



EUROPEAN COMMISSION  
DG Competition

***CASE AT.39813***  
***Baltic rail***

(Only the English text is authentic)

**ANTITRUST PROCEDURE**  
**Council Regulation (EC) 1/2003**

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Article 7 Regulation (EC) 1/2003  
Date: 02/10/2017

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Brussels, 2.10.2017  
C(2017) 6544 final

**COMMISSION DECISION**

**of 2.10.2017**

**relating to proceedings under Article 102 of the Treaty on the Functioning of the  
European Union**

**AT.39813 - Baltic Rail**

(Only the English text is authentic)

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# COMMISSION DECISION

of 2.10.2017

relating to proceedings under Article 102 of the Treaty on the Functioning of the European Union

**AT.39813 - Baltic Rail**

(Only the English text is authentic)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union<sup>1</sup>,

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<sup>2</sup>, and in particular Article 7 and Article 23(2) thereof,

Having regard to Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the Treaty,<sup>3</sup>

Having regard to the complaint lodged by AB ORLEN Lietuva on 14 July 2010, alleging infringements of Article 102 of the Treaty by AB Lietuvos geležinkeliai and requesting the Commission to put an end to that infringement,

Having regard to the Commission Decision of 6 March 2013 to initiate proceedings in this case,

Having given AB Lietuvos geležinkeliai the opportunity to make known its views on the objections raised by the Commission pursuant to Article 27(1) of Regulation No 1/2003 and Article 12 of Commission Regulation (EC) No 773/2004,

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

Having regard to the final report of the Hearing Officer in this case,

Whereas:

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<sup>1</sup> OJ, C 115, 9.5.2008, p.47.

<sup>2</sup> 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 (the "Treaty"). 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 where appropriate. The TFEU also introduced certain changes in terminology, such as the replacement of "Community" by "Union" and "common market" by "internal market". The terminology of the TFEU is used throughout this Decision.

<sup>3</sup> OJ L 123, 27.4.2004, p. 18.

## **1. INTRODUCTION**

- (1) On 2 September 2008, the Lithuanian railway undertaking and infrastructure manager, AB Lietuvos geležinkeliai ("LG"), allegedly detected a deformation on a 40 metre long segment ("Deformation") of a railway track running from Mažeikiai in Lithuania to the border with Latvia ("the Track") used for the transport of refined oil products from the refinery of AB ORLEN Lietuva ("OL") in Bugeniai, Lithuania ("the Refinery") to Latvia. All rail freight traffic on the Track was immediately suspended and in the following month LG removed the entire 19 kilometres of the Track.
- (2) The Commission considers that LG has abused its dominant position on the Lithuanian market for the management of railway infrastructure by removing the entire 19 kilometres of the Track in the legal and factual circumstances described below, thereby making the shortest and most direct route from the Refinery to the Latvian border unavailable to its competitors in the downstream market for the provision of rail transport services for oil products to the seaports of Klaipėda, Riga and Ventspils. This gave rise to potential anti-competitive effects of foreclosing competition on that market by raising entry barriers without an objective justification. The abuse started with the removal of the Track and it is on-going.

## **2. PARTIES TO THE PROCEEDINGS**

### **2.1. The addressee of the decision**

- (3) The undertaking addressed by this Decision is LG, a state-owned and vertically-integrated railway company that operates both as the railway infrastructure manager and as a provider of rail transport services in Lithuania. The shareholders' rights in LG are exercised by the Ministry of Transport. The Lithuanian state owns the railway infrastructure in Lithuania and LG has the legal monopoly to manage it (see recital (127)). LG is also the sole provider of rail transport services in Lithuania.
- (4) LG has three divisions within the same legal entity, namely: freight, passenger and infrastructure divisions. LG also has seven subsidiary companies, whose core activities include rolling stock repairs/manufacturing, security/cleaning services, track repairs and construction, railway design and research work, waste and protective greenery management, rail turnout manufacturing and shareholding.<sup>4</sup> As the manager of the railway infrastructure, LG performs all necessary repairs and construction works to the railway infrastructure and is responsible for the safety of that infrastructure.
- (5) In 2016, LG's total revenues were EUR 409.5 million with the complainant's rail transport business accounting for EUR [40-80] million, approximately [10-20]% of LG's turnover in that year.<sup>5</sup>

### **2.2. The complainant**

- (6) The complaint was submitted by OL, a company registered in the Republic of Lithuania, having its office at Juodeikiai village in the Mažeikiai district. Up to September 2009 the name of the company was AB Mažeikių nafta. OL is engaged in

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<sup>4</sup> LG's Annual Report 2015, page 11 (ID1312).

<sup>5</sup> LG's response to the 7<sup>th</sup> RFI (ID1351).



the refining of crude oil, as well as in the wholesale and, to a much lesser extent, the retail sale of oil products, predominantly in Lithuania, Latvia, Estonia and Poland.

- (7) OL owns and runs several facilities in Lithuania, with significant assets including the Refinery (the only refinery in the three Baltic states located near the state border with Latvia), the marine terminal in Būtingė and a pipeline system for transshipment of crude oil. OL's refined oil products, which comprise mainly gasoline, diesel and heavy fuel are sold in a number of countries, including, Lithuania, Latvia, Estonia, the Commonwealth of Independent States (CIS), Poland, the United States of America, Canada and Western Europe.
- (8) OL is wholly owned by Polski Koncern Naftowy Orlen S.A. ("PKN"). PKN is a Polish company, operating seven oil refineries within Poland, the Czech Republic and Lithuania. It is active in the wholesale and retail of oil products in Central and Eastern Europe.

### **3. PROCEDURE**

- (9) On 14 July 2010, the Commission received a complaint ("the Complaint") pursuant to Article 7 of Regulation 1/2003 lodged by OL against LG.<sup>6</sup>
- (10) In its Complaint OL explained that the Refinery is dependent on LG's rail transport services in order to transport its oil products to customers in Lithuania and Latvia, but principally to the Lithuanian seaport of Klaipėda for export by sea ("seaborne export"). According to the Complaint, in September 2008, after allegedly discovering the Deformation, LG immediately suspended traffic on the Track and in October 2008 LG removed the Track entirely. The Track was on the route from OL's refinery to the Latvian border and was used exclusively to transport OL's products to Latvia. OL argued that the actions of LG, in removing the Track, were not objectively justified and their purpose was to prevent OL from switching its seaborne exports to the Latvian seaports using the rail transport services of the Latvian railway company Latvijas dzelzceļš ("LDZ").
- (11) Between 8 and 10 March 2011, the Commission, assisted by the national competition authorities in Lithuania and Latvia, carried out inspections under Article 20 of Regulation 1/2003 at the premises of LG in Vilnius, Lithuania and of LDZ in Riga, Latvia.
- (12) On 6 March 2013, the Commission decided to initiate proceedings in the present case against LG pursuant to Article 2(1) of Commission Regulation No 773/2004. On the same day the Commission informed LDZ that it would not pursue any further the investigation against LDZ or its subsidiaries.<sup>7</sup>
- (13) On 5 January 2015, the Commission adopted a Statement of Objections addressed to LG ("SO") presenting its preliminary conclusion that some of LG's actions constituted an infringement of Article 102 of the Treaty. LG responded in writing to the SO on 8 April 2015. OL submitted observations on a non-confidential version of the SO on 25 March 2015. LG provided comments on OL's observations on 8 April 2015.

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<sup>6</sup> ID0008-0054; the formal complaint was preceded by an informal draft complaint of 21 June 2010 (ID0001-0007).

<sup>7</sup> ID0689.

- (14) On 27 May 2015, an oral hearing took place during which LG made known its views. OL was also afforded the opportunity to express its views at the oral hearing pursuant to Article 6(2) of Regulation No 773/2004.
- (15) On 23 October 2015 the Commission sent a letter of facts to LG ("Letter of Facts") to which it responded on 2 December 2015. On 29 February 2016, LG made a further submission to the Commission.<sup>8</sup>

#### **4. DESCRIPTION OF LG'S PRACTICES WHICH ARE THE SUBJECT OF THIS DECISION**

##### **4.1. OL railway freight business**

- (16) OL produces approximately 8 million tonnes of refined oil products annually. It exports approximately 6 million tonnes of its production and was the single largest Lithuanian exporter.<sup>9</sup> Between 4.5 and 5.5 million tonnes are exported annually by means of the Lithuanian seaport of Klaipėda to countries in Western Europe and beyond. Between 1 and 1.5 million tonnes are sold annually to customers in Estonia and Latvia. OL transports most of its products by rail<sup>10</sup> and is a significant customer of LG, representing approximately [10]% to [20]% of the tonnage transported annually by LG and between [10]% to [20]% of its revenue. OL's traffic to Klaipėda alone accounts for between [5] to [10]% of LG's business.<sup>11</sup> According to LG's statement, OL is *"a significant source of funds for the activities of the Lithuanian railway sector"*.<sup>12</sup>
- (17) OL transports between 1 and 1.5 million tonnes of its oil products to or through Latvia.<sup>13</sup> Until September 2008 OL's main route for that purpose serving about 60% of the cargo, was the Bugeniai-Mažeikiai-Rengė route ("Short Route to Latvia"),<sup>14</sup> a 34 kilometre route running from the Refinery through the railway junction in Mažeikiai to Rengė in Latvia. The Track that was removed as of 3 October 2008 and which is the subject of this Decision is a 19 kilometres long segment of the Short Route to Latvia located between Mažeikiai and the Latvian border. The Track was used exclusively for the transport of OL's products.<sup>15</sup>
- (18) In order to transport its products on the Short Route to Latvia, OL had contracted LG services for the Lithuanian leg of the journey, that is, from the Refinery to the Latvian border. LG then had entered into a sub-contract with LDZ to transport OL's products from the Refinery.<sup>16</sup> At the time LDZ did not have the regulatory authorisation to operate independently in the territory of Lithuania but operated as a

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<sup>8</sup> ID1277.

<sup>9</sup> LG's response to the 3<sup>rd</sup> RFI, annex 5, paragraph 1 (ID0481/1).

<sup>10</sup> According to paragraph 39 of complaint in 2008 and 2009, more than 90% of oil products produced by OL and dispatched from OL's refinery in Mažeikiai district were transported by rail. (ID0009/13).

<sup>11</sup> LG response to the 5<sup>th</sup> RFI (ID0866 and ID0869); Seized document ES9, page 1/3 (ID0816/1); seized document VJ6, page 1-2/4 (ID0651/1-2); seized document LK7, page 6/16 (ID0588/6); Complaint, paragraph 40 (ID0009/13).

<sup>12</sup> *"Tai yra reikšmingas lėšų šaltinis Lietuvos geležinkelių sektoriaus poreikiams"*, seized document LK7, page 6/16 (ID0588/6).

<sup>13</sup> OL's response to the 3<sup>rd</sup> RFI, page 25 (ID0787/25).

<sup>14</sup> OL's response to 1<sup>st</sup> RFI, page 7 (ID0206/7).

<sup>15</sup> Complaint, paragraph 42 (ID0009/14) and annex 22 (ID0032); LG's Comment on the Complaint, paragraph 34 (ID0414/11); seized document LK7, 12/16 (ID0588/12).

<sup>16</sup> OL's response to the 1<sup>st</sup> RFI, questions 2c-2f (ID0206/8-10); LDZ's response to the RFI, question 2b (ID0327/3).

sub-contractor of LG.<sup>17</sup> After crossing the Latvian border, LDZ continued to transport the cargo within the territory of Latvia under various contractual arrangements.<sup>18</sup>

- (19) Some of OL's products were transported to Latvia also on the Bugeniai-Joniškis-Meitene route ("Long Route to Latvia"). Since the suspension of traffic on the Track on 2 September 2008, all of the cargo previously transported on the Short Route to Latvia is being transported on this route. Figure and Table 1 describe the distances of the routes in Lithuania and Latvia that are relevant for this Decision:

**Figure 1 :** Relevant routes in Lithuania and Latvia



The Track from the Refinery to Skuodas via Latvia has been closed since 1995.

<sup>17</sup> LDZ's response to the RFI, question 3 (ID0327/4); seized document ES9, page 1/3 (ID0816/1); seized document VJ20 (ID0667/1).

<sup>18</sup> For the transport of cargo to Estonia LDZ was contracted directly by OL. For the transport of cargo to customers in Latvia LDZ was contracted by OL's Latvian subsidiary. For transport of cargo to the Latvian sea terminals LDZ was contracted by the respective terminal. See OL's response to the 1<sup>st</sup> RFI, pages 4, 8-9 (ID0206/4, 8-9).

**Table 1: Distances by rail<sup>19</sup>**

Route from the Refinery to	Total distance (in kilometres)	In Lithuania	In Latvia
Klaipėda (via Kuziai) <sup>20</sup>	228	228	-
Ventspils via the Short Route	277	34	243
Ventspils via the Long Route	352	152	200
Riga via the Short Route	163	34	129
Riga via the Long Route	238	152	86

#### 4.2. The commercial dispute between OL and LG

- (20) Up to September 2008 the relationship between OL and LG was governed by an agreement of 1999 ("1999 Agreement") which was signed by the owner of the Refinery at the time, the American group Williams International.<sup>21</sup> The 1999 Agreement included a specific commitment by LG to transport OL's cargo on the Short Route to Latvia.<sup>22</sup>
- (21) In early 2008 a commercial dispute arose between LG and OL regarding the rates paid by OL to LG. OL unilaterally applied a lower rate than requested by LG and withheld the payment of the difference.<sup>23</sup> On 17 July 2008 LG initiated arbitration proceedings against OL and on 28 July 2008 LG informed OL that from 1 September 2008 it would terminate the 1999 Agreement.<sup>24</sup> OL noted in its Complaint that LG's announcement was made three days after OL had formally requested LDZ for a quotation in order to replace LG's services. OL suggested that LG may have been informed of the request by LDZ.<sup>25</sup> On 10 November 2009 the arbitration court ruled that the unilateral termination of the 1999 Agreement was unlawful (see recitals (85) - (86) ).

<sup>19</sup> The distance calculations are based on the information found in seized document ES1, page 22/30 (ID0531/22); seized document ES9, page 2/3 (ID0816/2); seized document LK7, page 13/16 (ID0588/13); seized document VJ6, page 2/4 (ID0651/2); seized document VJ7, page 2/5 (ID0652/2); OL's response to the 1<sup>st</sup> RFI, question 5e (ID0206/25).

<sup>20</sup> The shorter Bugeniai-Skuodas-Klaipėda track, passing through Latvia, has been closed since 1995.

<sup>21</sup> OL's response to the 1<sup>st</sup> RFI, annex 1 (ID0221); seized document VJ3, page 1/3 (ID0648/1); seized document ES2, page 1/5 (ID0532/1); seized document VJ16, page 2/19 (ID0662/2).

<sup>22</sup> Article 6.1 of the agreement; OL's response to the 1<sup>st</sup> RFI, annex 1 (ID0221). The article reads: [business secret] *Particularly the Company shall be entitled to use the Bugeniai-Rengė (approximately 34 km) route to carry loads anywhere in Latvia, Estonia or CIS.* [business secret] [Emphasis added]. See also OL's response to the 1<sup>st</sup> RFI, annex 1 (ID0221).

<sup>23</sup> Seized document VJ3, page 1/3 (ID0648/1); seized document VJ16, pages 3/20-4/20 (ID0662/3,4).

<sup>24</sup> Complaint, annex 6 (ID0016); LG's comments on the complaint, paragraph 12 (ID0414/6).

<sup>25</sup> Complaint, paragraph 48 (ID0009/16).

### 4.3. OL sought to switch to LDZ and the Latvian seaports

- (22) According to the Complaint, OL explored the possibility of contracting LDZ directly for rail transport services on the Short Route to Latvia because of its commercial dispute with LG. OL also argued that it was considering, in parallel, switching its seaborne export business from the Lithuanian seaport of Klaipėda to the Latvian seaports of Riga and/or Ventspils,<sup>26</sup> transporting its cargo with LDZ.<sup>27</sup>
- (23) On 4 April 2008 OL wrote to the Latvian Ministry of Transport and Communications stating that it was considering switching its seaborne export business to the Latvian seaport of Ventspils using LDZ's rail transport services and suggested organising a meeting to discuss the matter with the Ministry. Specifically, OL sought information about the rates and discounts it could expect for LDZ's rail transport services.<sup>28</sup> In its response of 7 May 2008 the Ministry informed OL that it does not interfere with the commercial decisions of LDZ. Nevertheless, the Ministry wrote that it "*has great interest in development of freight transportation in Latvia*", noted that a meeting between OL and LDZ had been scheduled for later that month and promised to follow the results of that meeting.<sup>29</sup>
- (24) Documents found at the premises of LG show that LG was aware of and was concerned by a possible switch by OL to the Latvian seaports and LDZ. Seized document MST4 (ID0601) is an email correspondence dated 19 March 2008, between LG's Deputy Head of the Technical Development Department, the Deputy Director for Commerce and the Head of Tariff Department<sup>30</sup> It states:
- "As regards Mažeikių nafta [that is OL] – question 3.*
- There the rates were still being compared with the rates proposed by the Latvians for carriage to Ventspils.* [business secret]"<sup>31</sup>
- (25) On 12 June 2008, a meeting was held between LG and OL where the matter seems to have been discussed further. According to LG's minutes, the parties were discussing the Bugeniai-Skuodas-Klaipėda track (see map in recital (19)) which had been closed since 1995. LG explained its position not to invest in the renovation of that track and, in that context, asked OL whether it was planning to transport oil products to the Latvian ports. OL responded that it was examining the possibility and that LDZ was willing to make the necessary investment. LG responded that in view of this situation, no economic grounds existed for the renovation of the Bugeniai-Skuodas-Klaipėda route.<sup>32</sup>
- (26) Seized document VJ18 (ID0665) may add to the picture of LG's concerns. The document entitled "*The main changes which are proposed to the agreement with AB Mažeikių nafta*"<sup>33</sup> [that is OL] was found on the laptop of the Director of LG's

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<sup>26</sup> OL transports limited quantities of its products to the seaport of Riga; OL's response to the 1<sup>st</sup> RFI, question 1b (ID0206/3).

<sup>27</sup> OL's letter to the Ministry of Transport of Latvia; Complaint, annex 2 (ID0012).

<sup>28</sup> Ibid.

<sup>29</sup> Complaint, annex 3 (ID0013).

<sup>30</sup> For information on the positions held by the corresponding persons in 2008 see ID0835.

<sup>31</sup> Seized document MST4 (ID0601). "*del Mazeikiu naftos - 3 klausimas: ten dar buvo lyginami tarifai su Latvii siulomais tarifais, vezant i Venspili.* [business secret]"

<sup>32</sup> Seized document EL3, pages 2/4-3/4 (ID0519/2-3).

<sup>33</sup> *Pagrindiniai pakeitimai, kuriuos siuloma padaryti sutartyje su AB "Mažeikių nafta"*

Commerce Department in the Freight Transportation Directorate.<sup>34</sup> It is not dated but it still refers to the 1999 Agreement as "*the current agreement*" which means that the document must have been drafted before 1 September 2008 when the 1999 Agreement was terminated.<sup>35</sup> In paragraph 2 of that document it is suggested to "*implement an obligation to transport to Klaipėda not less than 6 million tonnes of cargo annually (maximum volumes, this amount may be adjusted in negotiations)*"<sup>36</sup> and in paragraph 7 it is suggested "*to revoke the condition that MN [that is Mažeikių nafta -OL] is entitled to use [business secret] the Bugeniai-Rengė route*"<sup>37</sup>. This document suggests that the possible loss of OL's rail traffic to Klaipėda was a matter of concern to LG before 1 September 2008 and that it may have been already anticipating circumstances in which it would not serve OL on the Short Route to Latvia.

- (27) On 25 July 2008, OL formally requested from LDZ a quotation for the transportation of between 4.5 and 5 million tonnes of refined oil products per year from the Refinery, via the Short Route to Latvia, to "*ports and terminals located in the territory of Latvia*" commencing from the 4<sup>th</sup> quarter of 2008.<sup>38</sup> LDZ made an offer on 29 September 2008 following an additional meeting with OL on 22 September 2008 (i.e. soon after the suspension of traffic on the Track, but before its removal).<sup>39</sup> According to OL the offer made by LDZ was "*concrete and attractive*".<sup>40</sup> On 17 October 2008 OL sent a letter to LDZ confirming its intention to transport approximately 4.5 million tonnes of oil products from the Refinery to the Latvian seaports;<sup>41</sup> OL and LDZ met on 20 February 2009.<sup>42</sup> Further discussions took place between them into spring 2009.<sup>43</sup> According to information provided by LG in its response to the SO, negotiations between OL and LDZ continued until at least June 2009 when LDZ made an application for a licence to operate on the Track (see recital (111)).<sup>44</sup> LDZ's perception at the time was that a switch to the Latvian seaports was a competitive constraint on LG.<sup>45</sup> According to OL "*the discussions*

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<sup>34</sup> ID636/1

<sup>35</sup> Paragraph 8 of seized document VJ18 (ID0665) reads: "*the current agreement is valid till the 31<sup>st</sup> of December 2024*" ("*Šiuo metu sutartis pasirašyta iki 2024 m. gruodžio 31 d.*"). This was the expiration date of the 1999 Agreement while the expiration date of the 2009 agreement is 1 January 2024. In addition, the document refers to articles that were part of the 1999 Agreement: paragraph 1 refers to article 4.3.ii; 2 to 4.3.i; 3 to 4.1; 4 to 4.3.iii; 5 to 4.4; 6 to 5; 7 to 6.1; 8 to 3.2.

<sup>36</sup> "*Taip pat MN siūloma įsipareigoti kasmet į Klaipėdos uostą pervežti ne mažiau 6 mln. t krovinių*".

<sup>37</sup> "*Siūloma atsisakyti punkto, kad MN gali naudotis [business secret] maršrutą Bugeniai-Rengė*".

<sup>38</sup> Complaint, annex 5 (ID0015).

<sup>39</sup> Complaint, annex 15 (ID0025).

<sup>40</sup> Complaint, footnote 37 (ID0009/23).

<sup>41</sup> Inspection document OKO16 (ID0135).

<sup>42</sup> OL response to the 4<sup>th</sup> RFI, annex 1 (ID1181/9-10).

<sup>43</sup> Ibid; Inspection document OKO13 (ID132).

<sup>44</sup> OL was aware that LDZ did not have a licence to operate independently on the Track and expected LDZ to apply for the necessary authorisation to operate independently in Lithuania or to subcontract LG for the Lithuanian leg of the journey; OL's response to the 1<sup>st</sup> RFI, question 3.a) (ID0206/10-11).

<sup>45</sup> In its response to the SO, LG quoted a news article dated 4 June 2009, reporting on the talks between OL and LDZ. In that article LDZ's board chairman is quoted saying: "*it is hard to say what they [OL] really want – do they want to transport products or do they want to blackmail the Lithuanian railways with our help*". LG sought to rely on this quote to demonstrate that LDZ was confused by OL's actions and that "*it is doubtful that OL's actual intention was to switch to the Latvian ports for its exports*" (LG's response to the SO, paragraphs 42-43 (ID1003/15) and annex 4 of the response (ID1007)). It is

*with LDZ were not completely broken off until the middle of 2010, when OL finally recognized that LG had absolutely no intention to restore the Rengė track in the short term".<sup>46</sup> Consequently LDZ withdrew its application for a licence to operate on the Track (see recital (111)).*

#### **4.4. The condition of the Track prior to 2 September 2008**

- (28) The Mažeikiai-Rengė track, running between Lithuania and Latvia, was built in 1873 when both countries were part of the Russian Empire.<sup>47</sup> The last major maintenance works were carried out in 1972 on the Lithuanian side<sup>48</sup> and 1973 on the Latvian side<sup>49</sup> when both countries were part of the Soviet Union. Following the restoration of independence in 1990 the two legs of the Mažeikiai-Rengė track were maintained separately<sup>50</sup> and neither LG nor LDZ can explain the difference in the condition of these two legs.<sup>51</sup> It is therefore not clear why the condition of the Lithuanian leg had deteriorated to a point where traffic had to be suspended, as argued by LG, while the Latvian leg was in September 2008 and is still today, in good repair, according to LDZ.<sup>52</sup>
- (29) A railway track can essentially be divided into the superstructure and the bed of the track. The superstructure is composed mainly of the rails and wooden or cement sleepers on which the rails lie. Other elements such as screws, braces, washers and gaskets are used to attach and fasten the rails and sleepers to each other and onto the bed of the track. The superstructure is then laid on the bed of the track. The upper part of the bed is a layer of ballast (crushed stone) that is used to stabilise the superstructure, to allow rain water to drain and suppress the growth of vegetation. The ballast is laid on an elevated structure of earth.
- (30) On 3 September 2004, after an inspection of the Track, LG prepared a report on its condition ("Report of 3 September 2004") as a result of which the speed limit was lowered to 40 km/h. During the inspection, five segments of the Track were inspected. Defects in the superstructure were detected on all five segments, including 400 metres behind the 18<sup>th</sup> kilometre mark, the segment on which the Deformation was detected approximately four years later on 2 September 2008. Nearby at 500 metres behind the 18<sup>th</sup> kilometre mark, further defects in the superstructure and ballast were found. The Report of 3 September 2004 concluded that if the Track was not repaired immediately it should be inspected the following winter and, if

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clear however that in order to "blackmail" LG the potential switch by OL to Latvia must have been considered as a credible competitive constraint.

<sup>46</sup> OL response to the 4<sup>th</sup> RFI (ID1181/7).

<sup>47</sup> LDZ's response to the RFI, question 14 (ID0327/7).

<sup>48</sup> Complaint, Annex 22, page 1 (ID0032/1); LG's response to the 1<sup>st</sup> RFI, paragraph 3 (ID0347/2); seized document VJ2, page 1/3 (ID0647/1); seized document VJ4, page 1/1 (ID0649/1).

<sup>49</sup> LDZ's response to the 1<sup>st</sup> RFI, question 17 (ID0327/7).

<sup>50</sup> LDZ's response to the 1<sup>st</sup> RFI, question 18 (ID0327/7); LG's response to 1<sup>st</sup> RFI, paragraphs 36 and 37 (ID0347/20-21).

<sup>51</sup> LDZ's response to the 1<sup>st</sup> RFI, question 20 (ID0327/7); LG's response to the 1<sup>st</sup> RFI, paragraph 36 (ID0347/20). In the Response to the SO, paragraphs 66-69 (ID1003/20-21) LG suggested that LDZ may have had different maintenance priorities than LG.

<sup>52</sup> LDZ's response to the 1<sup>nd</sup> RFI, questions 15, 16 and 21 (ID0327/7); LDZ's response to the 2<sup>nd</sup> RFI, question 41 (0710/12); LDZ's letter of 16 September 2015 (ID1191).

longitudinal movements of the rails were detected, the speed limit should be reduced to 15/25 km/h.<sup>53</sup>

- (31) The speed limit was reduced to 25km/h in February 2007 on four segments of the Track.<sup>54</sup> On 13 May 2008, a new inspection of the Track took place ("May 2008 Inspection") and based on its findings on 29 May 2008, the speed on the segment 400-1000 metres behind the 18th kilometre mark was further lowered to 25 km/h.<sup>55</sup> This segment of the track included the segment on which the Deformation was detected on 2 September 2008. During 2008 repair works were performed on the superstructure of the Track and five rails were replaced.<sup>56</sup> According to LG, it did not consider suspending traffic on the Track after the May 2008 Inspection because "*the speed limit still allowed for the rail traffic to continue and also because of the lack of sufficient funds for the repair works*".<sup>57</sup>

#### **4.5. September 2008: events leading to the removal of the Track**

##### *4.5.1. The detection of the Deformation*

- (32) On 2 September 2008, one day after the unilateral termination of the 1999 Agreement by LG, a monthly inspection of the Track identified the Deformation,<sup>58</sup> 400 metres behind the 18<sup>th</sup> kilometre mark (that is, within the segment on which speed had been limited to 25 km/h three months previously). Consequently, the traffic controller issued an order suspending traffic on the Track.<sup>59</sup> A special inspection performed that day measured the Deformation; it found that the Deformation had occurred on a 40 metres section of the Track and concluded that it exceeded the allowed parameters.<sup>60</sup>
- (33) The Deformation was detected during a regular monthly inspection. Prior to the inspection trains were running daily on the Track.<sup>61</sup> The last train passed shortly

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<sup>53</sup> LG's response the 1<sup>st</sup> RFI, annex 18 (ID0865), also seized as document EL1, pages 40/55-41/55 (ID0513/43-44).

<sup>54</sup> At 900 metres after the 4<sup>th</sup> kilometre mark, 800 metres after the 9<sup>th</sup> kilometre mark, 600 metres after the 16<sup>th</sup> kilometre mark and 1000 metres after the 18<sup>th</sup> kilometre mark; Response to the SO, paragraph 236 (ID1003/61).

<sup>55</sup> LG's response to the 1<sup>st</sup> RFI, annex 6 (ID0824/1); LG's response to the 3<sup>rd</sup> RFI, paragraph 7 (ID0433/4-5); seized document EL1, page 43/55 (ID0513/46); seized document JS6, page 1/3 (ID0577/1). LG explained that it could not have provided a copy of the inspection report because such records are kept for only one year.

<sup>56</sup> Seized document LK7, page 7/16 (ID0588/7); LG's response to the 1<sup>st</sup> RFI, annex 14 (ID243/1).

<sup>57</sup> LG's response to the 3<sup>rd</sup> RFI, paragraph 6 (ID0433/4).

<sup>58</sup> The Deformation was described as "track buckling" ("*kelio išmetimas*"); see seized document EL1, pages 18/55, 20/55, 25/55, 51/55 (ID0513/19, 21, 26, 54). As confirmed by LG (Response to SO, paragraph 219 (ID1003/57)), this type of deformation is rare (only 5 other incidents of rail buckling were reported in Lithuania in 2006-2012. The length of those deformations was substantially shorter: 3-12 metres, required only local repair works and traffic was not disturbed for more than 4 hours. See LG's response to the 4<sup>th</sup> RFI questions 34 (ID0749/25-29); see VGI annual reports on railway incidents 2010-2012 (ID1245/13, ID1246/17, ID1247/6);.

<sup>59</sup> Seized document EL1, pages 1/55, 18/55, 19/55, 20/55, 38/55 (ID0513/1, 19, 20, 21, 41); seized document ES12/ES18, pages 8/11, 9/11 (ID0539/8, 9 and ID0545/8, 9); LG's Response to 1<sup>st</sup> RFI, paragraph 8.2 (ID0347/6); LG's response to the 3<sup>rd</sup> RFI, annex 4, pages 9, 20-21 (ID0480/9, 20-21).

<sup>60</sup> LG's response to the 1<sup>st</sup> RFI, paragraph 8.3 (ID0347/6); seized document EL1 pages 20-21/55 (ID0513/21-22).

<sup>61</sup> Traffic intensity on the Track in 2008 was 1.5 trains per day; LG's response to the 1<sup>st</sup> RFI, paragraph 32 (ID0347/19).



before the Deformation was detected<sup>62</sup> and no accident or serious problems were reported prior to that monthly inspection.

- (34) OL later argued in the arbitration proceedings with LG that the latter infringed the 1999 Agreement by suspending traffic on the Track (see section 4.10). LG's position was that traffic was suspended only after the termination of the 1999 Agreement on 1 September 2008 and therefore LG was not under a contractual obligation to provide services to OL on the Track. This position was also expressed in a note found in the office of LG's Deputy CEO stating that the Deformation –

*"occurred and the traffic on the track was suspended already after LG informed OL regarding the termination of the 1999 Agreement. (LG notified OL in a timely manner that if OL till September does not settle LG's invoices for the services, in this case LG unilaterally will terminate the validity of 1999 Agreement.)"*<sup>63</sup>

- (35) The same point was made in a document addressed to the Lithuanian government,<sup>64</sup> where LG noted that-

*"For the last two years, OL has been publically accusing LG and simultaneously its shareholder the Government of the Republic of Lithuania, of the alleged intentional dismantling of the Rengė section in breach of the obligation stipulated in the [1999] agreement and passiveness in reconstructing it, even disregarding the fact that the actions of dismantling the Rengė section were in fact started on 3 October 2008, that is when the 1999 Agreement between LG and OL was no longer in force."*<sup>65</sup>

#### 4.5.2. The reports of 5 September 2008

- (36) On 3 September 2008 LG instigated an Inspection Commission composed of senior employees of its local branch<sup>66</sup> to investigate the reasons for the Deformation. The Inspection Commission visited and inspected only the site of the Deformation<sup>67</sup> and

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<sup>62</sup> According to LG the last train passed less than two hours before the Deformation was detected; LG's response to the 4<sup>th</sup> RFI, paragraph 57 (ID0749/25). According to OL's response to the 1<sup>st</sup> RFI, question 2h (ID0206/10) and annex 13 (ID0233) the last train passed at 20:50 on the evening of the previous day, 1 September 2008. LDZ also confirmed that the last train it operated on the Track passed on 1 September 2008; LDZ's response to the 2<sup>nd</sup> RFI, question 40 (710/12).

<sup>63</sup> *"Kelio riktas įvyko ir eismas buvo sustabdytas jau po to, kai LG informavo OL apie 1999 metų vežimo sutarties nutraukimą. (LG savalaikiai perspėjo OL, kad tuo atveju, jeigu OL iki rugsėjo mėnesio neapmokės LG pateiktų sąskaitų už atliktas paslaugas, tai tokiu atveju LG vienašališkai nutrauks 1999 metų vežimo sutarties galiojimą)".* Seized document ES3, page 3/5 (ID0533/3). The document is untitled and undated.

<sup>64</sup> See LG's response to the 2<sup>nd</sup> RFI, paragraph 32 (ID0400/13).

<sup>65</sup> *"OL pastaruosius dvejus metus viešai kaltino LG, o tuo pačiu - ir jos akcininkę Lietuvos Respublikos Vyriausybę neva tyčiniu Rengės ruožo išardymu pažeidžiant sutartyje numatytus įsipareigojimus ir pasyvumu jį rekonstruojant, nepaisydama net to, kad faktiniai Rengės ruožo išardymo veiksmai buvo pradėti 2010-10-03, t.y. jau nebegaliojant 1999 m. sutarčiai tarp LG ir OL."* Seized document VJ16, page 9/20 (ID0662/9); see also seized documents ES12/ES18, pages 6/11 and 8/11 (ID0539/6, 8 and ID0545/6, 8) and seized document VJ14, page 2/2 (ID0660/2).

<sup>66</sup> The members of the Inspection Commission were: The Deputy Director of Track Systems of LG's Šiauliai branch, the Head of Šiauliai Railway Section, the Senior Track Supervisor who detected the Deformation, and the Vice-Chief of Traffic Safety Services; LG's response to the 1<sup>st</sup> RFI, paragraph 8.4. (ID0347/6-7).

<sup>67</sup> LG's response to the 2<sup>nd</sup> RFI, paragraphs 9 and 11 (ID0400/4-5).

its findings regarding the condition of the Track referred only to that location.<sup>68</sup> The Inspection Commission submitted two reports namely the "Report on the Investigation of 5 September 2008"<sup>69</sup> and the "Technical Report of 5 September 2008".<sup>70</sup> The Report on the Investigation of 5 September 2008, concluded that-

*"the traffic incident 400m behind the 18<sup>th</sup> km of the Mažeikiai-Rengė section [that is the Track] was caused because of the physical deterioration of elements of the track superstructure: on the track about 70% of the braces deteriorated and approximately 80% of rail gaskets deteriorated."*<sup>71</sup>

In the section on "remedial measures"<sup>72</sup> the report stated that-

*"The consequences of the incident will be remedied upon receipt of the materials needed for the track superstructure and the required funding for the repair works."*<sup>73</sup>

(37) The Report on the Investigation of 5 September 2008 concluded that renovation works would only involve repair of the superstructure and no comment was made on the state of the bed of the Track or the quality of the ballast.

(38) These observations are supported by the Technical Report of 5 September 2008, which stated-

*"During the investigation the following reasons for the deformation of the track were established:*

- (1) Stand screws are corroded, insulating axle-box are worn out. Due to worn-out clamps and used single coil spring washers the required threads could not be ensured so that could be duly fastened.*
- (2) The track has approx. 70 per cent of defective braces. The braces are physically worn-out therefore there is no enough stability on the track;*
- (3) The track has approx. 80 per cent of the rail gaskets which are worn out. Due to it the proper fastening of the long rails cannot be ensured.*
- (4) Due to the fact that the trains with cargo go only to one direction and because of the defective braces, there are some shifts of the position of the long rails.*

*The Commission has determined: the traffic accident which occurred as a deformation on 18 km 4 pk of the Mažeikiai-Rengė track should be qualified as*

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<sup>68</sup> LG's response to the 3<sup>rd</sup> RFI, paragraph 9 (ID0433/6).

<sup>69</sup> "Rikto tarnybinio tyrimo aktas". Seized document EL1, pages 25/55-27a/55 (ID0513/26-28); LG's response to the 3<sup>rd</sup> RFI, annex 4, pages 5-7 (ID0480/5-7).

<sup>70</sup> "Techninė išvada". LG's response to the 3<sup>rd</sup> RFI, annex 4, page 13 (ID0480/13).

<sup>71</sup> "eismo įvykis tarpstotyje Mažeikiai-Rengė 18 km 4 pk įvyko dėl fiziškai susidėvėjusių viršaus kelio konstrukcijos elementų: kelyje apie 70% netinkamų sąvaržų, apie 80% susidėvėjusių bėgių tarpiklių." Seized document EL1, page 27a/55 (ID0513/28); LG's response to the 3<sup>rd</sup> RFI, annex 4, page 7 (ID0480/7).

<sup>72</sup> "Pastabos apie eismo įvykių padarinių likvidavimą".

<sup>73</sup> "Eismo padariniai bus likviduoti gavus reikalingas viršaus kelio konstrukcijos medžiagas ir finansavimą kelio atstatymo darbams atlikti." Ibid.

*a buckling, which happened due to physically worn out elements of the upper track construction.*"<sup>74</sup>

These findings were similar to those of the Report of 3 September 2004 (see recital (30) and the comparison in recital (46)).

- (39) As with the Report on the Investigation of 5 September 2008, the findings of the Technical Report of 5 September 2008 refer only to the site of the Deformation. It identified various problems with the superstructure of the Track which were the causes to the Deformation. The report makes no reference to the bed of the Track or to the ballast.
- (40) The "Protocol of the Operative Hearing",<sup>75</sup> also dated 5 September 2008, repeats the findings of the Technical Report of 5 September 2008 and concluded again that the Deformation had occurred because of the physical deterioration of elements of the Track's superstructure. It did not contain any conclusion as to the necessary repair works.

