**COMMISSION DECISION**

**of 18 December 2013**

**addressed to:**

**- Deutsche Bahn AG,**
**- DB Energie GmbH,**
**- DB Mobility Logistics AG,**
**- DB Fernverkehr AG and**
**- DB Schenker Rail Deutschland AG,**

**relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union (TFEU)**

**Case COMP/AT.39678/Deutsche Bahn I**
**Case COMP/AT.39731/Deutsche Bahn II**

(Only the German text is authentic)

NON-CONFIDENTIAL VERSION

ENGLISH WORKING TRANSLATION

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty[1], in particular Article 9(1) thereof,

Having regard to the Commission decision of 13 June 2012 to initiate proceedings in this case,

Having expressed concerns in the preliminary assessment of 6 June 2013,

Having given interested third parties the opportunity to submit their observations pursuant to Article 27(4) of Regulation (EC) No 1/2003 on the commitments offered to meet those concerns,

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Having regard to the final report of the Hearing Officer,

Whereas:

## 1. SUBJECT MATTER

(1) The present Decision is addressed to Deutsche Bahn AG and its subsidiaries DB Energie GmbH (DB Energie), DB Mobility Logistics AG, DB Fernverkehr AG and DB Schenker Rail Deutschland AG[2]. It concerns the pricing system, including its discounts, which DB Energie applies to railway undertakings operating in Germany for the supply of traction current. Traction current is the specific type of electricity that is used by locomotives to propel trains.

(2) In its Preliminary Assessment of 6 June 2013, the European Commission (the Commission) came to the provisional conclusion that the pricing system for traction current may raise concerns as regards its compatibility with Article 102 TFEU by creating a margin squeeze on the rail long distance passenger and freight transport markets.

---

1 OJ L 1, 4.1.2003, p.1. With effect from 1 December 2009, Articles 81 and 82 of the EC Treaty have become Articles 101 and 102, respectively, of the Treaty on the Functioning of the European Union ("TFEU"). The two sets of provisions are, in substance, identical. For the purposes of this Decision, references to Articles 101 and 102 of the TFEU should be understood as references to Articles 81 and 82, respectively, of the EC Treaty when where appropriate. The TFEU also introduced certain changes in terminology, such as the replacement of "Community" by "Union" and "common market" by "internal market". Where the meaning remains unchanged, the terminology of the TFEU will be used throughout this Decision.

2 Deutsche Bahn AG and all its subsidiaries as a whole will in the following be called "the DB Group".

## 2. THE PARTIES

(3) Deutsche Bahn AG is the ultimate parent company of subsidiaries providing logistics and rail transport services and functions as holding company for a group of companies (such as DB Energie GmbH, DB Mobility Logistics AG, DB Fernverkehr AG and DB Schenker Rail Deutschland AG) active in the railway sector (the "DB Group"). It regroups in a vertically integrated holding structure infrastructure management activities and passenger and freight transport services. Deutsche Bahn AG is a private joint stock company under German corporate law ("Aktiengesellschaft"), fully owned by the Federal Republic of Germany.

(4) One of the DB Group's core activities is to provide rail freight and passenger transport services in Germany. The main subsidiaries of the DB Group active in these sectors are DB Schenker Rail Deutschland AG for rail freight services, DB Regio AG for regional passenger transport services and DB Fernverkehr AG for long distance passenger transport services. DB Schenker Rail Deutschland AG, DB Regio AG and DB Fernverkehr AG are all wholly owned by the transport services holding DB Mobility Logistics AG. This holding is in turn 100 % owned by Deutsche Bahn AG[3].

(5) The DB Group manages the rail infrastructure and the related service facilities through its subsidiaries DB Netz AG, DB Station&Service AG and DB Energie[4]. DB Netz AG manages and maintains 33 000 kilometres of rail tracks in Germany. DB Station&Service AG is in charge of managing and operating the 5 400 railway stations. DB Energie manages and maintains the 7 700 kilometres of the electric network used for providing trains with traction current. It also directly supplies electric energy and diesel to railway undertakings[5].

## 3. PROCEDURAL STEPS UNDER REGULATION (EC) NO 1/2003

(6) The Commission initiated its investigation on the traction current pricing system as a result of information obtained from three complaints received between May 2009 and May 2011. On 11 May 2009, the Commission received a complaint from [*name of complainant*], a rail transport services provider competing with the DB Group[6]. It received another complaint on 25 September 2009 from Netzwerk Europäischer Eisenbahnen e.V. (NEE)[7], a German association of private railway undertakings. On 25 May 2011, another complaint was lodged by Raileco, a buying alliance for traction current of railway undertakings not belonging to the DB Group[8].

(7) Between 29 March 2011 and 1 April 2011 the Commission carried out unannounced inspections pursuant to Article 20 of Council Regulation (EC) No 1/2003 at the premises of Deutsche Bahn AG and its subsidiaries DB Mobility Logistics AG, DB

---

3 Deutsche Bahn Annual Report 2012, p. 55, 258 *et seq.*

4 Deutsche Bahn Annual Report 2012, p. 55, 62, 258 *et seq.*

5 Deutsche Bahn Annual Report 2011, p. 68, and Deutsche Bahn Annual Report 2012, p. 132 *et seq.*

6 Complaint from [*name of complainant*], case AT.39678, ID 2.

7 The complaint was formally lodged by the association Netzwerk Privatbahnen e.V., which changed name in November 2011 to Netzwerk Europäischer Eisenbahnen e.V. without changing its legal personality.

8 Complaint from Raileco, case AT.39915, ID 3. In 2011, Raileco had 26 members.

Energie, DB Schenker Rail Deutschland AG and DB Schenker Rail GmbH in Berlin, Frankfurt and Mainz.

(8) On 13 June 2012 the Commission opened proceedings with a view to adopting a decision under Chapter III of Regulation (EC) No 1/2003. On 6 June 2013 it adopted a Preliminary Assessment under Article 9(1) of Regulation (EC) No 1/2003 in which it sets out its Commission's competition concerns as regards a possible infringement by DB of Article 102 TFEU. These concerns related to a potential margin squeeze created by the DB Group's pricing system for traction current, including its discounts, on the markets for the provision of rail freight and long distance passenger transport services. This assessment was notified to Deutsche Bahn AG and its subsidiaries DB Energie, DB Mobility Logistics AG, DB Fernverkehr AG and DB Schenker Rail Deutschland AG on 6 June 2013.

(9) On 23 July 2013, the DB Group submitted commitments to the Commission in response to its Preliminary Assessment.

(10) On 15 August 2013, a notice was published in the Official Journal of the European Union pursuant to Article 27(4) of Regulation (EC) No 1/2003, summarising the case and the Commitments and inviting interested third parties to give their observations on the Commitments within one month following publication[9].

(11) On 25 September 2013, the Commission informed the DB Group of the observations received from interested third parties following the publication of the notice. On 21 November 2013, the DB Group submitted an amended proposal for commitments and submitted a signed final version on 17 December 2013.

(12) On 12 December 2013, the Advisory Committee on Restrictive Practices and Dominant Positions was consulted.

(13) On 13 December 2013, the Hearing Officer issued his final report.

## 4. PRELIMINARY ASSESSMENT

(14) Following the analysis of the evidence gathered in the course of the investigation, the Commission preliminarily raised concerns that the DB Group may have abused its dominant position on the market for the supply of traction current in Germany by charging prices of traction current to competitors on the rail transport markets that created a margin squeeze, in violation of Article 102 TFEU.

