



Europe Economics

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Responses to comments
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Europe Economics
Chancery House
53-64 Chancery Lane
London WC2A 1QU

Tel: (+44) (0) 20 7831 4717
Fax: (+44) (0) 20 7831 4515

www.europe-economics.com



1 Introductory note

Following the presentation at the consultation meeting of 6 October 2015, and during the following three weeks, several stakeholders provided comments and additional information to the report “Dominant Positions in National Railway Transport Services Markets”.

The following responses were received:

- Passenger rail: NS, Connexxion and Veolia, and ProRail.
- Freight rail: DB Schenker, EVO and KNV.

In general, we have found some confusion in the comments as to the difference between the concepts of *dominance* and *abuse of dominance*. The definition of dominance is provided below, but we should note that having a dominant position is not in itself an anti-competitive practice: it is the abuse of a dominant position that is prohibited (this may include charging excessive prices, exclusive purchasing, predation, or denying competitors access to an “essential facility”).

In this regard we would like to note that the scope of the study is on the definition of dominance, and not on abuse of dominance.

The study was conducted to provide findings and evidence to help the Authority for Consumers and Markets (ACM) to conduct an investigation to help them identify possible railway markets and the competitive conditions in these markets. The research does not aim to draw any definite conclusions but to be used as input in ACM’s future research or decision making processes. Hence, any definite conclusions and judgements will be done by ACM as they are not the object of our study.

Definition of dominance

The European Court has defined a dominant market position as “a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers.” Dominance is linked to the presence of significant market power, that is, the ability to profitably sustain prices above competitive levels or to restrict output or quality below competitive levels. It is important to note that market power is not concerned solely with the ability of a supplier to raise prices. An undertaking with market power might also have the ability to harm competition in other ways, for example by weakening existing competition, raising entry barriers or slowing innovation. Of note is also the fact that the concept of dominance is not related to competition harm in itself, but the *ability* to cause such harm.

In some sectors, the economic behaviour of undertakings (such as the prices they set or the level of services they provide) is regulated by the government or an industry regulator. In this situation an undertaking may still be considered to be dominant, although economic regulation may limit the extent to which that dominant position may be abused. Hence, it cannot be said that market power cannot exist when there is economic regulation; on the contrary, economic regulation exists precisely when there is deemed to be dominance. As an example, in 2004, the regulator for competition in the UK (then the OFT) noted that “regulation of the average price or profit level across several markets supplied by an undertaking may still allow for the undertaking profitably to sustain prices above competitive levels in one (or more) of

these markets and/or to engage in exclusionary behaviour of various kinds”.¹ It is also to be recognised that the purpose of price caps is to provide precisely competition constraints upon pricing. In that sense, the purpose of economic regulation is to countervail dominance, not to remove it.

¹ Assessment of market power (OFT415). https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284400/oft415.pdf.

2 Passenger

We received comments from NS (submitted by RBB), Connexxion and Veolia, and ProRail that relate to our analysis of the passenger market.

2.1 NS (RBB)

NS submitted their comments through RBB.

RBB has made a number of different comments. Our answers are provided in the original order to allow comparison with the original response.

1. Competitive tender

RBB says we fail to take into account the fact that part of public transport is awarded via a competitive tender and that the national rail network (HRN) has been privately awarded to NS under concession. Both forms of award have given a temporary monopoly to the concession, but this has nothing to do with a dominant position.

We note that the award of concessions is well recognised on page 31 of the report:

“Most of all, some concessions are awarded in public tenders while others are granted without any competition. Among those awarded privately is the concession for the core railway network (Hoofdrailnet)”.

We note that RBB recognises that concessions give a temporary monopoly and have no further comments. The issue of dominance under regulated industries is provided in the “Introductory note”.

2. Concession conditions

RBB says that the tendered concessions themselves are not obtained because of a dominant position, but in competition (competition for the market).

We believe this is true but does not apply to NS because the HRN concession has been granted to NS exclusively since 2005.² The concession area has never changed ownership (whereas it has for the other concession areas).

RBB says the concession of the HRN is accompanied by large amount of regulation and (concession) conditions. This indicates the absence of a dominant position.

² According to ACM, this was determined by law (Act of Parliament, i.e. the *Passenger Transport Act 2000*, as it read before 1 January 2007). Article 67, of the Act provides the following:

Article 67 [provisional English translation]

1. This article applies to the grant of de first concession on the core network, that will take place after the entry into force of the *Act on concessions for transport of persons per train*. [per 1 Jan. 2005] [that Act determined that, in principle, all rail concessions should be procured publicly, in accordance with the EU PSO-regulation].

2. Our Minister [of Transport] will grant the concessions, referred to in the first paragraph, to [NS] or to one of its subsidiaries, such to be determined by Royal Decree, without following a procedure of public procurement [referred to in paras 1-3 of this Act]. This concession will enter into force on a date to be determined by Royal Decree and will end on 1 January 2015.

3. Our Minister may deviate from para. 2; in that case, article 69c shall apply. [but deviation did not take place; concession was granted privately].

We note that the fact that NS is regulated does not preclude the possibility that it is dominant. A firm might have a dominance position in the market regardless of whether it is regulated or not (see the Introductory note).

3. Countervailing buyer power

RBB says that the lack of “outside options” has not been studied and therefore cannot lead to the conclusion that NS is likely to have a dominant position.