#### 4.5.3. *The letters from the director of LG's local branch of 4 and 5 September 2008*

- (41) On 4 September 2008, a day before the Inspection Commission submitted the Report on the Investigation of 5 September 2008 and the Technical Report of 5 September 2008, the director of LG's local branch (the "Local Director") sent a letter to the company's Railways Infrastructure Directorate (the "Letter from the Local Director of 4 September 2008"). In that letter the Local Director noted the same findings as the Report of the Investigation of 5 September 2008 and the Technical Report of 5 September 2008, but concluded that *"partial track repair will not solve the problem"*<sup>76</sup> and requested permission and financing to implement a project to repair the entire Track.<sup>77</sup> The Local Director repeated his conclusions in a second letter on 5 September 2008 (the "Letter from the Local Director of 5 September 2008") and estimated the costs of the works at LTL 38 million<sup>78</sup> (EUR 11 Million<sup>79</sup>). On the

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<sup>74</sup> *"Tyrimo metu nustatyta, kad kelio deformacija įvyko dėl šių priežasčių: 1. Padėklo varžtai paveikti korozijos, susidėvėjusios izoliacinės įvorės. Dėl susidėvėjusių gnybtų ir naudojamų vienvijų spyruoklinių poveržlių neužtenka bėgvaržčio sriegio kad tinkama jėga užtvirtintų bėgi; 2. Kelyje apie 70% netinkamų sąvaržų. Jos fiziškai susidėvėjusios, neužtikrina kelio stabilumo; 3. Apie 80% bėgių tarpiklių susidėvėję. Dėl to neužtikrinamas ilgabėgių užtvirtinimas. 4. Kadangi krautų krovinių traukinių eismas vyksta viena kryptimi, dėl defektinių sąvaržų atsirado išilginių bėgių poslinkiai. Komisija nustatė: Eismo įvykį dėl kelio deformacijos tarpstotyje Mažeikiai-Rengė 18 km 4 pk laikyti riktu, įvykusiū dėl fiziškai susidėvėjusių viršaus kelio konstrukcijos elementų."* LG's response to the 3<sup>rd</sup> RFI, annex 4, page 13 (ID0480/13). By "elements of the upper track construction" it is referred to the superstructure of the Track. See also the statement of the head of LG's the local branch in the Protocol of the Operative Hearing, LG's response to the 3<sup>rd</sup> RFI, annex 4, pages 14-15 (ID0480/14-15).

<sup>75</sup> *"Operatyvinio posėdžio protokolas"*, LG's response to the 3<sup>rd</sup> RFI, annex 4, pages 14-15 (ID0480/14-15). In that meeting the managers of the local branch of LG discussed the Deformation and decided how to formally classify it, to reprimand the track inspector for her negligence and to submit proposals regarding the necessary repair works.

<sup>76</sup> *"daliniai kelio ištaisymai neišspręs problemas"*.

<sup>77</sup> Seized document EL1, page 53/55 (ID0513/56).

<sup>78</sup> Seized document EL1, page 51/55 (ID0513/54).

<sup>79</sup> Calculations in Euros provided for indicative purposes according to the official fixed exchange rate 1 EUR = 3.45 LTL

same day LG's Railways Infrastructure Directorate issued a telegram ordering the suspension of traffic on the Track until repair works were completed.<sup>80</sup>

- (42) The Commission asked LG to clarify the basis on which the Local Director reached his conclusion that a comprehensive renovation of the Track was needed considering that the reports of 5 September 2008 referred only to the site of the Deformation and recommended only local repair of the superstructure. LG responded that-

*"The conclusion that repair works were needed on the entire 19 km of the track was based on the technical revision report of the commission for extraordinary inspection, established on 10 September 2008 [see section 4.5.4]"*.<sup>81</sup>

However, the Letter from the Local Director of 4 September 2008 had already been sent six days earlier hence the response of LG is implausible.

- (43) In its Response to the SO, LG explained that compared to the Reports of 5 September 2008, the Local Director identified a new element in the analysis, namely *"a link between the wear of the rail gaskets and the impossibility to fasten long rail"*<sup>82</sup> which explains the different conclusion. LG stated also that *"the conclusion of the Local Director was based on bad experiences with the Track since 2004"*,<sup>83</sup> specifically the failure of the speed reduction to prevent the Deformation.<sup>84</sup>
- (44) The Commission notes that the letters from the director of LG's local branch of 4 and 5 September 2008 do not mention the failure of the speed reduction to prevent the Deformation. Moreover, the members of the Inspection Commission that prepared the Report of the Investigation of 5 September 2008 and the Technical Report of 5 September 2008 were senior employees of the same branch (see recital (36)) who must have been also familiar with the history of the Track. LG did not contest this conclusion.<sup>85</sup> Moreover, the Local Director did not set out in his letters findings that were different than those made by the Inspection Commission. The differences between their conclusions remain therefore unexplained.

#### 4.5.4. *The Extraordinary Inspection Report of 12 September 2008*

- (45) On 10 September 2008 LG appointed another commission for an "extraordinary inspection" of the Track, composed of LG's employees<sup>86</sup> who inspected the entire 19 kilometres of the Track.<sup>87</sup> In its report of 12 September 2008 (the "Extraordinary Inspection Report of 12 September 2008") the commission noted:

(1) Various defects in the superstructure at various locations along the Track that were specifically identified (e.g. 900 metres behind the 18<sup>th</sup> kilometre mark). These defects were not limited to the site of the Deformation.

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<sup>80</sup> LG's response to the 1<sup>st</sup> RFI, paragraph 8.6 (ID0347/7); seized document EL1, pages 38/55, 52/55 and 54/55 (ID0513/41, 55-57).

<sup>81</sup> LG's response to the 3<sup>rd</sup> RFI, paragraph 10 (ID0433/6).

<sup>82</sup> LG's response to the SO, paragraph 231 (ID1003/60).

<sup>83</sup> Ibid.

<sup>84</sup> LG's response to the SO, paragraphs 84-86 (ID1003/25-26).

<sup>85</sup> See the Commission's Letter of Facts, point 8 (ID1219/5) to which LG did not respond; see LG's response to the Letter of Facts (ID1234).

<sup>86</sup> LG's response to the 1<sup>st</sup> RFI, Annex 6 (ID0824).

<sup>87</sup> The Commission notes that contrary to the statement in the letter, the Extraordinary Inspection Report.

(2) The general unsatisfactory condition of the ballast and the upper width of the Track.

(3) Gullies (carving in the bed of a track created by running water) in four locations on the Track: 8km 7pk, 10km 4pk, 11km 2pk, 18km 9pk.

(4) The signalling and overhead lines were physically worn out and in a critical condition.

The report concluded that these defects "*pose a real threat to train traffic safety*".<sup>88</sup>

(46) Table 2 compares the documents reporting on the state of the Track:

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<sup>88</sup> "*Sudaro realiq grėsme saugiam traukinių eismui.*" Seized document EL1, pages 30/55-31/55 (ID0513/32-33).

**Table 2: comparison of the various documents reporting on the state of the Track**

Report of 3 September 2004	Letter from the Local Director of 4 September 2008	Report on the Investigation of 5 September 2008	Technical Report of 5 September 2008	Extraordinary Inspection Report of 12 September 2008
Approximately 80% of rail gaskets deteriorated (" <i>80% bėgių tarpiklių susidevėję</i> ")	Approximately 80% of rail gaskets deteriorated (" <i>80% bėgių tarpiklių susidevėję</i> ")	<i>Approximately 80% of rail gaskets deteriorated ("apie 80% susidėvėjusių bėgių tarpiklių").</i>	Approximately 80% of rail gaskets deteriorated (" <i>80% bėgių tarpiklių susidevėję</i> ")	Around 80% of rail gaskets deteriorated (" <i>80% bėgių tarpiklių susidevėję</i> ")
Approximately 70% of double spring washers (type of braces) defective (" <i>70% spyruoklinių poveržlių neatlieka savo funkcijos</i> ")	Approximately 70% of braces deteriorated (" <i>70% netinkamų sąvaržų</i> ")	<i>Approximately 70% of the braces deteriorated ("apie 70% netinkamų sąvaržų,")</i>	Approximately 70% of braces deteriorated (" <i>70% netinkamų sąvaržų</i> ")	Around 80% of braces, stand screws, clamps, rail screws, springs, axle-boxes deteriorated (" <i>80% netinkamų sąvaržų, padėklų varžtų, veržlių gnybtų, bėgvaržčių, poveržlių, izoliacinių įvorių</i> ")
Stand screws corroded (" <i>Padėklo varžtai paveikti korozijos</i> ")	Stand screws corroded (" <i>Padėklo varžtai paveikti korozijos</i> ")		Stand screws corroded (" <i>Padėklo varžtai paveikti korozijos</i> ")	Stand screws corroded (" <i>Padėklo varžtai paveikti korozijos</i> ")
Deteriorated axle-boxes (" <i>Susidevėjusios izoliacines įvorės</i> ")	Deteriorated axle-boxes (" <i>Susidevėjusios izoliacines įvorės</i> ")		Deteriorated axle-boxes (" <i>Susidevėjusios izoliacines įvorės</i> ")	Deteriorated axle-boxes (" <i>Susidevėjusios izoliacines įvorės</i> ")
Longitudinal slip of rails with stands (" <i>Bėgių išiliginis poslinkis kartu su padėklais</i> ")	Longitudinal slip of rails with stands (" <i>Bėgių išiliginis poslinkis kartu su padėklais</i> ")		Longitudinal slip of rails (" <i>Bėgių išiliginis poslinkis</i> ")	
	Deteriorated clamps (" <i>Susidevėję gnybtai</i> ")		Deteriorated clamps (" <i>Susidevėję gnybtai</i> ")	Deteriorated clamps (" <i>Susidevėję gnybtai</i> ")
Loose stand screws and rail screws (" <i>Laisvi padėklo ir bėgių varžtai</i> ")				

Report of 3 September 2004	Letter from the Local Director of 4 September 2008	Report on the Investigation of 5 September 2008	Technical Report of 5 September 2008	Extraordinary Inspection Report of 12 September 2008
Budged/broken stands ( <i>"Pasislinkę ir lūžę padēklai"</i> )				
500 m behind the 18 <sup>th</sup> kilometre mark ballast shortage ( <i>"Trūksta skaldos"</i> )				
				gullies ( <i>"Išplovos"</i> ) in four locations
				Improper width of the major bed of the track ( <i>"Neteisinga pagrindinės sankasos viršaus plotis"</i> )
				Signal and communication system in poor condition ( <i>"Signalizacijos ir oro linija susidevėjusi"</i> )

- (47) It can be seen that the findings of the various documents are almost identical. The Extraordinary Inspection Report of 12 September 2008 however found that Approximately 80% of the braces were defective although the Report on the Investigation of 5 September 2008 and the Technical Report of 5 September 2008, drafted only a week previously, found that approximately 70% of the braces were defective, which is the same level as in 2004. The Extraordinary Inspection Report of 12 September 2008 also identified problems with the width of the bed of the Track and the signal communication systems, problems that were not identified previously.

#### 4.5.5. *The decision to remove the Track*

- (48) On 18 September 2008 LG's Deputy Director General and Director of the LG's Railways Infrastructure Directorate sent a letter to LG's Strategic Planning Council, discussing in general terms the condition of certain regional rail tracks in Lithuania and more specifically the Track.<sup>89</sup> That letter stated that the Extraordinary Inspection Report of 12 September 2008 concluded that the following works were necessary in order to renew traffic on the Track: 1.6 kilometres of rails had to be laid anew, fastenings had to be replaced along the entire 19 kilometres of the Track, the railway bed had to be repaired, and communication cables had to be replaced along the 19 kilometres of the Track.<sup>90</sup> The costs of such works were estimated at LTL 21.3 million (EUR 6.17 million). However, he explained that due to the overall poor condition the Track, the Track would still have to undergo major repair works within five years in order to ensure safe train traffic. The total cost of those works was estimated at LTL 40 million (EUR 11.59 million). The letter concluded with a recommendation that the entire Track should be repaired and that LG should therefore apply to the Ministry of Transport of Lithuania for funding a feasibility study concerning the renovation of the Track and other regional tracks and, in accordance with the results of that study, apply for a supplementary state subsidy for the renovation and development of those tracks.
- (49) On 19 September 2008,<sup>91</sup> LG's Strategic Planning Council decided to approve the renovation of five railway lines including the Track, to apply to the Ministry of Transport for allocation of funding from the state's budget and Union funds for the renovation of these lines. Moreover, LG's strategic Planning Council decided to-

*"Approve the immediate commencement of renovation work on the Mažeikiai–State border (direction Rengė) line. Charge the DI with dismantling the track superstructure, using suitable materials to repair other sections of the railway line and scrapping those that are not suitable for the purpose."*<sup>92</sup>

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<sup>89</sup> LG's response to the 1<sup>st</sup> RFI, Annex 6 (ID0824).

<sup>90</sup> The Commission notes that contrary to the statement in the letter, the Extraordinary Inspection Report of 12 September 2008 (ID0513/32-33) did not contain any conclusion regarding the necessary works. In response to the question, LG stated that the Deputy Director General's statements about the necessary works were based on the data (rather than conclusions) contained in this succinct report (LG's response to the 2<sup>nd</sup> RFI, paragraph 12 (ID0400/6)).

<sup>91</sup> The meeting was held on 19 September 2008 and the minutes were prepared on 22 September 2008.

<sup>92</sup> *"Pritarti nedelsiamam Mažeikių - valstybės sienos (Rengės kryptis) geležinkelio linijos renovacijos darbų vykdymui. Įpareigoti DI demontuoti viršutinę kelio konstrukciją, panaudojant tinkamas medžiagas kitiems keliams remontuoti bei nurašant netinkamas medžiagas į metalo laužą."* Seized documents EL1, pages 27/55-28/55 (ID0513/29-30).



In the following weeks, most likely starting on 3 October 2008,<sup>93</sup> LG removed the Track at its own expense<sup>94</sup> before obtaining the results of the proposed feasibility study and before having secured funding for renovating the Track.

- (50) The Track has not been renovated to date. Since the suspension of traffic on the Track, OL's affected cargo has been transported to Latvia on the Long Route to Latvia.

**Figure 2: Views of the Track**



View of the Track in Lithuania



View of the Track from the Latvian side<sup>95</sup>

#### **4.6. Involvement of the Lithuanian State Railways Inspectorate**

- (51) As described above, the investigation of the Deformation and the decision making process which led to the removal of the Track was conducted solely by LG's own

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<sup>93</sup> It seems that the works were executed in October 2008 (LG's response to the 1<sup>st</sup> RFI, paragraphs 8.10 and 13 (ID0347/9, 11), seized document EL1, page 32/55 (ID0513/35)), but it is not clear when they commenced. In seized documents VJ16, page 9/20 (ID0662/9) and ES12/ES18, page 8/11 (ID0539/8 and ID0545/8), as well as in LG's response to the SO, paragraph 94 (ID1003/28) it is stated that the works commenced on 3 October 2008. By contrast in LG's response to the 3<sup>rd</sup> RFI, paragraph 13 (ID0433/7) it is stated "*the removal of the upper construction of the [Track] was decided by the Strategic Planning Board on 22 September 2008, started on the same day and ended on 28 October 2008.*" The accuracy of this statement is doubtful not only considering the contradiction with the seized documents but also because according to the minutes recording the decision (seized documents EL1, pages 27/55-28/55 (ID0513/29,30)), the meeting of Strategic Planning Council took place on 19 September 2008 and the minutes were prepared on 22 September 2008.

<sup>94</sup> The removal of the Track cost around LTL 370 000 (EUR 107 000); see LG's response to the 1<sup>st</sup> RFI, paragraph 27 (ID0347/17) and seized document EL1 32A-32/55 (ID0513/34-35).

<sup>95</sup> The photos are taken from <http://www.miestai.net/forumas/showthread.php?p=352955#post352955> (ID0932), last accessed on 10 November 2014.

personnel. LG has stated that the documents arising from the various investigations were submitted to the Lithuanian State Railways Inspectorate (Valstybinė geležinkelio inspekcija prie Susisiekimo ministerijos, "VGI").<sup>96</sup>

- (52) The Commission requested LG to furnish the file that was submitted to the VGI following the Deformation and asked LG to clarify the involvement of the VGI in the investigation. It appears that LG submitted the Report of 3 September 2004, the Report on the Investigation of 5 September 2008 and the Technical Report of 5 September 2008 to the VGI. Those reports found that the Deformation could be repaired by local works on the superstructure. The VGI made no comment in relation to these reports. The documents recommending immediate and comprehensive renovation of the entire Track and the decision to commence works and remove the Track, namely the letter of 18 September 2008 of LG's Deputy Director General to Strategic Planning Council (see recital (48)) and the decision of LG's Strategic Planning Council of 19 September 2008 (see recital (49)) were not communicated to the VGI.<sup>97</sup> The VGI also did not visit the site of the Deformation or any other part of the Track.<sup>98</sup>
- (53) According to LG, it acted in accordance to Lithuanian law. The decision to suspend traffic on a rail track or perform works on a rail track was not part of the purview of the VGI at the time and LG was not obliged by law to provide more information to the VGI.<sup>99</sup> Irrespective of the question of whether LG was under a legal obligation to provide the VGI with more information or whether the VGI should have done more in supervising LG, the VGI's silence cannot be construed as an approval of LG's actions (see also section 4.10 with regard to the second arbitration decision).

#### **4.7. Information given to OL on LG's actions**

- (54) LG did not inform OL of the situation of the Track and LG's actions to remedy it. On 4 September 2008, a train loaded with OL's products was diverted to a different and longer route, without OL being consulted or informed. OL enquired by letter to LG why its cargo had been redirected to the Long Route to Latvia.<sup>100</sup> On 5 September 2008, LG informed OL by phone about the Deformation and suspension of traffic on the Track.<sup>101</sup>
- (55) OL was not informed of LG's intention to remove the Track. In response to the question whether LG notified or consulted with OL before removing the Track, LG stated that the removal was objectively necessary and LG did not have to consult

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<sup>96</sup> LG's response to the 1<sup>st</sup> RFI, paragraph 8.4 (ID0347/6-7). This point was also made by the arbitration court in the second arbitration procedure, see recital (88).

<sup>97</sup> LG's response to the 2<sup>nd</sup> RFI, paragraph 4-7 (ID0400/2-3). The file communicated to the VGI was submitted in LG's response to the 3<sup>rd</sup> RFI, annex 4 (ID0480).

<sup>98</sup> LG's response to the 2<sup>nd</sup> RFI, paragraph 8 (ID0400/3).

<sup>99</sup> LG's response to the 2<sup>nd</sup> RFI, paragraphs 1-7 (ID0400/1-3); LG's response to the SO, paragraphs 96-103 (ID1003/28-30).

<sup>100</sup> Complaint, annex 7 (ID0017).

<sup>101</sup> The date of the call was deduced from the documents submitted by complainant. In its letter 10 September 2008 (Complaint, annex 11 (ID0021), responding to OL letter of 4 September (Complaint, annex 7 (ID0017)), LG noted that it had informed OL by phone about the situation of the Track. OL responded (Complaint, annex 12 (ID0022)) that it was informed only 3 days after the Deformation was detected.

with OL. OL, as a client, was informed through the railway stations about the "temporary closure" of the Track.<sup>102</sup>

#### **4.8. The new transport agreement between LG and OL**

- (56) On 1 October 2008 LG and OL signed an interim transport agreement.<sup>103</sup> In January 2009 a new general transport agreement was concluded between LG and OL ("2009 Agreement").<sup>104</sup>
- (57) The 2009 Agreement used as its basis the standard pricing policy of LG in relation to rates (the "Tariff Book") which attributes a basic rate to each route in Lithuania. The 2009 Agreement applies a system of discounts to the Tariff Book rate.<sup>105</sup> [business secret]<sup>106</sup> [business secret]<sup>107</sup> [business secret]
- (58) [business secret]<sup>108</sup> [business secret]<sup>109</sup> [business secret]<sup>110</sup>
- (59) With respect to the Long Route to Latvia (and only in relation to that route) a fixed rate of LTL [10-20] was applied until traffic on the Track is reinstated. This rate was substantially lower than the standard Tariff Book rate [business secret].<sup>111</sup> This fixed rate is however still 40% higher than the rate OL used to pay for rail transport services on the Short Route to Latvia.<sup>112</sup>
- (60) The 2009 Agreement was concluded for a period of 15 years, until 1 January 2024, [business secret]<sup>113</sup>

#### **4.9. Funding the reconstruction of the Track**

##### *4.9.1. The initial request for funding*

- (61) LG claims that in September 2008 its intention had been to carry out the necessary works on the Track as soon as possible. LG claims that it therefore had decided on 22 September 2008 (in fact: 19 September 2008, see footnote 91) to immediately start the renovation works by removing the Track as well as applying to the Ministry of Transport for the allocation of financing. LG maintains that when the Track was removed it acted on the basis of reasonable expectation that the necessary funding

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<sup>102</sup> LG's response to the 1<sup>st</sup> RFI, paragraph 38-39 (ID0347/21); LG's Comments on the complaint, paragraphs 37-39 (ID0414/12); LG's response to the SO, paragraph 211 (ID1003/55).

<sup>103</sup> LG's comments on the Complaint, paragraph 29 (ID0414/9).

<sup>104</sup> Complaint, paragraph 57 (ID0009/18) and annex 21 (ID0031). See also seized document ES2, page 2/5 (ID0532/2); seized document ES3, page 3/5 (ID0533/3); seized documents ES12/ES18, page 1/11 (ID0539/1 and ID0545/1).

<sup>105</sup> The system of calculating rates is elaborated in the annex to the 2009 Agreement; Complaint, annex 21 (ID0031).

<sup>106</sup> Complaint, paragraphs 60-61 (ID0009/18-19). See also seized ES5, page 1/2 (ID0535/1); seized documents ES12/ES18, pages 1/11-2/11 (ID0818/1-2 and ID0545/1-2).

<sup>107</sup> OL owns a large fleet of railway tankers. See Complaint paragraph 62 (ID0009/19); seized document LK7 4/16 (ID0588/4).

<sup>108</sup> Article 6.2.3 of the 2009 Agreement; Complaint annex 21 (ID0031).

<sup>109</sup> Article 9.7 of the 2009 Agreement; Complaint annex 21 (ID0031).

<sup>110</sup> Article 6.1 of the 1999 Agreement was replaced by Article 4 of the 2009 Agreement, Complaint annex 21 (ID0031) stipulating: [business secret]

<sup>111</sup> Article 2.1.2.3 of the Annex to the 2009 Agreement; Complaint, annex 21 (ID0031). See also, seized document ES11, page 2/8 (ID0818/2); seized documents ES12/ES18, page 2/11 (ID0539/2 and ID0545/2).

<sup>112</sup> Complaint, paragraph 74 (ID0009/22), OL's response to the 1<sup>st</sup> RFI, question 2b (ID0206/7).

<sup>113</sup> Article 12.1 of the 2009 agreement.

would be granted for the renovation of the entire Track. However "no funds for these works were allocated in 2009".<sup>114</sup>

- (62) The Commission notes that LG submitted its request for funding on 2 October 2008, a day before starting the removal of the Track, in a short letter to the Minister of Transport requesting a sum of LTL 620 million (EUR 179.71 million) for the renovation of 8 different tracks.<sup>115</sup> No specific representations reference were made with respect to the Track. The Ministry's response of 28 October 2008 was that since these projects had not been approved in the past no provision for their financing was made. The Ministry reminded LG that Union Funds were still available and invited LG to identify projects for financing.<sup>116</sup>

#### 4.9.2. *The Feasibility Study*

- (63) Following the response of the Ministry of Transport of 28 October 2008, that is after the entire Track had already been removed, LG initiated the preparation of a feasibility study concerning the renovation and development of the eight rail tracks referred to in LG's letter to the Ministry of Transport of 2 October 2008 ("Feasibility Study"). On 11 December 2008 LG's Technical Board approved the outlines of the Feasibility Study.<sup>117</sup>
- (64) It took eight months after the approval of the Technical Board to receive the approval of the Director General of LG on 29 July 2009<sup>118</sup> and approximately three additional months to publish the call for tenders, in the second half of October 2009.<sup>119</sup> The Interim Feasibility Study was submitted on 8 June 2010<sup>120</sup> and the Final Feasibility Study on 8 October 2010.<sup>121</sup>
- (65) The Final Feasibility Study found that the reconstruction of the Track was recommended.<sup>122</sup> It reached this conclusion although it used a much higher cost estimate (LTL 66 million (EUR 19.13 million), excluding VAT<sup>123</sup>) than LG's estimate (LTL 41 million (EUR 11.88 million) excluding VAT, LTL 49.6 million (EUR 14.38 million) including VAT).<sup>124</sup>
- (66) LG explained that the difference in the estimated cost of the works was because of the increased price level between 2008 and 2010.<sup>125</sup> However, in February 2010 LG asked the Ministry of Transport to grant the reconstruction of the Track priority for Union funding and the request was approved in May 2010. The cost estimate

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<sup>114</sup>

Seized document MST33 (ID0634).

<sup>115</sup> Seized document MST32 (ID0633).

<sup>116</sup> LG's response to the 2<sup>nd</sup> RFI, annex 8, pages 2-3 (ID0397/2-3).

<sup>117</sup> LG's response to the 2<sup>nd</sup> RFI, paragraph 37.4 (ID0400/16).

<sup>118</sup> In the table provided in seized document LK7, page 8/16 (ID0588/8) it is noted on 16 October 2009 "call for tenders". In seized document VJ4, page 1/1 (ID0651/1), it was noted that on 16 October 2009 the call for tenders was sent to the public procurement authority and it was expected to be published on 23 October 2009.

<sup>119</sup> Seized document JS4 (ID0574).

<sup>120</sup> LG's response to the 1<sup>st</sup> RFI, annex 10 (ID0825).

<sup>121</sup> LG's response to the 1<sup>st</sup> RFI, paragraph 25 (ID0347/16);

<sup>122</sup> LG's response to the 1<sup>st</sup> RFI, annex 10, pages 50 and 83 (ID0825/49-82).

<sup>123</sup> LG's response to the 3<sup>rd</sup> RFI, paragraph 30 (ID0433/14); seized document VJ2, page 3/3 (ID0647/3); seized document EL13, page 3/5 (ID0529/3).

<sup>124</sup> LG's response to the 3<sup>rd</sup> RFI, paragraph 31 (ID0433/14).

submitted and approved amounted to LTL 41 million (49.6 million including VAT) without any adjustment,<sup>126</sup> thereby ignoring the alleged price increase.

- (67) Although a request for EU funding must be supported by a feasibility study,<sup>127</sup> LG did not wait for the results of the Feasibility Study. In February 2010, that is eight months before the Final Feasibility Study was submitted, LG requested that the Ministry of Transport grant priority for Union funding for the reconstruction of the Track (see section 4.9.6). The Commission asked LG why it identified the Track as a priority when, according to its own statements,<sup>128</sup> the Track was of low priority and there were not enough Union funds to finance the priority rail lines. LG's response was that it implemented a decision of 30 November 2009 by the Lithuanian government (see next recital).<sup>129</sup>
- (68) On 30 November 2009 the Lithuanian government held a meeting in order to address various requests made by OL and in order to consider possible solutions in view of the company's "*strategic importance... to the Lithuanian economy*".<sup>130</sup> At that meeting, the Lithuanian government delegated to "*the Ministry of Transport together with AB "Lietuvos geležinkeliai" and AB "ORLEN Lietuva" to adopt decisions regarding the traffic renewal on [the Track] as well as to notify the government on the adopted decisions.*"<sup>131</sup> This decision of the Lithuanian government was taken at a moment when the pressure on LG regarding the Track was increasing. On 22 October 2009, OL had made an offer to assist LG finance the reconstruction of the Track (see section 4.9.4). On 10 November 2009, an arbitration court found that the unilateral termination of the 1999 Agreement was unlawful and a second arbitration procedure was looming (see recitals (85) - (87)).

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<sup>126</sup> For LG's request see LG's response to the 3<sup>rd</sup> RFI, annex 8, pages 1-5 (ID0486/1-5); For the decision of the Lithuanian government see LG's response to the 1<sup>st</sup> RFI, annex 14 (ID0826).

<sup>127</sup> Applying for EU funding requires several preparatory steps: "building construction substantiation" (that is a feasibility study), approved technical project, environmental impact assessment and in relevant cases a building permit; see to that effect: Point 9.1 of the Order of the Minister of Transport and Communications of 5 July 2007 "Concerning the description of assessment, approval and funding arrangements of transport sector projects, whose costs can be co-financed from special EU 2007-2013 Structural Support Programme budget funds" (Lietuvos Respublikos susisiekimo ministro 2007 m. liepos 5 d. įsakymas Nr. 3-240 "Dėl transporto sektoriaus projektų, kurių išlaidos gali būti bendrai finansuojamos specialiosios Europos Sąjungos 2007–2013 metų struktūrinės paramos biudžeto programos lėšomis, vertinimo, tvirtinimo ir finansavimo tvarkos aprašo patvirtinimo") (ID01203); Point 14.1 Order No.3-137 of 29 April 2008 (ID01204) and 15.1 in and Order No 3-491 of 8 December 2008 (ID01205) concerning specific financing measures (Lietuvos Respublikos susisiekimo ministro 2008 balandžio 29 d. įsakymas Nr. 3-137 "Dėl VP2-4.3–SM-01 priemonės „Kelių ir geležinkelių tinklo tobulinimas gerinant saugų eismą ir mažinant neigiamą poveikį aplinkai“ projektų finansavimo sąlygų aprašo patvirtinimo" and Lietuvos Respublikos susisiekimo ministro 2008 gruodžio 8 d. įsakymas Nr. 3-491 "Dėl VP2-4.4-SM-01-V priemonės „Valstybinės reikšmės kelių ir geležinkelių infrastruktūros techninių parametrų gerinimas“ geležinkelių transporto projektų finansavimo sąlygų aprašo patvirtinimo"); see also LG's response to the 6<sup>th</sup> RFI, paragraphs 10-11 (ID1075/3).

<sup>128</sup> LG's response to the 1<sup>st</sup> RFI, paragraph 13 (ID0347/31-34); also LG's response to the 2<sup>nd</sup> RFI, paragraph 13 (ID0400/30-31).

<sup>129</sup> LG's response to the 3<sup>rd</sup> RFI, paragraph 23 and 34 (ID0433/11, 15).

<sup>130</sup> "...strateginę reikšmę Lietuvos ekonomikai..." LG's response to the 3<sup>rd</sup> RFI, annex 5, paragraph 1 (ID0481/1).

<sup>131</sup> "Susisiekimo ministerijai kartu su akcine bendrove „Lietuvos geležinkeliai" ir akcine bendrove „ORLEN Lietuva" priimti sprendimus dėl eismo Mažeikiai-Rengė kryptimi atkūrimo ir apie priimtus sprendimus informuoti Lietuvos Respublikos Vyriausybę" LG's response to the 3<sup>rd</sup> RFI, annex 5, paragraph 2.3 (ID0481/1).

- (69) Soon after the meeting of 30 November 2009, LG included the reconstruction of the Track in its 2010-2015 investment plan (see recitals (75) - (78)) and asked the Ministry of Transport to grant the project priority for EU funding without waiting for the results of the Feasibility Study.

#### 4.9.3. State funds

- (70) In parallel to the Feasibility Study process for the purpose of obtaining EU funding, LG claimed that it had approached the Ministry of Transport on three separate occasions (29 April 2009; 19 May 2009 and 21 August 2009) in order to request that the reconstruction of the Track be included in the state investment programme.<sup>132</sup> Indeed, in LG's letter of 21 August 2009, sent to the Ministry of Transport together with a draft proposal for the state investment programme, LG requested the Ministry of Transport to assign the funding for the reconstruction of the Track from the state capital investment funds allocated for the period of 2010-2012.<sup>133</sup>
- (71) LG was aware of the difficulties in securing state financing. In its letter to OL of 11 December 2009, LG stated that-

*"Given the country's economic finance and crisis and taking into consideration the fact that during these difficult times it would be difficult for the state to find the necessary funds for the financing of the project, AB "Lietuvos geležinkeliai" started the necessary steps in order to find alternative sources of financing for the implementation of the project, without waiting for the state budget assignments for year 2010."*<sup>134</sup>

- (72) Four days later, on 16 December 2009, in a letter to the Ministry of Transport LG reiterated its position that the State funding would not be granted and noted that-

*"Since October 2008 LG had started the necessary steps in looking for alternative financing options for the implementation of the project without waiting for the State budget assignments for the year 2010, that is in accordance with the requirements of the EU and Lithuanian laws it started performing the necessary procedures for implementation of the project by partially financing it from the EU financial assistance."*<sup>135</sup>

#### 4.9.4. OL's funding offer

- (73) On 22 October 2009, OL approached LG by letter stating that it was willing to cover the reconstruction costs of the Track and wished to discuss the possibilities of

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<sup>132</sup> LG's response to the 3<sup>rd</sup> RFI, annex 9, letter of 11 December 2009, page 1 (ID0452/1); see also letter of 16 December 2009 (ID0453).

<sup>133</sup> LG's response to the 3<sup>rd</sup> RFI, annex 9, letter of 21 August 2009 (ID0445/1).

<sup>134</sup> *"Atsižvelgiant į šalies ekonomikos finansų ir ūkio krizę ir įvertinant tai, kad valstybei šiuo sunkmečiu būtų sunku rasti biudžeto lėšų projekto finansavimui, AB „Lietuvos geležinkeliai“ pradėjo veiksmus ieškant alternatyvių finansavimo šaltinių projekto įgyvendinimui, nelaukiant valstybės biudžeto asignavimų skyrimo 2010 metais"*, LG's response to the 3<sup>rd</sup> RFI, annex 9, letter of 11 December 2009 (ID0452/1).

<sup>135</sup> *"LG jau 2008 m. spalio mėn. pradėjo veiksmus ieškant alternatyvių finansavimo šaltinių projekto įgyvendinimui, nelaukiant valstybės biudžeto asignavimų skyrimo 2010 metais. t. y. vadovaujantis ES ir LR teisės aktų reikalavimais pradėjo vykdyti būtinas procedūras Projekto įgyvendinimui dalinai finansuojant ES paramos lėšomis."* LG's response to the 3<sup>rd</sup> RFI, annex 9, letter of 16 December 2009 (ID0453/2).

recovering its investment.<sup>136</sup> OL never received a formal response to its offer and was only informed orally of LG's rejection at a meeting with LG's Chairperson of the Board (and at the time simultaneously Vice Minister for Transport and Communications, see also recitals (107) - (109)).<sup>137</sup> According to LG, pursuant to the law governing the activities of the railway infrastructure manager, the creation, upgrading and development of public railway infrastructure cannot be financed by using private investment possibilities.<sup>138</sup>

- (74) In its "Strategic Activity Plan for 2010-2012" from 2009, LG provided two further explanations for its rejection of the offer. Firstly, in order to take a loan LG must initiate an open tender procedure in which it cannot guarantee the success of OL. Secondly, LG had reached its borrowing limit and could not have borrowed more without the consent of its creditors.<sup>139</sup>

#### 4.9.5. *The self-financing option*

- (75) On 22 December 2009, a few weeks after the decision of the Lithuanian government of 30 November 2009 (see recital (68)), LG prepared a note for the Ministry of Transport that was signed by its Deputy Managing Director for infrastructure. The note laid down a detailed timeline for the carrying out of the renovation works in case the Ministry of Transport were to order that LG finance the reconstruction of the Track from its own resources. The note promised that in view of the importance of the project the process would be accelerated and works would be completed by the end of 2011.<sup>140</sup>

- (76) On the same day, 22 December 2009, a meeting was held at the Ministry of Transport which included representatives of both LG and OL. During that meeting LG presented three funding options for the reconstruction of the Track: state funds, Union funds and LG's own resources.<sup>141</sup> As described above, LG was very sceptical that state funds would be allocated, a position it had expressed a few days earlier in its letters to OL and to the Ministry of Transport. As set out below, the option of financing the reconstruction works by means of LG's own resources would be dependent on the reimbursement of those costs by means of Union funds.

- (77) In the meeting of 22 December 2009 LG repeated its commitment to accelerate the process of reconstructing the Track, concluding it within two years. LG reiterated that lower tariffs for the Long Route to Latvia had already been negotiated and indicated that it was willing to consider lowering them further. It was decided that OL would present LG with its demands ("*suggestions regarding business optimisation*"<sup>142</sup>) for the interim period until the Track was reconstructed.<sup>143</sup>

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<sup>136</sup> Complaint, annex 28 (ID0038) (also seized as document VJ5 (ID0650) and submitted also in LG's response to the 3<sup>rd</sup> RFI, Annex 12 (ID0477/2)).

<sup>137</sup> Complaint, paragraph 56 (ID0009/17).

<sup>138</sup> LG's response to the 3<sup>rd</sup> RFI, paragraphs 39-42 (ID0433/17-18). See also LG's response to the 2<sup>nd</sup> RFI, paragraphs 27-29 (ID0400/11-12) and LG's Comments on the Complaint, paragraph 50 (ID0414/15).

<sup>139</sup> Seized document JS5, 3/3 (ID0576/3).

<sup>140</sup> Seized document LK6 (ID0587), also submitted in LG's response to the 3<sup>rd</sup> RFI, annex 11, page 6 (ID0475/6). The documents in annex 11 were submitted to the Ministry of Transport in advance of the meeting on 22 December 2009.

<sup>141</sup> Complaint, annex 30 (ID0040). These options were described in detail in an earlier letter of LG to the Ministry of Transport, LG's response to the 3<sup>rd</sup> RFI, annex 9, letter of 16 December 2009 (ID0453).

<sup>142</sup> Ibid.

(78) Following the meeting of 22 December 2009, on 31 December 2009, LG amended its own 2010-2015 investment plan to include the reconstruction of the Track at the expense of other projects.<sup>144</sup> Soon afterwards, on 21 January 2010, LG wrote to the Ministry of Transport asking for its support in securing Union funds for the reconstruction of the Track and laid down a detailed request for re-prioritisation of various projects in order to allocate funds. The letter seems to suggest that LG's idea was that it would commence by financing the reconstruction of the Track by financing the project from its own resources, which had been dedicated to maintenance works and, following the completion of the project, when the Union funds would be disbursed, LG would use those funds for the financing of projects that were removed from LG's 2010-2015 maintenance plan for that purpose and were supposed to be financed by LG's own funds.<sup>145</sup>

#### 4.9.6. Union Funds

(79) On 8 February 2010, LG submitted a "project proposal" to the State Project Planning and Selection Commission with a request to include the reconstruction of the Track in the priority list for Union funding.<sup>146</sup> As explained above, LG stated that it did so in order to comply with the decision the Lithuanian government of 30 November 2009 (see recitals (68) and (69))

(80) For the purpose of that request, LG stated that *"this regional line [that is the Track] has an unquestionable international track status and influences international communication with Latvia"*<sup>147</sup> and its reconstruction is *"of an international and strategic importance, it can be concluded that it complies with the main criteria to receive the EU structural fund assistance."*<sup>148</sup> On 27 April 2010, the State Project Planning and Selection Commission recommended to the Minister of Transport that priority be granted to the project,<sup>149</sup> which the Minister so granted on 3 May 2010.<sup>150</sup>

(81) Following the approval of the project proposal of 8 February 2010, LG completed several further steps in the procedure: the Feasibility Study was completed on 8 October 2010; the Technical Project, that is the document that details all necessary works, was approved on 5 May 2011; and a construction permit was issued by the Mažeikiai district municipality on 17 June 2011.<sup>151</sup>

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<sup>143</sup> Complaint, annex 30 (ID0040). According to the arrangements set by the State at the time, major infrastructure works were financed from Union funds while LG's limited resources were used only for routine maintenance; See recital (186) and LG's response to the 1<sup>st</sup> RFI, paragraph 33 (ID0347/31), LG's response to the 2<sup>nd</sup> RFI, paragraphs 27-31 (ID0400/11-13); LG's response to the 3<sup>rd</sup> RFI, paragraph 6 (ID0433/4).

<sup>144</sup> LG's response to the 3<sup>rd</sup> RFI, annex 8, page 6 (ID0486/6) (also seized as documents ES6 (ID0536) and ES8 (ID0538)); seized document EL13, page 4/5 (ID0529/4).

<sup>145</sup> LG's response to the 3<sup>rd</sup> RFI, annex 8, page 6 (ID0486/6) and annex 7 at point 5 (ID0485/4).