(15) A margin squeeze may occur where a vertically integrated undertaking sells a product or service to competitors on an upstream market where it is dominant and competes with these undertakings on a downstream market for which the product or service is an input. A margin squeeze constitutes an abuse contrary to Article 102 TFEU if the spread between the price charged to competitors upstream and the price charged to the dominant undertaking's own customers downstream is "either negative or insufficient for competitors as efficient as the dominant undertaking to cover the specific costs" which the dominant undertaking has to incur to supply its downstream

9 OJ C 237, 15.8.2013, p. 28-30.

products or services[10]. As the case law points out: "in such circumstances, although the competitors may be as efficient as the dominant undertaking, they may be able to operate on the [downstream] market only at a loss or at artificially reduced levels of profitability"[11].

### 4.1. Background on traction current

**Traction current network**

(16) In Germany, the energy used to propel electric locomotives is supplied via an overhead catenary in the form of single-phase alternating current with a specific frequency of 16.7 Hz and a voltage of 15 kV[12]. This type of electricity is called "traction current". The 16.7 Hz frequency of traction current is different from the frequency of the standard domestic electricity which is 50 Hz[13]. Supplying this type of electricity to railway undertakings thus requires a separate specific network, connecting the catenary to the standard electricity networks (via converters) or to power plants directly producing 16.7 Hz electricity.

(17) DB Energie plays two essential roles in the German rail system: it operates the specific electrical network necessary for the distribution of traction current and it supplies traction current to railway undertakings by purchasing electricity from energy producers and reselling it to railway undertakings.

(18) In principle, DB Energie supplies traction current to railway undertakings at a fixed rate per KWh. This rate depends on the time of the day the traction current is supplied (day time and night time tariffs)[14]. This price is an "all-inclusive" offer for the supply of traction current where railway undertakings pay both for the consumption of traction current and for the use of the traction current network. DB Energie calls this price system *Bahnstromspreissystem* or BPS.

(19) Another possibility for railway undertakings to secure their demand for traction current is to purchase 50 Hz electricity from third party energy supplier and to feed it into DB Energie's traction current network. In this case, the customer only pays DB Energie for the use of its traction current network and for the conversion of the standard 50 Hz electricity into traction current. DB Energie calls this access to network offer *Durchleitungspreissystem* or DPS.

(20) The BPS has been in place since 2003 while the DPS was introduced in 2004. However, since then all railway undertakings have opted for the "all-inclusive" offer of the BPS and none has made use of the DPS, except for a period of one month in 2005 when a German energy trading company (PCC Energie) supplied the railway undertaking Rail4Chem with traction current[15].

---

[10] Case C-52/09, *Konkurrensverket v TeliaSonera Sverige AB*, [2011] ECR I-527, paragraph 32.

[11] Case C-52/09, *Konkurrensverket v TeliaSonera Sverige AB*, [2011] ECR I-527, paragraph 33.

[12] Deutsche Bahn, reply to request for information, case AT.39678, ID 1689, p. 18.

[13] The reason for this difference is that it was technically not feasible to use electric motors operating at 50 Hz for locomotives when electric traction was introduced in Germany.

[14] The prices of traction current are publicly available on the webpage of DB Energie: http://www.dbenergie.de/file/2542424/data/bahnstrom_preisblatt.pdf.

[15] Deutsche Bahn, reply to request for information, case AT.39678, ID 1649, p. 62.

(21) In November 2010, the German Federal Court of Justice ruled that the traction current network shall be regarded as an energy network and that its access conditions and fees should be regulated according to the German energy sector law (*Energiewirtschaftsgesetz* – EnWG)[16]. As a consequence, DB Energie should charge separately the grid access fee, so that third party electricity providers (i.e. not belonging to the DB Group) can also compete with DB Energie to supply electricity to railway undertakings[17].

**Price differences in traction current linked to the discount system of the BPS**

(22) The fixed prices of the all-inclusive BPS offer are complemented by three discounts: (i) a duration discount of up to 5% of the total invoice based on the duration of the contract; (ii) a volume discount of up to 4% of the total invoice based on the annual consumption; and (iii) a utilisation discount of 5% of the total invoice if the annual consumption exceeds 2 000 GWh. The discounts are available to any railway undertaking provided it fulfils the relevant conditions.

(23) DB Schenker Rail Deutschland AG and DB Fernverkehr AG have benefited from the maximum level of discount of 14% since the introduction of the BPS in 2003[18].

(24) On the other hand, competitors of the DB Group have not been able to benefit from such level of discounts, principally due to their much lower consumption volumes. Until 2008, none of the competitors was eligible to more than 2 % discount rate as their individual consumption was below the 200 GWh threshold. In 2008, following a settlement to proceedings initiated by some of its customers against the BPS in a German Court[19], some railway undertakings formed the Raileco purchasing consortium, which enabled its members to benefit from the maximum rate of the volume discount[20]. However, the combined consumption of Raileco has remained much below the 2 000 GWh threshold for the utilisation discount. In 2010, the consumption of the Raileco consortium amounted to only 1 026 GWh[21].

(25) The difference in discounts obtained is an important driver for the differences in prices of traction current paid by the DB Group and its competitors for traction current. On average, competitors have benefitted from discounts between 1% and 4% in the period 2003-2007 and of around 8% after 2008 and the creation of the Raileco consortium – see Table 1.

**Table 1: Differences in discounts granted by DB Energie**

---

[16] *Bundesgerichtshof*, judgement of 9 November 2010, case *EnVR 1/10*.

[17] More information on this change of pricing system and the conditions of the new system can be found on the website of DB Energie (in German only): http://www.dbenergie.de/dbenergie-de/netzbetreiber/netzbetreiber_bahnstromnetz/2500898/bahnstromnetz_konsultation.html.

[18] DB Schenker Rail Deutschland AG and DB Fernverkehr AG actually benefitted from discounts of up to 16% in 2008 to 2011 due to a duration discount higher than 5%. The duration discount is indeed calculated based on projected demand rather than on actual demand leading to slightly higher level of discounts since customers tend to overestimate their projected demand.

[19] Judgment of Oberlandesgericht Frankfurt / Main of 19 June 2006, *11 U 44/05*, attached to the complaint from NEE, case AT.39731, ID 23.

[20] Inspection document, case AT.39678, ID 889 / EM54, p. 1-6.

[21] Figure based on data supplied by Deutsche Bahn, reply to request for information, case AT.39678, ID 1689, p. 87.

| Market | Total discounts obtained on traction current price | 2003 | 2004 | 2005 | 2006 | 2007 | 2008 | 2009 | 2010 | 2011 | Average* 2003-2011 |
|---|---|---|---|---|---|---|---|---|---|---|---|
| Freight Market | DB SR DE AG** | 14% | 14% | 14% | 14% | 14% | 15% | 16% | 16% | 16% | 15% |
| | All competitors | 1% | 1% | 2% | 3% | 3% | 8% | 8% | 7% | 8% | 6% |
| | Raileco | | | | | | 10% | 10% | 9% | 9% | 10% |
| Passenger Market | DB FV AG*** | 14% | 14% | 14% | 14% | 14% | 14% | 14% | 14% | 14% | 14% |
| | All competitors**** | 6% | 4% | 5% | 5% | 6% | 8% | 7% | 8% | 8% | 7% |
| | Raileco | | | | | | 9% | 9% | 9% | 9% | 9% |

* Weighted average based on net sales to take into account changes in traction current volumes and prices over the period.
** DB Schenker Rail Deutschland AG.
*** DB Fernverkehr AG.
**** Average of all competitors active in the regional and long distance passenger markets.

(26) Price differences linked to the discount scheme are higher in the freight sector than in the passenger sector, since more rail freight undertakings do not belong to the Raileco consortium. In the rail freight sector, all other things being equal, competitors would pay in 2011 a price for traction current 9 % higher than DB Schenker Rail Deutschland AG due to the discount scheme. In the passenger sector, they would pay 7 % more.

