

***Case No COMP/M.4746 -
DEUTSCHE BAHN /
ENGLISH WELSH &
SCOTTISH RAILWAY
HOLDINGS (EWS)***

Only the English text is available and authentic.

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

Article 6(1)b in conjunction with Article 6(2)
Date: 06/11/2007

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COMMISSION OF THE EUROPEAN COMMUNITIES

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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 Where possible the information omitted has been replaced by ranges of figures or a general description.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.4746 – DEUTSCHE BAHN / ENGLISH WELSH & SCOTTISH RAILWAY HOLDINGS (EWS)
Notification of 14 September 2007 pursuant to Article 4 of Council Regulation No 139/2004**

1. On 14 September 2007, the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EC) No 139/2004¹ by which the undertaking Deutsche Bahn AG ("DB", Germany) acquires within the meaning of Article 3(1)(b) of the Council Regulation sole control of the whole of English Welsh & Scottish Railway Holdings Limited ("EWS", United Kingdom) by way of purchase of shares.
2. On 12 October 2007, the notifying party submitted undertakings, which following the result of the investigation and market testing of the first remedies, were refined on [date]. The proposed commitments were designed to eliminate the serious doubts identified by the Commission, in accordance with Article 6(2) of Council Regulation (EEC) No 139/2004. After examination of the notification and in the light of these undertakings, the Commission has concluded that the operation falls within the scope of the Merger Regulation and does not raise serious doubts as to its compatibility with the common market and the EEA agreement.

¹ OJ L 24, 29.1.2004 p. 1

I. THE PARTIES

3. DB is the state-owned German-based railway company engaged in, *inter alia*, rail passenger and freight transport (through its subsidiary "Railion") in Germany, Italy, The Netherlands and Denmark, and freight forwarding (by all modes of transport), logistics and ancillary services worldwide (through its subsidiary "Schenker").
4. EWS is the successor of the freight business of the former UK national rail monopoly. It is active in rail freight transport and related services in the UK and recently in France. EWS is currently a private limited company with more than [...] shareholders with a few principal shareholders, most of which are private equity holders holding [90-100]%

II. CONCENTRATION AND COMMUNITY DIMENSION

5. The proposed transaction concerns the acquisition of sole control of EWS by DB and will be effected by a share purchase agreement for all of the shares.
6. The transaction has a Community dimension pursuant to Article 1(2) of the Merger Regulation. The parties have a combined aggregate worldwide turnover in excess of € 5,000 million (DB € 30,053 million, EWS € [...]million), and at least two have a Community-wide turnover in excess of € 250 million (DB € [...]million, EWS € [...]million). DB achieves more than two thirds of its Community-wide turnover in Germany [...].

III. RELEVANT MARKETS

7. The proposed transaction affects rail freight services in the United Kingdom, Germany and France.

A. RELEVANT PRODUCT MARKETS

Market definitions as proposed by the notifying party

8. The notifying party (DB) submits three alternative product market definitions while considering that only the first alternative reflects market reality and should therefore be taken as a basis for the assessment of the present transaction:
 - (a) an **overall market for freight forwarding and logistics** (including transport by all modes i.e. land (including rail, road, inland waterways and pipelines), sea and air which would have to be further subdivided into **national** (i.e. domestic) and **international** (i.e. to/from a foreign destination) services;²
 - (b) a **market for freight forwarding** (including transport by all modes) which would have to be further subdivided according to the **type and volume of the transported goods**. Due to difficulties to provide reliable data, for the further

² For the definition of freight forwarding DB refers to previous Commission decisions, according to which "Freight forwarding can be defined as the organisation of transportation of items (possibly including ancillary activities such as customs clearance, warehousing, ground services etc.) on behalf of customers according to their needs."; Case COMP/M.1794 *Deutsche Post/AEI*; COMP/M. 4045 *Deutsche Bahn / BAX Global*.

subdivision DB however bases itself on a study on logistic services “Die Top 100 der Logistik” (2006) by Deutscher Verkehrs-Verlag which reflects the overall logistics market (including national and international services, all modes of transport, not only a segmentation according to the type and volume of goods).³ It is therefore not fully consistent with the proposed market definition.

- (c) a **market for rail cargo services** comprising only rail haulage and its organisation which may be subdivided into national and international (i.e. to/from foreign destination) services. Such a market delineation is considered as the smallest possible segmentation.
9. The notifying party however acknowledges that in relation to rail a further distinction can be drawn between block-trains and single wagon trains. Block trains (or full wagon trains) are entire trains belonging to the same customer and running from a single point of origin to a single point of destination. Single wagon trains are assembled of wagons of different customers in a marshalling yard in the region of origin (or arrival of other single wagon trains). From there they are transported to a marshalling yard in the region of destination and disassembled into single wagon loads for transport to their final destination. According to DB the provision of single wagon services requires a more complex organisational structure than the provision of block train services. It in principle requires a large rail network to allow for the efficient assembly and distribution of the individual wagons. According to the notifying party, a further differentiation would be possible in relation to the type of wagon used, i.e. between containerised traffic (containers or equivalent) and conventional wagons.

Previous Commission Decisions

10. The Commission has in previous decisions concluded that providers of freight forwarding services and of transport of goods do not directly compete with each other but that freight forwarding providers offer a service to customers which is often sub-contracted to the transport carrier.⁴ Within freight forwarding services the Commission has distinguished between domestic and international services and freight forwarding by air, land and sea.
11. The Commission has further found that not all modes of transport can be considered as generally substitutable in view of the geographic situation of the customer as well as the specific characteristics of the goods to be transported.⁵ The market investigations in these cases indicated that a distinct market for the transport of goods through rail can be

³ According to the study the overall logistics market can be subdivided into the following segments: 1 – national bulk logistics; 2: national direct-load cargo (non-specialised); 3: heavy goods haulage and plant services; 4: national tank container and silo transport; 5: other national direct-load cargo using specialised equipment; 6: general less-than-truck-load (LTL) cargo; 7: distribution of consumer goods and contract logistics of consumer goods; 8: industrial contract logistics; 9: hanging garments logistics; 10: high-tech goods, trade fair logistics, new furniture and moving transport; 11: terminal services, non-integrated warehousing, transshipment and other additional logistical services; 12: courier, express and parcel services; 13: cross-border transport and forwarding (land-based); 14: cross-border transport and forwarding (water-based); 15: cross-border transport and forwarding (air).

⁴ Case No. COMP/M.2905 *Deutsche Bahn/Stinnes*.

⁵ Case No. COMP/M.4294, *Arcelor/SNCF/CFL Cargo*; Case No. COMP/M.3150 *SNCF/Trenitalia*.

distinguished, but the Commission did not take a final position.⁶ As to a further subdivision of rail freight services the Commission has not excluded a subdivision according to the transported goods but has left it open in the end.⁷

Result of the market investigation

- Transport versus freight forwarding

12. The market investigation has clearly confirmed the Commission's previous findings that transport and freight forwarding are not being considered as substitutes but as separate product markets by customers and competitors and that transport may be regarded as an input for freight forwarding. While respondents defined transport as the physical movement of goods by using own (i.e. owned or leased) equipment including ancillary services to this end, freight forwarding is seen as the complex organisation of transport for the specific demand of a customer, possibly including all kinds of additional services up to the organisation of a whole logistics chain. In view of this it can be concluded that the first two market definitions proposed by the notifying party including both, transport and freight forwarding, would be too wide and would not reflect market reality.

- Different modes of transport

13. With regard to a further subdivision of the market for transport of goods according to the different means of transport (air, sea, land; within land: rail, road, barge, pipeline) the market investigation showed that this division cannot be drawn for all possible circumstances but has to be assessed case-by-case.
14. On the one hand, the vast majority of customers consider these markets (in particular air and sea) as separate in view of their different characteristics and the notifying party itself acknowledges that the different modes of transport have different characteristics in relation to prices and cost structures, timing and geographic availability. Whether goods are transported by air, sea, road, rail, inland waterway or pipeline appears in fact to be a complex function of many variables, depending on the customer's location, the type of good (weight, size, value, other qualities), the quantities to be shipped, the destination of the goods, timing and any other requirements. There are indications that rail presents certain characteristics which may make it most suitable/economically feasible for the transport of goods under certain conditions, i.e. in particular for bulk and heavy goods (coal, iron, oil), larger amounts and longer distances and customers with rail access.
15. Notwithstanding that a majority of customers indicated that they would switch to or from rail in case of a 5-10% price increase of their current mode of transport the level of substitutability would depend on a combination of the factors mentioned above

⁶ Case No. COMP/M.3971 *Deutsche Post/Exel*. In this decision the Commission has also taken the view that contract logistic services which may be defined as "*the part of the supply chain process that plans, implements and controls the efficient, effective flow and storage of goods, services and related information from the point of origin to the point of consumption in order to the customer's requirements*" are separate from freight forwarding.

⁷ In Case No. COMP/M.2905 *Deutsche Bahn/Stinnes* participants to the market investigation considered that the categories of the "Top 100" study as a possible but not the only meaningful subdivision of the logistics market.

including the suitability of other modes (like barge or pipeline) and the availability for the individual customer (e.g. access to inland waterway or short sea shipment).

16. Moreover, the substitutability between rail and other modes of transport may be only seemingly where rail freight services are overpriced in view of market power on a certain geographic market. The fact that most customers consider the different modes of transport as separate markets while they are at the same time prepared to switch to and from rail in case of a 5-10% price increase of their current mode of transport may indicate that the service provided by another rail company is a closer substitute than other modes like road transport services.
17. In view of the above and in line with previous Commission decisions, there are strong indications that, depending on the geographic and other circumstances, a separate market for rail freight services may be distinguished.