<sup>146</sup> LG's response to the 3<sup>rd</sup> RFI, annex 8, pages 1-5 (ID0486/1-5).

<sup>147</sup> *"Ši regioninė linija turi neginčijamą tarptautinės linijos statusą ir turi įtakos tarptautiniam susisiekimui su Latvija."* LG's response to the 3<sup>rd</sup> RFI, annex 8, page 3, section 5 (ID0486/3).

<sup>148</sup> *"... turi tarptautinę ir strateginę reikšmę, yra manoma, kad atitinka pagrindinius kriterijus ES struktūrinei paramai gauti."* LG's response to the 3<sup>rd</sup> RFI, annex 8, page 4, section 8 (ID0486/4).

<sup>149</sup> LG's response to the 3<sup>rd</sup> RFI, annex 7, pages 2-3 (ID0485/2-3).

<sup>150</sup> LG's response to the 1<sup>st</sup> RFI, annex 14 (ID0826).

<sup>151</sup> LG's response to the 1<sup>st</sup> RFI, paragraph 40 (ID347/22).



#### 4.9.7. *Removal from the priority list for Union funding*

- (82) Subsequently, however, LG prepared a number of documents for the Lithuanian government arguing against the reconstruction of the Track. Those documents argue that rebuilding the Track would be uneconomical (although the Final Feasibility Study later recommended the project; see recital (65)), that after the reconstruction of the Track OL would switch to the Latvian seaports, that LDZ would take over OL's rail business and that the investments made on the route to Klaipėda would be lost (those documents are discussed in detail below (see recitals (92) to (96), (103)).
- (83) On 29 September 2011, nine months after the favourable decision in the arbitration procedure against OL (see recital (88)), in a meeting of the State Project Planning and Selection Commission, LG recommended removing the Track's reconstruction project from the list of priority projects for Union funding in order to finance a different project. LG explained that-

*"Under the decision reached by the arbitration court... LG has the right not to reconstruct the [Track], and [OL] did not oppose LG's intention to exercise this right [...]"*

*The [Track] was and, after reconstruction, would continue to serve the needs of only one of the company's clients, namely [OL], although those needs could be fully met by the Kužiai-Mažeikiai main railway line [that is the Long Route].*

*Given that the court's decision removed not only the economic but also the legal grounds for carrying out the project to reconstruct the Mažeikiai-state border section of [the] railway line, LG proposes to transfer it to the list of reserve projects."<sup>152</sup>*

The State Project Planning and Selection Commission accepted LG's request and recommended to the Minister of Transport and Communications to remove the reconstruction of the Track project from the list of priority project for Union funding and to place it on the reserve list.<sup>153</sup>

- (84) On 4 October 2011, the Minister of Transport and Communications ordered the removal of the reconstruction of the Track project from the priority list for Union funding and downgraded it to the reserve list.<sup>154</sup> Consequently, LG considered that the reconstruction of the Track project would in all likelihood not be funded.<sup>155</sup> Since then LG has not taken any further steps with view of rebuilding the Track.

#### **4.10. Arbitration between LG and OL**

- (85) On 17 July 2008, LG initiated an arbitration procedure with OL in relation to their dispute regarding the calculation of transport rates (see recital (21)).

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<sup>152</sup> "[...] arbitražinio teismo sprendimu [...] LG turi teisę ruožo Mažeikiai-v.s.[valstybinė siena] nerekonstruoti, ir "ORLEN Lietuva" ketinimui pasinaudoti šia teise neprieštaravo. [...] geležinkelio ruožas Mažeikiai-v.s. buvo ir po rekonstrukcijos būtų skirtas tik vieno bendrovės kliento - AB „ORLEN Lietuva“ poreikiams, kurių tenkinimas gali būti pilnai užtikrinamas pagrindine geležinkelio linija Kužiai-Mažeikiai. Atsižvelgiant į tai, kad po teismo sprendimo neliko ne tik ekonominių, bet ir teisinių prižasčių vykdyti projektą "Mažeikiai-v.s. geležinkelio ruožo rekonstravimas". LG siūlo šį projektą perkelti į rezervinių projektų sąrašą." LG's response to the 1<sup>st</sup> RFI, annex 15, page 2 (ID0827/2).

<sup>153</sup> LG's response to the 1<sup>st</sup> RFI, annex 15, page 6 (ID0827/6).

<sup>154</sup> LG's response to the 1<sup>st</sup> RFI, annex 16 (ID0828).

<sup>155</sup> LG's response to the 1<sup>st</sup> RFI, paragraphs 41.4, 43-44 (ID0347/23).

- (86) On 10 November 2009, an arbitration court held that LG's unilateral termination of the 1999 Agreement was unlawful and that the 1999 Agreement had been in force until 1 October 2008 when OL and LG concluded an interim transport agreement (see recital (56); the "First Arbitration Decision").<sup>156</sup> The First Arbitration Decision exposed LG to the claim that it breached the 1999 Agreement by making the Track unavailable to OL between 2 September 2008 and 1 October 2008 (see recital (20)).
- (87) Following the First Arbitration Decision, on 22 January 2010, OL initiated a second arbitration procedure with LG raising various claims stemming from the First Arbitration Decision.<sup>157</sup> Of relevance to this Decision is the allegation that, by suspending traffic on the Track, LG had breached its obligation under the 1999 Agreement to provide rail transport services to OL on the Track until 1 October 2008. The subsequent decision of the arbitration court was handed down on 17 December 2010 (the "Second Arbitration Decision").
- (88) In the Second Arbitration Decision the arbitration court held that under the 1999 Agreement LG had a "best efforts" obligation and not an absolute obligation to provide rail transport services to OL on the Track.<sup>158</sup> The arbitration court was of the opinion that there was an objective need to repair the Track, which was not a result of LG's actions.<sup>159</sup> It also noted that the VGI did not issue any sanctions against LG and therefore, concluded that LG had acted in accordance with its legal requirements.<sup>160</sup>
- (89) In the Second Arbitration Decision, the arbitration court examined only the period between 2 September 2008 and 1 October 2008 when OL alleged that LG had breached its obligation to provide rail transport services to OL on the Track. The removal of the Track in October 2008 therefore fell outside of the scope of the arbitration court's examination. The reasons for the removal of the Track were not discussed during the arbitration procedure. The position of OL during this arbitration procedure was that LG undertook an absolute contractual obligation to transport OL's cargo on the Short Route to Latvia and therefore had an obligation to ensure that the Track was operational. OL argued that the unavailability of the Track alone, regardless of the reasons behind the closure of the Track was a breach of the 1999 Agreement.<sup>161</sup> OL did not advance any arguments doubting the occurrence of the Deformation occurred, the necessity for removing the Track or LG's motives in doing so.
- (90) As set out above (see recital (83)), the Second Arbitration Decision removed any concerns about any contractual obligation which LG may have had towards OL with respect to the Track<sup>162</sup> and prompted LG to recommend the removal of the

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<sup>156</sup> Seized document VJ10, page 58/114, paragraphs 282-304 (ID0655/58-63).

<sup>157</sup> Seized document VJ11 page 12/74, paragraph 10 (ID0656/12); seized document ES2, page 3/5 (ID0532/3); seized document ES12/ES18, page 5/11 (ID0539/5, ID0545/5); seized document ES17, page 4/19 (ID0544/4).

<sup>158</sup> Seized document VJ11, page 53/74, paragraph 128 and page 55/74, paragraph 133 (ID0656/53, 55); seized document ES15, page 2/8 (ID0542/2). See also seized document ES16, page 2/5 (ID0543/2).

<sup>159</sup> Seized document VJ11 page 54/74, paragraph 132 and page 55/74, paragraph 135 (ID0656/54, 55).

<sup>160</sup> Seized document VJ11 page 55/74, paragraphs 136-137 (ID0656/55, 56).

<sup>161</sup> Seized document VJ11, page 15/74 (ID0656/15); OL' s response to the 1<sup>st</sup> RFI, page 26 (ID0206/26).

<sup>162</sup> This point was made by LG shortly after the decision was handed down in its letter of 14 January 2011 to the Prime Minister of Lithuania and the Minister for Transport and Communications, seized document ES16, pages 2/5 and 5/5 (ID0543/2,5); see also seized document ES15, page 2/8 (ID0542/2).

reconstruction of the Track project from the priority list of projects for Union funding.

#### 4.11. Evidence regarding LG's concerns with respect to the Track

- (91) Documents seized at LG's premises indicate that LG was concerned about competition from Latvia, specifically from LDZ, and about OL switching to the Latvian seaports for its seaborne exports.

##### 4.11.1. Seized document LK7

- (92) Seized document LK7 entitled "Statement – Questions relating to AB Orlen Lietuva"<sup>163</sup> contains an extensive description of the relationship between OL and LG (including information in relation to revenue, rates, quantities, and conditions), a detailed timeline for the reconstruction of the Track and various arguments against it. The document is neither addressed nor dated and seems to be a draft. According to LG's response to the Commission's request for information, it was prepared in July 2010 by various departments of LG for the purpose of "*internal analysis*"<sup>164</sup> although in its response to the Commission's second request for information LG seems to have suggested that the document was intended to be addressed to the Lithuanian government.<sup>165</sup> The most complete version of the document, seized document LK7, was found at the office of the LG's Deputy CEO for infrastructure; parts of the document (seized documents JI4 and JI5) were found at the office of the CEO. Elements of the document (figures, arguments, tables) were also found in other documents of LG's Deputy CEO.<sup>166</sup> The fact that the document was drafted by several departments and found in the offices of members of the highest levels of LG's management indicates that the views presented therein were those of LG.
- (93) Under the headline "Dangers related to the reconstruction of the Mažeikiai – state border (in the direction of Rengė) section"<sup>167</sup> LG noted that-
- (1) LDZ will take over OL cargo in the direction of Latvia (1-1.5 million tonnes) resulting in an annual loss of revenue to LG of LTL [10-30] million (approximately EUR [3-10] million).
  - (2) OL freight transported to the Lithuanian seaport of Klaipėda would be redirected to the Latvian seaport of Ventspils since the latter would be better placed to accept larger capacity tankers than the first and because LDZ could offer rates that are [percentage] lower than those charged by LG for rail transport services to Klaipėda. LG's annual loss was estimated at LTL [100-150] million (approximately EUR [30-50] million) and it was noted that the seaport of Klaipėda would lose its main client.

The document also contains a map of the relevant routes in Lithuania and Latvia and a table comparing the length of these routes and the respective rates that LDZ and LG could offer.

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<sup>163</sup> "Pažyma dėl klausimų, susijusių su AB "ORLEN LIETUVA".

<sup>164</sup> "[...] vidinei LG analizei [...]". LG's response to the 3<sup>rd</sup> RFI, paragraph 16 (ID0433/8).

<sup>165</sup> LG's response to the 2<sup>nd</sup> RFI, paragraph 32 (ID0400/13, 14).

<sup>166</sup> Seized document VJ16, pages 1-12/20 (ID0662/1-12) discussed in recital (96); seized document ES1 page 22/30 (ID0531/22); seized document VJ7, page 2/5 (ID0652/2).

<sup>167</sup> "Grėsmės, susijusios su ruožo Mažeikiai – v.s. (Rengės kryptimi) atstatymu", Seized document LK7, page 13/16 (ID0588/13).

- (94) Annex 3 of the document is entitled "Advantages of the Latvian railways operator (LDZ Cargo) against LG in transporting the freight of AB 'ORLEN Lietuva' in the direction of Rengė".<sup>168</sup> LG noted that-
- (1) There were neither technological nor organisational barriers for LDZ to operate on the Short Route to Latvia and in fact LDZ was already cooperating with LG in transporting OL's cargo (see recital (18)). Transportation by LDZ would be even more attractive since LDZ could transport OL's cargo to Latvia without changing locomotive and crew and without any additional investment.
  - (2) It would be more difficult for LG than for LDZ to transport OL's cargo to seaports in Latvia. LG would have to establish a certain infrastructure in order to operate in Latvia. LG could use LDZ's services and not establish its own infrastructure in Latvia however in this case LDZ as a competitor would dictate its conditions.
  - (3) LDZ is in a position to pursue an aggressive rate policy and could undercut LG.
- (95) The document also endeavours to show that the reconstruction of the Track would not be economical since the cost of reconstruction and maintenance could not be recouped from infrastructure charges. However, this is contrary to the conclusion of the final Feasibility Report of October 2010 recommended the reconstruction of the Track (see recital (65)).<sup>169</sup>

#### 4.11.2. Seized document VJ16<sup>170</sup>

- (96) Pages 1-12/20 of seized document VJ16, were prepared by LG's Deputy CEO and dated 28 December 2010, soon after the Second Arbitration Decision was handed down. It seems that the document was intended for the Lithuanian government.<sup>171</sup> Under the heading "significance of the Rengė section"<sup>172</sup> the document states that-

*"LG draws the attention that upon reconstruction of the Rengė section, Lithuania may face a threat that **OL freight transported to Klaipėda port may be directed to Ventspilis port.**"<sup>173</sup> (Emphasis in the original document)*

The document reproduced the figures and the map presented in seized document LK7 and also added that-

*"Following the reconstruction of the Rengė section, OL - reasoning by Ventspilis alternative - will have a possibility to request reduction of the tariffs in the direction of Klaipėda and reduction of the tariffs for services in Klaipėda port.*

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<sup>168</sup> "Latvijos geležinkelių vežėjo (LDZ Cargo) pranašumai prieš LG, vežant AB „ORLEN Lietuva“ krovinius Rengės kryptimi", Seized document LK7, page 16/16 (ID0588/16).

<sup>169</sup> LG's response to the 1<sup>st</sup> RFI, paragraph 25 (ID0347/16) and annex 10 (ID0825/82).

<sup>170</sup> Two copies of the document, with slight differences in page numbering, were seized under identification VJ16 (ID0662) and ES17 (ID0544). For the purpose of convenience references will be made to document VJ16 (ID0662).

<sup>171</sup> LG's response to the 2<sup>nd</sup> RFI, paragraph 32 (ID0400/13, 14).

<sup>172</sup> "Rengės ruožo reikšmė".

<sup>173</sup> "LG atkreipia dėmesį, kad atstačius Rengės ruožą Lietuva gali susidurti su grėsme, kad OL kroviniai, vežami į Klaipėdos uostą, gali būti nukreipti į Ventspilio uostą". Seized document VJ16, page 9/20 (ID0662/9).

*The reconstruction of the Rengė section is urgent to OL not because of the transportation of the existing products in the direction of Latvia, as OL had obtained the respective compensations in the agreement, but because of the strategic interests to gain a possibility to “exert pressure” on Lithuania in respect of tariffs or direct export of all or part of the products via Ventspilis port.*<sup>174</sup>

These arguments were also reiterated in the concluding part of the document.<sup>175</sup>

#### 4.11.3. Seized documents VJ9

(97) Seized document VJ9 is an undated handwritten note of LG's Deputy CEO. It expresses very similar concerns to those expressed in seized documents LK7 and VJ16. It discusses the possibility of competition from Latvia and an independent Latvian operator, Baltijas Tranzīta Serviss, is referred to as a possible threat.<sup>176</sup> Under the heading *"takes over cargo from LG"* it is noted *"8 million tonnes – MN"* which is a reference to *"Mažeikių nafta"*, OL's name until September 2009, and to its annual 8 million tonnes of cargo transported by LG.<sup>177</sup> The note discusses the possible threats to the interests of the seaport Klaipėda and under the heading *"measures"*<sup>178</sup> it states-

*"2. Technical barrier*

*3. Creation of the integrated logistics chain LG-port-stevedoring companies by providing the general tariff of the service (actually, a logistics monopoly)*

*3. Synchronisation of the capacities of the logistics chain.*<sup>179</sup>

(98) Under the heading *"defence from Latvia"*<sup>180</sup> the document notes<sup>181</sup>-

*"1) UIC (rolling stock)*

*2) permission to LG not to provide additional services (that is by applying adequate prices)*

*3) not to provide assistance to the Latvians in the seaport (including stevedoring companies)*

*To prepare a general tariff and no other + additional services by stevedoring companies.*

*To establish one chain “port company, port and LG”*

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<sup>174</sup> *"Po Rengės ruožo atstatymo OL, motyvuodama Ventspilio alternatyva, turės galimybę reikalauti tarifų sumažinimo Klaipėdos kryptimi, bei paslaugų tarifų sumažinimo Klaipėdos uoste. Rengės ruožo atstatymas OL yra aktualus ne dėl šiuo metu esančių produktų vežimo Latvijos kryptimi, nes OL sutartyje gavo atitinkamas kompensacijas, tačiau dėl strateginių interesų įgyti galimybę „paspausti“ Lietuvą dėl tarifų, arba nukreipti dalies ar ir visų produktų eksportą per Ventspilio uostą."* Seized document VJ16, page 9/20 (ID0662/9).

<sup>175</sup> Seized document VJ16, page 12/20 (ID0662/12).

<sup>176</sup> Seized document VJ9, page 1/4 (ID0654/1).

<sup>177</sup> Seized document VJ9, page 1/4 (ID0654/1).

<sup>178</sup> *"Priemonės"*

<sup>179</sup> *"2. Techninis barjeras 3. Integralios logistikos. Logistikos grandinės LG-uostas-krovos kompanijos sukūrimas, įteisinant bendrą paslaugos tarifą (faktiškai logistikos monopolio) 3. Logistinės grandinės pajėgumų sinchronizavimas".* Seized document VJ9, page 2/4 (ID0654/2).

<sup>180</sup> *"Gynyba nuo Latvijos".*

<sup>181</sup> Seized document VJ9, page 3/4 (ID0654/3).

*Stevedoring companies could set very high tariffs for Latvia.*<sup>182</sup>

- (99) In a number of places the document discusses the "law reform" namely the transposition of the EU rail legislation into domestic law and the possible lobbying activities to influence it. The issue of separating infrastructure management and transport operation (see section 5) is specifically noted.<sup>183</sup>

#### 4.11.4. Seized documents VJ20

- (100) Seized documents VJ20 is an email dated 23 June 2009 sent by LG's then Deputy Director for Commerce to the Head of Marketing Service in the Tariff Department. This document expresses LG's concern that LDZ would obtain a permit to operate in Lithuania and consequently would gain OL's business. The email discusses possible contractual arrangements between LG and LDZ and notes that the suggested model-

*"would allow us avoiding the risk of interception by LDZ of a part of our transportation (in particular MN [that is OL] transportations) after obtaining a safety certificate in Lithuania.*<sup>184</sup>

- (101) LG argued in its response to the SO that-

*"documents VJ9 and VJ20 never mention the Track Bugeniai – Rengė explicitly and such a link cannot be simply implied from the content of documents VJ9 and VJ20. As a result, these documents are not relevant to prove LG's concerns regarding the Track and they correspond to a simple expression of LG's commercial thinking, which is necessary in each company.*<sup>185</sup>

- (102) Although documents VJ9 and VJ20 do not refer to the Track explicitly they reflect LG's deep concern of losing OL's seaborne export traffic to a Latvian competitor. Section 7.4 demonstrates that this competitive constraint was dependent on the Track.

#### 4.11.5. Seized document ES9/VJ6

- (103) This document was found in two copies identified as ES9 (ID0816) and VJ6 (ID0651) in the office of LG's Deputy CEO.<sup>186</sup> Although undated it appears to have been drafted in 2009.<sup>187</sup> It is entitled "*Statement – on the strategic interests of AB Orlen*"<sup>188</sup>. The arguments made in the document refer also to the interests of the

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<sup>182</sup> "1. UIC (riedmenys) 2. Leidimas LG neteikti paslaugų papildomų (t.y. taikant tinkamas kainas) 3. Uoste latviams neteikti paramos (krovos kompanijos taip pat). Parengti ištisinį tarifą ir kitokio nėra + papildomos krovos kompanijų paslaugos. Susieti viena grandine "uosto kompanija, uostas ir LG". Krovos kompanijos gali Latv. nustatyti l. aukštus įkainius". Seized document VJ9, page 3/4 (ID0654/3).

<sup>183</sup> Seized document VJ9, pages 2/4 and 3/4 (ID0654/2,3); an informal typed transcript was provided by LG (ID0491).

<sup>184</sup> "[...] leistų išvengti pavojaus, kad LDZ gavusi saugos sertifikatą Lietuvoje galėtų perimti iš mūsų dalį pervežimų (ypatingai MN pervežimus)". Seized document VJ20, page 1/1 (ID0667/1).

<sup>185</sup> LG's response to the SO, paragraph 150 (ID1003/40).

<sup>186</sup> See ID0645/1 and ID530/1.

<sup>187</sup> The document states that "*this year [OL] terminated the previous contract with [LG] and signed a new long-term contract*" (AB „ORLEN Lietuva“ šiais metais nutraukė ankstesnę ir pasirašė naują, jos interesus įvertinančią ilgalaikę sutartį su AB „Lietuvos geležinkeliais“). Seized document ES9, page 1 2/3 (ID0816/2). This must be a reference to the replacement of the interim agreement of October 2008 with the 2009 Agreement.

<sup>188</sup> "Pažyma "Dėl AB "ORLEN Lietuva" strateginių interesų".

state of Lithuania and the seaport of Klaipėda, suggesting that it was intended for the Lithuanian government. The document makes the following points:

- (1) It is in the interest of Lithuania to keep all economic activities of OL within its territory including transport and storage.<sup>189</sup>
- (2) Latvia is interested in OL switching to its seaports and has made "all kinds of efforts"<sup>190</sup> in that respect including applying for a permit for LDZ to operate in Lithuania.<sup>191</sup>
- (3) It compares the distances and transport rates to Klaipėda and to the Latvian seaport of Ventspils on the Long and Short Routes to Latvia concluding that on the latter LDZ could make a very competitive offer.<sup>192</sup>
- (4) A switch by OL to the Latvian seaports on the reconstructed Track would mean a significant financial loss to LG and to the Lithuanian State.<sup>193</sup>
- (5) Under the heading "proposed solution"<sup>194</sup> it is argued that the current transport via the Long Route to Latvia satisfies OL's needs and that the issue of renewal of traffic on the Short Route to Latvia "is no longer a Government-level issue".<sup>195</sup>

#### 4.11.6. Seized document LK13

- (104) Seized document LK13 was found in the office of the Chief Specialist in LG's General Division of the Internal Administration and Safety Department.<sup>196</sup> The document contains shorthand minutes of a meeting of LG's Board<sup>197</sup> held on 7 March 2011.<sup>198</sup> This was the day before the Commission conducted unannounced inspections at LG's premises. LG later provided the Commission with the official minutes of the meeting to which LK13 refers.<sup>199</sup>
- (105) While the shorthand minutes do not set out precisely the discussion which took place at the meeting of 7 March 2011, they make clear that LG's board discussed the rates charged to OL, the reconstruction of the Track and OL's future contract with the seaport of Klaipėda. The Chairperson of the Board commented about "*competition for the line to Ventspils*"<sup>200</sup> and that "*if Klaipėdos nafta signs then LG carries via Klaipėda*".<sup>201</sup> The Board decided "*to assign the administration of the company to*

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<sup>189</sup> Seized document ES9, page 1/3 (ID0816/1).

<sup>190</sup> "*visokeriopai siekia*".

<sup>191</sup> Seized document ES9, page 1/3 (ID0816/1).

<sup>192</sup> Seized document ES9, page 2/3 (ID0816/2).

<sup>193</sup> Seized document ES9, page 2/3 (ID0816/2).

<sup>194</sup> "*Siūlomas sprendimas*".

<sup>195</sup> "*yra jau ne Vyriausybės [...] lygmens klausimas*". Seized document ES9, page 2/3 (ID0816/2).

<sup>196</sup> ID518 identifies the person at which office the document was found. In its email of 5 March 2014 (ID874/1) LG indicated the position of that person at the time.

<sup>197</sup> LG's email of 5 March 2014 (ID874/1) indicating the forum, the participants and their positions.

<sup>198</sup> ID0518/2.

<sup>199</sup> ID0883.

<sup>200</sup> "*Venspilio kryptimi konkurencija*" seized document LK13, page 4/5 (ID594/4).

<sup>201</sup> "*jei Klaipėdos nafta pasirašo tai ir LG kad per Klaipėdą veža*" seized document LK13, page 4/5 (ID594/4).

*analyse the possibilities to grant Orlen the discounts for the traffic to Klaipėda in return for giving up the reconstruction of the [Track]".*<sup>202</sup>

- (106) Those documents illustrate again LG's preoccupation with the link between the reconstruction of the Track, the threat of competition from the Latvian seaports and transport of OL's oil products by LG to Klaipėda.

#### 4.11.7. Annex 33 of the Complaint

- (107) In its Complaint, OL claimed that a meeting took place on 16 March 2010 (that is before seized documents LK7 and VJ16 were drafted) between the President of OL's board and the Chairperson of LG's Board who was at the time also the Lithuanian Vice-Minister for Transport and Communications. According to OL the Chairperson of LG's Board *"explicitly declared that special tariffs would be conditional on OL transporting its refined oil products destined to seaborne export to Klaipėda the Lithuanian port"*.<sup>203</sup>
- (108) The language of the internal minutes of the meeting, that were drafted by OL, suggests that the Chairperson of LG's Board made any further rate discounts conditioned on a guarantee from OL with respect to the *"volume and the direction of transport"* of OL's oil products. The drafter of the minutes added an explanation that this was a reference to the seaport of Klaipėda.<sup>204</sup>
- (109) LG did not deny, or make any comment, on this point although the minutes were provided to LG together with the non-confidential version of the Complaint. LG did however comment on another argument made by OL with respect to those minutes.<sup>205</sup> In its Response to the SO, LG only noted that the document also stated:

*"Response on Rengė route - The reconstruction will be carried out on basis of EU funds. They do not accept the possibility of using OL as substitute investor. He anticipates that the reconstruction will last till 2012."*

According to LG this is *"proof that LG's purpose was to respond to the claims of OL, notably by reconstructing the Track."*<sup>206</sup> Indeed, the meeting took place few weeks after LG submitted the project proposal of 8 February 2010 to reconstruct the Track (see recital (79)) but in view of LG's actual actions described above, the Commission does not accept that this statement is evidence that LG genuinely intended at any time to rebuild the Track.

#### 4.12. LDZ's entry into the Lithuanian Market

- (110) As noted in recital (18), in 2008 LDZ did not have the necessary regulatory authorisations to operate independently in Lithuania. At that time LDZ operated in Lithuania as a sub-contractor of LG and under its supervision. Under such arrangement it was also transporting OL's products on the Short Route to Latvia. When crossing the border, the train came under the sole responsibility of LDZ.

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<sup>202</sup> *"Pavesti bendrovės administracijai išnagrinėti galimybes suteikti "Orlen Lietuva" vežimų Klaipėdos kryptimi nuolaidas mainais atsisakant Juodeikių – Rengės ruožo rekonstrukcijos."* (ID883/3).

<sup>203</sup> Complaint, paragraph 70 (ID0009/21).

<sup>204</sup> Complaint, annex 33 (ID0043).

<sup>205</sup> LG's Comments on the Complaint, paragraph 49 (ID0414/15). LG was referring to OL's argument that in that meeting LG rejected OL's offer to assist with funding of the reconstruction of the track.

<sup>206</sup> LG's response to the SO, paragraph 154 (ID1003/41).



- (111) In June 2009, LDZ started the process to obtain the necessary regulatory authorisations in order to operate independently in Lithuania. It made a request to operate on three routes in Lithuania. Two of those routes were for freight trains: from the Latvian border to Radviliškis (20 kilometres south to the Kužiai junction, see map in recital (22)) and the Short Route to Latvia. The third route from the Latvian border to Vilnius, was for passenger trains. However, the final formal application submitted in October 2011 referred only to the Latvian border – Radviliškis route, which runs along a part of the Long Route to Latvia.<sup>207</sup> LDZ explained that the application with respect to the Short Route to Latvia was withdrawn because *"it was no longer possible to use the route"*.<sup>208</sup>
- (112) LDZ explained that it did not request a regulatory authorisation to operate independently on the whole territory of Lithuania because its staff and rolling stock are fully employed in Latvia. Consequently it *"did not think there was a realistic opportunity to enter the Lithuanian market in other routes"*.<sup>209</sup>
- (113) The regulatory authorisation for LDZ to operate independently on the Latvian border – Radviliškis route was issued at the beginning of 2012<sup>210</sup> but since then LDZ has not provided such services,<sup>211</sup> although it does provide traction services in Lithuania as a sub-contractor of LG (and these are the only services it provides in Lithuania).<sup>212</sup> LG remains until today the only operator providing independent rail services in Lithuania.<sup>213</sup>

## 5. REGULATORY FRAMEWORK

### 5.1. Union legislation

- (114) Since the early 1990s, the Union has adopted several legislative measures aimed at liberalising the European rail industry, notably the three railway legislative packages adopted in the 2000s. Railway infrastructure is considered a natural monopoly and before liberalisation, a single state-owned undertaking managed the railway infrastructure and also provided rail transport services in almost all Member States. New entrants are usually dependent on the historical, vertically integrated, rail operators ("incumbents") for access to upstream railway infrastructure services while at the same time also competing with the incumbents downstream in the provision of rail transport services. The challenge for Union legislation was not only to grant railway undertakings a right to operate in other Member States but also to ensure that they would be able to exercise that right effectively vis-à-vis the incumbents. Union

<sup>207</sup> LDZ's response to the 1<sup>st</sup> RFI, paragraph 8.1 (ID0327/6).

<sup>208</sup> *"Pieprasījums dzelzceļa līnijai valsts robeža ar Latviju – Bugeniai tika atsaukts sakarā ar to, ka ir zudusi iespēja izmantot šo līniju."* LDZ's response to the 2<sup>nd</sup> RFI, question 24 (ID710/11). The application regarding Latvian border – Vilnius was withdrawn because the train concerned, the Riga-Vilnius-Gomel passenger train, was cancelled.

<sup>209</sup> *"nesaredzēja reālu iespēju ienākt Lietuvas tirgū citās līnijās"*. LDZ's response to the 2<sup>nd</sup> RFI, question 25 (ID710/11).

<sup>210</sup> LG's Comments on the Complaint, paragraph 9 (ID0414/4-5) (indicated 17 January 2012 as the granting date); LDZ's response to the 2<sup>nd</sup> RFI, question 20 (710/10) (indicating 29 December 2011 as the granting date).

<sup>211</sup> LDZ's response to the 2<sup>nd</sup> RFI, question 31 (ID710/11).

<sup>212</sup> LG's response to the 1<sup>st</sup> RFI, paragraph 56 (ID0347/27); LDZ's response to the 1<sup>st</sup> RFI, paragraphs 2.5 and 3.1 (ID0327/3, 4); LDZ's response to the 2<sup>nd</sup> RFI, question 31 (ID710/11).

<sup>213</sup> LG's response to the 4<sup>th</sup> RFI, paragraphs 46-47 (ID 0749/21-22).

legislation endeavoured therefore to mitigate the conflict of interest inherent in the activities of the incumbents.

#### 5.1.1. *Licensing and safety certificates*

- (115) In its amended version, applicable at the time of the relevant facts in this Decision, Article 3 of Directive 95/18/EEC<sup>214</sup> provided that in each Member State the body responsible for issuing licences for railway undertakings should be independent from bodies or undertakings that provide rail transport services. Article 4(5) of that Directive stated that such licences were to be valid throughout the territory of the Union, but its Article 4(4) clarified that such licences did not, in themselves, entitle the holder to access the railway infrastructure.<sup>215</sup>
- (116) Article 10(1) of Directive 2004/49/EC<sup>216</sup> provides that, in order to be granted access to the railway infrastructure, a railway undertaking must hold a safety certificate. The safety certificate may cover the whole railway network of a Member State or a defined part of it. The safety certificate is to be issued by a national safety authority that should be independent in its organization, legal structure and decision making from any railway undertaking and infrastructure manager (Article 16(1) of that Directive).

#### 5.1.2. *Directive 91/440/EEC*<sup>217</sup>

- (117) Article 10 of Directive 91/440/EEC liberalised all types of rail freight services in the Union as of 1 January 2007, granting railway undertakings established in the Union access to the railway infrastructure on equitable conditions for the purpose of operating such services in all Member States. In its amended version applicable at the time of the relevant facts in this Decision, Article 6(1) of Directive 91/440/EEC provided that separate profit and loss accounts and balance sheets must be kept and published for infrastructure management, on the one hand and rail transport services, on the other, and public funds paid to one of those two areas of activity may not be transferred to the other. Article 6(3) of Directive 91/440/EEC required the Member States to ensure that the essential function of determining equitable and non-discriminatory access to infrastructure (licensing, path allocation, infrastructure charging) is entrusted to bodies or firms that do not themselves provide any rail transport services<sup>218</sup>.

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<sup>214</sup> Council Directive 95/18/EC of 19 June 1995 on the licensing of railway undertakings, OJ L 143, 27.6.1995, p. 70–74, as amended by Directive 2001/13/EC.

<sup>215</sup> Directive 95/18/EEC was repealed by Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area (Recast), OJ L 343, 14.12.2012, p. 32. Articles 3, 4(4) and 4(5) of Directive 95/18/EEC were recast as Articles 16, 17(4) and 23(1) respectively of Directive 2012/34/EU.

<sup>216</sup> Directive 2004/49/EC of the European Parliament and of the Council of 29 April 2004 on safety on the Community's railways and amending Council Directive 95/18/EC on the licensing of railway undertakings and Directive 2001/14/EC on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification (Railway Safety Directive), OJ L 164, 30.4.2004, p. 44.

<sup>217</sup> Council Directive 91/440/EEC of 29 July 1991 on the development of the Community's railways, OJ L 237, 24.8.1991, p. 25–28, as amended.

<sup>218</sup> These provisions are recast in Articles 6(1) and 7(1) of Directive 2012/34/EU.

5.1.3. *Directive 2001/14/EC*<sup>219</sup>

- (118) In its amended version applicable at the time of the relevant facts in this Decision, Article 4(2) of Directive 2001/14/EC provides that where the infrastructure manager is not independent of a railway undertaking, the functions relating to setting infrastructure charges must be performed by a separate and independent body. Article 4(5) of that Directive instructs that the application of the charging scheme must result in equivalent and non-discriminatory charges for different railway undertakings performing services of equivalent nature.
- (119) Article 5 of Directive 2001/14/EC and its Annex II set out four categories of service to be supplied to railway undertakings: i) the "minimum access package", to which there is a right of equal access on a non-discriminatory basis to operate trains on the network (Annex II, point 1); ii) "track access to service facilities" (for example stations, terminals and yards) and "supply of services", to which access should be provided in a non-discriminatory manner and requests by railway undertakings may only be rejected if viable alternatives under market conditions existed (Annex II, point 2); iii) "additional services" which are provided in those service facilities (Annex II, point 3.c) and which the infrastructure manager had to provide upon request. Regarding those services, Article 5(3) of Directive 2001/14 did not set a non-discrimination obligation; and iv) "ancillary services" (access to telecommunication network, provision of additional information and technical inspection of rolling stock) which the infrastructure manager is not obliged to provide (Annex II, point 4).
- (120) Article 7 of Directive 2001/14/EC laid down the principles of infrastructure charging. According to Article 7(3) of Directive 2001/14, access to railway infrastructure and service facilities must be charged at the cost that is directly incurred as a result of operating the train service. Charges for services provided at the service facilities are not covered by that Article but, in setting them, account has to be taken of "*the competitive situation of rail transport*" (Article 7(7)). Charges for additional and ancillary services (points (iii) and (iv) in the previous paragraph) must relate to their cost where they are offered by only one supplier (Article 7(8)).
- (121) Article 11 of Directive 2001/14/EC set the principle of the proper performance of the railway infrastructure. According to this Article, infrastructure charging schemes must, through a performance scheme, encourage railway undertakings and the infrastructure manager to minimise disruption and improve the performance of the railway network. It may include penalties for actions which disrupt the operation of the network, compensation for undertakings which suffer from disruption and bonuses that reward better than planned performance.
- (122) Article 20(1) of Directive 2001/14/EC provided that "*the infrastructure manager shall as far as is possible meet all requests for infrastructure capacity including requests for train paths crossing more than one network, and shall as far as possible take account of all constraints on applicants, including the economic effect on their business.*" Article 29 of that Directive stated further that "*in the event of disturbance*

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<sup>219</sup> Directive 2001/14/EC of the European Parliament and of the Council of 26 February 2001 on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification, OJ L 75, 15.3.2001, p. 29–46.

*to train movements caused by technical failure or accident the infrastructure manager must take all necessary steps to restore the normal situation."*

- (123) Article 14(1) of Directive 2001/14/EC stated the principle of fair and non-discriminatory allocation of infrastructure capacity.<sup>220</sup> Article 14(2) of Directive 2001/14 reiterated the requirement of the independence of the capacity allocation function from any railway undertaking.
- (124) Article 30 of Directive 2001/14/EC required Member States to establish a national railway regulatory body independent of any infrastructure manager. The national railway regulatory body is to act as an appeal body against the decisions or conduct of the infrastructure manager, and is to supervise the charges set by the infrastructure manager.

#### 5.1.4. *The recast Directive 2012/34/EU*<sup>221</sup>

- (125) Directive 2012/34/EU, which was to be transposed by the Member States by 16 June 2015 without prejudice to the obligations of the Member States relating to the time limits for transposition into national law of the Directives it recasts (namely Directives 91/440/EEC and 2001/14/EC), clarified some of the provisions of the Directives from the "First Railway Package" of 2001 and strengthened in certain respects the separation between infrastructure management and rail transport operations. The list of services to be supplied to the railway undertakings laid down in Annex II was updated. Most notably it was clarified that track access to service facilities also includes the services supplied in those facilities. Where these services are provided by an undertaking that holds a dominant position in the national rail transport services market, they must be provided by an independent body or firm (Article 13(3) of Directive 2012/34/EU). Requests by railway undertakings for access to these services must be answered within a reasonable time limit and may only be refused if there are viable alternatives (Article 13(4) of Directive 2012/34/EU). Additional services (i.e. the third category) are also to be provided in a non-discriminatory manner (Article 13(7) of Directive 2012/34/EU).
- (126) Charges imposed for track access within service facilities (second category), which were not regulated in the First Railway Package, are now not to exceed the cost for providing it, plus a reasonable profit (Article 31(7) of Directive 2012/34). Similarly, charges imposed for additional and ancillary railway services offered by one supplier (third and fourth categories) should not exceed their cost, plus a reasonable profit.

## 5.2. **Lithuanian legislation**

### 5.2.1. *Ownership of infrastructure*

- (127) In Lithuania the public railway infrastructure is owned by the state<sup>222</sup> and entrusted to LG for management.<sup>223</sup> In accordance with Article 15 of the Railway Transport

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<sup>220</sup> Recast Article 39 of Directive 2012/34/EU.

<sup>221</sup> Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area; OJ L 343, 14/12/2012, p. 32–77

<sup>222</sup> Railway Transport Code of the Republic of Lithuania, Article 5, paragraph 1 (Lietuvos Respublikos geležinkelių transporto kodekso 5 straipsnio 1 dalis, Žin., 2004 Nr. 72-2489): "*Public railway infrastructure is Lithuanian State property*" ("*Viešojo geležinkelių infrastruktūra yra Lietuvos valstybės nuosavybė*").