## 4.2. Relevant markets

### *4.2.1. Product markets*

(27) The Commission preliminarily considers that the relevant upstream market is the market for the supply of traction current to railway undertakings on the German railway network. The relevant downstream markets are the markets for the provision of rail freight transport services and rail long distance passenger transport services.

**Relevant upstream market: supply of traction current**

(28) The supply of traction current to railway undertakings regroups two distinct services provided on two distinct markets, namely the transmission of traction current and the sale of traction current:

– The transmission of traction current is a monopoly of the DB Group operated by its subsidiary DB Energie;

– The sale of traction current consists in supplying electricity to a locomotive through the network and can in principle be performed by any electricity producer or trader.

(29) The Commission considers that the relevant upstream market is the market for the supply of traction current, i.e. the provision of both transmission and sale services. While one could consider both transmission and sale of traction current as distinct markets, this is not necessary for the purposes of the present Decision. First, in the period covered by the potential infringement, DB Energie has made an all-inclusive offer with its BPS pricing system covering both transmission and sale of traction current, which all railway undertakings have used. Second, the competitive constraints are the same for the sale of traction current and for the supply of traction

current, since the transmission of traction current can only be performed by DB Energie as the manager of the traction current network.

(30) The market for the supply of traction current is a separate market since there is no substitute to traction current for the propulsion of locomotives. While locomotives can also be powered by diesel, this mode of train propulsion is not substitutable to traction current since operating a traction current locomotive is on average 30 % cheaper than operating a diesel locomotive per tonne-kilometre transported[22]. A small and permanent increase in the price of traction current (in the range of 5 % to 10 %) will not be enough to annul the important cost-advantages of operating electric locomotives rather than diesel ones[23].

(31) This assessment is confirmed by the following facts: more than 80 % of the rail freight traffic in Germany is powered by traction current and this figure climbs to over 90 % for the DB Group[24]. Diesel tends to be mainly used for specific transport activities where tracks are not electrified (rural areas, last mile infrastructure, shunting)[25].

**Relevant downstream markets: rail freight and rail long distance passenger transport**

(32) The Commission preliminarily considers that the provision of rail freight transport services constitutes a separate market, different from road freight transport or inland waterways freight transport[26]. Given the type of goods transported by rail, their volume and weight (e.g. mining, construction products), as well as other constraints such as safety (e.g. for chemical products), road freight transport does not generally constitute a viable alternative[27]. For transport by inland waterways, its practical use would be restricted to situations where the points of origin and destination would be connected by a waterway and where transport speed is not a decisive criterion. Therefore, rail freight transport does not appear to be substitutable by inland waterway transport in this case[28].

(33) The Commission also considers that the provision of long distance rail passenger transport services constitutes a separate market, distinct from regional passenger rail services and from long distance passenger services provided through other modes (car, bus or plane):

– Regional and long distance rail passenger services in Germany constitute separate product markets since they serve different customer needs for transport services. Moreover, the two services require different business

---

22 Complaint from NEE, case AT.39731, ID 3, p. 23 and its annex 8, case AT.39731, ID 11, p. 1. Calculations are conducted for a Blue Tiger diesel locomotive and for a Siemens traction current locomotive.

23 Commission Notice on the definition of relevant market for the purposes of Community competition law, OJ C 372, 9.12.1997, p. 5–13, paragraphs 15-19.

24 See for example inspection documents, case AT.39678, ID 556 / MAM4-2, p. 2 and ID 510 / TB4, p. 1.

25 Complaint from NEE, case AT.39731, ID 3, p. 24.

26 For freight transport, see case COMP/M.5855 *DB / Arriva*, paragraph 145: "the Commission, while leaving the market definition open, has previously found that there are strong indications for a distinct market for the transport of goods by rail". See also cases COMP/M.5480 *DB / PCC*, COMP/M.3971 *Deutsche Post / Exel* and COMP/M.4746 *Deutsche Bahn / EWS*.

27 See case COMP/M.5480 *DB / PCC*, paragraph 21.

28 See case COMP/M.5579 *TL/Ermewa*, paragraph 123.

models with different key success factors, assets (rolling stocks) and regulatory requirements[29];

– Long distance rail passenger transport services generally belong to a different market than long distance transport by other modes due to regulatory differences and limited demand substitutability. First, intra-German long distance rail transport is cheaper than air transport[30]. Second, many German cities have no airport connection. Third, due to legal constraints in Germany, national long distance bus services are only authorised since 2013. For all these reasons, demand for long distance rail passenger transport is not generally substitutable by air or bus transport.

#### *4.2.2. Geographic market*

(34) The Commission considers that the relevant geographic market for the supply of traction current is Germany. The only possibility to supply traction current to trains operating on the German rail network is to use DB Energie's network which only covers the German territory.

(35) The Commission considers that the relevant geographic market is Germany for the downstream markets. Such markets should be considered national due to the entry barriers constituted by regulatory and technical requirements and access to infrastructure[31].

### 4.3. Dominant position

(36) Under the case law, a dominant position "relates to 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 and its customers"[32]. Consequently, the assessment of the dominance of an undertaking should inter alia take into account the constraints imposed by existing competitors, the constraints imposed by potential competitors and the constraints imposed by the bargaining strength of customers (countervailing buyer power)[33].

(37) DB Energie has no competitor on the market for the supply of traction current: DB Energie is the only supplier of traction current in Germany and therefore holds 100 % of the market. This has been consistently the case since 2003 except for one month in 2005 when a German energy trading company (PCC Energie) supplied the railway undertaking Rail4Chem with traction current.

---

29 Case COMP/M.5855 *DB / Arriva*, paragraphs 131-140.

30 Case COMP/M.5855 *DB / Arriva*, paragraph 139. Regarding the substitutability of rail and air transport services, in case COMP/M.5440 *Lufthansa / Austrian Airlines* the Commission concluded that there is no substitutability for time sensitive passengers, while no definite conclusion can be drawn concerning substitutability for non-time sensitive passengers.

31 Case COMP/M.5855 *DB / Arriva*, paragraphs 159 - 162.

32 Case C-549/10 P, *Tomra Systems and Others v Commission*, judgment of 19 April 2012, not yet reported, paragraph 38. See also Case 27/76 *United Brands and United Brands Continentaal v Commission* [1978] ECR 207, paragraph 65, and Case 85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461, paragraph 38.

33 See case C- 85/76, *Hoffmann-La Roche & Co. AG v Commission*, [1979] ECR I-461, paragraphs 38 and 48.

(38) There has been no credible entry threat into the market for the supply of traction current since 2004 and thus no potential competition to DB Energie. Although since 2004 energy traders and producers can request to supply traction current to railway undertakings through DB Energie's network, DB Energie received only two such requests[34] and only one resulted in third party supply for a very limited period of time.

(39) The market power of an undertaking may be mitigated by the countervailing buying power of one or several of its customers if they represent an important share of its sales. In the present case, DB Energie does not face countervailing buyer power. The transport subsidiaries of the DB Group collectively represent around 87 % of the sales of DB Energie. As they all belong to the same economic entity, they cannot be reasonably expected to exert market power on DB Energie. Other customers of DB Energie only represent a small share of its sales. Even the second biggest buyer – the Raileco consortium which regroups several railway undertakings – represents only around 8 % of DB Energie's sales of traction current.

(40) The Commission thus considers that DB Energie is dominant on the market for the supply of traction current in Germany. The dominance of DB Energie is also acknowledged in internal documents by the DB Group: "DB Energie is the only provider of 16.7 Hz traction current in Germany. It holds a dominant position on the market for the supply of traction current"[35].

## 4.4. Substantial part of the internal market

(41) The market for the supply of traction current in Germany constitutes a substantial part of the internal market since it covers the whole territory of a Member State[36] and traction current is important for the operation of rail transport services within Germany and for the operation of cross-border rail transport services from and to Germany[37].