Further subdivision of rail freight services

- National versus international rail freight

18. The market investigation has further provided strong indications that at least for rail there are separate product markets for domestic (national) and cross-border (international) services. While there are generally rather homogenous market conditions within a certain Member State, international rail services are still mainly provided by cooperating with other rail companies for on-transport beyond national borders in a complex legal and practical framework for in – and outgoing traffic. The supply side possibilities for rail operators therefore depend on their licenses, safety certificates and trained staff for the Member States concerned. Operators who would like to offer "seamless" services into another Member State need to comply with the regulatory and technical requirements of both. However, for the purposes of the this case, it can be left open whether domestic and cross-border services can be considered as separate sub-markets as the distinction would not influence the assessment on any of the alternative relevant markets.

- Single wagon services versus block train services

19. As for a further subdivision of rail freight services, the market investigation has indicated that single wagon services require different production capabilities than block trains. While block train services are simple point-to-point connections which can easily be provided by new entrants, only the incumbents (former national monopolists) are able to run a comprehensive i.e. nationwide single-wagon system. Only with regard to certain industrialized areas, it appears to be possible for new entrants to offer limited single wagon services. The market investigation has also shown that competitors expect block train services to grow but single wagon services to decline.
20. Moreover, there appear to be differences from the demand perspective as the level of substitutability between rail and other modes of transport depends inter alia on the amount of goods to be sent (i.e. whether it would amount to a full block train or single wagons only). Whereas for smaller consignments there appears to be higher substitutability between rail and road, the larger amounts transported by block trains seem to be more likely to be substitutable by barge if available. For containers there appears to be higher substitution between different modes of transport as containers

can more easily and economically be moved between ships, trains and trucks, which is likely to have an impact on the possibilities of last mile distribution.

21. However, for the purposes of this case, it can be left open whether block trains and single wagon trains can be considered as separate sub-markets of rail freight as this distinction would not influence the assessment on the individual alternative markets concerned.
22. The market investigation has also shown that the way in which a good can be transported, i.e. by container or 'conventional' wagons, is one of the factors which have an influence on the complex assessment of the substitutability with other modes.⁸ Although some competitors and some routes seem to specialize on container transport (depending on the available terminals), it would however not seem necessary to draw a further subdivision of rail freight services as most rail operators, in particular all incumbents, can offer all kinds of wagons and both types of services.

Conclusion

23. In view of the above the relevant product market for the purposes of this case is the market for rail freight transport which may be further subdivided into domestic (national) and cross-border (international) services as well as block trains and single wagon trains. Such subdivisions can however be left open as they would not influence the final assessment on the alternative markets concerned.

B. RELEVANT GEOGRAPHIC MARKETS

24. The notifying party proposes to define the geographical market for both national and international services as national.
25. The Commission has for the geographic market definitions of rail freight services previously considered that in view of different technical and regulatory requirements the markets not only for domestic but also for international rail freight services could be national.⁹ The latest market investigation on rail freight services which tested a possible origin/destination (O&D) approach distinguishing between short-haul (basically corresponding to national transport) and long-haul (basically corresponding to international transport based on cooperation) destinations rather confirmed that markets still tend to be national.¹⁰ However, in certain situations the Commission also found that a O&D-based approach might best reflect the competitive situation.¹¹
26. The market investigation indicated that the geographic market definition might be different for the different modes of transport. While the majority of customers seem to see road transport as an EEA-wide market, the geographic market for rail is perceived as

⁸ They also have different characteristics to the *combination* with other modes. While for containers the various modes of transport (ship, truck, barge or rail) can easily be combined with each other using special terminals on both ends), for conventional wagons the holding unit stays with the train and only the goods may be transferred to another mode of transport (multimodal transport, especially used for bulk goods).

⁹ Case No. COMP/M.2905 *Deutsche Bahn/Stinnes*.

¹⁰ Case No. COMP/M.4294, *Arcelor/SNCF/CFL Cargo*.

¹¹ Case No. COMP/M.3150 *SNCF/Trenitalia* regarding the tunnel of Fréjus between France and Italy.

mainly national. While both customers and competitors confirm that the demand for transport to international destinations is increasing, they also recognise the different frameworks in the various Member States as well as the existing barriers for cross-border services.

27. National rail companies have traditionally cooperated in international rail freight on the basis of the Uniform Rules Concerning the Contract of International Carriage of Goods by Rail (the current version being "CIM 1999").¹² In accordance with these rules, trains are mainly handed over from one operator to the next at the relevant border, with the operator in the area of origin being the lead operator and contractual partner of the customer.¹³
28. The market investigation in this case has shown that there is a trend towards the development of seamless cross-border services by one operator due to the opening up of the rail freight markets in the EU ¹⁴. Such services are however only emerging as they require the compliance with the regulatory and technical framework in each Member State, which is part of the journey.
29. In addition to that, competitors have however confirmed the importance of certain major "corridors" which might be conceived as separate markets. The transport policy of the EU is aimed to develop a trans-European transport network (TEN) for international freight transport to unblock major transport routes.¹⁵ According to some competitors the present transaction mainly concerns the major North-South corridor(s) from the Belgian/Dutch/German ports to North Italy.
30. As to this North-South direction, from a demand side perspective one could argue that a particular route would not be directly substitutable to another, however the choice of a harbour for incoming traffic to Europe is also part of an overall transport solution from the point of origin to the point of destination of the transported good. On the one hand different ports can serve as point of entry into continental Europe (e.g. Antwerp might be an alternative for Rotterdam), on the other hand different routes can be used between the same origin and destination (e.g. goods from Rotterdam can go through Germany and Switzerland, through Germany and Austria or through Belgium, France and Switzerland or even through Belgium and France). The hypothetical North-South *corridor(s)* may include these alternative points of origin and alternative *routes*.
31. In addition, in spite of the economic importance of certain corridors it seems questionable whether those reflect market reality in view of the fact that these corridors serve as a kind of 'highway', with multiple 'stops' on the way. Moreover, a corridor

¹² Appendix B to the Convention concerning International Carriage by Rail (COTIF) of 9 May 1980 as amended.

¹³ Whether other operators taking over for transport through other Member States become part of that contract or are merely being subcontracted is a matter of choice between the operators involved.

¹⁴ Directive 2001/12/EC of the European Parliament and of the Council of 26 February 2001 amending Council Directive 91/440/EEC on the development of the Community's railways; Directive 2001/13/EC of the European Parliament and of the Council of 26 February 2001 amending Council Directive 95/18/EC on the licensing of railway undertakings; Directive 2001/14/EC of the European Parliament and of the Council of 26 February 2001 on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification. For further information see http://ec.europa.eu/transport/rail/overview/infrastructure_en.htm.

¹⁵ http://ec.europa.eu/ten/transport/projects/doc/2005_ten_t_en.pdf

approach appears to be more appropriate in case of seamless services, which are only emerging on the main corridors.

Conclusion

32. Taking into account the existing technical, procedural barriers (e.g. lack of interoperability, homologation requirements for locomotives, national safety certificates) and the need for specially trained staff (with language skills and licences) to provide cross-border services, the relevant geographic market for rail freight transport seems to be national with the possibility of becoming larger than national in particular on certain international routes being part of a corridor or having special characteristics due to the market liberalization and the removal of barriers.

V. COMPETITIVE ASSESSMENT

33. The proposed transaction does not lead to any geographical overlap in the parties actual activities on any of the national rail freight markets. While EWS is currently active only in the UK and France, DB is active in several Member States including Germany, The Netherlands, Denmark, Switzerland and Italy, but not in the UK and France. DB provides cross-border rail freight services to the UK and France by cooperating with EWS, SNCF and SNCB for the UK and SNCF for France.
34. In view of the foregoing considerations on alternative market definitions the assessment will focus on i) a potential lessening of competition in domestic and cross-border rail freight markets in France; ii) the elimination of potential competition in domestic and cross-border rail freight transport within the UK and Germany iii) the elimination of potential competition and possible foreclosure of single wagon services in the UK relating to cross-border rail freight transport on the route between Germany and the UK; iv) the elimination of potential competition on North-South corridors; and v) a possible foreclosure of single wagon services in the UK relating to cross-border traffic on certain routes from countries (other than Germany) where DB is active to the UK.

A. BACKGROUND ON RAIL FREIGHT IN THE EEA

35. The EEA rail freight market was fully liberalised on 1 January 2007.¹⁶ According to DB there is a potentially large market for cross-border rail traffic in Europe. Today approximately 400 billion ton kilometres of freight with a market value of around EUR 19 billion are transported by rail. Around 44 % of freight traffic is currently cross-border.¹⁷ The market is expected to grow by around 1% per year.¹⁸

¹⁶ Directive 2001/12/EC of the European Parliament and of the Council of 26 February 2001 amending Council Directive 91/440/EEC on the development of the Community's railways; Directive 2001/13/EC of the European Parliament and of the Council of 26 February 2001 amending Council Directive 95/18/EC on the licensing of railway undertakings; Directive 2001/14/EC of the European Parliament and of the Council of 26 February 2001 on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification. For further information see http://ec.europa.eu/transport/rail/overview/infrastructure_en.htm. See also "SERVRAIL Study-Assessment of present and likely future conditions of providing rail-related services", Final report of December 2006, prepared by Steer/Davies/Gleave for DG TREN, http://ec.europa.eu/transport/rail/studies/doc/servrail_final_report.pdf.

¹⁷ DB estimates.