In the text we say:

“Moreover, due to the size of the core network, switching operators on the core network would require from a potential entrant substantial investments. This, on the one hand, reduces the number of outside options (i.e. other rail operators) for the government when awarding the core network concession. And, on the other, it might create a barrier to entry, especially for those operators who claim to be dependent on NS with respect to leasing rolling stock.”

The fact that the size of the core network reduces the number of outside options seems obvious: the larger the network (and the required investment) the fewer the number of potential bidding operators (the opposite is also true, breaking the concession into smaller operating units would encourage entry from more operators for which size is a restriction).

4. Use of SSNIP test

RBB says we should have focused on the effects of the actual situation, if the existence of a dominant position in the market was a reality, and not a hypothetical question of a SSNIP.

The SSNIP test is a standard tool in market definition. A useful reference can be found in European Commission (2012), “Roundtable on market definition”³. The SSNIP test provides relevant information on the switching behaviour of consumers which is useful for defining the relevant market.

5. Market Regulation Context

RBB says NS is regulated by the Minister of Infrastructure and the Environment, which specifies the conditions under which the concession is granted (so that NS cannot independently determine its prices or quality of the service). These should be examined before assessing dominance.

RBB says that even if NS were to have a dominant position, any problems would be addressed through regulation and the conditions of the concession.

Please refer to the Introductory note (see our answer in point 2 above). We also note that dominance is a structural characteristic of the market: any remedies (such as regulation and concession agreements) would not change the dominant position of NS (although they may change the possibilities of abuse of such position).

6. Prices may be above or below competitive level, so the 'cellophane fallacy' cannot be confirmed

We say:

“In the absence of such a connection with cost, the regulated price may not provide a good proxy for the competitive price. As such, although ticket prices are regulated, we have not established if these are above the competitive level. We, however, did find indications that suggest that they are. [...] That NS’s fares are [confidential:] than the fares of regional operators. Therefore, we cannot exclude the possibility that the cellophane fallacy is artificially inflating the switching rates.”

³ European Commission (2012), DAF/COMP/WD(2012)28.

RBB says that prices may or may not be on the competitive level, so the 'cellophane fallacy' cannot be confirmed.

We are very clear in our report about the limitations of the statement, but we also mention that we have found “indications that suggest that” prices are above the competitive level. The statement is hardly controversial and it is part of a set of four points that provide a justification as to why the (absolute) elasticity estimates from our survey may be too high.

7. Price regulation

We say:

“That said, we understand that the regulated price is not based on operator costs, but rather increases in line with consumer price inflation, whereas usually the regulated price for a firm will be derived based on the cost structure of the business and expectations surrounding efficiency gains over time. In the absence of such a connection with cost, the regulated price may not provide a good proxy for the competitive price.”

We would like to note that our text is aimed at providing an explanation as to why “the regulated price may not provide a good proxy for the competitive price”. However, **RBB says** that the prices of NS should raise with the price index, as that is what happens with other regulated companies.

It is widely agreed that output prices in competitive markets rise at the rate of growth of input prices minus productivity growth. In most settings (for example, standard incentive-based regulation based on an RPI-X framework), prices are regulated to allow for changes in the costs of inputs but also to take into account any efficiency gains over time. Price regulation that does not account for efficiency gains does not reflect the conditions of competitive markets (except for situations where there are no efficiency improvements).

8. Prices below cost

RBB says that it is even possible that the prices are below cost (and subsidies are necessary to make up for difference).

We have no comment, but in comparison with other operators this seems not to be the case.

9. Need to challenge the complete concession area

We say:

“Most of all, the core network constitutes a single concession area. That means that, in case of a competitive tender, suppliers could challenge the current core network operator only if they were able to challenge the entire concession area, i.e. they could not compete with the incumbent on a particular sub-region of the core network concession or on a particular route.”

RBB says that this depends on whether the purchases can switch to foreign (potential) competitors or can bid jointly with existing rail carriers.

The capacity to challenge the entire concession area or not is given by the concession terms⁴ and it is irrelevant of the type of players. Foreign competitors or joint tenders will not be able to compete with the incumbent on a particular sub-region of the core network concession. In practice, there are no potential competitors because the concession has been granted to NS exclusively since 2005 up to 2025. This implies that the concession has never changed ownership (whereas it has for the other concession areas).

⁴ According to ACM, the extent of the core network is actually defined by law (Royal Decree). Every part of the network defined there, belongs to the core network and is automatically integrated in the core concession area (Royal Decree: “Besluit van 20 december 2004, houdende vaststelling van het hoofdrailnet, bedoeld in artikel 69b, eerste lid, van de Wet personenvervoer 2000 (Besluit hoofdrailnet),” Stb. 2004, 742. Most recent change: Stb. 2014, 479).

10. Threat to cancel the concession

RBB says that the threat to cancel the concession provides a disciplining effect on NS. This also illustrates that the government does have countervailing power.

We believe this could be true but does not apply to NS because the concession has been awarded privately since 2005 until 2025.

11. SSNIP test and market definition not relevant

RBB says that other concessions may have a dominant position. And that if we applied the test to the tendered concession areas, the conclusion would be that there is an 'independent relevant market' with a dominant position for the carrier in question. This is in complete contradiction with the fact that there has been competition for the market and therefore there cannot be a dominant position (also and especially in the performance of the concession).

