

Access conditions for rolling stock leasing in Spain*

Ciara Vicente Mampel**

The offer of locomotives available in the lease market of rolling stock in Spain is basically reduced to the one that the state-owned rolling stock operating company can make available to third parties. This paper assesses the content of lease agreements concluded by said company in compliance with the sectoral legislation.

1. Addressing the issue

The specificities of the railway sector remain an obstacle to free competition among real or potential operators that are prevented from competitive access to the market for transport services due to the existence of barriers to the entrance. In Spain, one such obstacle is the access to rolling stock, in particular to locomotives. This was reiterated by the Spain's National Commission for Markets and Competition (known by its Spanish acronym, CNMC) in a Decision of 23 May 2018 on the access conditions to rolling stock of *Renfe Alquiler de Material Ferroviario S.A.* (hereinafter, *Renfe Alquiler*), which will be analysed below.

Several reasons substantiate the statement of the regulatory body. The high cost of acquiring the rolling stock and the long deadlines for its manufacture and authorisation for placing it in service, as well as the existence of technical differences to the European rail network (track gauge and signalling and traffic control systems), make it quite difficult to manufacture a rolling stock to be used across frontiers. This is why the rental is naturally the most beneficial alternative with which to acquire rolling stock in property. Nevertheless, the market for rolling stock leasing is not widespread in Spain. Unlike other European countries, there are only two companies engaged in the purchase of railway rolling stock for its subsequent leasing. One is *Alpha Trains Iberia S.L.*, which has its locomotive fleet leased as a whole. The other is *Renfe Alquiler*, which is a state-owned rolling stock operating company (ROSCO) set up in 2014 and owned by the incumbent *Renfe-Operadora*.

The Spanish railway market was traditionally characterised by a vertically integrated public monopoly, whereby the State was responsible for the management of the infrastructure and the provision of transport services. Both activities were entrusted to *Red Nacional de los Ferrocarriles Españoles* (Renfe) (Fernández Acevedo 2014). Nevertheless, in order to meet the European requirements, the restruc-

turing of the traditional market took place by detaching the activities of administration of railway infrastructure, which constitutes a natural monopoly, from the exploitation of the transport services, which are progressively open to competition (Cuerdo Mir 2007, Bermejo Vera 2014). On one hand, the construction, management and administration activities of the infrastructure were entrusted initially to *Renfe* and later *Administrador de Infraestructuras Ferroviarias (Adif)* (Carbonell Porras 2007). On the other hand, Spanish State created *Renfe-Operadora* for the provision of passenger and freight rail transport services, which integrated in its assets all the movable and immovable property of the former monopoly (Rams Ramos 2007). The commercial activity of *Renfe-Operadora* is now divided into four lines of activity (passengers, cargo and logistics, manufacture and maintenance, and asset management) by means of four commercial companies fully owned by the State. These are *Renfe Viajeros, S.A.*, *Renfe Mercancías, S.A.*, *Renfe Fabricación y Mantenimiento, S.A.* and *Renfe Alquiler de Material Ferroviario, S.A.* (Renfe 2013) (Figure 1). Therefore, despite having a large fleet of rolling stock, this company did not develop the lease until 29 April 2014 with the start-up of its subsidiary *Renfe Alquiler*, which, as has already been pointed out, is the quasi-monopolistic provider of rental services for rolling stock nowadays.

Given that the meaningful market power of the incumbent and its link with the ROSCO might bring about anticompetitive behaviours intended to hamper the proper functioning of the railway sector, the Spanish legislator envisaged an ex-ante regulatory framework of obligations that imposed certain conditions in the rental services of the latter. It is said that the imposition of ex-ante obligations is appropriate during a transition period for the complete liberalisation of economic sectors; mostly 'where former monopoly operators continue to benefit from inherited market power or where firms are vertically integrated' (Slot P.J., and Skudder A. 2001). Thus, *Renfe Alquiler* has a legal obligation to provide access to rolling stock that it owns to third

* The present study has been carried out in the framework of the research project 'Ventajas y riesgos de la competencia en el sector del transporte' (Ref. UJI-B2016-14), financed by Universitat Jaume I, Castellón de la Plana (Spain) (main researcher: M.V. Petit-Lavall).

