

EN

***Case No COMP/M.5855 -
DB/ARRIVA***

Only the English text is available and authentic.

**REGULATION (EC) No 139/2004
MERGER PROCEDURE**

Article 6(1)(b) in conjunction with Art 6(2)
Date: 11/08/2010

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EUROPEAN COMMISSION

Brussels, 11.08.2010
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In the published version of this decision, some information has been omitted pursuant to Article 17(2) of Council Regulation (EC) No 139/2004 concerning non-disclosure of business secrets and other confidential information. The omissions are shown thus [...]. Where possible the information omitted has been replaced by ranges of figures or a general description.

PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 6(1)(b) DECISION IN
CONJUNCTION WITH ARTICLE 6(2)

To the notifying party:

Dear Sir/Madam,

**Subject: Case No COMP/M.5855 - DB/ Arriva
Notification of 22.06.2010 pursuant to Article 4 of Council Regulation
No 139/2004¹**

1. On 22 June 2010, the European Commission received a notification of a proposed concentration pursuant to Article 4 of the EU Merger Regulation by which Deutsche Bahn AG ("DB", Germany) will acquire sole control over Arriva plc ("Arriva", United Kingdom) by public bid.

I. THE PARTIES

2. Deutsche Bahn AG ("DB") is the state-owned German holding company of a multinational mobility and logistics group. DB's core business is the operation of railway infrastructure and the provision of passenger and freight services in Germany. DB also operates bus services in Germany. Furthermore, DB operates passenger rail services in the United Kingdom ("UK"), Poland and Sweden, as well as bus services in Denmark and the Czech Republic. It also provides (through DB Schenker rail) rail freight services in many European countries and (through DB Schenker Logistics) freight forwarding services on a worldwide level.

¹ OJ L 24, 29.1.2004, p. 1 ("the EU Merger Regulation"). With effect from 1 December 2009, the Treaty on the Functioning of the European Union ("TFEU") has introduced certain changes, such as the replacement of "Community" by "Union" and "common market" by "internal market". The terminology of the TFEU will be used throughout this decision.

3. Arriva Plc ("Arriva") provides transport services including bus, train, commuter coach, water bus and airport related transport services, as well as bus and coach distribution. The UK is the company's largest country of operation. Arriva provides passenger railway services in Denmark, Germany, the Netherlands, Poland and Sweden and the UK and bus services in the Czech Republic, Denmark, Germany, Hungary, Italy, the Netherlands, Portugal, Slovakia, Spain, Sweden and the UK.

II. THE OPERATION AND THE CONCENTRATION

4. The proposed concentration concerns the acquisition of sole control by DB of Arriva, through a public offer made under the UK City Code on Takeovers and Mergers.
5. On 22 April 2010, DB announced its intention to make a recommended cash offer for the entire issued and to be issued share capital of Arriva ("the offer"). The total cash consideration for the offer is approximately GBP 1 585 million (approximately EUR 1 824 million). It is intended that the offer will be implemented by way of a Scheme of Arrangement under Part 26 of the United Kingdom Companies Act 2006 ("the scheme").
6. On 18 May 2010, the scheme document, containing the offer, was sent to Arriva's shareholders. On 17 June 2010 Arriva's shareholders approved the scheme in a court meeting. Court hearings to sanction the scheme and confirm the reduction in capital will be held on 24 and 26 August 2010, respectively. Subject to approval by the court and the satisfaction or waiver of other conditions precedent, it is expected that the scheme will become effective on 27 August 2010, at which point DB will acquire all of Arriva's share capital and sole control of Arriva.
7. The notified operation therefore constitutes a concentration within the meaning of Article 3(1)(b) of the EU Merger Regulation.

IV. EU DIMENSION

8. The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 000 million² (DB: EUR 29 335 million, Arriva: EUR 3 595 million). Each of them has a EU-wide turnover in excess of EUR 250 million (DB: EUR [...], Arriva EUR 3 595 million). DB achieves more than two thirds ([...])% of its turnover in Germany. Arriva does not achieve more than two-thirds of its aggregate EU-wide turnover within one Member State. The notified operation therefore has an EU dimension.

² Turnover calculated in accordance with Article 5(1) of the EU Merger Regulation and the Commission Consolidated Jurisdictional Notice (OJ C95, 16.04.2008, p1).

V. COMPETITIVE ASSESSMENT

9. DB and Arriva are both active in a number of Member States in the provision of passenger bus and/or passenger rail services. In addition, in Germany DB and Arriva both own and operate railway infrastructure and stations as well as freight transshipment terminals, and provide freight transportation services.
10. The notified concentration will result in the following affected markets: Denmark (bus sector), Sweden (rail sector) and UK (rail sector, but also limited overlaps between DB's rail services and Arriva's bus services in some areas), and Germany (rail and bus sector).
11. DB and Arriva also both have operations in the Czech Republic and Poland, but according to the parties this does not give rise to affected markets. DB and Arriva both operate bus services in the Czech market but DB's market presence is negligible. The market shares of DB and Arriva on the basis of revenues are estimated at below [0-5]% and [0-5]% respectively in the Czech bus market. DB and Arriva are active in the Polish regional passenger rail market at present only through Arriva PCC, a joint venture between DB Schenker Rail Polska and Arriva Polska Sp. zo.o. The market share of Arriva PCC is estimated at [0-5]% on the basis of train km in 2009.
12. The analysis below is presented by Member State due to the particularities of the different Member States that have an impact on the product and geographic market definition as well as on the competitive assessment.

A. Denmark

13. In Denmark the parties' activities overlap on the bus market. Arriva operates bus services across the country and is by far the leading bus operator. DB, since its takeover of the Danish company Pan Bus in 2007, is a smaller competitor and provides bus services only in certain regions.
14. There are no overlaps between the parties' rail activities since DB does not provide rail services in Denmark³. Arriva operates one route, the Midt-Vestjylland passenger rail route in central and western Jutland. This route accounts for roughly 5%⁴ of the contract volume of all Danish rail contracts, about 95 %⁵ of the total contract volume and of the passenger numbers is still operated by Danske Statsbaner ("DSB").
15. As to rail/bus overlaps, there is only one point-to-point connection (or 'flow') where Arriva's rail service overlaps with DB's bus service. This concerns the connection between the towns of Viborg and Skive in Jutland.
16. However, there is, if at all, very limited competition for passengers between these rail and bus services: First, bus contracts are awarded by the regional transport authorities on a gross cost basis which means that the bus operator cannot set fares or frequencies and

³ Except two cross-border routes on a "successive carrier" basis in cooperation with the national incumbent Danske Statsbaner, "DSB".

⁴ Source: Report "Med tog, bus færgen" by Trafikstyrelsen, page 78 (<http://www.trafikstyrelsen.dk>).

⁵ Including the Øresund Kystbanen route served by the joint venture with FirstGroup DSBFirst.

that the revenues earned from passengers are retained by the contracting authorities. Bus companies therefore cannot attract rail customers by charging lower fares or increase service frequencies.⁶ Secondly, the rail and bus services between Viborg and Skive have very different frequencies and journey duration: whereas Arriva's train runs an hourly service, DB/Pan Bus only operates a very limited number of journeys⁷. Moreover the bus trip takes almost 50% more of the time than the rail service. In the light of these circumstances, a significant impediment of effective competition appears to be excluded and this one rail-bus overlap is, therefore, not further discussed

1. The regulatory framework for the provision of bus services

17. Danish bus service contracts are awarded by regional *trafikskaber* (public transport authorities, "PTA"s) through public tendering or negotiated bidding procedures. There are very few exceptions to this rule: First, the bus services in three municipalities (Århus, Odense and Bornholm) are directly operated by the responsible transport authority and not tendered. Secondly, very specific bus services such as school buses and transport services for handicapped passengers can be - and some are - directly awarded by municipalities⁸
18. The PTAs are responsible for the provision of public transport services in their respective territories (see figure A.1. below) and are owned by the regions and municipalities in that territory. There are 6 PTAs in Denmark, namely the
 1. - **Nordjyllands Trafikskab (NT)** in northern Jutland;
 2. - **Midttrafik** in central Jutland;
 3. - **Sydtrafik** in southern Jutland;
 4. - **Fynbus** on the island of Fyn (Funen);
 5. - **Movia** on the island of Zealand (including Copenhagen) and
 6. - **Bornholm Amt Trafikskab** – on the island of Bornholm.

⁶ Rail contracts are awarded on a net cost basis by the central Danish Transport Authority Trafikstyrelsen. This means that the operator receives the revenues (fares), and the authority only fixes a maximum price. As a result of the structure of contracts in bus/rail, there cannot be a competitive harm following the transaction. The merged entity cannot increase the fares of the bus services due to the gross cost nature of the contracts. It may theoretically increase the rail fares to attract more bus passengers. However, this would only affect the revenues of the bus contracting authorities, not of the bus operators in view of their gross contracts and therefore such a strategy would be unprofitable.

⁷ DB/Pan Bus runs two journeys per day on weekdays, one per day on Saturdays and 3 per day on Sundays according to the timetables provided by the parties.

⁸ Another exception concerns long-distance express coach services (which are to be distinguished from the X-lines tendered by the PTAs) that are fully commercially operated and not under PTA contracts. The parties do not operate these coach services.

Figure A.1.

Territorial responsibility of the Danish PTAs



19. Due to the principle rule of bidding procedures, almost all bus services in Denmark are operated by private companies which are granted the right to operate specific routes or services⁹ for fixed periods on a "gross cost" basis. This means that the bus service provider is remunerated by the PTA with the PTA receiving all fare revenues and assuming the commercial risk. The PTAs set the fares and the frequencies of the service as well as certain quality standards, for instance, the age of the buses. The bus operator is, therefore, not in a position to change these parameters. PTAs may award bonuses, for instance, to reward an increase in the number of passengers¹⁰ as well penalties, for instance, for non-cleaned buses, unreliability or bad behaviour of personnel.

2. The relevant product market

20. The parties submit that in view of the situation in Denmark the (bidding) market for the award of bus service contracts constitutes the relevant product market. Due to the award of gross contracts bus operators cannot compete for passengers. Competition, therefore, takes place at the level of bidding for contracts. The parties further submit that there is no reason to distinguish between local (urban), regional (interurban) or long-distance (Expressbus/X-lines) bus services¹¹ because the contracts are all awarded by the PTAs under the same regulatory framework.

⁹ The services of some routes are also awarded to more than one operator.

¹⁰ These bonuses are based on passenger counts, penalties often on passenger surveys or complaints.

¹¹ In a previous decision (COMP/M.5557 – SNCF-P/CDPQ/Keolis/Effia) concerning the award of public transport service contracts in France (specifically the region Ile de France), the Commission distinguished local and regional services due to different regulatory conditions.

21. In previous decisions, concerning public transport (including bus services) in other countries, the Commission identified specific markets for the award of contracts to operate public bus services¹². Also in the present case the market investigation confirmed that the relevant product market is the one for the award of bus contracts.
22. Regarding overlapping routes of the two parties, the Commission found, on the basis of the market investigation, that the gross cost basis of Danish bus service contracts does not enable the bus operators to compete for passengers in case of overlapping routes or flows.¹³ The fare revenues are retained by the PTAs that also set the fares, the frequencies/timetables and the number of bus hours to be operated. Consequently, bus operators compete for contracts, not for passengers. This has also been confirmed by the PTAs.
23. Regarding potential differences between local (urban), regional (inter-urban) and/or long-distance (Expressbus/X-lines) bus services, the Commission found only few distinct features that relate to technical specifications, for instance, of the different bus types required for long-distance or urban services. Furthermore, very small bus companies, i.e. operators with less than 20 buses, usually do not bid for all contracts in large cities because these may require higher frequencies and, therefore, more buses. However, this only concerns a small fraction of contracts. Moreover, operators with less than 20 buses account for less than 10% of the Danish bus market.¹⁴
24. The regulatory framework for the award of urban, inter-urban and X-lines, however, is the same and the PTAs follow the same rules and procedures for all three types of bus services. Therefore, the Commission does not consider the definition of separate urban, inter-urban and X-line markets to be appropriate for the assessment of Danish bus services. This has also been confirmed by the PTAs.
25. In three municipalities (Århus in central Jutland, Odense on the island of Fyn and the island of Bornholm) the responsible PTA – or a subsidiary or department of it - operates the bus services itself so that the respective contracts are currently not tendered. Whether or not the contracts and the operators form part of the relevant product market as defined above can, however, be left open, since the competitive assessment does not change, whether or not these operators are included.

3. The relevant geographic market

26. The parties consider that the relevant geographic market for the award of bus contracts is national in scope since the PTAs conduct their tendering procedures under the same regulatory framework.

¹² COMP/M.1768, Schoyens/Goldmann Sachs/Swebus, Commission decision of 10 December 1999; COMP/M.5557 – SNCF-P/CDPQ/Keolis/Effia, Commission decision of 29 October 2009.

¹³ There are only two routes on which each of the parties operates bus services between the same towns (Viborg to Randers and Aalborg to Nykøbing). However, Arriva and DB operate at different frequencies (Arriva only operates one return journey of an X-line with limited stops between Viborg and Randers per day, while DB/Pan Bus runs a normal service several times a day according to the timetables submitted by the parties. In addition both operate services of the X-line between Aalborg to Nykøbing, but DB/Pan Bus only two per day and none on weekends, whereas Arriva runs eight services on weekdays and four on Saturdays and as well as on Sundays according to the timetables submitted by the parties; a third operator runs the remaining 4 services of that line on weekdays and two on Sundays.

¹⁴ Based on bus hours and contract volume according to the Entreprenørstatistik of Trafikstyrelsen www.trafikstyrelsen.dk.

27. The Commission in a previous decision left open the exact definition of the geographic scope of the bidding market for certain urban transport including bus - contracts in France¹⁵, but considered national markets with respect to other (urban and inter-urban) transport contracts.. The fact that the same regulatory framework applies to all PTAs across Denmark argues in favour of a national market. Bus operators can – and often do - apply for contracts in all PTA territories but still focus on particular regions. Thus, Arriva is particularly strong in the Movia territory of Zealand and the Fynbus territory on the island of Fyn where DB/Pan Bus is not present at all. However, the exact definition of the geographic scope can be left open for the purpose of this decision, since the transaction does not raise serious doubts under any alternative market definition.

4. Competitive assessment

28. Due to the takeover of several Danish bus companies¹⁶ Arriva is today by far the leading bus service provider in Denmark. Arriva is active in all PTA territories with the exception of Bornholm. Since DB's takeover of Pan Bus in 2007, DB has been providing bus services in Pan Bus' traditional focus area of Jutland. DB/Pan Bus is the 6th largest bus service provider in Denmark.¹⁷ It has been active only in northern, central and southern Jutland but not on the island of Fyn and the densely populated island of Zealand including Copenhagen.

4.1. The national market for the award of bus contracts

29. According to the statistics of *Trafikstyrelsen* Arriva has a market share of about [30-40]% (based on the number of buses) to [40-50]% (based on bus hours and contract volume) in a national market. The next largest competitors are City Trafic (Keolis group) with a market share of [5-10]%, Thykjaer with a share of [5-10]% and Tide achieving [5-10]%. DB/Pan Bus has a market share of [0-5]%. Of almost similar size are Netbus (which belongs to the Norwegian State railways and acquired former Partnerbus), Nobina (formerly named Concordia), Dito Bus and Fjord Bus.
30. The national market shares in terms of number of buses, bus hours and contract volume of Arriva, DB/Pan Bus and their major competitors are provided below:

¹⁵ COMP/M.5557, SNCF-P/CDPQ/Keolis/Effia (this decision concerned the markets for regional and local transport service contracts; the Commission considered that because of specific regulations for the region Île-de-France the geographic market probably only comprised the area in question).

¹⁶ Unibus (1997), Bus Denmark (1999), Combus (2001), Wulff Bus (2004) and Veolia Scandinavia's Danish bus operations (2007).

¹⁷ If the Busselskabet Århus Sporveje is excluded, Pan Bus is the 5th largest operator.

Table A.1.¹⁸

National market shares, planning period 2009/2010

City Trafik/Keolis	[5-10]%	[5-10]%	[10-20]%
Thykjær	[5-10]%	[5-10]%	[5-10]%
Tide Bus Danmark	[5-10]%	[5-10]%	[5-10]%
Busselskabet Århus Sporveje	[5-10]%	[5-10]%	[5-10]%
DitoBus	[0-5]%	[0-5]%	[0-5]%
Nobina	[0-5]%	[0-5]%	[0-5]%
Netbus (Partnerbus)	[0-5]%	[0-5]%	[0-5]%
Fjordbus	[0-5]%	[0-5]%	[0-5]%
Others	[20-30]%	[20-30]%	[10-20]%
Total	100%	100%	100%

31. As explained above, there are municipalities - the city of Århus, the city of Odense and the island of Bornholm - where the bus contracts are not tendered because the services are provided by the PTA/municipality itself. An exclusion of these bus operators from the market volume would, however, hardly affect the market share analysis. If the largest of these operators, the Busselskabet Århus Sporveje, is excluded from the market volume, for instance, in bus hours, Arriva's share would go from [40-50]% to [40-50]%, DB's from [0-5]% to [0-5]%.
 32. The market shares in terms of currently operated buses, bus hours or the current contract volume reflect the position of the competitors based on contract awards of the past. The Commission, however, has also analysed the very recent awards of contracts and the currently open tender procedures. This investigation shows that Arriva is not only the market leader on the basis of won contracts in the past but also with respect to the actual bidding behaviour. Thus, Arriva is not only a very active bidder (it has participated in more than [90-100]% of the tenders)¹⁹, but also successful as to the final award of [30-40]% of the tenders.
 33. Although DB/Pan Bus is - with about € [...] turnover in 2009 - rather small in terms of market shares, it nevertheless belongs to the larger operators with more than [...] buses in operation ([...] in 2009 according to the parties). This means that DB/Pan Bus – in contrast to the small bus companies with less than [...] or [...] buses - is able to bid for larger contracts. Thus, in 2007 DB/Pan Bus got for the first time two contracts in southern Jutland (territory of the PTA Sydtrafik) including a contract for the city of Esbjerg previously run by Arriva. In the Sydtrafik area DB/Pan Bus is now considered an active bidder with a [10-20]% market share in terms of bus hours.

¹⁸ Source: Entreprenørstatistik of Trafikstyrelsen (www.trafikstyrelsen.dk) for the timetable planning period 2009/10, figures are rounded and may not exactly add up to 100%.

¹⁹ According to the information provided by the parties for the period 2005-present).

34. On the other hand DB/Pan Bus has lost almost all of its contracts in northern Jutland and, furthermore, according to the Commission's information, has not succeeded in any tender procedure over the last 5 years in this territory. DB/Pan Bus also confined itself to the not so densely populated Jutland and did not try to extent its activities to the islands of Fyn or Zealand. The majority of the PTAs, therefore, do not consider DB/Pan Bus to be a very active bidder. Some of the PTAs expected DB to be more active following the takeover of Pan Bus in 2007 and, for instance, to bid for more contracts in territories where they had already operations or to start bidding in new territories, but this has not happened.
35. Other competitors have been more successful in winning contracts, entering new territories or the Danish market altogether. For instance, Tide only entered the Danish bus market in 2008 by starting to bid in tender procedures in southern Jutland and on the island of Fyn, i.e. without acquiring an existing bus company. Since then it has been an active bidder and already achieved a position among the largest competitors of Arriva. Nobina also only entered in 2008 and also on its own, i.e. without acquiring an existing operator. Since then it won contracts in the densely populated area of Zealand as well as in central Jutland. City Traffic (Keolis) is already an operator established for a long time (entering 1989). Other competitors that entered the market more recently have done so by taking over existing operators such as Netbus acquiring Partnerbus in 2006.
36. According to the PTAs there is a sufficient number of alternative bidders in the market and the market is competitive. They have not raised objections to the transaction²⁰ and confirmed that they have normally several bidders, in particular for larger urban areas where often most of the eight large bus companies bid. This view is also shared by the Danish transport authority and the competition authority.
37. Scale and regional knowledge appear to be (among the) main entry barriers named by most of the competitors. Consequently, it is difficult for small operators to enter the market. There are hardly any barriers, however, for larger companies. The recent entry examples mentioned above demonstrate that the Danish bus market is very open due to the regulatory framework that promotes competition through tender procedures in all PTA territories.
38. [...]²¹.
39. For all the reasons explained above, and despite the high market shares of Arriva, the concentration does not raise serious doubts on the Danish bus market as a whole. Pan Bus is a relatively small player and remained so following its acquisition by DB in 2007. Despite some new contracts awarded to it within the last three years, particularly in southern Jutland, DB/Pan Bus is not considered a very active bidder and the transaction has also not raised concerns with the majority of competitors submitting contributions in the context of the market investigation.

²⁰ One PTA regretted though to lose an additional bidder, in particular for urban contracts.

²¹ [...].

4.2. The regional markets for the award of bus contracts

40. If the analysis is carried out on the basis of regional markets, the market shares – in terms of bus hours - of the main competitors in the PTA territories are as follows:

Table A.2²²

	Movia	BAT	Fynbus	Sydtrafik	Midtrafik	NT
Arriva	[50-60]%	[0-5]%	[50-60]%	[20-30]%	[20-30]%	[40-50]%
DB/Pan Bus	[0-5]%	[0-5]%	[0-5]%	[10-20]%	[5-10]%	[5-10]%
Parties' shares combined	[50-60]%	[0-5]%	[50-60]%	[30-40]%	[20-30]%	[40-50]%
City Trafik	[10-20]%	[0-5]%	[0-5]%	[5-10]%	[0-5]%	[10-20]%
Tide Bus Danmark	[0-5]%	[0-5]%	[20-30]%	[30-40]%	[0-5]%	[0-5]%
Thykjær	[0-5]%	[0-5]%	[0-5]%	[20-30]%	[10-20]%	[10-20]%
Busselkabet Århus Sporveje	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[20-30]%	[0-5]%
DitoBus	[5-10]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%
Nobina	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%
Netbus(Partnerbus)	[5-10]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%
Fjordbus	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%
Others	[10-20]%	[90-100]%	[10-20]%	[10-20]%	[20-30]%	[20-30]%

Regional market shares (in terms of bus hours), planning period 2009/2010

41. As Table A.2 shows, Arriva has also a strong presence in the 5 main PTAs, where its market shares range from [10-20]% to [50-60]%. It is particularly strong on the islands of Fyn (Fynbus territory) and Zealand (Movia territory). In both regions, however, DB is not present and has never bid for a contract. The closest competitors of Arriva are Tide (Fyn and Sydtrafik) and City Trafik/Keolis (Movia and NT).
42. DB/Pan Bus is only active in northern, central and southern Jutland where it achieves market shares between [5-20]%. The combined market shares of the parties are [30-40]% in southern Jutland (territory of Sydtrafik), [20-30]% in central Jutland (Midtrafik territory) and [40-50]% in northern Jutland (NT territory), where according to the Commission's market investigation DB/Pan Bus' market share ([0-5]%) has, however, further, diminished due to recent losses of contracts. In northern Jutland DB/Pan Bus is not considered to be an active bidder anymore, and it has not got a new contract recently. The closest competitors are Thykjær and City Trafik/Keolis. However, in northern Jutland smaller competitors such as Todbjerg, Hjørring or Tylstrup are still in a relatively strong position, and two of these smaller operators won more tenders during the last 5 years than the larger companies Thykjær and City Trafik/Keolis according to the Commission's information.
43. In southern Jutland, Thykjaer and Tide – the latter with almost the same share as the combined one of Arriva and DB Pan Bus ([30-40]%) - are the closest competitors of the parties. Southern Jutland is the region where DB/Pan Bus has recently been considered to

²² Source: Entreprenørstatistik of Trafikstyrelsen (www.trafikstyrelsen.dk) for the timetable planning period 2009/10, figures are rounded and may not exactly add up to 100%.

be an active bidder. However, Thykjaer, Tide, City Trafik and a small operator are also among the most successful bidders of the last 5 years.

44. In central Jutland the parties achieve a combined share of [20-30]%. Due to the size of the city of Århus and its particular bus transport situation described already above, the Busselkabet Århus Sporveje is in second position with almost the same share, and Thykjaer in third with [10-20]%. If the PTA operator Busselkabet Århus is excluded from the market volume because these contracts are not tendered, this exclusion has only a limited effect: Arriva's share in bus hours would go from [20-30]% to [30-40]% and DB's from [5-10]% to [10-20]% with the second largest operator, Thykjaer, having about [10-20]%. As in northern Jutland, also in central Jutland the small operators have still a rather strong position. According to the Commission's information, four of these smaller operators feature among the 6 most successful bidders (in terms of won tenders) - together with Arriva and Thykjaer - over the last 5 years. DB/Pan Bus is not among these most successful bidders. It also is not among the most active bidders in that territory.
45. Due to the fact that the same regulatory framework and high degree of liberalisation is given throughout Denmark, the entry situation is the same as described above for the national market analysis. This is illustrated by some examples: Tide entered in 2008 by bidding for contracts in southern Jutland and on the island of Fyn. Nobina also entered in 2008 and has since then won several contracts in the Movia territory of Zealand.
46. Consequently, the concentration also does not significantly impede effective competition on the basis of regional bus markets.

4.3. Conclusion

47. On the basis of the above the Commission concludes that the proposed transaction does not raise serious doubts on the bus markets in Denmark.

B. Sweden

1. The relevant product market

48. The parties argue that the relevant product market should be the market for franchises for passenger rail services operated under contract to the relevant public transport authority without a distinction between regional and inter-regional services.
49. In *Keolis/AB Storstockholm Lokaltraffik/Busslink*, the Commission identified the existence of a specific market for public transport contracted by tender in Sweden, which could have included both regional and inter-regional bus and rail services²³. The Commission, however, ultimately left the market definition open. In *Schoyen/Goldman*

²³ See COMP/M.2960 Keolis/AB Storstockholm Lokaltraffik/Busslink, Commission decision of 4 December 2002.

Sachs/Swebus the Commission has assessed railway services and bus services separately²⁴.

50. For the purpose of the present decision the precise product market definition can be left open because under any alternative market definition the transaction would not raise serious doubts in Sweden.

2. The relevant geographic market

51. In *Keolis/AB Storstockholm Lokaltrafik/Busslink* the Commission noted that the parties' assumption of a Swedish market for public transport services is in line with previous decisions. However, it was also suggested by some competitors to the parties in that case that the market for public transport services contracted by tender could be regional or local. Eventually, this issue was left open²⁵.

52. For the purpose of the present decision the precise geographic market definition can be left open because under any alternative market definition the transaction would not raise serious doubts in Sweden.

