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Europe Economics Study

Dear Mrs Swelsen,

'Autoriteit Consument en Markt' (ACM) commenced a market research of the Dutch rail freight market in view of the implementation of the European 'recast directive', more specific section 13 paragraph 3 Directive 2012/34/EU¹. The research was performed by Europe Economics (EE) which laid down its conclusions in a draft report 'Research study: Dominant Positions in National Railway Transport Services Markets' dated 22nd September 2015 (Research Study). On 6 October 2015, ACM held a meeting in which the Research Study was presented. DB Schenker Rail Nederland N.V. (DB Schenker) has been given the opportunity to comment the Research Study not later than 21 October 2015; this letter reflects DB Schenker's remarks regarding the Research Study.

In its Research Study, EE states that DB Schenker might have market power in three areas, namely single wagon load, leasing market and service facilities. Contrary to the Research Study, DB Schenker comes to the conclusion that DB Schenker has no market power in general as well as in the aforementioned areas. The number of newcomers on the rail freight market in the previous years makes clear that there is no market power of DB Schenker to prevent the materialization of the liberalization of the rail freight market. In this letter DB Schenker substantiates its position.

DB Schenker first addresses the cause of the Research Study and concludes that given this cause, DB Schenker should not have been examined. Despite this, such investigation of a possible market power of DB Schenker was performed, and DB Schenker has some remarks and improvements regarding the Research Study. Remarks and improvements which are

¹ Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area (recast)

set out next. Based on these remarks and improvements, the key findings EE comes to should be replaced by the key findings DB Schenker puts forward at the end of this letter.

Reason for the Research Study

As mentioned before, the Research Study is commenced by ACM in view of the European Recast directive. This Directive states in section 13 paragraph 3 section 1 the following: *“To guarantee full transparency and non-discrimination of access to the service facilities referred to in points 2(a)², (b)³, (c)⁴, (d)⁵, (g)⁶ and (i)⁷ of Annex II, and the supply of services in these facilities where the operator of such a service facility is under direct or indirect control of a body or firm which is also active and holds a dominant position in national railway transport services markets for which the facility is used, the operators of these service facilities shall be organised in such a way that they are independent of this body or firm in organisational and decision-making terms.[...]”*.

DB Schenker holds the opinion that, based on the aforementioned clause, *trigger* of a market research as performed by EE should be a positive answer to the question whether a railway undertaking directly or indirectly controls mentioned facilities. DB Schenker does not control such facilities whatsoever.

EE states that *“Our interview with DB Schenker did not allow us to determine which parts of the service infrastructure they are responsible for managing.”*⁸ However, in the interview EE held with DB Schenker and in the answering of the questions EE sent DB Schenker prior to the interview, DB Schenker made *explicitly* clear that DB Schenker does not own or control any facilities as meant in the Directive whatsoever:

Question 20 EE: What types of infrastructure facilities do you own/manage?

Answer DB Schenker: None.

Question 21 EE: From the facilities mentioned above, which where inherited from your acquisition of the Dutch incumbent, Railion?

Answer DB Schenker: Not applicable.

EE’s 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.

DB Schenker 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.

² Passenger stations, their buildings and other facilities, including travel information display and suitable location for ticketing services.

³ Freight terminals.

⁴ Marshalling yards and train formation facilities, including shunting facilities,

⁵ Storage sidings.

⁶ Maritime and inland port facilities which are linked to rail activities.

⁷ Refuelling facilities and supply of fuel in these facilities, charges for which shall be shown on the invoices separately.

⁸ Research Study pages 75 and 76.

The Research Study

Apart from the need of the Research Study with respect to DB Schenker, the study follows a well-structured research approach, albeit some conclusions are drawn on wrong premises. It starts with a market definition exercise, followed by a two-step approach to assess market dominance:

- i) a market share analysis and
- ii) an assessment of the barriers to enter the market and of the extent to which DB Schenker is present at several levels of production, also known as vertical integration.

The objective of the market definition exercise is to provide the basis upon which the analysis of competition and the assessment of dominant positions will be conducted. Market definition allows for the calculation of market shares and enables as such the examination of market concentration. This being important since the European Commission's dominance assessment procedures indicate that market shares of less than 40 percent are seen as unlikely to be dominant.

EE identifies in its market definition exercise five markets to be considered in assessing market dominance:

- Two rail-only markets; these are markets where there are unlikely to be close substitutes for rail freight transport and as such the market would be covered by rail only. EE suggests the following possible rail-only markets:
 - light loads (less than 100 tonnes) over long distances (greater than 750 km);
 - heavy loads (more than 100 tonnes) to destinations that waterways do not cover.
- Two rail and road markets; these are markets where road haulage is likely to represent a close substitute for rail freight transport. The two rail and road markets are:
 - single wagon rail services;
 - transportation of light loads (less than 100 tonnes) over not too long distances (shorter than 750 km).
- Rail and waterway market: for heavy loads for those origins/destinations that are covered by waterways.