<sup>223</sup> Railway Transport Code of the Republic of Lithuania, Article 23, paragraph 1 (Lietuvos Respublikos geležinkelių transporto kodekso 23 straipsnio 1 dalis, Žin., 2004 Nr. 72-2489): "*Following the*

Code,<sup>224</sup> the list of railway lines are established in a government resolution for railway lines of national importance<sup>225</sup> and an order of the Minister for Transport and Communications for railway lines of regional importance.<sup>226</sup> LG manages the public infrastructure through a separate sub-division within the company.<sup>227</sup> LG is required to ensure proper and safe maintenance of the public railway infrastructure in Lithuania and, in the event of an accident to take all necessary measures to restore the normal situation.<sup>228</sup> Decisions regarding construction, conservation and closure

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*requirements of the legal acts of the Republic of Lithuania the manager of the public railway infrastructure – AB Lietuvos geležinkeliai by right of trust manages, uses, disposes without prejudice to limitations set in this Code and other legal acts, and provides companies with services related to the public infrastructure management and maintenance* ("Lietuvos Respublikos įstatymų nustatyta tvarka viešąją geležinkelių infrastruktūrą patikėjimo teise valdo, naudoja, ja disponuoja, nepažeisdamas šio Kodekso ir kitų teisės aktų nustatytų apribojimų, ir įmonėms teikia su viešosios geležinkelių infrastruktūros valdymu ir priežiūra susijusias paslaugas viešosios geležinkelių infrastruktūros valdytojas – akcinė bendrovė "Lietuvos geležinkeliai").

224 Railway Transport Code of the Republic of Lithuania, Article 15, paragraphs 1-3, (Lietuvos Respublikos geležinkelių transporto kodekso 15 straipsnio 1-3 dalys, Žin., 2004, Nr. 72-2489): *"According to the train traffic intensity, geopolitical, social and economic importance the railway lines are classified into railway lines of national or regional importance"* ("Geležinkelių linijos, atsižvelgiant į traukinių eismo intensyvumą, geopolitinę, socialinę ir ekonominę jų reikšmę, skirstomos į valstybinės reikšmės magistralines geležinkelių linijas ir regioninės reikšmės geležinkelių linijas"). *"Railway lines of national importance are those listed in an international railway network and other lines which have significant importance to the State economy, a list of those lines is approved by the Government"* ("Valstybinės reikšmės magistralinės geležinkelių linijos yra į tarptautinių geležinkelių linijų tinklą įtrauktos geležinkelių linijos ir kitos reikšmingos šalies ūkiui linijos, kurių sąrašą tvirtina Vyriausybė"). *"Railway lines of national importance are those listed in an international railway network and other lines which have significant importance to the State economy, a list of those lines is approved by the Government"* ("Valstybinės reikšmės magistralinės geležinkelių linijos yra į tarptautinių geležinkelių linijų tinklą įtrauktos geležinkelių linijos ir kitos reikšmingos šalies ūkiui linijos, kurių sąrašą tvirtina Vyriausybė").

225 Government resolution No 1244 of 5 October 2004 on the approval of the list of railway lines of national importance (Lietuvos Respublikos vyriausybės 2004 m. spalio 5 d. nutarimas Nr. 1244 "Dėl valstybinės reikšmės magistralinių geležinkelių linijų sąrašo patvirtinimo", Žin., 2004, Nr. 148-5355).

226 Order of the Minister of Transport and Communications No 3-453 of 8 September 2004 "Concerning the approval of the list of railway lines of regional importance" (Lietuvos Respublikos susisiekimo ministro 2004 m. rugsėjo 8 d. įsakymas Nr. 3-453 "Dėl regioninės reikšmės geležinkelių linijų sąrašo patvirtinimo", Žin., 2004, Nr. 137-5001. The Short Route is listed in the order of the Minister of Transport and Communications.

227 Railway Transport Code of the Republic of Lithuania Article 23 paragraph 1 (Lietuvos Respublikos geležinkelių transporto kodekso 23 straipsnio 1 dalis, Žin., 2004 Nr. 72-2489): *"Functions of the public railway infrastructure manager are performed by a separate sub-division of AB Lietuvos geležinkeliai, not performing licensed activity provided in Article 10 paragraph 1 of the Code"* ("Viešosios geležinkelių infrastruktūros valdytojo funkcijas atlieka atskiras akcinės bendrovės "Lietuvos geležinkeliai" padalinys, nevykdantis šio Kodekso 10 straipsnio 1 dalyje nurodytos licencijuojamos veiklos").

228 The relevant provisions are:

- a) Law on Railway Transport Safety of the Republic of Lithuania Article 11 paragraph 1 (Lietuvos Respublikos geležinkelių transporto eismo saugos įstatymo 11 straipsnio 1 dalis, Žin., 2010 Nr. 12-557): *"The managers of the railway infrastructure manage, use and maintain the railway infrastructure according to this law, Law on Construction of the Republic of Lithuania, Technical Specifications for Interoperability of the European Union and other legal acts"* ("Geležinkelių infrastruktūrą valdo, naudoja ir jos priežiūrą atlieka geležinkelių infrastruktūros valdytojai šio įstatymo, Lietuvos Respublikos statybos įstatymo, TSS ir kitų teisės aktų nustatyta tvarka");
- b) Railway Transport Code of the Republic of Lithuania Article 24 paragraph 1 point 1 (Lietuvos Respublikos geležinkelių transporto kodekso 24 straipsnio 1 dalies 1 punktas, Žin., 2004 Nr. 72-2489): *"Functions of the public railway infrastructure manager: (1) to ensure proper and safe maintenance of*

(liquidation) of the public railway infrastructure remain solely at the hands of the state and cannot be taken by LG.<sup>229</sup> LG's position is that the Track is not "closed" but rather that traffic is suspended until renovation works will be performed. The Track is still listed in the order of the Minister of Transport and Communications and appears in the Network Statement of LG.

### 5.2.2. Funding

- (128) The funding of infrastructure works in Lithuania depends on their type and scope. Article 27 of the Railway Transport Code (which was repealed on 8 October 2011) provided that maintenance costs of the railway infrastructure were to be covered by LG that is from the charges collected by it for the use of public railway infrastructure.<sup>230</sup> Article 8 of that Code provided that the creation, modernisation and development of the public railway infrastructure were to be financed by public funds.<sup>231</sup> In the Railway Transport Code that currently applies, reference is made

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*public railway infrastructure*" (*"Viešosios geležinkelių infrastruktūros valdytojo funkcijos: (1) užtikrinti tinkamą ir saugią viešosios geležinkelių infrastruktūros priežiūrą"*);

- c) Law on Basics of Transport Activities of the Republic of Lithuania Article 15 paragraph 1 point 2 (Lietuvos Respublikos transporto veiklos pagrindų įstatymo 15 straipsnio 1 dalies 2 punktą, Žin., 2002 Nr. 29-1034): *"Ensuring optimal functioning and balance between the incomes and expenditures the public transport infrastructure manager shall: [...] (2) ensure compliance of the public transport infrastructure with the requirements of safe traffic and environment provided in Articles 10 and 11 of this Law, maintain, modernize and develop public transport infrastructure properly"* (*"Viešosios transporto infrastruktūros objekto valdytojas, garantuodamas optimalų šio objekto funkcionavimą, išlaidų ir pajamų subalansavimą: [...] (2) užtikrina, kad viešosios transporto infrastruktūros objektas atitiktų saugaus eismo, aplinkosaugos ir kitus reikalavimus, nustatytus šio Įstatymo 10 ir 11 straipsniuose, tinkamai prižiūri, modernizuoja ir plėtoja viešosios transporto infrastruktūros objektus"*);
- d) Law on the Railway Transport Sector Reform of the Republic of Lithuania, Article 8, paragraph 1, point 4 (Lietuvos Respublikos geležinkelių transporto sektoriaus reformos įstatymo 8 straipsnio 1 dalies 4 punktą, Žin., 2004 Nr. 61-2182, negalioja nuo 2011-10-08): *"AB Lietuvos geležinkeliai shall ensure the proper technical condition of the public railway infrastructure and a safe and uninterrupted traffic of trains"* (*"AB "Lietuvos geležinkeliai" užtikrina tinkamą techninę viešosios geležinkelių infrastruktūros būklę bei nenutrūkstamą ir saugų traukinių eismą"*).
- e) Rules for Public Railway Infrastructure Capacities Allocation, paragraph 69 (Viešosios geležinkelių infrastruktūros pajėgumų skyrimo taisyklių, patvirtintų Lietuvos Respublikos vyriausybės 2004 m. gegužės 19 d. nutarimu Nr. 611, Žin. 2004, Nr. 83-3019, 69 punktą, kaip pakeista 2006 m. vasario 15 d. Nutarimu Nr. 167): *"in the event of disturbance to train movements caused by railway traffic accident the infrastructure manager must take all necessary steps to restore the normal situation."* (*"Jeigu dėl geležinkelių transporto eismo įvykio sutrinka traukinių eismas, viešosios geležinkelių infrastruktūros valdytojas privalo imtis visų būtinų priemonių, kad atkurtų įprastą padėtį."*)

<sup>229</sup> Railway Transport Code Article 9 paragraph 1 (Lietuvos Respublikos geležinkelių transporto kodekso 9 straipsnio 1 dalis, Žin., 2004, Nr. 72-2489): *"Decision on closure (liquidation), conservation of public railway infrastructure objects and construction of the new objects shall be taken by the Government"* (*"Sprendimą dėl viešosios geležinkelių infrastruktūros objektų uždarymo (likvidavimo), jų užkonservavimo ir naujų objektų statybos priima Vyriausybė"*).

<sup>230</sup> Railway Transport Code of the Republic of Lithuania Article 27 paragraph 1, the article is not applicable from 8 October 2011 (Lietuvos Respublikos geležinkelių transporto kodekso 27 straipsnio 1 dalis, Žin., 2004 Nr. 72-2489, neteko galios nuo 2011-10-08): *"Maintenance of the public railway infrastructure is financed from the charges collected for the use of public railway infrastructure"* (*"Viešosios geležinkelių infrastruktūros priežiūra finansuojama iš rinkliavų, gautų už naudojimąsi viešąja geležinkelių infrastruktūra"*).

<sup>231</sup> Railway Transport Code of the Republic of Lithuania Article 8, the article is not applicable from 8 October 2011 (Lietuvos Respublikos geležinkelių transporto kodekso 8 straipsnis, Žin., 2004 Nr. 72-2489, neteko galios nuo 2011-10-08): *"Programs for creation, modernization and development of the public railway infrastructure approved by the Government are financed from the state budget, charges collected for the use of public railway infrastructure, loans received on behalf of the State or with a*

only to "expenses incurred while performing railway infrastructure manager's functions" which are to be financed by infrastructure charges, public funds, loans and other sources.<sup>232</sup> In response to a request for information sent by the Commission, LG explained that it performs reconstruction, upgrading and major repair works using Union funds and that it uses its own resources only for the performance of routine repair works.<sup>233</sup>

### 5.2.3. Access to the infrastructure

- (129) Decisions on the allocation of infrastructure capacity in Lithuania are officially made by the VGI<sup>234</sup> in a non-discriminatory manner.<sup>235</sup> Applications are submitted to the VGI which verifies their completeness.<sup>236</sup> Applications are then forwarded to LG for

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*state guarantee, funds received from international financial institutions and EU funds through financial mechanisms for state and/or municipal capital partnership, also from financial assistance* ("Vyriausybės patvirtintos viešosios geležinkelių infrastruktūros kūrimo, modernizavimo ir plėtros programos finansuojamos iš valstybės biudžeto, rinkliavos už naudojimąsi viešąja geležinkelių infrastruktūra, valstybės vardu arba su valstybės garantija gautų paskolų, lėšų, gautų taikant valstybės ir (ar) savivaldybių kapitalo partnerystės finansinius mechanizmus iš tarptautinių finansinių institucijų, Europos Sąjungos fondų, taip pat lėšų, gaunamų kaip parama").

<sup>232</sup> Railway Transport Code of the Republic of Lithuania Article 23 paragraph 7 (Lietuvos Respublikos geležinkelių transporto kodekso 23 straipsnio 7 dalis, Žin., 2004 Nr. 72-2489, 2011 Nr. 121-5703, 2013 Nr. 46-2242): "Expenses incurred while performing railway infrastructure manager's functions are covered by the charges for railway infrastructure manager's services, state budget funds allocated according to the agreement indicated on paragraph 8 of this article, state budget funds allocated for the projects of renewal, modernisation and development of the public railway infrastructure, EU funds, loans, other resources" ("Išlaidos, patiriamos atliekant viešosios geležinkelių infrastruktūros valdytojo funkcijas, apmokamos iš rinkliavų už viešosios geležinkelio infrastruktūros valdytojo teikimas paslaugas, valstybės biudžeto lėšų, skiriamų pagal šio straipsnio 8 dalyje nurodytą sutartį, valstybės biudžeto lėšų, skiriamų viešosios geležinkelių infrastruktūros atnaujinimo, modernizavimo ir plėtros projektams įgyvendinti, Europos Sąjungos fondų, paskolų, kitų lėšų").

<sup>233</sup> LG's response to the 2<sup>nd</sup> RFI, paragraphs 28-30 (ID0400/12).

<sup>234</sup> Rules for Public Railway Infrastructure Capacities Allocation, paragraph 4 (Viešosios geležinkelių infrastruktūros pajėgumų skyrimo taisyklių, patvirtintų Lietuvos Respublikos vyriausybės 2004 m. gegužės 19 d. nutarimu Nr. 611, Žin. 2004, Nr. 83-3019, 4 punktas): "Capacities are allocated to the applicants by the State Railway Inspectorate under the Ministry of Transport and Communications" ("Pajėgumus pareiškėjams skiria Valstybinė geležinkelio inspekcija prie Susisiekimo ministerijos").

Rules for Public Railway Infrastructure Capacities Allocation, paragraph 23 (Viešosios geležinkelių infrastruktūros pajėgumų skyrimo taisyklių, patvirtintų Lietuvos Respublikos vyriausybės 2004 m. gegužės 19 d. nutarimu Nr. 611, Žin. 2004, Nr. 83-3019, 23 punktas): "The Inspectorate must analyse the applications and take a decision either to allocate capacities or to refuse to allocate within 7 months from the deadline for submission of the applications for capacities allocation" ("Inspekcija per 7 mėnesius nuo paraiškų skirti pajėgumus pateikimo termino pabaigos privalo jas išnagrinėti ir priimti sprendimus skirti pajėgumus ar jų neskirti").

<sup>235</sup> Rules for Public Railway Infrastructure Capacities Allocation, paragraph 3 (Viešosios geležinkelių infrastruktūros pajėgumų skyrimo taisyklių, patvirtintų Lietuvos Respublikos vyriausybės 2004 m. gegužės 19 d. nutarimu Nr. 611, Žin. 2004, Nr. 83-3019, 3 punktas): "Capacities are allocated following these principles: [...] 3.2. Applicants must not be discriminated [...]" ("Pajėgumai skiriami vadovaujantis šiais principais: [...] 3.2. Pareiškėjai neturi būti diskriminuojami [...]").

<sup>236</sup> Rules for Public Railway Infrastructure Capacities Allocation, paragraph 9 (Viešosios geležinkelių infrastruktūros pajėgumų skyrimo taisyklių, patvirtintų 2004 m. gegužės 19 d. Lietuvos Respublikos vyriausybės nutarimu Nr. 611, Žin. 2004, Nr. 83-3019, 9 punktas): "The Inspectorate approves the application content requirements and sets the list of documents to be attached to the application" ("Paraiškos turinio reikalavimus ir prie paraiškos pridedamų reikiamų dokumentų sąrašą nustato Inspekcija").

Rules for Public Railway Infrastructure Capacities Allocation, paragraph 10 (Viešosios geležinkelių infrastruktūros pajėgumų skyrimo taisyklių, patvirtintų 2004 m. gegužės 19 d. Lietuvos Respublikos

technical evaluation<sup>237</sup> after which LG submits a draft timetable.<sup>238</sup> In case of disagreement with an applicant regarding the timetable, LG is obliged to take all measures to solve it through negotiations with the applicant.<sup>239</sup> Capacity will not be allocated if for objective reasons it cannot be allocated as requested and the applicant does not agree to alternative capacity offered by LG.<sup>240</sup>

- (130) In order to apply for capacity,<sup>241</sup> the applicant must hold (among other things): a) a relevant licence<sup>242</sup> issued in accordance with the Railway Transport Code<sup>243</sup> and the

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vyriausybės nutarimu Nr. 611, Žin. 2004, Nr. 83-3019, 10 punktas): *"If the Inspectorate finds that not all required data is provided in the application and (or) not all required documents are submitted it informs the applicant in writing and sets a reasonable deadline for provision of the data and (or) documents"* ("Inspekcija, nustatiusi, kad paraiškoje nurodyti ne visi reikiami duomenys ir (ar) pateikti ne visi reikiami dokumentai, apie tai raštu praneša pareiškėjui ir nustato protingą terminą šiems duomenims ir (ar) dokumentams pateikti").

<sup>237</sup> Rules for Public Railway Infrastructure Capacities Allocation, paragraph 13 (Viešosios geležinkelių infrastruktūros pajėgumų skyrimo taisyklių, patvirtintų Lietuvos Respublikos vyriausybės 2004 m. gegužės 19 d. nutarimu Nr. 611, Žin. 2004, Nr. 83-3019, 13 punktas): *"The Inspectorate forwards the applications to the public railway infrastructure manager for technical evaluation not later than within a month after the deadline for application submission"* ("Inspekcija ne vėliau kaip per mėnesį nuo paraiškų pateikimo termino pabaigos perduoda paraiškas viešosios geležinkelių infrastruktūros valdytojui jų techniniam vertinimui atlikti").

<sup>238</sup> Rules for Public Railway Infrastructure Capacities Allocation, paragraph 16 (Viešosios geležinkelių infrastruktūros pajėgumų skyrimo taisyklių, patvirtintų Lietuvos Respublikos vyriausybės 2004 m. gegužės 19 d. nutarimu Nr. 611, Žin. 2004, Nr. 83-3019, 16 punktas): *"After a technical evaluation of applications the public railway infrastructure manager not later than 4 months after the deadline for application submission prepares a draft railway timetable and submits it to the Inspectorate and interested parties"* ("Viešosios geležinkelių infrastruktūros valdytojas, atlikęs paraiškų skirti pajėgumus techninį vertinimą, ne vėliau kaip per 4 mėnesius nuo paraiškų skirti pajėgumus pateikimo termino pabaigos parengia traukinių eismo grafiko projektą ir pateikia jį Inspekcijai ir suinteresuotiems asmenims").

<sup>239</sup> Rules for Public Railway Infrastructure Capacities Allocation, paragraph 18 (Viešosios geležinkelių infrastruktūros pajėgumų skyrimo taisyklių, patvirtintų Lietuvos Respublikos vyriausybės 2004 m. gegužės 19 d. nutarimu Nr. 611, Žin. 2004, Nr. 83-3019, 18 punktas): *"In case of disagreements among applicants regarding allocation of the same capacity in the particular part of the public railway infrastructure the public railway infrastructure manager must within 2 months from the deadline for request, remarks and (or) suggestions from interested parties take all measures to solve the disagreements through negotiations with interested parties. The principals and rules for coordination of applications for the same capacity are set by the Inspectorate"* ("Jeigu tarp pareiškėjų kyla nesutarimų dėl tų pačių pajėgumų skyrimo vienoje viešosios geležinkelių infrastruktūros dalyje, viešosios geležinkelių infrastruktūros valdytojas privalo per 2 mėnesius nuo suinteresuotų asmenų prašymų, pastabų ir (ar) pasiūlymų dėl traukinių grafiko projekto pateikimo termino pabaigos imtis visų priemonių, kad tie nesutarimai būtų pašalinti derybose su suinteresuotais asmenimis. Paraiškų, kai prašoma skirti tuos pačius pajėgumus, derinimo principus ir tvarką nustato Inspekcija").

<sup>240</sup> Rules for Public Railway Infrastructure Capacities Allocation, paragraph 26.3 (Viešosios geležinkelių infrastruktūros pajėgumų skyrimo taisyklių, patvirtintų Lietuvos Respublikos vyriausybės 2004 m. gegužės 19 d. nutarimu Nr. 611, Žin. 2004, Nr. 83-3019, 26.3 punktas): *"Capacities are not allocated if there are no requested capacities, existing capacities do not match requirements provided in the application and therefore cannot be used effectively, or due to other objective reasons there is no possibility to allocate them and the applicant refuses to use other capacities offered by the public railway infrastructure manager"* ("Pajėgumai neskiriami, jeigu prašomų pajėgumų nėra, esami pajėgumai neatitinka paraiškoje nurodytų charakteristikų ir dėlto negali būti efektyviai naudojami arba dėl kitų objektyvių priežasčių jų suteikti negalima ir pareiškėjas nesutinka naudotis geležinkelių infrastruktūros valdytojo pasiūlytais kitais pajėgumais").

<sup>241</sup> LG public railway infrastructure network statement for 2015-2016, paragraph 2.3 (ID1195/5)

<sup>242</sup> Licences to carry passengers, luggage and goods by railway along international routes issued in any Member State are valid in the Republic of Lithuania.



Licensing Rules for the Railway Undertakings (Carriers)<sup>244</sup>, and b) a safety certificate<sup>245</sup> issued in accordance with the Railway Transport Code<sup>246</sup> and the Rules for the Safety Certification of Railway Undertakings (Carriers) and the Public Railway Infrastructure Managers.<sup>247</sup> LG, however, is involved in issuing safety certificates and licences. LG's representatives participate in the commission that evaluates applications.<sup>248</sup> Although the current wording of the above mentioned legal acts does not expressly provide for any role to be played by LG,<sup>249</sup> LDZ reported that

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- <sup>243</sup> Lietuvos Respublikos geležinkelių transporto kodeksas, Žin., 2004 Nr. 72-2489
- <sup>244</sup> Geležinkelio įmonių (vežėjų) licencijavimo taisyklės, patvirtintos Lietuvos Respublikos vyriausybės 2003 m. birželio 17 d. nutarimu Nr. 783, Žin., 2003, Nr 59-2677.
- <sup>245</sup> LG public railway infrastructure network statement for 2015-2016, paragraph 2.3.2 (ID1195/5): The safety certificate consists of Part A and Part B. Part A is a certificate stating that the railway undertaking (carrier) has implemented the traffic safety control system meeting the Union requirements. This part of the safety certificate, issued in another Member State, is valid in the Republic of Lithuania. Part B is a certificate confirming that the railway undertaking (carrier) complies with the prescribed traffic safety requirements. This part of the safety certificate is issued and is valid only in the Republic of Lithuania.
- <sup>246</sup> Lietuvos Respublikos geležinkelių transporto kodeksas, Žin., 2004 Nr. 72-2489
- <sup>247</sup> Geležinkelio įmonių (vežėjų) ir geležinkelių infrastruktūros valdytojų saugos sertifikavimo taisyklės, patvirtintos Lietuvos Respublikos susisiekimo ministro 2003 m. sausio 23 d. įsakymu Nr. 3-37, Žin., 2003, Nr. 13-520
- <sup>248</sup> Rules for the Safety Certification of Railway Undertakings (Carriers) and the Public Railway Infrastructure Managers, wording valid until 29 September 2011, paragraph 34 (Geležinkelio įmonių (vežėjų) ir geležinkelių infrastruktūros valdytojų saugos sertifikavimo taisyklių, patvirtintų Lietuvos Respublikos susisiekimo ministro 2003 m. sausio 23 d. įsakymu Nr. 3-37, Žin., 2003, Nr. 13-520 (redakcija, galiojusi iki 2011-09-29), 34 punktą): *"For the evaluation of the applications for the safety certificate parts A and (or) B submitted by the undertakings (carriers) the head of the Inspectorate forms a commission of five members: one representative of the Ministry of Transport and Communications, 3 representatives of the Inspectorate and one representative of the manager of the public railway infrastructure"* ("Geležinkelio įmonių (vežėjų), pageidaujančių gauti saugos sertifikato A ir (ar) saugos sertifikato B dalis (-į), pateiktiems prašymams nagrinėti Inspekcijos viršininkas sudaro komisiją iš penkių narių: vieno Lietuvos Respublikos susisiekimo ministerijos atstovo, trijų Inspekcijos atstovų ir vieno viešosios geležinkelių infrastruktūros valdytojo atstovo").
- Licensing Rules for the Railway Companies (Carriers), wording until 1 January 2014, paragraph 21 (Geležinkelio įmonių (vežėjų) licencijavimo taisyklių, patvirtintų Lietuvos Respublikos vyriausybės 2003 m. birželio 17 d. nutarimu Nr. 783, Žin., 2003, Nr 59-2677 (redakcija, galiojusi iki 2014-01-01), 21 punktą): *"The State Railway Inspectorate forms a commission for evaluation of the applications and other questions provided in these Rules (hereinafter – commission). The Commission consists of 5 members: one representative of the Ministry of Transport and Communications, 3 representatives of the State Railway Inspectorate and one representative of the manager of the public railway infrastructure"* ("Valstybinė geležinkelio inspekcija sudaro komisiją paraiškoms ir kitiems šiose Taisyklėse nurodytiems klausimams nagrinėti (toliau vadinama – komisija). Komisija sudaroma iš 5 narių: vieno Susisiekimo ministerijos atstovo, trijų Valstybinės geležinkelio inspekcijos atstovų ir vieno viešosios geležinkelių infrastruktūros valdytojo atstovo").
- <sup>249</sup> Rules for the Safety Certification of Railway Undertakings (Carriers) and the Public Railway Infrastructure Managers (current wording), paragraph 52 (Geležinkelio įmonių (vežėjų) ir geležinkelių infrastruktūros valdytojų saugos sertifikavimo taisyklių, patvirtintų Lietuvos Respublikos susisiekimo ministro 2003 m. sausio 23 d. įsakymu Nr. 3-37, Žin., 2003, Nr. 13-520, 2011, Nr. 121-5730 (aktuali redakcija), 52 punktą): *"Applications are evaluated according the order set by the Inspectorate, which is prepared according to requirements set in the Commission Regulation (EU) No 1169/2010 of 10 December 2010 on a common safety method for assessing conformity with the requirements for obtaining a railway safety authorisation (OL 2010 L 327/13)"* ("Paraiškos vertinamos Inspekcijos nustatyta tvarka, parengta vadovaujantis 2010 m. gruodžio 10 d. Komisijos reglamento (ES) Nr. 1169/2010 dėl bendrojo saugos būdo, skirto įvertinti, kaip laikomasi reikalavimų įgaliojimams geležinkelių saugos srityje gauti (OL 2010 L 327, p. 13) reikalavimais").

in the second half of 2011 negotiations regarding the final wording of its application for a safety certificate were in fact conducted with LG.<sup>250</sup>

- (131) The Rules for Allocation of Public Railway Infrastructure Capacities<sup>251</sup> set the categories of infrastructure services that mirror the list of services in Annex II to Directive 2001/14. The "minimum access package" and access to railway infrastructure objects are to be provided in a non-discriminatory manner.<sup>252</sup> Additional services<sup>253</sup> are to be provided to all applicants if they are already provided by the manager of the public railway infrastructure. However, the non-discrimination requirement does not apply to these services.<sup>254</sup> Finally, ancillary services can be requested by applicants but the public railway infrastructure manager is not obliged to provide them.<sup>255</sup>

#### 5.2.4. Charges

- (132) The charges for services provided by the public railway infrastructure manager are set by the VGI<sup>256</sup> taking into account among other things data provided by LG<sup>257</sup> on costs allocation to the particular services for charges calculation purposes.<sup>258</sup>

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The current wording of the Licensing Rules for the Railway Companies (Carriers) (Geležinkelio įmonių (vežėjų) licencijavimo taisyklės, patvirtintos Lietuvos Respublikos vyriausybės 2003 m. birželio 17 d. nutarimu Nr. 783, Žin., 2003, Nr. 59-2677, 2013, Nr. 130-6666 (aktuali redakcija)) does not provide for applications' evaluation procedures in the VGI. ,

<sup>250</sup> LDZ's response to the 2<sup>nd</sup> RFI, paragraph 28 (ID710/11).

<sup>251</sup> Viešosios geležinkelių infrastruktūros pajėgumų skyrimo taisyklės, patvirtintos Lietuvos Respublikos vyriausybės 2004 m. gegužės 19 d. nutarimu Nr. 611, Žin. 2004, Nr. 83-3019

<sup>252</sup> Rules for Public Railway Infrastructure Capacities Allocation, paragraph 57 (Viešosios geležinkelių infrastruktūros pajėgumų skyrimo taisyklių, patvirtintų 2004 m. gegužės 19 d. Lietuvos Respublikos vyriausybės nutarimu Nr. 611, Žin. 2004, Nr. 83-3019, 57 punktą): *"Upon payment applicants are entitled to get services provided by the public railway infrastructure manager which constitute minimum access package and access to the railway infrastructure objects without any discrimination"* (*"Pareiškėjai turi teisę už atlygį be jokios diskriminacijos gauti viešosios geležinkelių infrastruktūros valdytojo teikiamas paslaugas, kurios sudaro minimalų prieigos paketą, ir prieigą prie geležinkelių infrastruktūros objektų"*).

<sup>253</sup> Rules for Public Railway Infrastructure Capacities Allocation, paragraphs 61 and 61.3 (Viešosios geležinkelių infrastruktūros pajėgumų skyrimo taisyklių, patvirtintų 2004 m. gegužės 19 d. Lietuvos Respublikos vyriausybės nutarimu Nr. 611, Žin. 2004, Nr. 83-3019, 61 ir 61.3 punktai): *"[...] These services are considered as additional and may consist of: [...] Fuel supply, manoeuvring and all other services provided in the public railway infrastructure objects"* (*"[...] Šios paslaugos suprantamos kaip papildomos ir jas gali sudaryti: [...] kuro tiekimas, manevravimas ir visos kitos viešosios geležinkelių infrastruktūros objektuose teikiamos paslaugos"*).

<sup>254</sup> Rules for Public Railway Infrastructure Capacities Allocation, paragraph 61 (Viešosios geležinkelių infrastruktūros pajėgumų skyrimo taisyklių, patvirtintų 2004 m. gegužės 19 d. Lietuvos Respublikos vyriausybės nutarimu Nr. 611, Žin. 2004, Nr. 83-3019, 61 punktą): *"If under the separate agreements the public railway infrastructure manager provided services that are not part of the minimum access package all applicants are entitled to get these services. These services are considered as additional [...]"* (*"Jeigu viešosios geležinkelių infrastruktūros valdytojas pagal atskiras sutartis teikia paslaugas, kurios neįeina į minimalų prieigos paketą, visi pareiškėjai turi teisę šias paslaugas gauti. Šios paslaugos suprantamos kaip papildomos [...]"*).

<sup>255</sup> Rules for Public Railway Infrastructure Capacities Allocation, paragraph 63 (Viešosios geležinkelių infrastruktūros pajėgumų skyrimo taisyklių, patvirtintų 2004 m. gegužės 19 d. Lietuvos Respublikos vyriausybės nutarimu Nr. 611, Žin. 2004, Nr. 83-3019, 63 punktą): *"The public railway infrastructure manager is not obliged to provide ancillary services"* (*"Viešosios geležinkelių infrastruktūros valdytojas pagalbinių paslaugų teikti neprivalo"*).

<sup>256</sup> Railway Transport Code of the Republic of Lithuania Article 25 paragraph 3 (Lietuvos Respublikos geležinkelių transporto kodekso 25 straipsnio 3 dalis, Žin., 2004 Nr. 72-2489): *"Charges for the*

- (133) According to the Rules of the Establishment of the Charge for the Use of Public Railway Infrastructure, charges for the minimum access package and access to railway infrastructure objects are based on the direct costs incurred by the public railway infrastructure manager excluding the cost of depreciation of fixed assets and excluding investment and loan management costs<sup>259</sup>. Charges for additional services provided by the public railway infrastructure manager are based on direct, indirect and operating costs<sup>260</sup> and include a 5% profit margin.<sup>261</sup> Charges for ancillary services are not regulated.

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*services provided by the public railway infrastructure manager are set by State Railway Inspectorate under the Ministry of Transport and Communications* ("Rinkliavų už viešosios geležinkelių infrastruktūros valdytojo teikiamas paslaugas dydžius nustato Valstybinė geležinkelio inspekcija prie Susisiekimo ministerijos").

<sup>257</sup> Rules of the Establishment of the Charge for the Use of Public Railway Infrastructure, paragraph 32.1 (Rinkliavos už naudojimąsi viešąja geležinkelių infrastruktūra nustatymo taisyklių, patvirtintų Lietuvos Respublikos vyriausybės 2004 m. gegužės 19 d. nutarimu Nr. 610, Žin., 2004, nr. 83-3018, 32.1 punktas).

<sup>258</sup> Rules of the Establishment of the Charge for the Use of Public Railway Infrastructure, paragraph 22 (Rinkliavos už naudojimąsi viešąja geležinkelių infrastruktūra nustatymo taisyklių, patvirtintų Lietuvos Respublikos vyriausybės 2004 m. gegužės 19 d. nutarimu Nr. 610, Žin., 2004, Nr. 83-3018, 22 punktas): *"Expenses of the services of the public railway infrastructure manager are calculated according to the expenses accounting method based on activities. Detailed method for cost allocation for services of the public railway infrastructure manager that form minimum access package and access to public railway objects, additional services and other services is set by the public infrastructure manager based on its organisational structure, technologies, accounting systems"* ("Viešosios geležinkelių infrastruktūros valdytojo teikiamų paslaugų išlaidos nustatomos vadovaujantis veiklomis pagrįstos išlaidų apskaitos metodu. Detalių išlaidų pasiskirstymo viešosios geležinkelių infrastruktūros valdytojo teikiamoms paslaugoms, kurios sudaro minimalų prieigos paketą, ir prieigai prie geležinkelių infrastruktūros objektų, papildomoms paslaugoms ir likusioms paslaugoms tvarką nustato viešosios geležinkelių infrastruktūros valdytojas, atsižvelgdamas į savo organizacinę struktūrą, darbų technologijas ir turimas apskaitos sistemas").

<sup>259</sup> Rules of the Establishment of the Charge for the Use of Public Railway Infrastructure, paragraph 25 (Rinkliavos už naudojimąsi viešąja geležinkelių infrastruktūra nustatymo taisyklių, patvirtintų Lietuvos Respublikos vyriausybės 2004 m. gegužės 19 d. nutarimu Nr. 610, Žin., 2004, Nr. 83-3018, 25 punktas): *"Charges for the services provided by the public infrastructure manager forming minimum access package and access to the railway infrastructure objects are based on the direct costs incurred while providing these services. These costs do not include depreciation cost of fixed assets of the public railway infrastructure, investment and loans management cost"* ("Rinkliavos už viešosios geležinkelių infrastruktūros valdytojo teikimas paslaugas, kurios sudaro minimalų prieigos paketą, ir prieigą prie geležinkelių infrastruktūros objektų grindžiamos tiesioginėmis išlaidomis, patiriamomis teikiant šias paslaugas. Į šias išlaidas neįtraukiamos viešosios geležinkelių infrastruktūros ilgalaikio turto nusidėvėjimo sąnaudos, investicinės ir paskolų tvarkymo išlaidos").

<sup>260</sup> Rules of the Establishment of the Charge for the Use of Public Railway Infrastructure, paragraph 29 (Rinkliavos už naudojimąsi viešąja geležinkelių infrastruktūra nustatymo taisyklių, patvirtintų Lietuvos Respublikos vyriausybės 2004 m. gegužės 19 d. nutarimu Nr. 610, Žin., 2004, Nr. 83-3018, 29 punktas): *"Charges for the additional services are based on direct, indirect and operational costs related to provision of these services"* ("Teikiamų papildomų paslaugų rinkliavų dydžiai grindžiami su šių paslaugų teikimu susijusiomis tiesioginėmis, netiesioginėmis ir veiklos išlaidomis").

<sup>261</sup> Rules of the Establishment of the Charge for the Use of Public Railway Infrastructure, paragraph 37 (Rinkliavos už naudojimąsi viešąja geležinkelių infrastruktūra nustatymo taisyklių, patvirtintų Lietuvos Respublikos vyriausybės 2004 m. gegužės 19 d. nutarimu Nr. 610, Žin., 2004, Nr. 83-3018, 37 punktas): *"The charges indicated in paragraph 5 of these Rules are set by the State Railway Inspectorate taking into account all costs of the public infrastructure manager incurred while providing particular additional service, which is provided by the public railway infrastructure manager and 5 % profit"* ("Valstybinė geležinkelių inspekcija rinkliavų, nurodytų Taisyklių 5 punkte, dydžius nustato

### 5.2.5. *Infringement procedures against Lithuania*

- (134) On 9 October 2009, the Commission sent the Republic of Lithuania a Reasoned Opinion regarding its implementation of the Union's railway Directives.<sup>262</sup> In its Reasoned Opinion, the Commission pointed out that the functions of the regulatory body were performed by the Ministry of Transport which also exercised shareholder rights in LG and had an interest in its economic success. The Commission considered that this situation would place the Ministry of Transport in a conflict of interest contrary to the requirements of Article 30 of Directive 2001/14/EC. Those concerns were resolved with the adoption of the law of 22 December 2009 that granted the Lithuanian Competition Council the powers of the regulatory body as required by Article 30 of that Directive.<sup>263</sup>
- (135) The Commission also considered that Lithuania had failed to implement Article 11 of Directive 2001/14/EC by not establishing a performance scheme. This concern was resolved with the notification by Lithuania of a new performance scheme in January 2012.<sup>264</sup> The infringement procedure was closed in 2013.

## 6. DOMINANT POSITION BY AN UNDERTAKING

### 6.1. Undertaking

- (136) According to settled case-law, the Commission must first establish whether LG is an undertaking within the meaning of Article 102 of the Treaty. The concept of an undertaking covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed.<sup>265</sup> Any activity consisting in offering goods or services on a given market is an economic activity.<sup>266</sup> The provision of locomotives, traction and access to the railway infrastructure constitutes an economic activity.<sup>267</sup> LG should therefore be considered as an undertaking for the purposes of Article 102 of the Treaty.

### 6.2. The relevant product market

#### 6.2.1. Principles

- (137) In order to identify the relevant market, the Commission takes into account the existence of competitive constraints. Firms are subject to three main sources of competitive constraints, namely demand substitutability, supply substitutability and

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<sup>262</sup> *įvertinusi visas viešosios geležinkelių infrastruktūros valdytojo išlaidas, patiriamas teikiant tam tikrą viešosios geležinkelių infrastruktūros valdytojo teikiamą papildomą paslaugą, ir 5 procentų pelną*".

<sup>263</sup> SG-Greffe(2009)D/6504 (ID873).

<sup>263</sup> The Law on Railway Sector Reform, Article 9 (Lietuvos Respublikos geležinkelių transporto sektoriaus reformos įstatymas, 2004 m. balandžio 8 d. Nr. IX-2104, Žin., 2004, Nr. 61-2182). The Law was amended on 22 December 2009 (Lietuvos Respublikos geležinkelių transporto sektoriaus reformos įstatymo 2, 9, 12 straipnių ir įstatymo priedo pakeitimo įstatymas, 2009 m. gruodžio 22 d., Nr. XI-618, Žin., 2009, Nr. 159-7204).

<sup>264</sup> Commission internal document (ID872).

<sup>265</sup> See judgment *Commission v Italy*, C-35/96, EU:C:1998:303; judgment *Höfner and Elser*, C-41/90, EU:C:1991:161; judgment *Fédération Française des Sociétés d'Assurances v Ministère de l'Agriculture et de la Pêche*, C-244/94, EU:C:1995:392; judgment *Job Centre*, C-55/96, EU:C:1997:603.