3. Competitive assessment

53. The Swedish county public transport authorities (PTAs) are responsible for the provision of public transport services (i.e. regional trains, buses, metro and ferries) in their respective areas. There are 21 PTAs, one for each county. Regional passenger rail services are generally tendered by the PTAs.
54. DB is currently not operating any rail services but is starting to operate two regional rail franchises in the course of 2010 (one in a joint venture). Arriva operates two regional rail franchises in Sweden. The franchises are operated under contract to the regional public transport authorities following competitive tendering. DB and Arriva do not operate rail franchises in the same regions. Arriva also operates local and regional bus services.
55. The parties' activities only overlap under a national market definition. The parties submitted the following data on market shares of regional rail passenger services based on train km on the national level:

²⁴ See COMP/M. 1768 Schoyen/Goldman Sachs/Swebus, Commission decision of 10 December 1999.

²⁵ See COMP/M.2960 Keolis/AB Storstockholm Lokaltrafik/Busslink, Commission decision of 4 December 2002.

Table B.1: Market shares of regional rail passenger services, 2009 – 2011

Operator	Market shares (in % of train km)		
	2009	2010	2011
Arriva	[10-20]	[10-20]	[10-20]
DB	[0-5]	[0-5]	[5-10]
Parties	[10-20]	[10-20]	[20-30]
SJ	[50-60]	[50-60]	[30-40]
DSB First	[10-20]	[10-20]	[10-20]
DSB	[0-5]	[5-10]	[10-20]
Tågkompaniet	10-20]	[10-20]	[10-20]
Veolia	[5-10]	[0-5]	[5-10]
Merresor	[5-10]	[5-10]	[0-5]

Source: DB's own data and best estimates

56. As DB has not yet started operating rail services it did not have any market share in 2009. From the end of 2010, and taking into account new contract awards, DB and Arriva will jointly operate approximately [20-30]% of the regional train km.
57. According to the notifying party, there are at least six other significant operators of regional train services in Sweden. The highest market share in regional train km can be attributed to the national incumbent railway operator SJ. However, according to the notifying party, SJ announced in 2009 that it has essentially chosen not to further participate in procurement processes for contract rail services for lack of adequate profitability. Since then SJ's market share has decreased.
58. Other major operators are DSB, which is the Danish State Railway, and DSB First, a joint venture between DSB and the British company First Group. Tågkompaniet is a Swedish company which was acquired by the Norwegian national railway operator Norges Statsbaner (NSB) in 2007.
59. The parties also provided information on the bidding processes in regional rail transport tenders from 2005 to 2009. According to the parties there have always been at least three, and up to six, bidders for each tender (with the exception of one tender contract in 2005, [...]).
60. The Commission further notes that the activities of DB and Arriva do not overlap on any routes in the passenger transport market.
61. In view of the relatively low market shares of the parties for regional rail passenger services, the number of competitors present in the Swedish regional passenger rail market and the absence of any overlap routes between the parties' activities, it can be concluded that the transaction does not give rise to serious doubts as to its compatibility with the common market as far as its effects in Sweden are concerned.

C. United Kingdom

62. DB operates passenger rail services in the UK. It operates Chiltern Railways under a rail franchise and, together with MTR Corporation, owns the 50/50 Joint Venture London Overground Rail Operations Ltd (LOROL). LOROL provides the London Overground under a concession for the Transport for London. DB also operates, through a 50/50 Joint Venture with Renaissance Trains Ltd, an open access passenger rail service (Wrexham & Shropshire) and operates the Tyne & Wear Metro, a light rail metro service, under a concession.
63. Arriva is active in passenger rail and passenger bus services. In passenger rail, Arriva operates two franchises, i.e. CrossCountry and Wales and Borders. In passenger bus, Arriva has bus operations across England, including London, and in Scotland and Wales.

1. The relevant product market

64. According to the parties, in countries where the provision of passenger rail services is tendered or franchised by the relevant state authorities, as is the case in the UK, a distinction has to be drawn between the competition to be awarded a franchise or concession (i.e. "competition for the market") and the market for the provision of such services to passengers (i.e. "competition in the market"). As regards competition for the market, the parties consider that the relevant market is the market for the award of franchises and concessions to operate passenger railway services. As regards competition in the market, the parties consider that the relevant market is that for passenger rail services but that on some flows there could be substitutability between bus and rail services.
65. In previous decisions the Commission has defined the product market as the supply of public passenger services by rail. In *First/Keolis/TPE JV* the Commission has also considered that in the UK, while competition in the market between passenger rail operators is limited, there is competition for the market, i.e. there may be a market for the award of railway franchises²⁶.
66. The UK Office of Fair Trading (UK OFT) and the UK Competition Commission (UK CC) have analysed many mergers in the UK public passenger transport sector. The UK OFT and the UK CC have generally not considered the market for the award of franchises and concessions in their analysis of concentrations involving railway operators²⁷. The focus of the UK OFT and CC analysis is on the competitive effects of the merger on individual rail and bus routes. They concentrate on the analysis of individual flows on which the parties' activities overlap and which are thus affected by the merger.
67. The market investigation also showed that the operators compete for passengers on rail/rail overlaps, i.e. routes where two or more railway franchises or concessions overlap. As regards rail/bus overlaps, according to the market investigation the question whether rail and bus operations compete depends on the specific route.

²⁶ See COMP/M.3273, *First/Keolis/TPE JV*, Commission decision of 8 December 2003.

²⁷ Under the United Kingdom Enterprise Act 2002, the award of a franchise is however considered to be a merger.

68. For the purpose of the present decision, two relevant product markets will be analysed: the market for the award of franchises and concessions and the passenger market on flows where the activities of the parties overlap.
69. However, for the purpose of present decision the precise product market definition can be left open, because under any alternative market definition the transaction would not raise serious doubts in the UK.

2. The relevant geographic market

70. The parties consider that the relevant geographic market for the award of franchises and concessions to operate passenger railway services is at least national.
71. In the Danish case *DSB/First/Öresundståg* it was submitted that the market for rail franchises is EEA-wide. However, the Commission did not have to conclude on the precise geographic market definition for the granting of rail franchises²⁸.
72. The market investigation indicated that the market for rail franchises in the UK is rather national in scope. The great majority of the respondents to the market investigation indicated that, in general, railway operators bid for the award of rail passenger franchises and concessions throughout the whole of the UK.
73. As regards competition in the market, the parties submit that the relevant geographic market is for point-to-point journeys on which the parties' activities overlap. In the case *First/Keolis/TPE JV* the Commission has delineated the geographic market for competition in the market as the extent of the network comprising the railway routes, stations and depots subject to the franchise²⁹.
74. However, in the case *Govia/Connex South Central* the Commission has held that the relevant geographic market may be defined as an individual point-to-point route, since rail travellers, especially business travellers and commuters do not regard an indirect journey between their point of departure and their intended destination as an acceptable substitute for the direct route³⁰.
75. For the purpose of present decision the precise geographic market definition can be left open because, under any alternative market definition, the transaction would not raise serious doubts in the UK.

3. Competitive assessment

76. DB only operates passenger rail services in the UK while Arriva operates both bus and passenger rail services.

²⁸ See COMP/M.4806, *DSB/First/Öresundståg*, Commission decision of 24 September 2007.

²⁹ See COMP/M.3273, *First/Keolis/TPE JV*, Commission decision of 8 December 2003.

³⁰ See COMP/M.2446, *Govia/Connex South Central*, Commission decision of 20 July 2001.

77. Mainline³¹ passenger rail services are regulated and usually operated under a franchise or concession. Passenger rail franchises are awarded by the government following a competitive tendering process with the Department of Transport (DfT) being the awarding authority, other than in Scotland and Wales. The Government of Scotland is responsible for the ScotRail franchise, whilst the Welsh Assembly Government is, with DfT, a co-signatory of the Wales and Border franchises.
78. In addition to franchises, there are concessions which are tendered and contracted by local authorities. With respect to the parties' activities the following concessions are of relevance: the former Merseyrail Electrics franchise (now Tyne & Wear Metro) which is now awarded as a concession by the Passenger Transport Executive for Merseyside and the London Overground network which is awarded as a concession by Transport for London ("TfL").
79. Passenger rail services which are not tendered and where the operator assumes the full revenue risk, may also be provided by "open access" operators on a purely commercial basis. In addition to holding the necessary operating licenses and authorisations, open access operators require a track access agreement with Network Rail, granting access to the rail network.
80. The bus passenger transport sector is entirely deregulated, with the exception of bus passenger transport services in London where also Arriva is active.

3.1. Market for rail franchises and concessions

81. The parties operate five (DB: 3, Arriva: 2) out of 20 total rail franchises and concessions, i.e. 25% of the existing franchises and concessions that have been awarded in the UK: DB currently holds one franchise (Chiltern Railways) and two concessions (London Overground and Tyne & Wear Metro, a light rail concession). Arriva holds two franchises (CrossCountry and Wales & Borders).
82. The total revenues of DB and Arriva in rail services under franchises in the UK amounted to GBP [400-500m] (DB GBP [100-200m]; Arriva GBP [300-400m]) 2008/2009³². The market shares in terms of train km of DB, Arriva and their major competitors in 2008/2009 are³³:

³¹ The mainline of a railway is a track that is used for through trains or is the principal artery of the system from which branch lines, yards, sidings and spurs are connected.

³² Total revenues of DB and Arriva are EUR [...] (DB EUR [...], Arriva EUR [...]). The exchange rate used is the 2009 average bilateral GBP/EUR exchange rate (0.89094) as published by the European Central Bank.

³³ These figures do not include Northern Ireland. Northern Ireland is subject to a different regulatory regime from that in Great Britain (i.e. England, Scotland and Wales). It has not been subject to deregulation or liberalisation and the rail operator Northern Ireland Railways remains under the ownership of Translink, a company owned by the Northern Ireland Government.

Table C.1: Market shares, 2008/2009

Operator	Market shares (in % of train km) 2008/2009
DB	[0-5]%
Arriva	[10-20]%
Parties	[10-20]%
First Group	[20-30]%
Govia	[10-20]%
Stagecoach	[10-20]%
Serco Group & Abellio (JV)	[10-20]%
National Express	[5-10]%

Source: DB's own data; ORR, National Rail trends Yearbook 2008-2009

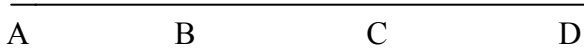
83. An analysis of the bids in the tender procedures over the last five years, which is however a small dataset, shows that [...] Arriva bid in [...] cases while DB bid in [...]. Arriva and DB each won [...] in the last five years. Furthermore, the bidding market appears competitive since there is a large number of competing operators that participate in tenders.
84. A similar picture emerges from the analysis of the complete set of tenders since 1996. Arriva participated in [...] out of the 19 tenders organised and DB (through its subsidiaries Laing Rail and Chiltern) participated in [...]. Other very active players included First Group which participated in 11 tenders, National Express with 11 tenders, and Stagecoach with 6 tenders. Furthermore, there have been at least three competing train operators in each tender that has taken place in the last 10 years.
85. The market investigation confirms this analysis. All market participants, except one, consider that there is a sufficient number of alternative competitors in the tender market.
86. The Commission therefore comes to the conclusion that the proposed transaction does not give rise to serious doubts as to its compatibility with the common market as far as its effects in the UK market for passenger rail franchise are concerned.

3.2. Analysis of individual overlap flows

87. As pointed out above Arriva is active both in rail and bus services. DB only has rail activities in the UK and no bus operations. As regards bus services, Arriva has a national market share of approximately [10-20]% in Great Britain³⁴. In London its estimated market share is approximately [20-30]%.

³⁴ As for rail, these figures do not include Northern Ireland as bus operations have not been deregulated and liberalised and the two bus operators (Citybus and Ulsterbus) remain under the ownership of Translink, a company owned by the Northern Ireland Government.

88. The parties submit that the activities of DB and Arriva overlap on [...] individual point-to-point journeys from a specific point of origin to a specific point of destination ("point-to-point flows") taking into account both rail and bus operations of DB and Arriva. On some flows, the overlapping services are rail/rail and on others they are rail/bus (between DB's rail operations and Arriva's bus operations).
89. A flow is defined as a particular journey between start and end points. A flow may constitute an entire train or bus route, or it may be only a part of a longer route. For example, consider the following diagram for a journey from A to D via B and C.



A to D is the route and the journeys A to B, A to C, and also A to D and all other combinations (B-C, B-D and C-D) would be flows on the route A to D.

90. The parties have submitted detailed information on the [...] individual point-to-point flows, including turnover, fare structure and passenger numbers³⁵.
91. The parties argue that no competition concerns will arise on any flow. According to the parties who refer to the UK CC's "Review of methodologies in transport inquiries"³⁶, on many flows, DB's and Arriva's services do not impose a competitive constraint on each other. The parties' arguments are as follows: (i) one party's services have a limited frequency; or (ii) DB and Arriva are not competing in fares (in rail/rail overlaps); or (iii) one or both parties operate the relevant services under a gross cost contract and do not receive passenger fare revenues, nor set the fares nor timetables and thus have no significant commercial freedom. The parties argue that other flows to which the preceding arguments do not apply are of such limited significance that the operator has no incentive to change the fare structure or the service level and therefore competition concerns can be excluded.
92. The overlaps can be grouped into five areas. Below there is a competitive analysis for each group of overlap flows.
93. Due to the large number of overlap flows that arises in several mergers in the area of passenger transport the UK CC has applied a number of filters to the overlaps. First, the UK CC has examined flows that account for a significant proportion of total route revenue. The UK CC has excluded from the initial analysis routes for which overlaps account for less than 10% of passengers and revenue since it is considered that it is not worthwhile for the merged entity to adjust fares/reconfigure routes post merger if the overlap flow only accounts for such a small share in revenue.

³⁵ These flows have been identified on the basis of applying a "proximity test" to the stopping points (i.e. bus stop or railway station) for each relevant origin and destination point on a given point-to-point flow. Following the approach previously used by the UK CC, the following test has been applied: (a) in urban areas, bus stops and train stations within 400 metres of each other are treated as overlapping; (b) for journeys with one end point outside the particular urban area, a catchment area of 1,200 metres is used at both end points; and (c) in rural areas, flows are considered to overlap where bus and rail services serve the same settlement, regardless of the station/stop location.

³⁶ K. Collyer., A. Felet, T. Kitchen "Review of methodologies in transport inquiries" (UK CC).

94. Second, the UK CC has filtered out of the analysis flows in which the parties are not effective competitors or third parties offer effective alternatives. In the case FirstGroup/ScotRail the UK CC considered that competitor frequencies had to be at least half as frequent to be considered effective.
95. Third, CC filters out flows of relatively little importance (with turnover of less than GBP 10 000)³⁷.
96. Also, the UK CC has used an indicator relating to the proportion of revenue on overlap flows from inter-available tickets (see also below) as an indication of no significant price competition pre-merger.
97. Furthermore, the UK CC considers also other constraints on the ability of the parties post-merger to raise prices. These include: i) regulation of rail fares and service levels ii) ratio between regulated and unregulated rail fares and iii) potential for entry/expansion.
98. The analysis below will also take into account these filters and assessment criteria applied by the UK CC.

a) Rail/bus overlap of DB operations for Transport for London (DB's JV LOROL which operates the London Overground) and Arriva bus services operated for Transport for London

99. All operations of DB and Arriva in this group are operated under so-called "gross cost contracts" with no possibility for the operator to set fares or timetables. The revenues earned from passengers are retained by the contracting authorities. In the case of LOROL [...] remuneration is based [...].
100. The parties cannot therefore compete in terms of prices and timetables. They would not retain any significant extra revenue either but it would predominately go to the contracting authority. Competition for these markets appears to take place only at the tender level. This has been confirmed in the market investigation.

b) Rail/bus overlap between DB metro operations in Tyne & Wear area and Arriva bus services

101. DB operates metro services [...]Arriva's bus services are unregulated.
102. Post transaction, the merged entity will have no incentive to increase prices or lower the frequency of its bus operations to divert passengers to the metro [...].

c) Rail/rail and rail/bus overlap of DB's open access rail service Wrexham and Shropshire and Arriva rail franchises and/or Arriva bus services (between Wrexham and Wolverhampton)

103. DB operates its open access rail service four times per day in each direction. This is significantly less than Arriva's rail and bus services which run at least every hour. Given the limited and infrequent services of DB's open access rail operations these are unlikely to be an effective competitor to Arriva's rail and bus operations. This is also in line with the UK CC's practice and has been confirmed in the market investigation.

³⁷ EUR 11 224.

d) Rail/rail overlap of DB rail franchise (Chiltern Railways) and Arriva rail franchise (CrossCountry) (between Birmingham and Banbury)³⁸

104. The parties' activities overlap in the provision of passenger rail services on the flows between Banbury, Leamington Spa and Birmingham. The overlap flows represent [...] of the revenue and passengers on the entire route for each of the two franchises³⁹. This is likely to make it commercially not profitable for the parties to adjust fares and/or reconfigure routes. This is also in line with the UK CC's practice which, as explained above, applies a filter of 10% of the revenues and excludes overlap flows with less than 10% of the route revenues from an in-depth analysis. Also the revenues on these flows are relatively limited for both parties (DB GBP [...], Arriva GBP [...])⁴⁰.
105. The parties argue that the overlap does not raise concern as on this overlap between [...] of the fare revenue comes from inter-available tickets. For these tickets the lead operator, normally the train operator with the greatest commercial interest, sets the fares and other train operators on this flow are obliged to also accept these inter-available tickets on their trains⁴¹. Therefore, inter-available tickets allow passengers to use any train with the same ticket.
106. Train operators, except the lead operator, however, are free to set their own operator specific tickets in addition to the inter-available tickets. However, these operator specific tickets only account for a very limited share (between [...]) of total revenues of the operators, the remaining revenue coming from inter-available tickets. The high share of inter-available tickets, according to the parties, demonstrates that there is little price competition on the flow pre-merger. Also, the UK CC considers that in flows in which a significant proportion (over 90%) of tickets comes from inter-available tickets it is likely that there was little price competition before between operators on this flow. This is not fully confirmed by the market investigation. The majority of respondents to the market investigation considered that operators compete even if inter-available tickets account for a significant share of fare revenues, since even in the presence of inter-available fares operators are free to offer operator specific fares and/or improve their service. On the other hand, in the Birmingham to Leamington Spa and Leamington Spa to Banbury flows neither franchise offers operator specific tickets.
107. The Commission also observes that in the concerned flows a significant share of the fare revenues on the inter-available tickets comes from regulated fares ([...] for Banbury to Birmingham, [...] for Banbury to Leamington Spa and [...] for Leamington Spa to Birmingham). These fares are regulated by the contracting authority and the franchise cannot raise the price of the regulated fares by more than

³⁸ Also the open access rail services Wrexham and Shropshire operates on the flow Banbury – Leamington Spa. However, as explained under c), this service is not considered to be an effective competitor to Arriva's services.

³⁹ For DB's Chiltern Railways the route runs from London Marylebone to Birmingham/Kidderminster. For Arriva's Cross Country the route runs either from Reading to Newcastle or Bournemouth to Manchester

⁴⁰ DB EUR [...], Arriva EUR [...].

⁴¹ This is laid down in the the ATOC (Association of Train Operating Companies) Ticketing and Settlement Agreement, as approved by the Office of Rail Regulation.

RPI + 1%.⁴² Operators are constrained in their ability to raise prices also for the non regulated ticket fares since regulated fares provide an alternative. This limits the ability of DB/Arriva to increase the prices post-transaction.

108. The market investigation has not provided any evidence that the transaction may lead to a significant impediment to effective competition with respect to any rail/rail operations of the parties in the UK.
109. Furthermore, London Midland (LM) provides 8 peak hour journeys a day between Birmingham and Leamington Spa and might potentially be able to increase its services.
110. Overall, given that i) the overlap flows represent [...] of the revenue and passengers on the entire route for each of the two franchises, ii) a significant share of the fare revenues comes from regulated fares, iii) potential entry from LM constrains any potential price increase and iv) the result of the market investigation the Commission concludes that the transaction does not raise serious doubts in terms of a significant impediment of effective competition on the rail/rail operations of the parties in the UK.

e) Rail/bus overlap of DB rail franchise and Arriva buses (in the area of Aylesbury – High Wycombe – Beaconsfield)

111. The last group of flow overlaps relates to the activities of the parties in the county of Buckinghamshire between Aylesbury High Wycombe and Beaconsfield. Arriva operates a number of bus services in the area while DB is active through the Chiltern train service.
112. In rail/bus overlaps the theory of harm concentrates on the possible effect of the merger on bus services (as prices for rail services are generally higher and regulation restricts the train operator's ability to alter services and fares and a high proportion of rail costs are fixed costs). Therefore the main concern is that, post-merger, the combined entity could profitably: (a) increase bus fares, to encourage passengers to shift from its bus services to train services where these overlap on a given flow; and/or (b) amend bus service frequencies, routes and configurations to make the bus into a feeder service for rail services.
113. On two (groups of) flows the parties seem to compete more closely (Aylesbury – Stoke Mandeville – Wendover and Aylesbury – Princes Risborough – High Wycombe – Beaconsfield). In the first (group of) flows, the parties' activities appear to run at approximately the same frequency (twice per hour). However, Arriva's bus services usually take 2-3 times longer than DB's rail services. For the most important of the 3 flows in question in terms of revenues [...] the journey time of the two operators differs very significantly (8 minutes versus 23). Furthermore, Tiger Line, a competitor, runs some services in these flows which are faster than Arriva's services (however, there are only 5 journeys per day).
114. In the second (group of) flows, for the great majority of the flows DB's activities are less frequent than Arriva's. DB operations have a frequency of one train per hour while Arriva's operations run every 20 minutes. According to the UK CC's practice,

⁴² Retail Price Index, a UK government measure of inflation.

Arriva and DB would not be considered effective competitors on these flows either. The only exception is the Princes Risborough – High Wycombe flow where both parties' services run approximately every 20 minutes. However, on this flow Arriva's service takes more than double the journey time (28 minutes versus 12 minutes for DB).

115. Furthermore, Tiger Lines is currently operating a service on these flows but with only 5 services per day. It is likely that Tiger Lines or another operator might find it profitable to enter these flows if post merger the parties were to increase the price of the bus tickets.
116. Furthermore, the revenue of the parties on the two groups of flows is limited (DB GBP [...], Arriva GBP [...]).
117. The market investigation did not provide any evidence that the transaction may lead to a significant impediment to competition with respect to the horizontal overlaps of rail/bus operations of the parties in the UK.
118. On the basis of the above the Commission therefore comes to the conclusion that the proposed transaction does not significantly impede effective competition in the UK as regards the individual point-to-point overlap flows of the parties.

3.3. Conglomerate issues

119. One market participant expressed concerns that the merged entity could introduce multi-modal tickets in areas where the parties operate bus and rail services, thereby excluding competing bus operators. Multi-modal tickets allow passengers to use both rail and bus services with a single ticket.
120. Usually, the inter-modal tickets in place are not operator specific but part of multi-modal ticketing schemes (such as PLUSBUS, a national scheme). Transport authorities encourage the use of multi-modal tickets since they tend to offer a lower price than the combined fare of bus and train services and are convenient for travellers.
121. Arriva, which already now operates both rail and passenger bus services in some areas, does not offer its own inter-modal tickets. Arriva participates in a number of multi-modal ticketing schemes across the UK, either as a bus operator and/or rail operator. Also DB participates in a number of multi-modal ticketing schemes.
122. Bus services of competitors appear to play a complementary role to the services offered by the parties, since their role is to facilitate access to the train services for passengers from different areas. As a result, competing bus operators' services bring additional demand for the train services offered by DB and therefore, it is unlikely that the merged entity would have the incentive to introduce such schemes with an exclusionary effect.

3.4. Conclusion

123. On the basis of the above the Commission therefore comes to the conclusion that the proposed transaction does not raise serious doubts in the UK as regards the market for passenger rail and bus services.

D. Germany rail

124. The Parties are active in various segments of the German rail sector. DB is the German rail incumbent and maintains significant market shares in several rail markets. DB also controls [0-100]% of the rail infrastructure under the regulatory authority of the Bundesnetzagentur.⁴³ Arriva is also active in most of the German rail markets, mainly through its subsidiary, Arriva Deutschland GmbH, and its subsidiaries and joint ventures. Arriva also owns and operates 546 km of rail infrastructure in Germany including terminals⁴⁴.
125. The Parties' activities significantly overlap in rail passenger transport i.e. (a) regional passenger rail transport and (b) long-distance passenger rail transport. In addition, the Parties' activities also lead to affected markets in rolling stock maintenance and rail freight transport.

1. The relevant product markets

1.1. Rail passenger transport

126. In Germany, there are significant regulatory differences between (a) long-distance passenger rail services and (b) regional passenger rail services.
127. Long-distance passenger rail services are operated commercially on an open access base without direct public funding or other additional economic regulation. Regional transport however is governed by the Regionalisation Act⁴⁵ which gives the German states (Bundesländer) the responsibility to ensure the provision of sufficient regional public transport, whether by rail or by bus. Depending on the law of the respective Bundesland, the Bundesland itself or a special state agency contracts the regional transport services from the (rail) operators. The contracting authority (hereafter referred to as Aufgabenträger) is responsible for awarding the contract for the provision of regional transport.
128. The Commission has not defined the markets for rail passenger transport in Germany in previous cases. According to the notifying party which refers to the different regulatory

⁴³ The main provisions of the German railway regulatory framework are contained in the General Railway Act (Allgemeines Eisenbahngesetz – AEG), which is supplemented by the Railway Infrastructure Usage Regulation (Eisenbahninfrastruktur-Benutzungsverordnung – EIBV). All public railway infrastructure operators are subject to the regulatory supervision of the BNetzA, irrespective of their size. § 13 and 14 AEG, supplemented by the EIBV, provide for free market access for railway undertakings licensed pursuant to § 6 of the AEG. In particular, § 14(1) AEG stipulates the obligation of railway infrastructure operators to grant access to the rail infrastructure on a non-discriminatory basis.

⁴⁴ Arriva operate two terminals, one in Lüneburg which is approximately 50 km of a DB rail/road terminal in Hamburg-Billwerder. The Hamburg-Billwerder Terminal is specialised in container handling from rail to road and handles block trains. It handled a total volume of around [...] tonnes in 2009. The Lüneburg terminal is focused on [...] and does only to a negligent extent container handling. [...] . Due to the different installation and significant differences in capacity, the two terminals neither have the [...] nor [...]. Therefore, competition concerns seem unlikely. In any event, the submitted commitments cover any potential competition issues in the terminal markets.

⁴⁵ Regionalisierungsgesetz – RegG of 1996.

regimes, a distinction has to be made between long-distance passenger rail transport and regional passenger rail transport.

129. The German Competition Authority (Bundeskartellamt) and the German Supreme Court (Bundesgerichtshof) have also distinguished between the market for regional public transport service and the market for long-distance transport services⁴⁶. They base the distinction mainly on the different regulatory regimes which lead to significant differences in the economic environment in the two markets.
130. The market investigation also confirmed that regional passenger rail transport is a separate market from long-distance passenger rail transport. Respondents to the market investigation explained that the commercial operation of long-distance trains requires different business models with different skill sets, risk and success criteria compared to the subsidised regional train services that are purchased by the Aufgabenträger. In addition, long-distance transport and regional transport do not concern the same purpose of travelling. Moreover, the characteristics of the traffic are different, for example in terms of frequencies or stops.