** Predoctoral Researcher, Institute for Transport Law (IDT), Universitat Jaume I de Castelló, Spain, vicentec@uji.es

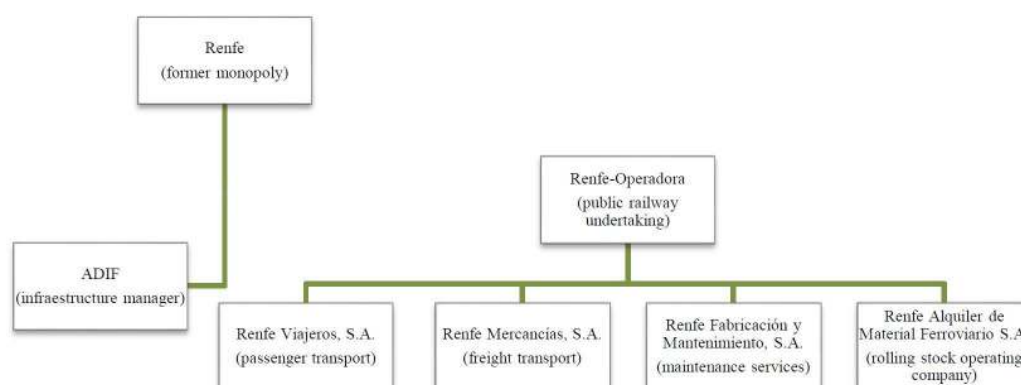


Figure 1. The restructuring of the Spanish rail sector

Source: Authors' own compilation

parties under objective, transparent and non-discriminatory conditions pursuant to the 16th Additional Provision of the Railways Act no. 38/2015, of 29 September, which extensively refers to the obligation of *Renfe-Operadora* to ensure the independence of the board members of its subsidiary from the transport operators who demanded the rental services of railway rolling stock, whether public or private. Thus, it is expressly prohibited for *Renfe Alquiler* to carry out activities that could impede access to the rolling stock that it owns by means of the establishment of access conditions that are not acceptable to railway undertakings (such as undue economic conditions) or that only enable them to access it under unfavourable conditions (such as a limited or delayed availability of rolling stock or the availability of older and, therefore, less competitive rolling stock).

It is specifically here, in the realm of providing access to rolling stock of *Renfe Alquiler* on a non-discriminatory basis, that the aim of this paper is focused. The following pages offer an assessment of the legal basis and content of the leasing contracts concluded by such a state commercial company to make its rolling stock available to third parties. According to the aforementioned decision of the CNMC, this particularly concerns what contractual conditions contained therein are inappropriate to this kind of lease because they increase the costs of leasing rolling stock and can affect the competitiveness of railway undertakings in the provision of rail transport services.

2. Lease agreements of rolling stock of *Renfe Alquiler*

A. Common structure

The main activity of *Renfe Alquiler* consists of carrying out leasing operations for the provision of the railway roll-

ing stock that it owns, and its facilities, as well as, when appropriate, the management of rolling stock that belongs to third parties. Under a lease agreement, one of the signing parties, called the lessor, is obliged to assign the full enjoyment of services of goods to a third party, called the user or lessee, for a specific period of time in return for regular expressly agreed-upon rental payments (Serra Rodríguez, 2016a). This legal business could be considered as renting (the lessor transfers the use of the good to a third party in exchange for a certain rent during the period of time agreed, without a purchase option, including the provision of additional services, among which is the maintenance of the good leased) or operational leasing (the manufacturer of the equipment directly cedes its use to the manufacturer's client, which acquires it in exchange for a periodic canon agreed). However, from a legal perspective, none of them do go beyond the structure or purpose of the typical lease contract, the content of which shall be substantially ruled by the general provisions of the Spanish Civil Code (hereinafter, CC), for everything that was not expressly agreed to by the contracting parties (Morillas Jarillo 1993; Cámara Lapuente 2008, Moreno Serrano 2017, Mercurio and Moschera 2011). Accordingly, all the lease agreements concluded by *Renfe Alquiler* are generally based on the following common structure.

It is a legal business that has bilateral character. Therefore, the contractual relationship arises between *Renfe Alquiler* (the lessor) that takes on the main provision of giving the exclusive use and enjoyment of the locomotives during an expressly agreed upon period, and a third party (the user or lessee) that acquires the use and enjoyment of locomotives transferred for their industrial or commercial exploitation, but not the property, in exchange for a price consisting in the regular payment of fees. However, besides the transfer

of the use of locomotives, the leasing contracts between *Renfe Alquiler* and its customers necessarily include the comprehensive maintenance of those (both preventive and, partially, corrective) to ensure the peaceful enjoyment of them. The comprehensive maintenance contract will be concluded by *Renfe Alquiler* with a single maintenance entity.