<sup>266</sup> See judgment *Commission v Italy*, C-118/85, EU:C:1987:283; judgment *Commission v Italy*, C-35/96, EU:C:1998:303

<sup>267</sup> See judgment *Deutsche Bahn v Commission*, T-229/94, EU:T:2012:20, paragraph 55 and in judgment *Aéroports de Paris v Commission*, T-128/98, EU:T:2000:290, paragraph 123.

potential competition. From an economic point of view, demand substitution constitutes the most immediate and effective disciplinary force on the suppliers of a given product or service.<sup>268</sup>

- (138) As regards demand substitutability, a relevant product market comprises all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of their characteristics, price and intended use.
- (139) This Decision concerns the following product markets: a) the (upstream) management of railway infrastructure; b) the (downstream) provision of rail transport services for oil products.

#### 6.2.2. *Management of railway infrastructure*

- (140) The management of railway infrastructure relates to the services provided by the railway infrastructure manager such as the access to the railway infrastructure (for example, making train paths available to railway undertakings) and additional railway services necessary for transportation purposes (for example, access to marshalling and shunting yards in order to form a train, or parking and cleaning facilities for rolling stock).
- (141) In *European Night Services*, the General Court held that there is "a market for access to and management of railway infrastructure".<sup>269</sup> The Commission has also defined the access to and management of railway infrastructure as a market in a previous decision.<sup>270</sup>
- (142) The management of railway infrastructure should be distinguished from the provision of rail transport services since these two types of services are not substitutable. Railway undertakings willing to transport oil products can only provide their rail transport services if they have access to the railway infrastructure. They need to contract with the infrastructure manager for access to the railway infrastructure and provision of additional railway services necessary to enable them to provide their rail transport services.
- (143) Moreover, Union legislation establishes a right of access to the railway infrastructure (and additional railway services necessary for transportation) and defines the principles for charging for those services (see section 5).
- (144) The Commission therefore considers that the relevant product market is the market for the management of railway infrastructure.

#### 6.2.3. *Provision of rail transport services for oil products*

- (145) From the demand side, OL needs to transfer a part of its oil products physically by rail from the Refinery to seaports for the purposes of export. This requires the provision of rail transport services, which cannot be substituted by other means of transport.
- (146) Transportation either by road or air does not offer an economically viable alternative for transporting large quantities of oil products. The transportation of oil products by truck is only economically viable when these products are being transported over

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<sup>268</sup> Commission Notice on the definition of relevant market for the purposes of Community competition law (97/C 372/03), paragraph 13.

<sup>269</sup> Case *European Night Services and Others v Commission*, T-374/94, EU:T:1998:198, paragraph 220.

<sup>270</sup> Case *GVG / FS*, COMP/37.685 , paragraph 49.

short distances and in relatively small quantities. Given the quantity of oil products produced by OL for seaborne export (between 4.5 and 5.5 million tonnes per year) transportation by road to a nearby seaport is unrealistic.<sup>271</sup>

- (147) Transportation via a pipeline is not an alternative for the transportation of OL's refined oil products. Although the Refinery has a direct pipeline connected to the sea terminal at Būtingė, this pipeline is used solely for the transportation of crude oil to the Refinery. The technical specifications of pipelines used for the transportation of crude oil are different from those used for refined products and, in any event, OL needs the whole capacity of the pipeline to Būtingė to transport crude oil.<sup>272</sup> OL assessed the possibility of building a new pipeline alongside the existing one but came to the conclusion that a project of that sort would require significant investment and that the need to obtain planning authorisations and environmental permits would leave the feasibility of the project uncertain.<sup>273</sup>
- (148) In previous cases involving mergers, the Commission left open the question of whether the rail freight transport market should be further divided according to the type of goods being transported.<sup>274</sup> It accepted that the market should be sub-segmented according to certain categories of goods that require specific rolling stocks and serve different customer bases.<sup>275</sup> The relevance of the type of goods being transported was also acknowledged with respect to related markets and was adopted for the market for wagon rental services.<sup>276</sup>
- (149) From the demand side, OL requires the transportation of oil products by rail. This service cannot be substituted with other types of rail freight transport services. From the supply side, the transportation of oil by rail can be seen as a service with the following features that are distinct from those characterising the broader market in rail freight transport services:
- (1) Oil transportation by rail requires a special type of wagons, namely tankers.
  - (2) Oil is a dangerous good. To transport it requires a certain level of expertise and the fulfilment of specific conditions in order to obtain the necessary safety certificate. The transportation of dangerous goods like oil is governed by specific legal acts in Lithuania and employees whose work is associated with

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<sup>271</sup> As mentioned by OL: "if OL tried to transport its annual production of around 10 million tonnes by road, it would need to be able to obtain the services of – and handle the logistics of – approximately 1,370 standard 20-tonne trucks per day, or around one truck every minute. This is quite clearly unfeasible". Complaint, footnote 19 (ID0009/10).

<sup>272</sup> There was historically an alternative Družba pipeline from Russia but it was closed in 2006 by the Russian operator Transneft.

<sup>273</sup> OL's reply to the 3<sup>rd</sup> RFI, question 3 (ID0787/4-5). The Lithuanian Minister of Energy subsequently took the decision to launch a regional level special plan for the construction of a main oil pipeline for the Refinery on 25 November 2013. However, work on the project was suspended on 6 March 2015 due to financial reasons and the significant uncertainty around whether regulatory approvals would be obtained. Moreover, for technical reasons such a pipeline would not be suitable for the transport of heavy oil products (that is a significant part of OL's oil products intended for seaborne export). OL's reply to the 6<sup>th</sup> RFI, question 5 (ID1181/6-7).

<sup>274</sup> Case COMP/M.2905 *DB/Stinnes*, paragraph 9; Case COMP/M.5855 *DB/Arriva*, paragraph 151.

<sup>275</sup> Case COMP/M.5844 *DB/Arriva*, paragraph 151.

<sup>276</sup> Case COMP/M.5579 *TLP/Ermewa* pages 5-7.

the transportation of such goods have to pass examinations and hold documents proving their qualifications.<sup>277</sup>

- (3) The difference between the two markets can be highlighted by analysing LG's margins. The margins for the transportation of OL's oil products by rail (which accounts for a significant part of the transportation of oil products by LG in Lithuania) were between [15-25]% (in 2008) and [30-40]% (in 2012).<sup>278</sup> Its margins for the broader rail freight market amounted to [5-15]% in 2008 and [5-15]% in 2012.<sup>279</sup> This seems to indicate that the competitive constraints are likely to be different. LG explains that *"transportation of different types of goods cannot yield the same amount of revenue per 1 tonne of transported goods. Such a difference [of margin] results from a number of factors, including market conditions (competition with other modes of transport or railway operators in other countries), the volume of transportation of goods, the value of goods, and the share of transportation costs in the total price of the goods"*.<sup>280</sup>

- (150) The Commission therefore considers that the second relevant product market in this case is the provision of rail transport services for oil products.

### **6.3. The relevant geographic market**

#### *6.3.1. Principles*

- (151) According to previous Decisions of the Commission and established case-law, the relevant geographic market comprises an area in which the undertaking(s) concerned are involved in the supply and demand of the relevant products or services, being an area where the competition conditions are similar or sufficiently homogeneous and one that can be distinguished from neighbouring areas where the competition conditions are appreciably different.<sup>281</sup>
- (152) The definition of the geographic market does not require the conditions for competition between traders or service-providers to be perfectly homogeneous. It is sufficient that they are similar or sufficiently homogeneous and, accordingly, it is only those areas where the conditions are "heterogeneous" that may not be considered to constitute a uniform market.<sup>282</sup>

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<sup>277</sup> Network Statement for 2013-2014, LG, pages 6-7.

<sup>278</sup> The margin for the transportation of OL's oil products was calculated based on the revenues and costs for the route to Klaipėda. LG's response to the 4<sup>th</sup> RFI, Annex 3 (ID0730), Annex 5 (ID0732). The volumes transported by the three other biggest customers of LG for the transportation of oil products (excluding goods in transit) are significantly lower than the volumes transported for OL. Annex 8 (ID0747).

<sup>279</sup> The margin for the railway freight market is calculated as the ratio between the profit before tax and the total sales revenue of LG's freight transportation directorate. LG's response to the 4<sup>th</sup> RFI, Annex 10, page 1 (ID0725/1).

<sup>280</sup> LG's response to follow-up questions of 13 September 2013, page 1 (ID795/1).

<sup>281</sup> See Commission Decisions in case COMP/37451, Deutsche Telekom AG, paragraph 92-93; and case COMP/38.233, Wanadoo Interactive, paragraph 205. See also judgment in *United Brands v Commission*, C-27/76, EU:C:1978:22, paragraph 44; judgment in *Michelin v Commission*, C-322/81, EU:C:1983:313, paragraph 26, judgment in *Alsattel v Novasam*, C-247/86, EU:C:1988:469, paragraph 15.

<sup>282</sup> See judgment in *Deutsche Bahn v Commission*, T-229/94, EU:T:1997:155, paragraph 92. See also judgment in *AAMS v Commission*, T-139/98, EU:T:2001:272, paragraph 39.

### 6.3.2. *Management of railway infrastructure*

- (153) The management of railway infrastructure is typically a national market in view of the different technical and regulatory requirements in different countries. The railway infrastructure in Lithuania is state-owned and access to it is regulated at the national level, albeit in accordance with Union law, as explained in section 5.
- (154) The Commission therefore considers that the relevant geographic market for the management of railway infrastructure is Lithuania.

### 6.3.3. *Provision of rail transport services for oil products*

- (155) The Commission has taken the view in previous Decisions that, given the different technical and regulatory requirements in different countries, the markets for rail freight transport services tend to be national in scope.<sup>283</sup>
- (156) In its Decisions concerning the air transport, the Commission developed a point-of-origin/point-of-destination ("O&D") pairs approach. This approach has also been applied to the rail sector.<sup>284</sup>
- (157) In this Decision, OL requires its oil products intended for seaborne export to be transported to a nearby seaport that is capable of handling those products. In practice, OL could use the routes mentioned in recital (19). Other routes could not be used as substitutes for the transportation of those oil products.
- (158) The Commission therefore defines the relevant geographic market for the purposes of this Decision based on the O&D pairs. The origin is the Refinery and the destinations are the neighbouring seaports capable of handling oil products namely Klaipėda, Riga and Ventspils. This single O&D market comprised of one origin and three destinations corresponds to the routes mentioned in recital (19).

## 6.4. **LG's dominant position on the relevant market**

### 6.4.1. *Principles*

- (159) According to settled case-law, dominance within the meaning of Article 102 of the Treaty is "*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, its customers and ultimately of consumers.*"<sup>285</sup>
- (160) The notion of independence, which is a special feature of dominance<sup>286</sup>, is related to the level of competitive constraints faced by the undertaking in question. For the finding of a dominance, the undertaking needs not have eliminated all opportunity for competition on the market.<sup>287</sup> However, it must have substantial market power sufficient to have an appreciable influence on the conditions under which competition will develop.<sup>288</sup>

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<sup>283</sup> Case COMP/M.5855 *DB/Arriva*, paragraphs 160-161.

<sup>284</sup> Case COMP/IV/37.685 *Ferrovie dello Stato*, paragraph 159.

<sup>285</sup> See judgment in *United Brands v Commission*, C-27/76, EU:C:1978:22, paragraph 65.

<sup>286</sup> See judgment in *Hoffmann-La Roche v Commission*, C-85/76, EU:C:1979:36, paragraphs 42-48.

<sup>287</sup> See judgment in *United Brands v Commission*, C-27/76, EU:C:1978:22, paragraph 113.

<sup>288</sup> See judgment in *Hoffmann-La Roche v Commission*, C-85/76, EU:C:1979:36, paragraph 39.



(161) Sections 6.4.2 and 6.4.3 analyse LG's dominance with regard to the management of railway infrastructure in Lithuania and the provision of rail transport services for oil products on the relevant O&D market, namely from the Refinery to the seaports of Klaipėda, Riga and Ventspils.

#### 6.4.2. *Management of railway infrastructure*

(162) According to Lithuanian law, the public railway infrastructure is exclusively owned by the Lithuanian state, while the management of that infrastructure is entrusted exclusively to LG – see section 5.2.1. Thus, LG currently benefits from a statutory monopoly on the market for the management of railway infrastructure and enjoys a dominant position on that market.

#### 6.4.3. *Provision of rail transport services for oil products*

(163) Although this Decision concerns an abuse of dominant position in the upstream market of the management of railway infrastructure in Lithuania, the Commission also assessed the dominance of LG in the downstream market of the provision of rail transport services for oil products.

(164) The Commission analysed the volumes of oil transported from the Refinery to the three neighbouring seaports of Klaipėda, Riga and Ventspils.<sup>289</sup> The analysis shows that OL's oil products intended for seaborne export are almost exclusively transported by LG to Klaipėda. LDZ transported very small quantities to the Latvian seaports, but these remained negligible compared to the quantities of oil products transported by LG.<sup>290</sup> Except for tiny quantities, LG was in 2008 and still is the only company providing rail transport services for oil products for the relevant O&D market.

(165) As explained in section 7.4.2, the position of a potential competitor such as LDZ in the market for the provision of rail transport services for oil products from the Refinery to the seaports of Klaipėda, Riga and Ventspils, deteriorated significantly following removal of the Track.

(166) LG therefore enjoys a dominant position on the market for the provision of rail transport services for oil products for the relevant O&D market (namely from the Refinery to the seaports of Klaipėda, Riga and Ventspils).

(167) Even if the market were defined as the provision of rail transport services for oil products (or even as the provision of rail transport services for freight in general) in Lithuania, the assessment of LG's dominant position would remain unchanged. LG was in 2008 and still is today the only company providing rail transport services for oil in Lithuania and for freight generally in Lithuania (see recital (113)).

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<sup>289</sup> For the purpose of this analysis, volumes of oil transported on parts of the routes mentioned in paragraph (19) but whose destination is not one of the three seaports (for instance, OL's products exported to Latvia or Estonia) were not taken into account since they are not part of the relevant geographic market as defined in Section 6.3.3.

<sup>290</sup> The volumes transported by LDZ from the Refinery to the Latvian seaports in 2008, 2009 and 2010 amount to 0.228, 0.006 and 0.038 million tonnes compared to the 4.5-5.5 million tonnes transported by LG to the seaport of Klaipėda. LDZ's response to the 2<sup>nd</sup> RFI, question 10 (ID0710/6).

## 6.5. Dominance in a substantial part of the internal market

- (168) It is established case-law that a Member State is considered to be a substantial part of the internal market and a dominant position in a Member State is caught by Article 102 of the Treaty.<sup>291</sup> The Court of Justice has also ruled that where a statutory monopoly is granted to an undertaking in respect of a specific territory, then "*those national provisions create a dominant position (...) in a substantial part of the common market*".<sup>292</sup>
- (169) LG enjoys a statutory monopoly in Lithuania over the management of the railway infrastructure and a *de facto* monopoly in the rail freight market in Lithuania, including the the provision of rail transport services for oil products, thus holding a dominant position in a substantial part of the internal market.

## 7. THE ABUSE

### 7.1. Principles

- (170) Article 102 of the Treaty prohibits any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it, insofar as the abuse may affect trade between Member States.
- (171) The fact that an undertaking holds a dominant position is not in itself contrary to the competition rules. However, an undertaking enjoying a dominant position is under a special responsibility, irrespective of the causes of that position, not to allow its conduct to impair genuine undistorted competition in the internal market.<sup>293</sup> The scope of this special responsibility has to be considered in the light of the specific circumstances of each case. The special responsibility of a dominant undertaking not to allow its conduct to impair genuine, undistorted competition in the internal market especially concerns any conduct, by commission or omission, which the undertaking decides on its own initiative to adopt.<sup>294</sup>
- (172) The Court of Justice defined the concept of abuse under Article 102 of the Treaty in the following terms: "*The concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition 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*".<sup>295</sup>

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<sup>291</sup> See for example the judgments in *BRT v SABAM*, Case 127/73, ECLI:EU:C:1974:25, paragraph 5; *Deutsche Bahn v Commission*, T-229/94, ECLI:EU:T:1997:155; *Irish Sugar v Commission*, T-228/97, ECLI:EU:T:1999:246, paragraph 99.

<sup>292</sup> See judgments in *Centre d'insémination de la Crespelle v Coopérative de la Mayenne*, C-323/93, EU:C:1994:368, paragraph 17 and judgment in *Höfner and Elser v Macrotron*, C-41/90, EU:C:1991:161, paragraph 28.

<sup>293</sup> See Judgments in *Michelin v Commission*, C-322/81, EU:C:1983:313, paragraph 57 and judgment in *Clearstream v Commission*, T-301/04, EU:T:2009:317, paragraph 132.

<sup>294</sup> Judgment in *TeliaSonera*, C-52/09, EU:C:2011:83, paragraph 53.

<sup>295</sup> Judgment in *Hoffmann-La Roche v Commission*, C-85/76, EU:C:1979:36, paragraph 91.

- (173) In *Tetra Pak II*, the Court of Justice highlighted that the fact that a dominant Company's abusive conduct has its adverse effects on a market distinct from the dominated one does not detract from the applicability of Article 102 of the Treaty.<sup>296</sup>
- (174) Article 102 of the Treaty is aimed not only at practices which may cause prejudice to consumers directly, but also at those which are detrimental to them through their impact on an effective competition structure.<sup>297</sup> According to settled case-law, the list of abusive practices contained in Article 102 of the Treaty is not an exhaustive list of the methods of abusing a dominant position prohibited by the Treaty.<sup>298</sup>
- (175) In its examination of the conduct of a dominant undertaking and for the purposes of identifying any abuse of a dominant position, the Commission is obliged to consider all of the relevant facts surrounding that conduct.<sup>299</sup> In that analysis, the Commission is entitled to refer to subjective factors, such as the motives or intent of the dominant undertaking. It is under no obligation to establish the existence of an anti-competitive intent on the part of the dominant undertaking. Moreover, existence of an intention to compete on the merits, if established, would not in itself militate against the finding of an abuse.<sup>300</sup>
- (176) According to the case-law of the Union courts, it is "*open to a dominant undertaking to provide justification for behaviour liable to be caught by the prohibition set out in Article [102]*".<sup>301</sup> Subsequently, "*it then falls to the Commission, where it proposes to make a finding of an abuse of a dominant position, to show that the arguments and evidence relied on by the undertaking cannot prevail and, accordingly, that the justification put forward cannot be accepted*".<sup>302</sup> Placing the burden of showing an objective justification on the dominant undertaking is all the more necessary where the undertaking is better placed to demonstrate such a justification,<sup>303</sup> and where the

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<sup>296</sup> Judgment in *Tetra Pak v Commission* ("Tetra Pak II"), C-333/94 P, EU:C:1996:436, paragraph 25. In that regard, judgments in *Istituto Chemioterapico Italiano and Commercial Solvents v Commission*, Joined Cases C-6/73 and C-7/73, EU:C:1974:18 and judgment in *CBEM v CLT and IPB*, C-311/84, EU:C:1985:39, provide examples of abuses having effects on markets other than the dominated markets. In judgments in *AKZO v Commission*, C-62/86, EU:C:1991:286 and judgment in *BPB Industries and British Gypsum v Commission*, T-65/89, EU:T:1993:31, the Union Courts found certain conduct on markets other than the dominated markets and having effects on the dominated markets to be abusive.

<sup>297</sup> Judgments in *British Airways v Commission*, C-95/04, EU:C:2007:166, paragraphs 106-107 and judgment in *Europemballage and Continental Can v Commission*, C-6/72, EU:C:1973:22, paragraph 26.

<sup>298</sup> See, for example, judgment in *Compagnie Maritime Belge Transports and Others v Commission*, C-395/96 P and C-396/96 P, EU:C:2000:132, paragraph 112; judgment in Case C-52/09, *TeliaSonera*, EU:C:2011:83, paragraph 26.

<sup>299</sup> Judgment in Case C-95/04 P, *British Airways*, EU:C:2007:166, paragraph 67; Case C-549/10 P, *Tomra v Commission*, EU:C:2012:221, paragraph 18.

<sup>300</sup> Case C-549/10 P, *Tomra v Commission*, EU:C:2012:221, paragraphs 19 et seq; Case T-301/04, *Clearstream*, EU:T:2009:317, paragraph 142.

<sup>301</sup> Case C-23/14 *Post Danmark*, ECLI:EU:C:2015:651, paragraph 47. See also, for example, Case C-95/04 P *British Airways*, ECLI:EU:C:2007:166, paragraph 69; Case T-321/05 *AstraZeneca*, ECLI:EU:T:2010:266, paragraph 686; and the Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ C 45, 24.2.2009, p. 7, paragraph 28.

<sup>302</sup> Case T-201/04 *Microsoft*, ECLI:EU:T:2007:289, paragraph 1144.

<sup>303</sup> Case T-321/05 *AstraZeneca*, ECLI:EU:T:2010:266, paragraph 686: "*although the Commission is required to take into account a possible objective justification for conduct which may constitute an abuse of a dominant position, it is still necessary for the undertaking concerned to raise that objective*

Commission has already shown "*factual evidence [which] may be of such a kind as to require the other party to provide an explanation or justification, failing which it is permissible to conclude that the burden of proof has been discharged*".<sup>304</sup>

## **7.2. Application to this Decision**

- (177) The Commission considers that LG has abused its dominant position on the Lithuanian market for the management of railway infrastructure by removing without objective justification the Track in the legal and factual circumstances described below thereby giving rise to potential anti-competitive effects on the relevant market for the provision of rail transport services for oil products between the Refinery and the seaports of Klaipėda, Riga and Ventspils by raising barriers to market entry.
- (178) The Commission considers that LG has abused its dominant position on the Lithuanian market for the management of railway infrastructure. In the legal and factual circumstances described below removing the Track was recourse to methods different from those which condition normal competition (section 7.3.2 below) thereby giving rise to potential anti-competitive effects of foreclosing competition on the market for the provision of rail transport services for oil products between the Refinery and neighbouring seaports by raising market entry barriers (section 7.4 below) without there being an objective justification (section 7.5 below).

## **7.3. The removal of the Track**

### *7.3.1. As regards the actual occurrence of the Deformation*

- (179) According to LG, the Track was entirely removed as of 3 October 2008 after discovering the Deformation on 2 September 2008. In its submissions OL doubted the occurrence of the Deformation proffering an expert report arguing that it was technically impossible for it to occur the way reported by LG.<sup>305</sup> LG maintained its position and supporting it with its own expert's report.<sup>306</sup>
- (180) The Commission notes the following facts that raise doubts about the actual occurrence of the Deformation:
- (1) Although certain defects in the superstructure had been detected and repaired on the Track in the course of 2008, the Deformation, a track buckling, which occurs rather rarely (see footnote 58), was detected one day after the unilateral termination by LG of its 1999 Agreement with OL. The 1999 Agreement provided that OL had a right to use the Short Route to Latvia; after the termination of the 1999 Agreement it could have been argued by LG that this obligation had also expired (see recitals (33) to (35)). This issue was indeed discussed in the arbitration procedures between LG and OL (see section 4.10). LG motivated its request to remove the reconstruction of the Track from the priority list for Union funding by expressing the view that under the decision of

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*ground of justification during the administrative procedure and put forward arguments and evidence in support thereof. ... That is more specifically the case where the undertaking concerned is alone aware of that objective justification or is naturally better placed than the Commission to disclose its existence and demonstrate its relevance".*

<sup>304</sup> Case C-204/00 P *Aalborg Portland*, ECLI:EU:C:2004:6, paragraph 79.

<sup>305</sup> Complaint, paragraph 118 (ID0009/34), OL's Observations on the SO, paragraphs 40-47 (ID0999/10).

<sup>306</sup> LG's Comments on OL's Observations, paragraphs 31-32 (ID1014/9).

the arbitration court it had "the right not to reconstruct" the Track (see recital (83)).

- (2) Although trains were passing on the Track on a daily basis at reduced speed (see footnote 61), with the last train passing a few hours before the Deformation was detected, the prior warnings did not find that such a serious problem was developing on the Track. The Deformation was detected in the course of a regular monthly inspection (see recital (32)). Therefore, the Deformation must have occurred or reached a critical condition by coincidence just before the regular monthly inspection was made.
  - (3) LG informed OL about the suspension of traffic on the Track 3 days after its discovery and only after OL had enquired about a train carrying its cargo that was re-directed without explanation. (see recitals (54) and (55)).
- (181) Nevertheless, the deterioration of the segment in which the Deformation was detected, that is 400 metres after the 18<sup>th</sup> kilometre mark, had already been documented in September 2004 and in May 2008 the speed limit on it had been reduced further (see recitals (30) and (31)). The occurrence of the Deformation was recorded in various written documents produced by LG. In those circumstances, and in spite its doubts, the Commission does not consider that there is enough evidence to set aside LG's allegation as regards the actual occurrence of the Deformation. The Commission therefore bases its analysis on the assumption that the Deformation occurred as reported by LG.

#### 7.3.2. *Recourse to methods different from those which condition normal competition*

- (182) Even on the basis of the assumption that the Deformation had occurred as reported by LG, the Commission considers that by removing the Track entirely LG has had recourse to methods different from those which condition normal competition.

##### 7.3.2.1. LG was aware of OL plans to switch to the Latvian seaports using LDZ's services

- (183) Documents seized at LG's premises show that LG had known of OL's plans to switch to a Latvian seaport using LDZ's services before it terminated the 1999 Agreement and it was contemplating pre-emptive changes in a new agreement with OL (see recitals (24) to (26)).

##### 7.3.2.2. The removal of the Track by LG was done in great haste without securing the necessary funds and without taking any of the normal preparatory steps for its reconstruction.

- (184) The Commission investigated why LG removed the Track already in October 2008 without securing the necessary funds and without taking any of the normal preparatory steps for its reconstruction.

- (185) In response to the Commission's request for information, LG stated that –

*"The Lithuanian leg of [the Track] was removed by LG as described above, in order to perform reconstruction works and reopen it for railway traffic as soon as possible, because this track was important for one of the major clients of LG, namely OL. LG was acting under persistent pressure from OL to speed up*

*the reconstruction on this track and therefore made best efforts to perform the necessary works as soon as possible.*"<sup>307</sup>

- (186) The Commission notes that LG considered at the time that it did not have sufficient funds to renovate the Track.<sup>308</sup> It was obvious that a protracted administrative procedure would have to be completed before funds could be secured<sup>309</sup> for a project of that magnitude.<sup>310</sup> According to the arrangements set by the Lithuanian state at the time, major infrastructure works were financed with Union funds while LG's limited resources were to be used only for routine maintenance.<sup>311</sup> A request for Union funding had to be supported by preparatory steps including a feasibility study (see recital (67)). Indeed, LG's Deputy Director General in his letter of 18 September 2008 (see recital (48)), indicated that the first step in repairing the Track would be the preparation of a feasibility study, a step that ultimately required two years to be accomplished (see recital (81) ). The final decision whether to allocate Union structural funds to a project had to be taken by the Ministry of Transport. There was therefore no guarantee that funds would be secured and no urgency in removing the Track. Indeed, although there are several tracks in Lithuania on which traffic is suspended,<sup>312</sup> LG was not able to provide any example of a track that has been removed before renovation works could start.<sup>313</sup>
- (187) The removal of the entire Track would not have significantly saved time when actual reconstruction works could have finally started after the conclusion of all preliminary

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<sup>307</sup> LG's response to the 1<sup>st</sup> RFI, paragraph 14 (ID0347/11-12) "*Geležinkelio kelio Bugeniai-Rengė Lietuvoje esanti atkarpa buvo išardyta, kaip aprašyta aukščiau, siekiant kuo greičiau atlikti kapitalinio remonto darbus ir atnaujinti eismą minėtu kelio ruožu, kadangi ši kelio atkarpa buvo svarbi vienam didžiausių LG klientų - OL. LG patyrė nuolatinį OL spaudimą paskubinti šio geležinkelio kelio kapitalinį remontą, todėl dėjo visas pastangas darbus atlikti kiek įmanoma greičiau*". See also LG's response to the 1<sup>st</sup> RFI, paragraph 26 (ID0347/17). In its letter to the Lithuanian government and in its internal correspondence LG explained that "*Siekiant kuo greičiau atstatyti kelio parametrus ir atnaujinti traukinių eismą minėto ruožo keliais, pradėti kelio kapitalinio remonto darbai*" ("*in order to speed up the restoration of the track parameters and the renewal of train traffic, in the said section, major repair works has commenced.*") See for example: LG's response to the 3<sup>rd</sup> RFI, annex 9, letters of 27 and 30 January 2009 (ID0442 and ID0443).

<sup>308</sup> LG's response to the 1<sup>st</sup> RFI, paragraph 33-34 (ID0347/19-20); LG's response to the 2<sup>nd</sup> RFI, paragraph 30 (ID0400/12); seized document LK3, page 4/5 (ID0584/4).

<sup>309</sup> LG's first planned step was to request the Ministry of Transport to allocate funds for a feasibility study (seized documents EL1, page 27/55 (ID0513/29) and LG's response to the 1<sup>st</sup> RFI, annex 6, page 2 (ID0824/2)). It took LG more than 18 months to submit the formal project proposal to the Ministry of Transport, a duration which according to LG is normal for such procedures in Lithuania (LG's response to the 3<sup>rd</sup> RFI, paragraph 29 (ID0433/14)) and therefore could have been anticipated at the time. In fact, it was shorter than the required period because the feasibility study that must support such proposals was completed only 8 months later. In response to a Commission's request for information LG stated that it expected works on the Track to finish in the 4<sup>th</sup> quarter of 2012 (LG's response to the 1<sup>st</sup> RFI, paragraph 30 (ID0347/18), 4 years after the removal of the Track. See also seized document ES2 page 4/5 (ID0532/4) and seized document ES10, page 2/2 (ID0817/2).

<sup>310</sup> This conclusion is reached by comparing the length of "major works" reported in LG's annual reports: 85 kilometres in 2007 (ID0855/19); 15.7 kilometres in 2008 (ID0856/20); 0.26 kilometres in 2009 (ID0857/17), 5.9 kilometres in 2010 (ID0858/19).

<sup>311</sup> See recital (186) and LG's response to the 1<sup>st</sup> RFI, paragraph 33 (ID0347/31), LG's response to the 2<sup>nd</sup> RFI, paragraphs 27-31 (ID0400/11-13); LG's response to the 3<sup>rd</sup> RFI, paragraph 6 (ID0433/4).

<sup>312</sup> LG's response to 1<sup>st</sup> RFI, paragraph 23.1-23.3 and 24 (ID0347/14-15).

<sup>313</sup> LG's response to the 1<sup>st</sup> RFI, paragraph 22 (ID0347/14). The track going through Skuodas, for example, has not been operated since 1997 but the tracks were not removed; LG's response to the 1<sup>st</sup> RFI, paragraph 24 (ID0347/15).

administrative steps. LG estimated that construction works *"at maximum speed"* would require 10 months<sup>314</sup> while the removal of the Track took 3 to 4 weeks.<sup>315</sup>

- (188) The Commission asked LG *"how the dismantling of [the Track] in October 2008 could 'speed up' the reconstruction of [the Track] considering that a lengthy and uncertain procedure of applying for the necessary funds was still to be followed?"*<sup>316</sup> In its response, LG reiterated, in essence, its position that the removal of the Track was a necessary element of its reconstruction and was meant to reduce the time for the performance of the remaining works. It added that the procedure is not lengthy but rather *"simple"*<sup>317</sup> and that –

*"When making the request for financing, LG acted in reasonable expectation that the necessary funds were actually granted for this project [...]. This expectation was also supported by the fact that LG was asked to present a feasibility study for this project."*<sup>318</sup>

- (189) In its Response to the SO, LG repeated its argument that it removed the Track with the intention of repairing it as soon as possible. It argued that the removal of the Track was not an extraordinary measure but a necessary measure before the Short Route could have been thoroughly repaired and traffic could resume.<sup>319</sup>
- (190) However, as noted in recital (62), LG made its request for funding on 2 October 2008 in a short letter to the Minister of Transport asking for LTL 620 million (approximately EUR 179.71 million) for the renovation of eight different tracks, including the Track. No specific representations were made with respect to the Track. There could have been no doubt that the request could not have been approved before following normal procedure. The normal procedure was expected to be protracted and its result could not be guaranteed (see recital (186)). Nevertheless, LG started removing the Track as of the next day, 3 October 2008, without even waiting for the response of the Minister of Transport.
- (191) Indeed, the Ministry of Transport's response of 28 October 2008 was that, since those projects had not been approved in the past, no provision for their financing was made. The Ministry of Transport reminded LG that Union funds were still available and invited LG to identify projects for financing (see recital (62)). The success of the funding request depended on the results of a feasibility study and the decision of the Ministry of Transport. In those circumstances, LG could not have had a *"reasonable expectation"* that funds would be allocated within a short time or, indeed, allocated at all. The Commission considers therefore that in its letter of 2 October 2008 LG did not make a genuine effort to obtain funding for the renovation of the Track.
- (192) The Commission considers that LG's subsequent actions also demonstrate that it was not seeking in reality to rebuild the Track. LG prepared notes to the Lithuanian government arguing against the reconstruction of the Track (see discussion on seized documents LK7, VJ16 and ES9/VJ6, recitals (92) to (96) and (103)). LG

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<sup>314</sup> See references at footnote 140. In another document LG estimated that construction works would require 12 months, see inspection document ES10, page 2/2 (ID0817/2).

<sup>315</sup> See footnote 93.

<sup>316</sup> LG's response to the 4<sup>th</sup> RFI, question 2 (ID0749/6-7).

<sup>317</sup> LG's response to the 4<sup>st</sup> RFI, paragraph 18 (ID0749/8).

<sup>318</sup> LG's response to the 4<sup>th</sup> RFI, paragraph 19 (ID0749/8).

<sup>319</sup> LG's response to the SO, paragraphs 210-223 (ID1003/55-58).

recommended adding the renovation of the Track to the priority funding list only because it was instructed to do so by the government (see recital (67)). In addition, following the Second Arbitration Decision (see section 4.10), LG requested to move the reconstruction project to the reserve list, which in all likelihood meant that no funds would be allocated to it (see recital (83) and (84)).

- (193) The Commission therefore finds that LG was not able to explain why it removed the Track in great haste, without first securing the necessary funds and without taking any of the preparatory steps for the Track's reconstruction.

#### 7.3.2.3. The removal of the Track was contrary to standard practice

- (194) The removal of the Track by LG is highly unusual also when considering the practice in the rail industry.
- (195) Firstly, as noted in recital (186), although there are several tracks in Lithuania on which traffic is suspended, LG was not able to provide any example of a track that was removed before renovation works could start.
- (196) Secondly, the Commission also sent requests for information to the railway infrastructure managers in the two other Baltic countries, Estonia and Latvia. The Estonian infrastructure manager was able to provide only one example for dismantling a long stretch of track. In that case, the track was removed because the route itself was closed, abandoned and replaced by a newly laid route.<sup>320</sup> The Estonian infrastructure manager also indicated that works requiring the dismantling of tracks are not performed on the entire track simultaneously but in intervals that interrupt traffic for a period of up to 12 hours.<sup>321</sup> Major repair works, including the removal of a track, would not commence before the administrative procedure to approve them has been concluded.<sup>322</sup>
- (197) According to the Latvian infrastructure manager, LDZ, a track would as a general rule be removed only after it has not been used for many years and there is no reason to believe that it would be re-used again.<sup>323</sup> In the two examples provided, the tracks were removed after 10 and 13 years of closure.<sup>324</sup> Similar to the practice in Estonia, in Latvia the removal of tracks during repair works on a route is carried out step by step.<sup>325</sup> Such works do not commence before the administrative procedure had been concluded and funding secured.<sup>326</sup>
- (198) In its Response to the SO, LG argued that the immediate removal of the entire Track was not an exceptional measure. To support this view, LG referred to an example in Poland where one of the sections of the Warsaw-Białystok-Lithuanian border line was closed for three years at the end of 2014 for modernisation works.<sup>327</sup> However, contrary to LG's practice in 2008, the section was closed and works commenced only after funds for its reconstruction had been made available and all the preparatory

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<sup>320</sup> EVR's response to RFI, paragraphs 4-6 (ID815/2).

<sup>321</sup> EVR's response to RFI, paragraphs 18-19 (ID815/4-5).

<sup>322</sup> EVR's response to RFI, paragraphs 28-29 (ID815/5).

<sup>323</sup> LDZ's response to the 3<sup>rd</sup> RFI, paragraph 1 (ID831/2).

<sup>324</sup> LDZ's response to the 3<sup>rd</sup> RFI, paragraph 5 (ID831/3).

<sup>325</sup> LDZ's response to the 3<sup>rd</sup> RFI, paragraph 7 (ID831/3).

<sup>326</sup> LDZ's response to the 3<sup>rd</sup> RFI, paragraph 10-11 (ID831/4).

<sup>327</sup> LG's response to the SO, paragraph 222 (ID1003/57).



steps required for its reconstruction had been taken.<sup>328</sup> It follows that the Polish example referred to by LG illustrates what appears to be the normal practice in the rail industry and emphasises how unusual it was to remove the Track at such haste.

7.3.2.4. LG was concerned that if the Track was rebuilt, LG would lose OL's business

(199) Documents seized at LG's premises show that LG was concerned that should the Track be reconstructed LDZ would enter the Lithuanian market, that OL would switch to a Latvian seaport using the Short Route to Latvia and that it would lose OL's business (see section 4.11).

7.3.2.5. LG took steps to convince the Lithuanian government not to rebuild the Track

(200) LG stated that it removed the Track with the intention of reconstructing it and resuming traffic as soon as possible (see recital (185)). However by removing the Track it made the limited repair option (see recital (48)) impossible although it was not guaranteed that funds would be available for complete renovation in which case a limited repair option might have been considered.

(201) Moreover, LG took steps to convince the Lithuanian government not to rebuild the Track (see recitals (92) to (96), (103)). According to LG's own statement, it recommended adding the renovation of the Track to the priority funding list only because it was instructed to do so by the government Government (see recital (67)). It later recommended to the Lithuanian government to reverse its decision and remove the project from the priority funding list after an arbitration court had found that LG did not infringe its obligations towards OL with respect to the Track (see recital (83)).

#### **7.4. Potential Effects on Competition**

(202) By removing the Track, LG, which holds a statutory monopoly on the upstream market for the management of railway infrastructure in Lithuania, deprived its competitor, LDZ, of the shortest and most direct route from the Refinery to the Latvian seaports of Riga and Ventspils. This behaviour, which did not constitute competition on the merits, was capable of having anti-competitive effects in the downstream market for rail transport services for oil products from the Refinery to the seaports of Klaipėda, Riga and Ventspils.

(203) More specifically, the Commission concludes that:

(1) Prior to the removal of the Track, LDZ had a credible opportunity to offer rail transport services for OL's oil products from the Refinery to a nearby seaport, and to exert competitive pressure on LG (see section 7.4.1).

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The works were part of the Rail Baltica project, whose various steps go as far back as 2000. Environmental authorisations, for example, were issued in 2009 (ID01253, available on the website of the European Investment Bank <http://www.eib.org/infocentre/register/all/50191913.pdf>) and 2011 (ID01252, available on the website of the European Investment Bank <http://www.eib.org/infocentre/register/all/51362001.pdf>); funds were secured in 2013 (ID01259/3, available on the website of the Polish rail undertaking PKP Polskie Linie Kolejowe S.A. [http://www.plk-inwestycje.pl/fileadmin/Mapa\\_-\\_Inwestycje/Rejestr\\_Umow\\_O\\_Dofinansowanie\\_2016\\_01\\_21.pdf](http://www.plk-inwestycje.pl/fileadmin/Mapa_-_Inwestycje/Rejestr_Umow_O_Dofinansowanie_2016_01_21.pdf)); construction permits in 2013 and 2014 (ID 1258/2, 8, 13, available on the website of the Wołomin municipality <http://archiwum.wolomin.org/moder-linii-kolej/modernizacja-linii-kolejowej-e-75-rail-baltica/>). Work started only in May 2014.

