



NS – alleged predation in the Dutch railway sector

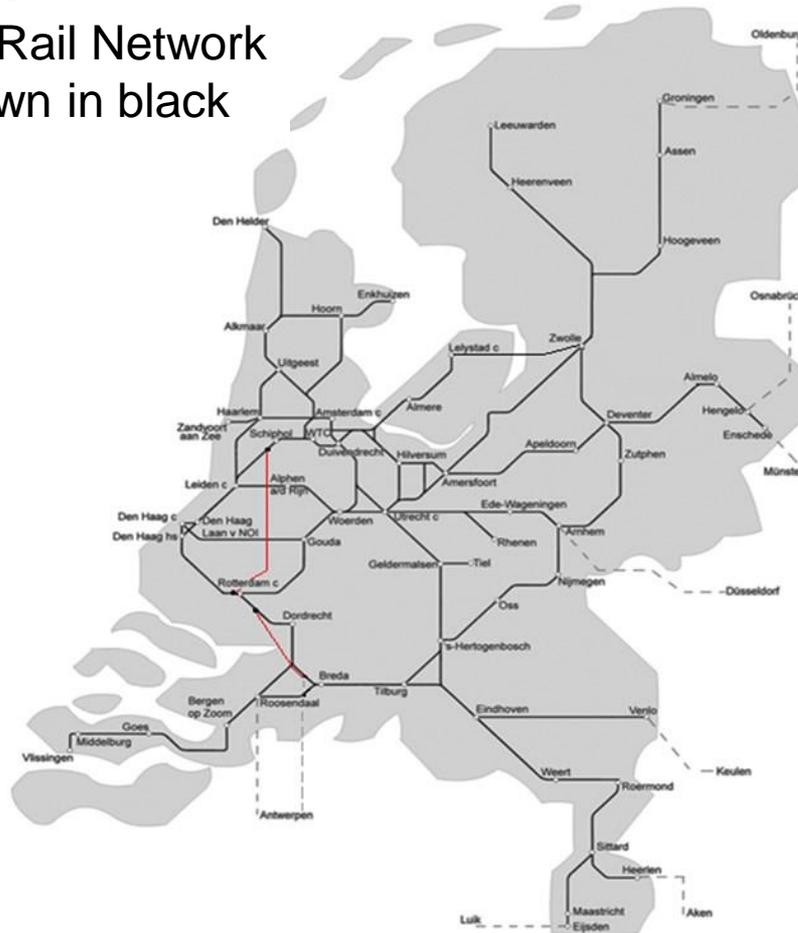
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The views expressed here are the author's

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Dutch railway sector as of 2014

Main Rail Network
shown in black



- Competition for local lines through tenders
- MRN granted to NS for 10-year periods
- Current MRN concession runs till 2025
- MRN potentially smaller in next concession period
- Mid-term review in 2019

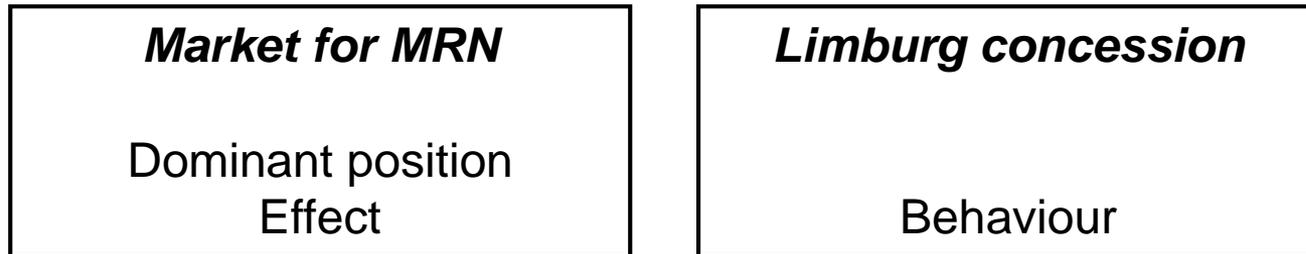
Dutch railway sector as of 2014



Local line Limburg

- Tender for local lines in Limburg in 2014
 - Train and bus services
- This line marked as ‘experiment’ by Min. of Infrastructure
 - Is “co-servicing” by competitors on same track possible?
- 3 bidders, NS won

ACM's theory of harm



1. NS dominant on market for MRN
2. Winning Limburg concession reduces probability that (parts of) MRN are opened up for competitors
3. NS submitted a predatory bid for the concession in Limburg

Dominance on market for MRN

- Relevant market for rail services on MRN
- Dominance:
 - *Private negotiations* between Government and NS have always resulted in MRN granted to NS
 - Not sufficient compensating buyer power
- Legal debate: should ACM have investigated the terms and conditions of the MRN concession?

Connection between Limburg concession and the market for the MRN

Winning Limburg affects probability of competition for (parts of) MRN after 2025

- Minister of Infrastructure in July 2012:
“The decentralisation in Limburg provides the opportunity to check how far reaching co-servicing by several operators on one rail segment ... works in practice”
- Secretary of Infrastructure in December 2012:
“On the basis of experience [in Limburg] I will consider ... whether other train services from the FMN’s plan can be decentralised”
- Board member of NS in 2014:
“LIMBURG. Question is should we bid there? Due to co-servicing I say yes, for if it is possible there, this is the beginning of wood rot in the MRN”

Connection between Limburg concession and the market for the MRN

- NS: ACM should demonstrate “*the mechanism by which NS could use on the one market its alleged dominant position on the other market*”
 - A dominant position is more valuable than a position subject to competition -> NS has stronger incentive to bid aggressively
- Legal debate: how important should experiences with co-servicing be for behaviour to be anti-competitive?

The AEC-test

- AEC-test: price below incremental cost is a sacrifice of profit
- Application to Limburg concession
 - Bidders do not set price and compete on quality
 - Expectations versus realisations (concession will run for 15 years)
 - Uncertainty and risk
- Method: IRR-WACC comparison on business case

The AEC-test

- Does the WACC reflect incremental costs?
- How high should the WACC be?
- Which value of the IRR (*base case* or *mean case*)?
- Assumptions underlying the business case - *expected number of travellers*
- Internal views within NS on merits of the business case
 - Internal controller could not advice positively on business case “*unless there is a strategic rationale of big importance*”

A direct test for profit sacrifice?

- Expected profits from a bid are:

$$\begin{array}{l} \textit{probability of winning} \quad \times \\ \textit{profit conditional on winning} \end{array}$$

- Exclusive focus on the probability of winning implies profit sacrifice
- CEO of NS:
 - “*Focus is now on the winning bid*”
 - “*if risk profile reasonable, NPV of 0 at a WACC of [...] could be basis for bid in light of strategic importance*”