1.1.1. Regional passenger rail transport

131. The German regulatory framework defines regional passenger transport by rail as the provision of urban, suburban and regional transport services by rail with a general travel distance for the majority of the travelling passengers of up to 50 km or a travel time of less than 60 minutes.
132. Regional rail passenger transport services are contracted in Germany by the Aufgabenträger. Generally rail operators need to have their own rolling stock, workshops and staff. They can otherwise lease it or contract out services to subcontractors.⁴⁷ According to the Parties, the Aufgabenträger contract regional passenger rail transport services with an annual value of EUR 5.2 billion and with a volume of approximately 630 million train kilometres annually. The Aufgabenträger have considerable discretion in the way they procure services. Contracts for regional transport are either tendered (Ausschreibung) or, under certain circumstances, awarded directly (Direktvergabe) to the rail operators. The contracts have typically a duration of 8 to 15 years. Regulation (EC) No 1370/2007⁴⁸ reinforces the principle of transparency and level playing field in awarding of concession in public passenger transport services by rail. Therefore, an increasing number of public tenders are expected in the near future.
133. According to the notifying party, the relevant product market is the provision of contracted regional passenger rail transport services vis-à-vis the Aufgabenträger i.e. the market for concessions. This is in line with the practice of the Bundeskartellamt confirmed by the German courts. The Commission, with respect to the French public

46 Cf. BKartA, Case B 9-142/01 of 19.06.2002 – Rheinische Bahngesellschaft et al./ELBA, p. 4; BKartA, ÖPNV Göttingen, WuW/E DE-V, p.603ff; BKartA, DB Regio/üstra, WuW/E De-V 891; BKartA Tätigkeitsbericht 2003/2004, p.147ff; BKartA Tätigkeitsbericht 2005/2006, p.143ff; BGH, KVR 5/05, DB Regio/üstra, BGHZ 166, p.165ff, para 23f; BGH, KVR 28/05, Deutsche Bahn/KVS Saarlouis, BGHZ 168, p.295ff, para. 1, 11.

47 Currently, only one Aufgabenträger in Germany has bought its own rolling stock which it provides to the operators.

48 Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road.

passenger transport markets, applied such a distinction in the SNCF-P/CDPQ/Keolis/Effia case and consequently focused its competitive analysis on the market for concessions.⁴⁹ For the German markets, the German Supreme Court⁵⁰ also confirmed this division between the concession and passenger market, and confined its competitive assessment to the market for concessions. In line with these findings, the relevant product market to be considered is the market for concessions (Aufgabenträgermarkt). This is due to the fact that regional passenger rail transport services are not operated on a commercial basis, but are contracted by the Aufgabenträger which remunerates the operators for the provision of these services. As a consequence, competition mainly occurs at the level of the concession of regional passenger transport services. In particular, lines or networks are contracted to certain operators and operators do not compete in terms of fares or other parameters of services relevant to the individual customer. The market participants almost unanimously confirmed that the concession regional rail market constitutes a separate relevant market based on the differences described above.

134. According to the notifying party, there is no single market for regional passenger services in Germany but a distinction has to be made between the markets for regional passenger transport by rail and regional passenger transport by bus, tram and metro.
135. In previous cases, the Commission has not taken a view on whether public passenger transport services by rail and by bus constitute separate markets in Germany. In the case Connex/DNVBVG/JV the product market definition was left open.⁵¹ As regards the practice in Germany, the Bundesgerichtshof decided in case DB Regio/üstra for regional passenger transport that passenger transport by rail and by road do not form part of the same market.⁵² Furthermore, separate markets for long-distance and regional passenger transport were defined by the Bundeskartellamt.⁵³
136. The market investigation confirmed that public passenger transports by rail and by bus do not belong to the same market. Indeed, the functioning of these two markets requires different qualifications and operators have to comply with different regulatory regimes. In Germany, public rail transport is governed by the Allgemeines Eisenbahngesetz (AEG) whereas the bus market follows the regulatory framework defined in the Personenbeförderungsgesetz (PBefG). Both laws define different requirements to enter the rail and the bus market, respectively e.g. the PBefG prohibits basically long distance bus services⁵⁴.

49 Case COMP/M.5557 - SNCF-P/CDPQ/Keolis/Effia, para. 17.

50 BGH, KVR 5/05, DB Regio/üstra, BGHZ 166, p.165ff, para. 24 and 53; BGH, KVR 28/05, Deutsche Bahn/KVS Saarlouis, BGHZ 168, p.295ff, para. 11, 16.

51 See COMP/M.2370 Connex/DNVBVG/JV, para 12.

52 See BGH case KVR 5/05 of 7 February 2006 – DB Regio/üstra, para 23 f. In contrast to this, the Bundeskartellamt did not take a final view but considered defining a combined market for short-distance passenger transport in metropolitan areas arguing that rail and bus services are fully integrated and interchangeable for passengers. Case B9-60210-FA-37/04 of 23 March 2004 Stadtwerke Frankfurt/Offenbacher Verkehrsbetriebe.

53 Following the definition of the German Passenger Transport Act (Personenbeförderungsgesetz, PBefG) according to which short-distance comprises journeys of on average not more than 50 kilometers or a travel time of not more than one hour (§ 8(1) PBefG).

54 Supplying new, more or less parallel, bus services with long-distance passenger rail services is only allowed when these represent a significant improvement over existing services. There exists only one historic exception for long-distance bus services to Berlin and international destinations.

1.1.2. Long-distance passenger rail transport

137. Long-distance passenger rail transport in Germany is in general not subject to public tenders or contracted in other ways by the Aufgabenträger, but is operated commercially on an "open access" basis⁵⁵.
138. According to the notifying party, the market for the provision of long-distance passenger transport includes long-distance passenger transport by a variety of modes of transport, e.g. rail, bus and air. However, the Commission in previous decisions did not consider that other modes of transport such as cars and buses belong to the same product market as rail services⁵⁶. Regarding competition with air traffic, whereas the Commission pointed to a certain degree of substitution between high speed railway and air traffic, it dismissed however such a substitution with regard to at least a significant number of customers.⁵⁷
139. A vast majority of the respondents to the market investigation in the present case showed that long-distance passenger rail transport constitutes a separate product market. From a regulatory perspective, the rules applicable to rail and street-bound services are different in Germany namely the German General Railway Act⁵⁸ for rail, and the Act for the Transportation of Passengers⁵⁹ for street bound services. Although there might be some routes where rail is competing to a certain extent with bus services, it was pointed out by market respondents that in most cases rail, bus and air services are not substitutable to each other in Germany. In particular, long-distance passenger transport by bus does barely exist in Germany due to a historic legal regime which provides that long-distance bus lines are not authorised as long as a sufficiently established rail connection is operated along the same path⁶⁰. The market investigation did not provide clear indications as to the substitutability between rail and air traffic for passenger transport in Germany.

1.1.3. Conclusion

140. On the basis of the above, the relevant product markets considered for the purpose of the present case are (a) regional rail transport, and (b) long-distance passenger rail transport.

⁵⁵ One exception is Arriva's Alex service. This service is a non-commercially operated long-distance service which was awarded to Arriva in a public tender process after DB had decided to discontinue its InterRegio service. According to the notifying party, it is a contracted service (bestellter Verkehr) and forms part of the same market as regional services, which are also contracted. For the purpose of this decision, the question whether the Alex service belongs to the regional or long-distance rail passenger market can be left open, as it does not change the assessment in these markets.

⁵⁶ Case COMP/M.2446 Govia/Connex South Central, para. 13; IV/M.816 CGEA/South Eastern Train Company Limited, para. 13.

⁵⁷ In Case COMP/M.5440 – Lufthansa/Austrian Airlines, for example, where the Commission found that there is no substitution between rail and plane with regard to the time sensitive passengers. Whereas "as regards non-time sensitive passengers, the views of the respondents to the Commission's market investigation questionnaires on the substitutability between plane and train services on this route were rather varied".

⁵⁸ Allgemeines Eisenbahngesetz, AEG.

⁵⁹ Personenbeförderungsgesetz, PBefG.

⁶⁰ § 13 (2) Personenbeförderungsgesetz.

1.2. Freight rail transport

1.2.1. Freight transport vs. freight forwarding

141. Freight transport covers the activity of the physical transfer of objects carried out by the transport provider with equipment it owns, leases, or otherwise legally uses itself. Freight forwarding has been defined as the organisation of transportation of items (possibly including activities such as customer clearance, warehousing, ground services etc.) on behalf of customers according to their needs.
142. The notifying party submits that there is only one single market consisting of freight forwarding and freight transport. However, the Commission has found in previous decisions that freight transport services constitute an input to freight forwarding services⁶¹. The freight forwarding providers would offer a service to their customers which might include the freight transport; however the freight transport would be often sub-contracted to the freight transport carriers⁶².
143. The market participants broadly confirmed the findings of the Commission in previous cases and pointed towards a separate market for freight transport.

1.2.2. Different modes of freight transport

144. The notifying party argues that there is one market for freight transport irrespective of the different modes of transport. However, in previous cases, the Commission has found that not all modes of transport are substitutable to each other and generally it depends on the geographic location of the customer and the specific characteristics of the goods to be transported⁶³. In this regard, the Commission, while leaving the market definition open, has previously found that there are strong indications for a distinct market for the transport of goods by rail.⁶⁴
145. In the present case, the market investigation has also pointed to the existence of a separate market for rail freight transport, different from the other modes of transport. Each mode of freight transport has different characteristics in relation to prices and cost structures, timing and geographic availability. In addition, market respondents confirmed that only rail freight transport can fulfil certain requirements related to the type of certain goods transported, volume/quantity, weight of the goods, the geographic location or speed of transport, and constitutes for a substantial part of the customers the only alternative.

61 For the definition of freight forwarding, see Case COMP/M.1794 Deutsche Post/AEI; COMP/M. 4045 Deutsche Bahn/BAX Global.

62 Case COMP/M.5480 Deutsche Bahn/PCC; Case COMP/M.2905 Deutsche Bahn/Stinnes.

63 Case COMP/M.4294, Arcelor/SNCF/CFL Cargo, Case COMP/M.3150 SNCF/Trenitalia, Case COMP/M.5096 RCA/MÁV Cargo.

64 Case COMP/M.5480 Deutsche Bahn / PCC; Case COMP/M.3971 Deutsche Post/Exel, Case COMP/M.4746 Deutsche Bahn/EWS.

1.2.3. Domestic vs. international rail freight transport

146. The notifying party contests the previous Commission findings with regard to the existence of a separate market for freight transport in general and the segmentation of the freight transport into domestic and international freight transport, in particular. The market investigation in the present case pointed to further distinctions between domestic and international rail freight transport. Competitors indicated that in order to provide international, i.e. cross-border or transit rail freight transport, the rail operator needs to comply with the different regulatory and technical requirements of the different countries or co-operate with another company. Currently, only very few competitors besides DB are able to provide international freight transport and their market shares are considerably lower in comparison to domestic transport.

1.2.4. Possible subdivision of rail freight transport into single wagon and block trains

147. The notifying party submits that the rail freight transport market shall not be divided between block train services⁶⁵ and single wagon train services.⁶⁶ Arriva provides block train services and, in co-operation with DB, single wagon train services. DB is active in both, block and single wagon train services.

148. In previous decisions, the Commission found that such a subdivision between single wagon and block train services cannot be excluded.⁶⁷

149. In the current market investigation a majority of customers and competitors consider that these two types of rail freight transport are not substitutable, since the choice of single wagon vs. block train services depends mainly on the quantity of goods to be transported. Respondents indicated that the provision of single wagon services requires a more complex organisational structure, a large rail network and a sufficient scale of operations which is very costly.

1.2.5. Possible subdivision in respect of the goods transported

150. In the notifying party's view, the freight transport market is not to be segmented according to the types of goods transported. The notifying party considers that, from a supply side, it does not matter which types of products are transported. DB and nearly all rail freight transport companies would be able to transport any product required by the customer.

151. The market investigation in the present case showed that such further sub-segmentation cannot be excluded. Market respondents indicated in particular that certain categories of goods (such as for example wood/timber) require very specific rolling stocks and that also the customer base is different depending on the categories of goods provided.

⁶⁵ Block trains are entire trains running from a single point of origin to a single point of destination.

⁶⁶ Single wagon trains are assembled in a marshalling yard in the region of origin, transported to a marshalling yard in the region of destination and disassembled into single wagon loads for transport to their final destination (often by intermodal transport). The provision of single wagon services requires a more complex organisational structure, a large rail network and a sufficient scale of operations.

⁶⁷ Case COMP/M.4746 Deutsche Bahn/EWS; COMP/M.5480 Deutsche Bahn/PCC.

1.2.6. Conclusion

152. On the basis of the above, and for the purpose of the present case, the product relevant markets considered is that for the rail freight transport. Further market segmentations into (i) domestic and international, (ii) single wagon and block trains, or (iii) according to the goods transported can be left open in this case, as the commitments proposed by DB are capable of removing the competition concerns that arise on the overall market for rail freight market as well as on the potential (sub)markets for domestic block trains and wood/timber rail freight transport.

1.3. Rolling stock maintenance

153. In the notifying party's view, there is an overall market for rolling stock maintenance, i.e. there are no distinct markets for heavy maintenance services and light maintenance services. Heavy maintenance consists of the refurbishment and overhaul and repair of components and accident damages. Light maintenance consists in the regular inspection of the rolling stock used and preventive and corrective repair and servicing. However, according to the notifying party, no clear line can be drawn between heavy and light maintenance services. The classification of a certain maintenance service as heavy or light maintenance varies between different railway undertakings.

154. The Commission has in its previous decisions distinguished between light maintenance services, heavy maintenance service and refurbishment of rail vehicles⁶⁸.

155. In the present case, the market participants indicated that there are separate markets for light maintenance and heavy maintenance as these types of services require different equipment, skills and technology and serve different customer needs.

156. On the basis of the above, and for the purpose of the present case, the relevant product market definition can be left open as the commitments proposed by DB are, in any event, capable of removing any competition concerns that arise on the light maintenance market.

2. The relevant geographic market

2.1. Regional rail passenger transport

157. In the notifying party's view, the market for concessions for regional passenger rail transport is national in scope. This is in line with the jurisprudence of the German courts⁶⁹ and the Bundeskartellamt. In DB's view, there are no indications for a regional delimitation of the concession rail market. In a previous Commission decision, relating

⁶⁸ Case COMP/M.2139 Bombardier/ADTrans. Refurbishment involves the modernization and adaptation of rolling stock to a completely new concept or design. According to the notifying party's definition, heavy maintenance includes the refurbishment. The product market definition can be left open as the competition concerns arise under any alternative product market definition.

⁶⁹ BGH, KVR 5/05, DB Regio/üstra, BGHZ 166, p. 165ff, para. 40 et seq. OLG Düsseldorf, VI (Kart) 1/04, DB/üstra, WuW/E 2005, 169. The relevant sentence in section, II.1.2. reads as follows: „In räumlicher Hinsicht umfasst der Aufgabenträgermarkt im SPNV das gesamte Bundesgebiet.“ („Geographically, the Aufgabenträgermarkt in regional passenger transport by rail comprises the whole German territory.“).

to the French public transport markets, it was considered that the relevant market for the concession of urban public passenger services was at least national in scope.⁷⁰

158. Indeed, the market investigation in the present case indicated that competition takes place at the national level. A number of railway operators, present in regional passenger rail transport in Germany, such as Veolia, Abellio or Keolis, as well as DB and Arriva, regularly participate in tenders throughout (a substantial part of) Germany. Furthermore, from a regulatory perspective competition conditions appear homogeneous throughout Germany. Therefore, for the purpose of the present case the market is considered as national in scope.

2.2. Long-distance passenger rail transport

159. The notifying party is of the opinion that, in analogy to the Commission's decision in airline cases, an individual Origin and Destination (O&D) approach might also be appropriate in the present case. However, with reference to the French market, the Commission decided that the legal monopoly of SNCF in long-distance passenger rail transport led to the definition of a national market.⁷¹
160. The situation in the provision of long-distance passenger rail services in Germany seems to be to a certain extent comparable to the French market. The market investigation also showed that the market is still very much shaped by national regulation and by DB's quasi monopoly in this market. There is a uniform railway regulation in Germany which is still different from other areas in the EEA. Therefore, for the purpose of the present case the relevant geographic market is considered as national in scope.

2.3. Rail freight transport

161. According to the notifying party, the market for rail freight transport is national in scope. The Commission has previously held that in view of different technical and regulatory requirements the markets for rail freight services are rather national in scope⁷², but could become international on certain routes which are part of a corridor⁷³. In certain particular situations the Commission also found that a corridor-based approach might best reflect the competitive situation.⁷⁴ In a recent decision, the Commission considered a distinct market for cross-border rail freight transport services between two neighbouring countries⁷⁵.

⁷⁰ Case COMP/M.5557 - SNCF-P/CDPQ/Keolis/Effia, para. 42f.

⁷¹ Case COMP/M.5557 - SNCF-P/CDPQ/Keolis/Effia, para. 49.

⁷² Case COMP/M.2905 Deutsche Bahn/Stinnes, Case COMP/M.4746 Deutsche Bahn/EWS, Case COMP/M.5096 RCA/MÁV Cargo.

⁷³ Case COMP/M.4746 Deutsche Bahn/EWS, Case COMP/M.4786 Deutsche Bahn/ Transfesa.

⁷⁴ A corridor-based approach considers that transport services between certain regions are, due to mainly geographical or technical reasons, only offered on one certain route or corridor, where other possible routes are not equally feasible either economically or technically. In that case, each corridor has to be regarded as one distinct geographical market. See e.g. Case COMP/M.3150 SNCF/Trenitalia regarding the tunnel of Fréjus between France and Italy.

⁷⁵ Case COMP/M.5096 RCA/MAV Cargo regarding cross-border rail services between Austria and Hungary.

162. The market investigation has broadly confirmed the view of the notifying party and the findings in previous decisions. Market participants underlined that there are still barriers to enter the German rail freight market, due to regulatory and technical requirements and sufficient availability and access to infrastructure. Therefore, for the purpose of the present case the rail freight markets discussed above shall be considered as national in scope.

2.4. Rolling stock maintenance

163. In the notifying party's view, the geographic market for maintenance services is at least national in scope. In a previous Commission decision the markets for light maintenance, heavy maintenance and refurbishment services have been defined as national or even sub-national⁷⁶.

164. The market investigation showed clear indications that the market for rail maintenance services is national in scope. Respondents showed that it is important that railway companies have access to maintenance facilities not far from their geographic scope of activities to be able to operate economically. Therefore, for the purpose of the present case the market is considered as national in scope.

3. Competitive Assessment

3.1. Regional rail passenger transport

165. The market for regional rail passenger transport is still very concentrated. On the national market for regional passenger services by rail, DB had a market share of approximately [70-80]% in terms of train kilometres (km) in 2009. In the same year, Arriva had a market share of [0-5]% in terms of train km. The proposed transaction therefore leads to a combined market share of [80-90]%. Arriva is behind Veolia the second largest competitor of DB. There are a number of smaller competitors in the market but their market shares are limited.

166. At a national level, the parties' largest competitors for tenders in regional passenger transport and their respective market share in 2009 (in terms of train km) are the following: Veolia Verkehr GmbH, a subsidiary of Veolia Environnement (with a market share of [5-10]%), HLB – Hessische Landesbahn GmbH, a regional transport provider owned by the Bundesland of Hesse ([0-5]%), Keolis Deutschland, a subsidiary of SNCF: ([0-5]%), Abellio Rail, a subsidiary of Nederlandse Spoorwegen ([0-5]%), and BeNEX GmbH, a regional passenger service provider co-owned by Hamburger Hochbahn AG, which is the public transport operator owned by the Land of Hamburg ([0-5]%).

⁷⁶ Case COMP/M.2139 Bombardier/ADTranz.

Table D.1: German regional rail passenger transport- market shares in 2009 (train km)

Rail Operators	Market share (train km)
DB	[70-80]%
Arriva	[0-5]%
Combined	[80-90]%
Veolia	[0-5]%
HLB	[0-5]%
Keolis	[0-5]%
Abellio	[0-5]%
BeNex	[0-5]%

Source: DB's best estimates

167. In the notifying party's opinion, the notified concentration does not result in competition concerns in the market for concessions for regional passenger rail transport for several reasons. Market shares would be of limited significance in tender markets. The notifying party argues that most of the tenders awarded on the market for concessions would not immediately be reflected in the market shares because the contracts only start one to two years after the tender. In addition DB's market share would decrease steadily as tendered contracts are increasingly won by DB's competitors.
168. However, the market respondents were broadly very concerned about the proposed transaction in respect of the regional passenger rail transport market. In particular, the responsible Aufgabenträger indicated strongly their fear to lose one of the few active competitors of DB in the market. The proposed transaction would threaten to significantly impede the development of a competitive environment in this newly liberalised market. The Aufgabenträger also indicated that they intend to launch an important number of tenders in the coming years and that they fear that the proposed transaction will have a very significant impact on these tenders since Arriva is one of the few competitors that can compete for tenders involving larger volumes of train kilometres. Moreover, between 2012 and 2015 a significant number of DB's contracts expire, with large amounts of train kilometres to be newly awarded.
169. In addition, the market investigation respondents underlined that DB, as the incumbent operator, has an advantage of having a well functioning infrastructure (maintenance, rolling-stock, sales and ticketing) all over Germany. Although at a smaller scale, Arriva is one of the few companies that also has its own railway infrastructure and its own rolling stock maintenance and its own terminals. It was indicated by market respondents that this gives Arriva a competitive advantage in the market and underlines its potential as a competitive restraint for DB.
170. The proposed transaction therefore raises serious doubts on the German market of regional passenger rail transport mainly based on the high market shares of DB and Arriva's relatively strong position as third biggest market player, as confirmed by the concerns issued from a high number of respective Aufgabenträger.

3.2. Long-distance passenger rail transport

171. DB, as the incumbent operator, provides long-distance passenger rail transport services throughout Germany and has a market share that is close to a monopoly.
172. Arriva operates long-distance rail services on a commercial basis through its subsidiary Vogtlandbahn GmbH. The so-called Vogtland-Express runs once a day from Plauen via Zwickau, Chemnitz and Riesa to Berlin and back. On this route Arriva achieved a turnover of € [...] in 2009.⁷⁷ Arriva's market share on a national market is less than ([0-5] %).
173. Besides Arriva, only two other companies are currently active in long-distance passenger rail transport. Veolia Verkehr is operating the InterConnex 1 long-distance connection between Leipzig and Warnemünde (via Berlin and Rostock) as well as the Harz-Berlin Express, the latter only partially operating on a commercial basis. Georg Verkehrsorganisation GmbH operates a night service between Malmö and Berlin. Both competitors have also a market share of less than ([0-5]%).
174. Competitors in the market investigation raised concerns with regard to the acquisition of one of the very few competitors which succeeded in entering this market where the barriers of entry are very high. They further stated that Arriva has the necessary know-how to expand in this market. Moreover respondents to the market investigation pointed to the fact that the access by DB to the information on the business model of Arriva in Germany will reinforce its capacity to preserve its strong dominant position in this market.
175. A majority of the market investigation respondents pointed to the very high barriers to entry in the long-distance passenger rail market due to:
- a) The high investments needed for example for procurement of rolling stocks, setting up of a distribution system, construction of depots or hiring and training drivers and conductors. Both DB, which enjoys already financial advantages on the capital market as a state owned company, and Arriva have this financial strength.
 - b) Long period of time to enter the market. Respondents explained that the lack of availability of used rolling stock and the resulting need to procure new material leads to a significant burden for any new entrant, in particular, as the procurement of new rolling stock takes between 3-4 years and the operator does not know at the time of procuring the trains whether it is able to obtain the necessary train tracks.
 - c) DB's advantages resulting from the [...]. In addition respondents pointed out that there is a [...].⁷⁸

⁷⁷ Furthermore, Arriva provides passenger transport services from Lindau/Oberstdorf to Munich and from Munich/Regensburg to Prag/Hof (the so-called ALEX – services). However, the notifying party argue that as this service is provided as a contracted service (awarded in a tendering process) on a non-commercial basis for an Aufgabenträger, the ALEX service is not falling within the long-distance passenger rail market. However, if it would be included in the market for long-distance passenger rail transport Arriva's market shares would be slightly higher.

⁷⁸ Approximately 34,000 km of railway infrastructure in Germany is owned by DB and operated through its business unit DB Netz, complemented by more than 5,400 stations. In view of the total length of the railway infrastructure network in Germany of [...] DB operates thus approximately [90-100]%.

- d) The dependency and possible discrimination of new entrants regarding services offered by DB (or DB Netz) such as rail energy or rail tracks access. With regard to rail tracks access respondents indicated that this is awarded by DB Netz on the basis of framework contracts under restrictive time constraints. According to these respondents, the time constraints of the application of rail tracks access, the confirmation of rail tracks access and the start of operations is such that it is impossible for an operator to develop the project in that time frame. This also may imply that the new operator pays rail tracks access fees while the operator is not ready to start its services.
176. In addition, despite the very low market share of Arriva on the market for long-distance passenger rail transport, the market investigation revealed that Arriva is one of the key competitors of DB since it has its own rail tracks⁷⁹, it acquired indispensable knowledge of the long-distance market, which would allow Arriva to expand its long-distance operations in the future. Moreover, it was mentioned by market respondents that Arriva's strength in the regional rail passenger market in combination with its own well functioning infrastructure makes Arriva a very credible player to enter the market for long-distance passenger rail transport to a larger extent and to exert already today competitive pressure on the quasi monopolist DB.
177. Arriva is, in spite of its very low market share, thus currently one of the few competitors that could enter the German long-distance passenger rail market on a larger scale. Therefore, serious doubts exist as regards the German market for long-distance passenger rail transport.

3.3. Rail freight transport

178. The proposed transaction will lead to overlaps in the overall market for rail freight transport and in particular in the market for domestic block train transport services.
179. DB's rail freight related activities are organised in its business unit DB Schenker Rail. DB Schenker Rail serves as a rail transport provider and rail freight forwarder for external customers and internally for DB Schenker Logistics. DB Schenker Rail is focused on freight transportation and freight forwarding services by rail.
180. DB Schenker Rail operates an open network system for the transport of single wagons and groups of wagons, and operates block train routes for point-to-point transport services. Moreover, DB Schenker Rail provides combined traffic services, including traction, trans-shipment, provision of rolling stock and provision of additional services.
181. Arriva is active in the German rail freight transport mainly through its subsidiary Osthannoversche Eisenbahnen AG (OHE). OHE is primarily active in the transport of goods for [...]. OHE offers block train services and – in cooperation with DB – single wagon train services (on its own railway infrastructure in Niedersachsen) and in some areas further logistical services. These services are, however, ancillary to the rail

⁷⁹ Arriva operates rail infrastructure through its subsidiaries Osthannoversche Eisenbahnen AG (OHE), Prignitzer Eisenbahn GmbH and Regentalbahn AG. In total, Arriva operates 546 km of rail infrastructure in Germany. Based on a total length of rail network in Germany of [...] Arriva has a market share of [0-5]%.

freight business. OHE operates approximately [...] block train services per week throughout Germany.