- (2) After the removal of the Track, LDZ had no more opportunity to offer competitive rail transport services for OL's oil products from the Refinery to a nearby seaport so as to exert competitive pressure on LG (see section 7.4.2).
  - (3) The result was a foreclosure of the market for the provision of rail transport services for oil products from the Refinery to the seaports of Klaipėda, Riga and Ventspils (see section 7.4.3).
- (204) In this section, the following terminology is used to refer to the different routes which could be used to transport OL's oil products intended for seaborne export as described in recital (19):
- (1) the route to Klaipėda via Kuziai ("Route to Klaipėda");
  - (2) the routes to the two Latvian seaports via the Track ("Short Route to Riga" and "Short Route to Ventspils", collectively referred as "Short Routes to the Latvian seaports"); and
  - (3) the routes to the two Latvian seaports via Joniškis ("Long Route to Riga" and "Long Route to Ventspils", collectively referred as "Long Routes to the Latvian seaports").

7.4.1. *Prior to the removal of the Track, LDZ had a credible opportunity to offer rail transport services for OL's oil products and to exert competitive pressure on LG*

- (205) Section 4.3 demonstrated that OL, LG and LDZ were of the opinion that a switch by OL to the Short Routes to the Latvian seaports was a credible option that exerted a competitive constraint on LG. OL and LDZ spent two years exploring this option in negotiations and the chair of LDZ's board was quoted as saying that the negotiations had the effect of bringing pressure to bear on LG. LDZ even made an application for a licence to operate trains on the Lithuanian leg of the Short Routes to the Latvian seaports, but not on (the whole Lithuanian leg of) the Long Routes to the Latvian seaports. Negotiations stopped when it became clear that it was unlikely that the Track would be rebuilt. Subsequently, LDZ withdrew its licence request (see recitals (22), (23) and (27)). Both OL and LDZ maintained this position in their submissions during the Commission's investigation.<sup>329</sup>
- (206) The evidence on the file further shows that LG was seriously concerned about such a switch by OL to LDZ and those concerns were documented from the beginning of the negotiations between OL and LDZ before the Track was removed (see recitals (24) to (26)) and up to the day before the Commission's unannounced inspection of LG's premises when the investigation became known to LG (see section 4.11).
- (207) The evidence therefore demonstrates that, by removing the Track, LG deprived OL of a credible opportunity to switch to LDZ for the transportation to its oil products intended for seaborne export. Nevertheless, the Commission also conducted an analysis of the capacity and costs of the routes.
- (208) The Commission's analysis confirms that:

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<sup>329</sup> OL maintained this position in its complaint and subsequent submissions. In response to the Commission's RFI, LDZ stated that "transportation through Bugeniai-Renge track (that is, the Track and therefore the Short Route to the Latvian seaports) could be feasible technically and economically"; LDZ's response to the 1<sup>st</sup> RFI, question 11 (ID0327/7).

- (1) Based on technical and capacity considerations, OL's oil products could have been transported from the Refinery to the Latvian seaports.
- (2) The Latvian seaports were a credible alternative to the port of Klaipėda for the handling of OL's oil products.
- (3) For OL, rail transport cost was the main criterion in choosing a route for the transportation of its oil products.
- (4) Rail transport costs depend on the distance of the route and the Member State where it is located.
- (5) LDZ could have made a competitive offer on the Short Routes to the Latvian seaports.

7.4.1.1. Based on technical and capacity considerations, OL's oil products could have been transported from the Refinery to the Latvian seaports

(209) The transportation of large volumes of oil products on the Short Routes or the Long Routes to the Latvian seaports was technically feasible:<sup>330</sup>

- (1) On the Lithuanian side, LG confirmed that "*there are no circumstances which may affect the transportation of oil products at these routes*".<sup>331</sup>
- (2) On the Latvian side, LDZ confirmed that there are no special considerations for the selection of routes in Latvia for the transport of oil products.<sup>332</sup>
- (3) Oil products have been consistently transported by rail on these routes with varying volume levels.<sup>333</sup>

(210) None of the Short Routes or Long Routes to the Latvian seaports has experienced potential capacity problems:

- (1) On the Lithuanian side, LG confirmed that "*the railway infrastructure was not overloaded and there is no threat of this kind [of potential saturation of the route's capacity] at any of the aforementioned route*".<sup>334</sup>
- (2) On the Latvian side, LDZ confirmed that on its side of the routes, there were no capacity constraints either and that it was possible to transport large volumes (that is several million tonnes per year) of refined oil products.<sup>335</sup>

(211) In its response to the SO, LG argued that the Lithuanian leg of the Short Routes to the Latvian seaports "*was not capable of transporting the total amounts of cargo required by OL because physical and load constraints for cargo transportation were imposed by an International Traffic Agreement, between CIS, Baltic States, Bulgaria and Finland*".<sup>336</sup> As a consequence of that agreement, only four trains per day could

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<sup>330</sup> Absent the removal of the Track for the Short Routes to the Latvian seaports.

<sup>331</sup> LG's response to the 4<sup>th</sup> RFI, paragraph 23 (ID0749/11).

<sup>332</sup> LDZ's response to the 2<sup>nd</sup> RFI, question 4 (ID0710/2).

<sup>333</sup> The yearly volume of OL's oil products transported on the Lithuanian part of the Short Routes to the Latvian seaports varied between 0.5 million tonnes in 2006 and 0.9 million tonnes in 2008. The yearly volume of OL's oil products transported on the Lithuanian part of the Long Routes varied between 0.3 million tonnes in 2007 and 1.2 million tonnes in 2011, this volume mainly relating to oil products for export to Latvia and Estonia. LG's response to the 4<sup>th</sup> RFI, Annex 3 (ID0730).

<sup>334</sup> LG's response to the 4<sup>th</sup> RFI, paragraph 22 (ID0749/11).

<sup>335</sup> LDZ's response to the 2<sup>nd</sup> RFI, question 3 (ID0710/2).

<sup>336</sup> LG's response to the SO, paragraphs 259 and 260 (ID1003/67).

pass along the Track in each direction, which would not have been enough to switch the entire production of OL's oil products intended for seaborne export to the Latvian seaports.

- (212) The Commission notes that, based on LG's own estimations, it can be inferred that 78% of OL's oil products intended for seaborne export could have been transported on the Track in 2008.<sup>337</sup> That would have been enough to exert competitive pressure on LG.
- (213) The Commission nevertheless analysed the agreement in detail. On 20 March 1992, the Commonwealth of Independent States ("CIS") established a Council for Railway Transport "*for coordination of rail transport at the international level*".<sup>338</sup> LG, under its agreement of 18 February 1993 with the Council for Railway Transport, "*is participating in the work of the Council for Railway Transport*".<sup>339</sup> According to Article 4 of that agreement "*decisions taken by the Council for Railway Transport or the Board are obligatory to LG after its representative announces joining to these decisions*". The limit of four trains per day on the Track was established in the 48th session of the Council for Railway Transport which was held on 29-30 May 2008 in Bishkek, Kyrgyzstan and related solely to the period 2008/2009. LG's representative participated in the session and announced *joining to this decision*. By "*International Traffic Agreement*" LG is in fact referring to the minutes of this session and its annexes.<sup>340</sup>
- (214) The agreement mentioned by LG cannot therefore be characterised as an "*International Traffic Agreement between CIS, Baltic States (...)*" since the Lithuanian state had no part in it. As acknowledged by LG itself, the VGI, which takes the official decisions to allocate infrastructure capacity in Lithuania (see recital (129)), was not bound by this agreement.<sup>341</sup> Similarly, LDZ participated in the Council for Railway Transport, but the state of Latvia did not.<sup>342</sup>
- (215) The Commission nevertheless endeavoured to understand the reasons for the limitation of four trains per day on the Track. LG explained that the limitation was put in place because:<sup>343</sup>
- (1) the state of the Track required trains to travel only during the day;
  - (2) the train station in Rengē, on the Latvian leg of the Short Routes to the Latvian seaports, was closed overnight;
  - (3) since OL never asked to transport more than four trains a day, LG never analysed the option of transporting more than that.

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<sup>337</sup> LG estimates that a limitation of four trains per day would lead to a capacity limit of 4.4 million tonnes per year. Taking into account that OL was also using the Track to transport its oil products exported to Latvia and Estonia, the capacity limit for OL's oil products for seaborne export amounted to 3.45 million tonnes in 2008 that is 78% of the entire production of OL's oil products intended for seaborne export. LG's response to the SO, Annex 2, Section 2.3.1 (ID1005/20-22) and LG's response to the 4<sup>th</sup> RFI, Annex 3 (ID0730).

<sup>338</sup> LG provided a copy of the decision (ID1129/7-8) and an informal translation to English (ID1147).

<sup>339</sup> LG provided a copy of the agreement (ID1115) and an informal translation to English (ID1143).

<sup>340</sup> LG's response to the 6<sup>th</sup> RFI, Annexes 6 and 7 (ID1083 and ID1084, and, the informal translations to English, ID1146 and ID1145).

<sup>341</sup> LG's email of 31 July 2015 (ID1152/1).

<sup>342</sup> LG's email of 7 August 2015 (ID1155/1).

<sup>343</sup> LG's response to the 6<sup>th</sup> RFI, question 4.3 (ID1075/5-6).

- (216) This shows that the limit was not based on considerations of managing flows of international traffic. In fact, not all rail border crossings between Lithuania and Latvia and between Lithuania and Belorussia were covered by the so-called "*International Traffic Agreement*".<sup>344</sup> Instead, the limit was proposed by LG based on considerations relating to LG's own analysis of the Track's capacity and demand. It is therefore not tenable to argue that this limit was "imposed" by the "*International Traffic Agreement*" when it was LG who suggested it to the Council for Railway Transport and later adhered to it voluntarily following a unilateral announcement.
- (217) As regards the first argument in recital (215), LG itself stated that, during 2008, traffic on the Track was not suspended during the night.<sup>345</sup> Moreover, LG does not substantiate why a suspension of traffic during the night would have limited the number of trains during the day to four.
- (218) As regards the second argument in recital (215), LG admitted it was not able to provide any documentary evidence to support this statement and LDZ stated that there were no capacity restrictions in Latvia for transporting additional 5 million tonnes via the Short Routes to the Latvian seaports.<sup>346</sup> On the contrary, LDZ stated that the Jelgava – Rengē – state border route which corresponds to the Latvian leg of the Short Routes to the Latvian seaports, could provide a carrying capacity of up to 18 train-pairs, which would increase the amount of the transported cargo up to 18 million tonnes per year.<sup>347</sup>
- (219) Finally, the third argument in recital (215) suggests that this limit might have been revised if a concrete request had been received for more capacity on the Track.
- (220) None of the points made in recitals (213) to (219) was contested by LG in its response to the Letter of Facts.<sup>348</sup> The Commission therefore considers that the so-called "*International Traffic Agreement*" did not constrain the volume of oil that could have been transported on the Short Routes to the Latvian seaports.
- (221) It follows that the transportation by rail of large volumes of oil products, such as the volumes of OL's oil products intended for seaborne export, was technically feasible on both the Short and the Long Routes to the Latvian seaports.
- 7.4.1.2. The Latvian seaports were a credible alternative to the port of Klaipeda for handling of OL's oil products
- (222) OL's oil products intended for seaborne export amounted to 4.4 million tonnes in 2008 and 4.6 million tonnes in 2009. The production included light oil products and heavy oil products. In 2008 and 2009, the proportion of heavy oil products amounted to 37% and 29% respectively.<sup>349</sup>

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<sup>344</sup> The "*International Traffic Agreement*" refers to the border crossings in Meitene, Rengē and Eglaine with Latvia but not to Turmantas. It refers to the border crossings in Gudogai and Stasilos with Belorussia but not to Marcinkonys. LG's response to the 6<sup>th</sup> RFI, Annex 7 (ID1084, and, the informal translations to English, ID1145).

<sup>345</sup> LG's email of 7 August 2015, response to question 6 (ID1155/2).

<sup>346</sup> LDZ's response to the 2<sup>nd</sup> RFI, questions 3 and 4 (ID0710/2).

<sup>347</sup> LDZ's response to the 3<sup>rd</sup> RFI, question 3a (ID1173/6).

<sup>348</sup> Commission's Letter of Facts, points 12 to 23 (ID1219/6-8) and LG's response (ID1234).

<sup>349</sup> OL's response to the 1<sup>st</sup> RFI, question 5b (ID0206/21). Gasoline, diesel and JET are light oil products, fuel oil is heavy oil product.

- (223) In 2008, when considering a switch to the Latvian seaports, OL contacted four terminals (two terminals in Riga for light oil products, one terminal in Riga for heavy oil products and one terminal in Ventspils for heavy oil products).<sup>350</sup> OL mentioned that *"OL has obtained assurances from four terminals in Riga and Ventspils that they would each be able to handle OL's seaborne export business for light or heavy oil products respectively"*.<sup>351</sup>
- (224) OL also mentioned that *"OL's light oil products (gasoline, diesel and jet fuel) would have been exported through the port of Riga.(...) It is likely that OL's heavy oil products (high sulphur fuel oil) would have been exported either through Riga, or through Ventspils, or through some combination of the two. (...) Thus OL would certainly have used Riga, and possibly also Ventspils. The exact solution adopted would have depended on the outcome of OL's commercial negotiations with the various terminals at Riga and Ventspils."*<sup>352</sup>
- (225) In its response to the SO, LG alleges, however, that the port of Riga is not adequate to handle OL's entire oil export volumes for the following reasons:<sup>353</sup>
- (1) As an historic city-port, its access by rail is constrained, leading to congestion issues and delays. Moreover, the capacity of the terminals to unload a high number of railcars is limited, which increases the duration of the journey on the Short Routes and Long Routes to Riga.
  - (2) The port of Riga is exposed to ice forming and to freezing sea conditions during the winter season, therefore requiring special ships and increasing the costs for transportation by sea.
  - (3) In 2008, some terminals could only be reached by tankers with a draft of a maximum of 9.05 metres (compared with 11.7 to 12.5 metres for other terminals). As a consequence, smaller ships would have to be used, which also increases the costs for transportation by sea. This is particularly the case for the only terminal capable of handling heavy oil products in the port of Riga.
  - (4) The total capacity of the five largest terminals in the port of Riga was estimated to be 7.8 million tonnes. Those terminals handled 5.3 million tonnes in 2008. Therefore the port of Riga could have handled only an additional 2.5 million tonnes, which was not enough to handle OL's entire production of oil intended for seaborne export (4.45 million tonnes in 2008).<sup>354</sup>
- (226) As a preliminary step, the Commission compared the characteristics of the three seaports to see if they each had experience of handling oil products and reasonable storage capacity for liquid products such as oil, as well as no particular constraints on the dimensions of vessels. Based on this high-level assessment, the ports of Riga and Ventspils are *prima facie* credible candidates for the handling of large volumes of oil products such as those required by OL and are therefore a credible alternative to the port of Klaipėda. In 2012, the port of Riga was the biggest seaport in the Baltic states

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<sup>350</sup> OL's response to the 2<sup>nd</sup> RFI, question 4a (ID0332/7).

<sup>351</sup> OL's response to the 2<sup>nd</sup> RFI, question 4(b) (ID0332/8).

<sup>352</sup> OL's response to the 2<sup>nd</sup> RFI, question 3 (ID0332/6).

<sup>353</sup> LG's response to the SO, Section 3.4.1.2 (ID1003/67-69)

<sup>354</sup> The maximal capacity of the five largest terminals can be found in the Argus Report (ID1144/1). The volume of oil handled by the nine terminals of the port of Riga can be found in the Freeport of Riga Environment Report (ID1102/24 and, for the English version, ID1200/24).

in terms of cargo flow and the port of Ventspils was the biggest seaport in the Baltic states in terms of oil handling. The three largest oil cargo terminals in the Baltic sea (of which two were contacted by OL) were located in Riga and Ventspils.<sup>355</sup> Figure 3 summarises the main characteristics of the ports.<sup>356</sup>

Comparison of the ports (2012)	Cargo turnover (mln tons)	Oil turnover (mln tons)	Liquid storage capacity (m3)	Max length of vessels (m)	Max depth (m)
Riga	36.1	7.58	435	295	16.0
Ventspils	30.3	16.06	1500	270	17.0
Klaipeda	35.2	8.10	738	270	15.0

Figure 3 Comparison of the ports

- (227) As regards the first argument in recital (225), the fact that the Short Routes to the Latvian seaports have a longer journey time than the Route to Klaipėda is nothing new.<sup>357</sup> It does not show that the Short Routes to the Latvian seaports were not a credible alternative to the Route to Klaipėda. As explained in section 7.4.1.3, OL selects its route solely on the basis of the costs it incurs and considers that other factors such as delivery time do not play a significant role. Therefore, it is enough for the Commission to take into account the additional cost due to the longer journey time (such as the additional depreciation of the wagons) when comparing the costs of the different routes, to show that the Short Routes to the Latvian seaports were a credible alternative to the Route to Klaipėda. Sections 7.4.1.4 and 7.4.1.5 show that the Short Routes to the Latvian seaports were a credible alternative, even when taking into account the additional cost due to the longer journey time as explained in paragraph (277).
- (228) As for the second argument in recital (225), the seaport of Riga experiences some ice formation only during more severe winters, but not in all winters. When ice does form, navigation remains possible but traffic restrictions are issued according to the type of vessel being used. Between 2005 and 2013, only four temporary traffic restrictions were issued. During these traffic restrictions, only vessels of minimum "Class IC" standard were allowed to navigate. But given the sea conditions in the Baltic sea in the winter season, tankers used to transport OL's oil products from the seaport of Klaipėda, are also of a minimum "Class IC" standard. Accordingly, the choice of the seaport of Riga would not have any impact on the type of tankers that would need to be used when compared to those calling at the seaport of Klaipėda. Moreover, the costs for transportation by sea used by the Commission to compare the

<sup>355</sup> Competitive position of the Baltic States Ports, KPMG Baltics SIA, November 2013 (ID1193/3,31). The study was mentioned by LG in its response to the SO, Annex 2 (ID10005).

<sup>356</sup> Competitive position of the Baltic States Ports, KPMG Baltics SIA, November 2013 (ID1193/22,23). Although the study used by LG in its response to the SO relates to 2012, the Commission's view is that it gives a useful insight on the likely competitiveness of the Latvian seaports even for 2008-2009.

<sup>357</sup> OL's response to the 3<sup>rd</sup> RFI, question 18 (ID0787/16).

routes (see section 7.4.1.3)<sup>358</sup> are based on historical data and therefore already factor-in any additional cost due to navigation restrictions.<sup>359</sup> None of the points made in this paragraph were contested by LG in its response to the Letter of Facts.<sup>360</sup>

- (229) As for the third argument in recital (225), LG does not demonstrate what impact the train limit might have had on costs for transportation by sea. At first view, the costs are lower in the port of Riga than in the port of Klaipėda (see recitals (238) to (240)). Moreover, a comparison of the position of the terminals contacted by OL with the restrictions on the draft of vessels provided by LG shows that only the heavy oil terminal in Riga was constrained by a restriction of 9.05 metres.<sup>361</sup> Other terminals contacted by OL were not affected by that restriction. This point was not contested by LG in its response to the Letter of Facts.<sup>362</sup>
- (230) By contrast, the Commission's comparison of the ports (see recital (226)) shows that the port of Riga (and the port of Ventspils) has a deeper maximum berth than the port of Klaipėda.<sup>363</sup> Moreover, if the berth restriction had had a significant impact on costs for transportation by sea, OL, which intended to negotiate the best commercial terms by getting the terminals of Riga and Ventspils to compete with one another for heavy oil products, could have simply selected the terminal in Ventspils. Therefore, it is enough for the Commission to show that the Short Route to Ventspils or a combination of the Short Routes to Riga and Ventspils were a credible alternative to the Route to Klaipėda.
- (231) Moreover, even if OL had been in a position to switch only its production of light oil products intended for seaborne export (that is, 63% and 71% of OL's oil products intended for seaborne export in 2008 and 2009 respectively), this would have been enough to exert competitive pressure on LG.
- (232) As for the fourth argument in recital (225), the terminals in Riga could have given priority to the handling of OL's oil products (in particular due to its appreciable volume of oil products) and discontinued contracts with smaller clients in order to free up capacity. This does not seem to be an uncommon practice. In 2010, OL had to find a second terminal in Klaipėda following the decision by its existing terminal not to fulfil their contractual obligations vis-à-vis OL and to allocate significant capacity to Lukoil to the detriment of OL.<sup>364</sup> A further possibility is that the terminals could have made the necessary capacity adjustments in order to handle OL's oil products, although it is difficult to speculate on these capacity adjustments.<sup>365</sup>
- (233) Based on the information available, the seaport of Riga appeared to be a credible alternative to the port of Klaipėda for the handling of OL's oil products. The

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<sup>358</sup> Within that section, the cost for transportation by sea is referred to as the "ocean freight rate".

<sup>359</sup> OL's response to the 4<sup>th</sup> RFI, question 1 (ID1181/2).

<sup>360</sup> Commission's Letter of Facts, point 30 (ID1219/9) and LG's response (ID1234).

<sup>361</sup> This is done by comparing the map with the limitations on the dimensions of the vessels, LG's response to the SO Annex 2 (ID1005/27) with the map with the location of the terminals, Argus Report (ID1444/3). The terminal Man-Tess mentioned by OL corresponds to the terminal T2 in the map.

<sup>362</sup> Commission's Letter of Facts, point 31 (ID1219/10) and LG's response (ID1234).

<sup>363</sup> The limitation on the vessel's dimension is by definition inferior to the berth depth. The high-level comparison of the port relates to the year 2012.

<sup>364</sup> OL's response to the 1<sup>st</sup> RFI, question 1a (ID0206/2).

<sup>365</sup> In any case, the terminals of the seaport of Riga continued to increase their capacity after 2008. The port of Riga reached a maximum capacity of handling 10 million tonnes in 2014 after a significant investment in port railway infrastructure. LG's response to the SO, paragraph 266 (ID1003/69).



Commission cannot exclude the possibility that the terminals in Riga would not have been able to handle the entire production of OL's oil products intended for seaborne export and it therefore leaves the point open. However, even taking into account the capacity restrictions described by LG, OL would still have been able to switch 56% of its production of oil intended for seaborne export to the port of Riga in 2008.<sup>366</sup> This would have been enough to exert competitive pressure on LG.

- (234) Moreover, OL could also have switched its production to the port of Ventspils. Based on the comparison of the ports (see recital (225)), the port of Ventspils, which is the leading port in the Baltic sea for the handling of oil products, appeared to be a credible alternative to the port of Klaipėda. This is corroborated by LG itself, which stated in seized document LK7 that the seaport of Ventspils is better placed to accept larger capacity tankers than the seaport of Klaipėda (see recital (93)).
- (235) Finally, OL could also have switched one part of its production to the port of Riga and another to the port of Ventspils, as suggested by OL itself. In its response to the SO, LG argued that this would have led to additional costs in terms of loss of economies of scale and scope. The Commission considers that the loss of economies of scale and scope compared to the situation where only one port was used, is likely to have been limited for the following reasons:
- (1) As regards terminal costs, OL already used two terminals in the port of Klaipėda and would in any event have had to use at least two terminals if it exported all its products through the port of Riga, since none of the terminals at Riga are capable of handling both light and heavy oil products.
  - (2) It is unlikely that splitting the handling of oil products between at least two terminals, whether in the same port or in different ports, would lead to markedly higher terminal costs. On the contrary, OL managed to lower its costs by switching from one to two terminals in Klaipėda.<sup>367</sup>
  - (3) As regards rail transport costs, splitting oil deliveries between the ports of Riga and Ventspils would not have weakened OL's bargaining position vis-à-vis LDZ given that the total volumes transported by LDZ would have remained unchanged and discounts offered by LDZ would have been calculated on the basis of the total volumes transported.<sup>368</sup>
  - (4) By contrast, OL's sister refinery in Poland, PKN Plock, even used multiple rail providers for the transportation of its oil products out of its refinery. This allowed PKN Plock to obtain lower rates for rail transport services.<sup>369</sup>
- (236) The Commission's analysis confirms that the Latvian seaports (and their terminals with which OL had started to negotiate) were a credible alternative to the port of Klaipėda. This is consistent with corroborating evidence which shows that LG was

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<sup>366</sup> 2.5 million tonnes out of 4.45 million tonnes of OL's oil products intended for seaborne export in 2008. LG's response to the SO (ID1003/69), LG's response to the RFI Annex 3 (ID0730).

<sup>367</sup> OL's response to the 2<sup>nd</sup> RFI, question 4 (ID0332/7). OL would have needed to use (at least) two terminals even if it exported all its products via the port of Riga only, since no terminal in Riga could handle both light and heavy oil products.

<sup>368</sup> OL's response to the 4<sup>th</sup> RFI, question 3 (ID1181/5).

<sup>369</sup> OL's updated response to the 3<sup>rd</sup> RFI, question 9 (ID0787/9). Although the situation in Poland has no direct link with the situation in Lithuania, this shows that using multiple railway providers does not necessarily lead to higher rates.

deeply concerned by the prospect of OL switching to the Latvian seaports (see recitals (24) to (26) and section 4.11). While the possibility that the port of Riga was not able to handle the entire production of OL's oil products intended for seaborne exports, cannot be excluded, Riga could have handled a significant part of that production, which would have been enough to exert competitive pressure on LG. Moreover, OL could alternatively have switched to the port of Ventspils or to a combination of the two Latvian ports.

#### 7.4.1.3. OL chooses route to seaport based on rail transport costs

- (237) According to OL, the main factors affecting its choice of seaport for its exports are the costs of the journey to the port (rail transport costs) and the costs of the services at and from the ports (total sea transport costs). The total sea transport costs include the costs of the services in the port itself (port fees) and the costs for transportation by sea to the destination port (ocean freight rates).
- (238) As regards port fees, OL notes that using the Latvian ports would be more economical than using the port of Klaipėda.<sup>370</sup> OL emphasises that it currently pays lower port fees in Riga than in Klaipėda, despite the much higher volumes of services in Klaipėda.<sup>371</sup> OL also indicates that it received an offer from a terminal in Ventspils for a port fee which was lower than in Klaipėda.<sup>372</sup>
- (239) As for ocean freight rates, the ports of Riga and Ventspils seemed more attractive than the port of Klaipėda. OL notes, however, that the choice of the port (Riga, Ventspils or Klaipėda) has only a limited impact on the price it pays: *"relative ocean freight rates [to Rotterdam] may vary over time and thus OL does not view any particular port as having an inherent advantage in this respect"*.<sup>373</sup>
- (240) The Commission compared the total sea transport costs for the three ports. The total sea transport costs were lower for the port of Riga than the port of Klaipėda in 2008, although the difference had become negligible by 2011. The total sea transport costs are lower for the port of Ventspils than the port of Klaipėda for each year.<sup>374</sup> The

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<sup>370</sup> OL's response to the 3<sup>rd</sup> RFI, question 14 (ID0787/14). *"Their port fees [in Riga and Ventspils] are all cheaper than those of Klaipėdos Nafta [the main terminal currently used by OL in Klaipėda] and OL expects that their cost advantage could be significantly improved if it guaranteed large volumes to those terminals]"*

<sup>371</sup> OL's response to the 2<sup>nd</sup> RFI, question 4(b) (ID0332/8). The average port fees paid by OL in Riga have previously been EUR [0-5] per tonne compared to EUR 3.54 per tonne in Klaipėda. OL further expects that higher volumes in Riga of around 5 million tonnes could lead to even lower port fees. As shown in recital (209), the volume of OL's oil products handled in the port of Riga was significantly lower than in Klaipėda.

<sup>372</sup> OL's response to the 4<sup>th</sup> RFI, question 4 (ID1181/7). OL obtained a specific offer from Ventspils Nafta for handling of heavy oil products at approximately EUR 3 per tonne at the time.

<sup>373</sup> OL's updated response to the 3<sup>rd</sup> RFI, question 13 (ID0787/12-14). The difference between ocean freight rates from Klaipėda and Riga to Rotterdam varied between 13% and -1.5% between 2008 and 2012. From 2008 to 2010, Riga was more competitive but the situation changed in 2011. In 2012, the ocean freight rate to Rotterdam was 1.5% less expensive from Klaipėda than from Riga. From 2008 to 2012, the difference between ocean freight rates from Klaipėda and Ventspils varied between 23% and 5%, the port of Ventspils being more competitive.

<sup>374</sup> OL's response to the 2<sup>nd</sup> RFI, question 4 (ID0332/7-8) and OL's updated response to the 3<sup>rd</sup> RFI, question 13 (ID0787/13-14), OL's response to the 4<sup>th</sup> RFI, question 4 (ID1181/7). The total sea transport costs are the sum of port fees and ocean freight rates. Using the average port fees in Riga and Klaipėda, the total sea transport costs of Riga were EUR 1.43 lower per tonne than the total sea transport costs of Klaipėda 2008 but only EUR 0.01 lower per tonne in 2011, out of about a total cost of EUR 14 per

comparison of total sea transport costs fluctuates, however, over time and depends on the outcomes of the commercial negotiations between OL and the terminals. The ports of Riga and Ventspils therefore could have been a credible alternative to the port of Klaipėda at the very least, whether or not they can also be said to have had a significant competitive advantage in terms of total sea transport costs.

- (241) Other factors relating to the choice of port include the availability of the facilities required to handle oil products, the port's capacity and logistical restrictions. However, according to OL there are no significant differences between the ports in Klaipėda, Riga and Ventspils as regards those factors.<sup>375</sup>
- (242) As for rail transport costs, cost is the main criterion for OL in choosing a route for transporting its oil products to a specific inland destination: "*OL's choice of transport route would be exclusively driven by the total cost of the route*".<sup>376</sup> Other considerations, such as reliability (limited delay in delivery), flexibility (ability to change transport plans at short notice) or simplicity (administrative burdens) of the routes do not play a significant role.<sup>377</sup> Moreover, independent of the route, OL mentions that "*price is the only significant criterion that OL would apply when choosing a provider of rail services, assuming that all providers had sufficient capability to offer the services*".<sup>378</sup>
- (243) The Commission thus concludes that the main criterion for comparing the routes in this case was rail transport costs. The Commission therefore restricted the rest of its analysis of the economic competitiveness of the routes to rail transport costs.

#### 7.4.1.4. Rail transport costs depend on distance of route and Member State where it is located

- (244) This section analyses the factors affecting the cost of rail transport. The analysis suggests that rail transport costs are driven by several factors apart from the efficiency of the operator of the route. These are a) the volume of freight transported, b) the distance of the route and c) the Member States through which it passes.
- (245) Firstly, LG acknowledges that rail transport costs dependent on the volumes of freight transported on a given route.<sup>379</sup> However, the efficiency gains that can be achieved through higher volumes can be achieved on any given route. Hence, to compare the relative competitiveness of routes, the Commission focuses on the distance of the route and the Member States through which it passes.
- (246) Secondly, as regards the distance, the agreements signed between OL and LG for the transportation of OL's oil products in Lithuania (that is, the 1999 and 2009

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tonne. Using the specific offer received by OL from a terminal in Ventspils, the total sea transport costs of Ventspils were EUR 2.72 lower per tonne than the total sea transport costs of Klaipėda in 2008 and EUR 1.16 lower in 2011.

<sup>375</sup> OL's response to the 3<sup>rd</sup> RFI, question 14 (ID0787/14).

<sup>376</sup> OL's updated response to the 3<sup>rd</sup> RFI, question 12 (ID0787/11).

<sup>377</sup> OL's updated response to the 3<sup>rd</sup> RFI, question 12 (ID0787/12): "*The other factors [transport time, reliability, flexibility or simplicity] listed by the Commission are not significant. The reality is that OL operates in markets that are highly price sensitive, and logistics costs have a direct impact on OL's profit margin. Thus OL must focus exclusively on the total cost of the route*".

<sup>378</sup> OL's updated response to the 3<sup>rd</sup> RFI, question 7 (ID0787/8).

<sup>379</sup> "*Transportation volumes do influence freight transportation cost because variable costs [variable depending on volumes] account for around [percentage] of all freight transport costs*". This implies that around [percentage] of the costs are fixed and that significant efficiencies can be generated by higher volumes of freight on a given route. LG's response to the 4<sup>th</sup> RFI, paragraph 38 (ID0749/19).

Agreements) define a "basic tariff" to which several discounts or surcharges are applied depending on the actual service provided by LG. The Commission analysed the evolution of these basic tariffs based on distance and found that the basic tariffs increased with the distance.<sup>380</sup>

- (247) This situation is also reflected in the structure of the tariff book prices of railway undertakings. Tariff book prices are the prices charged by railway undertakings for the standard transport of one tonne of freight or of a specific product. They do not include any volume or customer-specific discounts and thus generally constitute an upper limit on the prices charged for a route. The Commission analysed the tariff books of LG and LDZ for the routes used by OL for transporting its oil products in Lithuania and Latvia.<sup>381</sup> The Commission found that the tariff book prices charged on a given route increased with distance for each year and for both LG and LDZ.<sup>382</sup>
- (248) The Commission conducted similar analyses with respect to the costs incurred by LG and LDZ in transporting OL's products on the routes in question.<sup>383</sup> It found that the costs per tonne increased with distance.<sup>384</sup>
- (249) The results of this analysis reflect the economic activities needed for the provision of the rail transport services. Indeed, the costs of these services can be viewed as the sum of two elements: firstly fixed costs independent of distance (such as shunting

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<sup>380</sup> OL's response to the 1<sup>st</sup> RFI, Annex 2, Table No. 3(ID0222/17) and Annex 1, Annex 4.1 (ID0221/23). In each contract, the basic tariff prices increase depending on the distance by intervals of [distance] kilometres. The relationship between price and distance is [price structure]. The price considered is the marginal price, that is the price per tonne for each additional tonne above [price structure] tonne (one wagon). In the 1999 Agreement the price per tonne of freight charged by LG to OL increased by EUR [1-2] every 100 kilometres and in the 2009 Agreement by EUR [2-3] every 100 kilometres.

<sup>381</sup> Both LDZ and LG provide their tariff book prices separately for wagons from the common park (provided by the railway undertaking) and for wagons from the customers' park (provided by the customer) – the latter being cheaper. Both prices have the same dependence on distance. The Commission has thus used the average tariff book price between the price for own wagons and the price for the common park. For Lithuania, the Commission analysed the tariff book prices for the Lithuanian leg of the Short Route to Riga, the Lithuanian leg of the Long Route to Riga and the Route to Klaipėda for the years 2006 to 2012. For Latvia, the Commission analysed the tariff book prices for the Latvian leg of the Short Route to Riga, the Long Route to Riga, the Short Route to Ventspils and the Long Route to Ventspils for the period 2006 to 2008.

Tariff book prices are from the LG's response to the 4<sup>th</sup> RFI, Annex 1 (ID0789) for LG and from the LDZ's response to the 2<sup>nd</sup> RFI, question 5 (ID0710/3) for LDZ.

<sup>382</sup> For example, a simple regression analysis (using the method of least squares – function SLOPE in Excel) shows that in 2008 the tariff book price increased by EUR [1-2] per tonne per 100 kilometres in Lithuania and EUR [0-1] per tonne per 100 kilometres in Latvia. Tariff book prices are from the LG's response to the 4<sup>th</sup> RFI, Annex 1 (ID0789) for LG and from the LDZ's response to the 2<sup>nd</sup> RFI, question 5 (ID0710/3) for LDZ.

<sup>383</sup> For Lithuania, the Commission analysed the costs for the Lithuanian leg of the Short Route to the Latvian seaports, of the Long Route to the Latvian seaports and of the route to Klaipėda for the years 2006 to 2012, except for the Lithuanian leg of the Short Route to the Latvian seaports for which data are only available up to 2008, that is before the removal of the Track. For Latvia, the Commission analysed the costs for the Latvian leg of the Short Route to the Riga, of the Long Route to Riga, of the Short Route to Ventspils and of the Long Route to Ventspils for 2008 and 2009. Costs are from LG's response to the 4<sup>th</sup> RFI, Annex 5 (ID0732) and Annex 3 (ID0730), from LDZ's response to the 2<sup>nd</sup> RFI, question 11 (ID710/6) and LDZ's response to the 3<sup>rd</sup> RFI, question 1 (ID1173/3-4).

<sup>384</sup> For example, a simple regression analysis (using the method of least squares – function SLOPE in Excel) shows that in 2008 the costs increased by EUR [2-3] per tonne per 100 kilometres in Lithuania and by EUR [1-2] per tonne per 100 kilometres in Latvia.

costs, wagon preparation costs or administrative costs) and secondly costs that depend on distance (such as track access charges, energy costs and train driver costs).

- (250) The strong relationship between costs (and prices) of a transport service and distance is demonstrated by the conduct of OL. When assessing potential routes to Latvia, OL makes a direct link between the length of the route and its attractiveness as a transport solution.<sup>385</sup> Similarly, during a high-level meeting between OL and LG, OL pointed out that "*using the longer routes instead of the shorter increases the costs of transport without justification*" since the Track was removed.<sup>386</sup>
- (251) Thirdly, the comparison of the costs incurred by LG and LDZ for transporting oil products in Lithuania and Latvia respectively (and of the tariff book prices) also suggests that the Member State in which the service is provided has an influence on those costs.
- (252) The Commission's analysis suggests that, in 2008, the tariff book prices were cheaper in Latvia than in Lithuania (except for distances lower than [distance] kilometres)<sup>387</sup> and that the railway transport costs were lower in Latvia than in Lithuania (except for the distances lower than [distance] kilometres).<sup>388</sup>
- (253) The Commission analysed whether rail transport costs depended on the Member State in which the service was provided, independently of the respective efficiencies of LG and LDZ. It is difficult to assess to what exact extent the difference in competitiveness of railway undertakings in conducting their train operations plays a role and to what extent that difference is "structural", in other words that it depends on the Member State where the transportation of oil products is occurring. However, certain factors show that at least part of the difference is structural. The level of energy prices,<sup>389</sup> the labour costs<sup>390</sup> and the levels of track access charges<sup>391</sup> were all lower in Latvia than in Lithuania.
- (254) While the Commission cannot accurately quantify the impact of these structural factors on rail transport costs, it nonetheless concludes that all other things being

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<sup>385</sup> OL's response to the 1<sup>st</sup> RFI, question 2.a) (ID0206/7). OL notes that "*depending on the final destination within Latvia, the Bugeniai-Rengė track was not always the shortest and therefore economically most interesting route*". This statement concerns the selection of routes for the products destined for Latvia and Estonia (that is, not in respect to the products intended for seaborne export).

<sup>386</sup> Complaint, Annex 33, page 1 (ID0043/1).

<sup>387</sup> A simple regression analysis shows that the tariff book prices were lower in Latvia except for distances lower than [distance] kilometres in 2008. For more details on the data used to analyse the tariff book prices and the regression analysis, see recital (247).

<sup>388</sup> A simple regression analysis shows that costs were lower in Latvia except for distances lower than [distance] kilometres. For more details on the data used to analyse the costs and the regression analysis, see recital (248).

<sup>389</sup> Eurostat, electricity prices by type of user – EUR per kWh, for industrial consumers. Electricity prices were around 20% lower in Latvia than in Lithuania in the years 2006 to 2008.

<sup>390</sup> Eurostat, monthly labour costs by NACE Rev. 1.1 activity, for the Transport, storage and communication sector. Labour costs are 16%-18% lower in Latvia than in Lithuania in 2006-2007.