## 4.5. Practices raising concerns

### *4.5.1. The concept of margin squeeze*

(42) The preliminary assessment of the Commission is that the pricing system for traction current applied by DB Energie to railway undertakings, including its discounts, fulfils the conditions necessary for finding a margin squeeze.

(43) A margin squeeze may occur where a vertically integrated undertaking sells a product or service to competitors on an upstream market where it is dominant and competes with these undertakings on a downstream market for which the product or service is an input.

---

[34] Deutsche Bahn, reply to request for information, case AT.39678, ID 1649, p. 62.

[35] Inspection document, case AT.39678, ID 1142 / CDB29, p. 2. The original text reads: "*Die DB Energie ist die einzige Anbieterin von 16,7-Hz-Bahnstrom in Deutschland. Es besteht eine marktbeherrschende Stellung der DB Energie für die Bahnstromversorgung*".

[36] See case T-228/97, *Irish Sugar v Commission*, [1999] ECR II-2969, paragraph 99.

[37] 50% of the rail freight traffic in Germany is cross-border (international and transit). The share of international passenger traffic is 5% of total passenger traffic in Germany. See EUROSTAT Transport database, available at: http://epp.eurostat.ec.europa.eu/portal/page/portal/transport/introduction.

(44) A margin squeeze constitutes an abuse contrary to Art. 102 TFEU if the spread between the price charged to competitors upstream and the price charged to the dominant undertaking's own customers downstream is "either negative or insufficient for competitors as efficient as the dominant undertaking to cover the specific costs" which the dominant undertaking has to incur to supply its downstream products or services[38]. As the case law points out: "in such circumstances, although the competitors may be as efficient as the dominant undertaking, they may be able to operate on the [downstream] market only at a loss or at artificially reduced levels of profitability"[39].

(45) The Court of Justice has further specified that a margin squeeze must at least lead to potential anti-competitive effects to constitute an abuse[40]. The potential anti-competitive effect of a margin squeeze usually results from increased entry costs of competitors or their delayed prospects of becoming profitable[41]. Such potential anti-competitive effect is proved inter alia where the margin squeeze concerns an input which is indispensable for competitors to be active on the downstream market[42].

(46) In *TeliaSonera*, the Court held that "Article 102 TFEU refers not only to practices which may cause harm to consumers directly but also to those which are detrimental to them through their impact on competition"[43]. In *AstraZeneca*, the Court specified, that a dominant undertaking cannot eliminate a competitor "by using methods other than those which come within the scope of competition on the merits"[44]. Moreover, "the concept of 'abuse' is an objective concept referring to the conduct of a dominant undertaking which is such as to influence the structure of a market where the degree of competition is already weakened precisely because of the presence of the undertaking concerned, and which, through recourse to methods different from those governing normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition"[45].

(47) The existence of a margin squeeze should, as a general rule, be assessed "based on the costs incurred by the dominant undertaking itself and on its strategy"[46]. Thus, in

---

[38] Case C-52/09, *Konkurrensverket v TeliaSonera Sverige AB*, [2011] ECR I-527, paragraph 32.

[39] Case C-52/09, *Konkurrensverket v TeliaSonera Sverige AB*, [2011] ECR I-527, paragraph 33.

[40] Case C-52/09, *Konkurrensverket v TeliaSonera Sverige AB*, [2011] ECR I-527, paragraph 64.

[41] Case T-336/07, *Telefonica v Commission*, judgment of 29 March 2012, not yet reported, paragraph 279.

[42] Case C-52/09, *Konkurrensverket v TeliaSonera Sverige AB*, [2011] ECR I-527, paragraphs 70-71.

[43] Case C-52/09, *Konkurrensverket v TeliaSonera Sverige AB*, [2011] ECR I-527, paragraph 24;case C-280/08, *Deutsche Telekom v Commission*, [2010] ECR I-9555, paragraph 176;joined cases C-468/06 to C-478/06 *Sot. Lélos kai Sia and Others*, [2008] ECR I-7139, paragraph 68.

[44] Case C-457/10 P, *AstraZeneca AB and AstraZeneca plc v Commission*, judgement of 6 December 2012, not yet reported, paragraph 75.

[45] Case C-457/10 P, *AstraZeneca AB and AstraZeneca plc v Commission*, judgement of 6 December 2012, not yet reported, paragraph 74.

[46] While in principle the lawfulness of the pricing policy of the dominant undertaking is assessed by making reference to its prices and costs, the Court of Justice has also held that there may be particular circumstances where "the costs and prices of competitors may be relevant to the examination of the pricing practice at issue. That might in particular be the case where the cost structure of the dominant undertaking is not precisely identifiable for objective reasons, or where the service supplied to competitors consists in the mere use of an infrastructure the production cost of which has already been written off, so that access to such an infrastructure no longer represents a cost for the dominant undertaking which is economically comparable to the cost which its competitors have to incur to have access to it, or again where the particular market conditions of competition dictate it, by reason, for

general, the so-called as-efficient competitor test can be used to calculate whether there is an insufficient spread between the upstream and downstream prices charged by the dominant undertaking as defined above.

*4.5.2. Assessment in the present case*

**The DB Group as a vertically integrated undertaking**

(48) DB Energie belongs to a vertically integrated group which is also active on the relevant downstream markets. DB Energie and railway undertakings of the DB Group are part of the same holding and are thus legally part of a vertically integrated group. Moreover, in its business practice, the DB Group behaves as a vertically integrated group by coordinating the strategy, the financing and the decision-making of its upstream and downstream subsidiaries:

– According to an internal document of the DB Group, "[t]he objective of the traction current price construction [is to] ensure a competitive advantage for the DB Group in the area of energy procurement"[47];

– The financial targets of DB Energie and of the other subsidiaries of the DB Group are set at the ultimate level of the DB Group: the subsidiaries of the DB Group are all piloted based on ROCE (Return On Capital Employed) targets set by the holding DB AG[48];

– The pricing system for traction current and its discount scheme was adopted by the holding of the DB Group, after consultation with the downstream railway undertakings of the DB Group[49].

**Profitability of as-efficient competitors**

(49) The Commission has assessed whether the pricing practice of the DB Group on traction current is liable to prevent other railway undertakings from competing profitably on the downstream market. In the case at hand, the Commission conducted an "as-efficient competitor test" to assess whether the transport companies of the DB Group themselves would be able to compete profitably on the rail transport markets if they had to pay the price for traction current charged by DB Energie to competing railway undertakings, hence if they had benefitted from the same level of discounts as their competitors.

example, of the fact that the level of the dominant undertaking's costs is specifically attributable to the competitively advantageous situation in which its dominant position places it". See Case C-52/09, *Konkurrensverket v TeliaSonera Sverige AB*, [2011] ECR I-527, paragraphs 41, 45, 46.

47 Inspection document, case AT.39678, ID 634 / RR1, p. 2. The original text reads: "*Zielsetzung der Bahnstrompreisbildung: [...] Sicherung der Wettbewerbsvorteile im Bereich der Energiebeschaffung für den DB Konzern*".

48 Inspection document, case AT.39678, ID 847 / EM13, p. 4-5: "*The ROCE is the key figure for the value-oriented piloting of the DB Group. […]. This Group-wide objective will be translated into risk-specific targets for each part of the Group*". The original text reads: "*Der ROCE stellt die Spitzkennziffer für die wertorientierte Steuerung des DB Konzerns dar. […]Das Ziel für den DB Konzern wurde - risikospezifisch - in Zielvorgaben für die einzelnen Konzernsparten überführt*".