Accordingly, the lessee will mostly be obliged to affect the locomotives to their industrial or commercial exploitation and to pay the price to the lessor, as agreed (Sánchez Hernández 2016b). It is a periodic payment, usually monthly, which will depend on the type of locomotive leased, in accordance with the commercial offer of *Renfe Alquiler*. More specifically, this monthly rent will be the total amount of two elements. The first is a fixed fee for each vehicle leased that will depend on the type of locomotive that is subject to the contract, the number of those and the lease period. The second is a variable fee that is determined based on the price per kilometre driven for each vehicle leased. That obligation shall be fulfilled if the lessor carries out its own obligations (Sánchez Hernández 2016a). Especially, that *Renfe Alquiler* delivers the leased tractor rolling stock in the place and according to the previously agreed conditions (Article 1554.1 CC) having the lessee the right to review the state in which it is supplied. Moreover, unless otherwise agreed, *Renfe Alquiler* is obliged to make all the necessary repairs for the peaceful enjoyment of the leased locomotive if it is not attributable to the acts of the lessee (Sánchez Hernández 2016a).

Nevertheless, against the lessor, the user is obliged to receive the leased locomotive, to use it in accordance with its nature and to preserve it in the state in which it was received according to the expressly agreed upon use or according to commercial uses or usage (Article 1555.2 CC). This obligation is not met with the loss or deterioration of the leased locomotive (Sánchez Hernández 2016b). On the whole, the lessees assume the risk for loss or deterioration of the locomotive leased, whether it is not proven that they acted with all the due diligence to avoid causing a harmful event or, at least, that they have taken the necessary measures of care and vigilance to avoid causing the harmful event. The Spanish Supreme Court considers it to be a rebuttable presumption of responsibility for the deterioration or loss of the leased asset, which operates against the lessee, which has the obligation to prove that it acted with all due diligence to avoid the production of the harmful event, not being enough to prove that the leased asset was used as agreed – Judgment no. 70/2016, of 17 February (RJ 2016, 545) reiterating the Supreme Court doctrine, e.g., in its Judgments no.1097/2006, of 24 October (RJ 2006, 671) and no. 134/2001, of 12 February (RJ

2001, 850). In this case, there is a distribution of responsibilities and risks between *Renfe Alquiler* and the lessees in the event of defects, breakdowns and damages in the locomotives. However, the latter must conclude, in any case, a fully comprehensive coverage of locomotive risks prior to its reception, civil liability insurance and a guarantee in case of breaching its contractual obligations. The lease contracts define the availability and reliability index of the locomotives that the lessor agrees to comply with, together with the penalties that the latter will assume against the lessee in case of non-compliance. These availability indexes, which depend on the technical characteristics and age of each vehicle, will allow the operator to know the days on which the locomotives will be subject to a preventive maintenance intervention, detailing the duration of these in the contracts as well as other additional causes that are described and that they will be, in any case, the responsibility of *Renfe Alquiler*.

Furthermore, the lease agreements include a wide range of assumptions on which both *Renfe Alquiler* and the lessee railway undertaking can terminate the contract with the corresponding compensation for damages, as well as the cases in which the parties must pay penalties for non-compliance (for example, by early termination of the contract without due cause or breach thereof). These penal clauses fulfil a double function. One function is a guarantee of compliance with the main obligation, since the penalty compels the debtor to perform the due service. The other is the indemnity function of the damages that may have produced the breach or defective fulfillment of the main obligation – Judgment of the Supreme Court no. 197/2016, of 30 March (RJ 2016, 1153) with reference to its own settled case law, e.g., Judgments of the Supreme Court no. 586/2013, of 8 October (RJ 2013, 7802); no. 93/2012, of 21 February (RJ 2012, 4524); no. 930/2006, of 28 September (RJ 2006, 6390). Hence, besides reproducing the general decisional regime of mutual obligations, pursuant to the breach of one party empowers the other to choose between claiming the performance of the obligation or to urge the termination of the contract (Art. 1124 CC), penal clauses for non-compliance with the main obligation have also been agreed upon, by which the debtor of the benefit that is to be guaranteed (lessor or lessee) is obliged to pay a certain amount of money, as agreed.