182. To a limited extent, Arriva operates some cross-border block train services⁸⁰ on the routes [...]

Table D.2: German rail freight transport- market shares in 2009 (tonne km)

Rail Operators	2009
DB	[70-80]%
Arriva	[0-5] %
Combined	[70-80]%
Competitors combined	[20-30]%
SNCF (Veolia Cargo, ITL)	[5-10]%
SBB Cargo	[0-5] %
Häfen & Güterverkehr Köln AG (HGK)	[0-5] %
TX Logistik	[0-5] %
CTL	[0-5] %
Havelländische Eisenbahn AG	[0-5] %
Others	[5-10]%

Source: DB's best estimates

183. On an overall rail freight transport market, Arriva's market share is [0-5]% while the market share of DB is around [70-80]%.
184. The notifying party argues that there are a significant number of other competitors on the market. In addition, the increment of the proposed transaction would not be important and the market share of DB would have decreased over time.
185. However, the market respondents expressed concerns about the proposed transaction concerning its effects on rail freight transport. The broad majority of respondents underlined Arriva's potential as a strong competitive force in the market beyond its currently very modest market shares. This is illustrated by the fact that Arriva's transport volume in tonne km has been continuously growing in the last three years despite the economic downturn in 2008-2009⁸¹.
186. In addition, market participants mentioned that the proposed transaction will strengthen the dominance of DB in rail freight transport and remove a growing competitive force in the market. Several customers indicated that they would expect a price increase in freight transport services post-transaction.

⁸⁰ [...].

⁸¹ Arriva transport volume by single wagon and block train services increased from [...] (2007) to [...] (2009).

3.3.1. Block train freight transport

187. DB has a market share of [60-70] % in terms of tonne km in 2009 in a German market for block train services (comprising domestic and international services).⁸² In the same year, Arriva had a market share of [0-5]% in terms of tonne km.⁸³ The competitors are all relatively small with Veolia and SBB as biggest competitors with around [0-5]% market share each.

Table D.3: German block train services - market shares in 2009 (tonne km)

Rail Operators	2009
DB	[60-70]%
Arriva	[0-5] %
Combined	[70-80]%
Competitors combined	[30-40]%
Veolia Cargo	[0-5] %
SBB Cargo	[0-5] %
Häfen & Güterverkehr Köln AG (HGK)	[0-5] %
TX Logistik	[0-5] %
ITL	[0-5] %
CTL	[0-5] %
Havelländische Eisenbahn AG	[0-5] %
Mitteldeutsche Eisenbahn GmbH	[0-5] %

Source: DB's best estimates

188. While Arriva's position in the international block train market is rather minimal, it has been able to acquire a significant market share in the domestic block train market. The market participants underlined Arriva's further potential in this segment. It was often mentioned by market participants that Arriva's role as infrastructure provider in particular with respect to the important ports of Hamburg and Bremerhaven gives it a competitive advantage in comparison to other non integrated competitors to challenge DB's market position.

Table D.4: German domestic block train services - market shares in 2009 (tonne km)

Rail Operators	2009
DB	[60-70]%
Arriva	[0-5] %
Combined	[70-80]%
Competitors combined	[30-40]%
Veolia Cargo	[5-10]%
SBB Cargo	[5-10]%
Häfen & Güterverkehr Köln AG (HGK)	[0-5] %
TX Logistik	[0-5] %
CTL	[0-5] %
Havelländische Eisenbahn AG	[0-5] %
Mitteldeutsche Eisenbahn GmbH	[0-5] %
Others	[5-10]%

Source: DB's best estimates

⁸² [...].

⁸³ Arriva had in 2009 approximately [...] and transports a volume of over [...] per year.

189. In a market for domestic block train services DB held in 2009 approximately [70-80]% of the market while Arriva held approximately [0-5]% (in tonne km). During the market investigations, the respondents, in addition to the concerns raised for the overall rail freight transport market, underlined Arriva's strength in providing block train services and in competing against DB. Customers and competitors have broadly expressed concerns regarding the effect of the transaction in particular for the area of block train services.

3.3.2. National freight transport by rail –types of goods transported

190. In light of Arriva's freight activities, the parties' market shares for the relevant categories of goods in 2009 were as follows: in a potential market for the rail freight transport of wood/timber, Arriva would have a market share of about [5-10]% while DB has a market share of [60-70]%. A number of customers mentioned Arriva's strength in this segment and indicated that the proposed transaction would remove the biggest competitor to DB in this market.

Table D.5: German block train services - market shares in 2009 by category of goods (tonne/ year)

Category	Rail Operators	2009
Wood/timber (in terms of t/ per year)	DB	[60-70]%
	Arriva (OHE)	[5-10]%
	Priessnitzalbahn	[5-10]%
	CTH	[5-10]%
	Raildocs	[5-10]%
	LHG	[0-5]%
	Mittelweserbahn	[0-5]%
	Others	[5-10]%

Source: DB's best estimates

3.3.3. Conclusion

191. Taking all these elements into account, and even though the increment brought about by the transaction is relatively limited, the proposed transaction raises serious doubts for the overall market for rail freight transport due to the high market shares of DB, and Arriva's potential as a significant competitive force underlined by the concerns raised by a majority of the market respondents. On the basis of narrower markets, i.e. in a market of block train rail freight transport and in a market for the rail freight transport of wood/timber, the transaction raises also serious doubts as in these sub-markets Arriva's position is even stronger.

3.4. Rolling stock maintenance

192. Arriva-operated maintenance sites offer both heavy and light maintenance services for freight and passenger rolling stock. DB offers as well light and heavy maintenance services but mainly to DB's own train operating units. In an overall market for (light and heavy) maintenance and in a market for heavy maintenance only, the parties' combined market share is below 15% and therefore would, according to the notifying party, not be affected.

193. According to the notifying party, only the merchant market for light maintenance is affected with a combined market share of around [20-30]% and an increment of [5-10]% (Arriva). Other competitors indicated by the notifying party would include Veolia with about [10-20]%, Euromaint ([5-10]%), SBB Cargo ([5-10]%), HGK ([5-10]%), additional competitors such as BeNEX, Keolis, Abellio, TX Logistik, CTL would account together for about [10-20]%. According to the notifying party, also suppliers of rolling stock, such as Siemens, Alstom, Bombardier, Knorr Bremsen, Vossloh, Voith, Talgo, and Stadler offer maintenance services and increasingly provide after-sales maintenance services.
194. However, as DB is using most of its capacity for heavy and light maintenance in-house, its market shares in the merchant market are less representative of the scale of operations that DB is undertaking in maintenance and therefore of its competitive position. For example DB has in-house more than EUR [...] turnover in light maintenance whereas its revenues in the merchant market are EUR [...] and the total merchant market size according to the notifying party is approximately EUR [...]. Therefore, DB is currently only providing [...] of its sales to third parties. Besides DB, Arriva is currently one of the main maintenance service providers in Germany. Arriva achieved a turnover of about EUR [...] in the light maintenance, [...] of which (EUR [...]) being attained with the sales to third parties.
195. The relatively modest combined market shares submitted by the notifying party seem therefore not to reflect fully the strength of the parties and especially the importance of DB in the area of light maintenance services. This is underlined by the fact that DB has about [...] maintenance sites in comparison to 141 maintenance sites of its competitors.
196. In addition, post transaction, the new entity would be the clear market leader on the merchant market, double the size of its second biggest competitor. A significant number of market respondents pointed to the importance of access to maintenance services in order to compete on the rail market(s). Concerns were raised by a number of competitors that post-transaction, DB will restrict third parties access to Arriva's maintenance sites and that would further weaken chances to increase competition in the German rail markets.
197. Therefore, based on the market investigation in the first phase, the proposed concentration raises competition concerns in the market of light rail maintenance service which are, in any event, removed by the proposed remedies.

4. Conclusion for Germany Rail

198. On the basis of the above the Commission concludes that there are serious doubts as to the compatibility of the notified concentration with the internal market regarding the German markets for (a) concessions for regional passenger rail transport, (b) long-distance passenger rail transport, and (c) rail freight transport (and possible narrower markets such as a market of block train rail freight transport, and in a market for the rail freight transport of wood/timber).

E. Germany bus

1. The regulatory framework

199. In Germany, the responsibility for ensuring the provision of public transport by bus usually lies with municipalities (i.e. cities) or administrative districts (Landkreise), which are so-called "Aufgabenträger" (responsible authorities). Some municipalities and districts have created special purpose entities or associations, which act as the Aufgabenträger for the municipalities and districts involved.⁸⁴
200. According to the German federal law on passenger transport (Personenbeförderungsgesetz, "PBefG"), the provider of scheduled passenger bus transport must hold a concession for each line to be operated. Concessions are issued by the so-called Genehmigungsbehörde, which is the competent regulatory authority. The Genehmigungsbehörde is established on the level of the Länder. It should be noted that authorities who are responsible for the provision of public transport by bus in their area ("Aufgabenträger") are different from the authorities granting the concessions ("Genehmigungsbehörden"). Depending on the laws of the individual Land, the task of supervising bus operators and issuing concessions may therefore be carried out by different state entities.⁸⁵
201. The concession holder is obliged to provide the licensed services⁸⁶ but is protected from competition on the route(s) in question for the duration of the concession, which is at maximum eight years. Thus, there is only competition for the concessions or for the service contracts, i.e. "competition for the market", and no competition in the market for the provision of such service to passenger. Even if routes served by operators may overlap on limited flows, there is usually no competition between operators, since tariffs are fixed by the transport associations, and revenues are shared among the operators according to a pre-negotiated allocation formula.
202. § 13 of PBefG defines the conditions for obtaining a concession. For example, the PBefG requires that a proposed service is in line with the public interest and the public transport plan. According to the PBefG, a service would be contrary to the public interest if there is already sufficient provision of transport on the route in question or if it could easily be provided by existing bus or rail operations. As a result, scheduled

⁸⁴ Since 1996, the federal states (Länder) are responsible for establishing the legal framework for the provision and supervision of sufficient regional public transport in their respective territories. The Länder have assigned the responsibility to provide sufficient public transport by bus to the municipalities and districts. The regulatory authorities, by contrast are established on the level of the Länder.

⁸⁵ Regulatory approval is also required for the transfer of the concession, as well as for the transfer of the entire operational management of a concession or route to a third party (§. 2(2) Nr. 2, 3 PBefG). Depending on the laws of the individual Land, the task of supervising bus operators and issuing concessions is therefore carried out by state ministries, state administration offices (Landesverwaltungsämter), regional branches of the Land government (Bezirksregierungen) or special purpose entities.

⁸⁶ The concession holders are not required by German law to actually provide the services themselves and can therefore award sub-contracts.

long-distance bus operations are currently not allowed in Germany as this transport need is fulfilled by rail transport.⁸⁷

203. Scheduled passenger bus services are either operated on the initiative of the bus operator that applies for the necessary concession for a specific route (these are so-called "commercial services", or "eigenwirtschaftliche Verkehre"), or contracted by the Aufgabenträger under public service contracts following a tender procedure on routes where buses are not operated commercially (so-called "non-commercial services" or "gemeinwirtschaftliche Verkehre"). Regardless of whether the service is a commercial service or a non-commercial service, the service provider always needs a concession from the responsible Genehmigungsbehörde.⁸⁸
204. However, it should be noted that the vast majority of scheduled bus services in Germany are provided as commercial services. The responses in the market investigation showed that, e.g. in 2009, out of a total of 1449 granted concessions, around 1427 concessions were granted for commercial services and 22 concessions were granted for non-commercial services.⁸⁹ The figures for 2007 and 2008 are similar. In 2006, on the basis of the submissions of the parties in the proceedings which involved inter alia DB, the Bundesgerichtshof found that 99% of all services were provided as commercial services.⁹⁰

2. The relevant product market

205. The relevant product market is the competition for the market for the provision of scheduled bus services, including both "commercial" and "non-commercial" services. As discussed already with respect to rail passenger transport in Germany (see above paragraph 133) it is necessary to distinguish between competition for the market where the competent authorities (districts and municipalities) are the customers and the market for the provision of scheduled bus services where the passenger are the customers ("Fahrgastmarkt").
206. According to the parties, the German bus market can be subdivided into the provision of scheduled bus services (Linienverkehre) and the provision of sub-contracted services that are provided to the concession holders (Auftragsverkehre). They further propose that a market for the provision of non-scheduled bus services (Gelegenheitsverkehre) exists.

⁸⁷ Exceptions are the routes to and from Berlin, where DB operates long-distance bus services connecting Berlin with several cities in the west of Germany. Moreover, there are international long-distance bus services. Arriva is not active on long-distance bus operations. The German federal government is currently discussing whether to abandon entirely the de-facto protection of rail transport from competition by long-distance bus services.

⁸⁸ The distinction if a service is a commercial or a non-commercial service is independent of who provides the service, i.e. both communal and non-communal operators can provide commercial and non-commercial services. In general, commercial services should be self-financing by fare income and non-commercial services depend on public funding. However, it should be noted, that public funds in form of compensation are also paid to the concession holder of commercial services. For example, such compensation is paid for reduced fares for pupils and disabled persons, compensation for fare revenue losses due to multi-modal ticketing within a transport association area or support for investments in infrastructure and vehicles.

⁸⁹ These figures take into account the responses of 13 authorities competent for granting bus concessions.

⁹⁰ See BGH case KVR 5/05 of 7 February 2006 – DB Regio/üstra, para. 25.

207. For the provision of scheduled bus services, the parties propose to define separate product/services markets for public passenger transport by rail and by bus⁹¹. They submit that in particular for regulatory reasons bus and rail constitute separate markets as different laws apply.
208. As discussed above in paragraph 135 the Commission has not taken a definite view on whether public passenger transport services in Germany by rail and by bus constitute separate markets in previous cases⁹², while the Bundesgerichtshof decided in case *DB Regio/üstra* for regional passenger transport that passenger transport by rail and by road do not form part of the same market.⁹³ and the Bundeskartellamt defined separate markets for long-distance and short-distance passenger transport depending on the distance of below/above 50 km or travel time of one hour time.⁹⁴ The market investigation confirmed that public passenger transports by rail and by bus do not belong to the same market.⁹⁵
209. The market investigation further provided an indication that the German bus market can be subdivided into the provision of scheduled bus services under a concession (Linienverkehre) and the provision of sub-contracted services that are provided to the concession holders (Auftragsverkehre). A majority of competitors indicated that the level of commercial risk and the contractual provisions are very different between the two types of services.
210. However, as the parties are (a) only exceptionally present in the provision of sub-contracted services⁹⁶ and (b) have no significant activities in the provision of non-scheduled bus services, the market for the provision of sub-contracted services and the market for the provision of non-scheduled bus services are not further discussed in this decision.
211. Furthermore, both "commercial", i.e. directly awarded, services and "non-commercial" services that are awarded following a tender, fulfil the same purpose for the Aufgabenträger, namely the provision of bus services to the public. The Commission therefore considers that "commercial" bus services and "non-commercial", i.e. tendered, bus services form part of the same market. The relevant market is therefore the competition for the market for scheduled bus services, including both "commercial" and "non-commercial" services.

⁹¹ The parties argue that the bus market includes services by tram and by metro as these would serve the same purposes and the same authorities are responsible for bus, tram and metro services.

⁹² See COMP/M.2370 Connex/DNVBVG/JV, para 12

⁹³ See BGH case KVR 5/05 of 7 February 2006 – DB Regio/üstra, para 23 f. In contrast to this, the Bundeskartellamt did not take a final view but considered defining a combined market for short-distance passenger transport in metropolitan areas arguing that rail and bus services are fully integrated and interchangeable for passengers. Case B9-60210-FA-37/04 of 23 March 2004 Stadtwerke Frankfurt/Offenbacher Verkehrsbetriebe.

⁹⁴ Also the German PBefG defines short-distance journeys as journey of on average of not more than 50 kilometers or a travel time of not more than one hour (§ 8(1) PBefG).

⁹⁵ See above para. 136.

⁹⁶ The parties supply and demand sub-contracted services. On the demand side, Arriva sub-contracts about [...]. DB, by contrast, sub-contracts a significant part of the services for which it holds concessions (about [...] in 2009). On the supply side, Arriva has a focus on operating services provided under its own concessions, although Arriva's [...]. DB provides sub-contracted services [...].

212. In addition, several respondents to the market investigation (in particular smaller bus companies) indicated that scheduled passenger services should not include services by tram and metro as the provision of these services requires different know-how, special qualifications, and substantially larger financial investments. However, as competition concerns arise under any alternative product market definition, the precise market definition can be left open in this respect.

3. The relevant geographic market

213. Regarding the geographic market definition, the parties submit that the market for scheduled bus services is national in scope as it is characterised by an increasing number of public tenders for service contracts, as well as increasing competition for concessions. Regardless of this position, the parties provided information on regional markets, which were defined following the decision practice of the Bundeskartellamt.⁹⁷ Indeed, in decisions and judgments prior to the entry into force of Regulation 1370/2007, the Bundeskartellamt and the Bundesgerichtshof have considered the German scheduled bus services market as being regional in scope.

214. The market investigation provided indications that the market for scheduled passenger services is rather a regional market where local presence and understanding of the specific needs and (technical) requirements of the public transport authorities and passengers is decisive for successfully participating in competitions for concessions or in tenders. In particular, respondents to the market investigation underlined that in order to compete for concessions or to participate in tenders it would be essential to have information on passenger demand and flows in the region concerned and that this information is usually only known to players that are already active in a certain region. Furthermore, companies that have bus depots and other operations in the proximity are able to respond to changes in passenger demand by re-allocating buses within their area of operation. Additionally, the existence of only very few market players that are active in several regions (through different regional subsidiaries)⁹⁸ and the presence of a large number of only regionally active, small competitors illustrates the likely regional scope of the market. The market investigation further provided indications that such regional markets are rather broader than districts because passenger streams regularly cross district borders and operators tend to serve several adjacent districts. Moreover, the existence of transport associations reflects the integration of several districts.

215. Despite the indications that the geographic market is wider than district level, it is not possible, on the basis of the information received in the market investigation in first phase, to definitively conclude on the precise scope of the relevant geographic market. In the following, the Commission will therefore assess the competitive effects of the notified transaction in possible alternative markets, i.e. the national level, the level of transport associations or areas comprising several districts (or municipalities) as well as the level of individual districts (or municipalities).

⁹⁷ In order to delineate the relevant geographic market, the Bundeskartellamt investigates the integration of transport services in certain areas in terms of commuter flows, locations, course of routes, and degree of synchronisation of timetables. The Bundeskartellamt usually finds the geographic market to include one district/municipality or a number of adjacent districts in a certain area.

⁹⁸ Indeed, there are only very few companies active in several regions in Germany at the same time, namely DB, Arriva, Abellio, Veolia and Rhenus Veniro.

4. Competitive assessment

4.1. Competition for concessions and tender procedures

216. The German PBefG gives a legal preference for the so-called "commercial operation" of bus services as opposed to operations provided under a tendered service contract (so-called "non-commercial" or "tendered services"). However, it is important to note that also for commercial services public funding is regularly provided, which the operator receives in addition to the revenue generated from fares.
217. Regulation (EC) No. 1370/2007⁹⁹, which entered into force on 3 December 2009 requires the tendering of all public service contracts which are neither beneath a certain value threshold nor provided by an entity directly controlled by the respective municipality. Currently, the German PBefG allows that concessions can be directly awarded without a tender procedure to communal operators, but also to entities not directly controlled by the respective municipality and public compensation can be paid to the concession holder. For example, such compensation is paid for reduced fares for pupils and disabled persons, compensation for fare revenue losses due to multi-modal ticketing within a transport association area or support for investments in infrastructure and vehicles¹⁰⁰.
218. Remuneration for the publicly procured transport services is provided by the Aufgabenträger. Depending on the type of contract, the economic risk is borne by the Aufgabenträger if it receives the fare revenues (gross cost contracts) or the bus operator insofar as the fare revenues form part of its income (net cost contracts).
219. As the Aufgabenträger can provide public funding for both commercial services and contracted, i.e. non-commercial services, it de facto has a choice whether services should be operated commercially or under a public service contract following a tender procedure.
220. A new form of competition for concessions without a tender ("Genehmigungswettbewerb") has emerged some years ago. Service providers are entitled to receive information about existing concessions and their duration in order to be able to place competing applications once the concessions are renewed. If the Genehmigungsbehörde receives several applications for a concession, the concession will be granted to the applicant with the best offer in terms of service quality and number of frequencies. Regulatory authorities can facilitate the process regarding competition for concessions by publishing the expiry of a concession.¹⁰¹
221. However, the market investigation showed that there are considerable differences between regions as to the amount of competing applications for concessions and that there is a reluctance on the side of bus operators to place competing bids as new

⁹⁹ Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70, OJ L 315, 3.12.2007. The regulation entered into force on 3 December 2009.

¹⁰⁰ Gesetz über Finanzhilfen des Bundes zur Verbesserung der Verkehrsverhältnisse der Gemeinden, GVFG.

¹⁰¹ For example, the Genehmigungsbehörde for Niedersachsen, LNVG, informs bus companies that are active in the proximity of a bus line for which a concession expires about the fact that a company has applied for a new concession for this line. Competitors are thus able to place competing bids.

operators do not possess any information on passenger demand and flows. Thus, the historic operator has an information advantage over its competitors to ensure the renewal of its concession. Furthermore, according to the provisions of § 13(3) of the German PBefG, the fact that a route was operated in accordance with the public interest by a certain provider for several years has to be “adequately taken into account” by the regulatory authorities in case there are competing applications for a renewal of the concession. As a result, in case of similar offers by competing providers, the concessions are generally awarded to the incumbent operator. In sum, the regulatory authorities in Germany have de facto a considerable margin of discretion in the award procedure of a concession.

222. The Commission's investigation showed that in terms of overall numbers the most important procedure is the direct award of concessions (without competing applications). Based on the data received during the market investigation from the regulatory authorities for the period from 2007 to 2009, almost all concessions, with very few exceptions, have been awarded to the incumbent concession holder at the moment of the concession renewal.¹⁰²
223. As regards non-commercial services, until now, tenders for the provision of bus services have been organised by the responsible authorities only to a very limited extent. The Commission's investigation showed that in 2009 less than 1% of services has been awarded following a tender procedure¹⁰³.
224. However, it has to be noted that there are significant differences between the German Länder: for example, the Land of Hessen has gradually started to introduce tendering ten years ago and decided that as of 2010 all bus services should be put on tender.¹⁰⁴
225. Regulation (EC) No. 1370/2007 will change considerably the market for scheduled bus services as more and more services will need to be put on tender in the future.¹⁰⁵ As the Regulation entails provisions to encourage the implementation of tendering already before December 2019 (the date by which the Regulation needs to be fully applied), several German Länder (including Bayern, Brandenburg and Rheinland-Pfalz) have recommended that the responsible authorities apply the new rules immediately or well before that date.¹⁰⁶

¹⁰² In regions such as Oberfranken, Bremen, Oberpfalz or Brandenburg all concessions were renewed in favour of the previous operators in 2009.

¹⁰³ In accordance with Directives 2004/17/EC or 2004/18/EC, or with EU Regulation 1370/2007, depending on the type of contract, cf. Art. 5(1) of EU Regulation 1370/2007.

¹⁰⁴ Land legislation was introduced which made most forms of public funding for commercial services unavailable. Consequently, many regional bus services in Hessen are no longer offered as commercial services and therefore have to be procured by the Aufgabenträger using public tenders.

¹⁰⁵ As exclusive rights as a compensation for public service obligations can only be granted in public service contracts, concessions under the PBefG might also have to be tendered in the future. Even if concessions under the PBefG were not understood to grant exclusive rights in the sense of Regulation (EC) No. 1370/2007 and were thus not to require a public service contract under Regulation (EC) No. 1370/2007, the Regulation will, in any event, lead to an increase of public tenders. As the Regulation only foresees limited possibilities for financial compensation (other than those fixed by law or in public service contracts), the scope for providing public funding for commercially operated services will further be reduced.

¹⁰⁶ See e.g. Leitlinien zur Anwendung der Verordnung (EG) Nr. 1370/2007 über öffentliche Personenverkehrsdienste auf Schiene und Straße, Allgemeines Ministerialblatt Bayern, Nr. 10 of 29

4.2. The role of communal operators

226. The majority of concessions is currently held by communal operators. Under Regulation (EC) No. 1370/2007, municipalities may decide that services are provided by communal operators and directly award these services without tenders. However, pursuant to Article 5 (2) (b) of Regulation 1370/2007, if a competent local authority awards a public service contract directly to a communal provider (communal operator) controlled by that competent local authority, that communal operator must not take part in competitive tenders for public passenger transport services outside the territory of the competent local authority. In case of municipal operators this includes also services into the territories of neighbouring districts, so that e.g. municipal operators in cities/towns cannot provide services in adjacent districts.
227. The market investigation clearly showed that already today, in preparation of the full application of Regulation (EC) No. 1370/2007, communal operators to which a service is directly awarded generally do not compete for services outside their "home territory" and have e.g. already transferred existing concessions for services outside their "home territory". Furthermore, as explained above in paragraph 220, respondents to the market investigation illustrated that for the award of concessions under the German PBefG, authorities have de facto the possibility to reaward concessions to their communal operators on the basis of quality considerations and the proven experience. In addition, the market investigation indicated that communal operators often have lower offers.
228. As the activities of communal operators are already today almost entirely limited to the area of the municipality to which they belong, they do not exert competitive pressure in tenders for non-commercial services or make competing applications for concessions for commercial services outside their territory. Furthermore, it may be plausible that a SSNIP test may indicate that municipal operators do not belong to the same product market as private operators even though they place a competitive constraint. The responses in the market investigation indicated that municipalities and districts do not award their contracts on a strictly commercial basis and that the switching from a communal operator to a non-communal operator (and vice versa) is also influenced by political considerations.¹⁰⁷
229. For the Commission's further analysis market share information is therefore provided in two ways, (a) including and (b) excluding communal operators.