We have not been asked to investigate dominance in other concession areas, so we cannot assess whether there is competition for the market in those instances. However, we do note that the concession of NS has been awarded privately whereas it is a public tender for the other concessions. The concession area has never changed ownership (whereas it has for the other concession areas).

12. Statistical significance

RBB says we do not provide significance of the estimates. In particular it would be expected that EE estimates elasticities along with standard derivations. If the result of EE conjoint analysis is not significantly below one, the product market definition as argued by EE is not valid.

We include in the report upper and lower bounds of our estimates based on confidence intervals of the switching rates (after a 10% price increase). The range we estimated is not very wide: from -8.75 to -1.185 (or, in terms of elasticities, from -0.875 to -1.185). The consequences for the project and the conclusions in the report are negligible. Even taking the upper bound, our conclusions would not change in any significant manner. That is because the entire range lies below the thresholds of profitability for Case 2 (moderate economies of density) (and also Case 3, no economies of density). This means that even with the upper bound of our estimate, it would be profitable to increase prices by 10% in Case 2, which is the most realistic one, (and Case 3). For Case 1 (extreme economies of density) the upper bound is above the threshold that would make a 10% price increase profitable. That means that a price increase would be unprofitable only if train operators have only fixed costs (a very unrealistic assumption). In the report we also refer to the results of the sensitivity analysis and other issues (the fact that subsidized travellers are not included, the possibility of a cellophane fallacy, and the use of stated preference methods) which are consistent with a lower elasticity, and would make it even more unlikely that a price increase would be profitable.

While calculating the confidence intervals we also revisited all the calculations for the switching rates, and noticed a typo that occurred in the process of extracting data from the simulator to an excel spreadsheet. After adjusting for that, the point estimate of the switching rate has changed from -0.906 to -1.016. This change, however, does not change our conclusions in a significant way: as we show in the report, the estimate has to be below 1.43 for train operators to be able to increase prices profitably (as that is the threshold for Case 2, which has the most realistic assumptions about costs).

13. Relevance of the difference between peak and non-peak travellers

RBB says that there may be different price elasticities for peak and non-peak travellers. The joint elasticity for all passengers is possibly inelastic, but can vary for the two groups, as the price for non-peak travellers is elastic such that if the price rises, this group of travellers would stop contributing to recovering the fixed costs as the passengers would switch to alternative forms of transport.

RBB notes the interrelation between peak and off-peak capacity: revenues from peak passengers and non-peak passengers jointly serve to cover the fixed costs.

There are also differences in elasticities between peak and off-peak travellers, which allows different pricing, **according to RBB**: because it is likely that non-peak travellers have a more elastic demand than peak travellers, it would be more economically viable to charge different rates. This is different from a dominant position.

We have been asked to reach aggregate conclusions, so there was no need to differentiate between peak and off-peak travellers (if NS is dominant in one segment only or in both peak and off-peak markets is not relevant, as it will still be dominant in a national railway transport services market). RBB mentions different pricing schemes according to elasticity of passengers. This is something we have not investigated but if this were true it would be indicative that NS has market power to discriminate between consumers (if costs are roughly the same for the peak and off-peak segments, how it would otherwise be possible to charge above cost in one of the segments?).

14. Prices per passenger

RBB says that the study shows that average revenue per passenger per kilometre for NS is higher than those for other carriers.

We say:

“Although, we should note that this could be a result of many factors, the findings seem to suggest that some operators’ can sustain prices above their immediate competitors which would also suggest lack of substitutability between transport services by different operators.”

But **RBB concludes** this is incorrect because: (a) there are many factors that determine the difference (so these should first be corrected for); (b) it doesn’t exclude the possibility that other carriers are sustaining prices (i.e. this it doesn’t only apply to NS); (c) the concession areas are not comparable with the HRN.

The different factors are recognised and mentioned in the paragraph. We also note that this could apply to other operators (see paragraph). Finally, the fact that the concession areas are not comparable is recognised in the text as part of other factors.

15. Competition for the market

RBB mentions that competition for the market should be considered.

We agree with such analysis but note that the concession for HRN has been awarded privately. Only the concessions which are awarded in public open tender allow for competition for the market.

16. Market shares

High market shares of NS mean nothing, **RBB says**: to the extent that there are areas tendered i.e. there is competition for the market with even a 100% market share there is actual competitive pressure, resulting from the tender process.

We believe this is true but does not apply to NS because the concession has been awarded privately since 2005.

17. Claims not proved

RBB says that some issues have not been properly investigated.

In relation to benefits for NS in respect of **rolling stock**, we say:

“As some rail operators argued, the scale of NS’s operations in the core network allows them to increase the rolling stock and locomotives on better terms when NS (or its daughter companies) compete for other areas. This,

according to operators, gives NS an advantage when bidding for tenders (especially in tenders awarded in a short time frame, for example, in those replacing an operator in the middle of the concession as a result of some unexpected circumstances)."

RBB says there is no evidence for this claim.

We report evidence as provided by the interviews with the operators (see quoted text, above). We would also like to note that the simple *belief* by operators of such advantages may be enough to discourage potential competition when competing for tenders in other areas. In addition, technical railway requirements for trains in the Netherlands differ from all surrounding countries which means that ordering new trains or rebuilding existing trains to Dutch standards is more expensive and requires much more time. As a consequence, foreign competitors often completely rely on NS if they need to introduce rolling stock on a relatively short term in a Dutch concession.