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

For the last three markets EE mentions, (two rail and road markets, and the rail and waterway market) EE concludes that given the relative size of the road haulage market and the waterway freight market compared to rail, it is unlikely that DB Schenker would have substantial market share and therefore any significant market power.

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 far going conclusion is drawn when no proper basal data is available. Not only there exists no legal basis to investigate DB Schenker but also EE has not found quantitative data to determine DB Schenker's market share, EE's opinion that 'it is interesting to study the entry or expansion barriers

in these two markets and the degree of market power of DB Schenker' is an unstable basis for the Research Study as performed.

No level playing field between different modes of transport

Between different modes of transport, no level playing field exists. Rail transport is faced with the highest costs of all relevant modalities⁹. 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. In this respect, DB Schenker kindly refers to the DB Position Paper "Growth prospects of European rail freight. Required action to realize the sector's growth potential" that is annexed to this letter.

The aforementioned high costs of the modality 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. Compared to Dutch ports like Rotterdam, Amsterdam and Vlissingen, the Belgian ports like Antwerp and Zeebrugge as well as the German ports like Hamburg and Bremen become more and more attractive. DB Schenker questions whether the Dutch calculation of infrastructure charges are in conformity with EU legislation.

Apart from the high infrastructure charge for freight trains in the Netherlands, the priority that is given to freight trains compared to passenger trains does not reflect the price that has to be paid for the capacity. Rail freight trains face on the one hand the lowest priority and on the other hand the highest infrastructure charge.

Despite the well-structured approach the results of the EEs' study are wrong

DB Schenker has the following major remarks concerning the study of EE. The remarks are so fundamental that the conclusions of the EEs' study should be altered completely.

The major remarks are:

1. EE forgets to consider seaport competition.
2. EE overrates the performance and market share of rail freight transport compared to road haulage for light loads over long distances.
3. EE changes their assessment from 'no indication' and 'limited evidence' to 'some evidence' based on only *one interviewee* despite all other interviewees having had no concerns.

Seaport competition

In their study, EE considers the potential of substitution:

- a. between rail operators (intramodal substitutability),
- b. from rail to an alternative mode of freight transport and
- c. across time periods for freight transport (shift to other transport times by rail).

These three are considered as close substitutes for rail freight transport.

⁹ E.g. high costs for the use of the infrastructure, salary costs, abolition of 'red diesel', high costs for making locomotives and train drivers international interoperable, costs for, in the Netherlands alone, four (!) safety systems (ERTMS, ATB EG, ATB NG, ATB VV).

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.

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.

In order to substantiate, some facts:

- rail freight transport in the Netherlands is 89% international transport¹⁰;
- 81% of international rail freight transport in the Netherlands has as destination Germany, and Germany and Belgium account for two thirds of incoming rail tonnage¹¹;
- both Germany and Belgium have seaports severely competing with the ports of Rotterdam, Vlissingen and Amsterdam;
- 85% of all rail freight transport in the Netherlands has an origin or destination in a seaport¹².

Besides this, 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.

Conclusion

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 EE's market definition that is limited to the Netherlands only, is wrong, and must be geographically expanded.

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

Light loads (less than 100 tonnes) over long distances (greater than 750 km) are considered by EE as a rail-only market. This is absolutely incorrect.

EE reports on page 57: *“Interview respondents highlighted that, while road does not face the same timetable constraints as rail, the speed and reliability of road transportation is highly dependent on actual conditions faced on the road and can be significantly affected by congestion. Where **speed** and **reliability** is of importance to customers, road may not be*

¹⁰ Page 51 Research Study.

¹¹ Page 51 Research Study.

¹² 2002, Policy Research Corporation study commissioned by Dutch Ministry of Transport.

a good substitute for rail. This may also include transportation over longer distances, which results in higher likelihood of congestion along parts of the route. For that reason, substitutability of road cargo may be limited to shorter distances in situations where there are any speed and reliability concerns.” (Bold by DB Schenker)

This may be based on the perception or the ambition of a few interviewees, but it is not based on facts. 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.

In order to substantiate, some facts¹³:

- International rail freight transport to and from the Netherlands over long distances (greater than 750 km) is less than 4 million tonnes (less than 10% of the total rail freight market to and from the Netherlands);
- To compare (source Eurostat data): road haulage between the Netherlands and Poland (distances greater than 750 km) amounts to 5,0 million tonnes (5 year average, years 2010-2014); between the Netherlands and Spain 2,5 million tonnes (5 year average, years 2010-2014); between the Netherlands and Italy 0,5 million tonnes (5 year average, years 2010-2014); and between the Netherlands and the Czech Republic 1,3 million tonnes (5 year average, years 2010-2014);
- For just the four above-mentioned countries road haulage amounts to 9,3 million tonnes, (5 year average, years 2010-2014) which makes that over long distances (greater than 750 km) in total road haulage is many times larger than rail freight transport.