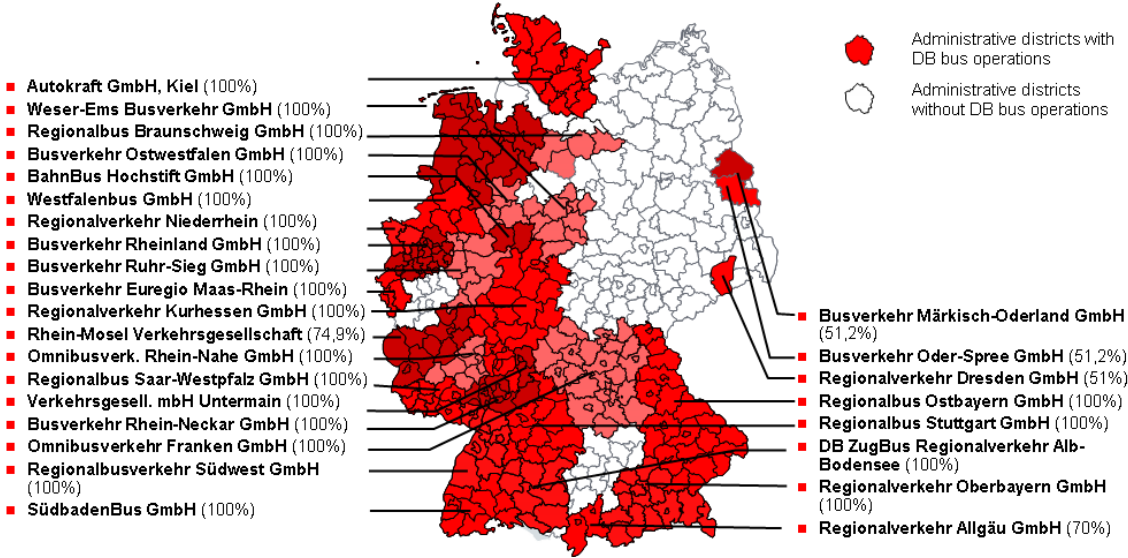
September 2009, p. 309 at para. 9.1; Ministerium für Infrastruktur und Landwirtschaft Brandenburg, Anhang zum Leitfaden vom Dezember 2007 für die kommunalen ÖPNV-Aufgabenträger - Hinweise des Landes zum Abschluss öffentlicher Dienstleistungsaufträge; Leitlinien des Landes Rheinland Pfalz, Ablauf des PBefG-Genehmigungsverfahrens nach Inkrafttreten der VO (EG) Nr. 1370/2007 zum 03. Dezember 2009.

¹⁰⁷ E.g. the responses indicated that, in general, communes with a communal operator award a large part of the required services to this operator. In doing so, they also take into account follow-up costs such as redundancy/compensation/pension claims which could be associated with the (partial) closing down of the communal operator. Conversely, setting up a communal operator generally requires considerable investments.

4.3. Position of DB and Arriva in the German bus market

- 230. Both, DB and Arriva hold concessions and provide passenger transport by bus either themselves or use sub-contractors. In 2009, DB operated [600-700] million vehicle kilometres with [...] own busses (another [...] busses were operated by sub-contractors) and achieved a turnover of EUR [1-2]billion. Arriva entered the German market only in 2005 through acquisition of an existing bus operator. In 2009, Arriva operated [30-40] million vehicle kilometres with [...] buses and achieved a turnover of EUR [50-100]million.
- 231. DB's bus activities are provided by [...] regional bus companies and their subsidiaries. As can be seen in figure E.1 below, which presents the regional bus companies and some of their subsidiaries, DB is active throughout Germany, with a clear focus in the former West Germany.

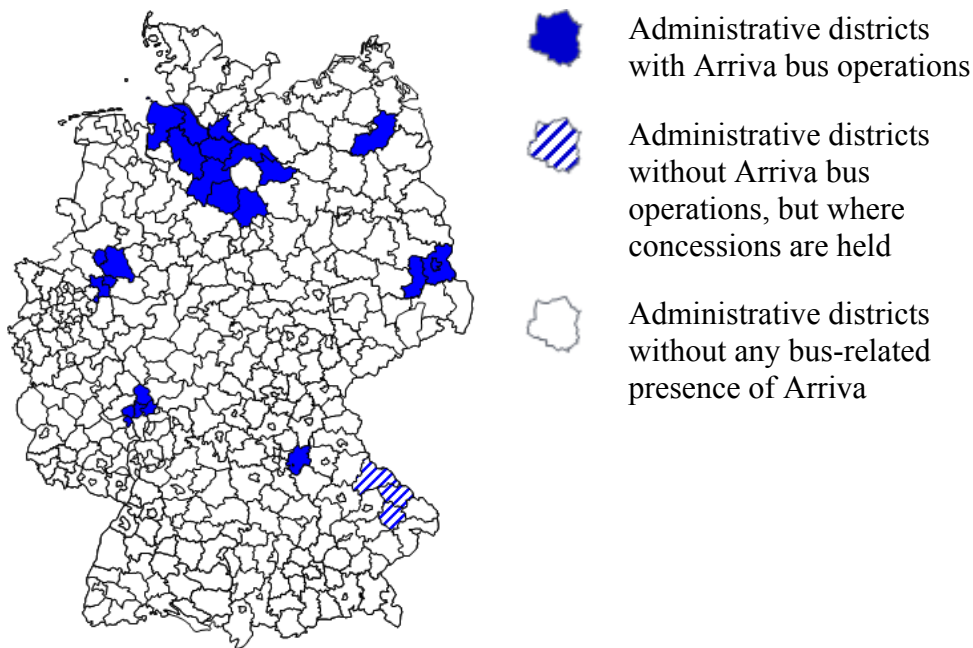
Figure E.1: Activities of DB in scheduled bus services in Germany



Source: DB

- 232. Figure E.2 below shows the activities of Arriva. Arriva acquired several German bus companies and is active in various regions in Germany through 17 regional operating companies and their subsidiaries.

Figure E.2: Activities of Arriva in scheduled bus services in Germany



Source: DB

233. While the majority of DB's and Arriva's current operations are complementary from a geographic perspective, the parties' activities overlap in Ost-Bayern (Eastern Bavaria), Franken (Franconia), the Rhein/Main area, Westfalen (Westphalia); Niedersachsen (Lower Saxony) and Brandenburg.

4.4. Effects of the transaction on the national level

234. At the national level, i.e. the geographic scope proposed by the notifying party, DB is the largest operator in the market for scheduled bus services. It will further strengthen its position by the acquisition of Arriva, the fourth largest private operator in the market. Remaining players include Veolia¹⁰⁸ and Rhenus-Veniro, which are both only slightly larger than Arriva, as well as Abellio, Transdev and a large number of small and medium sized private enterprises (around 5400).
235. Regarding the small and medium sized companies, they are mainly active as subcontractors and therefore often do not directly compete with Deutsche Bahn or Arriva for concessions or in tenders. The market investigation showed that due to the dependence of the small and medium-sized bus operators from, in particular, DB¹⁰⁹, the competitive pressure these companies exert towards DB is rather reduced. In a situation where DB holds a concession and the existing sub-contractor competes unsuccessfully for the concession after expiry, he risks also losing the contract with DB for the provision of sub-contracting services.

¹⁰⁸ Veolia and Transdev intend to merge.

¹⁰⁹ Arriva uses sub-contractors only to a limited extent ([5-10]% of its services in 2009). DB's share of sub-contracted services amounted to [50-60]% in 2009.

236. In order to assess the position of DB and Arriva on the national German bus market, the Commission evaluated the importance of communal operators on this market. Measured in revenues, communal operators represented in 2009 74% of the entire German bus market. Measured in vehicle kilometres the share of communal operators was 51% in 2009, indicating the relatively higher turnover per vehicle kilometre achieved by communal operators, which are stronger in cities than in regional transport in rural areas.
237. After the transaction, as shown in table E.1 below,¹¹⁰ on a national German market the parties would have a combined market share measured in bus kilometres of [20-30]% (DB [20-30]%, Arriva [0-5]%) if communal operators are taken into account or a combined market share of [40-50]% on a national German market (DB [40-50]%, Arriva [0-5]%) if communal operators are not taken into account as shown in table E.2. The data in tables E.1 and table E.2, as well as all data presented below for Germany, exclude tram and metro operations. As DB and Arriva do not offer any tram and metro service their market share may be lower if tram and metro services were included. It is however not expected to change to a significant extent.

Table E.1: German bus market in 2009 including communal operators (on the basis of both revenues and bus km)

	German bus market in 2009 (including communal operators)			
	Revenues (million EUR)	Market shares (based on revenues)	Vehicle km (million)	Market share (based on km)
DB	[...]	[10-20]%	[...]	[20-30]%
Arriva	[...]	[0-5]%	[...]	[0-5]%
Parties	[...]	[10-20]%	[...]	[20-30]%
Veolia Verkehr	[...]	[0-5]%	[...]	[0-5]%
Rhenus-Veniro	[...]	[0-5]%	[...]	[0-5]%
Abellio	[...]	[0-5]%	[...]	[0-5]%
Transdev	[...]	[0-5]%	[...]	[0-5]%
Total market	[...]		[...]	

Source: DB's best estimates

238. The combined market shares on a national German market measured in revenues are [10-20]% (DB [10-20]%, Arriva [0-5]%) if communal operators are taken into account (table E.1) or [60-70]% (DB [50-60]%, Arriva [0-5]%) if communal operators are not taken into account, as shown in table E.2.

¹¹⁰ Some major communal operators have a market share calculated on a national level that may exceed the market share of the smallest private competitor presented above, i.e. Transdev with a market share of [0-5]%. However, as these communal operators are not active throughout Germany and, as explained above, generally do not compete for services outside their "home territory" they are not included in table E.1. In addition, market share data of the communal operators for a national bus market excluding tram and metro was not available. If metro and tram were included in the market, the communal operators of big cities such as Hamburg, Munich, Berlin, Cologne would have higher market share than some of the private operators mentioned above.

Table E.2: German bus market in 2009 excluding communal operators (on the basis of both revenues and bus km)

	German bus market in 2009 (excluding communal operators)			
	Revenues (in mn EUR)	Market share (based on revenues)	Vehicle km (in mn)	Market share (based on vehicle km)
DB	[...]	[50-60]%	[...]	[40-50]%
Arriva	[...]	[0-5]%	[...]	[0-5]%
Parties	[...]	[60-70]%	[...]	[40-50]%
Veolia Verkehr	[...]	[5-10]%	[...]	[0-5]%
Rhenus-Veniro	[...]	[0-5]%	[...]	[0-5]%
Abellio	[...]	[0-5]%	[...]	[0-5]%
Transdev	[...]	[0-5]%	[...]	[0-5]%
Total market	[...]		[...]	

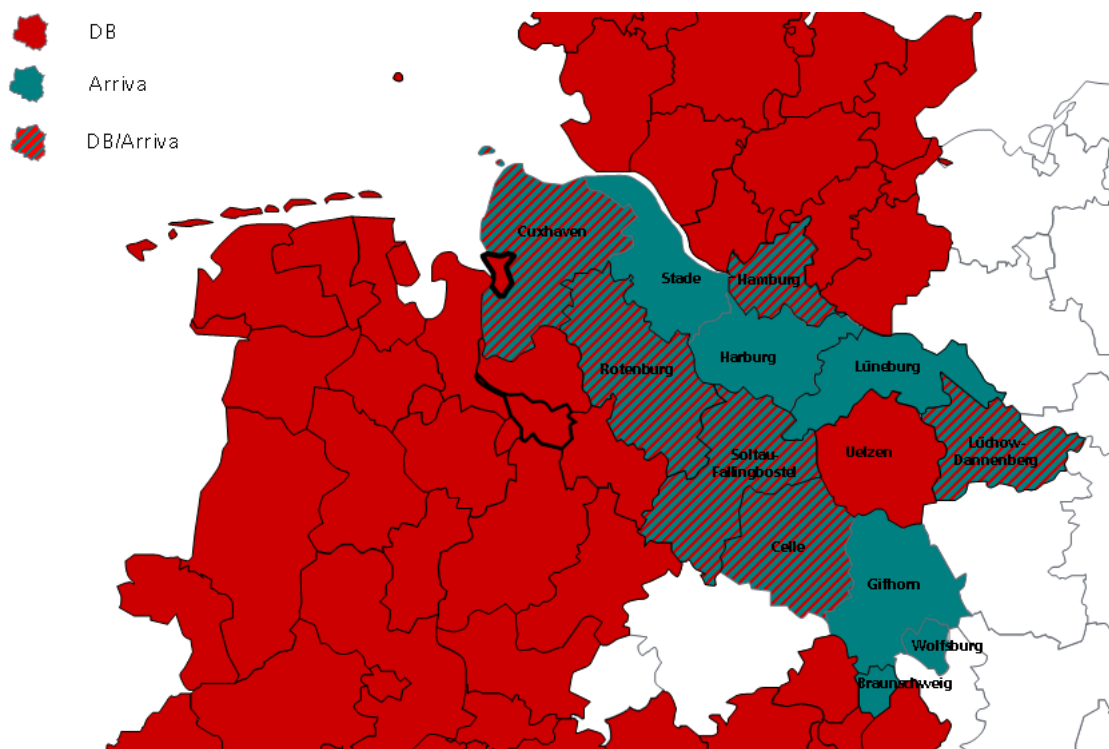
Source: DB's best estimates

239. To further investigate the role of DB and Arriva in the German bus market, the Commission has assessed historic tender data provided by responsible authorities and the notifying party. Out of a sample of [...] tenders carried out in the past five years in which either Arriva or DB participated, Arriva has participated in [...] and won [...] tenders while DB participated in [...] and won [...] tenders. Both parties have bid in the same tender in [...] cases. In the [...] cases of overlap, DB has won [...] (around [30-40]%) and Arriva [...] ([5-10]%). In these tenders Abellio ([...] wins) and Hessenbus ([...]) have also been successful. Overall, Arriva has been an active player in various tenders. Its participation rate relative to DB appears to be higher than the market shares in revenues and km indicate. However, it has not been possible to establish the number of other operators in the bids and therefore the results of the analysis of this limited dataset are not entirely conclusive.
240. Some respondents to the market investigation signalled that the proposed transaction will give rise to serious competition problems at a national level as one of the important private undertakings present in the market for scheduled bus services would be taken out of the market. In addition, as DB and Arriva are among the few operators that provide passenger bus services in several regions all over Germany, they are competing in tenders or competitions for concessions. Furthermore, it is likely that the market share of Arriva underestimates its potential competitive effect since respondents to the market investigation anticipate that Arriva will expand its operations- at least in regions adjacent to its current operations. Also, the market shares of each of the remaining competitors post-merger are very small, even if communal operators are included. Communal operators however generally do not bid outside their "home territory" (see above paragraphs 226 and 227).
241. Based on the above, the Commission concludes that on a possible national market for scheduled bus services in Germany the transaction raises competition concerns which are, in any event, removed by the proposed commitments.

4.5. Effects of the transaction on the level of the *Länder*: the Land of Niedersachsen

242. On the level of the *Länder*, the Land which is the most affected by the proposed transaction is the Land of Niedersachsen.
243. DB and Arriva are the most important private bus operators in Niedersachsen. As can be seen in figure E.2 above, Arriva is particularly active in the North of Niedersachsen, mainly with its subsidiaries OHE and KVG Stade, whereas DB is active in almost every district in Niedersachsen. Furthermore, Arriva operates bus depots in the districts of Cuxhaven, Stade, Lüneburg, Soltau-Fallingbostel and Celle.¹¹¹ The activities of DB and Arriva currently overlap in the districts of Bremen/Bremerhaven¹¹² (Cuxhaven, Rotenburg, Lüchow-Dannenberg, Celle¹¹³ and Soltau-Fallingbostel).
244. Furthermore, DB and Arriva are active in a number of directly adjacent districts.

Figure E.3: areas of activities of DB and Arriva by districts



Source: DB

¹¹¹ [...].

¹¹² While Bremen and Bremerhaven are not part of Niedersachsen but form a separate Bundesland, they are exclusively bordering on Niedersachsen.

¹¹³ In the district of Celle, DB is only active through [...] and not in the provision of scheduled services. Therefore, the overlap in the district of Celle is not further discussed in this decision.

245. As can be seen in table E.3 below, in Niedersachsen, the parties have a combined market share on the basis of 2009 data of [...]% (DB [60-70]%, Arriva [20-30]%), if communal operators are not included. The combined market share is around [...]% (DB [20-30]%, Arriva [10-20]%) if communal operators are included.

Table E.3: Market shares Niedersachsen (based on bus km), 2009

Niedersachsen		
	Market shares including communal operators	Market shares excluding communal operators
DB	[20-30]%	[60-70]%
Arriva	[10-20]%	[20-30]%
Parties	[30-40]%	[80-90]%
Others	[60-70]%	[10-20]%
Total	100%	100%

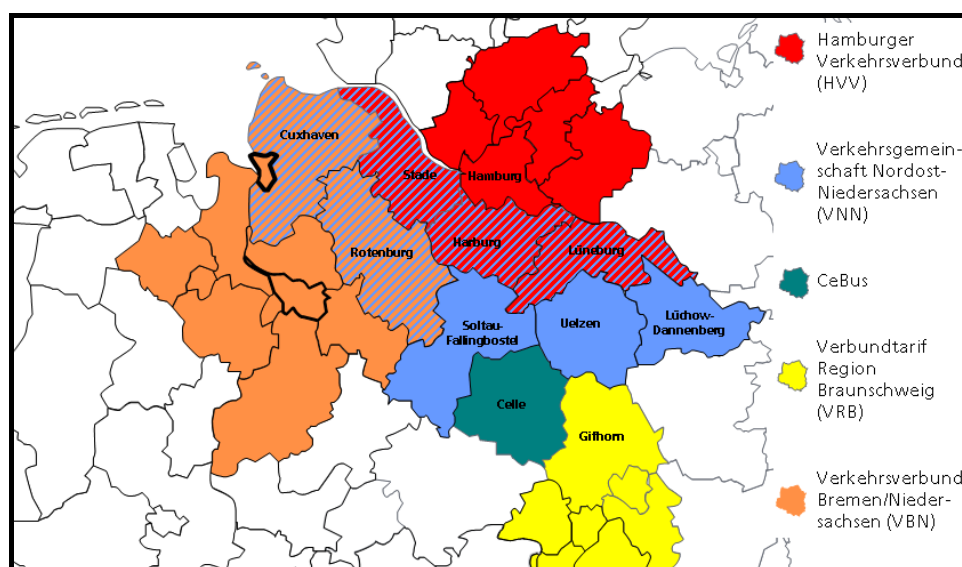
Source: DB's best estimates

246. The overall market size measured in revenue is estimated at EUR [...] if communal operators are included and at EUR [...] if communal operators are not included.
247. If Niedersachsen is considered the relevant geographic market, the transaction leads to very high market share ([80-90]%) if communal operators are not included and high market shares ([30-40]%) if they are included.
248. The market investigation confirmed that it is easier and therefore more likely for a competitor to enter the adjacent areas to his existing operations than to enter an area that is further away from his operations (pointing to agglomeration economies). Also, respondents to the market investigation consider DB and Arriva as the most likely potential competitors also in those areas of Niedersachsen where their activities do not yet overlap. Furthermore, Arriva has several operations also in rail in Niedersachsen which are likely to facilitate its expansion in the area by benefitting from network effects. Taking together the overlap districts and the directly adjacent districts, a large part of Niedersachsen is affected by the proposed transaction.
249. For these reasons the Commission concludes that there are serious doubts as to the compatibility of the notified transaction with the internal market as regards a possible market consisting of Niedersachsen.

4.6. Effects of the transaction on the level of transport associations

250. The Commission's investigation has shown that in several regional markets DB and Arriva are important -or even the only- alternatives for municipalities to the direct award to communal operators. If the services by communal operators are not included, the transaction leads to very high market shares in five regional markets on the basis of transport associations, two of which are in Niedersachsen, i.e. Verkehrsverbund Bremen-Niedersachsen and Verkehrsgemeinschaft Nordost-Niedersachsen (see also figure E.4).

Figure E.4: Transport associations in North-East Niedersachsen



Source: DB

4.6.1. Verkehrsverbund Bremen-Niedersachsen (VBN)

251. The Verkehrsverbund Bremen/Niedersachsen (VBN) area includes the cities of Bremen, Bremerhaven, Delmenhorst and Oldenburg and the districts of Ammerland, Diepholz, Osterholz, Oldenburg, Verden and Wesermarsch, as well as parts of the districts of Rotenburg (Wümme) and Cuxhaven¹¹⁴.
252. As can be seen in table E.4 below, in the area of the VBN, the parties have a combined market share on the basis of 2009 data of [50-60]% (DB [50-60]%, Arriva [0-5]%), if communal operators are not included. The combined market share is around [5-10]% (DB [5-10]%, Arriva [0-5]%) if communal operators are included.¹¹⁵

Table E.4: Market shares Verkehrsverbund Bremen-Niedersachsen (VBN), 2009¹¹⁶

Verkehrsverbund Bremen-Niedersachsen (VBN)		
	Market shares including communal operators	Market shares excluding communal operators
DB	[5-10]%	[50-60]%
Arriva	[0-5]%	[0-5]%
Parties	[5-10]%	[50-60]%
Others	[90-100]%	[40-50]%
Total	100%	100%

Source: DB's best estimates

¹¹⁴ According to the notifying party, no information on the total market size is available.

¹¹⁵ The data for the VBN is derived from the cost-allocation key of the VBN as no reliable data on revenues or vehicle kilometres for bus operations were available. On the basis of the cost-allocation key non-bus operators were identified and excluded in order to estimate market shares for scheduled bus operations.

¹¹⁶ The differences in market shares including communal operators and excluding communal operators is caused by the fact that the city of Bremen which is part of the VBN has a large communal operator, Bremer Straßenbahn AG.

253. Furthermore, Arriva is active in adjacent areas and therefore its market share is likely to underestimate the extent of the competitive constrain it places in the market. Therefore, the transaction raises competition concerns with respect to a potential regional market consisting of the area of the VBN which are, in any event, removed by the proposed commitments.

4.6.2. Verkehrsgemeinschaft Nordost-Niedersachsen (VNN)

254. The area of Verkehrsgemeinschaft Nordost-Niedersachsen (VNN) covers the districts of Cuxhaven, Harburg, Lüchow-Dannenberg, Lüneburg, Rotenburg (Wümme), Soltau-Fallingb. Stadel, Stade and Uelzen.

255. As can be seen in table E.5 below, in the area of the VNN, the parties have a combined market share on the basis of 2009 data of [80-90]% (DB [10-20]%, Arriva [60-70]%), if communal operators are not included. The combined market share is around [80-90]% (DB [10-20]%, Arriva [60-70]%) if communal operators are included.¹¹⁷

Table E.5: Market shares Verkehrsgemeinschaft Nordost-Niedersachsen, 2009

Verkehrsgemeinschaft Nordost-Niedersachsen (VNN)		
	Market shares including communal operators	Market shares excluding communal operators
DB	[10-20]%	[10-20]%
Arriva	[40-50]%	[60-70]%
Parties	[50-60]%	[80-90]%
Others	[40-50]%	[10-20]%
Total	100%	100%

Source: DB's best estimates

256. This area is the stronghold of Arriva, where it is the current market leader. Regardless of the inclusion or exclusion of communal operators, the transaction leads to very high combined market shares (up to [80-90]%). Furthermore, respondents to the market investigation indicate that in this area Arriva is the most likely competitor of DB (and vice versa) in future tenders and in competitions for concessions. Therefore the Commission concludes that there are serious doubts as to the compatibility of the notified transaction with the internal market as regards a possible market consisting of the area of the VNN. The total turnover of the VNN is estimated at around EUR [...] including communal operators and around EUR [...] excluding communal operators.

257. The parties submit that the VNN should not be considered as the relevant geographic market. Instead, the VNN should be split according to commuter flows into one area comprising Hannover and adjacent district and another area comprising Hamburg and its surroundings. In case of a possible smaller geographic market which covers only some districts and not the whole area of the VNN, the Commission has also assessed a possible delineation of an eastern and a western part of VNN.

¹¹⁷ Similar to the methodology applied for VBN also for VNN an estimation of market shares was done by the parties on the basis of the cost-allocation key in the VNN. Non-bus operators were identified and excluded in order to estimate market shares for scheduled bus operations.

258. The estimated market shares for VNN East (covering the districts Lüneburg, Soltau-Fallingb., Uelzen, Lüchow-Dannenberg) on the basis of bus kilometres in 2009 are as follows:

Table E.6: Market shares VNN East (on the basis of bus km), 2009

VNN East		
	Market shares including communal operators	Market shares excluding communal operators
DB	[20-30]%	[30-40]%
Arriva	[30-40]%	[30-40]%
Parties	[60-70]%	[60-70]%
Others	[30-40]%	[30-40]%
Total	100%	100%

Source: DB's best estimates

259. The overall market size of VNN East measured in revenue is estimated at EUR [...] if communal operators are included and at EUR [...] if communal operators are not included.
260. The estimated market shares for VNN West (covering the districts Cuxhaven, Rotenburg, Stade and Harburg) on the basis of bus kilometres in 2009 are as follows:

Table E.7: Market shares VNN West (on the basis of bus km), 2009

VNN West		
	Market shares including communal operators	Market shares excluding communal operators
DB	[0-5]%	[5-10]%
Arriva	[40-50]%	[50-60]%
Parties	[50-60]%	[50-60]%
Others	[50-60]%	[40-50]%
Total	100%	100%

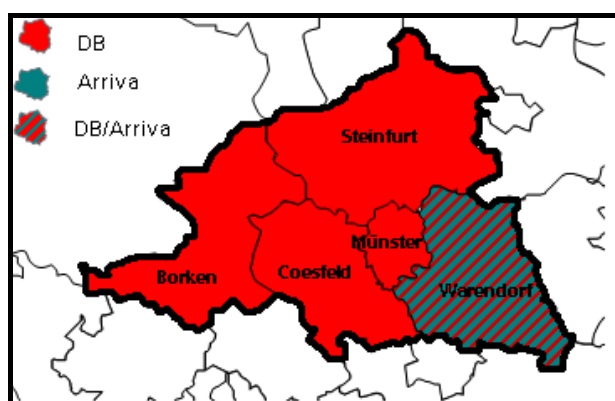
Source: DB's best estimates

261. The overall market size of VNN West measured in revenue is estimated at EUR [...] if communal operators are included and at EUR [...] if communal operators are not included.
262. On the basis of combined market shares of above [50-60]% (both including and excluding communal operators) and the fact that barriers to entry and expansion in these market are high due to the slow changes in awarding concessions to new applicants and the advantages of incumbent operators due to their market knowledge, the Commission concludes that there are serious doubts as to the compatibility of the notified transaction with the internal market as regards a possible market consisting of Verkehrsgemeinschaft Nordost-Niedersachsen (VNN) as a whole and, if smaller relevant geographic markets were defined, in possible markets consisting of the western and eastern part of VNN.

4.6.3. Verkehrsgemeinschaft Münsterland (VGM)

263. The parties' activities in the Verkehrsgemeinschaft Münsterland (VGM) are indicated in figure E.5 below. The area of VGM covers the districts of Borken, Steinfurt, Coesfeld, Warendorf and Münster. Arriva operates bus services in the Münsterland area through its subsidiary Verkehrsbetriebe Bils, based in Warendorf. Arriva's bus depots are in Albersloh, Ahlen and Warendorf, all in the district of Warendorf. DB provides bus services in Münsterland through its subsidiary Westfalenbus (WB). DB does not have a depot in the VGM area [...].

