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European Union Committee

10th Report of Session 2008–09

Recast of the First Rail Freight Package

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NOTE: References in the text of the report are as follows:

(Q) refers to a question in oral evidence

(p) refers to a page of written evidence

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SUMMARY

In 2001, the Council of Ministers and the European Parliament adopted the so-called First Railway Package. Comprising three Directives, this was intended to open up the rail freight market to competition and help to improve rail's share of the overall freight market. However, in 2006 the Commission published a report concluding that the implementation of the Package was inadequate. In 2008, the Commission began infraction proceedings against 24 Member States. In the light of this, the Commission has committed itself to recasting the Package.

In this report, the Committee looks at which elements of the Package need amending and which need clarification.

One of the main aims of the original Package was to ensure that infrastructure managers in each Member State treat all rail freight operators fairly. In order to achieve this, we recommend the Commission use the recast to require the full, rather than simply accounting, separation of railway infrastructure managers from rail train operators. We believe that full separation is the surest way to remove market distortions and to create the conditions necessary for increased rail freight.

Another principal requirement of the Package was for Member States to establish separate rail regulators. This is one of the main areas of concern for the Commission and many of the infraction proceedings include allegations of inadequate implementation of this requirement. We conclude that the recast of the Package should include more detailed provisions about the powers and remits of regulators. We also believe that the recast Package should include a requirement for regulators to be independent of government. We recommend that the Commission do not propose establishing an EU-level regulator. We believe that closer cooperation between national regulators and between infrastructure managers is necessary but an EU-level regulator is not.

We also received evidence on the charges levied for use of rail infrastructure and access to rail-related services such as sidings, marshalling yards and fuelling stations. The provisions of the Package have allowed a wide variety of rail freight access charges to be levied across the EU, which has hindered growth. We recommend that the Commission include in the recast mandatory definitions of which costs can and cannot be included in infrastructure charges. We also recommend that the recast include a requirement for Member States to agree multi-annual contracts with their infrastructure managers. Regarding rail-related services, we recommend that Member States should be required to give their regulators the powers to act in this area.

In conclusion, we support recasting the Package. We also believe that the Commission should pursue infraction proceedings vigorously and make more use of competition laws where appropriate. In this way, we believe the aim of an open and competitive rail market can be achieved and international rail freight can be encouraged further.

Recast of the First Rail Freight Package

CHAPTER 1: INTRODUCTION

1. The European Commission published a white paper entitled “European transport policy for 2010: time to decide”¹ in September 2001. The paper concluded, the EU’s “transport system needs to be optimised to meet the demands of enlargement and sustainable development”. The Commission identified three interlinked obstacles to achieving this goal: an imbalance between modes of transport, congestion on roads and rail routes and the environmental impact of transport. To combat these obstacles the Commission proposed a “modal shift” away from road to other forms of transport, particularly rail. In the freight market, with which this report is concerned, road transport has continued to be dominant while rail freight’s share of the market has declined (see Figures 1 and 2).

FIGURE 1
Rail freight, EU-25²

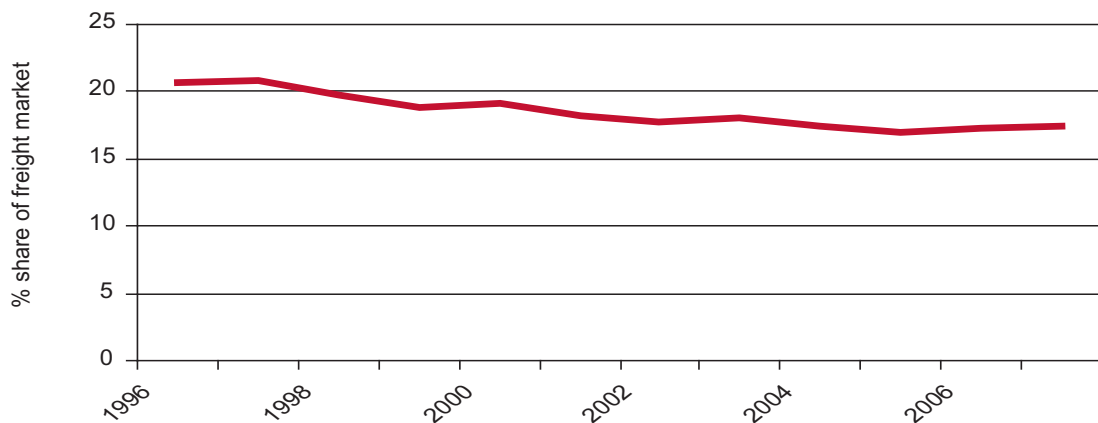
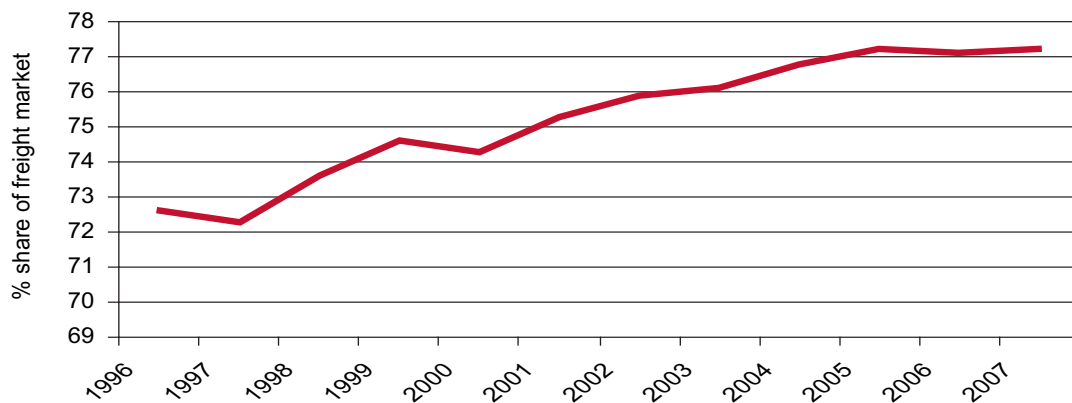