49 See the proposed resolution to the board, inspection document, case AT.39678, ID 1056 / HZ24.

(50) Over the period 2003-2011, competitors of the DB Group benefitted from an average 6 % discount in the rail freight market and from an average 7 % in the rail passenger market compared to an average of over 14 % for the transport companies of the DB Group. Based on financial data submitted by the DB Group, the Commission has assessed the profitability of the DB transport companies, respectively DB Schenker Rail Deutschland AG in the freight sector and DB Fernverkehr AG in the long distance passenger sector, if they had benefitted from discounts of only 6 % and 7 % respectively on traction current[50]. The "as-efficient competitors" whose profitability should be assessed are thus hypothetical firms benefitting from these lower levels of discounts with the same level of efficiency as the DB transport companies.

(51) In the present case, the Commission assessed the profitability of such as-efficient competitors on average over the period 2003-2011[51]. In line with previous margin squeeze cases[52], the Commission considers that the relevant costs to assess the profitability of the as-efficient competitor are the long run average incremental costs (LRAIC) of the relevant transport company of the DB Group[53]. In the present case, the Commission uses as a proxy for LRAIC of the as efficient competitor the costs incurred by DB Schenker Rail Deutschland AG and DB Fernverkehr AG, as reported under the regulatory obligation of the DB Group to separate the accounts of its upstream and downstream activities[54]. On the basis of the Commission's preliminary assessment, over the entire period 2003-2011[55]:

– In the rail freight market, the as-efficient competitor incurs additional annual costs of traction current of EUR 25 million and generates an average annual "Profit from ordinary business"[56] of minus EUR 4 million or minus 0.1 % of average total revenues;

---

50 Submission of Deutsche Bahn, case AT.39678, ID 1907 and ID 1908.

51 In previous margin squeeze cases, the Commission has generally assessed the profitability of the as-efficient competitor on a year-by-year basis. The approach to assess the profitability of the as-efficient competitor over a longer period aggregating several years of activity was nonetheless used in Telefónica and confirmed by the General Court. See Case T-336/07 *Telefónica v Commission*, judgment of 29 March 2012, not yet reported, paragraphs 212 to 265

52 Commission Decision of 21 May 2003 in case COMP/C-1/AT.37451, AT.37578, AT.37579 — *Deutsche Telekom AG*, and Commission Decision of 4 July 2007 in case COMP/AT.38784 – *Telefónica*.

53 LRAIC are considered as the standard cost benchmark for potential price-based exclusionary conduct. The long run incremental cost of an individual product is the average of all the (variable and fixed) costs that an undertaking incurs to produce a particular product. It is the difference between the total costs incurred by the undertaking when producing all products, including the individual product under analysis, and the total costs of the firm when the output of the individual product is set equal to zero, holding the output of all other products fixed.

54 Submission of Deutsche Bahn, case AT.39678, ID 1907 and 1908. DB declared that the profit and loss statements were taken from the firms' audited financial statements (based on German HGB accounting principles). Accounting data of DB transport companies provide a good proxy of their LRAIC because they are "incremental" to rail transport services since there are likely limited common costs between DB's activity as an energy network manager and trader and as a provider of rail services. They can also be considered as "long-term" since depreciation and amortisation costs have been fairly stable in the relatively long time period considered.

55 The average used is the simple average of profitability (Profit) of the as-efficient competitor each year.

56 The "profit from ordinary business" is the EBIT minus net financial costs plus net income from participations.

– In the long distance passenger rail market, the as-efficient competitor incurs additional annual costs of traction current of EUR 19 million and generates an average annual "Profit from ordinary business" of minus EUR 8 million or minus 0.2 % of average total revenues.

(52) The profitability of the as-efficient competitor can also be assessed by its unit value to take into account the changes in volume of activity (in tonne-kilometre for freight transport and in passenger-kilometre for long distance transport) over the period[57]. On this basis, the Commission has preliminarily assessed that:

– In the rail freight market, the as-efficient competitor would generate an average annual "Profit from ordinary business" of minus EUR 0.2 per thousand tonne-kilometres;

– In the long distance passenger rail market, the as-efficient competitor would generate an average annual "Profit from ordinary business" of minus EUR 0.6 per thousand passenger-kilometres.

(53) In the Commission's assessment, "Profits from ordinary business" are negative for the as-efficient competitors both in the freight and in the long distance passenger markets. These negative levels of profitability over the entire period 2003-2011 which the Commission's preliminary assessment has established cannot allow adequate remuneration for shareholders of private railway undertakings[58]. If margins are insufficient to remunerate shareholders, they are likely to move their capital to more profitable investments or not invest at all in such markets. The results mentioned above with quasi-null or negative margins in the freight and long distance passenger sectors may deter potential competitors from market entry (due to very low anticipated profits) and likely hamper existing competitors (due to lower realised profits than capital costs).

(54) Therefore, the Commission, on the basis of its preliminary analysis, has concerns that the pricing practice of the DB Group for traction current and its discounts led to a margin squeeze on the rail freight and long distance passenger markets over the period 2003-2011.

**Potential anti-competitive effects in the rail transport markets**

(55) The results of the as-efficient competitor tests conducted for the rail freight and rail long distance passenger transport markets, which highlight that an as-efficient competitor would have probably experienced unsustainable profitability levels due to the DB Group's pricing practices, should be interpreted in the context of the specific conditions of the rail sector to assess the potential anti-competitive effects of these practices.

---

57 The average used is the simple average of unit profitability (Profit per tonne-kilometre or passenger-kilometre) of the as-efficient competitor each year.

58 The cost of capital of the railway undertakings of the DB Group was 9.9 % in 2010. Considering that the ratio of capital employed over revenues was at 65 % for freight and 35 % for passenger transport, this means that the "minimum" margins to be generated by the subsidiaries of the DB Group to create value for shareholders were between 3.5 % of total revenues (passenger market) and 6.5 % (freight market) in 2010. See Deutsche Bahn Annual Report 2011, p. 79 and 176.

(56) It is unlikely that actual competitors of the DB Group can reach the same efficiency levels as an incumbent undertaking. In particular, competitors in the recently liberalised rail markets in Germany are new entrants or small players. They have to incur significant investments and one-off costs to enter the market and gain customers, which DB transport companies no longer have to incur due to their position as incumbents. Thus, in the present case, the margin squeeze practice has in reality a stronger negative impact on competition than the as efficient competitor test allows to identify.

(57) The Commission raises concerns that the margin squeeze resulting from DB Energie's pricing system for traction current and its discounts is liable to hinder the maintenance of the degree of competition existing in the downstream market for rail transport services or the growth of that competition. Although competitors have managed to increase their combined market shares in the rail freight transport markets between 2003 and 2011, the Commission considers that the margin squeeze resulting from the traction current pricing system has made market entry slower or more difficult, so that it is liable to hinder competition in the market in the long term[59].

(58) First, the Commission's concerns regarding a possible margin squeeze relate to an input, traction current, which is indispensable to compete on the downstream rail transport market. A degraded access to traction current hence translates into "a competitive disadvantage on that market for competitors which is such as to prevent or restrict their access to [the downstream markets] or the growth of their activities"[60]. For the period covered by this Decision, it could only be provided by DB Energie and it was uneconomical to substitute traction current by other sources of energy for the vast majority of rail transport services (see recital (30)). Moreover, DB Energie had an obligation under European and German law to supply traction current to railway undertakings upon request and under the same conditions as soon as it supplies traction current to the railway undertakings of the DB Group.

(59) Railway undertakings competing with the DB Group thus could not escape the margin squeeze resulting from DB Energie's traction current pricing system and would have suffered losses or artificially reduced profits on the downstream transport markets, as described in recital (53). As a result, their growth has likely been slowed down or hindered by DB's behaviour. In general, slowing down or hindering the growth of competitors reduces the intensity of competition on the market. This is all the more true in the rail sector, where economies of scale, economies of scope and network effects have a significant impact on rail undertakings' efficiency due to inherent high fixed costs (costs of rolling stock, costs of obtaining a license or costs of training personnel).