Figure E.5: Activities of DB and Arriva in the VGM area



Source: DB

264. As can be seen in table E.7 below, in the area of the VGM, the parties have an estimated combined market share on the basis of bus km in 2009 of [90-10]% (DB [90-10]%, Arriva [0-5]%), if communal operators are not included. The combined market share is around [20-30]% (DB [20-30]%, Arriva [0-5]%) in 2008 if communal operators are included.

Table E.8: Market shares Verkehrsgemeinschaft Münster (on the basis of bus km), 2008/2009

Verkehrsgemeinschaft Münsterland (VGM)		
	Market shares including communal operators (2008)	Market shares excluding communal operators (2009)
DB	[20-30]%	[90-100]%
Arriva	[0-5]%	[0-5]%
Parties	[20-30]%	[90-100]%
Others	[70-80]%	[0-5]%
Total	100%	100%

Source: DB's best estimates

265. The overall market size measured in revenue is estimated at EUR [...] in 2008 if communal operators are included and at EUR [...] in 2009 if communal operators are not included.
266. If communal operators are not included, the transaction leads to a monopoly of the parties in the area of the VGM. Besides DB and Arriva, the communal operators Regionalverkehr Münsterland GmbH and Stadtwerke Münster GmbH are active in the VGM.
267. [...] Although Arriva has currently limited own operations in the area of the VGM and only in one district (Warendorf), the market investigation showed that Arriva is seen as the most likely competitor of DB to submit competing applications for concessions and in future tenders in this area. The market investigation clearly showed concerns that the acquisition of Arriva by DB would result in the loss of the only competitor in the area of Warendorf and most likely potential competitor for the area of Verkehrsgemeinschaft Münsterland as no other private competitor would remain. Therefore, the Commission concludes that there are serious doubts as to the compatibility of the notified transaction with the common market as regards a possible market consisting of the area of the VGM.

4.6.4. Verkehrsverbund Großraum Nürnberg (VGN)

268. The Verkehrsverbund Großraum Nürnberg (VGN) covers the districts of Amberg-Sulzbach, Ansbach, Bamberg, Bayreuth, Erlangen-Höchststadt, Forchheim, Fürth, Neumarkt i. d. Oberpfalz, Neustadt a. d. Aisch-Bad Windsheim, Nürnberger Land, Roth and Weißenburg-Gunzenhausen, as well as parts of the districts of Donau-Ries, Eichstätt, Haßberge, Kelheim, Neustadt an der Waldnaab and Regensburg, and the cities of Amberg, Ansbach, Bamberg, Bayreuth, Erlangen, Fürth, Nürnberg and Schwabach.¹¹⁸
269. Arriva has only few operations in the area of the VGN. In 2005, Autobus Sippel (now a subsidiary of Arriva) succeeded in a public tender of the administrative district of Forchheim and won a contract to provide bus services between the town of Effeltrich (administrative district of Forchheim) and the city of Erlangen. DB operates many scheduled bus services in the entire area of the transport association VGN through its subsidiary Omnibusverkehr Franken (OVF).
270. As can be seen in table E.9 below, in the area of the VGN, the parties have a combined market share in 2009 on the basis of bus km of [50-60]% (DB [50-60]%, Arriva [0-5]%), if communal operators are not included. The combined market share is around [30-40]% (DB [30-40]%, Arriva [0-5]%) if communal operators are included.

¹¹⁸ The districts and towns of Bamberg and Bayreuth only joined the VGN as of 1 January 2010 and therefore are not reflected in the data for 2009.

Table E.9: Market shares Verkehrsverbund Großraum Nürnberg (on the basis of bus km), 2009

Verkehrsverbund Großraum Nürnberg (VGN)		
	Market shares including communal operators	Market shares excluding communal operators
DB	[30-40]%	[50-60]%
Arriva	[0-5]%	[0-5]%
Parties	[30-40]%	[50-60]%
Others	[60-70]%	[40-50]%
Total	100%	100%

Source: DB's best estimates

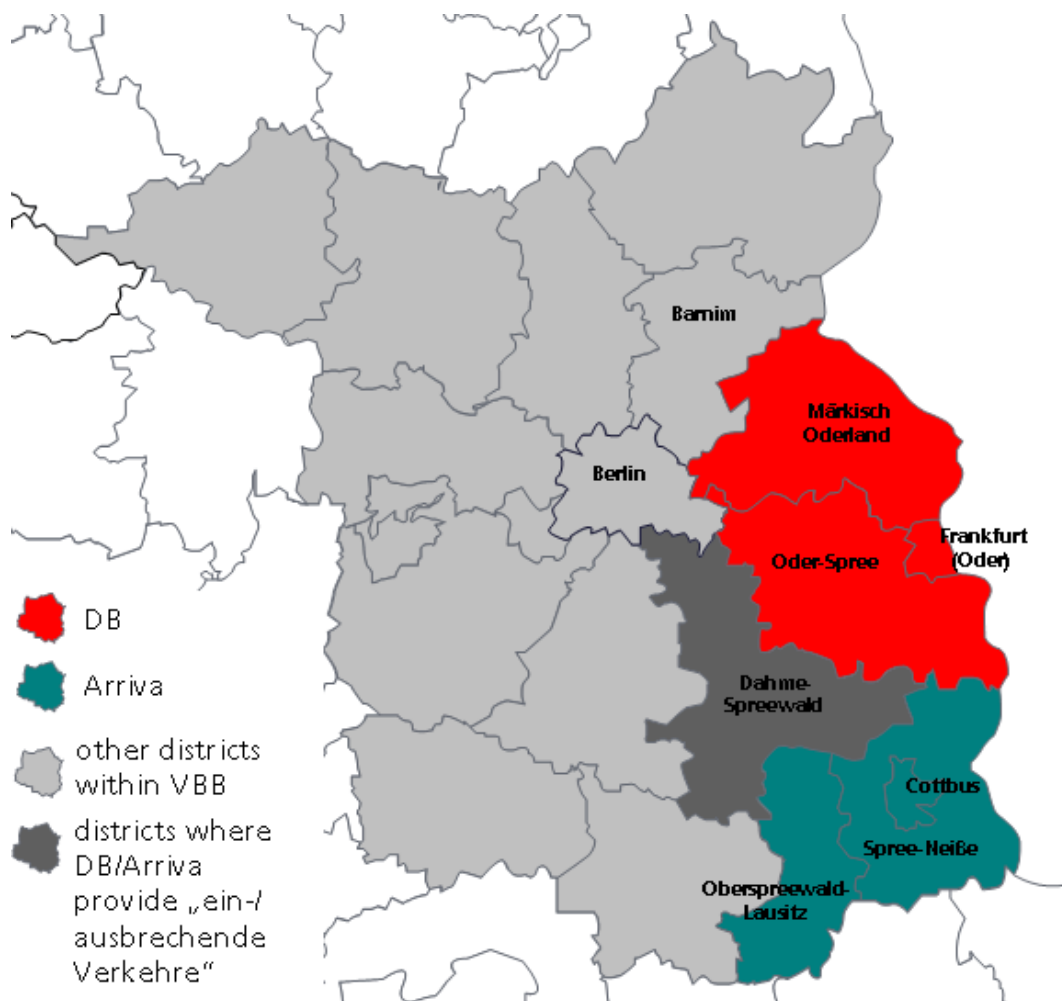
271. The overall market size measured in revenue is estimated at EUR [...] in 2009 if communal operators are included and at EUR [...] in 2009 if communal operators are not included.
272. If communal operators are not included, the transaction leads to a very strong position of the parties in the area of the VGN. Besides DB and Arriva, as private operators, only small and medium-sized companies are active with own concessions in the area of the VGN (around 20). Communal operators are VAG, infra fürth GmbH and Stadtverkehr Schwabach. During the market investigation the Aufgabenträger for Forchheim also expressed its concern about the transaction as Arriva is the major competitor of DB in the districts of Forchheim, Erlangen-Höchstadt, and Bayreuth. The transaction is therefore likely to lower the competitive pressure on DB in this region. This is supported by the submission of the responsible authority for Erlangen-Höchstadt.
273. Therefore, the transaction raises competition concerns with respect to a potential regional market consisting of the area of the VGN which are, in any event, removed by the proposed commitments.

4.6.5. Part of Verkehrsverbund Berlin/Brandenburg (East Brandenburg)

274. In Berlin/Brandenburg, Arriva provides services through its subsidiaries Südbrandenburger Nahverkehr and Neißeverkehr. Südbrandenburger Nahverkehr focuses on bus services in the district of Oberspreewald-Lausitz, whereas Neißeverkehr predominantly operates in the district of Spree-Neiße (and also in some parts of the Cottbus area in a joint venture with the municipal operator Cottbusverkehr). Both companies also operator services on some routes leading from these districts into neighbouring areas (*ein- / ausbrechende Verkehre*). Arriva has [...] depots [...].

275. In Berlin/Brandenburg, DB has [...] shareholdings in two bus companies, Busverkehr Märkisch-Oderland (BMO) and Busverkehr Oder-Spree (BOS)¹¹⁹. BMO and BOS are almost entirely active within the districts of Märkisch-Oderland and Oder-Spree, with only some routes leading from these districts into neighbouring areas (*ein- / ausbrechende Verkehre*). There are significant services from both districts into Frankfurt (Oder) and, to a limited extent, from Märkisch-Oderland into Barnim and Berlin, as well as from Oder-Spree into Dahme-Spreewald. There are no services into Spree-Neiße.
276. As can be seen in figure E.6 below, Arriva and DB provide bus services in neighbouring districts in Berlin/Brandenburg.

Figure E.6: Activities of DB and Arriva in Berlin/Brandenburg



¹¹⁹ [...].

277. The transport association Berlin/Brandenburg covers a large area. The notifying party argues that the parties' activities do not overlap at the level of individual districts but only on the level of the area of the entire transport association. The notifying party also argues that any hypothetical regional market smaller than the entire Verkehrsverbund Berlin/Brandenburg would need to have to differentiate between the regions Oderland-Spree (Frankfurt/Oder, Märkisch Oderland, Oder-Spree and Dahme-Spreewald) and Lausitz (Cottbus, Elbe-Elster, Oberspreewald and Spree-Neiße).
278. However, at this stage, the Commission cannot exclude that a relevant geographic market could consist of a market including both Oderland-Spree and Lausitz. The Commission has therefore requested DB to provide market share data for such a hypothetical market (East Brandenburg), which includes Märkisch-Oderland, Oder-Spree, Dahme-Spreewald, Cottbus, Spree-Neiße, Oberspreewald-Lausitz.
279. As can be seen in table E.10 below, in this area, the parties have a combined market share on the basis of bus kilometres in 2009 of [90-100]% (DB [50-60]%, Arriva [40-50]%) if communal operators are not included. The combined market share is [60-70]% (DB [30-40]%, Arriva [20-30]%) if communal operators are included.

Table E.10: Market shares in East Brandenburg (on the basis of bus km), 2009

East Brandenburg		
	Market shares including communal operators	Market shares excluding communal operators
DB	[30-40]%	[50-60]%
Arriva	[20-30]%	[40-50]%
Parties	[60-70]%	[90-100]%
Regionale Verkehrsgesellschaft Dahme-Spreewald mbH	[20-30]%	[0-5]%
Cottbusverkehr	[10-20]%	[0-5]%
Total	100%	100%

Source: DB's best estimates

280. The overall market size measured in revenue is estimated at EUR [...] in 2009 if communal operators are included and at EUR [...] in 2009 if communal operators are not included.
281. Regardless of the inclusion or exclusion of communal operators, the transaction leads to very high combined market shares ([60-70]% or [90-100]%). Together with the fact that Arriva is the most likely competitor of DB in future tenders and in competitions for concessions, the Commission concludes that there are serious doubts as to the compatibility of the notified transaction with the common market as regards a possible market consisting of East Brandenburg.

4.7. Effects of the transaction on the level of districts

282. If markets are defined on the level of districts, there are serious doubts as to the compatibility of the notified transaction with the common market as regards possible markets in five districts (i.e. Lüchow-Dannenberg, Soltau-Fallingb., Forchheim, Erlangen/Erlangen-Höchstadt and Warendorf).
283. There are a number of additional districts where both parties are active and which are technically affected. In these markets, the market shares of the parties are low and a number of competitors are present. However, the transaction may raise competition concerns in adjacent districts to the ones listed above in view of Arriva's role as actual or potential competitor to DB. The market investigation in general showed that Arriva and DB are considered likely entrants for districts adjacent to those where they are already active. However, on balance the market investigation did not provide any evidence that would lead the Commission to have serious doubts as to the compatibility of the notified transaction with the internal market as regards these possible markets on district level.

4.7.1. Lüchow-Dannenberg

284. The district of Lüchow-Dannenberg is part of the Verkehrsgemeinschaft Nordost-Niedersachsen (VNN). Arriva is active in Lüchow-Dannenberg through its subsidiary KVG Stade. DB is active through Regionalbus Braunschweig.
285. As can be seen in table E.11 below, in Lüchow-Dannenberg, the parties have a combined market share on the basis of bus kilometres in 2009 of [60-70]% (DB [50-60]%, Arriva [5-10]%) including communal operators. If communal operators are not included the combined market share is [90-100]% (DB [80-90]%, Arriva [10-20]%).

Table E.11: Market shares Lüchow-Dannenberg (on the basis of bus km), 2009

Lüchow-Dannenberg		
	Market shares including communal operators	Market shares excluding communal operators
DB	[50-60]%	[80-90]%
Arriva	[5-10]%	[10-20]%
Parties	[60-70]%	[90-100]%
Others	[30-40]%	[0-5]%
Total	100%	100%

Source: DB's best estimates

286. The overall market size measured in revenue is estimated at EUR [...] in 2009 if communal operators are included and at EUR [...] in 2009 if communal operators are not included.

287. Due to the very high combined market shares of the parties and the fact that Arriva is regarded as the most likely competitor of DB in future tenders and in competitions for concessions in VNN, the Commission concludes that there are serious doubts as to the compatibility of the notified transaction with the common market as regards a possible market consisting of the district of Lüchow-Dannenberg. If communal operators are not included, the transaction leads to a monopoly of the parties in that district. Besides DB and Arriva, only the communal operator Lüchow-Schmarsauer Eisenbahn is active in Lüchow-Dannenberg.

4.7.2. Soltau-Fallingbostel

288. The district of Soltau-Fallingbostel is also part of the Verkehrsgemeinschaft Nordost-Niedersachsen (VNN). Arriva is active in Soltau-Fallingbostel through its subsidiary Verkehrsbetriebe Osthannover (VOG). DB is active through Haller Busbetrieb, which is a subsidiary of Regionalbus Braunschweig.

289. As can be seen in table E.12 below, in Soltau-Fallingbostel, the parties have a combined market share in 2009 of [50-60]% (DB [30-40]%, Arriva [20-30]%) including communal operators. If communal operators are not included the combined market share is [60-70]% (DB [40-50]%, Arriva [20-30]%).¹²⁰

Table E.12: Market shares Soltau-Fallingbostel, 2009

Soltau-Fallingbostel		
	Market shares including communal operators	Market shares excluding communal operators
DB	[30-40]%	[40-50]%
Arriva	[20-30]%	[20-30]%
Parties	[50-60]%	[60-70]%
Others	[40-50]%	[30-40]%
Total	100%	100%

Source: DB's best estimates

290. Total market size for the bus market, which however also includes tram and metro, amounts to EUR [...] including communal operators. No other data on market size is available.

291. Due to the high combined market shares of the parties and the fact that Arriva is seen as the most likely competitor of DB in future tenders and in competitions for concessions in VNN, the Commission concludes that there are serious doubts as to the compatibility of the notified transaction with the common market as regards a possible market consisting of the district of Soltau-Fallingbostel.

¹²⁰ Market shares are derived from the revenue analysis carried out by Verkehrsgemeinschaft Heidekreis in 2009.

4.7.3. Forchheim

292. The district of Forchheim is part of the Verkehrsverbund Großraum Nürnberg (VGN). As explained in paragraph 269, Arriva has only few operations in Forchheim. DB operates through its subsidiary Omnibusverkehr Franken (OVF).
293. As can be seen in table E.13 below, in Forchheim, the parties have a combined market share on the basis of bus kilometres in 2009 of [90-100]% (DB [90-100]%, Arriva [5-10]%). In Forchheim no communal operator is active.

Table E.13: Market shares Forchheim (on the basis of bus km), 2009

Forchheim	
	Market shares
DB	[90-100]%
Arriva	[5-10]%
Parties	[90-100]%
Others	[0-5]%
Total	100%

Source: DB's best estimates

294. The overall market size measured in revenue is estimated at EUR [...] in 2009.
295. Due to the very high combined market shares of the parties, which is close to monopoly, and the fact that Arriva is seen as the most likely competitor of DB in future tenders and in competitions for concessions in this area, the Commission concludes that there are serious doubts as to the compatibility of the notified transaction with the common market as regards a possible market consisting of the district of Forchheim.

4.7.4. Erlangen/Erlangen-Höchstadt

296. The district of Erlangen/Erlangen-Höchstadt is also part of the Verkehrsverbund Großraum Nürnberg (VGN). As explained in paragraph 269, Arriva has only few operations in Erlangen/Erlangen-Höchstadt (bus service from the region Forchheim to Erlangen). DB operates through its subsidiary Omnibusverkehr Franken (OVF).
297. As can be seen in table E.14 below, in Erlangen/Erlangen-Höchstadt, the parties have a combined market share on the basis of bus kilometres in 2009 data of [90-100]% (DB [80-90]%, Arriva [0-5]%) if communal operators are not included. The combined market share is around [30-40]% (DB [30-40]%, Arriva [0-5]%) if communal operators are included.

Table E.14: Market shares Erlangen/Erlangen-Höchstadt (on the basis of bus km), 2009

Erlangen/Erlangen-Höchstadt		
	Market shares including communal operators	Market shares excluding communal operators
DB	[30-40]%	[80-90]%
Arriva	[0-5]%	[5-10]%
Parties	[30-40]%	[90-100]%
Others	[60-70]%	[5-10]%
Total	100%	100%

Source: DB's best estimates

298. The overall market size measured in revenue is estimated at EUR [...] in 2009 if communal operators are included and at EUR [...] in 2009 if communal operators are not included.
299. If communal operators are not included, the transaction leads to very high market shares of the parties (close to monopoly) in Erlangen/Erlangen-Höchstadt. Although Arriva has currently few operations in the district, Arriva is regarded as the most likely competitor of DB in future tenders and in competitions for concessions in this area. Therefore, in this scenario the Commission concludes that there are serious doubts as to the compatibility of the notified transaction with the common market as regards a possible market consisting of the district Erlangen/Erlangen-Höchstadt.

4.7.5. Warendorf

300. The district of Warendorf is part of the Verkehrsgemeinschaft Münsterland (VGM). As explained in paragraph 263, Arriva operates bus services in the district of Warendorf through its subsidiary Verkehrsbetriebe Bils. DB provides bus services in Warendorf through its subsidiary Westfalenbus (WB).
301. As can be seen in table E.15 below, in Warendorf, the parties have a combined market share on the basis of bus kilometres in 2009 of [90-100]% (DB [90-100]%, Arriva [0-5]%) if communal operators are not included. The combined market share is around [20-30]% (DB [20-30]%, Arriva [0-5]%) if communal operators are included.

Table E.15: Market shares Warendorf (on the basis of bus km), 2009

Warendorf		
	Market shares including communal operators	Market shares excluding communal operators
DB	[20-30]%	[90-100]%
Arriva	[0-5]%	[0-5]%
Parties	[20-30]%	[90-100]%
Others	[70-80]%	[0-5]%%
Total	100%	100%

Source: DB's best estimates

302. The overall market size measured in revenue is estimated at EUR [...] in 2009 if communal operators are included and at EUR [...] in 2009 if communal operators are not included.
303. If communal operators are not included, the transaction leads to a [90-100% market share] of the parties in the district of Warendorf. Besides DB and Arriva, the communal operator Regionalverkehr Münsterland is active in this district. Although Arriva has currently small operations in the area of the VGM, Arriva is seen as the most likely competitor of DB in future tenders and in competitions for concessions in the area. Therefore, in this scenario the Commission concludes that there are serious doubts as to the compatibility of the notified transaction with the common market as regards a possible market consisting of the district of Warendorf.

4.8. Conclusion

304. As indicated earlier, it is not possible on the basis of the market investigation in first phase to safely conclude on the definitive (geographic) market definition. It has thus been necessary to assess the competitive effects of the notified transaction on alternative markets, having in mind that there are indications that the geographic market for passenger bus services is wider than the district level. The competitive assessment carried out on this basis has shown that the notified transaction raises serious doubts as to the compatibility of the notified concentration with the internal market regarding passenger bus services on a number of alternative markets. These also include the wider possible geographic markets in Niedersachsen, Verkehrsgemeinschaft Nordost-Niedersachsen as a whole, both the western and the eastern part of Verkehrsgemeinschaft Nordost-Niedersachsen, Verkehrsgemeinschaft Münsterland, and East-Brandenburg. According to Article 6(1)(c) of the Merger Regulation, the fact that the notified transaction raises serious doubts on these (and alternative) markets leads to the initiation of proceedings unless the notifying parties modify the notified transaction in a way that removes these serious doubts (Article 6(2) of the Merger Regulation).

VI. PROPOSED COMMITMENTS

305. In order to render the concentration compatible with the internal market, the undertakings concerned have modified the notified concentration by entering into the following commitments, which are annexed to this decision and form an integral part thereof.
306. A first commitment package was submitted on 20 July 2010. After a first examination by the Commission the notifying party amended the commitments and submitted revised commitments on 23 July 2010. After an examination and a market test these commitments were slightly improved on 10 August 2010. These commitments are considered suitable to entirely remove the serious doubts identified.

A. Description of the commitments

307. In order to address the competition concerns identified in the market for regional and long-distance passenger rail transport services, rail freight, rolling stock maintenance, as well as passenger bus transport services in Germany, DB commits to divest the entirety of Arriva's 100% indirect interest in Arriva Deutschland GmbH ("Arriva Deutschland"). The divestment covers all of Arriva's rail and bus operations in Germany.
308. Arriva Deutschland is the holding company for all of Arriva's bus and rail activities in Germany. Its rail activities include the operation of long-distance and regional passenger rail services, rail freight transport services and the operation of freight terminals, the operation of railway infrastructure and the provision of rolling stock maintenance services. It also provides bus services in various parts of Germany, i.e. in the Bundesländer of Niedersachsen, Nordrhein-Westfalen, Bayern, Brandenburg, Mecklenburg-Vorpommern and Hessen.
309. Arriva Deutschland's business is carried out through subsidiary companies, joint ventures and other companies in which it has shareholdings. The divestment will include Arriva Deutschland's shareholdings in all such companies. Arriva Deutschland and all such companies will retain all existing assets,¹²¹ contracts and concessions, employees (including management).¹²²
310. The main operating companies in which Arriva Deutschland is a direct or indirect shareholder are Osthannoversche Eisenbahn AG, metronom Eisenbahngesellschaft mbH, Prignitzer Eisenbahn GmbH, Ostdeutsche Eisenbahn GmbH, Regentalbahn AG, Autobus Sippel GmbH, KVG Stade GmbH & Co KG, Südbrandenburger Nahverkehrs GmbH, Neißeverkehr GmbH and Verkehrsbetriebe Bils GmbH.
311. In 2009, Arriva Deutschland had revenues of EUR [400 - 500] million and profits of EUR [...]. It operates [...] items of rolling stock (locomotives, multiple units, coaches), [...] buses, [...] maintenance workshops for rail, [...] bus depots, [...] rail-served freight terminals and 546 route km of railway infrastructure. It operates one long-distance passenger rail service and holds numerous contracts to operate regional passenger rail services (some extending into the Netherlands, Poland and the Czech Republic); it also operates rail freight services in Germany and to/from neighbouring countries. It further holds concessions and contracts to operate bus services in various parts of Germany.
312. In 2009, Arriva Deutschland operated approximately [30-40]million rail km, corresponding to around [5-10]% of all regional passenger rail services in Germany. It operates regional rail services in various Bundesländer, including Niedersachsen (and services to/from Hamburg and Bremen), Brandenburg, Berlin, Sachsen, Bayern and Nordrhein-Westfalen.

121 Except for excluded assets as defined in para. 25 of Schedule 2, attached to the Commitments: in particular, the right to use the ARRIVA name, trade mark, brand or logo.

122 Except for the personnel mentioned in para. 32 of Schedule 2, attached to the Commitments.

313. Arriva Deutschland (including its subsidiary VLG Gifhorn) operated about [30-40] million bus km under its own concessions in Germany. Arriva Deutschland's bus activities are in particular located in Northern Germany. Furthermore, Arriva Deutschland provides bus services in the regions mentioned above.
314. The divestment business also includes Arriva Grundstücksgesellschaft mbH ("Arriva Grundstück"), which is the owner of real estate used by certain of Arriva Deutschland's subsidiaries. The divestment will not include Arriva Deutschland's subsidiary WBL GmbH, which, whilst owned by Arriva Deutschland, has no activities on any market in Germany.
315. According to the commitments, DB must enter into a binding sales and purchase agreement with a suitable purchaser approved by the Commission within [...] Failing that, a divestiture trustee approved by the Commission will have an irrevocable mandate to enter into such a sale and purchase agreement on behalf of DB within [...].

B. Assessment of the proposed commitments

316. As set out in the Commission Notice on remedies¹²³, the Commission assesses the compatibility of a notified concentration with the internal market on the basis of its effect on the structure of competition in the European Union. Where a concentration raises serious doubts which could lead to a significant impediment to effective competition, the parties may seek to modify the concentration so as to resolve the serious doubts identified by the Commission with a view to having the merger cleared. In assessing whether or not the remedy will restore effective competition, the Commission considers *inter alia* the type, scale and scope of the remedies by reference to the structure and the particular characteristics of the market in which these serious doubts arise.
317. As concerns the different types of remedy, divestiture commitment are considered to be the best way to eliminate competition concerns resulting from horizontal overlaps. The divested activities must consist of a viable business, which if operated by a suitable purchaser, can compete effectively with the merged entity on a lasting basis, and which is divested as a going concern.
318. The Commission's assessment has concluded that the proposed remedy package as submitted by the notifying party on 10 August 2010 addresses all serious doubts identified in the course of the procedure. As such, the Commission comes to the conclusion that the commitments entered into by the notifying party are sufficient to eliminate the serious doubts as to the compatibility of the transaction with the common market.
319. The divestment business, Arriva Deutschland including Arriva Grundstück, constitutes Arriva's entire rail and bus business in Germany. Therefore, the proposed divestment will completely eliminate the entire overlap between the parties in the German rail and bus markets in which serious doubts have been identified.

