedure
  - Ordinance of the Ministry of Transport – inclusion of “other criteria” not explicitly mentioned in the legal provision by the municipal councils
• **Examples of discretionary criteria:**

- Criterion for initiator for opening a line or for traditional carrier
- Eligibility criterion – such as the requirement for experience in public passenger transport services in towns with more than 500 000 residents
- Criterion “experience in a certain town”
- Criterion “Court and Tax registration of the provider of transportation services in the relevant municipality in which the competition is organized”
- Requirement for the participants to be Bulgarian legal or natural persons
- Requirement for compulsory setting of minimum or maximum prices
- Requirement for certain turnover
- Requirement for certain amount of revenue for the past financial year
- Criterion of having paid profit tax in the last 3 financial years
- Criterion for ownership of the operating buses
• **Proposal of the CPC** – the inclusion of an explicit provision to restrict the power of local authorities to include discretionary, anti-competitive requirements

• **Outcome**
  – non-binding opinion
  – no legislative change
  – continuous wave of complaints

• **What can we do?**
  – Preparation and publication of a Guidance document
  – Regulatory Impact Assessment Guidelines
  – Seminars

• **Positive developments**
  – Improved transparency of the tendering procedure
  – Public service contract has a maximum period of 10 years
US rail and motor carrier deregulation

Russell Pittman

Department of Justice, Antitrust Division
United States
U.S. rail regulation and deregulation

• Interstate Commerce Act of 1887
  – Required “reasonable and just” rates, approved in advance
  – Made track and service abandonment difficult

  – Moved long distance passenger operations into single, government subsidized corporation (Amtrak)

• Staggers Rail Act of 1980
  – Permitted rate flexibility, including contracts
  – Eased abandonment
U.S. motor carrier regulation and deregulation

• Motor Carrier Act of 1935
  – Regulated rates, patterned on regulated rail rates
  – Routes and commodities to be approved in advance by ICC, with incumbents able to object

• Motor Carrier Act of 1980
  – Freed rates, limited collective ratemaking
  – Eased entry restrictions
What led to deregulation?

• Rail
  – Declining share of freight
  – Bankruptcy of companies
• Motor Carrier
  – Clear superiority of unregulated parts of sector: private carriers, within state carriers
• Overall (including airlines)
  – Academic studies
  – Government agencies – even the regulators
    • In fact Civil Aeronautics Board probably the leader
    • DOJ and FTC as competition advocates
    • DOJ and FTC as continuing competition advocates post-restructuring: mergers, other regulations, complementary sectors
Results of deregulation

- Rail: (almost) everybody won
  - Prices dropped on average for 20 years
  - But profits have steadily increased
  - Labor lost, more in wage levels than employment levels (latter trend was down anyway)
- Motor Carriers
  - Significant rate reductions
  - But profits fell, especially in less-than-truckload
  - Labor lost wages and employment
- In both cases, “total welfare” gains large, driven by benefits for shippers and their customers
- Large gains from improvements in technology
Promoting competition in railroad transportation in Russia

Vladimir Kachalin

Federal Antimonopoly Service
Russian Federation
Reform directions and indicators

• Reduction of monopolization and growth of competition in cargo vehicle service
  – In 2009 the number of the cargo vehicles in Russia exceeded 1 million, including:
    • 370,000 or 36.7% owned by the “Russian Railroads” JSC
    • 250,000 or more than 24.8% owned by RR daughter or subsidiary companies
    • 387,000 or 38.5% owned by companies not affiliated with RR
  – Trends in distribution of cargo vehicles between RR and independent operators:
    • Increase in no. of total cargo vehicles 2003-2009 – more than 23%
    • Independent private businesses acquired more than 200,000 vehicles
    • RR park (with subsidiaries) remained at 2003 level, i.e. 619,000 vehicles
    • Target distribution of vehicles provided by the reform program:
      40% - RR; 60% - other independent owners

• Growth in independent providers’ share of services to operators (e.g. vehicle repairers)
  – RR – 80.2%; RR daughters – 15.1%; Independent – 4.7%.
  – Out of 21 repair depots in Russia 14 are sold already
  – FAS recommended the RR daughter companies to abstain from participation in tenders for acquisition of remaining 7 RR repair facilities
Factors influencing competition in cargo vehicle service

- Type of cargo vehicles
- Supply and demand for vehicles of each type
- Cost of vehicles
- RR tariffs for cargo transportation by each type of vehicles
- Transportation routes
- Share of transportation costs in total costs of goods delivered
- Other factors

RR continue to hold 70-75% of the park of the universal cargo vehicles due to:
- High volume of goods transported by such vehicles
- Low attractiveness of this market segment for private investors because of:
  - Low tariffs
  - Technological limitations

Independent private investors are most active in supply of specialized vehicles
- Incl. cisterns; mineral carriers; pellet carriers
  Partially due to vertical integration of mineral extraction and oil companies in rail transportation
Typical anticompetitive practices

- RR imposing discriminatory conditions of access to rail routes and other infrastructure:
  - Discrimination between own and independent owners/renters of vehicles
  - Discrimination between various independent owners/renters
  - Inconsistency of decisions of some RR managers on access to rail routes with the company obligation to provide non-discriminatory access to rails and infrastructure

- Leads to:
  - Underutilization of independent operators’ vehicles → increase in their costs
  - Violation of contractual obligations of independent operators caused by their inability to provide vehicles for loading in due time
    - Independent operators losing customers
    - Substitution of independent operators’ vehicles by those of operators related to RR or “privileged” by RR managers
  - Independent operators exiting the market
  - Disincentives to new entry/expansion
  - Limitation of competition

- Enforcement problems / difficulties in proving refusal to deal case:
  - RR route managers use technical impossibility to let all the vehicles through under the conditions of limited availability of railways and infrastructure as a defence
• Rules apply to all stakeholders: regulators, rail/infrastructure providers and customers/operators
• Rules apply to a limited number of services based on technological operations of transportation
• Leaning on existing legal base of rail transportation:
  – RR Charter, law on railroad transport, rules of transportation, Tariff Guidelines
• Terms of access to rails/infrastructure under conditions of their limited availability:
  – By priority,
  – On competitive basis where possible
• Standard contracts/contract provisions
• Information disclosure standards, including disclosure of rails/infrastructure availability
• Standard dispute resolution procedures
Cross-cutting questions (1)

• Who were the major stakeholders?
Cross-cutting questions (2)

• What sort of arguments did your agency use to persuade your country legislators/regulators to introduce pro-competitive changes?
Cross-cutting questions (3)

• Were there any attempts to evaluate the effects of the changes? If yes, what evaluation methods were used?
Cross-cutting questions (4)

- What other considerations do you consider to be important in making pro-competitive reforms in the transportation sector?
Competition advocacy in the transportation sector

Q&A
Competition advocacy in the transportation sector

Concluding remarks