In relation to **other services**, we say:

"[...] NS is likely to have an advantageous position due to its status regarding some relevant elements of rail infrastructure with the most important aspects of it being the ownership of ticket vending machines, and the management of travel information. These might improve NS's ability to bid for other concession areas, and potentially impact other operators' profitability."

RBB says this does not provide any substantiation. There are no tenders won in such a way. In addition, NS is not necessarily the sole provider of services (particularly) stations: services, are also provided by ProRail or the municipality in which the station is located. The facilities or services that are exclusively provided by NS, are non-discriminatory and presented in a transparent manner.

While it is true that other entities provide access to infrastructure, there are elements of the infrastructure that are solely under the control of NS. The advantage NS has due to this unique position was supported by our interviews with other rail operators active in the Dutch market. In addition, in a recent investigation, ACM concluded that NS does not only has exclusive ownership of various services on stations.⁵ Although a correct implementation and enforcement of national railway and competition law should largely remedy this, NS still has an inherent advantage from owning these facilities (as other rail operators may still see a risk that NS will prevent access to such services).

In relation to **access to capital**, we say:

"[...] Public ownership might allow access to capital at low cost (governments are usually able to borrow large amounts of money at relatively low cost). To the extent to which this mechanism is exploited in the Netherlands, NS might have an advantage over other private operators."

"Further, some rail operators noted that the fact that NS is state-owned creates another advantage, as it is very unlikely that it would become insolvent or go bankrupt (again, lower capital costs derived from lower probability of insolvency)."

RBB says these propositions are not further investigated or substantiated. It also remains unclear why foreign state enterprises would not benefit in the same way from gaining access to the capital markets and thus positions on the Dutch market.

As above, the advantage NS has due to its position was supported by other rail operators active in the Dutch market.

We have added the following text:

⁵ <https://www.acm.nl/nl/publicaties/publicatie/14323/Besluit-klacht-Veolia-over-aanbesteding-openbaar-vervoer-Limburg/>

“However, this may be less relevant for foreign state-owned operators”.

In the 'economies of scale', 'scope' and 'density' no notification is made which suggests that NS derives advantages here: **EE uses a lot of 'might' and 'seem'** examples, **RBB claims:**

“In the case of NS, it seems that their access to information (including other operators’ revenues) might contribute to a better coordination and strategic planning. Moreover, through their subsidiary NS Financial Services Company, NS might benefit from relatively simple access to additional rolling stock which is suitable for the Dutch railway system. Relative to other operators who do not have such direct access, this might improve NS’s efficiency in the management of rolling stock.”

Firstly, we note that the objective of the report was to provide evidence rather than final conclusions. Secondly, where evidence is indicative rather than definitive we reflect that in the language used.

In relation to **other potential entry** barriers, we say:

“Suppose that an operator (not the same one as the existing awardee of a concession) wants to start a train service from The Hague to Brussels and vice versa. If that operator decides to stop the train at intermediate stations in the Netherlands (for example Rotterdam, Dordrecht, Roosendaal) this can put competitive pressure on NS. In that case, NS can ask the ACM to investigate if the economic equilibrium of the core network is disturbed. Result of the investigation can be that the international train operator is not allowed to stop at one or more intermediate stations or cannot start the route at all.”

RBB says that this is just a casual remark but this is because the text has been misquoted. The original paragraph links the explanation to Dutch legislation.

“Moreover, according to the Dutch legislation, a potential entry of a supplier of an international train route could be tested using an “economic equilibrium test”. This test is meant to protect the concession in the core network and also regional concessions against too much competition from suppliers of international routes. Suppose that an operator (not the same one as the existing awardee of a concession) wants to start a train service from The Hague to Brussels and vice versa. If that operator decides to stop the train at intermediate stations in the Netherlands (for example Rotterdam, Dordrecht, Roosendaal) this can put competitive pressure on NS. In that case, NS can ask the ACM to investigate if the economic equilibrium of the core network is disturbed. Result of the investigation can be that the international train operator is not allowed to stop at one or more intermediate stations or cannot start the route at all.”

2.2 Connexion and Veolia

Connexion and Veolia make the following comments:

1. Description of the concession

Connexion and Veolia note that NS’s concession should not be described as a tender because there is no competition in the process of awarding this concession. This should be explicitly included in the report.

The nature of the core network concession is already discussed in the report, see Section 2.3 and 3.1.

2. Rules to prevent abuse of dominant position

Connexion and Veolia argue that the HRN concession does not include any rules or procedures to prevent abuse of the dominant position. In their view, the concession area should be smaller, or at least it should be ensured that the concession holder does not adversely affect other rail operators and that it shares the resources necessary for the Dutch railway market to function properly.

The assessment of any potential abuse of the market position is outside the scope of the report.

3. Concession conditions

Connexion and Veolia argue that the dominant position is in part resulting from the obscurity of the financial conditions of the HRN concession. In particular, they note that NS pays the grantor approximately €80 million per year for the right to operate on the HRN. It is unclear how this fee was calculated and whether it is on an adequate level. If it is too low, the surplus contributes to NS's dominance. This should be explicitly included in the report.

We have added this observation as a footnote in Section 3.2.4 (Barriers to entry/expansion) under the heading "Incumbency advantages":

"Some rail operators also argued that NS has an advantage over other operators as a result of the financial conditions included in the concession agreement for the core network. Under the current concession agreement, NS is obliged to pay a yearly fee for the concession to operate on the core network. As noted by two of the Dutch rail operators, it is unclear how this fee is calculated and whether it is on an adequate level. The operators argue that the fee is set too low so that NS has a competitive advantage over other operators".