(60) In the rail freight market, the limited incentives for entry and the potential anti-competitive effects are underpinned by the following considerations:

---

59 It is not necessary for competitors to be excluded from the market to prove anti-competitive effects. See case C-52/09, *Konkurrensverket v TeliaSonera Sverige AB*, [2011] ECR I-527, paragraph 65: "the fact that the desired result, namely the exclusion of those competitors, is not ultimately achieved does not alter [the margin squeeze's] categorisation as abuse within the meaning of Article 102 TFEU".

60 Case C-52/09, *Konkurrensverket v TeliaSonera Sverige AB*, [2011] ECR I-527, paragraph 70.

– Foreclosure may have taken place through a lower growth in market shares, which competitors would have increased absent the margin squeeze. In the rail freight market the DB Group has retained very high market shares of around 75 % despite the market having been liberalised more than 15 years ago;

– No competitor has reached a significant size compared to the railway undertakings of the DB Group – the largest competitor holds slightly more than 5 % of the market;

– Competitors have not or only to a limited extent entered some of the important segments of the rail freight market, such as the single wagon segment.

(61) In the long distance passenger transport market, the likely anti-competitive effects of the margin squeeze resulting from the traction current pricing system are underpinned by the very limited competition on the market since the DB Group holds 99% market share.

(62) The likely abusive nature of DB's conduct is further evidenced by the intent of DB Energie on preserving its competitive position on the downstream markets through its pricing for traction current. While intent is not a necessary prerequisite to show an abuse, it is one of the criteria which can be used for assessing the abusive nature of behaviour under Article 102 TFEU[61].

(63) Securing price differentiation between the downstream subsidiaries of the DB Group and their competitors was indeed a key objective of the pricing system for traction current. It was explicitly stated by DB Energie when it discussed a potential revision of its pricing system in 2008: "[The] objective [is to] secure a price differentiation in the supply of traction current for the transport companies of the Group"[62]. DB Energie aimed at maximising the size of such price differentiation through discounts. DB Energie's managing director mentioned that "DB Energie would try to maximise the discounts for DB AG to the extent possible"[63]. In the view of the DB Group, the discounts in the traction current pricing system are thus a means to secure a competitive advantage for the DB Group[64]. Conversely, it is apparent from DB internal documents that the DB Group feared that "the suppression of the discount steps alters the price structure to the disadvantage of DB transport companies and regularly leads to price increases for the DB transport companies"[65].

**Absence of objective justification of conduct**

---

61 Case T-458/09, *Slovak Telekom v Commission*, not yet reported, paragraph 58.

62 Inspection document, case AT.39678, ID 890 / EM52, p. 3. The original text reads: "*Zielstellung: Sicherung einer Preisdifferenzierung in der Bahnstromversorgung für die Transportgesellschafen des Konzerns*".

63 Inspection document, case AT.39678, ID 841 / EM7, p, 2. The original text reads: "*Bzgl. des Rabattsystems merkte Herr […] an, dass DB Energie versucht die Rabatte für die DB AG im Rahmen des Möglichen zu maximieren*".

64 Inspection document, case AT.39678, ID 782 / PDE31, p. 4: "[In today's pricing system] the discount scheme secures an advantage for the Group [and] the synergies of the integrated undertaking are used". The original text reads: "*Rabattsystem [im heutigen Preissystem] sichert Vorteile für den Konzern [und] Synergien des integrierten Unternehmens werden genutzt*".

65 Inspection document, case AT.39678, ID 608 / KK2, p. 5. The original text reads: "*Durch den Entfall der Rabattstaffeln verändert sich die Preisstruktur zuungunsten der DB-Transporteure und ist in der Regel mit Preiserhöhungen für die DB-EiVUs verbunden*".

(64) A margin squeeze may be justified if it is objectively necessary or if it produces substantial efficiencies that outweigh any anti-competitive effects on consumers. Such efficiencies should be realised as the result of the conduct, the conduct should be indispensable to the realisation of such efficiencies and should bring benefits to the consumers that outweigh its negative effects on competition. Last, the conduct should not lead to the elimination of effective competition[66]. It is for the dominant undertaking invoking such a justification to demonstrate that the above conditions are met.

(65) The DB Group has not demonstrated that DB Energie's traction current pricing system leading to a margin squeeze is not objectively necessary. Moreover, the DB Group does not face regulatory constraints on pricing conditions that would force it to charge prices leading to a margin squeeze, neither on the upstream nor on the downstream markets.

(66) The DB Group has further not demonstrated that DB Energie's traction current pricing system creates sufficient efficiency gains to outweigh its anti-competitive effects. Lower prices for rail transport services that may result from lower traction current prices of the transport companies belonging to the DB Group could not outweigh the long-term negative effects on competition. Moreover, the Commission preliminarily considers that the discounts of the traction current pricing system are unlikely to generate efficiencies for DB Energie. DB concedes that potential efficiencies linked to the stability and size of long term demand for traction current stem from the fact that DB Energie supplies the entire rail sector and not specific undertakings[67]. In this regard, there are no significant discount schemes based on volumes purchased or duration in other countries where 16.7 Hz traction current is used and where there is only one supplier of traction current (Austria, Sweden and Switzerland)[68].

## 4.6. Effect on trade between Member States

(67) The abusive behaviour affects trade between Member States within the meaning of Article 102 TFEU. The traction current pricing system of DB Energie leading to a margin squeeze has a direct impact on cross-border economic activity because it influences international and transit flows of freight and passengers by rail and hinders railway undertakings from other Member States from competing on the domestic German rail transport markets.

(68) Such impact is also appreciable because the German rail transport sector is one of the largest in the EU. Furthermore, Germany plays an essential role in cross-border rail

---

66 Case C-209/10 *Post Danmark*, judgment of 27 March 2012, not yet reported, paragraph 42, case C-52/09, *Konkurrensverket v TeliaSonera Sverige AB*, [2011] ECR I-527, paragraph 76, case C-95/04 P *British Airways v Commission* [2007] ECR I-2331, paragraph 86 and case T-203/01, *Manufacture française des pneumatiques Michelin v Commission*, [2003] ECR II-4071, paragraphs 107-109.

67 Deutsche Bahn, reply to request for information, case AT.39678, ID 1649, p. 22.

68 SBB AG, reply to request for information, case AT.39678, ID 1769, p. 2; ÖBB-Infrastruktur AG, reply to request for information, case AT.39678, ID 1914, p. 9-11; Trafikverket, reply to request for information, case AT.39678, ID 1707, p. 6-7. In Austria, there is a mechanism for rewarding long-term demand since prices for traction current are cheaper with 3-year contracts than with 1-year contract. The duration requirement is thus much less stringent than the duration requirement of DB Energie (with up to 10-year duration discount).

traffic in the EU as it is an important transit country on the major European north-south and east west axes both for goods and passengers.

## 5. PROPOSED COMMITMENTS

(69) The DB Group does not agree with the Commission's preliminary assessment that it may have abused its dominant position on the market for the provision of traction current to railway undertakings in Germany. It has nevertheless offered commitments pursuant to Article 9 of Regulation (EC) No 1/2003, to meet the Commission's competition concerns.

(70) The DB Group submitted initial commitments on 23 July 2013. They aim at allowing entry from third party electricity providers on the market for supplying traction current to railway undertakings in Germany so that the latter may switch to alternative traction current providers and DB Energie loses its dominant position on this market and its ability to set prices such as to create a margin squeeze. Their key elements are as follows:

– At the latest 3 months after the notification of the Commission decision under Article 9 of Regulation (EC) No 1/2003 in this case and at the earliest on 1 January 2014, DB Energie will introduce a new pricing system for traction current with separate supply prices for electricity and separate grid access fees as approved by the relevant German Regulatory Authority *(Bundesnetzagentur*).