36. A common feature in the national rail freight segments in the EEA is the existence of former state owned monopolist operators whose market share in their respective home markets faced or beginning to face (depending on the country) increasing competition as a result of the requirement in the EC Liberalisation Directives that member states offer “open access” to their rail networks. This has led to increasing competition not only through the creation of new entrants but also through the diversification of operators active in other areas of the domestic rail sector and through outsourcing of existing in-house railways.
37. However, while liberalization has provided room for both new entrants and incumbents present in other member states to compete with each other, the former incumbents still tend to have high market shares and possibly dominant positions in their home countries. This seems mainly be due to the fact that in spite of the ongoing liberalization process barriers to entry continue to be high. Large investments are required to start operations even in the block train market (rolling stock, training, marshalling tracks etc.). New entrants usually start in a restricted geographic area, serving a small number of big customers. The creation and maintenance of a single wagon system requires a huge one-off investment (renting one single track in a marshalling yard incurs costs of more than EUR 10 million per year¹⁹), which can – if at all – only be refinanced by a new entrant if the entrant has a significant volume of national and international single wagon freight cargo.

B. ASSESSMENT

1. FRANCE

38. The market investigation has raised concerns that the proposed transaction may result in a significant impediment of effective competition in both cross-border and domestic services in France, if it would eliminate or weaken EWS as a new entrant that would exert an important competitive constraint on SNCF in France in the future.²⁰
39. The French rail freight sector is still the third largest in the EU-27 group of countries (behind Germany and Poland). In addition to being a large domestic market, France also acts as a key origin, destination and transit point for international flows moving to and from other key European markets, such as Germany, Spain, Italy and Belgium.
40. Although the French rail freight market became fully liberalised in April 2006 the market investigation has shown that barriers to entry remain high (in view of a lengthy regulatory approval process for obtaining a safety certificate and access rights as well as licences for wagons, a difficult access to bottleneck facilities that are controlled by SNCF (like maintenance facilities for locomotives) and a shortage of drivers and (second-hand) locomotives certified for the French market.

18

http://ec.europa.eu/dgs/energy_transport/figures/trends_2030_update_2005/energy_transport_trends_2030_update_2005_en.pdf. See also Servrail report, Fn. 24.

19 DB's estimate.

20 The Commission has in previous cases found that it is possible to consider a proposed merger could lead to the strengthening of a dominant position of a third party; See Cases COMP/M.1383 *Exxon/Mobil* and M.2434 *Grupo Vilar*.

41. The incumbent rail operator SNCF is the dominant provider of all kinds of rail freight services in France with (according to own estimates) an overall market share of around 97%²¹. SNCF is the only provider of comprehensive (nationwide) single wagon services in France.
42. The main new entrants in the French domestic and cross border rail freight markets are EWS and Veolia Cargo (as subsidiary of Veolia Environnement). Both have entered the market with block train services serving industrial customers and account together for a market share of less than 5%. DB is not active in France. Potential entrants according to EWS are Europorte 2 (inactive) and SNCB (certificate approved).
43. EWS (through its French subsidiary ECR) provides domestic and cross-border rail freight transport in France [...] to customers [...], and has a direct link to the UK through the Channel Tunnel. It has obtained a rail safety certification covering [...] of the French rail network and has currently a rolling stock of [40-50] locomotives. While EWS is currently small with a turnover of around EUR [...] million (August 06 – July 07) and an estimated market share of less than [5]%. It has a very ambitious expansion plan and expects to be able to achieve a "rail market share" of [...]% in the medium term.
44. As regards the French domestic market, EWS claims that they have seen a strong demand for their services. In this regard, EWS has a preliminary order book of € [...] million [...] from around [...] customers, [...]. To be able to meet expected demand EWS have [...] locomotives on order ([...]which are intended for France only) for phased in delivery until end 2009. In order to run the trains it has plans to have more than [...]French drivers by end 2008 (with further [...]drivers in training at the time).
45. The strategy of EWS – as also reflected in their current order book [...] Internal EWS documents²² suggest that its expansion plans focus on France and [...] neighbouring countries [...]. As such, EWS has ordered a number of locomotives that will be compatible for cross-border services in [...].
46. According to DB and supported by internal documents²³, the valuation of EWS conducted for the sake of this transaction is to a large extent based on the forecasted [...] revenues [...]. These forecasts are not separated by [...] rail transport activities or by any other alternative segmentation. DB argues that it based the offer made to EWS taking into account this [...].
47. In view of the financial strength of DB as well as its experience on other domestic and international rail markets in Europe, DB could *prima facie* seem well placed to strengthen the overall market position of EWS in France should it wish to do so. EWS even claims that its ability to [...]
48. A majority of customers responding to the Commission's market investigation have been positive or remained neutral as regards the impact of the proposed transaction on the French market. For those that expressed a positive view it was stated that it

²¹ SNCF press release <http://fret.sncf.com/fr/quisnous/actu/2007/presse/cp20070904.pdf>.

²² [...].

²³ Evaluation prepared by [...] for DB.

should increase competition with SNCF and that the merger would positively influence the slow liberalisation process in France.

49. However, other respondents to the market investigation raised concerns that the merger might lead to a lessening of competition if DB were to align EWS' activities in France with SNCF. The two carriers have a [...] number of co-operative agreements in both passenger transport and freight transport and virtually no direct competition on any particular route. All cross-border traffic with SNCF between Germany and France is operated by interoperable locomotives. DB estimates that about [>400] trains per week are run in both directions. In order not to provoke SNCF entry on the German market or lose cooperation with SNCF for incoming traffic to other operators, DB might consider it preferable to limit EWS's activities in France and to compete less fiercely than EWS would have absent the merger.
50. [...²⁴]. DB has also argued that one of its main reasons for not entering France on its own has been [...]. And although theoretically DB could run block trains into France without the cooperation of SNCF, it has not made any attempts to do so. [...]²⁵ [...] indications from the market investigation have [not] provided any evidence that DB ever had any plans to enter the French market on their own. Rather, DB has confirmed that it would like to expand its co-operation with SNCF for freight services between Germany and France.
51. In view of the fact that for single wagon trains SNCF and DB will continue to depend on the other party, [...] block train transport, which, according to DB accounts for about [40-60]% of the bilateral rail traffic between France and Germany.
52. In addition to the possible deterrent effect of potential competitive reactions by SNCF, DB's incentive to compete in domestic services within France is not as apparent as the incentives of EWS. While EWS [...] has clear plans for the development of a strong position in France, [...] DB would not need such an additional base in view of its activities in other Member States and its strong position in neighbouring Germany.
53. Despite the apparent ability of DB to strengthen the competitive pressure stemming from EWS in France its incentives may in fact result in the opposite: in view of the close business relationship with SNCF and the apparent lack of comparable incentives to create an overall rail freight business (including both domestic and cross border services) focusing on France, it cannot be established that DB would fulfil the business plan of EWS as aggressively as EWS itself would have done in the absence of the merger.
54. In view of the above, there are serious doubts that the proposed transaction, by removing a key competitive force in the provisions of rail freight services in France (EWS), might significantly impede effective competition in a substantial part of the common market, in particular as a result of the strengthening of SNCF's dominant position in the provision of such services in France.

²⁴ [...]

²⁵ Therefore, although DB has [15-30] locomotives equipped for operation in France, these are only intended to be used for [...].

2. Potential competition in relation to the UK and Germany

a) United Kingdom

55. As in other EU countries, the dominant freight forwarding and logistics mode in the UK is road transport. Road has a modal share (by billion tonne kilometres) of almost 65%, as compared with less than 9% for rail.²⁶ In particular for international freight, air and sea ship are naturally important modes of transport in the UK.
56. All UK rail freight services are operated on an open access basis (excluding services through the Channel Tunnel, where the open access is expected shortly).²⁷
57. The UK rail industry is considered by competitors as one of the most liberalised in the EU. This is reflected in the increased competition between four competitors, i.e. EWS (the former incumbent, active in block train, single wagon train, intermodal and multimodal services), its major competitor Freightliner (active in block trains, in particular containers for intermodal transport) as well as two smaller operators which are GB Railfreight (active in rail freight forwarding and transport) and Direct Rail Services (which evolved from being specialised on transport of used nuclear fuel to providing a wider range of freight forwarding services).
58. According to their best estimates EWS considers to have a market share of approximately [85-95]% for domestic and [20-30]% for international rail freight transport except for rail freight to Germany through the Channel Tunnel where they have [90-100]% (see below).
59. At first glance the merger may raise concerns in relation to the elimination of DB as a potential entrant for the provision of block train and single wagon services within the UK. However, despite the fact that DB is active in domestic and international services in several Member States and would in theory seem to have the necessary experience and financial strength to enter the UK it is unlikely that this would happen absent the merger due to the specific circumstances of the UK rail freight market.
60. For DB to start providing block train services in the UK (either for domestic or cross-border transport), it would have to overcome not only the usual barriers to entry but also those which are specific for the UK. The UK rail freight market which was liberalised in 1996/1997 is perceived as highly competitive.²⁸ With EWS and Freightliner there are already two strong competitors active on the market complemented by two smaller ones, each with different specialisations regarding the transported goods. Technical barriers consist mainly of the need to acquire rolling stock (locomotives and wagons), which are able to operate on the special UK rail and load gauges, as well as licences, safety certificate and staff. The additional barrier of the Channel Tunnel would make entry for DB even less attractive. In addition, there are no indications of any kind (e.g., internal documents) that would suggest that DB

²⁶ DB with reference UK Department of Transport.