Conclusion

Light loads (less than 100 tonnes) over long distances (greater than 750 km) are not a rail-only market, but a rail and road market. Consequently, given the relative size of the road haulage market compared to rail, it is highly unlikely (read: it is non-existent) that DB Schenker would have substantial market share and therefore any significant market power.

Conclusions apparently based on a single interviewee's opinion

Every analysis of EE in the assessment of entry barriers and degree of vertical integration ends with the conclusion of 'no indication' or 'limited evidence'. There is only one exception¹⁴: *“In the context of the Dutch rail freight market, there is therefore limited*

¹³ Source of the data is 'Eurostat'. Depending on the used query, results differ. Despite the deviating results, all results show the same relative market share of rail compared to total transports.

¹⁴ Page 74 Research Study.

evidence to suggest that a larger operator would benefit from any economies of scale in full train load traffic at least. The only exception would be the capacity of DB Schenker to influence the leasing market by effectively reducing the available supply of locomotives (**based on one interviewee**, and mentioned as a barrier to capital stock).” (Underlined and bold by DB Schenker).

Reference is made to page 73¹⁵: “In terms of access to locomotives via the leasing market, generally there was the consensus that this was reasonably easy, with a number of firms offering such services. [...] In terms of wagons **all operators** indicated that leasing wagons is necessary for their interactions with some clients, but **only one operator** indicated that access to specialized wagons can be a significant issue, particularly in cases of chemical wagons¹⁶. [...] 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.” (Bold by DB Schenker).

DB Schenker can not 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’.

Moreover, EE mentions in its key findings the following two factors of market power:

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

There is no evidence in the EEs’ report to backup these key findings, and it seems they are all based on *only one interviewee’s personal opinion* despite the answers of all other interviewees. Furthermore, these key 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 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.*”¹⁷ (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.*”¹⁸ (Bold by DB Schenker).

¹⁵ Page 73 Research Study.

¹⁶ Please note that DB Schenker does not have the disposal over so called chemical wagons.

¹⁷ Page 74 Research Study.

¹⁸ Page 76 Research Study.

DB Schenker has no dominance on the rail freight market

The Research Study shows¹⁹ 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 considerable decrease of DB Schenker's market share shows that new entrants can and do make attractive offers in intramodal competition.

The same table shows that there is no scale effect at all. DB Schenker's market share of tonne kilometres (gross) decreases in the 2011 to 2013 period with 15 percentage point but DB Schenker's share in the train kilometres in this period only decreased with 9 percentage point. This implies that competitors of DB Schenker, smaller companies, manage to produce their traffics in a more efficient way than DB Schenker given the higher tonne kilometres/train kilometres – ratio over time and the rail freight market is still attractive to enter into.

Conclusion

DB Schenker 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 can not be deemed to be dominant.

Single wagon load

A recent study of PwC²⁰, annexed to this letter, 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 in the focus of new entrants.

Conclusion

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

Locomotive Leasing

DB Schenker 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.

¹⁹ Table 5.1 Research Study, page 70

²⁰ "Study on Single Wagonload Traffic in Europe – challenges, prospects and policy options", Final report, February 2015

The major remarks as explained above lead to the conclusion that EE should revise the key findings in its report

The key findings of EE can be found on page 78: *In rail-only markets, the following factors suggest that DB may have some degree of market power [...].*

Since there are no rail-only markets with a geographic dimension limited to the Netherlands (see the relevant abovementioned remarks of DB Schenker), the key findings should be revised as follows:

“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. Furthermore research by Europe Economics indicates that:

- ***DB Schenker faces no advantages in obtaining access to the infrastructure however vis-à-vis freight traffic, passenger traffic is favoured in Dutch legislation [page 72];***
- ***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 [page 73];***
- ***there is limited evidence to suggest that a larger operator would benefit from any economies of scale [page 74];***
- ***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 [page 76].”***

DB Schenker trusts the EE report will be adjusted in conformity with DB Schenker’s remarks and improvements as stated in this letter.

However, although DB Schenker has no cause to presume that the remarks and improvements regarding the Research Study DB Schenker makes will not be incorporated in the final version of the Research Study, DB Schenker requests and if necessary demands that this letter will be included in the final version of the Research Study or will be added to the final version of the research study as an inextricable annex.

DB Schenker highly appreciates your feedback on its comments in the next three weeks and is looking forward to the final version of the Research Study.

Yours faithfully,

DB Schenker Rail Nederland N.V.



F. Holtz
Chief Financial Officer



Th.J.J. Kramer LL M
Manager Legal Affairs

Annexes:

- DB Position Paper "Growth prospects of European rail freight. Required action to realize the sector's growth potential"
 - pwc report "Study on Single Wagonload Traffic in Europe – challenges, prospects and policy options", Final report, February 2015
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