Finally, the lessee is empowered to sub-lease the locomotive transferred by entering into a new lease contract with a third party provided that it has the prior consent of *Renfe Alquiler*. Once the term of the lease stipulated in the contract has elapsed, the lessee must return the locomotives to *Renfe Alquiler* in the same state in which they were received, presuming that the lessee receives the leased asset

in good condition, unless otherwise agreed or proven (Articles 1561 and 1652 CC) (Cámara Lapuente, 2008). The locomotives whose lease contracts expire and are therefore returned to *Renfe Alquiler* could be again offered in lease to all railway undertakings.

B. Clauses that can restrict the access to *Renfe's locomotives*

A question that needs to be addressed is which of these contractual conditions can, according to the aforementioned decision of the CNMC, restrict the access to *Renfe's* locomotives in an objective, transparent and non-discriminatory conditions, as envisaged in Spanish law. Essentially, the regulatory body focuses on the provision of maintenance services, especially the choice of a company in charge of them, on the economic conditions applied and on other relevant clauses to access to locomotives such as penalty or damage insurance clauses.

As pointed out above, *Renfe Alquiler* is responsible for choosing the maintenance entity and the approved centre, both of which are charged with full maintenance of the locomotives in accordance with the law in force. Because of this, the incentives of the lessor and the lessee in the maintenance and conservation of the rolling stock are not aligned mostly in those leases that are of a shorter duration. *Renfe Alquiler*, as owner of the locomotives, looks after conserving them in running order so as to extend their economic life as much as possible. On the contrary, lessees will be willing to maximise their use at the lowest possible cost. *Renfe Alquiler* has concluded a comprehensive maintenance contract of all its locomotive fleet with an undertaking integrated in its own business group: *Renfe Fabricación y Mantenimiento*. *Renfe Fabricación y Mantenimiento* is also a state-owned company that is fully owned by *Renfe-Operadora*, which is entrusted with the provision of manufacturing services. This maintenance entity meets all the legal requirements to operate maintenance services and also has the necessary know-how to guarantee the proper conservation of the locomotives because it has traditionally been providing these services. Nonetheless, the regulatory body claims that not all of these circumstances are enough to justify this choice, given the conflicts of interests effectively posed by vertically integrated structures. This is not only because of the link between the lessor (*Renfe Alquiler*) and the company in charge of the maintenance of locomotives, but also because of the integration of these companies into a holding company (*Renfe-Operadora*) that also controls railway undertakings (*Renfe Mercancías* and *Renfe Viajeros*) (Figure 2).

The two facts highlighted above pose negative elements, especially for lessees. On one hand, there is a lack of trans-

parency in the conditions of the provision of maintenance services arising from not contracting such services under competitive conditions in the market. On the other hand, *Renfe Fabricación y Mantenimiento* is currently responsible for executing maintenance services in locomotives owned not only by *Renfe Alquiler* but also by *Renfe Viajeros* and

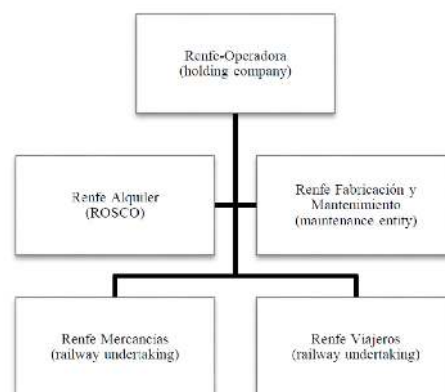


Figure 2. The structure of the model discussed

Source: Authors' own compilation

Renfe Mercancías. This is why the regulatory body has required *Renfe Alquiler* to band the locomotives in batches and submit the maintenance services of each of them to competitive agreements, through a tender procedure that is open to any entity under the administrative principles of equity, transparency and non-discrimination.

As far as the economic conditions of the agreements are concerned, the commercial offer of *Renfe Alquiler* is not discriminatory against any lessees, beyond the existing differences on the variable fee, which will depend on the number of kilometres driven for each vehicle leased. However, the CNMC points out that the monthly rent that the lessees must pay to *Renfe Alquiler* is not objective depending on the type of the locomotive leased. The prices for the rental services of the most modern *Renfe's* locomotives, which are the most competitive ones, are similar to those set in the market by its competitors. However, the prices for the oldest ones, which do not face any competition in the market, are disproportionate to their residual value. This is why *Renfe Alquiler* has been urged to justify why the fixed rental fee that the lessees must satisfy is based on objective parameters (such as technical characteristics, cost of maintenance services, residual value or expected profitability of the asset).