4. Lease of rolling stock

Connexion and Veolia argue that NS has also a dominant position in terms of equipment suitable for the Dutch tracks. Because of limited time between the procurement and the commencement of the concession, regional operators have to rely on the rolling stock quickly available for lease in the market. NS is the only readily available source of rolling stock. As such, NS can by itself decide whether and on what conditions it will lease the stock to other operators. HRN concession does not require the concession holder to provide a non-discriminatory access to such resources. The situation is aggravated by the fact that NS itself, through its subsidiaries, competes for regional concessions.

This line of argumentation is already discussed in Section 3.2.4, where the report says the following.

"In the Dutch context, the barrier resulting from high costs of rolling stock might be further aggravated by the fact that NS provides train leasing services. According to some Dutch rail operators, in certain instances NS is the only train leasing company providing rolling stock suitable for the Dutch railway system. This indicates that the short term leasing system is not fully operating as in certain circumstances operators are completely relying on rolling stock provided by NS's subsidiary (although this may be less of a problem in the long run if operators are able to buy or lease additional rolling stock elsewhere)."

5. Access to information

Connexion and Veolia would welcome more focus in the report on NS's position in relation to access to information (NS has full information about the behaviour of travellers). The HRN concession does not require NS to share that information with other operators. According to Connexion and Veolia NS abuses its position, especially when competing for regional concessions.

The report already discussed NS's position in relation to access to information (see Section 3.2.2). The potential abuse following from this position is outside the scope of the report.

2.3 ProRail Comments

1. Size of the network

ProRail says that the core network accounts for 68.4% of the length of the passenger transport rail network in the Netherlands.

The exact proportion of the core network in the entire rail network in the Netherlands will depend on the definition and variable in which the proportion is measured. In our report the 90 per cent figure is based on

a report by OECD⁶ and refers to passenger-kilometres rather than length of tracks. We can make this clear in the report to avoid confusion.

We will also add the 68.4 per cent measure to the report as a footnote on page 31.

“In terms of length, the core network accounts for almost 70 per cent of the total length of the passenger transport rail network in the Netherlands (although for market definition purposes the share of passenger-kilometres is typically used)”.

2. Access to infrastructure

ProRail notes that they have to, and do, provide equal access to all their infrastructure. However, they do not own all the infrastructure, as NS Subsidiary “NS Stations” owns the railway stations in the Netherlands (with the exception of platforms and tunnels leading to these platforms). In some cases, ProRail’s infrastructure can only be reached by properties that belong to NS or NS subsidiaries.

This will be clarified in a footnote:

“This means that even ProRail, which is responsible for managing and providing equal access to the infrastructure, is to some extent reliant on NS in cases where the infrastructure managed by ProRail can only be accessed through the infrastructure owned or managed by NS or its subsidiaries.”

⁶ OECD (2013), “Recent Developments in Rail Transportation”, DAF/COMP(2013)24, p. 147.

3 Freight

We received comments from DB Schenker, EVO and KNV on the freight part of the report. These comments will be discussed below.

3.1 DB Schenker

DB Schenker made the following comments.

1. Control of facilities

We say:

"Our interview with DB Schenker did not allow us to determine which parts of the service infrastructure they are responsible for managing."

DB Schenker says that DB Schenker made explicitly clear that DB Schenker does not own or control any facilities as meant in the Directive.

We are aware that DB Schenker owns diesel tank facilities⁷ and that it is the only operator knowing how to use the automatic freight train composition system near the port of Rotterdam.

2. Alleged lack of co-operation

We say:

"Our interview with DB Schenker did not allow us to determine".

DB Schenker says that the statement regarding the alleged lack of co-operation of DB Schenker in the interview is wrong, can be considered as offensive and should therefore be deleted.

This statement regards our collection of evidence. There is no insinuation, let alone statement, that DB Schenker did not fully co-operate.

We can change to the following.

"The information obtained from the interview with DB Schenker did not allow us to determine which parts of the service infrastructure they are responsible for managing."

3. Need of the investigation

DB Schenker says it has no control over service facilities as meant in clause 13 paragraph 3 section 1 of the Recast Directive. In this respect, an investigation regarding market power of DB Schenker as performed by EE can be deemed unnecessary.

We have no comments on the need for an investigation.

DB Schenker says there exists no legal basis to investigate DB Schenker and also that EE has not found quantitative data to determine DB Schenker's market share.

We have no comment on the legal basis of the investigation.⁸ Several market shares are presented, together with their sources and limitations of the data.

⁷ See <http://www.vivens.info/overzicht%20tankplaten%20en%20contactpersonen.htm>.

DB Schenker says EEs' opinion that 'it is interesting to study the entry or expansions barriers in these two markets and the degree of market power of DB Schenker' is an unstable basis for the Research Study as performed.

The text quoted by DG Schenker is not in the study. In any case, the study of entry or expansions barriers was part of the specifications for the study. This is an important piece of analysis when assessing dominance.

4. Pipelines and airfreight

DB Schenker says that in determining the markets, pipelines and airfreight as modes of transport, have not been taken into account. This shortcoming should be corrected.

