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OFFICE OF RAIL REGULATION

2 August 2010

Neil McDonald
Managing Director Industrial
DB Schenker Rail (UK) Limited
Carr Hill
Doncaster
DN4 8DE

Dear Mr McDonald,

Competition Act 1998 Investigation

1. I am writing to inform you of the outcome of our Competition Act 1998 investigation into the pricing conduct of the DB Schenker Rail UK Ltd (DBS). We intend for this to be an open letter and will publish it on our website on Tuesday 3 August.

2. We have found no evidence that DBS has infringed the prohibition imposed by section 18 of the Competition Act 1998 or Article 102 of the Treaty on the Functioning of the European Union.

3. In summary we found no evidence that DBS's pricing for the contract could reasonably be found to be anti-competitive in itself or as part of an anti-competitive strategy. Our full reasoning and the facts upon which we base our findings are set out in our decision document, a copy of which is supplied to you with this letter. We intend to publish a non-confidential version of the decision document on 18 August 2010.

4. We found that DBS priced this contract above the avoidable costs that it incurred as a result of operating the contract. We found no evidence of any intent by DBS to eliminate or unreasonably constrain a competitor. In summary, we found no evidence that DBS was competing otherwise than on the merits.

5. We endorse the benefits that arise from competition in terms of lower prices, higher quality of service, and greater efficiency. Competition within the UK rail-freight sector has been a good news story to date. We have been pleased to observe the incidence of new entry since privatisation and the customer benefits that have resulted from this. Our recent

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survey of freight customers has shown that customers continue to value having a choice of rail freight service provider, recognising the importance of this in driving down prices and improving service quality.

6. We are aware that reductions in overall freight volumes brought about by the recession may create surplus capacity and make competition for business particularly intense. This may lead to downward pressure on prices. We are committed, however, to taking action against any pricing or indeed any other aspect of commercial activity that goes beyond normal competition. We will take a practical, effects based, approach to investigating concerns about anti-competitive conduct. Our concern will always be to identify whether there is evidence of behaviour that is capable of distorting effective competition. This would mean looking at operators' actual conduct on the market as well as their stated strategies. This holds true for all operators who hold positions of dominance such that their conduct is capable of influencing the structure of the market.

7. We acknowledge that all parts of the rail freight industry are under considerable pressure at the moment. A key focus for us will be on addressing barriers to entry and growth. Such barriers can result from the behaviour of incumbents but they may also be structural. Part of our strategy is to identify what those barriers are and to propose and (where appropriate and within our power) implement remedies. Our current freight market studies form part of this strategy. There are other activities which have the same objective, such as the development of third party access contracts and our forthcoming review of Part J of the Network Code as part of our corporate strategy commitment to ensure the "Efficient use of capacity on the mainline network".

8. I understand that you and your colleagues have expressed concerns over the duration of this investigation. We continually look for ways to make our processes more efficient and we endeavour to reach decisions in as short a time as possible. Our published target is currently six months to reach either a draft decision (statement of objections) or non-infringement decision. We met that target here in part due to the compliance shown by all parties in providing us information and data within the timescales required. We are, however, well aware of the business uncertainty which can arise during the course of an investigation and will continue to improve our processes whilst at the same time remaining mindful of the need to base our findings on sound evidence and robust analysis.

9. We have supplied to you a copy of our decision on which we invite you to make:

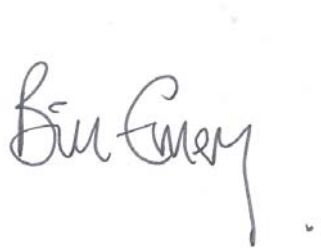
- final reasoned representations as to confidentiality (see Annex for more information on the framework); and

- any comments on matters of factual accuracy.

Please do so by midday on Monday 16 August 2010. If we do not hear from you by then, we will assume that you are content for us to publish the decision with only those redactions indicated in the version supplied to you. We intend to publish the non-confidential version of the decision on Wednesday 18 August 2010.

10. This letter and the copy of our decision are copied to George Shaw and Paul Gold at DBS.

Yours sincerely



Bill Emery

Annex

The framework within which ORR will decide whether it is necessary to disclose information provided to us during the course of the investigation is set by the Competition Act 1998 (Office of Fair Trading's Rules) Order 2004, SI 2004/2751 ('the OFT rules') and by relevant case law.

Rule 6 of the OFT Rules, provides you the opportunity to identify information (including information within documents) which you consider should be treated as confidential and provide an explanation as to why ORR should treat it as such. Confidential information is defined at rule 6(1) as:

> (a) commercial information whose disclosure the OFT or a regulator thinks might significantly harm the legitimate business interests of the undertaking to which it relates; or
>
> (b) information relating to the private affairs of an individual whose disclosure the OFT or a regulator thinks might, significantly harm the individual's interests; or
>
> (c) information whose disclosure the OFT or a regulator thinks is contrary to the public interest.

Please see the ORR Competition Act guideline: Application to Services Relating to Railways at: http://www.rail-reg.gov.uk/upload/pdf/247.pdf for more details of the case law. In particular, we would like to draw your attention to paragraph 4.24:

> "The judgment of the CAT in the case concerning Replica Football shirts provides guidance to a competition authority on how such discretion should be interpreted. Three key limitations on the confidentiality exclusion emerge:
>
> - the need to exclude confidential information only extends "so far as is practicable" and therefore entails a proportionality exercise;
> - the words of the statute provide for a subjective judgement to be made by the competition authority; and
> - the competition authority must believe there is a risk of significant harm to the company's legitimate business interests. In particular, the Tribunal has emphasised that commercial information over two to three years old will not generally present a risk of significant harm."