Other essential issues that have been discussed are the penalties for early termination of the contract without

due cause or breach thereof, and the fully comprehensive coverage of the risks that affect the locomotive. The lease agreement includes penal clauses that dissuade both the lessor and the lessee from breaching their contractual obligations by paying a pecuniary amount, as agreed. One of these penalty clauses states that the lessee must pay to the lessor if there is an early termination of the agreements by the lessee without just cause or by *Renfe Alquiler* due to the breach of the lessee. This penalty is not applied vice versa (that is, if *Renfe Alquiler* is the party that breaches the agreement or ends it in advance and without just cause). In this case, the regulatory body has considered that this contractual term is unfair since it entails a significant imbalance in the parties' rights and obligations arising from the lease contract. This situation is again due to the conflicts of interest posed by the vertically integrated structures in compliance with the obligation of the ROSCO to provide access to locomotives on a non-discriminatory basis. In particular, this is because this undertaking can involve incentives to terminate the lease contracts without just cause, with the aim of favouring the railway undertakings integrated in its group to the detriment of its competitors in the market. Thus, it is requested that all lease agreements also incorporate a penalty clause for breach or early termination of the lessor in the same way as they do for the lessees, so that there is a symmetry in the penalties that may correspond to both contracting parties.

The damage insurance clause, for its part, has been described as disproportionate because the total amount of the insurance required is very high compared to the residual value of the locomotives, thus entailing an unjustified increase in the costs that the railway undertakings must bear. This clause is discriminatory as well because it does not apply to the lease agreements concluded between *Renfe Alquiler* and the railways undertakings integrated in its group. On the contrary, these contracts include clauses that set the amount that lessees must pay in case of loss or destruction of locomotives, which is not as high as that of the mandatory damage insurance for the rest of the alternative railway undertakings. The fact that the independence of the board members of *Renfe Alquiler* is granted by *Renfe-Operadora* should assume that *Renfe Alquiler* behaves independently from the policy of its group, treating all the lease undertakings equally. Therefore, the obligation to conclude a damage insurance should be required from any lessees in a similar way to avoid any possible preferential treatments.

3. Closing remarks

As claimed by the Spanish regulatory body, *Renfe Alquiler* has set specific contractual conditions of access to its

railway rolling stock, which are economically unaffordable to potential railway undertakings or, at least, which gives them unrestricted access to it compared other undertakings integrated in its group, closing the competitiveness of those in the market for rail transport services.

Fulfilling all of the requirements addressed by the CNMC will ensure the enforcement of contractual terms that are equally favourable for all the lessee railway undertakings to reduce the well-known conflicts of interest posed by the vertical integration of *Renfe Alquiler* in a holding company (*Renfe-Operadora*) that simultaneously controls the entity responsible for the provision of the maintenance services of the leased locomotives (*Renfe Fabricación y Mantenimiento*) and the largest railway companies in Spain (*Renfe Mercancías* and *Renfe Viajeros*). This is because the structural separation of *Renfe Alquiler* and *Renfe-Operadora* does not prevent *Renfe-Operadora*, as the owner of the rental services provider company, from carrying out behaviours aimed at hindering the entry of potential newcomers. Thus, the principle of party autonomy on which the whole private legal relationship is based has been slightly restricted in compliance with the obligation of *Renfe Alquiler* to provide access to railway rolling stock on a non-discriminatory basis. However, the situation in other European countries should be taken into account as well. An example is the British ROSCOs, privately owned rolling stock operating companies that have been disassociated from the incumbent.

Be that as it may, this is just the beginning of a new competitive controversy that is particularly raised at the Spanish railway sector. The 16th additional provision has remained in the last amendment of the of the Railways Act no. 38/2015, following the Royal decree-law no. 23/2018, of 21 December, which transposes into Spanish law the Directive (EU) 2016/2370 of the European Parliament and of the Council of 14 December 2016 amending Directive 2012/34/EU regarding the opening of the market for domestic passenger transport services by rail and the governance of the railway infrastructure. The new provision adds a new paragraph stating that the conditions of leasing rolling stock services of *Renfe Alquiler* to alternative railway undertakings shall have to be established in the regulations. Thus, the conclusions reached by the CNMC should at least be born in mind for a further regulatory development.