FIGURE 2
Road freight, EU-25³



¹ COM(2008)370 final

² Data from Eurostat (<http://epp.eurostat.ec.europa.eu>)

³ *Ibid*

2. The white paper prioritised market opening as a way to increasing rail's share of the freight market. The Commission intended the First Railway Package, adopted in 2001, to do this by removing barriers to intra-EU rail freight and encouraging competition. However, in 2006 the Commission published a report⁴ on the implementation of the Package that concluded that:

“At the moment, the Directives are still having an unequal effect in practice from one Member State to another, and have not led to the arrival of new entrants in all the Member States. Where appropriate, the Commission will launch infringement procedures if transposition is incomplete or has not been done properly: it is in fact necessary to ensure that the implementation is done in the spirit of Community legislation as well as to the letter.”
3. On 26 June 2008, the Commission began infringement proceedings against 24 Member States, including the UK⁵. In its 2008 and 2009 Legislative and Work Programmes (LWP)⁶, the Commission committed itself to proposing a recast⁷ of the Package.
4. The 2009 LWP proposes simplifying the package by merging its three constituent Directives into one. The aim of this is to “improve readability”⁸ and encourage fuller compliance by Member States. The LWP also says that the recast will contain, *inter alia*, new measures to strengthen the powers of regulators and increase cooperation between infrastructure managers. The LWP sums this up as creating a “genuine internal market” for rail freight.
5. In the light of this commitment, Sub-Committee B (Internal Market) (see Appendix 1) decided to conduct an inquiry into how the Package needs to be amended. They took evidence from a number of witnesses on the role of infrastructure managers, railway undertakings and regulators, and their relationships to one another. They also received evidence on other barriers to a “genuine internal market”. The oral evidence and written submissions are printed in HL Paper 90–II. Witnesses are listed in Appendix 2 and we are grateful for their contribution. This report follows up the Committee's earlier report *Liberalising Rail Freight Movement in the EU*⁹.
6. We focus in this report on high-level issues rather than the many and varied details of rail freight and in chapter five discuss some of the more specific problems with rail freight identified by witnesses. We do not discuss the regulation of the Channel Tunnel. Although the Tunnel is essential to the UK increasing its use of rail freight to the continent, it is exempt from some of the provisions of the First Railway Package under Article 8(2) of Directive 2001/14/EC¹⁰. We do not discuss passenger rail legislation.
7. We thank our Specialist Adviser, Professor Christopher Nash of the University of Leeds¹¹, for his help and advice throughout the inquiry.
8. A glossary of terms and abbreviations can be found in Appendix 5.
9. **We make this report to the House for debate.**

⁴ COM(2006)189 final

⁵ The issue identified by the Commission was due to a misunderstanding of the UK's implementation of the Package. This has now been resolved. For details of the alleged infractions see Figure 3.

⁶ COM(2007) 604 final and COM(2008) 712 final

⁷ A recast is used to consolidate pieces of legislation and to make substantive changes to the legislation.

⁸ *Op cit*

⁹ European Union Committee, 4th Report (2004–05): *Liberalising Rail Freight Movement in the EU* (HL 52)

¹⁰ OJ L75 (15 March 2001) pp 29–46

¹¹ Professor Nash's declared interests are listed in Appendix 4.

CHAPTER 2: LEGISLATIVE CONTEXT

10. The European Community began legislating to liberalise European railways in 1991. The Directive on the development of the Community's railways (91/440/EEC)¹² aimed to open the international rail freight market to new entrants by requiring accounting separation of infrastructure managers—that is, the bodies responsible for providing and maintaining the rail network—from railway undertakings—that is, companies providing freight services—and by prohibiting discriminatory systems of infrastructure charging and capacity allocation. In 1995, further Directives dealt with the licensing of railway undertakings (95/18/EC)¹³ and infrastructure capacity allocation and the charging of infrastructure fees (95/19/EC)¹⁴. Three Railway Packages of 2001–07 revised and extended the measures to produce the current situation.
11. The Council of Ministers and European Parliament adopted the First Railway Package in 2001 for implementation by March 2003. It comprises three Directives: 2001/12/EC¹⁵, 2001/13/EC¹⁶ and 2001/14/EC¹⁷. The most significant parts of the package are Directives 2001/12/EC on the development of the Community's railways and 2001/14/EC on the allocation of railway infrastructure capacity and the levying of charges for the use of the railway infrastructure and safety certification.
12. Directive 2001/12/EC amended 91/440/EEC. Originally, the proposal was to require the complete separation of infrastructure managers from service operators, but the Council did not agree to this. A compromise was reached where the two functions could remain in separate divisions of the same organisation, provided that there was separate accounting and independence of decision-making. However, to remove incentives for discriminatory behaviour, the essential functions of capacity allocation, charging and licensing could not be undertaken by an organisation that also provided rail services.
13. Directive 2001/14/EC set out the rules for setting infrastructure charges and for capacity allocation. It provides for non-discriminatory access to a basic package of infrastructure capacity and rail-related services. It requires infrastructure managers to publish network statements setting out the capacity of the infrastructure and the arrangements for and costs of using it. Member State governments must ensure that the finances of the infrastructure manager are sound, and that there is pressure on it to reduce costs either through the regulatory process or through a multi-annual contract with government. The Directive also requires a regulatory body to be established to hear appeals from undertakings alleging unfair treatment by the infrastructure manager. This body must be independent of the