¹²³ OJ C 267, 22.10.2008, p. 1.

320. Arriva Deutschland at present already constitutes a viable, stand-alone business that will be divested in its current form as a going concern, without any carve-out being necessary. Once acquired by a suitable purchaser, it will therefore be likely to effectively compete with DB and other competitors in the markets for rail and bus concessions in Germany on a lasting basis.
321. The excluded assets do not appear to endanger the viability of the divestment business. The merged entity will retain the right to use the Arriva name, trade mark, brand or logo whereas Arriva Deutschland can only use it for a transitory period. However, the Arriva brand only plays a minor role in the marketing of the train and bus services which are rather known under the local brands such as metronome or PEG. In view of the fact that Arriva is currently active in 12 European countries, it can lead to confusion if Arriva Deutschland had the right to use Arriva name, trade mark, brand or logo in Germany. Nevertheless, as the name, trade mark brand and logo cannot be changed immediately, the transitory period appears justified.
322. [...].
323. The transfer of ownership of Arriva Deutschland from Arriva to the purchaser does not affect the operation of Arriva Deutschland's current business. [...].
324. The market test provided an overall positive feedback on the proposed divestiture and confirmed the notifying party's view that the divestment business is likely to attract the interest of a significant number of potential purchasers.
325. A large number of respondents in the market test, however, pointed out that in order for a purchaser to successfully operate the divested business, it needs to have specific experience in the rail/bus passenger transport sector. In addition, several Aufgabenträger stated that the purchaser should pursue a long-term strategy. This requirement is motivated by the long-duration of public transport contracts (up to 10-15 years). These contracts require significant investments and public authorities appear to be reluctant to award contracts to bidders whose future ownership is uncertain. The competitiveness of Arriva Deutschland could thus be diminished if the purchaser does not present a convincing long-term strategy.
326. In addition, the purchaser should have sufficient financial resources to fund the future growth of Arriva Deutschland. [...].
327. Furthermore, a majority of respondents indicated that [...]. Indeed, it follows from the Commission's market investigation that the rail and bus markets are bidding markets and the continuing award of significant contracts is decisive for the present and future viability of the divestment business. [...].
328. In order to address these concerns, the commitments provide [...]. In addition, the commitments provide for the immediate appointment of the Hold Separate Manager and of the Monitoring Trustee within one week from the present decision, and for further measures preserving the viability and competitiveness of the divestment business.

C. Conditions and obligations

329. Under the first sentence of the second subparagraph of Article 6(2) of the EU Merger Regulation, the Commission may attach to its decision conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-à-vis the Commission with a view to rendering the concentration compatible with the common market.
330. The achievement of the measure that gives rise to the structural change of the market is a condition, whereas the implementing steps which are necessary to achieve this result are generally obligations on the Parties. Where a condition is not fulfilled, the Commission's decision declaring the concentration compatible with the common market no longer stands. Where the undertakings concerned commit a breach of an obligation, the Commission may revoke the clearance decision in accordance with Article 8(5) of the EU Merger Regulation. The undertakings concerned may also be subject to fines and periodic penalty payments under Articles 14(2) and 15(1) of the EU Merger Regulation.
331. In accordance with the basic distinction described above, the decision in this case is conditional on the full compliance with Section B of the Commitments. The remaining requirements set out in the other Sections C, D and E of the Commitments are considered to constitute obligations

VII. CONCLUSION

332. For the above reasons, the Commission has decided not to oppose the notified operation as modified by the commitments and to declare it compatible with the internal market and with the functioning of the EEA Agreement, subject to full compliance with the conditions in sections B of the commitments annexed to the present decision and with the obligations contained in the other sections of the said commitments. This decision is adopted in application of Article 6(1)(b) in conjunction with Article 6(2) of Council Regulation (EC) No 139/2004.

For the Commission
(*signed*)
Stefan Füle
Member of the Commission

CASE COMP/M.5855 DEUTSCHE BAHN/ARRIVA

**COMMITMENTS OFFERED
BY DEUTSCHE BAHN AG
PURSUANT TO ARTICLE 6(2) OF COUNCIL
REGULATION (EC) NO. 139/2004**

9 AUGUST 2010



FRESHFIELDS BRUCKHAUS DERINGER

European Commission
Directorate General for Competition
Merger Registry
rue Joseph II 70 Jozef-II straat
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9 August 2010

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Case COMP/M. 5855 – *Deutsche Bahn/Arriva*

COMMITMENTS TO THE EUROPEAN COMMISSION

Pursuant to Article 6(2) of Council Regulation (EC) No. 139/2004 (the “*Merger Regulation*”), Deutsche Bahn AG hereby provides the following Commitments (the “*Commitments*”) in order to enable the European Commission (the “*Commission*”) to declare the acquisition by Deutsche Bahn AG of sole control of Arriva plc (the “*notified concentration*”) compatible with the common market and the EEA Agreement by adopting a decision pursuant to Article 6(1)(b) of the Merger Regulation (the “*Decision*”).

The Commitments shall take effect upon the Effective Date, with the exception of paragraph 9 (appointment of Hold Separate Manager) and paragraphs 19 and 21 to 27 (appointment and functions of the Monitoring Trustee), which shall take effect as of the date of these Commitments.

This text shall be interpreted in the light of the Decision to the extent that the Commitments are attached as conditions and obligations, in the general framework of EU law, in particular in the light of the Merger Regulation, and by reference to the Commission Notice on remedies acceptable under Council Regulation (EC) No. 139/2004 and under Commission Regulation (EC) No. 802/2004.

Section A. Definitions

For the purpose of the Commitments, the following terms shall have the following meaning:

Affiliated Undertakings means the undertakings controlled Deutsche Bahn or Arriva, as the case may be, whereby the notion of control shall be interpreted pursuant to Article 3 of the Merger Regulation and in the light of the Commission Consolidated Jurisdictional Notice.

Arriva means Arriva plc, a public limited company incorporated under the laws of England and Wales with registered number 347103 and its registered office at 1 Admiral Way, Doxford International Business Park, Sunderland SR3 3XP, United Kingdom.

Arriva Deutschland means Arriva Deutschland GmbH, a company incorporated under the laws of the Federal Republic of Germany, with its registered office at Bahnhofplatz 1, D-94234 Viechtach, Germany and registered with the Commercial Register of the Amtsgericht Deggendorf under number 2881.

Arriva Deutschland Group means Arriva Deutschland and its subsidiaries, joint ventures and other companies and entities in which it has a shareholding, partnership interest or other interest with the exception of WBL GmbH (as more particularly described in **Schedule 1**).

Arriva Grundstück means Arriva Grundstücksgesellschaft mbH, a company incorporated under the laws of the Federal Republic of Germany, with its registered office at Märkisches Ufer 34, D-10179 Berlin, Germany and registered with the Commercial Registry of the Amtsgericht Charlottenburg under number HRB 113945 B.

Assigned Contracts means the contracts that will be assigned to the Purchaser (as more particularly described in **Part B** of **Schedule 2**).

Closing means the transfer of the legal title of the Divestment Business to the Purchaser.

Deutsche Bahn means Deutsche Bahn Aktiengesellschaft, a company incorporated under the laws of the Federal Republic of Germany, with its registered office at Potsdamer Platz 2, D-10785 Berlin, Germany and registered with the Commercial Register of Berlin-Charlottenburg, Germany, under number 50000.

Divestment Business means the Arriva Deutschland Group and the business carried on by it (other than the Excluded Assets), Arriva Grundstück and the Assigned Contracts, as more particularly described in **Part A** of **Schedule 2**.

Divestiture Trustee means one or more natural or legal person(s), independent from the Parties, who is approved by the Commission and appointed by Deutsche Bahn and who has received from Deutsche Bahn the exclusive Trustee Mandate to sell the Divestment Business to a Purchaser at no minimum price.

Effective Date means the date of adoption of the Decision.

Excluded Assets means the assets identified in **Part B** of **Schedule 2**.

First Divestiture Period means the period of [...] from the Effective Date, including any extension thereto granted by the Commission pursuant to paragraph 38.

Hold Separate Manager means the person appointed by Deutsche Bahn to manage the day-to-day business of the Divestment Business under the supervision of the Monitoring Trustee.

Key Personnel means all personnel necessary to maintain the viability and competitiveness of the Divestment Business, as listed in **Part B of Schedule 2**.

Monitoring Trustee means one or more natural or legal person(s), independent from the Parties, who is approved by the Commission and appointed by Deutsche Bahn, and who has the duty to monitor Deutsche Bahn's compliance with the conditions and obligations attached to the Decision.

Parties means Deutsche Bahn and Arriva.

Personnel means all personnel employed by the Divestment Business, including Key Personnel, with the exception of those personnel listed in paragraph 32 of **Schedule 2**.

Purchaser means the entity approved by the Commission pursuant to paragraphs 17 and 18 as the acquirer of the Divestment Business in accordance with the Purchaser Requirements.

Purchaser Requirements has the meaning given to that term in paragraph 17.

Trustee(s) means the Monitoring Trustee and the Divestiture Trustee.

Trustee Divestiture Period means the period of [...] from the end of the First Divestiture Period, including any extension thereto granted by the Commission pursuant to paragraph 38.

WBL GmbH means WBL GmbH, a company incorporated under the laws of the Federal Republic of Germany, with its registered office at Märkisches Ufer 34, D-10179 Berlin, Germany and registered with the Commercial Registry of the Amtsgericht Charlottenburg under number HRB 109069 B.

Section B. The Divestment Business

Commitment to divest

1. In order to restore effective competition, Deutsche Bahn commits to divest, or procure the divestiture of, the Divestment Business by the end of the Trustee Divestiture Period as a going concern by procuring (i) the sale of Arriva's entire direct and indirect legal and beneficial interests in Arriva Deutschland and in Arriva Grundstück and (ii) the assignment of the Assigned Contracts to a Purchaser and on terms of sale approved by the Commission in accordance with the procedure described in paragraph 18. To carry out the divestiture, Deutsche Bahn commits to find a Purchaser and to enter, or procure the entering, into a final binding sale and purchase agreement for the sale of the Divestment Business within the First Divestiture Period. If such an agreement has not been entered into at the end of the First Divestiture Period, Deutsche Bahn shall grant the Divestiture Trustee an exclusive mandate to sell the Divestment Business in the

Trustee Divestiture Period in accordance with the procedure described in paragraph 28.

2. Deutsche Bahn shall be deemed to have complied with this commitment if, by the end of the Trustee Divestiture Period, a final binding sale and purchase agreement has been entered into with the Purchaser, if the Commission approves the Purchaser and the terms in accordance with the procedure described in paragraph 18 and if Closing takes place [...] after the approval of the Purchaser and the terms of sale by the Commission pursuant to paragraph 18.
3. In order to maintain the structural effect of the Commitments, Deutsche Bahn shall not, for a period of 10 years after the Effective Date, acquire direct or indirect influence over the whole or part of the Divestment Business, unless the Commission has previously found that the structure of the market has changed to such an extent that the absence of influence over the Divestment Business is no longer necessary to render the notified concentration compatible with the common market. For the avoidance of doubt, the provisions of this paragraph 3 do not prevent Deutsche Bahn or its Affiliated Undertakings from bidding for or otherwise being awarded any contract, concession or franchise which is currently held or may at any time within the period of 10 years from the Effective Date be held by the Divestment Business, should the relevant public authority re-tender or otherwise re-award, in accordance with applicable European and national law, such contract, concession or franchise upon its expiry or termination.

Structure and definition of the Divestment Business

4. The Divestment Business consists of the Arriva Deutschland Group and the entire business carried on by it (with the exception of the Excluded Assets), Arriva Grundstück and the Assigned Contracts. The present legal and functional structure of the Divestment Business as operated to date is described in **Part A of Schedule 2**. The Divestment Business, described in more detail in **Part B of Schedule 2**, includes (with the exception of the Excluded Assets):
 - (a) the Arriva Deutschland Group;
 - (b) all tangible and intangible assets (including intellectual property rights) owned or used by the Arriva Deutschland Group and Arriva Grundstück which contribute to the current operation or are necessary to ensure the viability and competitiveness of the Divestment Business;
 - (c) all licences, permits and authorisations issued by any governmental organisation awarded to or held by the Arriva Deutschland Group and Arriva Grundstück for the benefit of the Divestment Business;
 - (d) all contracts, concessions, franchises, leases, commitments, customer orders, other agreements and all customer, credit and other records of the Arriva Deutschland Group and Arriva Grundstück, including the Assigned Contracts (items referred to under (b) to (d) hereinafter collectively referred to as “*Assets*”); and

- (e) the Personnel (other than those personnel identified in **Part B** of **Schedule 2** as not being part of the Divestment Business).

Section C. Related commitments

Preservation of the viability, marketability and competitiveness of the Divestment Business

5. From the Effective Date until Closing, Deutsche Bahn shall preserve the economic viability, marketability and competitiveness of the Divestment Business, in accordance with good business practice, and shall minimise as far as possible any risk of loss of competitive potential of the Divestment Business. In particular Deutsche Bahn undertakes:
 - (a) not to carry out any act upon its own authority that might have a significant adverse impact on the value, management or competitiveness of the Divestment Business or that might alter the nature and scope of activity, or the industrial or commercial strategy or the investment policy of the Divestment Business;
 - (b) to make available sufficient resources (including maintaining all existing financing and leasing arrangements provided to the Divestment Business by Arriva and/or its Affiliated Undertakings) from the date of completion of the notified concentration for the continued operation and development of the Divestment Business, on the basis and continuation of the existing business plan of Arriva Deutschland and for any subsequent invitations to tender issued by a competent authority (*Aufgabenträger*) [...] for which Arriva Deutschland decides to bid. Without prejudice to the generality of this undertaking, Deutsche Bahn shall provide, or procure the provision of, on an arm's length basis, financing (including for working capital and for capital investments, for example in new rolling stock or other fixed assets) and guarantees for the Divestment Business for new contracts awarded to Arriva Deutschland (whether as a result of tenders submitted before or after the Effective Date) before the end of the First Divestiture Period and, if applicable, the end of the Trustee Divestiture Period, [...];
 - (c) to take all reasonable steps, including appropriate incentive schemes (based on industry practice), to encourage all Key Personnel employed as at the Effective Date (and who have not before that date submitted their resignation) to remain with the Divestment Business; and
 - (d) not to transform any concession held by the Arriva Deutschland Group for the operation of bus services into a *Gemeinsschaftskonzession* with Deutsche Bahn or any Affiliated Undertaking, provided that this does not apply to any existing application by [...] and Deutsche Bahn for the joint award of a concession made before the date of these Commitments or to any future application made by [...] and Deutsche Bahn in respect of any services currently operated by Deutsche Bahn under a concession

currently held by [...], details of which are set out in paragraph 26(b) of **Schedule 2**.

Hold-separate obligations

6. Deutsche Bahn commits, from the Effective Date until Closing, to keep the Divestment Business separate from its own businesses and the other businesses of Arriva that it is retaining and to ensure that Key Personnel of the Divestment Business – including the Hold Separate Manager – have no involvement in any business retained and vice versa. Deutsche Bahn shall also ensure that the Personnel do not report to any individual outside the Divestment Business.
7. Deutsche Bahn shall procure that any employee or director of Arriva, or its Affiliated Undertakings, (other than an employee or director of the Arriva Deutschland Group) who is a member of the management or supervisory board of Arriva Deutschland, any member of the Arriva Deutschland Group or Arriva Grundstück shall resign from all such positions at completion of the notified concentration and be replaced by an employee of the Arriva Deutschland Group or of the Monitoring Trustee. [...].
8. Deutsche Bahn shall not solicit, and shall procure that its Affiliated Undertakings (including, as of the date of completion of the notified concentration, Arriva and its Affiliated Undertakings, other than members of the Arriva Deutschland Group or Arriva Grundstück) do not solicit, the Personnel at any time before Closing, except either (a) where such an offer or employment is made following a response by such employee to a bona fide public advertisement for a situation vacant or (b) [...].
9. Until Closing, Deutsche Bahn shall assist the Monitoring Trustee in ensuring that the Divestment Business is managed as a distinct and saleable entity separate from Deutsche Bahn and the businesses of Arriva that will be retained by it. Deutsche Bahn shall, by no later than two weeks before the Effective Date, submit to the Commission a proposal for the appointment of a person to be the Hold Separate Manager and shall, having received the Commission's approval, appoint that person as the Hold Separate Manager by no later than the Effective Date (or if the Commission has not approved the appointment of a Hold Separate Manager by one week before that date, within one week of the date of its approval). In the event that completion of the notified concentration takes place before the Hold Separate Manager has been appointed in accordance with this paragraph 9, Deutsche Bahn shall not exercise the voting rights attached to the shares it will then hold in Arriva, except where this is necessary to maintain the full value of its investment in Arriva and with the consent of the Monitoring Trustee (or, if a Monitoring Trustee has not been appointed by Deutsche Bahn in accordance with these Commitments, with the consent of the Commission). The Hold Separate Manager shall be responsible for the management of the Divestment Business, under the supervision of the Monitoring Trustee. The Hold Separate Manager shall manage the Divestment Business independently and in the best interest of the business with a view to ensuring its continued economic viability,

marketability and competitiveness and its independence from Deutsche Bahn and the businesses of Arriva that will be retained by it.

10. To ensure that the Divestment Business is held and managed as a separate entity, the Monitoring Trustee shall exercise Deutsche Bahn's rights as a shareholder in the Arriva Deutschland Group and Arriva Grundstück (except for its rights for dividends that are due before Closing), including to approve tenders to be submitted in response to invitations to tender submitted by the competent public authorities (*Aufgabenträger*), with the aim of acting in the best interest of the Divestment Business, determined on a stand-alone basis, as an independent financial investor acting so as to maintain the full value of its investments, and with a view to fulfilling Deutsche Bahn's obligations under the Commitments.

Ring-fencing of the Divestment Business

11. Deutsche Bahn shall implement all necessary measures to ensure that it does not after the Effective Date obtain any business secrets, know-how, commercial information, or any other information of a confidential or proprietary nature relating to the Divestment Business. In particular, the participation of the Divestment Business in any central information technology network of the Arriva group shall be severed to the extent reasonably possible, without compromising the viability of the Divestment Business. Deutsche Bahn may obtain information relating to the Divestment Business which is reasonably necessary for the divestiture of the Divestment Business or the disclosure of which to Deutsche Bahn is required in order for Deutsche Bahn to comply with any statutory, tax, legal, regulatory or similar obligation.

Non-solicitation of employees

12. Deutsche Bahn undertakes, subject to customary limitations, not to solicit, and to procure that its Affiliated Undertakings do not solicit, the Key Personnel transferred with the Divestment Business for a period of [...] after Closing except where such employment is made following a response by such employee to a bona fide public advertisement for a situation vacant.

Non-use of trademarks

13. Deutsche Bahn undertakes not to use, within the territory of the Federal Republic of Germany, for a period of [...] from Closing, the ARRIVA name, trade mark or logo in relation to any railway activity (including: the operation of passenger or freight transport services; the provision of rolling stock maintenance and refurbishment services; the operation of railway infrastructure, stations and freight terminals; and related activities) and the provision of passenger road transport services. For the avoidance of doubt, this obligation does not apply to any activity carried on by Deutsche Bahn or any Affiliated Undertaking incorporated in a country other than the Federal Republic of Germany or to any cross-border service operated to/from Germany by an Affiliated Undertaking, including without limitation services from/to the Czech Republic, Denmark, the Netherlands or Poland.

Due diligence

14. In order to enable potential purchasers to carry out a reasonable due diligence of the Divestment Business, Deutsche Bahn shall, subject to customary confidentiality assurances and dependent on the stage of the divestiture process:
- (a) provide to potential purchasers sufficient information as regards the Divestment Business;
 - (b) provide to potential purchasers sufficient information relating to the Key Personnel and allow them reasonable access to the Key Personnel.

Reporting

15. Deutsche Bahn shall submit written reports in English on potential purchasers of the Divestment Business and developments in the negotiations with such potential purchasers to the Commission and the Monitoring Trustee no later than 10 days after the end of every month following the Effective Date (or otherwise at the Commission's request).
16. Deutsche Bahn shall inform the Commission and the Monitoring Trustee on the preparation of the data room documentation and the due diligence procedure and shall submit a copy of an information memorandum to the Commission and the Monitoring Trustee before sending the memorandum out to potential purchasers.

Section D. The Purchaser

17. In order to ensure the immediate restoration of effective competition, the Purchaser, in order to be approved by the Commission, must:
- (a) be independent of and unconnected to the Parties;
 - (b) have the financial resources, proven expertise and incentive to maintain and develop the Divestment Business as a viable and active competitive force in competition with Deutsche Bahn and other competitors;
 - (c) neither be likely to create, in the light of the information available to the Commission, *prima facie* competition concerns nor give rise to a risk that the implementation of the Commitments will be delayed, and must, in particular, reasonably be expected to obtain all necessary approvals from the relevant regulatory authorities for the acquisition of the Divestment Business (the before-mentioned criteria for the Purchaser being the "**Purchaser Requirements**").
18. Completion of the final binding sale and purchase agreement shall be conditional on the Commission's approval. When Deutsche Bahn has reached an agreement with a purchaser, it shall submit a fully documented and reasoned proposal, including a copy of the final agreement(s), to the Commission and the Monitoring Trustee. Deutsche Bahn must be able to demonstrate to the Commission that the Purchaser meets the Purchaser Requirements and that the Divestment Business is

being sold in a manner consistent with the Commitments. For the approval, the Commission shall verify that the Purchaser fulfils the Purchaser Requirements and that the Divestment Business is being sold in a manner consistent with the Commitments. The key elements in assessing the suitability of the purchaser include, among others, the Purchaser's necessary industry know how, the presentation of a compelling business plan for the Divestment Business, and a strong financial commitment to the future development of the Divestment Business. The Commission may approve the sale of the Divestment Business without one or more Assets and/or without some of the Personnel, if this does not affect the viability and competitiveness of the Divestment Business after the sale, taking account of the Purchaser.

Section E. Trustees

Appointment Procedure

19. Deutsche Bahn shall, by no later than the Effective Date (or if the Commission has not approved the appointment of a Monitoring Trustee by one week before that date, within one week of the date of its approval under paragraph 23) appoint a Monitoring Trustee to carry out the functions specified in the Commitments for a Monitoring Trustee. If completion of the notified concentration takes place before the Monitoring Trustee has been appointed in accordance with this paragraph 19, Deutsche Bahn shall not exercise the voting rights attached to the shares it will then hold in Arriva, except where this is necessary to maintain the full value of its investment in Arriva and with the consent of the Commission.
20. If Deutsche Bahn has not entered into a binding sale and purchase agreement [...] before the end of the First Divestiture Period or if the Commission has rejected a purchaser proposed by Deutsche Bahn at that time or thereafter, Deutsche Bahn shall appoint a Divestiture Trustee to carry out the functions specified in the Commitments for a Divestiture Trustee. The appointment of the Divestiture Trustee shall take effect upon the commencement of the Extended Divestment Period.
21. The Trustee(s) shall be independent of the Parties, possess the necessary qualifications to carry out its (or their) mandate(s), for example as an investment bank or consultant or auditor, and shall neither have nor become exposed to a conflict of interest. The Trustee(s) shall be remunerated by Deutsche Bahn in a way that does not impede the independent and effective fulfilment of its mandate. In particular, where the remuneration package of a Divestiture Trustee includes a success premium linked to the final sale value of the Divestment Business, the fee shall also be linked to a divestiture within the Trustee Divestiture Period.

Proposal by Deutsche Bahn

22. No later than two weeks before the Effective Date, Deutsche Bahn shall submit a list of one or more persons whom Deutsche Bahn proposes to appoint as the Monitoring Trustee to the Commission for approval. Should the circumstances in paragraph 20 be applicable, no later than one month before the end of the First

Divestiture Period, Deutsche Bahn shall submit a list of one or more persons whom Deutsche Bahn proposes to appoint as Divestiture Trustee to the Commission for approval. In respect of each proposal for the appointment of a Trustee, the proposal shall contain sufficient information for the Commission to verify that the proposed Trustee fulfils the requirements set out in paragraph 21 and shall include:

- (a) the full terms of the proposed mandate, which shall include all provisions necessary to enable the Trustee to fulfil its duties under these Commitments;
- (b) the outline of a work plan which describes how the Trustee intends to carry out its assigned tasks;
- (c) an indication whether the proposed Trustee is to act as both Monitoring Trustee and Divestiture Trustee or whether different trustees are proposed for the two functions.

Approval or rejection by the Commission

23. The Commission shall have the discretion to approve or reject the proposed Trustee(s) and to approve the proposed mandate subject to any modifications it deems necessary for the Trustee to fulfil its obligations. If only one individual or institution is approved, Deutsche Bahn shall appoint, or cause to be appointed, the individual or institution concerned as Trustee, in accordance with the mandate approved by the Commission. If more than one individual or institution is approved, Deutsche Bahn shall be free to choose the Trustee to be appointed from among the names approved. The Trustee shall be appointed within one week of the Commission's approval, in accordance with the mandate approved by the Commission.

New proposal by Deutsche Bahn

24. If all the proposed Trustees are rejected, Deutsche Bahn shall submit the names of at least two more individuals or institutions within one week of being informed of the rejection, in accordance with the requirements and the procedure set out in paragraphs 19 and 23.

Trustee nominated by the Commission

25. If all further proposed Trustees are rejected by the Commission, the Commission shall nominate a Trustee, whom Deutsche Bahn shall appoint, or cause to be appointed, in accordance with a trustee mandate approved by the Commission.

Functions of the Trustee

26. The Trustee shall assume its specified duties in order to ensure compliance with the Commitments. The Commission may, on its own initiative or at the request of the Trustee or Deutsche Bahn, give any orders or instructions to the Trustee in

order to ensure compliance with the conditions and obligations attached to the Decision.