– In this new system, DB Energie will charge the same price for electricity to all railway undertakings without volume- or duration-based discounts. Contracts under the new pricing system will last for a maximum of one year.

– Before the entry into force of the new system, DB Energie will allow its customers to terminate their contract for the supply of traction current without penalty with a notice period of six weeks. Once the new system is in place, contracts will last for a maximum period of one year with a notice period of two months.

– In addition, the introduction of the new system will be complemented by an obligation of accounting and information separation between the activities of DB Energie as traction current network manager and as provider of electricity.

– Four months after the entry into force of the commitments, DB Energie will pay to railway undertakings in Germany not belonging to the DB Group a one-time payment of 4% of their yearly traction current invoice, based on the period of one year before the entry into force of the new pricing system.

– DB Energie and DB Mobility and Logistics AG will provide each year the necessary data for the Commission to assess if the price levels for traction current and transport services charged by the DB Group could lead to a margin squeeze. DB Energie will also notify to the Commission in advance any changes to its electricity price.

- The commitments will enter into force at the latest three months after the notification of the Commission's decision. They will last for 5 years after the notification of the Commission's decision or until 20 % of traction current volumes purchased by competitors of the DB Group are sourced from third party electricity providers. The commitment by DB Energie not to grant duration-based discount for its electricity supply offer will only last for 3 years.

- The DB Group will also appoint a trustee who will monitor its compliance with the commitments.

## 6. COMMENTS RECEIVED IN RESPONSE TO THE COMMISSION'S NOTICE PURSUANT TO ARTICLE 27(4) (MARKET TEST)

(71) In response to the publication on 15 August 2013 of a notice pursuant to Article 27(4) of Regulation (EC) No 1/2003 (the "Market Test"), the Commission received 13 responses from interested third parties. These included railway undertakings active in Germany and competing with the DB Group on either the rail freight or passenger markets. Third party electricity providers and the German regulatory authority *Bundesnetzagentur* also provided comments.

(72) The respondents generally welcomed the proposed commitments, which they believed would address the concerns expressed by the Commission. Some respondents regretted that the Commission was considering to make legally binding commitments from the DB Group in this case. In their view, an Article 9 Decision would not be appropriate for an alleged 10-year infringement and would not facilitate their potential private damages claims.

(73) The comments received related mainly to the following main elements: (i) ability of DB Energie to grant access to the traction current network in the specified timeframe, (ii) scope and timing of transmission of information to railway undertakings by DB Energie, (iii) need for a price cap on traction current in the new system, (iv) value of the payment and (v) duration of commitments.

*Ability of DB Energie to grant access to the traction current network in the specified timeframe*

(74) Some market test participants expressed doubts on the technical ability of DB Energie to grant effective access to third party electricity providers in the timeframe envisaged by the current commitments.

*Contract termination and ability to switch to third party electricity suppliers*

(75) Market test participants have also pointed out that if they do not manage to change their supplier before the entry into force of the new pricing system, they would have to continue their contract with DB Energie for another year which would delay the development of competition on the market.

*Information transmitted by DB Energie to railway undertakings*

(76) In addition, market test participants have highlighted that the level of information sent by DB Energie to railway undertakings on their traction current consumption as

well as the timing of the transmission of such information would not enable railway undertakings to prepare their switching to a third party electricity provider at the time of the entry into force of the commitments.

*Price cap on traction current*

(77) Among the respondents a number of railway undertakings expressed concerns that the prices of traction current may rise due to the change of pricing system foreseen in the commitments, as a result of the application of the German regulatory framework for energy. They expect that such an increase would be negative for competition, as it would increase the margin squeeze.

*Value of payment*

(78) While the railway undertakings participating in the market test in principle welcomed the payment of 4 % of the traction current invoice on the past year of consumption, they almost unanimously complained that the level of the payment was insufficient and should be raised to at least 5 % for a period of 3 to 5 years.

*Duration of commitments*

(79) Railway undertakings have expressed their concerns both that the commitments would only last for 5 years (3 for the renouncement of using duration discount) and that they could be terminated earlier when the market share of third party electricity providers reach 20 % of the contestable market, i.e. the market for supplying traction current to non-DB railway undertakings.

(80) The 20 % threshold corresponds to the 3 to 4 biggest competitors of DB shifting to a third party electricity supplier for traction current. However, railway undertakings have pointed out that this would correspond to an energy volume of around 300 GWh, which would likely only be attractive for one electricity provider, as the use of the traction current network implies some economies of scale. Railway undertakings thus suggested increasing the threshold so that the commitments would not prematurely end when only one alternate provider has been able to enter the market.

## 7. SUBMISSION OF THE FINAL COMMITMENTS

(81) In response to the comments received pursuant to the Market Test, the DB Group submitted a revised proposal on 21 November 2013 that addresses some of the points mentioned above[69]. In particular, the final commitments differ from the proposed initial commitments in the following aspects:

– DB Energie postpones the entry into force of the new pricing system to 1 July 2014. By this date DB Energie commits to offer access to the traction current network to third party energy providers so that from this date on they can sell traction current to railway undertakings[70].

69 The Annex to this Decision contains the full version of the final commitments.

70 DB Energie will initially grant access to its network by way of an interim technical solution until the final access model is implemented under the supervision of the Bundesnetzagentur. The interim

– Within the first six months after the entry into force of the new pricing system, customers will be allowed to terminate their contract without penalty with a notice period of two months.

– DB Energie will provide railway undertakings with detailed information on their individual consumption pattern for traction current for each locomotive in the year 2013 upon request within two months.

– The commitments will have general default duration of 5 years after the introduction of the new pricing system. DB also removed the specific earlier termination for the renouncement for duration discounts.

– The commitments may come to an end earlier than the default duration if the market share of third party electricity providers reaches 25 % of the market for supplying traction current to non-DB railway undertakings over one calendar year.

## 8. ASSESSMENT OF THE FINAL COMMITMENTS IN LIGHT OF THE OBSERVATIONS RECEIVED IN RESPONSE TO THE MARKET TEST

### 8.1. Purpose of the final commitments

(82) In its Preliminary Assessment, the Commission expressed the preliminary view that DB Energie's pricing system for traction current, including its discounts, may lead to a margin squeeze on the markets for rail freight and long distance passenger transport services in Germany.

(83) The Commission considers that the final commitments offered by DB are adequate to remedy the Commission's concerns expressed in its Preliminary Assessment since they will introduce competition on the market for the supply of traction current by promoting entry of third party electricity providers. The competition from third party electricity provider will in turn constrain the price setting ability of DB Energie for traction current and remove the possibility of a margin squeeze.

### 8.2. Introduction of a new pricing system for traction current on 1 July 2014

(84) The Commission considers that the introduction of a new pricing system with separate prices for electricity and for access to the traction current network is a necessary prerequisite for opening up the market for the supply of traction current and for allowing entry from third party energy providers. It will ensure that competition between electricity providers occur on the price of electricity, independently of the conditions of access to the network.

(85) The Commission furthermore considers that the DB Group's commitment to "offer access to the traction current network" on 1 July 2014 will provide for an effective market opening even if this access is only based on an interim solution. Indeed, the expected available capacity to access the traction current network with this interim

---

solution should initially guarantee a capacity for the traction current network of up to 250 traction units. Available capacity should regularly increase until the final system is in place, with which all potential demand could be covered.

solution will likely be sufficient to ensure that demand for switching is met as it represents around 20% of the total consumption of traction current by railway undertakings not belonging to the DB Group. This mechanism complements the current regulatory obligation to DB Energie to grant access to its network under the German regulatory framework.