¹² OJ L237 (24 August 1991) pp 25–28

¹³ OJ L143 (27 June 1995) pp 70–74

¹⁴ OJ L143 (27 June 1995) pp 75–78

¹⁵ OJ L75 (15 March 2001) pp 1–25

¹⁶ OJ L75 (15 March 2001) pp 26–28

¹⁷ *Op cit*

infrastructure manager, but may be within the Transport Ministry of a Member State.

14. Since the First Railway Package came into force, two further packages have also been agreed. The Second Railway Package¹⁸ provides for the complete opening of the markets for international and domestic freight and for harmonised safety legislation. It also established a European Railway Agency to advise the Commission on safety and interoperability issues. The Third Railway Package¹⁹ will open the market for international passenger services by 2010 and introduce international train driving licences.
15. As noted above, the Commission concluded in 2006 that the implementation of the First Railway Package was inadequate and, in 2008, commenced infraction proceedings against 24 of the 25 Member States with railways²⁰ (the one exception was the Netherlands). See Figure 3 for further details of the alleged infractions.
16. There are a number of other measures that also have a bearing on rail freight. The European Railway Traffic Management System (ERTMS), which—with financial support from the Commission—is being installed on six freight corridors, is intended to avoid the need for operators to have locomotives equipped to deal with the different signalling systems of all the Member States through which they run. In 2008, the Commission proposed a Regulation requiring Member States to establish freight corridors with revised governance arrangements, clear targets and implementation plans, and giving priority to some freight over passenger trains²¹ (see Box 1). Also in 2008, the Commission adopted a “Greening Transport” package²². This proposes, amongst other things, a revised “Eurovignette” Directive allowing the charging of heavy goods vehicles for congestion and air and noise pollution, and a revision of the rules regarding rail track access charges to encourage the reduction of noise from freight wagons.
17. This report does not deal with the Second or Third Packages or these other pieces of legislation, which do not relate to the First Railway Package.

¹⁸ The Second Railway Package comprises Directives 2004/51/EC (OJ L164 (30 April 2004) pp 164–172), 2004/49/EC (OJ L164 (30 April 2004) pp 44–113), 2008/57/EC (OJ L191 (18 July 2008) pp 1–45) and Regulation (EC) 881/2004 (OJ L164 (30 April 2004) pp 1–43).

¹⁹ The Third Railway Package comprises Directives 2007/59/EC (OJ L315 (3 December 2007) pp 51–78), 2007/58/EC (OJ L315 (3 December 2007) pp 44–50) and Regulation 1371/2007 (OJ L315 (3 December 2007) pp 14–41).

²⁰ Malta and Cyprus do not have significant rail networks.

²¹ COM(2008) 852 final

²² COM(2008) 433 final

FIGURE 3

Summary of alleged infractions provided by the Department for Transport

| | AT | BE | BU | CZ | DE | DK | EE | GR | ES | SF | FR | HU | IE | IT | LT | LU | LV | PL | PT | RO | SE | SL | SK | UK |
|--|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|
| Insufficient guarantee infrastructure manager independence from railway holding/affiliates | X | X | | | X | | | X | | | | | | X | | | | X | | | | | | |
| Essential functions still performed by incumbent railway undertaking | | | | X | | | X | | | | X | X | | | | X | X | | | | | | X | |
| Insufficient access of foreign freight railway undertakings to national infrastructure | | | | | | | | | X | | | | | | | | | | | | | | | |
| Incumbent railway undertaking insufficient management independence | | | | X | | | X | X | | | | | | | | | | | X | | | | X | |
| Infrastructure manager doesn't determine infrastructure charges | | | | X | | | | X | | | X | | | X | | | | | | X | | | | |
| Infrastructure charges not related to costs | | | | | | | X | | | | X | | | | | | | | | | | | | |
| Insufficient legal provisions to ensure infrastructure manager revenue and costs | | | | | | | | | | X | | | | | | | | | X | | | | | |
| Insufficient incentive for infrastructure manager to reduce infrastructure costs/access charges | | | X | X | X | | | X | | | X | X | X | | X | | | X | | | | | X | X |
| Charges set above marginal cost (or similar) | | | | | | | | | | | X | | | | | | | X | | | | | X | X |
| Regulatory body insufficient powers to control charges | | | | | | | | | | | X | | | | | | | | | | | | | |
| Absence of performance scheme to encourage railway undertakings/ infrastructure manager to minimise disruption | X | X | X | X | | X | | X | X | X | X | X | X | | X | X | | | X | | X | X | | |
| Regulatory body insufficient powers to monitor rail service market competition | X | | X | X | | X | X | X | X | X | X | | | X | X | X | X | | | | | | X | |
| Regulatory body insufficient accessibility | | X | | | | X | | X | | | | | | | X | X | X | | X | X | | | X | |
| Regulatory body insufficient independence from incumbent railway undertaking/infrastructure manager | | X | X | | | X | | X | X | | X | | | X | X | X | X | | X | | | | X | |
| Regulatory body insufficient powers to enforce decisions and requests for information | | | | X | | | X | X | X | X | | | | X | | X | X | | | | | | | X |
| Regulatory body decisions not subject to judicial review | | | | | | | | | | | | | | | | | | | | | | | X | |
| Regulatory body no obligation to take action within 2 months | | | | | | | | | | | | | | | | | | | | | | | | X |
| Insufficient procedure to determine international train paths | | | X | | | | | | X | X | | | | | X | | X | | | | | | | |
| Infrastructure charges not related to costs | | | | | | X | | | | | | | X | | | | | | | | | | | |
| No provision for regulator participation in international cooperation of regulatory bodies | | | | | | X | X | | X | | | | | | | | X | | | | | | X | |
| Insufficient provision for infrastructure manager cooperation in traffic control | | | | | | X | | | | | | | | | | | | | | | | | | |
| Infrastructure manager tasks not consistent with financing | | | | | | | | | | | | | | | | | | X | | | | | | |
| Regulatory body insufficient supervision of applicant/infrastructure manager negotiation on infrastructure charges | | | | | | | | | | | | | | | | | | X | | | | | | |
| No separate profit and loss accounts and balance sheets for infrastructure manager and transport services | | | | | | | | | | | | | | | | | | | | | X | | | |