²⁷ Charges for the use of the infrastructure are reviewed periodically by the Office of Rail Regulation (*ORR*), <http://www.rail-reg.gov.uk/server/show/nav.130>

²⁸ Statement to Parliament by the Transport Secretary Alistair Darling on the Government's objectives for rail freight on 19 July 2005. Confirmed by respondents to the market investigation.

was considering entry into the domestic UK market for block trains nor has the market investigation brought up any evidence in this regard.

61. For the UK single wagon services (both domestic and cross-border), entry barriers would be even higher due to the extensive costs of setting up a comprehensive distribution network.

b) Germany

62. The German freight transport market is the largest in Europe. Similar to the UK the dominant mode of transport in Germany is by road. In the modal split of domestic transport rail accounted for approximately 17% in 2005, while road accounted for approximately 69% and ship for approximately 11%.²⁹
63. Contrary to most other EU Member States but similar to the UK, the rail freight segment has grown significantly in the last years. In 2006, it saw an increase of 12% as compared to the previous year. In relation of the modal split, rail increased from a share of 15% in 2002 to a share of 17% in 2005 while the share of road transport remained the same.³⁰
64. The German rail freight market was liberalised in 1994. In particular as regards block train traffic, there are over 100 smaller railway competitors active. According to DB's own estimates its current market share for domestic services would be [75-95]%, compared to [80-100]% for international services (except to the UK where it would be 100%). Main competitors in the rail freight market in Germany are in particular TX Logistik, Rail4Chem and Veolia Cargo.
65. DB is the sole rail freight company that operates a comprehensive single wagon network in Germany.
66. In relation to block trains (both for domestic and cross-border services in Germany), in view of the overall market conditions including the large number of entrants already existing in Germany, it seems very unlikely that the elimination of EWS as a potential entrant for domestic or international services in Germany would lead to anti-competitive effects as it cannot be established that its potential entry would act as a more significant competitive constraint on DB compared to other operators already active on the market.
67. With respect to single wagon services (both domestic and cross-border), the likelihood of entry is small due to the high entry barriers for this type of service. As noted earlier, maintaining a single wagon network is loss-making in many countries despite the fact that the national incumbents typically are the sole companies operating a single wagon system.

c) Potential competition between Germany and the UK

68. Today only 1% of total freight traffic between Germany and the UK is carried by rail through the Channel Tunnel (on the "Wembley-Gremberg-line"), i.e. [5-25] trains per

²⁹ DB estimates.

³⁰ Best estimates provided by DB.

week ([5-25] trains to the UK and [5-25] trains to Germany), representing [>300,000] tonnes per year (2006).³¹ The main reasons for the low percentage of rail freight appear to be a combination of the type of goods imported from and exported to the UK, and its unique geographic position of being an island. Further, freight services through the Channel Tunnel are perceived as comparatively expensive and cumbersome to use. Train access to the UK is controlled by the Channel Tunnel which can set prices to the firms providing traction through the Tunnel and today only SNCF and EWS offers rail freight services through the Tunnel. The share of rail of all volumes shipped between Germany and the UK has decreased by 36% since 2000. According to the notifying party there are no types of goods carried between the UK and Germany which are currently only transported by rail.³²

69. As opposed to other international routes, currently only single-wagon freight trains run through the Channel Tunnel. EWS and DB provide these services on the basis of traditional cooperation agreements, i.e. for transport of single-wagon freight trains from Germany to the UK. DB works together with EWS in cooperation with [...].³³ EWS is providing equivalent services to customers in the UK with the difference that it can take trains also through the tunnel before it hands them over to SNCF-SNCB-DB.³⁴ DB then provides final distribution within Germany or transit to other Member States.
70. In view of the fact that only 11% of capacity dedicated to freight traffic is used at the moment there are no actual capacity constraints for freight trains in the Channel Tunnel.
71. On the basis of the narrowest possible market definitions, i.e. for a) rail freight transport from Germany to the UK and b) rail freight transport from the UK to Germany it could be argued that the proposed transaction may:

i) Eliminate EWS and/or DB as future potential providers of seamless cross-border services in the direction in which they are already active (i.e. DB for seamless

³¹ For comparison, the trade flow between Austria and Germany is 11.5 million tons by rail.

³² This is underlined by situations when the Channel Tunnel was closed in the 1990s because of fire or virtually closed because of the presence of asylum seekers in 2000, traffic managed to find other modes. Much of this traffic in fact failed to return to rail, resulting in the decline in on-rail cross Channel traffic from 3.2 million tonnes in 1999 to 1.5 million tonnes today. These volumes remain in decline today.

³³ For transportation between Gremberg, a marshalling yard near Cologne in Germany (operated by DB) and Wembley, a marshalling yard near London in the UK (operated by EWS), single wagon trains, originating from the German and other continental European single wagon networks, are assembled in Gremberg, are transported together to the UK and are broken up for further onward transit on arrival in Wembley. The reverse is true for shipments transported into Germany (the only difference being that some of these are then further transported to other European countries).

³⁴ Eurotunnel operates the Channel Tunnel infrastructure and makes available capacity to train operators who are licensed to operate cross-Channel rail freight services. At the moment only EWS and SNCF Provide services jointly in accordance with the "Railway Usage Contract". Through its subsidiary, Europorte 2, Groupe Eurotunnel SA maintains the possibility of operating rail services through the Tunnel. There is no open access to the Channel Tunnel as set out by the Commission's first rail package as this package does not cover the Tunnel. Instead it is subject to a regulatory regime overseen by the Anglo-French Tunnel Intergovernmental Commission. Nevertheless, from January 2008 (subject to certain conditions) open access has been agreed for the Tunnel.

- services from Germany to the UK and EWS for seamless services UK to Germany);
- ii) Eliminate EWS and DB as potential entrants to the direction where they are not yet active (i.e. EWS for – potentially - seamless services from Germany to the UK and DB for seamless services UK to Germany). [...];
 - iii) Eliminate potential competition between DB and EWS if a block train market between the UK and Germany should develop in the future; and/or
 - iv) Foreclose UK single wagon services for potential competitors from Germany.
72. In view of previous case law as reflected in the Commission's guidelines on the assessment of horizontal mergers³⁵ in order to assess whether the elimination of DB/EWS as potential competitors on each other's market may have significant anti-competitive effects, two conditions would have to be fulfilled: i) the potential competitor would have to already exert a significant constraining influence or there would have to be a significant likelihood that it would grow into an effective competitive force and ii) there is not a sufficient number of other potential competitors which could maintain sufficient competitive pressure after the merger.
73. Roughly two-thirds of customers that procure transport between Germany and the UK believe that the parties would be starting to compete with each other on this route absent a merger. However, at the same time, the majority of customers that procure transport between Germany and the UK trust that the merger will be beneficial for this route.
74. DB is the only rail operator capable of servicing single wagons all over Germany. Similarly, in the UK, although offering a single wagon service is not the main focus of its business (accounting for approximately [<10]%) of its activity), EWS is the only rail freight operator capable of offering such a service (as distinct from the transport of intermodal containers, in which Freightliner is the largest player).
75. Given that the parties are the only rail companies currently offering services in the UK to Germany and from Germany to UK, it could be argued that DB and EWS are each others' closest potential competitors.

³⁵ Guidelines on the Assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 31/5, 5 February 2004, paragraphs, 58 ff. and 68 ff.

i) Potential competition by DB in single wagon services

76. DB argues that one of the synergies of the proposed transaction would be to provide seamless services on the UK-Germany route, which could become an attractive proposal for current non-rail customers. DB strongly denies any intentions to enter the UK-Germany route on their own arguing that [...] whereas the merger with EWS would make [...] economically feasible.
77. Internal documents of DB have not provided any indication that DB has plans to enter the route either with a seamless service to the UK or in the other direction. The absence of such entry plans is further supported by the fact that [...].
78. To become a likely entrant in the future DB would have to invest in two different types of locomotives - one capable of running in Germany/France/Belgium and one for the UK; resulting in a total estimated investment for one pair of locomotives of more than EUR [>10] million. It would still need to cooperate with either EWS, SNCF or Europorte 2 for the Channel Tunnel (as, for security reasons only one type of locomotive, which only these parties have, is permitted in the Tunnel). Taking into consideration that the entire turnover from the Germany-UK service amounts to approximately EUR [<15] million such an investment would not appear economically attractive.
79. In addition, distribution and assembly of goods in the UK would require large further fixed investments of a magnitude that seem to exceed any future operational profit streams.
80. Competitors responding to the market investigation also agreed that DB would not have an incentive to enter the DE-UK route as the efforts and costs associated with such entry would be too high compared to potential return.

ii) Potential competition by EWS in single wagon services

81. EWS on the other hand possesses the necessary licenses and safety certificates to continue with its freight-service across the French, [...] and German border instead of handing the goods over to DB. It has also ordered locomotives homologated for [...]. In view of this EWS would seem to be able to provide seamless services from the UK to Germany in the near future.
82. EWS has submitted financial data which indicate that [...] ³⁶
83. [...], it seems unlikely to be profitable for EWS to make the substantial investments that are needed to set up a single wagon distribution network to be able to run traffic from the UK to Germany on its own.
84. In addition, it is noted that DB is not active on the UK to Germany route and, as has been argued above, has no economic incentive to operate this direction on its own in the foreseeable future. Hence, even if EWS were to make the necessary investments to operate the UK-Germany route on its own, the merger would not lead to a lessening of competition.

³⁶ EWS confidential submission of 11 October, para 13.

85. Regarding the opposite direction of Germany to the UK, [...] it would not appear to be economically attractive for EWS to undertake the necessary investments and costs required for offering a single wagon service on this route. [...].