The report mentions pipelines and airfreight. However it notes:

“That said, in our interviews with rail freight operators pipelines were not generally cited as representing a close competitor to rail.”

“Given the distances involved, and the types and weights of products being transported by rail it seems unlikely that air transport represents a close substitute for rail freight transport.”

Inclusion of pipelines would be relevant for very specific sub-sections of the market where liquids and gasses are concerned; airfreight would be relevant in the transportation of high-value goods. Their inclusion would not have significant impacts on our overall conclusions and would not, in particular, alter conclusions about markets that could be considered rail only.

5. Markets

DB Schenker says that despite the fact that EE has no data on the market share of DB Schenker in the two specified rail-only markets, EE draws the conclusion that DB Schenker retains a significant market share (above 40%). It seems remarkable that such a far going conclusion is drawn when no proper basal data is available.

We note that a 40% figure is not mentioned anywhere in the report. In cases where high market shares are reported caveats on the assumptions are clearly made.

6. No level playing field between different modes of transport

DB Schenker says that between different modes of transport, no level playing field exists. Rail transport is faced with the highest costs of all relevant modalities. For freight trains, the costs for the use of the rail infrastructure in the Netherlands increased extremely in the past years and will even increase more disproportional in 2016. Barge and truck are not confronted with infracharges or extreme increases of costs for using the infrastructure.

DB Schenker says high costs in rail freight not only gives rail freight a disadvantage compared to other freight transport modalities, it also gives Dutch rail freight companies in particular a disadvantage compared to our surrounding countries.

Analysis of the level playing field is out of the scope of the study. We have no comment (although we recognise in the study that the costs for rail are higher than for road and barge). However, we note that if rail has the highest costs this is a barrier to entry which DB is able to meet. This, on itself, could be an indication of market power.

7. Seaport competition

⁸ According to ACM the legal basis can be found in the Institutional Act of ACM, article 4.2.

DB Schenker says EE mistakenly forgets to consider seaport competition as a direct substitute for rail freight transport in the Netherlands. This concerns the second of the two rail-only markets as mentioned above: heavy loads (more than 100 tonnes) to destinations that waterways do not cover.

The report considers maritime transport. However, we can add some clarification for destinations that waterways do not cover. This will not change the main conclusions of the report.

“Likely destinations that waterways do not cover are the seaports in direct competition with Dutch seaports: Hamburg, Bremen, Antwerp, or Zeebrugge. In case of short sea shipping (from port to port) this is only a direct alternative for rail in very few instances. In any case, short sea shipping is rarely a full alternative to rail, as seaports cannot reach inland destinations (hence, they cannot be a substitute unless used with other transport modes).”

8. On-site rail terminals

DB Schenker says it is absolutely correct to conclude that if a consumer (industry) has an operational rail terminal on site and no direct access to a waterway on site, there is no alternative for full train loads (particularly for heavy loads). So, there is no alternative for rail transport, but there is certainly, in the majority of cases, an alternative for the Netherlands.

We would like to note that the issue is not so much whether the alternative exists (it is hard to imagine industrial sites with no access other than train) but whether such alternatives are viable (in a sense that a small but significant and non-transitory increase in price, SSNIP, would make consumers switch). In any case, we do not draw conclusions on this aspect. In the report we say:

“The potential for additional subdivisions based on customers’ speed and environmental requirements as well as for customers having a rail terminal on site was acknowledged for special cases, but lack of information did not allow for an assessment of its significance.”

Footnote 139 also recognises these markets are likely to be small:

“We have also identified that potential subdivisions also exist where transport specifications may lead to a market being rail only but that would be a case-by-case consideration. In particular, these additional rail only subdivisions could include: a market for high-speed transports; a market for transports with environmental credentials; and a market for transports where the customer has a rail terminal on site. Because these are likely to be small, they are not considered in this part of the analysis.”

9. Single wagon and sea ports

DB Schenker says that in recent times, the options for transfer of smaller consignments between the four main ports of Rotterdam, Vlissingen, Antwerp and Zeebrugge have increased and the incremental additional cost of transferring products by barge/short sea is both common and on the increase. The use of both block train and single wagon load therefore must be considered in the context of the Belgian Rail freight market also where other block and single wagon load options are available to customers to the same hinterland regions served through Rotterdam. The largest railway undertaking in Belgium already provides services to several European countries, giving customers a choice.

This is already recognised in the text.

“In this case, foreign single wagon providers (mainly rail incumbent operators) would be substitutes to DB Schenker, enlarging the relevant market to broader than Netherlands.”

DB Schenker says that seaports in Belgium and Germany and onward rail transport are to be considered as direct substitutes for Dutch seaports and onward rail transport, and therefore EEs' market definition that is limited to the Netherlands only, is wrong, and must be geographically expanded.

We do not define the geographical market as being limited to the Netherlands; rather we say: “for a rail only product market the geographic market would be at least the Netherlands”.⁹ We also recognise for the need of an O&D definition for specific cases.

10. Road haulage is the market leader for light loads over long distances

DB Schenker says light loads (less than 100 tonnes) over long distances (greater than 750 km) are considered by EE as a rail-only market, and this is incorrect. Facts (transport data from Eurostat) clearly point out that road haulage over long distances (greater than 750 km) is much larger than rail freight transport. This is even more stimulated since large heavy trucks of 25.25 metres and of a maximum weight of 60 tonnes are allowed on the roads more and more. Furthermore, road haulage with double manned ride or postilion system can be considered to be as fast as and as reliable as rail freight transport. For example the use of road haulage for long distance fresh flower transport and fresh products transport.