Source: DG TREN

CHAPTER 3: INFRASTRUCTURE MANAGERS AND RAILWAY UNDERTAKINGS

18. The infrastructure manager is responsible for providing and maintaining the rail infrastructure. In some Member States, the infrastructure manager is also responsible for capacity allocation, setting charges for the use of infrastructure and providing access to other rail-related services, such as terminals, sidings and marshalling yards (see chapter five for further details).
19. Article 6 of Directive 91/440/EEC, as amended by Directive 2001/12/EC, provides for accounting separation between infrastructure managers and railway undertakings. It says, “Member States may also provide that this separation shall require the organisation of distinct divisions within a single undertaking or that the infrastructure shall be managed by a separate entity”. The setting of charges and the allocation of capacity must be undertaken by a body that is independent in legal form and decision making from any train operator. Member States have implemented this requirement in different ways. For example, in Germany the Deutsche Bahn Group includes the infrastructure manager, DB Netz AG, and the dominant German freight operator, DB Schenker Rail. In France there is a separate infrastructure manager, Réseau Ferré de France (RFF). However, RFF has appointed SNCF, the incumbent operator, as its “delegated manager” with responsibility for many of the duties usually undertaken by the infrastructure manager²³. In the UK the infrastructure manager, Network Rail, is prevented by statute from owning an operator.
20. The majority of witnesses were in favour of the recast requiring full separation of infrastructure managers from operators rather than allowing the “distinct divisions with a single undertaking” option. Lord Berkeley, Chairman of the Rail Freight Group, identified the separation of the infrastructure manager and the train operator as one of the two major principles “that need to be got right” (Q 73).
21. Witnesses argued that separation is necessary to ensure all operators have equal access to the infrastructure. The European Rail Freight Association (ERFA) argued that accounting separation alone cannot guarantee non-discriminatory access and questioned the effectiveness of a “Chinese wall” between infrastructure managers and incumbent rail operators where they are part of the same organisation (p 61). Similarly, the Belgian regulator, the Service de Regulation du Transport Ferroviaire et de l’Exploitation de l’Aéroport de Bruxelles-National, lacked confidence in Chinese walls between divisions, saying, “sometimes a wall can collapse very quickly” (Q 267).
22. The Government were also concerned that the Package “has not achieved the desired intention of ensuring transparent, equitable and non-discriminatory access to rail infrastructure for non-incumbent, independent operators” (p 137). Arriva, a privately owned operator, put it bluntly: “the motivation to retain the infrastructure is primarily an instrument to maintain control over a monopoly asset and the operators using it” (p 109).
23. European Rail Infrastructure Managers (EIM) agreed that an infrastructure manager independent of any rail operator is desirable because “if you want to

²³ See RFF’s website: http://www.rff.fr/pages/connaitre/sncf_rff.asp?lg=en

open a market, you have to make it easy for people to enter a market. By having an independent infrastructure manager, it is very easy, because his remit is to ensure that the infrastructure is used in the most effective manner” (Q 44).