(iii) Block train competition

86. [...]. According to the parties' experience with customers that have requested block train services it turned out that [...].³⁷ The parties submit, that the lack of demand for block trains is due to the circumstance that consignors sending (bulk) goods in sufficient quantities to fill a block train (e.g. coal, ore; or tank and silo goods) usually reach the UK by (short sea) ship. Other heavy goods and automotive transports are difficult to transport by rail to the UK due to the smaller loading gauge (because of which continental wagons cannot run in the UK).

87. Nevertheless, should there be a future demand for block trains or intermodal trains, other competitors would also seem able to enter the market. For such services there would be much less dependence on EWS or DB as opposed to single wagon distribution. In this regard it is noted that with the implementation of open access both SNCF and Europorte 2 could be relied on for passage through the Channel Tunnel.

88. Furthermore, the geographic specificities of this particular route stemming from the fact that the UK is an island easily reachable from Germany or from neighbouring Netherlands by short sea links (ship or ferry) appear to work largely in favour of substitutability with other modes of transport especially when compared to continental routes. The very limited use of rail on this route ([5-25] trains a week) especially compared to routes like the German-French route (around [>400] trains per week) appears to grant some further support to the notifying party's' argument of substitutability on this route.

89. The parties themselves have provided evidence of customers either switching to other modes of transport or simultaneously using alternative means of transport for the haulage of the same type of good on the Germany-UK route. The Parties also point to this effect to earlier incidents leading to the virtual closing down of the Channel Tunnel that forced much of the traffic through the Tunnel to switch to alternative means of transport not only temporarily, but permanently³⁸.

³⁷ According to DB, to even consider offering a block train service from Germany to the UK or in the opposite direction, a supplier would at least need volumes in the range of [...]tons per year, which would be between approximately 30% and 70% of the volumes currently transported on the entire Wembley-Gremberg Service. As wagons would have to be brought to the customer siding, collected there and held for a couple of days, low frequencies would raise costs for wagons. Combined with the fact that UK gauge wagons are in general a scarce resource it would seem that block train services with low frequencies such as once a week or every other week may not economically viable.

³⁸ The parties submit that on-rail cross- Channel traffic has fallen from 3.2 million tonness in 1999 to 1.5 million tonnes.

iv. Possible foreclosure of UK single wagon services for potential competitors from Germany

90. In Germany, where DB is dominant in single-wagon services but faces limited competition in some areas, where some competitors provide single wagon services in certain industrial areas, concerns were raised that the merged entity might in the future have the incentive to foreclose these operators from single wagon services to the UK.³⁹ During the Commission's investigation however no evidence was found that DB would have the ability to raise prices for customers in view of the particularly strong inter- and multimodal competition by short sea ship transport on this particular route (see above) Therefore it can be concluded that the proposed operation is unlikely to result in a significant impediment of effective competition with regard to a potential foreclosure in relation to the UK single-wagon services.

Conclusion

91. In view of the above mentioned technical and economic constraints and obstacles it appears unlikely that one of the parties would be considered as a likely entrant for single wagon services into the other direction absent the merger that would grow into an effective competitive force. For block trains, currently no market exists. If, absent the merger, a block train market would develop in the future, there are a number of potential rail operators that would in principle be able to provide such services as well.

3. POTENTIAL COMPETITION IN RELATION TO NORTH-SOUTH CORRIDORS

92. During the course of the Commission's market investigation it was alleged that DB may be dominant on a North-South corridor, which comprises several international North-South routes and that the proposed merger may remove potential competition from EWS on such routes. The concerns related to major routes from the North-Western European ports (Belgium, Netherlands and Germany), in particular Rotterdam, to Northern Italy.

93. The Rotterdam – Italy rail corridor comprises parts of the rail networks of the Netherlands, Germany, Switzerland and Italy between the port of Rotterdam on the one hand and two intermodal terminals (Novarra, Galerata) in the area of Milan, and the marshalling yard in Verona in Italy⁴⁰. The route is part of the Trans-European

³⁹ For block trains, where there is no demand on the route through Germany today, EWS would not be the only potential cooperation partner for transport in the UK (and through the Tunnel - As mentioned above, transport through the Channel Tunnel is currently provided by SNCF and EWS jointly. As of the opening of full open access of the Channel Tunnel EWS would compete with SNCF to offer services through the Tunnel. Further, Europorte 2 has also announced the start of a service from November 2007 to provide short haul services through the Tunnel to and from Lille and the Belgian border to London. Potential competitors of DB/EWS would therefore not need to rely on the merged entity for access to the Channel Tunnel.)

⁴⁰ As defined by *Railnet Europe*, an association of 31 European rail infrastructure managers.

Transport Network.⁴¹ This corridor cannot be considered as a true O&D market, as only part of the goods transported on the route is transported the whole way.⁴²

94. As DB is present in The Netherlands and Germany as an incumbent (with limited activities also in Switzerland and Italy) it naturally has a high share in rail freight transport originating in these Member States. However, the market investigation has also shown that there are a number of competitors on the various North-South routes. On the Rotterdam-Genoa route these include new entrants such as Rail4Chem, ERS (Maersk), Dillen & Le Jeune and CFL as well as other incumbents such as SBB, OBB and TX Logistics (a subsidiary of Trenitalia), which have strong positions on their "national" part of the various international routes. On the alternative route through Austria both TX Logistics and OBB are active. On alternative routes between the North Sea ports to Northern Italy through France (namely from Antwerp, Zeebrugge, Le Havre) DB is not active at all, but there are incumbents such as SNCF and SNCB (at least on part of the route) and other new entrants, such as Veolia Cargo.
95. EWS does not provide rail freight services on the North-South corridor (not in any international North-South routes that are part of this corridor). The possibility of EWS's entry into this hypothetical market is different regarding the alternative routes of the corridor.
96. EWS is neither present in the Netherlands, nor in Germany, Switzerland or Italy. EWS submits that they have no intention either to enter [...] EWS has no safety certificate for [...]. Even if EWS might potentially constitute a potential entrant on such corridor there is no evidence that EWS [...] would be in a better position than other actual or potential competitors or that such entry would have a particularly significant effect compared to other actual and potential competition.
97. On alternative corridors between the North Sea ports to Northern Italy through France (namely from Antwerp, Zeebrugge, Le Havre, Rotterdam) neither DB nor EWS are active.
98. In view of the above, the proposed transaction is unlikely to result in a significant impediment of effective competition on any potential North-South corridor in Europe as EWS does not seem to represent a significant competitive constraint on any of these routes today.⁴³

4. POTENTIAL FORECLOSURE IN RELATION TO THE UK

⁴¹ http://ec.europa.eu/ten/transport/projects/doc/2005_ten_t_en.pdf, page 58.

⁴² The majority of traffic from the Netherlands through Germany ends up in the Ruhr area, so that only a marginal part of this traffic ends up in Italy. Part of the goods are also transported from Germany to Italy..See: Rail facts & figures 2007 Statistical overview of rail freight transport in the Netherlands, page 43 <http://www.railcargo.nl/documenten/Rail%20Facts%20Figures%202007.pdf>.

⁴³ Finally should also be noted, that the rail connection between the ports of northern Europe and Italy faces strong competition from other modes of transport. For all traffic (including container traffic), the major part of shipments between the port of Rotterdam and Italy is transported by sea (Rotterdam to Italy: rail 18%, sea 52%, road 6%, Road and barge 24% (DB ROMP database). As the figures show, not only sea is more important in this route than rail, but also the combination of barge and trucks. The importance of intermodal competition on this route is underlined by the fact that 99% of the goods transported by DB in this whole route today are containerized.

99. Finally the market investigation has voiced concerns that EWS who has a *de facto* monopoly on the single wagon network in the UK would have - following the merger with DB - incentives to stop cooperating with other railway undertakings wishing to run cross-border freight trains into the UK, in particular with regard to the economically important UK-Italy route.
100. Such concerns could only be raised for the cross-border markets for those countries where rail operators compete with DB for consignments requiring single wagon distribution in the UK. This would restrict potential concerns in particular to those EEA-countries where DB is already present (Germany (as discussed above), The Netherlands, Denmark and Italy)⁴⁴
101. As to the Netherlands and Denmark, the notifying party have confirmed that there are no rail freight services between these countries and the UK today, i.e. there are neither block trains nor single wagon trains that are directly hauled to or from the UK without any additional marshalling or change in the composition of the train.
102. In Italy, where DB is not active in single-wagon services, such a concern could only relate to "block trains" which would later require single wagon distribution in the UK. The market investigation has not established that there is currently any demand for such services. EWS confirmed that it does not provide single wagon services for any direct trains from Italy to the UK.
103. In view of the above the proposed operation is unlikely to result in a significant impediment of effective competition in relation to a potential foreclosure in relation to the UK market.

VI. COMMITMENTS

1. ASSESSMENT OF THE COMMITMENTS

104. The Commitments offered by DB to address the concerns of the Commission with regard to France include the undertaking by DB to fulfil EWS's expansion plans in France in the next five years with regard to executing investments into locomotives and the hiring of personnel and to use these for rail freight transport in France. DB also offered access to the EWS locomotive driver training schools and maintenance facilities and services in France.

a) Description of Initial Commitments

105. On 12 October 2007 DB submitted an initial proposal, in which
- DB commits to implement and continue executing the current business plan of Euro Cargo Rail (ECR), EWS's subsidiary in France, [...] (the "***Business Plan Commitment***")
 - For a period until [...] DB commits to utilise less than [...] % of the total locomotives owned or leased by EWS or ECR (as foreseen in the ECR Business Plan) and operable in France for [...] (the "***Locomotive Usage Commitment***"). In

⁴⁴ For Switzerland, where DB also has a subsidiary, the Commission would not have jurisdiction under the Merger Regulation.

the event that this is not fulfilled DB commits to offer for hire for a period of [...] and on arms length basis a number of locomotives equivalent to the number of locomotives by which the [...] % would be exceeded to any operator organising or planning to organise non-cross-border rail transportation on the domestic routes in France (except SNCF and its affiliates) (the "*Locomotive Rental Commitment*").