Throughout the report we have tried to select transportation characteristics that would be strongly suggestive of the modes that are more likely to be used. While doing so we have continuously highlighted the potential for case-by-case considerations that might provide exceptions; we certainly do not imply that rail covers all transportation for this category.

DB Schenker’s statement that large heavy trucks (25.25 metres and of a maximum weight of 60 tonnes) are allowed on the roads “more and more” does not contradict our conclusions. On the one hand, it does not reflect the current situation as it is recognised this is changing in the future. On the other hand, while 60 tonne trucks might be allowed, this leaves a range of, say, 60-100 tonnes that is not well covered by this modality. We also should note that such solutions (double-manned) are likely to be attained at an increased cost (this would lead to reduced competitiveness).

In any case, Eurostat data gives no evidence on substitution possibilities for light loads >750 km. The fact that road transport on long distances is larger than rail, does not directly relate to the market definition: it may still be possible for a hypothetical monopolist on light load long distance rail to profitably raise prices.

11. Conclusions based on a single interviewee's opinion

We say:

- *there is some evidence that their presence in the locomotive leasing market has been restricting supply and driving up prices for competitors; and*
- *the vertical integration of the business with respect to the service infrastructure.*

DB Schenker cannot understand why EE, on the basis of the opinion (with no factual proof) of only one interviewee, and despite all the other operators indicating that there is no issue, uses the phrase 'some evidence' in its key findings instead of 'limited evidence' or even 'no evidence'.

“Some” is defined as “an unspecified amount or number”, and this is how it is used in the text. We always mention this is based on one case. The fact that this is possible is enough to show dominance (it would require more evidence to show abuse, which we do not do, see our Introductory note for differences between dominance and abuse).

12. Contradictions

DB Schenker says our findings are contradicted by other parts of the report:

"There is some evidence to suggest that a large provider operating in the Dutch rail freight market would enjoy a dominant position, which, in DB Schenker's case, were to happen though its influence on the locomotive leasing

⁹ Page 68.

market. However, **most respondents** have not expressed significant concerns about the leasing market, albeit that they accept the significant leasing costs to be part of their total cost basis." (Bold by DB Schenker).

"DB Schenker's market position appears enhanced by the group's presence in both the upstream and downstream parts of the supply chain. However, despite their presence at these levels of the supply chain there is **limited evidence** that this position results in creating barriers for potential entrants or competitors who require access. [...] Interviewees have provided very limited indication of access issues to service infrastructure, so we consider the first segment of the supply chain to be of limited relevance for finding of dominance." (Bold by DB Schenker).

Statements by interviewees in interviews are treated as a form of evidence. When only one interviewee has provided a particular statement then this gives rise to the use of phrases such as "limited evidence". If all interviewees had provided the same comment, then this would lead to a characterisation such as "strong evidence".

13. DB Schenker has no dominance in the rail freight market

DB Schenker says the Research Study shows that the market share (tonne kilometres (gross)) of DB Schenker decreased in the years 2011 to 2013 with 15 percentage point. Even if 'dominance' or a 'privileged position' of DB Schenker on the market is assumed, there are obviously no negative effects on competition.

The analysis of abuse of dominant position are not investigated in the study.

DB Schenker says that the considerable decrease of DB Schenker's market share shows that new entrants can and do make attractive offers in intramodal competition.

This is well reflected in the report. As an example, page 71 mentions: "The decline in the firm's market share is noticeable and could indicate a high degree of competitive pressure from other rail operators."

DB Schenker says it has no dominant position on the rail freight market. Figures show indisputably that although DB Schenker has a large but declining share of the Dutch rail freight market, its position cannot be deemed to be dominant.

We do not conclude on market dominance. However, in the market for rail only the declining market share of DB Schenker is well reflected in the report and in particular, in the key findings (page 77) :

- "A number of freight operators have entered the market since liberalisation, suggesting that barriers to entry are not too high. One operator has managed to secure 15% of total turnover in just four years (entered the market in 2011)."
- "DB's market share has been stable at its lowest recent levels (according to data collected from the consultations) and while this has coincided with an economic crisis, the volume of rail freight more broadly has increased since 2009."

14. Single wagon load

DB Schenker says that a recent study of PwC shows clearly that in Europe, single wagonload traffic is operated at low or even no profitability at all. This because of the strong competition of (mainly) the modality road strengthened by the disadvantageous competitive environment single wagonload traffic faces all over Europe. This hostile environment prevents new entrants from investing in a market that does not allow for margins at all. This leads to the relatively high market share of DB Schenker in single wagon load traffic, which is explicitly not generated by abuse of market power by DB Schenker and also has to be understood in a historical perspective. Full train services are simply much more profitable than single wagon load traffic and therefore is the focus of new entrants.

Abuse of dominance is outside the scope of our report. However, if single wagon is loss making this would raise the question as to how is it being financed (perhaps is being subsidised by other market segments with excess profits).

DB Schenker says it has no market power at all in single wagon traffic, certainly when competition with other modalities, especially road, is taken into account.

We do not draw conclusions on market power for rail and road markets. We show the evidence as found (with caveats where relevant).