24. Witnesses also gave examples of how the problems of integrated infrastructure managers manifest themselves. Lord Berkeley said, “there is no transparency of the movement of funds between an infrastructure manager and a train operator. How can you have fair competition ... if you think that the incumbent train operator is being unfairly subsidised by the infrastructure manager or one of the local authorities that is funding it?” (Q 73) ERFA argued that this lack of transparency leads to “a lot of suspicions about what has gone on internally” (Q 154).
25. Other problems include the flow of staff between subsidiaries of a holding company (ERFA, Q 154, the Belgian regulator, Q 266), the fact that some integrated infrastructure managers deal with safety certification for their subsidiaries as well as their competitor freight operators, and potential confidentiality issues where the subsidiaries of a holding company share the same IT system (the Belgian regulator, Q 266). EIM identified safety certification in France as a problem because the responsibilities of the regulator and safety body to approve locomotives have been “re-delegated back to SNCF” (Q 45).
26. The Federal Network Agency, the German regulator, said that “because Deutsche Bahn is still influenced by a holding structure ... There is also a tendency to give preferential treatment to their own subsidiaries” (Q 186). Whereas other witnesses referred to informal collusion between divisions such as “the quiet word in the ear” (Lord Berkeley, Q 76) or operators “suspected to have the slightest advantage” (ERFA, Q 154), the Federal Network Agency cited the specific example of DB Netz AG offering a “special rebate” which only DB Schenker Rail could take up (Q 186).
27. Some witnesses argued the result of separating infrastructure managers from operators was increased competition and promotion of the use of rail freight. The Office of Rail Regulation, the UK rail regulator, said that since privatisation “the rail freight market share of land transport has grown from around 8.5 per cent to 12 per cent in the last 10 years. There has been a substantial amount of growth in rail freight and volumes of freight moved are up by 60 per cent” (Q 133). Lord Adonis, Minister of State, Department of Transport, said that the UK’s market structure was “one of the underlying reasons for this growth” (Q 500). Other witnesses also cited the UK’s growth in rail freight as supporting the separation of infrastructure managers from operators (Rail Freight Group p 21, Network Rail p 2).
28. However, NewRail, a research centre based in Newcastle University, said that some of the growth in rail freight could be accounted for by the changes in the coal sector. As more coal has been imported, the amount needing to be carried by rail freight from Scottish ports has increased (Q 95). Lord Adonis agreed that the increase in coal being carried by rail freight was “a big factor in the increase in rail freight in Britain” but insisted that market liberalisation was another significant influence (Q 530).
29. In contrast with other witnesses, Deutsche Bahn argued that the development of railway markets in Europe does not provide evidence that full ownership separation is required to achieve market opening (p 152). They

- cited the Rail Liberalisation Index 2007²⁴, which scores countries in terms of the degree of their market opening (p 152). The Index gave high scores to countries with holding structures like Germany and Austria as well as those with fully separated markets like the UK and Sweden. In the Community of European Railway and Infrastructure Companies' (CER) view, "rail freight growth is not directly linked to the opening up of the market. We do not have such evidence". They argued instead "that rail traffic growth is much more related to the investments into the infrastructure and the track access charging schemes" (Q 316).
30. Some witnesses argued that integration was an effective model provided there was a strong regulator. The Federal Network Agency said that the holding company system works in Germany because they have sufficient powers. Their regulatory remit covers not only the railways but also the energy, telecommunications and postal markets. According to them, there is strict separation of functions in the energy market but no such requirements for telecommunications. However, despite these different structures "success is open to every model" because they are able to regulate the markets effectively (Q 184). The Office of Rail Regulation agreed that integration may be acceptable when there is a strong regulator (Q 141).
 31. Network Rail, the UK infrastructure manager, argued that if a strong, independent regulator is established the legislation does not need to require the separation of infrastructure managers from operators. They explained that the history of independent regulation of markets in the UK shows that "regulation in itself has forced that separation and actually forced the companies to want that separation" (Q 19). Similarly, the Office of Rail Regulation said that effective regulation would encourage an integrated infrastructure manager to "move towards wanting to separate itself anyway" (Q 141).
 32. However, ERFA disagreed. They argued that even "a very, very strong regulator will never be able to counterbalance a bad market" (Q 155). They said that in an integrated market the regulator needs to intervene "very early in the processes, the earlier the better ... but the risk of him coming too late is extremely great because he does not have full transparency on all the processes". They also argued that the regulator would need to "mirror all the processes that are going on" and would therefore become over-staffed and inefficient. Finally, ERFA argued that the consequence of needing such a regulator would be "over-intrusive" regulation (Q 155).
 33. Other evidence also suggests that strong regulation is not sufficient to counter integrated infrastructure managers and operators. The Belgian regulator said that they were aware that some operators had difficulties accessing rail-related services (see chapter five) and "although we are able to deal with such complaints we have not received any formal complaints" (Q 238). Arriva said that in Germany they had often opted for dealing with problems "in a co-operative way", rather than going as far as lodging a formal complaint (QQ 367–369). This lack of formal complaint may be explained by the dominance an integrated infrastructure manager can have in a national market. We would expect independent operators to be reluctant to lodge formal complaints against integrated infrastructure managers for fear of

²⁴ *Rail Liberalisation Index 2007: Market opening: comparison of the rail markets of the Member States of the European Union, Switzerland and Norway*, IBM

damaging their relations with the infrastructure managers on whom they rely to operate.