Duties and obligations of the Monitoring Trustee

27. The Monitoring Trustee shall:

- (i) propose in its first report to the Commission a detailed work plan describing how it intends to monitor compliance with the obligations and conditions attached to the Decision;
- (ii) oversee the on-going management of the Divestment Business with a view to ensuring its continued economic viability, marketability and competitiveness and monitor compliance by Deutsche Bahn with the conditions and obligations attached to the Decision. To that end the Monitoring Trustee shall:
 - (a) monitor the preservation of the economic viability, marketability and competitiveness of the Divestment Business, and the keeping separate of the Divestment Business from Deutsche Bahn and the businesses of Arriva that will be retained by it, in accordance with paragraphs 5 and 6 of the Commitments;
 - (b) supervise the management of the Divestment Business as a distinct and saleable entity, in accordance with paragraph 7 of the Commitments;
 - (c) (i) in consultation with Deutsche Bahn, determine all necessary measures to ensure that Deutsche Bahn does not after the effective date obtain any business secrets, knowhow, commercial information, or any other information of a confidential or proprietary nature relating to the Divestment Business, in particular to sever the Divestment Business' participation in any central information technology network to the extent reasonably possible, without compromising the viability of the Divestment Business, and (ii) decide whether such information may be disclosed to Deutsche Bahn as the disclosure is reasonably necessary to allow Deutsche Bahn to carry out the divestiture or as the disclosure is necessary in order for Deutsche Bahn to comply with any statutory, tax, legal, regulatory or similar obligation;
 - (d) monitor the splitting of assets and the allocation of Personnel between the Divestment Business and Deutsche Bahn or Affiliated Undertakings;
- (iii) assume the other functions assigned to the Monitoring Trustee under the conditions and obligations attached to the Decision;
- (iv) propose to Deutsche Bahn such measures as the Monitoring Trustee considers necessary to ensure Deutsche Bahn's compliance with the conditions and obligations attached to the Decision, in particular the

maintenance of the full economic viability, marketability or competitiveness of the Divestment Business, the holding separate of the Divestment Business and the non-disclosure of competitively sensitive information;

- (v) review and assess potential purchasers as well as the progress of the divestiture process and verify that, dependent on the stage of the divestiture process, (a) potential purchasers receive sufficient information relating to the Divestment Business and the Personnel in particular by reviewing, if available, the data room documentation, the information memorandum and the due diligence process, and (b) potential purchasers are granted reasonable access to the Personnel;
- (vi) provide to the Commission, sending Deutsche Bahn a non-confidential copy at the same time, a written report in English within 15 days after the end of every month. The report shall cover the operation and management of the Divestment Business so that the Commission can assess whether the business is held in a manner consistent with the Commitments and the progress of the divestiture process as well as potential purchasers. In addition to these reports, the Monitoring Trustee shall promptly report in writing to the Commission, sending Deutsche Bahn a non-confidential copy at the same time, if it concludes on reasonable grounds that Deutsche Bahn is failing to comply with these Commitments;
- (vii) within one week after receipt of the documented proposal referred to in paragraph 18, submit to the Commission a reasoned opinion as to the suitability and independence of the proposed purchaser and the viability of the Divestment Business after the sale and as to whether the Divestment Business is sold in a manner consistent with the conditions and obligations attached to the Decision, in particular, if relevant, whether the sale of the Divestment Business without one or more Assets or not all of the Personnel affects the viability of the Divestment Business after the sale, taking account of the proposed purchaser.

Duties and obligations of the Divestiture Trustee

28. Within the Trustee Divestiture Period, the Divestiture Trustee shall sell at no minimum price the Divestment Business to a Purchaser, provided that the Commission has approved both the Purchaser and the final binding sale and purchase agreement in accordance with the procedure laid down in paragraph 18. The Divestiture Trustee shall include in the sale and purchase agreement such terms and conditions as it considers appropriate for an expedient sale in the Trustee Divestiture Period. In particular, the Divestiture Trustee may include in the sale and purchase agreement such customary representations and warranties and indemnities as are reasonably required to effect the sale. The Divestiture Trustee shall protect the legitimate financial interests of Deutsche Bahn, subject to Deutsche Bahn's unconditional obligation to divest at no minimum price in the Trustee Divestiture Period.

29. In the Trustee Divestiture Period (or otherwise at the Commission's request), the Divestiture Trustee shall provide the Commission with a comprehensive monthly report written in English on the progress of the divestiture process. Such reports shall be submitted within 15 days after the end of every month with a simultaneous copy to the Monitoring Trustee and a non-confidential copy to Deutsche Bahn.

Duties and obligations of Deutsche Bahn

30. Deutsche Bahn shall provide and shall cause its advisors to provide the Trustee(s) with all such cooperation, assistance and information as the Trustee (s) may reasonably require to perform its (or their) tasks. The Trustee(s) shall have full and complete access to any of Deutsche Bahn's or the Divestment Business' books, records, documents, management or other personnel, facilities, sites and technical information necessary for fulfilling its duties under the Commitments and Deutsche Bahn and the Divestment Business shall provide the Trustee(s) upon request with copies of any document. Deutsche Bahn and the Divestment Business shall make available to the Trustee(s) one or more offices on their premises and shall be available for meetings in order to provide the Trustee(s) with all information necessary for the performance of its (or their) tasks.
31. Deutsche Bahn shall provide, or shall cause the Divestment Business to provide, the Monitoring Trustee with all managerial and administrative support that it may reasonably request on behalf of the management of the Divestment Business. This shall include all administrative support functions relating to the Divestment Business which are currently carried out at headquarters level. Deutsche Bahn shall provide and shall cause its advisors to provide the Monitoring Trustee, on request, with the information submitted to potential purchasers, in particular give the Monitoring Trustee access to the data room documentation and all other information granted to potential purchasers in the due diligence procedure. Deutsche Bahn shall inform, or shall cause the Divestment Business, the Monitoring Trustee on possible purchasers, submit a list of potential purchasers, and keep the Monitoring Trustee informed of all developments in the divestiture process.
32. Deutsche Bahn shall grant or shall procure that Affiliated Undertakings to grant comprehensive powers of attorney, duly executed, to the Divestiture Trustee to effect the sale, the Closing and all actions and declarations which the Divestiture Trustee considers necessary or appropriate to achieve the sale and the Closing, including the appointment of advisers to assist with the sale process. Upon request of the Divestiture Trustee, Deutsche Bahn shall cause the documents required for effecting the sale and the Closing to be duly executed.
33. Deutsche Bahn shall indemnify the Trustee(s) and its (or their) employees, agents and advisers (each an "***Indemnified Party***") and hold each Indemnified Party harmless against, and hereby agrees that an Indemnified Party shall have no liability to Deutsche Bahn for any liabilities arising out of the performance of the Trustee's (or Trustees') duties under the Commitments, except to the extent that

such liabilities result from the wilful default, recklessness, gross negligence or bad faith of the Trustee(s) or its (or their) employees, agents or advisers.

34. At the expense of Deutsche Bahn, the Trustee(s) may appoint advisers (in particular for corporate finance or legal advice), subject to Deutsche Bahn's approval (this approval not to be unreasonably withheld or delayed) if the Trustee(s) consider(s) the appointment of such advisers necessary or appropriate for the performance of its duties and obligations under the Mandate(s), provided that any fees and other expenses incurred by or on behalf of the Trustee(s) are reasonable. Should Deutsche Bahn refuse to approve the adviser(s) proposed by the Trustee(s) the Commission may approve the appointment of such advisers instead, after having heard Deutsche Bahn. Only the Trustee(s) shall be entitled to issue instructions to the adviser(s). Paragraph 33 shall apply *mutatis mutandis*. In the Trustee Divestiture Period, the Divestiture Trustee may (subject to any professional or legal duties owed by them) use advisers who served Deutsche Bahn during the First Divestiture Period if the Divestiture Trustee considers this in the best interest of an expedient sale.

Replacement, discharge and reappointment of the Trustee

35. If the Trustee(s) cease(s) to perform its (or their) functions under the Commitments or for any other good cause, including the exposure of the Trustee(s) to a conflict of interest:
- (i) the Commission may, after hearing the Trustee(s), require Deutsche Bahn to replace the Trustee(s); or
 - (ii) Deutsche Bahn, with the prior approval of the Commission, may replace the Trustee(s).
36. If a Trustee is removed according to paragraph 35, the Trustee may be required to continue in its function until a new Trustee is in place to whom the Trustee has effected a full hand over of all relevant information. The new Trustee shall be appointed in accordance with the procedure referred to in paragraphs 19 to 23.
37. Except in the case of the removal of a Trustee in accordance with paragraph 33, the Trustee(s) shall cease to act as Trustee(s) only after the Commission has discharged it (or them) from its (or their) duties after all the Commitments with which the Trustee(s) has (or have) been appointed to monitor and/or implement have been implemented. However, the Commission may at any time require the reappointment of the Monitoring Trustee if it subsequently appears that the relevant Commitments might not have been fully and properly implemented.

Section F. The Review Clause

38. The Commission may, where appropriate, in response to a request from Deutsche Bahn showing good cause and accompanied by a report from the Monitoring Trustee:

- (i) grant an extension of the time periods foreseen in the Commitments, or
- (ii) waive, modify or substitute, in exceptional circumstances, one or more of the undertakings in these Commitments.

Where Deutsche Bahn seeks an extension of a time period, it shall submit a request to the Commission no later than one month before the expiry of that period, showing good cause. Only in exceptional circumstances shall Deutsche Bahn be entitled to request an extension within the last month of any period.

.....
Dr. Frank Montag

.....
Dr. Thomas W. Wessely

duly authorised for and on behalf of Deutsche Bahn AG

SCHEDULE 1

Companies comprising the Arriva Deutschland Group

The Arriva Deutschland Group comprises Arriva Deutschland GmbH and the following companies:

Railway sector

Company	Arriva Deutschland ownership	Registered office	Rail related operations and locations for provision of services
Arriva Bachstein GmbH	[...]	[...]	Holding company for Ostthannoversche Eisenbahn AG (OHE)
Ostthannoversche Eisenbahn AG (OHE)	[...]	[...]	Rail freight (block trains services throughout Germany; wagon load services in Lower Saxony in cooperation with DB) Rolling stock maintenance (in Uelzen, Celle and Bleckede) Infrastructure
metronom Eisenbahngesellschaft mbH	[...]	[...]	Rail passenger transport
Ostthannoversche Umschlagsgesellschaft mbH (OHU)	[...]	[...]	Freight terminal services in Wittingen port
Uelzener Hafenbetriebs- und Umschlags GmbH (UHU)	[...]	[...]	Freight terminal services in Uelzen port
Unikai Hafenbetrieb Lüneburg GmbH	[...]	[...]	Freight terminal services in Lüneburg port
Kraftverkehr Ostthannover GmbH (KOG)	[...]	[...]	Freight forwarding and logistics
KOG Südwest Verwaltungs-GmbH	[...]	[...]	None. Former general partner in KOG Südwest GmbH & Co. KG (which has been liquidated)

Company	Arriva Deutschland ownership	Registered office	Rail related operations and locations for provision of services
NOVOLOG GmbH	[...]	[...]	None. Its former road freight services ceased in April 2010
SEMA Servicemanufaktur für den Schienenverkehr AG	[...]	[...]	Rolling stock maintenance
NiedersachsenBahn Verwaltungs-GmbH	[...]	[...]	No market activities
NiedersachsenBahn GmbH & Co KG	[...]	[...]	Holding company for metronom
Norddeutsche Bahngesellschaft mbH	[...]	[...]	No market activities
Hafen Lüneburg GmbH	[...]	[...]	Harbour infrastructure activities
MegaHub Lehrte Betreibergesellschaft mbH	[...]	[...]	No market activities but being used to develop a terminal in Lehrte
Prignitzer Eisenbahn GmbH	[...]	[...]	Rail passenger transport Railway infrastructure Rolling stock maintenance
P.E. Arriva AG	[...]	[...]	Holding company for Prignitzer Eisenbahn GmbH
PE Cargo GmbH	[...]	[...]	No market activities
Ostdeutsche Eisenbahn GmbH (ODEG)	[...]	[...]	Rail passenger transport
Ostdeutsche Instandhaltungsgesellschaft mbH (ODIG)	[...]	[...]	Rolling stock maintenance
Arriva Werke Nord GmbH	[...]	[...]	Rolling stock maintenance
Schieneninfrastrukturgesellschaft Prignitz mbH	[...]	[...]	Cargo transfers in Prignitz area (de minimis activity)
Prignitzer Lokomotiv- und Waggonbau GmbH	[...]	[...]	No market activity
Walser Eisenbahngesellschaft mbH	[...]	[...]	Shunting activities in Austria (no activities in

Company	Arriva Deutschland ownership	Registered office	Rail related operations and locations for provision of services
			Germany)
Regentalbahn AG	[...]	[...]	Railway infrastructure
Regental Bahnbetriebs GmbH	[...]	[...]	Regional passenger transport
Regental Fahrzeugwerkstätten GmbH	[...]	[...]	Rolling stock maintenance
Vogtlandbahn GmbH	[...]	[...]	Rail passenger transport
Dreiländerbahn GmbH	[...]	[...]	Rail passenger transport
Berchtesgadener Land Bahn GmbH	[...]	[...]	Rail passenger transport

Bus sector

Company	Arriva Deutschland ownership	Registered place of business	Bus operations and locations for provision of services
Verkehrsbetriebe Osthannover GmbH (VOG)	[...]	[...]	Regional bus services in the north-east of Lower Saxony
KVG Stade GmbH & Co KG	[...]	[...]	Urban and regional bus services in the north of Lower Saxony
KVG Stade Verwaltungs-GmbH	[...]	[...]	No activities – general partner of KVG Stade KG
KVG Lüneburg GmbH (KVG)	[...]	[...]	Urban and regional bus services in the north of Lower Saxony
Osthannoversche Eisenbahnen AG (OHE)	[...]	[...]	Urban and regional bus services in the Gifhorn area in eastern Lower-Saxony
Kraftverkehr Celle Stadt und Land GmbH (KVC)	[...]	[...]	Urban and regional bus services in the Celle area in central lower Saxony
Celler Straßenbahn GmbH	[...]	[...]	Urban and regional bus services in the Celle area in Eastern Lower Saxony
CeBus GmbH & Co. KG	[...]	[...]	Urban and regional bus services in the Celle area in Eastern Lower Saxony
CeBus Verwaltungs-GmbH	[...]	[...]	No activities – general partner of CeBus KG
Verkehrsgesellschaft Landkreis Gifhorn mbH (VLG)	[...]	[...]	Urban and regional bus services in the Gifhorn area in eastern Lower-Saxony
KVB Kraftverkehrsbetriebe GmbH	[...]	[...]	Urban and regional bus services in the Gifhorn area in eastern Lower-Saxony
GVB GmbH	[...]	[...]	Sub-contracted services for VLG in the Gifhorn area in eastern Lower Saxony
Autobus Sippel GmbH	[...]	[...]	Bus services throughout the Rhein-Main area

Company	Arriva Deutschland ownership	Registered place of business	Bus operations and locations for provision of services
			Coach hire in Nürnberg
ACS Bus- und TruckCenter GmbH	[...]	[...]	Operation of workshops
Rhein-Main Bus GmbH	[...]	[...]	Bus services throughout the Rhein-Main area
Autobus Papproth GmbH	[...]	[...]	Bus services throughout the Rhein-Main area
Autobus Dreschmeier GmbH (in liquidation)	[...]	[...]	None – in liquidation
Sippel Travel GmbH	[...]	[...]	Coach hire
Sippel-Coach GmbH	[...]	[...]	Travel business
Neißeverkehr GmbH	[...]	[...]	Bus services in south-east Brandenburg
Südbrandenburger Nahverkehrs GmbH	[...]	[...]	Regional bus services in south Brandenburg
Verkehrsbetriebe Bils GmbH	[...]	[...]	Urban and regional bus services in the Münsterland region of North Rhine-Westphalia, coach hires
EVG Euregio Verkehrsgesellschaft mbH & Co. KG	[...]	[...]	Urban and regional bus services transport in the Münsterland region of North Rhine Westphalia
EVG Euregio – Verwaltungs- und Beteiligungs-GmbH	[...]	[...]	None – general partner of EVG KG
B. B. Reisen GmbH	[...]	[...]	Urban passenger transport in Neustrelitz (Mecklenburg Western-Pomerania)
B. B. Touristik GmbH (dormant company)	[...]	[...]	No current business, formerly coach hire and travel agencies in Mecklenburg Western-Pomerania

SCHEDULE 2

The Divestment Business

Part A – legal and functional structure

Legal structure

1. The Divestment Business comprises:
 - (a) the Arriva Deutschland Group (as described in **Schedule 1**);
 - (b) Arriva Grundstücksgesellschaft mbH; and
 - (c) the Assigned Contracts (see **Part B** below).
2. Arriva Deutschland has its registered office at Bahnhofplatz 1, D-94234 Viechtach, Germany and its principal place of business at Märkisches Ufer 34, D-10179 Berlin, Germany.
3. The current shareholders of Arriva Deutschland (each an indirect wholly owned subsidiary of Arriva) are:
 - (a) Arriva Coöperatie WA ([...]);
 - (b) Arriva International (Northern Europe) Limited ([...]); and
 - (c) Arriva International (Southern Europe) Limited ([...]).
4. Arriva Grundstück has its registered office at and its principal place of business at Märkisches Ufer 34, D-10179 Berlin, Germany.
5. Arriva Grundstück is a wholly-owned subsidiary of Arriva International Limited, a direct wholly-owned subsidiary of Arriva plc.
6. The Divestment Business does not include WBL GmbH, a direct 100% subsidiary of Arriva Deutschland. WBL GmbH has its registered office at and its principal place of business at Märkisches Ufer 34, D-10179 Berlin, Germany. [...] The ownership of WBL GmbH will be transferred to another Arriva group company before Closing.

Functional structure

7. Arriva Deutschland and its subsidiaries operate all essential functions of business. Arriva Deutschland Group is segmented into four regional business units, for Northern, Southern, Eastern and Western Germany. Each regional business unit has both rail and bus operations, except the South which has rail activities only. [...].

8. Each region has a director with the responsibility for operational performance, financial delivery and the management of client bodies (*Aufgabenträger*) and regional stakeholders.
9. Within each region, different operating companies conduct the business of Arriva Deutschland. Arriva Deutschland owns, directly or indirectly, 100% of the major subsidiary companies, except in the North Region (OHE business) and the East Region (ODEG business).

Region North

10. Arriva Deutschland Group's North region comprises the business of OHE (and its subsidiaries and joint ventures). It is managed from Celle.
11. OHE (and its subsidiaries and joint ventures) are active in the following business sectors:
 - (a) regional passenger rail services (metronom);
 - (b) bus services (KVG Stade, KVG Lüneburg, VOG Lüneburg, VLG Gifhorn, CeBus Celle);
 - (c) cargo services (by road and rail) and related activities;
 - (d) the operation of railway infrastructure;
 - (e) the operation of railway maintenance workshops and depots (Celle, Bleckede and Uelzen);
 - (f) the operation of bus depots (Stade, Buxtehude, Cuxhaven, Lüneburg, Hitfeld, Celle, Faßberg and Gifhorn); and
 - (g) harbour and freight terminal activities (Lüneburg, Wittingen and Uelzen).

Region South

12. Arriva Deutschland Group's South region is based upon Regentalbahn AG. It includes Arriva Deutschland's [...] joint venture with Salzburg AG (Berchtesgadener LandBahn).
13. Regentalbahn is managed from Viechtach and is only active in the rail business. with the following activities:
 - (a) passenger rail transport: through RBG (under the brands Waldbahn and Oberpfalzbahn), VBG (with the brands alex, VEX and trilex) and BLB;
 - (b) rail engineering; and

(c) rail infrastructure.

14. Arriva Deutschland Group operates workshops in the Region South in Neumark, Schwandorf, Viechtach and Salzburg (the latter being owned by its joint venture partner, Salzburg AG).

Region East

15. Arriva Deutschland Group's East region comprises PE Arriva, PEG, AWN, BB Reisen, Neißeverkehr, SBN and ODEG ([...] joint venture with BeNex GmbH). The regional management is based in Berlin.
16. Arriva Deutschland Group's activities in the East region comprise:
- (a) passenger rail services;
 - (b) rail engineering;
 - (c) bus services; and
 - (d) operation of rail infrastructure.
17. In addition, the East region undertakes some management and administration activities with regard to Arriva Deutschland Group's rail activities in the West region, which are operated by PEG. Furthermore, Arriva Deutschland Group operates workshops at Neustrelitz, Meyenburg, Eberswalde, Parchim and Görlitz in the region East.

Region West

18. Arriva Deutschland Group's West region comprises Autobus Sippel, Bils and PEG Rail (West).
19. The region's bus business is managed from Hofheim-Wallau whilst the rail business is partially managed from the region East.
20. Arriva Deutschland Group's activities in the West region comprise both rail and bus operations. A rail workshop is located in Mülheim. Bus depots are located in Hofheim-Wallau, Mainz-Kastel, Kelsterbach and Frankfurt-Rebstock, Nürnberg (Erlangen), Albersdorf and Ahlen.

Part B – Assets, Excluded Assets, Assigned Contracts and Personnel

21. Following paragraph 4 of these Commitments, the Divestment Business includes all assets, tangible and intangible, currently owned or used by the Arriva Deutschland Group (other than the Excluded Assets), but is not limited to, the tangible and intangible assets, personnel and contracts identified below.

Tangible assets

22. The Divestment Business includes all tangible assets owned or used by the Arriva Deutschland Group in relation to its railway business, including the following:
- (a) [...] locomotives for passenger trains, thereof [...] in Region North and [...] in Region South;
 - (b) [...] cargo locomotives in Region North;
 - (c) [...] double deck passenger coaches [...];
 - (d) [...] passenger rail cars, thereof [...] in Region South, [...] in Region East and [...] in Region West;
 - (e) [...] passenger coaches (Region South);
 - (f) workshops in Celle, Uelzen and Bleckede (all Region North); Mühlheim (Region West); Neumark, Schwandorf, Viechtach (all Region South); Neustrelitz, Meyenburg, Eberswalde, Parchim and Görlitz (all Region East);
 - (g) 546 km of railway infrastructure in Germany;
 - (h) all train stations operated by the Arriva Deutschland Group, whether owned, rented or leased, in particular Pritzwalk Hainholz, Falkenhagen Gewerbepark Prignitz, Brügge, Meyenburg, Wendisch Priborn, Ganzlin, Silbermühle, Plau am See, Plau-Quetzin [...], Weitendorf, Sternberg, Dabel, Krakow am See, Klein Grabow, Hoopenrade, Klueß [...], Pritzwalk, Kuhbier, Groß Langerwisch, Jakobsdorf, Laaske, Putlitz Süd, Putlitz [...];
 - (i) three inland port terminals along the *Elbeseitenkanal* in the ports of Lüneburg, Wittingen and Uelzen.
23. The Divestment Business includes all tangible assets owned or used by the Arriva Deutschland Group in relation to its bus business, including the following:
- (a) [...] buses, thereof [...] in Region North, [...] in Region East and [...] in Region West;
 - (b) all bus depots including all workshops, in particular Neustrelitz, Hofheim-Wallau, Kelsterbach, Mainz-Kastel, Albersloh, Ahlen, Großräschen, Stade, Buxtehude, Cuxhaven, Hitfeld, Lüneburg, Soltau, Winsen, Celle, Faßberg, Gifhorn (owned by VLG Gifhorn [...]), Guben, Forst, Spremberg, Calau, Großkmelen, Lauchhammer, Lübbenau, Senftenberg;

Intangible Assets

24. The Divestment Business includes the following intangible assets:

- (a) the brand names used by the businesses of the Arriva Deutschland Group for certain passenger and/or freight rail services, including *vogtland express*, *VEX*, *ALEX*, *trilex*, *Oberpfalzbahn*, *Waldbahn*, *PEG* and *OHE*;
- (b) the brand names used by the businesses of the Arriva Deutschland Group for certain bus services, which correspond to the name of the company holding relevant concession or contract;
- (c) certain domain names used by the Divestment Business;
- (d) a limited licence permitting the use, for a transitional, “running down” period not to exceed [...] from Closing of the ARRIVA name, trade mark, brand or logo on vehicles and rolling stock owned or used by the Arriva Deutschland Group as at the date of Closing (upon request of the Purchaser, based on good business reasons, and upon confirmation of the Monitoring Trustee, the running-down period can be extended to [...]);
- (e) the right to retain, for a transitional period until its next scheduled repaint, on any vehicle owned or used by the Arriva Deutschland Group as at the date of Closing the ARRIVA corporate livery.

Excluded Assets

25. The Divestment Business shall not include the following Excluded Assets:

- (a) WBL GmbH (see paragraph 6, above);
- (b) the right to use (other than for the transitional, “running down” period referred to in paragraph 24(d), above) the ARRIVA name, trade mark, brand or logo;
- (c) the right to use (other than as permitted by paragraph 24(e), above) the ARRIVA corporate livery on any vehicle.

Licences, concessions, contracts, etc.

26. The Divestment Business includes all licences, concessions, permits, authorisations awarded to or held by the Arriva Deutschland Group, including the following:

- (a) all licences awarded pursuant to § 6 AEG;
- (b) all concessions for providing passenger transport services by bus on specific routes:
 - [...];

- [...];
 - [...];
 - [...];
 - [...];
 - [...];
 - [...];
- (c) safety certificates and operating licences to provide passenger and freight transport services by rail in Germany.

Contracts and Assigned Contracts

27. The Divestment Business includes the following Assigned Contract: Train Purchase Agreement dated December 2009 between (1) [...] (an indirect wholly-owned subsidiary of Arriva plc) and (2) [...] for the supply of [...] diesel multiple units and [...] electric multiple units for use on [...], to be delivered in [...]. The purchaser will be required to reimburse [...] for the advance payments made under Train Purchase Agreement.
28. The Divestment Business includes all contracts, agreements, leases, commitments and understandings, including all contracts for the operation of bus and/or rail services, to which the Arriva Deutschland Group is a party, including the following:
- (a) all contracts between Arriva Deutschland (or its subsidiaries and joint ventures) and different client bodies (*Aufgabenträger*) regarding regional passenger transport services by rail, including the following:
- [...];
 - [...];
 - [...];
 - [...];
 - [...];
 - [...];
 - [...];
 - [...];
 - [...];
 - [...];

- [...];
- [...];
- [...];
- [...];
- [...];
- [...]
- [...];
- [...]
- [...].

(b) all contracts/agreements between Arriva Deutschland and different client bodies (*Aufgabenträger*) and sub-contracts with the holders of concessions regarding regional passenger transport services by bus, including the following:

- [...];
- [...];
- [...];
- [...];
- [...];
- [...];
- [...]
- [...].

(c) all customer, credit and other records concerning:

- all customers of the regional passenger transport business by rail, including [...].
- all customers of the rail freight business, of which the following are the principal customers: [...].
- all customers of the bus business including:
 - the following *Aufgabenträger*: [...].

- the following concession holders, regarding sub-contracted services: [...].
- all customers of the freight terminal business, of whom the principal customers are (at Uelzen) [...], (at Wittingen) [...] and (at Lüneburg) [...].
- all customers in the infrastructure business, including: [...] and [...].

Personnel and Key Personnel

29. The Divestment Business includes all employees employed by the Arriva Deutschland Group (other than the personnel identified in paragraph 32 below), who comprise the Personnel. As at 31 December 2009 (the most recent date for which data are available), the Divestment Business had [...] ([...] full time equivalents), allocated as set out below:

[...]

30. The Divestment Business includes the following Key Personnel:

- [...]
- [...]
- [...] ¹²⁴
- [...]
- [...]
- [...]
- [...]
- [...]
- [...]

31. The Divestment Business has no seconded or shared Personnel.

32. [...]

[...]

¹²⁴ [...].