– DB undertakes to provide access for a period of [...] following Closing to any interested third party Open Access Rail Operator (except SNCF and incumbents of neighbouring countries) and insofar as is permitted by the limits of existing capacity to ECR's driving schools, maintenance facilities and services in France on fair and non-discriminatory terms.⁴⁵

106. In addition to the Commitments offered to remedy the concerns relating to France, DB also offered as part of its initial commitments to remedy any possible concerns the Commission might have on the UK-Germany route and with respect to possible foreclosure for cross-border rail transport into the UK, [...]. As the Commission did not raise serious doubts with respect to these concerns, the Commitments offered were not needed. Consequently, it is only the Commitments relating to France that will be addressed below.

b) Assessment of Initial Commitments

107. The Business Plan and Locomotive Usage Commitments aim to maintain the competitive constraint stemming from EWS in France by committing DB to continue ECR's expansion plans and by preventing DB from re-deploying ECR's assets outside of France. By lowering barriers to entry in France, the Commitment relating to driving schools and maintenance facilities provides an additional guarantee to help to ensure that the level of competition in France would be maintained post-merger.

108. The Commission considers that the restriction of the usage of locomotives to mostly domestic traffic within France does not provide an accurate reflection of the strategy of ECR [...]. [...].

109. With regards to the Business Plan and Locomotive Usage commitments and the commitment relating to driving schools and maintenance facilities the market test indicated that some improvements were needed in order to make these sufficient to maintain competition in the French market. In particular, it was suggested that the time period of [...] would be too short. Some respondents suggested 5 years would be more appropriate.

110. Concerns were further expressed with respect to the practical implementation of the Business Plan Commitment in view of the complexities of any such business plan. To this effect the Commission also notes the inherent difficulties of monitoring and enforcing a general commitment to a very specific and detailed Business Plan [...] which would inevitably give rise to deviations from concrete figures and would require a case-by-case analysis of whether a particular deviation is justified or not.

⁴⁵ See also Directive 2001/14/EC of the European Parliament and of the Council of 26 February 2001 on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification, OJ L 75 of 15 March 2001.

111. Notwithstanding a largely positive feedback concerning the idea of the driving school and maintenance facility commitments, respondents called for assurances with regards to their implementation, inter alia solicitation of drivers-in-training by EWS and an efficient dispute resolution mechanism. Concerns were also raised that the "limits to capacity" clause may be used to bar access to these services.

112. With respect to the Locomotive Rental Commitment the Commission notes that this commitment would create an automatic opt-out for DB in terms of implementing the Locomotive Usage Commitments. This in turn raises questions about the reconciliation of such an opt-out with the provisions of the EC Merger Regulation relating to the breach of obligations and conditions attached to decisions taken pursuant to Article 6 (2) of that Regulation. Furthermore, as also indicated by the market test, it is unclear how such random (and unplanned) short-term hire arrangements would significantly lower any barriers to entry for new entrants (some respondents pointed out the long-term nature of investments and planning in the rail freight sector and the lack of certainty offered by this commitment) and how these arrangements could consequently contribute to maintaining competition in France. Overall it is doubtful whether the questionable additional value of this commitment would justify the inherent complexities of its monitoring and implementation.

c) Final Commitments

113. On 5 November 2007 DB submitted modified Commitments in which

- DB commits to fulfil the objectives of the ECR Locomotive Plan [...] and commit to fulfilling the objectives of the Business Plan with regard to the number of locomotives and personnel for France during the Business Plan Period [...].
- DB commits to use [...] locomotives and personnel subject to the Commitments for a [...] mix of domestic, cross-border [...] operations in France. DB has the flexibility to use only a maximum of [...] % of the locomotives and personnel concerned in any given 12 months for any other purpose (including rendering services to SNCF or sub-letting to third parties).
- DB undertakes to provide access during the Business Plan Period to any interested third party Open Access Rail Operator (except for SNCF) to ECR's driving schools, maintenance facilities and services in France on fair and non-discriminatory terms and conditions.

d) Assessment of Final Commitments

114. As opposed to a general commitment to a complex Business Plan, the Commitments of 5 November 2007 place clear and enforceable obligations on DB with respect to executing the investments foreseen for key assets (locomotives) and key personnel needed to operate these. The Commitments would have the effect of changing the incentive structure of DB by creating incentives to use [...] the assets and personnel concerned for French-based operations. Furthermore, the time period of the commitments is extended to cover the entire Business Plan Period, addressing concerns raised to this effect by respondents to the market testing of the remedies.

115. By extending the scope of the Locomotive Usage Commitment to cross-border services in France the final Commitments provide a more accurate reflection of the France-based expansion strategy of ECR.

116. Finally, with respect to the driving schools and maintenance facilities remedies, the final Commitments include additional guarantees of implementation addressing concerns raised during the market testing, *inter alia* a detailed fast-track dispute resolution mechanism, a non-solicitation clause and the elimination of the possibility to use "limits to capacity" arguments to refuse access. Furthermore, the scope of the Open Access Rail Operators allowed to benefit from this commitment has been extended to include all operators except SNCF.

e) Conclusion on the Commitments

117. In light of the above, it is concluded that the Commitments submitted on 5 November 2007 remove the serious doubts as to the compatibility of the proposed transaction with the common market.

2. CONDITIONS AND OBLIGATIONS

118. Under the first sentence of the second subparagraph of Article 6(2) of the 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.

119. The decision in this case is conditioned on the full compliance with Sections B and C of the Commitments submitted by the Notifying Party on 5 November 2007.

120. The remaining requirements set out in the other Sections of the Commitments submitted by the Notifying Party on 5 November 2007 are considered to constitute obligations.

VII. CONCLUSION

121. The Commission has concluded that the remedies submitted by the Notifying Party are sufficient to remove the serious doubts raised by the concentration. Accordingly, subject to the full compliance with the commitments submitted by the Notifying Party, the Commission has decided not to oppose the notified operation and to declare it compatible with the common market and with the EEA Agreement. This decision is adopted in application of Article 6(1)(b) and Article 6(2) of Council Regulation (EC) No 139/2004.

122. The detailed text of the commitments is annexed to this decision. The full text of the annexed commitments forms an integral part to this decision.

For the Commission
Signed
Neelie KROES
Member of the Commission



By hand and by fax: 00 32 2 2964301

European Commission
DG Competition
Rue Joseph II 70 Jozef-II straat
B-1000 BRUSSELS

Case COMP/M.4746 (DB/EWS)

COMMITMENTS TO THE EUROPEAN COMMISSION

Pursuant to Article 6(2) of Council Regulation (EC) No 139/2004 (the “*Merger Regulation*”), Deutsche Bahn Aktiengesellschaft (“*DB*”) hereby provides the following Commitments (the “*Commitments*”) in order to enable the European Commission (the “*Commission*”) to declare the acquisition of English Welsh & Scottish Railway Holdings Limited (“*EWS*”) by DB compatible with the common market and the EEA Agreement by its decision pursuant to Article 6(1)(b) of the Merger Regulation (the “*Decision*”).

The Commitments shall take effect upon the date of adoption of the Decision. However, the material obligations specified in Sections B and C shall only become effective at Closing (as defined below in Section A).

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 Community law, in particular in the light of the Merger Regulation, and by reference to the Commission Notice on remedies acceptable under Council Regulation (EEC) No 4064/89 and under Commission Regulation (EC) No 447/98.

Section A. Definitions

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

Affiliated Undertakings: undertakings controlled from time to time by the Parties and/or by the ultimate parents of the Parties, whereby the notion of control shall be interpreted pursuant to Article 3 Merger Regulation and in the light of the Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004.

Business Plan Period: means the period from Closing until [...].

Closing: closing of the transaction underlying the notified concentration.

DB: Deutsche Bahn Aktiengesellschaft, incorporated under the laws 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 HRB 50 000 including all Affiliated Undertakings post closing of the proposed transaction. For the avoidance of doubt this includes EWS and Affiliated Undertakings.

Driver Training Services: means the driver training services offered through DB's driver training school in France (the current locations of which are set out in **Annex 3**).

ECR Business Plan: current business plan of EWS' subsidiary Euro Cargo Rail SAS, 60 Avenue Hoche, F-75008 Paris (**ECR**), as submitted to the Commission on the 11 October 2007 and attached to these Commitments as **Annex 2**.

ECR Locomotive Plan: means the schedule attached as **Annex 1**, setting out the number of French-operable locomotives currently owned, leased or ordered by EWS for each Quarter until [...].

Effective Date: the date of adoption of the Decision.

EWS: English Welsh & Scottish Railway Holdings Limited, incorporated under the laws of England, with its registered office at McBeath House, 310 Goswell Road, London EC1V 7LW, United Kingdom and registered with the Company Register at Companies House, Cardiff, United Kingdom under number 03116322 including all Affiliated Undertakings.

Open Access Rail Operator: means any public or private undertaking, licensed according to applicable Community legislation, the principal business of which is to provide services for the transport of goods by rail and which is licensed to do so in the EEA by a national European rail authority (excluding any such operator which is affiliated with the Parties or the French incumbent railway operator (**SNCF**)).

Maintenance Facilities: means any maintenance and service facilities owned or operated by DB in France from time to time.

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

Parties: DB and EWS.