15. Locomotive Leasing

DB Schenker says it is alleged to have influence on the locomotive leasing market. This opinion is not given a sound basis. DB Schenker does not lease any of its locomotive fleet from the leasing market.

Our point is in relation to existing supply of locomotives to lease. We say: *“However, there exists limited evidence (feedback from one interviewee) that suggests DB Schenker are using their financial power to decrease the available supply in the locomotive leasing markets, thereby inflating their competitors’ costs”*

We should note that impacts on the leasing market can also be influenced by operators that purchase locomotives. The available supply of locomotives in the leasing market is a crucial determinant of the final leasing price that would be faced by operators that wish to lease a locomotive. Hence, if operators can purchase a significant amount of locomotives this can affect the leasing market by limiting the available supply (a decrease in supply would potentially create shortages and lead to increased prices).

16. EE should revise the key findings in its report

DB Schenker suggest changing the key findings should be revised to include: “There are no markets in which DB Schenker retains a significant market share. Therefore there are no indications suggesting that DB Schenker may have any degree of market power.”

The conclusion or judgement is up to ACM. As requested in the terms of reference of the study, we do not conclude in any way in the report.

DB Schenker suggest including: “• DB Schenker faces no advantages in obtaining access to the infrastructure however vis-a-vis freight traffic, passenger traffic is favoured in Dutch legislation”.

This cannot be concluded from our study.

DB Schenker suggest including: “• there is limited evidence to suggest that new entrants or current operators would have any difficulty in accessing the required capital stock to offer rail freight services in the Netherlands”.

In the report we say *“there is some evidence that their presence in the locomotive leasing market has been restricting supply and driving up prices for competitors”*.

This would be changed for:

“there is some evidence (one respondent) that their presence in the locomotive leasing market has been restricting supply and driving up prices for competitors;”.

DB Schenker suggest including: “• there is limited evidence to suggest that a larger operator would benefit from any economies of scale”.

We suggest adding this comment along the following lines:

“Economies of scale do not appear to confer upon DB Schenker a significant advantage over its competitors (except for the possibility of restricting supply, which has been mentioned by one respondent only).”

DB Schenker suggest including: “• there is limited evidence that DB Schenker's presence in both the upstream and downstream parts of the supply chain (vertical integration) results in creating barriers for potential entrants or competitors who require access.”

This is already reflected in our conclusions.

3.2 EVO

1. European perspective

EVO says rail freight must be assessed from the European perspective. Indeed, it is particularly cross-border rail freight and rail carriers are almost all foreign companies.

Geographical European dimension is taken into account in the report, by looking at the markets of Germany and Belgium.

2. No evidence of abuse of dominance

EVO says that although there is a dominant rail carrier, there is no evidence that it misused its position to hinder other carriers in offering their services to shippers and other customers.

Abuse of dominance is outside the scope of our report.

3. Financial barriers

EVO notes that because of the scale of the dominant carrier one could expect them to face favourable financial conditions in locomotives and wagons which can be driven internationally. For smaller operators access to the market is more difficult because of the financial barriers that they would need to overcome. After all, the cost of locomotives, in particular, the ones that can operate in the Netherlands is quite high.

This is already reflected in the report:

“any benefit of being a large operator would only arise to the extent that larger operators can negotiate better rates from leasing companies, or they can make more efficient use of the rolling stock they lease.”

4. Specialised services

EVO notes that customers have limited options when it comes to specialised services. This is particularly so when it comes to single wagonload transport and special transports concerning 'oversized' dimensions; these specifications are not financially viable for smaller operators.

This is reflected in the report both in terms of single-wagon loads as well as in the case of specialised wagons. In any case, the size of these submarkets appears limited.

5. No evidence of abuse of dominance

EVO says that although shippers obviously like to see more competition on the track, we cannot say that this is hampered by the dominance of the largest carrier.

Abuse of dominance is outside the scope of our report.

6. No evidence of abuse of dominance

EVO says abuse of power could be observed when a dominant operator charges high prices to customers. While many customers can switch to other modes at higher rates there are some customers who are highly dependent on rail transport.

While this could happen in theory, we have no evidence of such market practices. Abuse of dominance is outside the scope of our report.

3.3 KNV

1. Market segments

KNV says the report examines the rail market, making use of a division into segments. The researchers acknowledge the existence of market segments and the fact that they respond differently to market conditions. You acknowledge that no such segmentation in the Dutch tariff for usage fees.

No action required.

2. VAT

KNV mentions the report brings out the effect of increased VAT in image.

No action required.

3. Role of ACM

KNV notes that it is known that the railway market is not working as a perfectly level playing field. The question and challenge is that the imperfections are and what we can do about it. It raises questions about the tension that exists within the commands given to ACM; both as guardian of market forces and as rail regulator as defined in 2012/34.

Analysis of the level playing field is out of the scope of the study. We have no comment.

4. Leasing market

KNV mentions that lease rates in NL are higher. However, this is mainly due to the costs caused by the specific Dutch requirements concerning technical systems and regulations. DBS possibly has a scale advantage, but this advantage is due to the lack of interoperability.

This is already reflected in the report:

“any benefit of being a large operator would only arise to the extent that larger operators can negotiate better rates from leasing companies, or they can make more efficient use of the rolling stock they lease.”

5. Geographic scope

KNV says that a more European approach to market forces, monopolization and competition ratios would have been preferred.

Geographical European dimension is taken into account in the report. Abuse of dominance is outside the scope of our report.