References

- Bermejo Vera, J. (2014), 'Evolución histórica del régimen jurídico del transporte por ferrocarril', in P. Menéndez, *Régimen jurídico del Transporte Terrestre: Carreteras y Ferrocarril (Tomo I)* (Cizur Menor: Aranzadi): 263–340.
- Cámara Lapuente, S. (2008), *El Arrendamiento de Bienes Muebles* (Cizur Menor: Aranzadi).
- Carbonell Porras, E. (2007), 'La entidad pública empresarial «administrador de infraestructuras ferroviarias» (ADIF)', in G. Caramés, *El Régimen Jurídico del Sector Ferroviario (Comentarios a la Ley 39/2003, de 17 de noviembre, del Sector Ferroviario)* (Cizur Menor: Aranzadi): 217–242.
- CNMC (2018), Decision of the 23 of May, on the conditions of the access to rolling stock of RENFE Alquiler de Material Rodante, S.P. E. by railway undertakings (STP/DTSP/055/17)(Madrid:CNMC) <https://www.cnmc.es/sites/default/files/2036340_23.pdf>, accessed 17 January 2019.
- Cuerdo Mir, M. (2007), 'La liberalización del sector ferroviario. La apertura del transporte ferroviario a la competencia', in G. Caramés, *El Régimen Jurídico del Sector Ferroviario (Comentarios a la Ley 39/2003, de 17 de noviembre, del Sector Ferroviario)* (Cizur Menor: Aranzadi): 85–126.
- Fernández Acevedo, R. (2014), 'Ordenación jurídica del Servicio de transporte por ferrocarril', in P. Menéndez, *Régimen jurídico del Transporte Terrestre: Carreteras y Ferrocarril (Tomo I)* (Cizur Menor: Aranzadi): 850–864.
- Mercurio R., and Moschera, L. (2011), 'Sistemi flessibili di incentivo e finanziamento: il leasing del materiale rotabile nei sistema di trasporto ferroviario', *Working paper series Centro Studi di trasporto collettivo «Carlo Mario Guerci»*, 6: <<http://www.consorziocesit.it/media/0/13427747656000/moschera2.pdf>>, accessed 22 January 2019.
- Moreno Serrano, E. (2017), 'El contrato de renting', in A. Abril, *Los contratos mercantiles y su aplicación práctica* (Hospitalet de Llobregat: Wolters Kluwer España, S.A.): 235–281.
- Morillas Jarillo, M^a J. (1993), 'Algunos aspectos del leasing de aeronaves en España', *Revista de Derecho Mercantil*, 208: 471–588.
- Rams Ramos, L. (2007), 'La entidad pública empresarial RENFE-Operadora', in G. Caramés, *El Régimen Jurídico del Sector Ferroviario (Comentarios a la Ley 39/2003, de 17 de noviembre, del Sector Ferroviario)* (Cizur Menor: Aranzadi): 247–280.
- Renfe, D. G. Económico-Financiera (2013), *Informe anual 2013* <http://www.renfe.com/docs/Informe_anual_2013.pdf>, accessed 22 January 2019.
- Sánchez Hernández, A. (2016a), 'Artículo 1554. Obligaciones del arrendador', in R. Valpuesta Fernández, et al., *Código Civil Comentado, Libro IV, De las obligaciones y contratos. Contratos en particular, derecho de daños y prescripción (Arts. 1445 al final)* (Cizur Menor: Aranzadi): 387–393.
- Sánchez Hernández, A. (2016b), 'Artículo 1555. Obligaciones del arrendatario', in R. Valpuesta Fernández, et al., *Código Civil Comentado, Libro IV, De las obligaciones y contratos. Contratos en particular, derecho de daños y prescripción (Arts. 1445 al final)* (Cizur Menor: Aranzadi): 393–396.
- Serra Rodríguez, A. (2016), 'Del contrato de arrendamiento. Disposiciones generales', in R. Valpuesta Fernández, et al., *Código Civil Comentado, Libro IV, De las obligaciones y contratos. Contratos en particular, derecho de daños y prescripción (Arts. 1445 al final)* (Cizur Menor: Aranzadi): 352–365.
- Slot P.J., and Skudder, A. (2001), 'Common features of community law regulation in the network-bound sectors', *Common Market Law Review*, 38: 87–129.