<sup>391</sup> International Transport Forum, OECD, Charges for the Use of Rail Infrastructure 2008 (ID0900/32-33). The typical railway infrastructure charges in Lithuania for a 960 gross tonne freight trains are the same as in Latvia at EUR 6.5 per train-kilometre while the railway infrastructure charges in Lithuania are much higher for a 2000 gross tonne freight train at EUR 11.5 per train-kilometre compared to around EUR 6.5 per train-kilometre in Latvia. According to this study, the railway infrastructure charges for freight trains in Lithuania are the highest in Europe.

equal, the higher the portion of the route in Latvia, the more attractive the route would be for the customer OL.

- (255) It follows that, based on two main cost factors identified (distance and Member State), the Short Route to Riga appears to be the most attractive. It is by far the shortest (163 kilometres compared to 228 kilometres for the Route to Klaipėda) and it is also the one that has the shortest part in Lithuania (with only 34 kilometres in Lithuania). The Commission's analysis therefore confirms that offers to transport OL's oil products on the Short Route to Riga could have been more competitive than offers on the Route to Klaipėda or on the Long Route to Riga.

#### 7.4.1.5. LDZ could have made competitive offer on Short Routes to Latvian seaports

- (256) This section compares the cost incurred by the railway undertakings in operating the Route to Klaipėda and the Short Routes to the Latvian seaports. As acknowledged by LG, it makes economic sense to analyse the costs as the lowest prices that could be offered to OL.<sup>392</sup>
- (257) The Commission first calculated the cost to operate each route based on the direct costs incurred by LG on the Lithuanian leg of the routes and the direct costs incurred by LDZ on the Latvian leg of the routes. The Commission then compared the costs of the Short Routes to the Latvian seaports with those of the Route to Klaipėda for transporting OL's oil products, in order to check if the Short Routes to the Latvian seaports could have been credible alternatives to the Route to Klaipėda.
- (258) The Commission also compared the costs of transporting 50% of OL's products to Riga and 50% of OL's oil products to Ventspils (the "Mixed Route to the Latvian seaports"), a scenario that the Commission considers to be realistic in the event that the port of Riga did not have the necessary capacity to handle the entire production of OL's oil products intended for seaborne export (see section 7.4.1.2).<sup>393</sup>
- (259) Figure 4 below compares the different routes:

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<sup>392</sup> LG's response to the SO, Annex 2, paragraph 31 (ID1005/12).

<sup>393</sup> In particular, the port of Riga would have been able to handle 50% of OL's oil products intended for seaborne export even taking into account the capacity restrictions in the port of Riga (2.5 million tonnes) mentioned by LG. As regards the resulting costs, the scenario is more conservative compared to the scenario where OL would have switched its production of light oil products intended for seaborne export to Riga and its production of heavy oil products to the port of Ventspils (37% in 2008 and 29% in 2009 of the entire production of OL's oil products intended for seaborne export) because then the more expensive Short Route to Ventspils would have had less weight.

**Figure 4 Costs per tonne for the transportation of OL's oil products (Short Routes and Route to Klaipeda)**

Routes	Distance (km)	Costs 2008(EUR/T)	Costs 2009(EUR/T)
<b>Costs on Short Route to Riga</b>	<b>163</b>	[costs]	[costs]
Lithuanian leg by LG	34	[costs]	[costs]
Latvian leg by LDZ	129	[costs]	[costs]
<b>Cost on Short Route to Ventspils</b>	<b>277</b>	[costs]	[costs]
Lithuanian leg by LG	34	[costs]	[costs]
Latvian leg by LDZ	243	[costs]	[costs]
<b>Costs on Route to Klaipeda by LG</b>	<b>227</b>	[costs]	[costs]
<b>Difference Short Route to Riga/ Route to Klaipeda</b>		<b>-[20-30]%</b>	<b>-[20-30]%</b>
<b>Difference Short Route to Ventspils/Route to Klaipeda</b>		<b>-[0-10]%</b>	<b>[0-10]%</b>
<b>Difference Mixed Short Routes/Route to Klaipeda</b>		<b>-[10-20]%</b>	<b>-[0-10]%</b>

- (260) The costs on the Short Route to Riga are [20-30]% lower (in 2008) and [20-30]% lower (in 2009) per tonne transported than the costs incurred on the Route to Klaipeda. This means that provided LDZ was as efficient as LG on the Lithuanian leg of the Short Route to Riga, LDZ could have transported OL's oil products at a lower cost than LG could have done on the Route to Klaipeda.
- (261) Moreover, the analysis probably under-estimates the cost-effectiveness of the Short Routes to the Latvian seaports compared to the Route to Klaipeda for the following reasons:
- (1) The costs provided by LG for the Route to Klaipeda are for high volumes of freight (several million tonnes) and thus incorporate the effect of volume efficiencies, while the costs provided by LG for the Short Routes to the Latvian seaports are for lower volumes of freight.
  - (2) The costs computed for the Short Routes to the Latvian seaports are the sum of the two sets of costs of LG and LDZ on their respective legs of the journey. It is likely that if the entire journey were to be conducted by one single railway undertaking some synergies would be achieved, particularly with regard to fixed costs.
  - (3) Both LG and LDZ included the depreciation costs of their tank wagons in their cost estimates. LG included depreciation costs of tank wagons only to the extent that LG's wagons (and not OL's own wagons) were used to transport OL's oil products.<sup>394</sup> In practice, approximately [45-55]% of the wagons used to transport OL's products on the Route to Klaipeda were owned by LG, the other wagons being owned by OL.<sup>395</sup> LDZ, on the other hand, made the assumption that all the wagons were owned by LDZ to estimate its costs. LDZ estimated that its costs would have been [0...10]% lower than the ones

<sup>394</sup> LG's sixth response to the 6<sup>th</sup> RFI, question 4.3 (ID1075/6).

<sup>395</sup> OL's updated response to the 3<sup>rd</sup> RFI, question 11 (ID0787/10). OL indicates that in 2012 [45-55]% of the wagons used were owned by the rail undertakings. OL indicates that the proportion may have been higher prior to 2012, even though OL was prioritising its own wagons for the Route to Klaipeda.

submitted to the Commission and used for the analysis if it were assumed that [45-55]% of the wagons were OL's wagons.<sup>396</sup>

- (262) The costs incurred on the Short Route to Ventspils were [0-10]% lower (in 2008) and [0-10]% higher (in 2009) than the costs incurred on the Route to Klaipėda. Taking into account the under-estimation of the cost-effectiveness of the Short Routes to the Latvian seaports explained in recital (261), the Commission considers that the Short Route to Ventspils could have been a credible alternative to the Route to Klaipėda, even for 2009.
- (263) The costs for transporting OL's oil products on the Mixed Route to the Latvian seaports were [10-20]% lower (in 2008) and [0-10]% lower (in 2009) than the costs on the Route to Klaipėda. The Commission considers that this option could have been a credible alternative to the Route to Klaipėda.
- (264) This analysis is corroborated by the statements and actions of both OL and LDZ as follows:
- (1) OL stated that the only credible option for a switch to LDZ was on the Short Routes to the Latvian seaports.<sup>397</sup>
  - (2) Evidence shows that negotiations between OL and LDZ continued at least until June 2009 and, according to OL's statement, until mid-2010. The efforts made by the parties demonstrated that OL and LDZ considered the switch to be a credible option (see recital (27)).
  - (3) In June 2009 LDZ started the process to obtain the necessary regulatory authorisations to operate independently in Lithuania. It made a request to operate freight trains on two routes, namely the Latvian border – Radviliškis route and the Lithuanian leg of the Short Routes to the Latvian seaports (see recital (111)). Considering that OL was the only customer on the Lithuanian leg of the Short Routes to the Latvian seaports, it is clear that LDZ considered at the time that such a switch would be a credible option.
- (265) This analysis is further corroborated by the evidence found in LG's internal documents seized during the inspection carried out at the office of LG's Deputy CEO. That inspection showed that LG was concerned that:
- (1) The reconstruction of the Track would allow LDZ to offer rates lower than those charged by LG on the Route to Klaipėda. (see recital (93)).
  - (2) LDZ was in a position to pursue an aggressive rate policy and undercut LG (see recital (94)).
  - (3) The Track would be used by OL to “exert pressure” with respect to tariffs (see recital (96)).
  - (4) LDZ could make a very competitive offer (see recital (103)).
- (266) The Commission's analysis therefore confirms that, if the Track had not been removed, LDZ would have been able to make a competitive offer on the Short Route

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<sup>396</sup> LDZ's response to the 3<sup>rd</sup> RFI, question 2 (ID1173/5). For confidentiality reasons, the exact percentage has been redacted and replaced by the interval from 0% to 10%.

<sup>397</sup> OL's response to the 1<sup>st</sup> RFI, questions 3.f and 3.g (ID0206/15-16); OL's response to the 2<sup>nd</sup> RFI, question 1 (ID0332/2).



to Riga, on the Short Route to Ventspils and on the Mixed Route to the Latvian seaports. LDZ was a potential competitor to LG and was exerting competitive pressure on LG.

#### 7.4.1.6. Economic analysis of routes based on comparable costs

- (267) LG argued in its response to the SO that the Short Routes to the Latvian seaports were more expensive than the Route to Klaipėda in terms of tariffs and were therefore not credible opportunities for LDZ to enter the market.<sup>398</sup> However, to arrive at this conclusion, LG compared the actual price charged by LG to OL to transport its products to the port of Klaipėda (that is, the price resulting from commercial negotiations and including various discounts) with the tariff book prices of LDZ (that is, prices that do not include any volume or customer-specific discounts and thus generally constitute an upper limit on the prices charged for a route).<sup>399</sup> The Commission considers that this analysis is inherently flawed because it compared totally different types of tariff. This point was not contested by LG in its response to the Letter of Facts.<sup>400</sup>
- (268) Moreover, the Commission considers that, in order to infer the competitiveness of the routes, analysing costs is a more reliable indicator than analysing book prices. The costs provide a direct measure of the minimum price that an undertaking as efficient as LG on the Lithuanian network and as efficient as LDZ on the Latvian network could charge OL while still making a profit on the route.
- (269) LG also argues in its response to the SO that LG's and LDZ's costs in 2008 as relied on by the Commission are not comparable for the following reasons:<sup>401</sup>
- (1) Costs fluctuate year by year. Therefore, the Commission's method of assessing the level of costs for the one single year of 2008 was too limited to draw any conclusions.
  - (2) LG and LDZ used different cost allocation methods. In particular, changes in LG's and LDZ's respective methods of allocating costs resulted from implementation of Directive 91/440/EEC which provided for, among other things, the separation of accounts (see recital (117)). These changes applied as from 2008 for LDZ and as from 2009 for LG. Therefore the comparison of the costs is skewed for 2008.
  - (3) LG and LDZ might have provided cost estimates that do not include comparable cost components or comparable level of services. In particular, LG seems to suggest that LDZ did not take into account a list of cost components that was as exhaustive as the one LG took into account when estimating its costs.
  - (4) LG provided costs estimates for transporting OL's oil products based on actual costs and volumes, while LDZ provided estimates for transporting oil products

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<sup>398</sup> LG's response to the SO, section 3.4.1.3.1 (ID1003/70).

<sup>399</sup> The analysis of the 1999 and 2009 Agreements between OL and LG shows that various discounts were applied compared to the tariff book prices. See section 4.8 as an example of discounts applied for the 2009 Agreement. Details of the 1999 Agreement can be found in the Complaint, Annex 21 (ID0031). Details of the 2009 Agreement can be found in the OL's response to the 1<sup>st</sup> RFI (ID0221).

<sup>400</sup> Commission's Letter of Facts, point 49 (ID1219/13) and LG's response (ID1234).

<sup>401</sup> LG's response to the SO, section 3.4.1.3.2 (ID1003/70-73).

in general. Moreover, LDZ estimated its costs based on the assumption that every train would have been loaded to maximum capacity, which leads to an under-estimation of LDZ's costs.

- (5) Until 2008, LG's infrastructure cost component was calculated based on real infrastructure maintenance costs. It is only from 2009 that LG's infrastructure cost component began to be calculated based on the infrastructure fee paid by one arm of LG (the railway undertaking) to the other arm (the railway infrastructure manager) as a consequence of the separation of accounts required by Directive 91/440/EEC. LDZ's costs were calculated based on infrastructure fees both in 2008 and 2009.
  - (6) The cost of the journey time (which relates to the depreciation of the wagons) is not reflected in the Commission's comparison. Taking into account the cost of the journey time and the fact that the journey time of the Short Routes to the Latvian seaports is longer than on the Route to Klaipėda,<sup>402</sup> the Route to Klaipėda would be the cheapest option.
- (270) As for the first argument in recital (269), the Commission has extended its analysis to the year 2009 in section 7.4.1.5 and that analysis shows that, in 2009, the Short Routes to the Latvian seaports remained a credible alternative to the Route to Klaipėda. Negotiations between OL and LDZ on a possible switch mainly occurred in 2008 and 2009 (see recital (27)). Therefore the Commission considers that the cost figures for the years 2008 and 2009 are the most pertinent even if costs may continue to fluctuate afterwards.
- (271) As for the second argument in recital (269), the Commission notes that it extended its analysis to include the year 2009. While differences in accounting principles between LG and LDZ may have existed in 2008, in 2009 the same accounting principles applied for both LG and LDZ in accordance with Directive 91/440/EEC. The analysis shows that the Short Routes to the Latvian seaports remained a credible alternative to the Route to Klaipėda in 2009.
- (272) The Commission set out the cost figures for 2009 in the Letter of Facts. In its response to the Letter of Facts, LG claimed that the cost calculation methodologies used by LG and LDZ, which influence pricing decisions, may have been different even after implementation of the Directive 91/440/EEC. Not all costs can be directly attributed to a specific route (for example, administrative expenses) and every company uses a cost allocation methodology that is best suited to meet its business needs.<sup>403</sup>
- (273) The Commission acknowledges that cost allocation methodologies used by LG and LDZ may have been different even in 2009, and this may have influenced their estimations of a cost component, such as administrative expenses, that is not attributable to a specific route. However, administrative expenses represent only [0-10]% of LG's total costs and therefore a different cost allocation methodology would

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<sup>402</sup> OL's response to the 3<sup>rd</sup> RFI, question 18 (ID0787/16). The average time required to transport OL's products by train from the Refinery to the port and back to the Refinery (including all operations such as loading, unloading, border crossing, etc.) is approximately 3.2 days for the Route to Klaipėda, 5.2 days for the Short Route to Riga, 5.6 days for the Short Route to Ventspils, 6.4 days for the Long Route to Riga and 6.9 days for the Long Route to Ventspils.

<sup>403</sup> LG's response to the Letter of Facts (ID1234) and its Annex 2(ID1235).

have produced only a limited difference in the cost.<sup>404</sup> Moreover, LG does not explain whether any such potential difference would have favoured the Short Routes to the Latvian seaports or the Route to Klaipėda. As explained in recital (261), there were also other factors which favoured the Route to Klaipėda and therefore made the Commission's analysis more conservative.

- (274) As for the third argument in recital (269), the Commission asked LG and LDZ to list the services covered when estimating their costs. Based on an analysis of the services actually covered, the Commission considers that the cost estimates cover similar services. In particular, both companies included the transportation of OL's oil products but also the return of the empty wagons.<sup>405</sup> This is not surprising since LG and LDZ were already transporting OL's oil products and therefore knew which services to provide. Moreover, the Commission asked LG and LDZ to break down their costs per component (such as wages, material, depreciation, infrastructure charges, and so forth). Based on the responses, the Commission considers that LDZ included the same cost components as LG and endeavoured to include all possible cost components related to the transportation of OL's oil products, contrary to what LG seemed to suggest.<sup>406</sup>
- (275) As for the fourth argument in recital (269), LDZ, as a potential competitor, had never transported the entire volume of OL's oil products intended for seaborne export and therefore could not estimate the cost based on historical data.<sup>407</sup> LDZ had to estimate the cost of transporting oil in general and make assumptions about the number of trains needed to transport the requisite volumes of oil. LDZ would have had the same issue in real negotiations and would have had to proceed in this way in order to offer a price to OL. Moreover, contrary to LG's allegations, the assumption that the trains would be loaded to full capacity is a reasonable one since the trains on the Route to

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<sup>404</sup> A cost breakdown can be found in LG's response to the 4<sup>th</sup> RFI, annex 5 (ID0732), LDZ's response to the 3<sup>rd</sup> RFI, question 1 (ID1173/3-4) and LDZ's email (ID1179/1).

<sup>405</sup> LG's costs included the preparation of OL's wagons for loading, maintenance works of the wagon park, other services such as return of private empty stock. LDZ's costs included the maintenance of the wagon park, tow services, the formation of trains and the return of empty wagons. LDZ's response to the 2<sup>nd</sup> RFI, question 11 (ID0710/6). LG's response to the 4<sup>th</sup> RFI, paragraph 36 (ID0749/16-17) for the definition of services to OL.

<sup>406</sup> LG was not able to provide a breakdown of its costs for 2008 so for this year the Commission could not compare if both undertakings included the same cost components. For 2009, LG submitted a breakdown of its costs into the following categories: wages and social security, fuel, material, infrastructure charges, depreciation, internal (such as administration expenses) and others. LDZ also submitted a breakdown of its costs along the same categories, at the request of the Commission. The allocation per cost component of LDZ was calculated manually since LDZ does not keep accounts in the breakdown requested by the Commission. Based on these considerations, the Commission concludes that LDZ included the same cost components as LG. LDZ mentioned that their costs also included fees for the technical inspection of cargo wagons, fees for repairs of cargo wagons, fees for handling of cargo wagons on the railheads and intermediate stations, fees connected to locomotive ownership, fees connected to the provision of working conditions for the locomotive crews and railway station employees.

Costs can be found in LG's response to the 4<sup>th</sup> RFI, annex 5 (ID0732), LDZ's response to the 3<sup>rd</sup> RFI, question 1 (ID1173/3-4) and LDZ's email (ID1179/1).

<sup>407</sup> LDZ had already transported tiny quantities of OL's oil to the Latvian seaports before 2008, but the volumes (and presumably the size and frequency of the trains) were different, whereas the costs of rail transport services are dependent on the volumes of freight on a given route as acknowledged by LG. LG's response to the 4<sup>th</sup> RFI, paragraph 38 (ID0749/19) and Annex 3 (ID0730).

Klaipėda were also loaded to full capacity.<sup>408</sup> This point was not contested by LG in its response to the Letter of Facts.<sup>409</sup>

- (276) As for the fifth argument in recital (269), the Commission extended its analysis to the year 2009, when both LG and LDZ were estimating their infrastructure cost component based on infrastructure fees. The analysis shows that the Short Routes to the Latvian seaports remained a credible alternative to the Route to Klaipėda in 2009. This point was not contested by LG in its response to the Letter of Facts.<sup>410</sup>
- (277) As for the sixth argument in recital (269), the Commission agrees that the cost of the journey time due to additional depreciation on the wagons must be taken into account when comparing the routes. However, depreciation on the wagons had already been included in the cost estimates previously submitted by LG, as later acknowledged by LG itself.<sup>411</sup> Depreciation on the wagons had also been included in LDZ's cost estimates.<sup>412</sup> Therefore, the Commission's analysis already takes into account the cost of the journey time due to additional depreciation on the wagons.
- (278) By contrast, LG's analysis in the response to the SO is inherently flawed since it consists of adding a new estimate for depreciation on the wagons in addition to the previously cost estimates submitted by LG which already included that depreciation. Moreover LG seems to have over-estimated the cost of the journey time in its analysis.<sup>413</sup> This point was not contested by LG in its response to the Letter of Facts.<sup>414</sup>
- (279) The Commission's analysis therefore confirms that the cost estimates provided by LG and LDZ were comparable. Different cost allocation methods between LG and LDZ may have resulted in a small difference. However, even if there were such a difference favouring the Short Routes to the Latvian seaports, it would have been too small to change the conclusions in the Commission's analysis.
- (280) LDZ therefore could have made a competitive offer to OL in 2008 or in 2009 and exerted a competitive pressure on LG. The results of the Commission's analysis are corroborated by internal documents seized at LG's premises which show that LG was

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<sup>408</sup> LDZ made the assumption of a train of 55 wagons with a net weight of 3300 tonnes, which corresponds to a fully loaded train. Based on historical data, the average volume of OL's oil products transported in a train is between 3200 and 3600 tonnes and a train is made up of between 55 and 64 wagons. This shows that LDZ's assumption when estimating its costs was realistic. LDZ's response to the 2<sup>nd</sup> RFI, question 11 (ID0710/6) and OL's response to the 3<sup>rd</sup> RFI, question 10 (ID0787/9).

<sup>409</sup> Commission's Letter of Facts, point 52 (ID1219/14) and LG's response (ID1234).

<sup>410</sup> Commission's Letter of Facts, point 52 (ID1219/44) and LG's response (ID1234).

<sup>411</sup> LG's response to the 6<sup>th</sup> RFI, question 4.3 (ID1075/7).

<sup>412</sup> LDZ's response to the 3<sup>rd</sup> RFI, question 2c (ID1173/5).

<sup>413</sup> LG argues in its response to the SO, Annex 2 (ID1005/19) that the cost of journey time amounted to between [percentage] of the true total cost of each route, due to the depreciation of the tank wagons (longer journey time means higher usage of the rolling stock). This does not seem to consistent with the fact that LG's total depreciation costs amounted to only [percentage] of total costs in 2009 and with the discount factor of about [percentage] which was applied on tariff book prices by LG when OL used its own wagons. Moreover, the cost of journey time as estimated by LG in its response to the SO is largely dependent on the depreciation period which is used. LG proposes a depreciation period of 12 years, while a tank wagon has typically a much longer lifetime.

LG's costs can be found in LG's response to the 4<sup>th</sup> RFI, annex 5 (ID0732) and LG's tariff book prices can be found in Annex 1 (ID0789).

<sup>414</sup> Commission's Letter of Facts, points 53-55 (ID1219/14) and LG's response (ID1234).

concerned about the possibility of OL switching to the Latvian seaports and LDZ undercutting LG's tariffs (see recital (264)).

- (281) Moreover, even if LDZ's costs for providing rail transport services on the Short Routes to the Latvian seaports had been higher than those of LG on the Route to Klaipėda, LDZ could nonetheless have acted as an effective constraint on LG insofar as LDZ's costs remained below the prices that OL paid LG for those services, net of discounts.
- (282) More specifically, in 2008 and 2009, OL paid EUR [price] and [price] respectively per tonne for rail transport services on the Route to Klaipėda.<sup>415</sup> Those prices significantly exceed the costs of the Short Routes to the Latvian seaports as shown in recital (259), even when taking into account a small difference in the cost allocation mechanisms. For instance, in 2008 and 2009 the price charged by LG on the Route to Klaipėda was respectively [65-85]% and [65-85]% higher than the cost of operating the Short Route to Riga, and respectively [30-40]% and [30-40]% higher than the cost of operating the Short Route to Ventspils.
- (283) Even assuming that LDZ required some profit margin on its rail transport services, the significant difference between the costs of operating the Short Routes to the Latvian seaports and the prices charged by LG suggests that competing offers by LDZ would have put pressure on LG to reduce the prices charged to OL, in order not to lose OL to LDZ.
- (284) Therefore, even if the Route to Klaipėda were more cost-effective than the Short Routes to the Latvian seaport, *quod non*, LDZ could still have exerted competitive pressure on LG, given the significant difference between the cost of the Short Routes to the Latvian seaports and the prices charged by LG to OL on the Route to Klaipėda. As a result, even if OL had not eventually switched to LDZ to export its oil products via the port of Riga or Ventspils, LDZ would still have had a competitive impact on the prices charged by LG to OL for the relevant rail transport services.

7.4.2. *Without the Track, LDZ had no more opportunity to offer rail transport services for OL's oil products and to exert competitive pressure on LG*

- (285) Prior to removal of the Track LDZ had a credible opportunity to transport OL's oil products intended for seaborne export via the Short Routes to the Latvian seaports (see section 7.4.1). Even after removal of the Track, LDZ still had the possibility in theory to try to compete with LG either on the Long Routes to the Latvian seaports or on the Route to Klaipėda. However, on those routes, LDZ would not have been able to offer rail transport services for OL's oil products in a way that would have exerted competitive pressure on LG.
- (286) The Route to Klaipėda, which is 228 km long, is entirely within the territory of Lithuania. The Long Routes to the Latvian seaports have a significant part within the territory of Lithuania (152 km). The whole Route to Klaipėda and a significant part of the Long Routes to the Latvian seaports are controlled by LG as railway infrastructure manager.
- (287) Sections 7.4.2.1 to 7.4.2.3 show that LG had a competitive advantage on its own network. If operating on long distances in Lithuania, LDZ would have operated far

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<sup>415</sup> The price per tonne is directly derived from LG's response to the 4<sup>th</sup> RFI, annex 3 (ID0730).

from its logistical base and would have depended on LG for the access to the railway infrastructure and the provision of additional railway services. From an *ex ante* perspective, this represented a substantially higher risk for LDZ than operating on the Short Routes to the Latvian seaports if the Track had not been removed.

- (288) Moreover, section 7.4.2.4 shows that even if LDZ had been able to offer rail transport services for OL's products on the Long Routes to the Latvian seaports without facing barriers to entry, *quod non*, the Long Routes to the Latvian seaports would not have been cost-efficient compared to the Route to Klaipėda.
- (289) Finally, in section 7.4.2.5 sets out corroborating evidence found during the Commission's inspection. This shows that LG was contemplating barriers to entry on its own network whereas on the Short Routes to the Latvian seaports LDZ would not have faced barriers to entry.

#### 7.4.2.1. Barriers to entry in the rail sector

- (290) Vertically-integrated railway undertakings have a competitive advantage on their own network over their competitors. The rail freight sector exhibits high barriers to entry for railway undertakings that do not manage the relevant railway infrastructure. In all Member States, entry to the rail freight sector by new entrants or incumbents from other Member States has taken time and, at the end of 2008, non-incumbent freight operators had a combined market share of more than 20% in only seven Member States.<sup>416</sup>
- (291) OL itself assessed the possibility of starting its own railway undertaking to serve its transport needs for its own oil products. Describing the process to set up a railway undertaking in Lithuania, OL identified related regulatory barriers to entry. Overall, OL estimated the time needed to complete such a project at between three and four years.<sup>417</sup> This included the time needed to obtain the licence, the safety certificate, the capacity allocation and the contract with the incumbent for additional railway services. OL argues that it was concerned about the risks of applying for the necessary licences and safety certificates in Lithuania, bearing in mind that those are granted by the VGI, which is closely linked to LG.<sup>418</sup> Therefore, after assessing the possibility of starting its own railway undertaking,<sup>419</sup> OL abandoned the project.<sup>420</sup>
- (292) Sections 7.4.2.2 and 7.4.2.3 describe the barriers to entry and competitive disadvantages that a potential competitor such as LDZ faces on LG's network. The Commission has focused on the most significant barriers to entry, namely:
- (1) access to the railway infrastructure and to additional railway services; and
  - (2) lack of information and transparency on market entry conditions.

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<sup>416</sup> Second report on monitoring and development of the rail market, SEC(2009)1687/2, p.10 (paragraph 30).

<sup>417</sup> OL's response to the 3<sup>rd</sup> RFI, Annex 3, page 20 (ID0718/20).

<sup>418</sup> OL's response to the 3<sup>rd</sup> RFI, question 26 (ID0787/21). LG's Chairperson of the Board was simultaneously Vice Minister for Transport and Communications, Complaint, paragraph 56 (ID 0009/18).

<sup>419</sup> OL's response to the 3<sup>rd</sup> RFI, Annex 3 (ID0718).

<sup>420</sup> OL's updated response to the 3<sup>rd</sup> RFI, question 26 (ID0787/21).

#### 7.4.2.2. Access to the railway infrastructure and to additional railway services

- (293) New entrants depend on vertically-integrated incumbents for access to the railway infrastructure, since they must request capacity in order to be able to operate on the incumbent's network. They must also rely on the incumbent for the provision of additional railway services, which are not necessarily regulated (or are regulated in a way that allows for leeway regarding prices and quality of the service provided). This is the case, for example, for certain maintenance services (for rolling stock), access to certain facilities (such as marshalling and shunting yards to form a train, or parking and cleaning facilities for rolling stock) or back-up services (in case a train breaks down and disrupts traffic).
- (294) If the new entrant uses the services of the incumbent, the incumbent can largely dictate the terms on which they are provided, leading to uncertainty in quality and cost. The alternative is for the new entrant to establish its own facilities, but this requires significant investments. If the new entrant establishes its own facilities, it will not be able to benefit from the same economies of scale as the incumbent.
- (295) The Commission has pointed out the risk of discrimination relating to access to the railway infrastructure and additional railway services, based on the results of impact assessments and stakeholders surveys:
- (1) *"Operators entering a new market continue to face discrimination in obtaining access to the infrastructure and rail-related services, which are often owned and operated by the incumbent rail undertaking".*<sup>421</sup>
  - (2) *"New entrant RUs reported many cases of discrimination in access to rail related services. [...] There are cases of rail undertakings that manage service facilities refusing to give service access to interested parties, thereby discriminating against smaller operators. Such discriminatory treatments reduce the potential development of new business and are more serious when the service is managed by the incumbent RU".*<sup>422</sup>
  - (3) *"Higher prices for new entrants: this obstacle is a consequence of the other obstacles. Due to higher number of obstacles and variety of problems, investment burden and financial consequences are higher for new entrants".*<sup>423</sup>
  - (4) *"If new entrants do not get access to facilities at acceptable conditions, they will in many cases not enter the market, even if access to the main infrastructure is secured. In most cases it would be too costly for new entrants to build their own facilities in the Member States where they intend to operate".*<sup>424</sup>
- (296) As regards capacity allocation in Lithuania, applications for access to railway infrastructure are submitted to the VGI, which verifies the completeness of the

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<sup>421</sup> Communication from the Commission of 17 September 2010 concerning the development of a Single European Railway Area, COM(2010)474 final, page 7.

<sup>422</sup> Commission staff working document - Impact assessment accompanying document to the proposal for a directive of the European Parliament and of the Council establishing a single European railway area - (Recast), SEC(2010)1042, page 6-7.

<sup>423</sup> Stakeholder survey conducted by the Commission in 2012 in preparation of its proposal on the Fourth Railway Package. SEC(2010)1042, page 47.

<sup>424</sup> Impact assessment on the Fourth Railway Package. SWD(2013) 12 final of 30 January 2013 on "Impact Assessment", page 127.

application. The application is then forwarded to LG for technical evaluation and, following that evaluation, LG submits a draft timetable (see recital (129)). When assessing the possibility of developing its own railway undertaking, OL argued that it was concerned about the risks of seeking access to the Lithuanian railway infrastructure. Although applications for capacity allocation are regulated and made to the VGI, it is LG (as railway infrastructure manager) which evaluates the application and prepares a draft railway schedule for the VGI.<sup>425</sup>

- (297) Therefore LDZ would have had to request access to the Lithuanian railway infrastructure, and that request would have depended on evaluation of the application by the incumbent, LG. As a consequence of the Track having been removed, the request for capacity allocation would have been in respect of much longer and significantly busier routes in Lithuania and would therefore have been more complex, thereby increasing friction with the railway infrastructure manager LG.
- (298) By contrast, with the Short Routes to the Latvian seaports, only 34 kilometres is inside in Lithuania and that stretch was used exclusively for OL's traffic. So, requests for capacity allocation would have been less complex, and LG's ability to raise difficulties would have been more limited as a result. Consequently, the Short Routes to the Latvian seaports represented, from an *ex ante* perspective, a significantly lower risk for LDZ (and its customers).
- (299) As for the additional railway services necessary for the provision of rail transport services in Lithuania, OL identified the dependence on LG as a significant risk for the success of its project to create its own railway undertaking, given that LG was also a competitor. OL noted as a risk the fact that there is "*no competition on the Lithuanian market – LG is the supplier of the majority additional services needed by carriers*".<sup>426</sup>
- (300) If LDZ had been operating on the Route to Klaipėda or the Long Routes to the Latvian seaports, it would have depended to a greater extent on its competitor LG for the provision of additional railway services. It would not have been able to provide the necessary additional railway services from Latvia and establishing its own facilities in Lithuania would have required significant investments. This was particularly the case for the Route to Klaipėda which is located entirely in Lithuania.
- (301) By comparison, if the Track had not been removed, LDZ could have transported OL's oil products on the Short Routes to the Latvian seaports and relied primarily on its own facilities in Latvian territory. Consequently, for LDZ, the Short Routes to the Latvian seaports represented, from an *ex ante* perspective, a significantly lower risk.
- (302) In its response to the SO, LG argued that access to network and additional railway services can be obtained easily, for the following reasons:
- (1) the principle of non-discrimination established in Directive 2001/14/EC has been transposed into Lithuanian law; and
  - (2) LG and LDZ already had a practice of mutual cooperation.<sup>427</sup> [business secret]<sup>428</sup>

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<sup>425</sup> OL's response to the 3<sup>rd</sup> RFI, question 26 (ID0787/21).

<sup>426</sup> OL's response to the 3<sup>rd</sup> RFI, Annex 3, page 18 (ID0718/18).

<sup>427</sup> LG's response to the SO, section 3.4.2.2.2 (ID1003/81-82)



- (303) As regards the first argument in recital (302), recitals (293) to (300) explained that the transposition of the principle of non-discrimination established under Directive 2001/14/EC into Lithuanian law left some leeway for LG to impose unfavourable terms for the access to the railway infrastructure and the provision of additional railway services (even for services to which this principle applied, which is not the case for all services – see recital (131)).
- (304) As for the second argument in recital (302), the Commission notes that the cooperation agreement between LG and LDZ [business secrets]<sup>429</sup> Moreover, the cooperation agreement was established at a time where LG and LDZ were not competing against each other, with LDZ acting as a traction service provider and not as an independent railway service provider in Lithuania. It is questionable whether the agreement would have been renewed if LG and LDZ had become competitors. This point was not contested by LG in its response to the Letter of Facts.<sup>430</sup>

#### 7.4.2.3. Lack of information and transparency on market entry conditions

- (305) The Commission, as well as studies on the liberalisation of the Union rail freight markets, has identified the lack of transparency in the conditions for market entry and the difficulties of accessing access such information in the network statements of infrastructure managers as one of the main barriers to entry to new markets for railway undertakings:
- (1) *"Lack of transparency and an ineffective functioning of the institutional framework constitute other barriers to the provision of rail services and competition. Essential information for new entrants, such as on application or appeal procedures, is not yet systematically and easily accessible in 'network statements'".<sup>431</sup>*
  - (2) *"Our analysis of the prices charged for rail-related services shows that there is often little price transparency; [...] Our case study has shown that the access conditions to the rail-related services within some EU Member States are not clear; as a consequence, it can be difficult for new entrants and current industry participants to make informed and sound business decisions on*

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<sup>428</sup> Agreement DB-31/K-927-345 of June 2003 on use of locomotives and crews in the frontier area (ID1011).

<sup>429</sup> Agreement DB-31/K-927-345 of June 2003 on use of locomotives and crews in the frontier area (ID1011/8).

<sup>430</sup> Commission's Letter of Facts, point 56 (ID1219/15) and LG's response (ID1234).

<sup>431</sup> Commission staff working document - Impact assessment accompanying document to the proposal for a directive of the European Parliament and of the Council establishing a single European railway area - (Recast), SEC(2010)1042, p. 7. This assessment, dating back to the beginning of the liberalisation process (three years after EU-wide liberalisation) was reiterated by the Commission in its supporting documents to its proposal for a Fourth Railway Package, identifying the lack of transparency on market conditions and prices as an important market entry barrier. See Commission Staff Working Document Impact Assessment accompanying the document Proposal for a Directive of the European Parliament and of the Council amending Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area, as regards the opening of the market for domestic passenger transport services by rail and the governance of the railway infrastructure, SWD(2013) 12 final of 30 January 2013, page 16.

*launching and developing offers of rail services, and investing in rail transport equipment".*<sup>432</sup>

- (306) LG, as the incumbent and as the infrastructure manager for the rail network in Lithuania did not suffer from this lack of information. As the Commission has highlighted in its proposal for a Fourth Railway Package: "*Information asymmetries lead to competitive advantages for incumbents*".<sup>433</sup>
- (307) Following removal of the Track, LDZ would have had to operate on significantly longer distances in Lithuania and therefore was more dependent on LG, in particular for the additional railway services. As a consequence, LDZ was even more exposed to the lack of information and transparency about access conditions and charges for those additional railway services. By contrast, LDZ was familiar with the entire Lithuanian leg of the Short Routes to the Latvian seaports and had a long experience of operating on the Lithuanian leg of those routes as a sub-contractor of LG. Consequently, LDZ would have been less dependent on LG for information on the Lithuanian leg of those routes, due to its short length and its proximity with the Latvian territory.
- (308) In its response to the SO, LG argued that the relevant information was available in its Rail Network Statement. However, the Network Statement of 2008-2009 defines only the formulae for calculating the charges for access to Lithuanian railway infrastructure.<sup>434</sup> It does not specify the actual prices for the additional railway services, mentioning only that additional services are charged in accordance with the relevant regulation (Rules for Calculating Charges). That regulation specifies that the fees are set by the VGI according to the principle that they cannot be lower than the costs of the infrastructure manager. Those costs are estimated on the basis of costs as transmitted to the VGI by LG (see recital (132)). For a potential competitor such as LDZ, this leaves uncertainty as to the actual amount of these charges, especially since its competitor LG had some leeway in estimating its own costs. This point was not contested by LG in its response to the Letter of Facts.<sup>435</sup>

#### 7.4.2.4. The Long Routes to the Latvian seaports were not cost-efficient

- (309) Sections 7.4.2.1 to 7.4.2.3 showed that LDZ's competitive position on the Route to Klaipėda and the Long Routes to the Latvian seaports was weaker than on the Short Routes to the Latvian seaports because those routes required trains to be operated over long distances within the territory of Lithuania on LG's railway infrastructure far from LDZ's logistical base.
- (310) In addition, even if LDZ had been able to offer rail transport services for OL's oil products on the Long Routes to the Latvian seaports without facing barriers to entry, *quod non*, the Long Routes to the Latvian seaports would not have been cost-efficient as compared with the Route to Klaipėda. Consequently, the Long Routes to the Latvian seaports were not competitive alternatives to the Route to Klaipėda

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<sup>432</sup> SERVRAIL study, Assessment of present and likely future conditions of providing rail related services, December 2006, Steer Davies Gleave (ID0901/3).

<sup>433</sup> COM(2013) 25 final of 30 January 2013 on "*The Fourth Railway Package – completing the single European railway area to foster European competitiveness and growth*", page 4.

<sup>434</sup> Network Statement in Lithuania 2008-2009 (ID1104).

<sup>435</sup> Commission's Letter of Facts, points 57-58 (ID1219/15) and LG's response (ID1234).

(which was not a credible option either for LDZ for the reasons set out in sections 7.4.2.1 to 7.4.2.3).

- (311) To test the statement in recital (310), the Commission compared the costs incurred by railway undertakings when operating the Route to Klaipėda and the Long Routes to the Latvian seaports. Figure 5 shows the comparison for the different routes. The Commission used the same methodology described and applied in section 7.4.1.5. Therefore, the considerations relating to the comparison of the routes set out in section 7.4.1.6 apply equally to the analysis in Figure 5.