Section B. Commitments relating to the continued implementation of the ECR Business Plan

B.1 – The Business Plan Commitment

1. During the Business Plan Period, DB undertakes to:
 - (a) fulfil the objectives set in the ECR Locomotive Plan with regard to the number of locomotives;
 - (b) fulfil the objectives set in the ECR Business Plan with regard to the number of locomotives and number of personnel for France;
 - (c) maintain ECR as a separate, independent legal entity, which maintains separate audited accounts; and
 - (d) provide all necessary assets, support, resources and personnel reasonably required by ECR in order to continue to implement the ECR Business Plan.

B.2 - The Locomotive Usage Commitment

2. During the Business Plan Period, in order to ensure the strictest compliance with the ECR Business Plan, DB undertakes that it shall utilise [...] of the locomotives as set out in the ECR Locomotive Plan and the ECR Business Plan for a [...] mix of:
 - (a) domestic rail freight services within France;
 - (b) [cross-border operations] in France; and
 - (c) [...]
3. DB shall not on a yearly basis utilise cumulatively more than [...]% of the locomotives or personnel referred to in Section B.1.1 (a)-(b):
 - a) outside of the usage referred to in Section B.2.2 (a) to (c); and
 - b) for services rendered by DB to SNCF and/or operators affiliated with SNCF; and
 - c) for the use of operators other than DB.
4. DB shall report on such usage including the provision of the appropriate justification in accordance with the Reporting obligation set out in Section D below.

Section C. Provision of Driver Training Services and services from Maintenance Facilities

5. During the Business Plan Period, DB undertakes to provide any interested Open Access Rail Operator, on fair and non-discriminatory terms and conditions, with Driver Training Services and services from Maintenance Facilities in France (the ***Driver Training and Maintenance Commitment***).

Terms and conditions for requesting Driver Training Services

6. Any Open Access Rail Operator wishing to receive Driver Training Services will be required to give DB at least three months written notice before the training is required, and shall provide the DB with a copy of its training specification, as approved by l'Établissement Public de Sécurité Ferroviaire (***EPSF***), at least one month before the training is due to commence. The written notice and the copy of the training specification should be sent to

The Director General
Euro Cargo Rail SAS
60 Avenue Hoche
F-75008 Paris
France.

Pricing for Driver Training Services

7. The price for the Driver Training Services shall reflect the costs for drivers trainers' salaries, standard training materials, the hire cost of the training facility (except where the Open Access Rail Operator wishes to provide its own training facility), and the daily hire cost of the simulator and will include a reasonable margin for overheads and profit. The exact price for each driver training course shall be agreed upon between DB and any Open Access Rail Operator so as to reflect costs.

Non solicitation

8. DB undertakes, subject to customary limitations, not to solicit (and to procure that its Affiliated Undertakings do not solicit), either during, or for a period of 3 years following the completion of, their training, students of the driving school for whom training in DB's driver training school is procured by Open Access Rail Operators.

Terms and conditions for requesting services from the Maintenance Facilities

9. Any Open Access Rail Operator wishing to receive any service advertised pursuant to Section C.11.b) below from the Maintenance Facilities will be required to give DB at least one month's notice in writing before the service is required, including details of the services it is requesting. Such written notice should be sent to

The Director General
Euro Cargo Rail SAS
60 Avenue Hoche
F-75008 Paris
France.

Pricing for services provided at Maintenance Facilities

10. The price for any service requested from DB at a Maintenance Facility pursuant to Section C.9 above shall reflect the costs of providing such services and will include a reasonable margin for overheads and profit. The exact price for each service offered at a Maintenance Facility shall be agreed upon between DB and any Open Access Rail Operator so as to reflect costs.

Transparency

11. DB will publish on all the relevant websites:
 - a) details of the Driver Training Services in France;
 - b) a list of the Maintenance Facilities in France, including their addresses and the services offered at each; and
 - c) the procedure by which, and the terms on which, an Open Access Rail Operator may obtain any Driver Training Services or services from any Maintenance Facility.

Section D: General Provisions

Reporting

1. During the Business Plan Period, DB will provide the Monitoring Trustee and the Commission with a quarterly report, setting out full details of the new locomotives acquired in the reporting period. It shall also provide a complete list of all locomotives operated by ECR in France or ordered by ECR for use in France at that time, including the type of locomotive, the means of acquisition (leased, purchased or other) and the date of delivery.
2. During the Business Plan Period, DB will, for the purpose of demonstrating its continued implementation of the ECR Business Plan, provide the Monitoring Trustee and the Commission with a quarterly report, setting out full details [relating to] [...].
3. During the Business Plan Period, DB will, for the purpose of demonstrating its continued implementation of the ECR Business Plan, provide the Monitoring Trustee and the Commission with a quarterly report, setting out full details of [...] locomotives operated by ECR during the previous reporting period [...], so as to demonstrate that it has complied with the Locomotive Usage Commitment outlined in Section B.2 above.
4. During the Business Plan Period, DB will provide the Monitoring Trustee and the Commission with a quarterly report to demonstrate that it has complied with the Driver Training and Maintenance Commitment.

Fast Track Dispute Resolution

5. In the event that a third party claims that DB is failing to comply with the requirements of the Driver Training and Maintenance Commitment vis-à-vis that third party, the fast track dispute resolution procedure as described herein shall apply.
6. Any third party Open Access Rail Operator who wishes to avail itself of the fast track dispute resolution procedure (a “**Requesting Party**”) shall send a written request to DB (at the address provided in Section C.6 above) (with a copy to the Monitoring Trustee) setting out in detail the reasons leading that party to believe that DB is failing to comply with the requirements of the Driver Training and Maintenance Commitment. The Requesting Party and DB will use their best efforts to resolve all differences of opinion and to settle all disputes that may arise through co-operation and consultation within a reasonable period of time not exceeding fifteen [15] working days after receipt of the Request.

7. The Monitoring Trustee shall present its own proposal (the “**Monitoring Trustee Proposal**”) for resolving the dispute within eight [8] working days, specifying in writing the action, if any, to be taken by DB in order to ensure compliance with the commitments vis-à-vis the Requesting Party, and be prepared, if requested, to facilitate the settlement of the dispute.
8. Should the Requesting Party and DB (together the “**Parties to the Arbitration**”) fail to resolve their differences of opinion in the consultation phase, the Requesting Party shall serve a notice (the “**Notice**”), in the sense of a request for arbitration, to the Arbitral Court of the International Chamber of Commerce (hereinafter the “**Arbitral Institution**”), with a copy of such Notice and request for arbitration to DB at the address provided in Section C. 6 above).
9. The Notice shall set out in detail the dispute, difference or claim (the “**Dispute**”) and shall contain, *inter alia*, all issues of both fact and law, including any suggestions as to the procedure, and all documents relied upon shall be attached, e.g. documents, agreements, expert reports, and witness statements. The Notice shall also contain a detailed description of the action to be undertaken by DB (including, if appropriate, a draft contract comprising all relevant terms and conditions) and the Monitoring Trustee Proposal, including a comment as to its appropriateness.
10. DB shall, within 10 working days from receipt of the Notice, submit its answer (the “**Answer**”), which shall provide detailed reasons for its conduct and set out, *inter alia*, all issues of both fact and law, including any suggestions as to the procedure, and all documents relied upon, e.g. documents, agreements, expert reports, and witness statements. The Answer shall, if appropriate, contain a detailed description of the action which DB proposes to undertake vis-à-vis the Requesting Party (including, if appropriate, a draft contract comprising all relevant terms and conditions) and the Monitoring Trustee Proposal (if not already submitted), including a comment as to its appropriateness.

Appointment of the Arbitrators

11. The Arbitral Tribunal shall consist of three persons. The Requesting Party shall nominate its arbitrator in the Notice; DB shall nominate its arbitrator in the Answer. The arbitrator nominated by the Requesting Party and by DB shall, within five working days of the nomination of the latter, nominate the chairman, making such nomination known to the Parties to the Arbitration and the Arbitral Institution which shall forthwith confirm the appointment of all three arbitrators.
12. Should the Requesting Party wish to have the Dispute decided by a sole arbitrator it shall indicate this in the Notice. In this case, the Requesting Party and DB shall agree on the nomination of a sole arbitrator within five working days from the communication of the Answer, communicating this to the Arbitral Institution.
13. Should DB fail to nominate an arbitrator, or if the two arbitrators fail to agree on the chairman, or should the Parties to the Arbitration fail to agree on a sole arbitrator, the default appointment(s) shall be made by the Arbitral Institution.
14. The three-person arbitral tribunal or, as the case may be, the sole arbitrator, are herein referred to as the “**Arbitral Tribunal**”.

Arbitration Procedure

15. The Dispute shall be finally resolved by arbitration under the Rules of the Arbitral Court of the International Chamber of Commerce, with such modifications or adaptations as foreseen herein or necessary under the circumstances (the “**Rules**”). The arbitration shall be conducted in Paris, France, in the English language.
16. The procedure shall be a fast-track procedure. For this purpose, the Arbitral Tribunal shall shorten all applicable procedural time-limits under the Rules as far as admissible and appropriate in the circumstances. The Parties to the Arbitration shall consent to the use of e-mail for the exchange of documents.
17. The Arbitral Tribunal shall, as soon as practical after the confirmation of the Arbitral Tribunal, hold an organisational conference to discuss any procedural issues with the Parties to the Arbitration. Terms of Reference shall be drawn up and signed by the Parties to the Arbitration and the Arbitration Tribunal at the organisational meeting or thereafter and a procedural time-table shall be established by the Arbitral Tribunal. An oral hearing shall, as a rule, be established within two months of the confirmation of the Arbitral Tribunal.
18. In order to enable the Arbitral Tribunal to reach a decision, it shall be entitled to request any relevant information from the Parties to the Arbitration, to appoint experts and to examine them at the hearing, and to establish the facts by all appropriate means. The Arbitral Tribunal is also entitled to ask for assistance by the Monitoring Trustee in all stages of the procedure if the Parties to the Arbitration agree.
19. The Arbitral Tribunal shall not disclose confidential information and shall apply the standards attributable to confidential information under the Merger Regulation. The Arbitral Tribunal may take the measures necessary for protecting confidential information in particular by restricting access to confidential information to the Arbitral Tribunal, the Monitoring Trustee, and outside counsel and experts of the opposing party.
20. The burden of proof in any dispute under these Rules shall be borne as follows: (i) the Requesting Party must produce evidence of a prima facie case and (ii) if the Requesting Party produces evidence of a prima facie case, the Arbitral Tribunal must find in favour of the Requesting Party unless DB can produce evidence to the contrary.