Conclusions

34. We conclude from the evidence that the full separation of infrastructure managers from railway undertakings has not been the only factor contributing to rail freight growth. It is clear from the evidence that factors such as funding and changes to other markets are also important. However, we believe that the growth of rail freight has been restricted by the fact or suspicion that some freight operators have received preferential treatment from infrastructure managers. The evidence of the Federal Network Agency demonstrates that even where there is a strong and active regulator, placing infrastructure management and freight operation in different divisions of the same company is not sufficient to guarantee an open market where operators can be confident of non-discriminatory treatment. **We believe that this approach, no matter how well regulated, leaves room for unfair practices. Full separation is much more likely to remove that possibility and create the conditions necessary for increased rail freight. We recommend the Commission include in the recast a requirement for the full separation of infrastructure managers from railway undertakings.**
35. **We conclude that the lack of formal complaints to regulators in some Member States is evidence of the practical constraints on market opening. We believe this demonstrates the need for the Commission to press ahead with the proposed recast, to bring about a genuine free market that operates without fear or favour.**

CHAPTER 4: REGULATION

36. Article 30(1) of Directive 2001/14/EC requires Member States to establish a regulatory body to oversee the rail market. It says, “this body, which can be the Ministry responsible for transport matters or any other body, shall be independent in its organisation, funding decisions, legal structure and decision-making from any infrastructure manager, charging body, allocation body or applicant”. Article 30(2) requires regulators to have the power to oversee the relationships between infrastructure managers and operators in terms of capacity allocation, charges and safety certification. Article 30(4) gives regulators the power to “request relevant information from the infrastructure manager, applicants and any third party involved within the Member State concerned, which must be supplied without undue delay”.
37. The failure of Member States to allocate sufficient powers to regulators is one of the most significant shortcomings identified by the European Commission in its 2006 report on the implementation of the First Railway Package²⁵. This “curate’s egg”²⁶ (NewRail p 36) in implementation was also a concern to witnesses. The Rail Freight Group (Q 77) and ERFA (Q 155) said the French regulator was an example of poor implementation of the Package. According to IBM’s 2006 report *Rail Regulation in Europe: Comparison of the status quo of the regulation of rail network access in the EU-25 countries, Switzerland, and Norway*²⁷, the French regulator comprises a full-time secretary general and six part-time members and can only make recommendations to the transport ministry. On the other hand, Network Rail said that the Office of Rail Regulation is “more than adequate” (p 3). Similarly, the Federal Network Agency said that they had powers that went further than the requirements of European law (p 19 and QQ 197–198).

Independence of regulatory bodies

38. Witnesses regarded the independence of regulators from government, infrastructure managers and train operators as fundamental to their effectiveness (Network Rail, p 3; Department for Transport, p 138; Rail Freight Group p 23; Brian Simpson MEP, p 121). According to the Government, the statutory independence from Government of the Office of Rail Regulation had “ensured the correct application of European rail legislation, with transparent, equitable and non-discriminatory access to rail infrastructure for all operators” (p 150)²⁸. However, in the opinion of the European Association for Forwarding, Transport, Logistic and Customs Services (CLECAT), the Package’s provisions are “not completely adequate regarding the independence of regulators” (p 153). Similarly, the Rail Freight Group argued that the role of regulators was “not well defined” in the Package. Although there was a requirement that they should be independent of any infrastructure manager, the regulator was permitted to be

²⁵ *Op cit*

²⁶ Meaning a mixture of good and bad. The expression is derived from a famous cartoon in Punch magazine.

²⁷ *Rail Regulation in Europe: Comparison of the status quo of the regulation of rail network access in the EU-25 countries, Switzerland, and Norway*, IBM 2006

²⁸ Infraction proceedings were started against the UK on the grounds that the Office of Rail Regulation had no obligation to take action within two months of a complaint. The Minister explained that this was due to a misunderstanding of the UK’s legislation. The Office of Rail Regulation is obliged to take action within two months (Q 500).

part of a ministry, which in turn may own the infrastructure and incumbent freight operator (p 22). Such arrangements could not guarantee the independence of the regulator and that the recast should accordingly include a specific requirement for regulatory independence from government and infrastructure managers (p 23). EIM agreed that if a ministry controlled both the regulator and an operator it was difficult to understand how “a fair judgment can be made” by regulators (Q 49).

39. However, although most witnesses agreed with the need for effective, independent national regulators, not all agreed that additional legislation was required to achieve it. Deutsche Bahn said, “the existing legislation has to be implemented properly in all Member States which is currently not the case” (p 152). For CER the need for regulators’ independence “is already foreseen in the current legislation. Give them that. Implement it properly” (Q 312). As noted above, however, the Directive makes reference only to independence from any infrastructure manager, charging body, allocation body or operator.

Powers of regulators

40. Network Rail noted that in most Member States, regulators have “unclear competencies” (p 3). According to the Rail Freight Group, the provisions of the First Railway Package do not give the regulators “sufficient powers to be truly effective” (p 23). Lord Berkeley considered that regulatory bodies should have the powers to regulate rail-related services and the system of infrastructure charging and the ability to act as an appeals body where there are disputes between operators and the infrastructure manager (Q 73). He concluded that the experience of implementing the First Railway Package demonstrated that regulators need stronger powers to correct market distortions and that “a light touch has been tried and found wanting” (Q 87).
41. Other witnesses agreed that regulators need to have clearly defined powers. Arriva and ERFA listed in detail the powers they believed regulators should have, including powers to monitor the market, issue opinions that have immediate legal effect and act in the area of rail-related services such sidings, marshalling yards and fuelling stations (see chapter five for more details) (pp 110–111 and pp 63–64).
42. Apart from lacking the necessary legal powers, EIM argued that some regulators do not have enough administrative, financial or staff resources to play an active role in the operation of the market (p 13). CER highlighted the need for regulators to have the capacity and resources to act because “without such knowledge and understanding, regulatory bodies are not likely to facilitate the creation of a real European railway area” (p 97). The Government pointed to anecdotal evidence that “many European rail regulators lack the competences, the resources and the necessary independence from government to be effective local enforcers of the spirit and the letter of European rail legislation” (p 138).
43. Network Rail, although in favour of “strong and independent regulation throughout Europe”, voiced a note of caution, suggesting that the recast should not be too prescriptive as it would be detrimental to already liberalised markets (p 3). They argued that regulators should be able to tailor their actions to the particular conditions of their nation markets rather than the EU attempting “one size fits all” regulation which would “end up creating all sorts of horrible distortions” (Q 20).