**Figure 5 Costs per tonne for the transportation of OL's oil products (Long Routes and Route to Klaipėda)**

<b>Routes</b>	<b>Distance (km)</b>	<b>Costs 2008(EUR/T)</b>	<b>Costs 2009(EUR/T)</b>
<b>Costs on Long Route to Riga</b>	<b>238</b>	[costs]	[costs]
Lithuanian leg by LG	152	[costs]	[costs]
Latvian leg by LDZ	86	[costs]	[costs]
<b>Cost on Long Route to Ventspils</b>	<b>352</b>	[costs]	[costs]
Lithuanian leg by LG	152	[costs]	[costs]
Latvian leg by LDZ	200	[costs]	[costs]
<b>Costs on Route to Klaipėda by LG</b>	<b>227</b>	[costs]	[costs]
<b>Difference Long Route to Riga/ Route to Klaipėda</b>		<b>[10-20]%</b>	<b>[20-30]%</b>
<b>Difference Long Route to Ventspils/Route to Klaipėda</b>		<b>[30-40]%</b>	<b>[40-50]%</b>

- (312) The Long Routes to the Latvian seaports are less competitive than the Route to Klaipėda. The costs incurred on the Long Route to Riga were [10-20]% higher (in 2008) and [20-30]% higher (in 2009) than the costs incurred on the Route to Klaipėda. The costs incurred on the Long Route to Ventspils were [30-40]% higher (in 2008) and [40-50]% higher (in 2009) than the costs incurred on the Route to Klaipėda.
- (313) The considerations described in recital (261) regarding the Short Routes to the Latvian seaports apply *mutatis mutandis* for the Long Routes to the Latvian seaports. This means that the cost-effectiveness of the Long Routes to the Latvian seaports is probably under-estimated (in other words, the costs of the Long Routes to the Latvian seaports are probably over-estimated).
- (314) Although the costs of the Long Routes to the Latvian seaports may be over-estimated, it seems unlikely that LDZ would have been able to make a competitive offer on the Long Routes to the Latvian seaports. Consequently, after the removal of the Track and without taking into account the barriers to entry, the only economical option left to LDZ for competing with LG for the transportation of OL's oil products intended for seaborne export would have been to try to offer rail transport services on the Route to Klaipėda.

#### 7.4.2.5. Corroborating evidence on competitive advantage of LG on its network

- (315) LG had a competitive advantage on its rail network in Lithuania. The competitive advantage would not have applied, or would have represented less of an obstacle for LDZ, if the Track had been available. Before the removal of the Track, LG's ability to prevent LDZ from entering the market of the provision of rail transport services for oil products was limited. In view of the short length of the Lithuanian leg of the Short Routes and its proximity to the Latvian border, LDZ could have provided rail

transport services to OL while relying on its facilities in Latvia and without depending significantly on LG.

- (316) That conclusion is corroborated by documents seized during the Commission's inspection of LG's premises. These documents show that LG was contemplating barriers to entry within the Lithuanian network, whereas on the Short Routes to the Latvian seaports LDZ would have faced no barriers to entry:
- (1) in a document found in the office of LG's Deputy CEO for Infrastructure (see recital (94)), LG noted itself that there were neither technological nor organisational barriers preventing LDZ from transporting OL's freight on the Short Route to Riga;
  - (2) in the same document, LG mentioned that the transportation of OL's oil products to the seaport in Riga would be more difficult for it than for LDZ because LG would have to establish its own infrastructure in Latvia or rely on the services of LDZ under conditions which could be dictated by their competitor. Although the document relates to the difficulties of competing against the Latvian incumbent in Latvian territory, considering the nature of the difficulties identified, the competitive disadvantages that LG would have encountered if it had tried to operate in Latvia over long distances would have applied equally to LDZ if LDZ had tried to operate in Lithuania over long distances.
  - (3) a note from LG's Deputy CEO (see recitals (97) to (99)) discusses the possible threats to the interests of the seaport of Klaipėda and lists under the heading "*defence from Latvia*" various barriers to entry that LG would have been in a position to raise. In that document, the possibility of not providing additional railway services (by charging "*adequate*" prices) is explicitly mentioned.<sup>436</sup>

7.4.3. *LG's behaviour foreclosed LDZ and had potential anti-competitive effects on the market for the provision of rail transport services for oil products*

- (317) Section 7.4.1 shows that, prior to the removal of the Track, LDZ could have made a competitive offer on the Short Routes to the Latvian seaports. LDZ had experience of operating on the Short Routes to the Latvian seaports (as LG's sub-contractor for the Lithuanian leg) and would have been able to transport OL's oil products on those routes without depending significantly on LG.
- (318) After the removal of the Track, the only other possible option for LDZ (in theory at least) would have been to try to compete on the Route to Klaipėda or on the Long Routes to the Latvian seaports. However, for the reasons set out in section 7.4.2, operating on the Route to Klaipėda or on the Long Routes to the Latvian seaports was not a credible alternative for LDZ. LDZ would have had to establish itself in Lithuania, far from its logistical base, and depend on its competitor LG for the quality and the cost of LDZ's services.<sup>437</sup> From an *ex ante* perspective, this presented

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<sup>436</sup> While the document mentions an independent Latvian operator, Baltijas Tranzīta Serviss, as a potential competitor, it is likely that LG would have considered similar barriers to entry and would have been able to raise them if LDZ had tried to operate on the Lithuanian leg of the Long Route to the Latvian seaports.

<sup>437</sup> Moreover, even if LDZ would have been able to compete with LG via the Long Routes to the Latvian seaports, *quod non*, they were not cost-efficient compared to the Route to Klaipėda and therefore were not credible alternatives.

a substantially higher risk for LDZ. LDZ was therefore much less likely to compete with LG after removal of the Track.

- (319) LG's conduct therefore increased barriers to market entry and weakened LDZ's competitive position. This weakened (potential) competition on the market for the provision of rail transport services for oil products from the Refinery to the seaports of Klaipėda, Riga and Ventspils through a practice that cannot be considered competition on the merits.<sup>438</sup> LG's conduct foreclosed LDZ and reduced, if not eliminated, the competitive constraint previously exerted by LDZ.
- (320) Indeed, prior to the removal of the Track, OL was negotiating with LDZ for the transportation of its oil products intended for seaborne export. LDZ made an offer for the transportation of OL's oil products from the Refinery via the Short Route to the Latvian seaports. This offer was considered by OL to be "*concrete and attractive*". The seriousness of the option to switch to the Short Routes to the Latvian seaports is evidenced by the negotiations between OL and LDZ that continued until mid-2010, by LDZ's perception that such a switch was indeed a competitive constraint on LG (see recital (27)) and LDZ's application for a licence to operate on the Lithuanian leg of the Short Routes to the Latvian seaports (see recital (111)).
- (321) Once it became clear that the Track would not be reopened for traffic in the near future, LDZ withdrew its request for a licence to operate on the Lithuanian leg of the Short Routes to the Latvian seaports and never applied for a license to operate on the Route to Klaipėda nor on the whole Lithuanian leg of the Long Routes to the Latvian seaports (see recital (112)).
- (322) OL always considered that the availability of the Short Routes to the Latvian seaports was a necessary condition for reaching an agreement with LDZ and so, in the absence of the Track, negotiations with LDZ became irrelevant.<sup>439</sup> Consequently, the negotiations broke off in mid-2010, when OL came to the conclusion that LG had no intention of restoring the Track in the short term (see recital (27)).
- (323) More than eight years after the removal of the Track (and more than ten years after the Union-wide liberalisation of the rail freight market), there is still no competition for the transportation of OL's oil products (and there is still no competition within the wider Lithuanian rail freight market – see recital (113)).
- (324) That absence of competition ensures that the business represented by the transportation of OL's oil products intended for seaborne export remains captive to LG. LG's margins for the transportation of OL's oil products on the Route to Klaipėda amounted to [20-30]% of its revenues in 2008 and increased to [30-40]% in 2012. By comparison, the average level of profitability achieved by LG in the rail freight market in Lithuania was [10-20]% in 2008 and [10-20]% in 2012 (see recital (149)).

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<sup>438</sup> This remains valid if the relevant market were defined as the provision of rail transport services for oil products (or even for freight in general) in Lithuania.

<sup>439</sup> OL's response to the 1<sup>st</sup> RFI, questions 3 f-3.g (ID0206/15-16); OL's response to the 2<sup>nd</sup> RFI, question 1 (ID0332/2).

## **7.5. Objective justification**

### *7.5.1. General considerations*

- (325) LG raised safety arguments to justify the removal of the entire Track, namely that the Track was unsafe and that traffic could not have been renewed before extensive repair works that required the removal of the entire Track were carried out.
- (326) Safety considerations may indeed have provided an objective justification for the actions of LG. LG has an obligation, as the railway infrastructure manager, to ensure the safety of the railway network and to restore the normal situation in case of disturbance. However, when considering the burden that is placed on LG to provide objective justification for its actions in line with the principles set out in recital (176), it is incumbent on LG, the infrastructure manager that removed the Track, at the very least to provide a clear and coherent explanation for its actions.
- (327) This is even more so when considering that the central evidence, the Track itself, is not available for inspection anymore because LG had removed it in haste and contrary to normal practice.
- (328) The Commission considers that LG failed to show objective justification for the removal of the Track for the reasons explained below.

### *7.5.2. Assessment*

- (329) Initially, in reply to a request for information, LG argued that the closure and subsequent removal of the Track were the result of the Deformation.<sup>440</sup> As noted in section 7.3.1, although the Commission had doubts regarding the occurrence of the Deformation it based its analysis on the assumption that the Deformation did occur as alleged by LG. Nevertheless, its occurrence cannot explain the removal of the entire Track. This link between the Deformation as such and the removal of the entire Track does not derive from contemporaneous documents. In any event, LG itself did not make that argument anymore in the Response to the SO.
- (330) In the Response to the SO, LG qualified its argument and argued that the Deformation in fact led LG to review its assessment of the state of the entire Track. This review had then triggered the decision to remove it. Indeed, in reply to a request for information, LG had stated that, between the May 2008 Inspection, when the Track was considered safe for traffic of dangerous cargo (oil products) with speed restriction, and September 2008, no special inspections had been conducted. There was therefore no reason to believe, before September 2008, that the conclusions reached in May 2008 were no longer valid.
- (331) The argument based on a re-assessment of the state of the Track following the Deformation cannot be supported by the initial reports prepared by LG's Inspection Commission after the Deformation was detected. Indeed, those two initial reports, that is the Report of the Investigation of 5 September 2008 and the Technical Report of 5 September 2008, considered only the area where the Deformation occurred and set out that the Deformation was caused by a local problem of the superstructure of the Track and that it could have been repaired locally (see recitals (36) to (39)), as was done in other incidents of rail buckling (see footnote 58). Those reports did not consider the state of the Track in its entirety.

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<sup>440</sup> LG's response to the 1<sup>st</sup> RFI, paragraph 8 (ID0347/5).

- (332) The first confirmations that comprehensive renovation of the Track would be required before traffic could be resumed on it appeared in letters from the Local Director dated 4 and 5 September 2008 (see section 4.5.3) to LG's headquarters. Those letters noted the same problems with the superstructure that had already been mentioned four years earlier in the Report of 3 September 2004 and later, in the Reports of 5 September 2008 in relation to the area where the Deformation had occurred (see Table 2 in recital (46)). The letters of the Local Director were therefore not based on any report that would have assessed the state of the Track after the Deformation. When asked to clarify the basis for those letters, LG's reply was implausible (see recital (42)).
- (333) As noted earlier (see recitals (42) to (43)), in its Response to the SO, LG argued that *"the conclusion of the Local Director was based on bad experiences with the Track since 2004"*, specifically the failure of the reduction of the speed limit to prevent the Deformation. The Commission notes, however, that the letters from the Local Director of 4 and 5 September 2008 do not mention the failure of the reduction of the speed limit to prevent the Deformation. Moreover, the members of the Inspection Commission that handed down the Report of the Investigation of 5 September 2008 and the Technical Report of 5 September 2008 were senior employees in the same branch, who must have been familiar with the history of the Track too. LG did not contest this conclusion. The Local Director did not invoke in his letters different findings than those made by the Inspection Commission.
- (334) The discrepancies between, on the one hand, the conclusions of the initial reports of 5 September 2008, which pointed to a local repair of the Deformation site, and, on the other hand, the letters of the Local Director, which referred to more comprehensive works on the Track, remain unexplained.
- (335) On 10 September 2008, LG established a commission for "extraordinary inspection" of the Track. This was therefore the first time after the Deformation was detected that inspectors considered the state of the Track in general. Two days later, that commission submitted its Extraordinary Inspection Report of 12 September 2008, concluding that the Track was not safe for traffic (see recital (45)). Following the Extraordinary Inspection Report of 12 September 2008, LG's Deputy Director General sent a letter to LG's Strategic Planning Council suggesting comprehensive works should be carried out on the bed and superstructure of the Track (see recital (48)).
- (336) A recurrent position in LG's correspondence with the Minister for Transport, and in its submissions to the Commission, is that the main reason for the removal of the entire Track was that it suffered from a systemic problem in the bed of the Track, namely a loss of ballast that caused the bed to narrow. In order to repair the bed, the superstructure above it had first to be removed.<sup>441</sup>
- (337) However, the condition of the Track had been known since at least the Report of 3 September 2004 and yet no systemic problems in the bed of the Track were reported until the Extraordinary Inspection Report of 12 September 2008, although the Track

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<sup>441</sup> Seized documents JS1 pages 1/3 and 2/3 (ID0571/1-2) (another copy of the same document was seized under identifier VJ2 (ID0647)), JS6, page 2/3 (ID0577/2) (and identical wording in JI6, page 2/2 (ID0557/2)); LG's response to the 1<sup>st</sup> RFI, paragraphs 1 and 15 (ID0347/1, 12); LG's response to the 4<sup>th</sup> RFI, paragraphs 6-10 (ID0749/3-4); LG's response to the SO, paragraph 229 (ID1003/59).

had been the subject of regular checks. With respect to the bed of the Track, the Report of 12 September 2008 reported four gullies that had been detected at specific points along the Track. It also noted a problem with the ballast but with no indication of the specific locations at which the defects were discovered (see recital (45)). This is markedly different from the way in which other findings had been recorded in previous reports which had noted their exact location. With respect to the ballast, for example, the Report of 3 September 2004 had noted the exact location of the ballast defect it had detected ("*500 metres behind the 18<sup>th</sup> kilometres*", see recital (30)); it had not identified a general problem with the ballast.

- (338) In its Response to the SO LG stated that unlike the Inspection Commission of 3 September 2008 which prepared the Reports of 5 September 2008 and did not note problems with the bed of the Track, the Extraordinary Inspection Commission of 10 September 2008 included bed and ballast specialists<sup>442</sup> and that "*in order to perform an analysis of the bed, ballast has to be excavated. The bad condition of the bed cannot be seen visually.*"<sup>443</sup>
- (339) However, when the Commission endeavoured to clarify this new explanation LG stated that the Extraordinary Commission did not excavate any ballast from the Track.<sup>444</sup>
- (340) Later, in its response to the Letter of Facts, LG revised its position, arguing that the main objective of the Extraordinary Inspection Commission of 12 September 2008 was a visual evaluation of the Track for apparent defaults such as "*ballast rise, pits, subsidence, slides of embankment slopes, landslides, dyke splay, settle, or the deterioration of parts of the embankment slope.*" According to LG, "*only after determining any such visual defects, special research is being performed.*"<sup>445</sup> The Commission notes however that none of those defects was mentioned in the Extraordinary Inspection Report of 12 September 2008 and that the decision to dismantle the Track was taken before it conducted any "special research", which supposedly would have included excavation of ballast.
- (341) In the technical annex attached to its response to the Letter of Facts LG added that the visible defects identified by the Extraordinary Inspection Report of 12 September 2008 were the four "*elutions (gullies), which show embankment defects, due to which embankment deformation are possible.*"<sup>446</sup>
- (342) The conclusion from this explanation is that the only cogent finding that the Extraordinary Inspection Report of 12 September 2008 made with respect to the bed of the Track with the tools at its disposal (that is visual inspection) related to the gullies. However, none of the contemporaneous documents or the many earlier submissions made by LG during the investigation identified the gullies as giving LG the reason to remove and repair the entire Track. Furthermore, no explanation was provided why gullies identified on four locations would require removing and repairing the entire 19 Km of Track. Lastly, since gullies are visible and the Track was examined in May 2008 and regular monthly inspections were conducted along

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<sup>442</sup> LG's response to the SO, paragraph 91 (ID1003/27).

<sup>443</sup> LG's response to the SO, paragraph 226 (ID1003/58).

<sup>444</sup> LG's response to the 6<sup>th</sup> RFI, paragraph 8 (ID1075/3).

<sup>445</sup> LG's response to the Letter of Facts, annex 1, paragraph 13 (ID1234/5) and annex 2, page 2 (ID1239/2),

<sup>446</sup> LG's response to the Letter of Facts, annex 2, page 2 (ID1239/2).



the Track, it remained unexplained why it was not found earlier that the Track was unsafe.

- (343) It is recalled that following the Report of 3 September 2004 the speed limit on the Track was lowered but traffic continued (see recital (30)). The Commission asked LG to explain the changes in the condition of the Track between September 2004 and September 2008. In response, LG provided a table prepared ex post for the purposes of the reply to the request for information<sup>447</sup> (the "Table provided by LG") that "*illustrates the theoretical-gradual deterioration*" of the Track. The Table provided by LG was based on the Report of 3 September 2004 and the Extraordinary Inspection Report 12 September 2008.<sup>448</sup> The Table provided by LG was therefore not based on direct empirical knowledge of the state of the Track.
- (344) However, most of the information noted in the Table provided by LG is either not mentioned in the Report of 3 September 2004 and the Extraordinary Inspection Report of 12 September 2008 or not measured (thereby making any comparison impossible).
- (345) The only element in the Table provided by LG that refers to the bed of the Track is the "ballast impurity" indicating an increase of ballast impurity from 38% to 40%. Considering that the condition of the ballast was identified as the main reason for the unsafety of the entire Track, this seemingly small difference cannot explain the change in LG's view of the safety of the entire Track. LG did not identify the formation of gullies as a change in the Track's condition.
- (346) With respect to the superstructure LG also argued that:

*"In some parts of the track (in total 1,6 km) 80% of the braces were unsuitable (see paragraph 2 of the report). In accordance with the provisions of Table 20 of the Rules for Railway Track Maintenance... the traffic should be forbidden in this case".*<sup>449</sup>

- (347) The Report of 3 September 2004 (see recital (30)), the letter from the Local Director of 4 September 2008 (see recital (41)) and the Report on the Investigation of 5 September 2008 as well as the Technical Report of 5 September 2008 (see section 4.5.2) noted that on some sections of the Track, 70% of the braces were defective, a level which according to Table 20 of the Rules for Railway Track Maintenance corresponds to the speed limit of 25 km/h that was implemented in these sections of the Track. In addition, in February 2007 and May 2008 the Track was inspected and the speed limited on some sections (including that of the Deformation) was lowered to 25 km/h which corresponds to 70% of defective braces. It is therefore surprising that a week after the reports of September 2008 and the letter from the Local Director, namely in the Extraordinary Inspection Report of 12 September 2008, 80% of braces were found to be defective, above the 75% limit beyond which traffic should be suspended. No explanation was provided as to the allegedly sharp deterioration in the condition of the Track in such a short time span. Furthermore, Table 20 of the Rules for Railway Track Maintenance seems to suggest that the level of defective materials should refer to segments of 1 kilometre while the

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<sup>447</sup> LG's response to the 2<sup>nd</sup> RFI, paragraphs 14-18 (ID0400/8-9).

<sup>448</sup> LG response to the 3<sup>rd</sup> RFI, paragraph 5 (ID0433/3).

<sup>449</sup> LG's response to the 2<sup>nd</sup> RFI, paragraph 13.2 (ID0400/6-7); LG's response to 3<sup>rd</sup> RFI, paragraph 11 (ID0433/6).

Extraordinary Inspection Report of 12 September 2008 refers to shorter segments of the Track.<sup>450</sup>

- (348) In any case, problems with 1.6 kilometres out of 19 kilometres of the Track do not necessarily require its complete removal and LG has not explained why repair works could not have been performed on the relevant segments with limited interruptions to traffic.

#### 7.5.2.1. The Wacetob Report

- (349) In order to support its arguments, LG annexed to its response to the SO a report prepared by the Warsaw Center for the Advancement of Science and Organisation in Construction ("the Wacetob Report"). According to the case law of the Union courts it is not possible to attach to such report a level of credibility and, therefore, a probative value beyond that of a mere statement from LG.<sup>451</sup> In any case the Commission considers that the analysis presented in the Wacetob Report does not support LG's argument that the removal of the entire Track was necessary before traffic on it could have been renewed.

- (350) With respect to the Deformation ("dilation" in the terminology used in the Wacetob Report), the Wacetob Report states that *"it is possible to deduce that this incident occurred because of bad rail fastening system, as stated in the Act of 5 September 2008"*<sup>452</sup> (emphasis in the origin). The Wacetob Report therefore confirms that the Deformation occurred, as stated in the reports of 5 September 2008, due to problems in the superstructure (see section 4.5.2).

- (351) The Wacetob Report concludes that-

*"LG has undertaken numerous steps to detect and repair track defects on the railway network under its responsibility between 2004 and 2015. A table listing all these defects is submitted together with this report as **Annex 3** together with an attachment containing 11 pictures of rail defects (numbered 1-11). These pictures clearly show that the track was in such a bad condition that poses a threat to safety of traffic and it was necessary to dismantle the track to repair track defects."*<sup>453</sup> [Underline added]

- (352) The Commission notes that no information or analysis was provided regarding the *"11 pictures of rail defects"*. It is not even clear if they are photos of elements of the Track. It is impossible to reach any conclusion, let alone that it was necessary to dismantle the Track, on the basis of these 11 anonymous photos.

- (353) The Wacetob Report goes on to respond to five questions asked by LG. In response to questions 1,3 and 5, the Wacetob Report notes the various defects identified on the Track in 2004, 2007 and May 2008 (see recitals (30) and (31)) and the fact that lowering the speed limit did not prevent the occurrence of the Deformation. It

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<sup>450</sup> The Extraordinary Inspection Report of 12 September 2008 refers to the segments 100–700 metres behind the 3<sup>rd</sup> kilometre mark, 800–900 metres behind the 4<sup>th</sup> kilometre mark, 900 metres behind the 17<sup>th</sup> kilometre mark and 600 metres behind the 18<sup>th</sup> kilometre mark. It may be possible for example to find within a segment of 1 kilometre a stretch of several hundred metres where 80% of the material is defective while on the entire 1 kilometre segment the percentage of defective material is lower. For the purpose of setting the speed limit the condition of the entire 1 kilometre segment should be considered.

<sup>451</sup> See judgment in *Siemens AG v Commission*, Case T-110/07, ECLI:EU:T:2011:68, paragraph 137.

<sup>452</sup> The Wacetob Report, page 12 (ID1004/13).

<sup>453</sup> The Wacetob Report, page 16 (ID1004/17).

concludes therefore that a reduced speed limit could not have prevented additional incidents,<sup>454</sup> that the other defects had to be repaired<sup>455</sup> and that successive track repairs to the relevant sections and limiting traffic to a minimum would not have been sufficient to ensure safe traffic.<sup>456</sup> As noted above, the defects identified on the Track in 2004, 2007 and May 2008 did not lead LG to the conclusion that a suspension of traffic was necessary until a complete renovation of the Track. On the argument that the occurrence of the Deformation in September 2008 should have led to that conclusion the Commission has explained above its view that it is not convincing (see recital (332)).

(354) In response to question 4 the Wacetob Report states that:

*"Taking into account the conclusions of the Mažeikiai-State Border section track inspection by the commission formed on 2 September 2008, as well as Evaluation of 25 February 2015, we can conclude that major repair works (such as fixing the embankment, upper track construction, bridges, culverts and other structures) were necessary in order to eliminate the threat to safe traffic. In order to fix the embankment and bridges, it was necessary to dismantle the upper track."*<sup>457</sup>

(355) It is recalled that the special inspection of 2 September 2008 only examined the Deformation, found that it occurred on a 40 metres section of the Track and concluded that it exceeded the allowed parameters (see recital (32)). It made no findings regarding the embankments or bridges. The conclusions of the Wacetob Report are therefore based solely on the evaluation made for the purposes of responding to the SO in 2015 ("February 2015 Evaluation").

(356) The February 2015 Evaluation identified problems with the bed on five sections of the Track amounting to a total length of 3300 metres.<sup>458</sup> The Wacetob Report does not explain, however, why defects along 3300 metres of the bed of the Track would require the complete renovation of its entire 19 kilometres. Furthermore, the February 2015 Evaluation was made more than seven years after the removal of the Track. During those seven years the bed of the removed Track had not been maintained and according to OL's submission, which was not contested by LG,<sup>459</sup> during that time the state of the bed of the Track had significantly deteriorated.<sup>460</sup> Finally, as noted in recitals (336) to (342), the various reports of the state of the

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<sup>454</sup> The Wacetob Report, response to question 1, page 17 (ID1004/18).

<sup>455</sup> The Wacetob Report, response to question 3, page 18 (ID1004/19).

<sup>456</sup> The Wacetob Report, response to question 5, page 19 (ID1004/20).

<sup>457</sup> The Wacetob Report, response to question 4, page 18 (ID1004/19).

<sup>458</sup> The February 2015 Report, LG's response to the 6<sup>th</sup> RFI, Annex 3 (ID1117) identified defects along the bed of the Track at: kilometre 2, pk 3-4; kilometre 11, pk 2-8; kilometre 17, pk 1-9; kilometre 18, pk 2-8; kilometre 19, pk 5-10.

<sup>459</sup> In response to the Commission's Letter of Facts LG did not contest the findings and conclusions in OL's submission but only reasserted the reliability of the Wacetob Report. See LG's response, Annex 1, paragraph 15 (ID1234/5) and annex 2, page 3 (ID1239).

<sup>460</sup> According to OL, the bed of the Track was already damaged by the works for dismantling the Track. It was further damaged because of the lack of maintenance allowing weeds and plants to grow on the bed and destabilise it. In the absence of the rail, vehicles were crossing or travelling on the bed destabilising it further. Finally, ballast from the bed of the Track was taken for local construction and road works. OL's submission of 21 October 2015 (ID1210).

Track that were prepared by LG in May and September 2008 identified only limited damage to the bed of the Track.

### 7.5.3. *Conclusions on the alleged objective justification*

(357) LG provided various explanations in support of its argument that the Track was unsafe and that traffic could not have been renewed before extensive repair works that required its removal had been carried out. The Commission finds that these explanations are inconsistent with each other, at times simply contradicting one another and are unconvincing. The Commission therefore considers that LG failed to show objective justification for the removal of the Track.

## 8. EFFECT ON TRADE BETWEEN MEMBER STATES

(358) Article 102 of the Treaty prohibits any abuse of a dominant position within the internal market or in a substantial part of it, insofar as the abuse may affect trade between Member States. An abuse of a dominant position may affect trade between Member States where it is capable of influencing, either directly or indirectly, actually or potentially, the pattern of trade in goods and services between Member States.<sup>461</sup>

(359) This Decision concerns the provision of rail transport services for oil products across two Member States (Lithuania and Latvia). The removal of the Track prevented a Latvian undertaking (LDZ) from competing with a Lithuanian undertaking (LG) for the transportation of those products. Rail transport services for OL's accounts for approximately [10-20]% of the total annual revenues generated by LG and OL is the largest customer on the market for the provision of railway transportation services for oil products in Lithuania.

(360) The role that the Track plays in relation to trade between Member states was also acknowledged by LG when it stated that "*this regional line [that is, the Track] has an unquestionable international track status and influences international communication with Latvia*" and that the reconstruction of the Track is "*of an international and strategic importance*" (see recital (80)).

(361) The Commission therefore considers that LG's conduct affects trade between Member States to an appreciable extent. Furthermore, it affects trade between Member States in a manner which might hinder the attainment of the objectives of a Single European Railway Area.

## 9. DURATION OF THE INFRINGEMENT

(362) According to settled case law of the Union courts the system of competition established by Articles 101 and 102 the Treaty is concerned with the economic consequences of unlawful conduct. Those Articles apply as long as the conduct, even if ended, produces its effects.<sup>462</sup>

(363) The infringement started on 3 October 2008 when LG started removing the entire Track. The infringement is on-going as at the date of adoption of this Decision the

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<sup>461</sup> See judgment in *Bagnasco and Others*, C-215, 216/96, EU:C:1999:12, paragraph 47.

<sup>462</sup> See for example the judgment in *Quinn Plastics v Commission*, C-70/12 P, ECLI:EU:C:2013:351, paragraph 40 and the references there.

likely anti-competitive effects brought about by removing the Track are still continuing.

## **10. FINES**

### **10.1. Principles**

- (364) Under Article 23(2) of Regulation 1/2003, the Commission may by decision impose fines on undertakings where, either intentionally or negligently, they infringe Article 102 of the Treaty.
- (365) The fine must not exceed 10% of its total turnover of the undertaking in the preceding business year.
- (366) Article 23(3) of Regulation 1/2003 provides that, in fixing the amount of the fine, the Commission must have regard to the gravity and duration of the infringement. In doing so, the Commission will set the fine at a level sufficient to ensure deterrence.
- (367) The Commission's current methodology for determining the level of the fines is set out in the Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation (EC) No 1/2003 ( "Guidelines").<sup>463</sup>
- (368) Firstly, the Commission determines a basic amount. The basic amount of the fine is set by reference to the value of sales to which the infringement directly or indirectly relates (paragraph 13 of the Guidelines). The basic amount is related to a proportion of the value of sales of up to 30% (paragraph 21 of the Guidelines), depending on the degree of gravity of the infringement, multiplied by the duration of the infringement (paragraph 19 of the Guidelines). The Commission may also include in the basic amount an additional amount of a sum of up to 25% of the value of sales (paragraph 25 of the Guidelines).
- (369) Secondly, the Commission takes into account circumstances that result in an increase or decrease in the basic amount. For this purpose, an overall assessment which takes account of all the relevant circumstances is carried out (paragraph 27 of the Guidelines).

### **10.2. Application to this Decision**

- (370) The Commission found that LG has abused its dominant position as the railway infrastructure manager in Lithuania in breach of Article 102 of the Treaty and considers it appropriate to impose a fine on LG.

#### *10.2.1. Intent or negligence*

- (371) The Commission considers that based on the facts described in this Decision and the assessment contained in it, the infringement has been committed either with the intention of foreclosing competition or at least negligently since LG disregarded the fact that by removing the Track it would foreclose competition on the market for the provision of rail transport services for oil products between the Refinery and the seaports of Klaipėda, Riga and Ventspils.

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<sup>463</sup> OJ C 101/65, 27.4.2004.

## 10.2.2. *The basic amount of the fine*

### 10.2.2.1. Value of Sales

- (372) For the calculation of the value of sales, the Commission normally uses as a proxy the sales of goods or services to which the infringement directly or indirectly related in the relevant geographic area within the EU during the last full business year of the undertakings' participation in the infringement (paragraph 13 of the Guidelines). If the sales achieved by the undertakings during that year are not sufficiently representative of their annual sales achieved during the infringement period, the Commission may take into account other years as a proxy for the determination of the relevant value of sales.
- (373) The infringement in this Decision foreclosed competition in the market for the provision of rail transport services for oil products between the Refinery and the seaports of Klaipėda, Riga and Ventspils. In this market, LG's value of sales is composed of the income generated by transporting OL's oil products from the Refinery to the seaport in Klaipėda. Since the infringement is on-going, the Commission considers LG's value of sales in 2016 to be the reference. During that year, the value of sales amounted to EUR [\*].<sup>464</sup>

### 10.2.2.2. Gravity

- (374) The gravity of an infringement determines the percentage of the value of sales taken into account in setting the fines. In assessing the gravity of an infringement, the Commission will have regard to a number of factors, such as the nature of the infringement, the combined market share of all the undertakings concerned, the geographic scope of the infringement and/or whether or not the infringement has been implemented (paragraph 22 of the Guidelines).
- (375) As a general rule, the basic amount of the fines is related to a proportion of the value of sales of up to 30%, depending on the degree of gravity of the infringement, multiplied by the number of years of the infringement (paragraphs 21 and 29 of the Guidelines).
- (376) In its assessment, the Commission has considered the following elements:
- (377) **The nature of the infringement:** the Commission considers that the infringement in the form of removal of a public railway track between two Member States harms further consolidation of the Single Market, in particular a single European rail market.
- (378) **Market shares:** on both the market for management of the railway infrastructure and the market for rail transport services of oil products in Lithuania LG is the only service provider.
- (379) **The geographic scope of the infringement** covers the origin and destination combinations from the Refinery to the seaports of Klaipėda, Riga and Ventspils in two Member States, namely Lithuania and Latvia.
- (380) **Implementation:** the abusive conduct of removing the Track began as of 3 October 2008.

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<sup>464</sup> LG's response to the 7<sup>th</sup> RFI, page 2 (ID1351/2).

(381) The Commission has taken into account the limited geographical scope of the infringement on the one hand and the very high market shares of LG and the negative impact of the infringement on further consolidation of the Single Market on the other hand. The Commission therefore considers that the proportion of the value of sales to be taken into account should be [\*], thereby leading to an initial amount of the fine of EUR [\*].

#### 10.2.2.3. Duration

(382) The infringement started on 3 October 2008 and is on-going at the date of adoption of this Decision. The multiplier to be applied to the initial amount is therefore 9.

#### 10.2.2.4. Additional amount

(383) According to paragraph 25 of the Guidelines, irrespective of the duration of the undertaking's participation in the infringement, the Commission may include in the basic amount an additional amount of up to 25% of the value of sales in order to deter undertakings. For the purpose of deciding the proportion of the value of sales to be considered in a given case, the Commission will have regard to a number of factors, in particular those referred to in paragraph 22 of the Guidelines and elaborated in section 10.2.2.2.

(384) In view of the nature of the infringement (see recital (377)), the Commission imposes an additional amount of [\*] of the value of sales, that is EUR [\*].

#### 10.2.3. *Mitigating and aggravating circumstances*

(385) There are no mitigating or aggravating circumstances to be taken into account.

(386) The rounded amount of the fine is therefore EUR 27 873 000.

#### 10.2.4. *Application of the 10% turnover limit*

(387) According to Article 23(2) Regulation (EC) No 1/2003, the fine for the infringement by LG must not exceed 10% of its total turnover in business year preceding the adoption of the Commission decision.

(388) LG's total turnover in 2016 was EUR 409.5 million.<sup>465</sup> The final amount set out in recital (386) does not exceed 10% of the total turnover of LG for the last full business year.

#### 10.2.5. *Conclusion: final amount of fines for LG*

(389) Therefore the fine to be imposed on LG pursuant to Article 23(2) of Regulation (EC) No 1/2003 should be EUR 27 873 000.

## 11. REMEDIES

### 11.1. Principles

(390) According to Article 7 of Regulation (EC) No 1/2003 where the Commission, acting on a complaint or on its own initiative, finds that there is an infringement of Article 102 of the Treaty it may by decision require the undertakings concerned to bring such infringement to an end.

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<sup>465</sup> LG's response to the 7<sup>th</sup> RFI, page 3 (ID1351/3).

- (391) According to that Article, the Commission may impose any behavioural or structural remedies that are proportionate to the infringement and that are necessary to bring the infringement effectively to an end.
- (392) The Union courts have confirmed that the Commission may require the undertaking to submit proposals with a view of bringing the situation into conformity with the requirements of the Treaty.<sup>466</sup> The Commission cannot impose on the undertaking its own choice from amongst all the various potential courses of action that are in conformity with the Treaty.<sup>467</sup>
- (393) The requirement for a remedy to be effective also authorises the Commission to require a dominant undertaking to refrain from all measures that have an equivalent effect to the identified abusive behaviour.

## **11.2. Application to this Decision**

- (394) The Commission considers that there may be several possible structural or behavioural remedies that would bring the infringement to an end either by restoring the competitive situation that existed before the removal of the Track by reconstructing it or by eliminating the disadvantages facing competitors on the alternative routes to the seaports of Klaipėda, Riga and Ventspils as described in section 7.4.2.
- (395) The Commission therefore considers that it would be appropriate to order LG to bring the infringement to an end and to submit to it within three months a proposal for measures to that effect. That submission shall be sufficiently detailed in order to enable the Commission to make a preliminary assessment as to whether the proposed measures will ensure effective compliance with the Decision.
- (396) The Commission also considers that it would be appropriate to order LG to refrain from repeating any act or conduct having the same or an equivalent object or effect of removing the rail track between Mažeikiai in Lithuania and the Latvian border.

## **12. CONCLUSIONS**

- (397) In light of the consideration set out in this Decision LG should be held liable for the infringement of Article 102 of Treaty, a fine should be imposed on it pursuant to Article 23(2) of Regulation (EC) No 1/2003 and an order adopted requiring LG: a) to bring the infringement to an end in accordance with Article 7(1) of that Regulation and b) refrain from repeating any act or conduct having the same or an equivalent object or effect.

HAS ADOPTED THIS DECISION:

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<sup>466</sup> *Commercial Solvents v Commission*, Jointed Cases 6 and 7/73 , ECLI:EU:C:1974:18 paragraph 45. See also, *ITP v Commission*, T-76/89 , ECLI:EU:T:1991:41, paragraph 71 and *RTE v Commission*, T-69/89, ECLI:EU:T:1991:39, paragraph 98.

<sup>467</sup> *Automec v Commission*, T-24/90. ECLI:EU:T:1992:97, paragraph 52.



### *Article 1*

AB Lietuvos geležinkeliai has infringed Article 102 of the Treaty by removing the rail track between Mažeikiai in Lithuania and the Latvian border. The infringement started on 3 October 2008 and is on-going at the date of adoption of this Decision.

### *Article 2*

For the infringement referred to in Article 1, a fine of EUR 27 873 000 is imposed on AB Lietuvos geležinkeliai.

The fine shall be credited in euro, within a period of three months from the date of notification of this Decision to the following account held in the name of the European Commission:

BANQUE ET CAISSE D'EPARGNE DE L'ETAT  
1-2, Place de Metz  
L-1930 Luxembourg

IBAN: LU02 0019 3155 9887 1000  
BIC: BCEELULL  
Ref.: European Commission – BUFI/AT.39813

After the expiry of this period, interest will automatically be payable at the interest rate applied by the European Central Bank to its main refinancing operations on the first day of the month in which this Decision is adopted, plus 3.5 percentage points.

Where AB Lietuvos geležinkeliai lodges an action for annulment against this Decision, it must cover the fine by the due date, either by providing an acceptable financial guarantee, or by making a provisional payment of the fine in accordance with Article 90 of Commission Delegated Regulation (EU) No 1268/2012.<sup>468</sup>

### *Article 3*

AB Lietuvos geležinkeliai shall bring to an end the infringement referred to in Article 1 and submit to the Commission within three months a proposal for measures to that effect. That submission shall be sufficiently detailed in order to enable the Commission to make a preliminary assessment as to whether the proposed measures will ensure effective compliance with the Decision.

AB Lietuvos geležinkeliai shall refrain from repeating any act or conduct having the same or similar object or effect to the act described in Article 1.

### *Article 4*

This Decision is addressed to AB Lietuvos geležinkeliai, Mindaugo g. 12, LT- 03603 Vilnius, Lithuania.

This Decision shall be enforceable pursuant to Article 299 of the Treaty.

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<sup>468</sup> Commission Delegated Regulation (EU) No 1268/2012 of 29 October 2012 on the rules of application of Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council on the financial rules applicable to the general budget of the Union (OJ L362, 31.12.2012, p.1).

Done at Brussels, 2.10.2017

*For the Commission*  
*Margrethe VESTAGER*  
*Member of the Commission*