Involvement of the Commission

21. The Commission shall be allowed and enabled to participate in all stages of the procedure by:
 - a) Receiving all written submissions (including documents and reports, etc.) made by the Parties to the Arbitration;
 - b) Receiving all orders, interim and final awards and other documents exchanged by the Arbitral Tribunal with the Parties to the Arbitration (including Terms of Reference and procedural time-table);
 - c) Giving the Commission the opportunity to file amicus curiae briefs; and

- d) Being present at the hearing(s) and being allowed to ask questions to parties, witnesses and experts.
- 22. The Arbitral Tribunal shall forward, or shall order the Parties to the Arbitration to forward, the documents mentioned to the Commission without delay.
- 23. In the event of disagreement between the Parties to the Arbitration regarding the interpretation of the Driver Training and Maintenance Commitment, the Arbitral Tribunal may seek the Commission's interpretation of the Driver Training and Maintenance Commitment before finding in favour of any Party to the Arbitration and shall be bound by the interpretation.

Decisions of the Arbitral Tribunal

- 24. The Arbitral Tribunal shall decide the dispute on the basis of the Driver Training and Maintenance Commitment and the Decision. Issues not covered by the Driver Training and Maintenance Commitment and the Decision shall be decided (in the order as stated) by reference to the Merger Regulation, EU law and general principles of law common to the legal orders of the Member States without a requirement to apply a particular national system. The Arbitral Tribunal shall take all decisions by majority vote.
- 25. Upon request of the Requesting Party, the Arbitral Tribunal may make a preliminary ruling on the Dispute. The preliminary ruling shall be rendered within one month after the confirmation of the Arbitral Tribunal, shall be applicable immediately and, as a rule, remain in force until a final decision is rendered.
- 26. The Arbitral Tribunal shall, in the preliminary ruling as well as in the final award, specify the action, if any, to be taken by DB or an Affiliated Undertaking in order to comply with the commitments vis-à-vis the Requesting Party (e.g. specify a contract including all relevant terms and conditions). The final award shall be final and binding on the Parties to the Arbitration and shall resolve the Dispute and determine any and all claims, motions or requests submitted to the Arbitral Tribunal. The arbitral award shall also determine the reimbursement of the costs of the successful party and the allocation of the arbitration costs. In case of granting a preliminary ruling or if otherwise appropriate, the Arbitral Tribunal shall specify that terms and conditions determined in the final award apply retroactively.
- 27. The final award shall, as a rule, be rendered within six months after the confirmation of the Arbitral Tribunal. The time-frame shall, in any case, be extended by the time the Commission takes to submit an interpretation of the Commitment if asked by the Arbitral Tribunal.
- 28. The Parties to the Arbitration shall prepare a non-confidential version of the final award, without business secrets. The Commission may publish the non-confidential version of the award.
- 29. Nothing in the arbitration procedure shall affect the power to the Commission to take decisions in relation to the Driver Training and Maintenance Commitment in accordance with its powers under the Merger Regulation.

Section E. Monitoring Trustee

I. Appointment Procedure

1. DB shall appoint a Monitoring Trustee to carry out the functions specified in the Commitments.
2. The Monitoring Trustee shall be independent of the Parties, possess the necessary qualifications and experience to carry out its mandate, for example a consultant or auditor, and shall neither have nor become exposed to a conflict of interest. The Monitoring Trustee shall be remunerated by ECR in a way that does not impede the independent and effective fulfilment of its mandate.

Proposal by DB

3. No later than one week after the Effective Date, DB shall submit a list of one or more persons (“**Prospective Monitoring Trustee**”) whom DB proposes to appoint as the Monitoring Trustee to the Commission for approval.
4. The proposal shall contain sufficient information for the Commission to verify that the proposed Monitoring Trustee fulfils the requirements set out in Section E.2 and shall include:
 - a) the full terms of the proposed mandate, which shall include all provisions necessary to enable the Monitoring Trustee to fulfil its duties under these Commitments;
 - b) the outline of a work plan which describes how the Monitoring Trustee intends to carry out its assigned tasks;
 - c) an indication whether the proposed Monitoring Trustee is to act with regard to all the Commitments, or whether different Monitoring Trustees are proposed for any of the individual Commitments.

Approval or rejection by the Commission

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

New proposal by the Parties

6. If all the proposed Monitoring Trustees are rejected, DB 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 Section E.1-5.

Monitoring Trustee nominated by the Commission

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

II. Functions of the Monitoring Trustee

8. The Monitoring 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 Monitoring Trustee or DB, give any orders or instructions to the Monitoring Trustee in order to ensure compliance with the conditions and obligations attached to the Decision.

Duties and Obligations of the Monitoring Trustee

9. 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 compliance with the conditions and obligations attached to the Decision.
 - (iii) Assume the other functions assigned to the Monitoring Trustee under the conditions and obligations attached to the Decision.
 - (iv) Propose to DB such measures as the Monitoring Trustee considers necessary to ensure DB's compliance with the conditions and obligations attached to the Decision.
 - (v) Provide to the Commission, sending DB a non-confidential copy at the same time, a written report at the end of each quarterly period on the compliance with the conditions and obligations set out in the Commitments.
 - (vi) Promptly report in writing to the Commission, sending DB a non-confidential copy at the same time, if it concludes on reasonable grounds that DB is failing to comply with the Commitments.

III. Duties and obligations of the Parties

9. DB shall provide and shall cause its advisors to provide the Monitoring Trustee with all such cooperation, assistance and information as the Monitoring Trustee may reasonably require to perform its tasks. The Monitoring Trustee shall have full and complete access to any of DB's books, records, documents, management or other personnel, facilities, sites and technical information necessary for fulfilling its duties under the Commitments and DB shall provide the Monitoring Trustee upon request with copies of any document. DB shall make available to the Monitoring Trustee one or more offices on their premises and shall be available for meetings in order to provide the Monitoring Trustee with all information necessary for the performance of its tasks.

10. DB shall provide the Monitoring Trustee with all managerial and administrative support that it may reasonably request on behalf of ECR.
11. DB shall indemnify the Monitoring Trustee and its employees and agents (each an “Indemnified Party”) and hold each Indemnified Party harmless against, and hereby agrees that an Indemnified Party shall have no liability to DB for any liabilities arising out of the performance of the Monitoring Trustee’s duties under the Commitments, except to the extent that such liabilities result from the wilful default, recklessness, gross negligence or bad faith of the Monitoring Trustee, its employees, agents or advisors.
12. At the expense of DB, the Monitoring Trustee may appoint advisors (in particular for legal advice), subject to DB’s approval (this approval not to be unreasonably withheld or delayed) if the Monitoring Trustee considers the appointment of such advisors necessary or appropriate for the performance of its duties and obligations under the Mandate, provided that any fees and other expenses incurred by the Monitoring Trustee are reasonable. Should DB refuse to approve the advisors proposed by the Monitoring Trustee the Commission may approve the appointment of such advisors instead, after having heard DB. Only the Monitoring Trustee shall be entitled to issue instructions to the advisors. Section E.11 [Indemnification] shall apply *mutatis mutandis*.

IV. Replacement, discharge and reappointment of the Monitoring Trustee

13. If the Monitoring Trustee ceases to perform its functions under the Commitments or for any other good cause, including the exposure of the Monitoring Trustee to a conflict of interest:
 - a. the Commission may, after hearing the Monitoring Trustee, require DB to replace the Monitoring Trustee; or
 - b. DB, with the prior approval of the Commission, may replace the Monitoring Trustee.
14. If the Monitoring Trustee is removed according to Section E.13, the Monitoring Trustee may be required to continue in its function until a new Monitoring Trustee is in place to whom the Monitoring Trustee has effected a full hand over of all relevant information. The new Monitoring Trustee shall be appointed in accordance with the procedure referred to in Section E.1-7.
15. Beside the removal according to Section E.13, the Monitoring Trustee shall cease to act as Monitoring Trustee only after the Commission has discharged it from its duties after all the Commitments with which the Monitoring Trustee has been entrusted have been implemented.

Section F. Review Clause

1. The Commission may, where appropriate, in response to a request from DB showing good cause and accompanied by a report from the Monitoring Trustee:
 - a. Grant an extension of the time periods foreseen in the Commitments, or
 - b. Waive, modify or substitute, in exceptional circumstances, one or more of the undertakings in these Commitments.

2. Where DB 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 DB be entitled to request an extension within the last month of any period.

On behalf of Deutsche Bahn AG

Dr. Frank Montag



ANNEX 1
ECR LOCOMOTIVE PLAN

[...]

ANNEX 2
ECR BUSINESS PLAN

[...]

ANNEX 3
DRIVER TRAINING SERVICES

[...]