EU-level and cross-border regulation

44. The Office of Rail Regulation considered that cooperation across borders was essential to enable different regulators to share information on the way they work and to promote awareness among regulators of the potential knock-on effects of their actions in another Member State (Q 145). CLECAT argued that the lack of cross-border regulatory cooperation was an obstacle to the opening of the rail market (p 153). Both ERFA and Network Rail agreed that regulators should be required to deal with cross-border services (p 63, p 3). Witnesses gave some examples of problems encountered by operators crossing borders. These included excessive waiting times at borders, the opening times of cross-border stations being linked to the timetables of incumbent operators only (ERFA pp 60–63) and differences in safety requirements (Arriva p 64, EIM p 13, ERFA p 64).
45. Brian Simpson MEP suggested there should be “a European federation of rail regulators and infrastructure managers” to improve the coordination of rail regulators (Q 424). Network Rail noted that regulators across the EU already met together but that it is “a somewhat unbalanced group at the moment” (Q 40). CER confirmed that Article 31 of Directive 2001/14/EC required the exchange of information between regulators. However, they added that when this exchange consisted of “a weak regulator who is not independent meeting a strong one ... [it] does not make any sense” (Q 348).
46. The Office of Rail Regulation noted that the proposed Regulation concerning a European rail network for competitive freight²⁹ (see Box 1) would reinforce the requirement for regulatory bodies to cooperate (Q 145). Network Rail said that the draft Regulation should be considered alongside the recast of the First Railway Package as it required national regulators and infrastructure managers to work more closely with each other (Q 34). EIM called for better coordination of regulators along international corridors (Q 51) as well as better working practices between the regulators and the infrastructure managers (Q 53).

BOX 1

Regulation concerning a European rail network for competitive freight

On 11 December 2008, the Commission published a proposal for a Regulation concerning a European rail network for competitive freight. The proposal deals with the creation, selection, governance, funding and management of international rail freight corridors through which some freight traffic will be given priority over passenger services.

In particular, the draft Regulation requires:

- Member States to select trans-European routes to be designated as international rail freight corridors;
- Infrastructure managers of Member States along freight corridors to form a governance body with independent legal status in charge of supervising the creation of the corridor and the services it provides;
- The governance body to set up a one-stop shop where applicants can request train paths along its freight corridor;
- Regulatory bodies responsible for freight corridors to cooperate. The proposal also gives regulatory bodies the power to deal with complaints.

²⁹ COM(2008) 852 final

47. The Rail Freight Group went further than other witnesses and made a case for a European regulatory body (p 23). Lord Berkeley clarified this suggestion, saying it “was put forward ... in a sense of frustration that if you cannot get European regulators to work together in a sensible way ... then possibly you need some over-arching agency” (Q 84). He argued that “*in extremis*” an EU regulator would be necessary to act where national regulatory bodies fail to cooperate (Q 85).
48. The majority of witnesses, however, were not in favour of an EU regulator. Network Rail’s view was that independent regulators could achieve the necessary improvements in the market without recourse to an EU regulator (Q 34). The Office of Rail Regulation agreed, arguing it would be “premature” to have an EU regulator (Q 143). In their view, the first step should be to have “properly established, properly resourced” national regulators and build on them (Q 143). Similarly, ERFA said that it was necessary “to do the ground work first because otherwise the European one will just be an empty shell” (Q 157). These views were shared by the Government who said that “if all European regulators were as independent, as strongly resourced and had the powers of the Office of Rail Regulation then that would solve the problem of the lack of regulation across Europe” (Q 518). The Minister added that an EU regulator would only be appropriate if “coordination between national regulators had manifestly failed” (Q 520).

Conclusions

49. The evidence demonstrates that the requirements of the Package have allowed a variety of different forms of regulator to be established, each with different powers and resources. Some are able actively to work to ensure non-discriminatory access for all operators and to combat the preferential treatment of incumbent operators. Other regulators are limited in their competence and capacity and retain links to infrastructure managers through government ownership. This has led to differences between national markets in areas like safety certification and access to rail-related services that restrict intra-EU freight. For a genuine internal market in rail freight to be achieved each national market must be regulated to a similar standard. Therefore, we believe that regulators must be independent of government, infrastructure managers and operators, well funded and staffed, and with sufficient powers to require other bodies to comply with the law. **We recommend that the Commission should use the recast to specify the powers and remits of national regulators. The Commission should also extend the provisions of the Package to require regulators to be independent of governments.**
50. If negotiations on the recast result in requirements that fall short of full separation (as was the case for Directives 91/440/EEC and 2001/12/EC), it will be vital that effective regulators are created in every Member State (apart from Malta and Cyprus). **We recommend that the Government and the Commission work to ensure that proposals to require such regulators are not weakened or compromised.**
51. We believe that if every national market were regulated to a similar standard and infrastructure managers were separated from operators, many of the cross-border problems would be eased. However, it seems likely that if cross-border rail freight increases as planned then ensuring the efficient movement

of trains from one Member State to another will continue to be important. Therefore, **we welcome the requirements set out in the proposed Regulation on competitive rail freight for regulators and infrastructure managers to cooperate on cross-border issues.**

52. We do not support the establishment of an EU-level regulator. We agree with the majority of witnesses that the creation an EU-level regulator would be premature. Cooperation between independent regulators and infrastructure managers should be sufficient to manage the cross-border problems highlighted by witnesses.