### 8.3. Obligations of DB Energie relating to the supply of traction current

(86) The Commission considers that the final commitments will facilitate the uptake of competition on the market for the supply of traction current. They aim at facilitating the switching of traction current supplier and at ensuring that new entrants have sufficient time to develop and consolidate their offer on the traction current market.

(87) The commitment by DB Energie to submit information on traction current consumption, including detailed information by locomotive upon demand, ensures that all railway undertakings possess sufficient information to be able to get an offer from third party energy supplier and, if they wish so, to prepare their switching to such a supplier at the time of the entry into force of the commitments.

(88) Moreover, the commitment that railway undertakings can terminate their existing contracts with DB Energie without penalty before the entry into force of the new system ensures that railway undertakings are not bound to long lasting contracts with DB Energie and therefore allow them, if they wish to do so, to effectively switch traction current provider.

(89) The Commission also considers that the introduction of a maximum contract duration by DB Energie of 1 year and the possibility for railway undertakings to terminate their contract within the first six months after the entry into force of the new pricing system give railway undertakings enough flexibility as to the point in time when they want to change to another supplier.

(90) Last the renouncement by DB Energie to offer volume- or duration- based discount will promote the development of competition both by increasing price transparency on the market for the supply of traction current and by preventing DB Energie to leverage its inherited economies of scale while its competitors have not yet been able to develop similar efficiencies.

### 8.4. One-time payment to railway undertakings

(91) The Commission considers that the one-time payment to railway undertakings is an adequate means to prevent the margin squeeze from being prolonged in a transition phase while the new pricing system is introduced and third party energy suppliers have not entered the market for traction current. The payment is therefore limited to one year, a duration which the Commission considers sufficient to facilitate market entry. The level of the payment of 4% is also considered by the Commission to be sufficient to prevent a margin squeeze in the first year after the entry into force of the new pricing system, since a price reduction of 4% would most likely have prevented a margin squeeze over the entire period of the alleged infringement.

(92) The Commission considers that this payment prevents the margin squeeze from being continued before third party energy providers can enter the market and therefore sees no need to modify the payment clause. The Commission does not

consider it necessary to include a price cap for electricity in the new pricing system either. In the short-term, the payment limits the possibility for the DB Group to charge a margin squeeze and in the long-term competition on the market for the supply of traction current should limit the ability of DB Energie to charge a margin squeeze.

(93) Regarding the comment that the level of the payment would be insufficient and should be raised, the Commission stresses that the payment granted in the commitments is not a compensation for harm suffered through possible anti-competitive behaviour. A commitments decision within the meaning of Article 9 of Regulation (EC) No 1/2003 does not contain a finding of an infringement of the EU antitrust rules. In addition, Article 9 Decisions do not aim at directly compensating harm suffered from a violation of those rules.

### 8.5. Notification of information to the Commission

(94) The Commission considers that the data which DB Energie and DB Mobility and Logistics AG commit to provide to the Commission each year are suitable to assess if the price levels charged by the DB Group for traction current and for transport services lead to a margin squeeze. Hence, this commitment allows the Commission to monitor the pricing strategy of the DB group and to open a new investigation if necessary.

### 8.6. Duration of the commitments

(95) The Commission considers that the general duration of the final commitments of five years is sufficiently long for third party electricity suppliers to develop their offer and for railway undertakings to change providers. In case third party electricity providers reach 25% of the market for supplying traction current to non-DB railway undertakings before five years have elapsed, the Commission considers that this would prove that competition has been developing steadily on the market and would justify a premature end of the commitments.

(96) The Commission especially considers that the 25% threshold in the final commitments is set at a sufficient level. The commitments would only prematurely end once third party energy providers would supply a critical mass of railway undertakings since under current circumstances the threshold of 25% would only be reached if more than the four biggest non-DB railway undertakings switched to a third party energy provider.

## 9. PROPORTIONALITY OF THE AMENDED COMMITMENTS

### 9.1. Principles

(97) The principle of proportionality requires that the measures adopted by institutions of the Union must be suitable and not exceed what is appropriate and necessary for attaining the objective pursued[71].

---

[71] See for instance, Case T-260/94 Air Inter v. Commission [1997] ECR II-997, paragraph 144 and Case T-65/98 Van den Bergh Foods v. Commission [2003] ECR II-4653, paragraph 201.

(98) In the context of Article 9 of Regulation (EC) No 1/2003, application of the principle of proportionality entails, first, that the commitments in question address the concerns expressed by the Commission in its Preliminary Assessment and, second, that the undertakings concerned have not offered less onerous commitments that also address those concerns adequately. When carrying out that assessment, the Commission must take into consideration the interests of third parties[72].

### 9.2. Application in the present case

(99) The commitments are sufficient to address the concerns identified by the Commission in its Preliminary Assessment. They will in particular allow the uptake of competition on the market for the supply of traction and limit the DB Group's ability to squeeze its competitors – see recitals (82)-(94).

(100) The DB Group has not offered less onerous commitments in response to the Preliminary Assessment that also address the Commission's concerns adequately.

(101) The Commission has taken into consideration the interests of third parties, including those of the interested third parties that have responded to the notice published on 15 August 2013 pursuant to Article 27(4) of Regulation (EC) No 1/2003.

(102) This Decision accordingly complies with the principle of proportionality.

## 10. CONCLUSION

(103) The Commission considers that the commitments offered by DB meet the Commission's concerns and that therefore the conditions of Article 9(1) of Regulation (EC) No 1/2003 are fulfilled.

(104) By adopting a decision pursuant to Article 9(1) of Regulation (EC) No 1/2003, the Commission makes commitments, offered by the undertakings concerned to meet the Commission's concerns expressed in its Preliminary Assessment, binding upon them. Recital 13 of the Preamble to the Regulation (EC) No 1/2003 states that such a decision should not conclude whether or not there has been or still is an infringement.

(105) The Commission's assessment of whether the final commitments offered by DB are sufficient to meet its concerns is based on its Preliminary Assessment, representing the preliminary view of the Commission based on the underlying investigation and analysis, and the observations received from third parties following the publication of a notice pursuant to Article 27(4) of Regulation (EC) No 1/2003.

(106) In the light of the commitments offered by DB, the Commission considers that there are no longer grounds for action on its part and, without prejudice to Article 9(2) of Regulation (EC) No 1/2003, the proceedings in this case should therefore be brought to an end.

---

72 Case C-441/07 P Commission v Alrosa, [2010] ECR I-5949, paragraph 41.

(107) The Commission retains full discretion to investigate and open proceedings under Article 102 of the Treaty as regards practices that are not the subject matter of this Decision.

HAS ADOPTED THIS DECISION:

*Article 1*

The Commitments as listed in the Annex shall be binding until 30 June 2019, unless the conditions laid down in Section 3 of the commitments are fulfilled.

*Article 2*

It is hereby concluded that there are no longer grounds for action in this case as regards the pricing system for traction current.

*Article 3*

This Decision is addressed to:

Deutsche Bahn AG, Potsdamer Platz 2, 10785 Berlin, DEUTSCHLAND

DB Energie GmbH, Pfarrer-Perabo-Platz 2, 60326 Frankfurt am Main, DEUTSCHLAND

DB Mobility Logistics AG, Potsdamer Platz 2, 10785 Berlin, DEUTSCHLAND

DB Fernverkehr AG, Stephensonstraße 1, 60326 Frankfurt am Main, DEUTSCHLAND

DB Schenker Rail Deutschland AG, Rheinstraße 2, 55116 Mainz, DEUTSCHLAND

Done at Brussels,

*For the Commission*

*Joaquin Almunia*
*Vice-President*