CHAPTER 5: BARRIERS TO NEW ENTRANTS

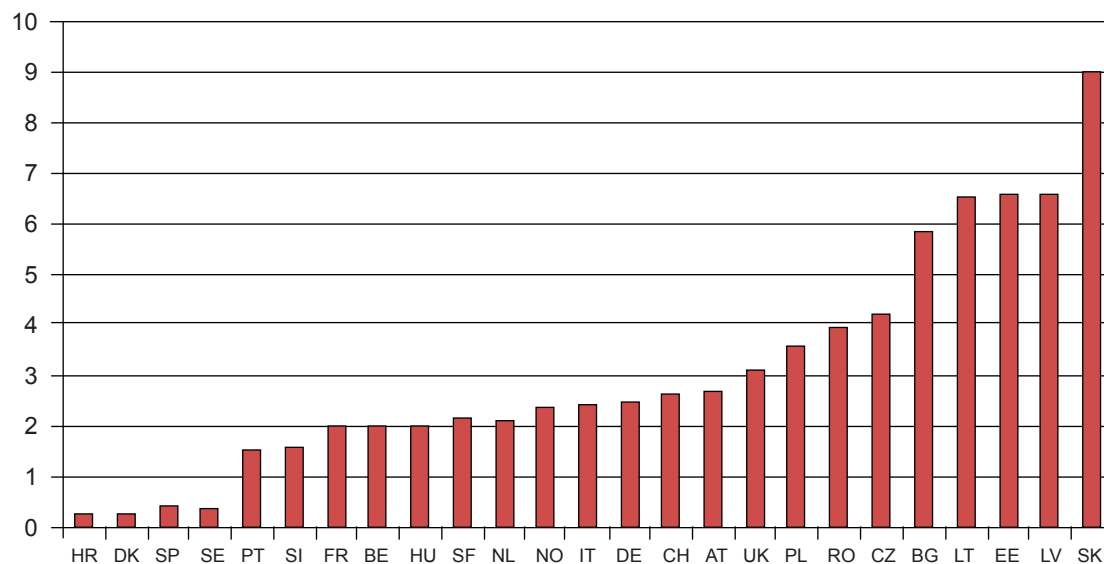
53. Most witnesses not only discussed the regulatory system and the relationships between infrastructure managers and railway undertakings, but also highlighted a number of barriers to new entrants and distortions in the market.

Infrastructure charges

54. One of the principal barriers to new entrants identified by witnesses was the level of charges for the use of infrastructure. Directive 2001/14/EC specifies that infrastructure charges “shall be set at the cost that is directly incurred as a result of operating the train service”. However, it also provides that “in order to obtain full recovery of the costs incurred by the infrastructure manager a Member State may, if the market can bear this, levy mark-ups”³⁰. This provision for mark-ups has resulted in infrastructure charges varying from one Member State to another (see Figure 4).

FIGURE 4

2008 access charges for typical 960 gross ton freight trains (€/train-km)³¹



55. Some witnesses considered that the flexibility of the provisions allowing mark-ups was necessary. Deutsche Bahn said that the existing provisions should not be amended because flexibility is necessary “to adjust to national specificities” (p 152). Similarly, the Office of Rail Regulation referred to taking account of “specific circumstances” (p 55). Network Rail gave more detail, arguing that the ability to be flexible in setting infrastructure charges was needed so that charges could, for instance, take into account the impact of rail vehicles on infrastructure, allowing Member States to encourage vehicles that do less damage (p 5).
56. However, a number of witnesses argued that the variability of infrastructure charges is undesirable. Arriva suggested that the current legislation had

³⁰ *Op Cit*

³¹ Taken from *Charges for the Use of Rail Infrastructure 2008*, International Transport Forum, OECD/ITF 2008. Exchange rate used £0.80279 = €1. For further details of the methodology used see *Charges for the Use of Rail Infrastructure 2005*, International Transport Forum, OECD/ITF 2005

- produced an overly complex system for companies operating through a number of Member States, and that the variety of charges prevented cross-border freight operators from accurately calculating the charges they would incur (p 112). Similarly, NewRail's view was that the First Railway Package had created a situation where "almost any pricing position" could be established. This, they argued, "compromises moves towards interoperability" and "discourages newer, smaller market entrants to develop and deploy new services and niche applications" (pp 36–37).
57. Lord Adonis agreed that the diversity of charging schemes had adversely affected the freight market (Q 540) but the Government supported the need for flexibility for infrastructure managers to levy higher charges to support specific infrastructure projects (Q 542). To combat the diversity of charges they called for greater clarity in the recast as to what costs "directly incurred" means and said the recast should "clearly lay down what elements of costs can be included ... and which ones must not be" (Q 541). According to Lord Berkeley, charges should only recoup "a minimum, the wear and tear costs" on the network (Lord Berkeley Q 86). Others expressed a similar interpretation (Freightliner PL Q 167 and NewRail p 4). However, ERFA argued that the current legislation allowed infrastructure charges to be calculated in a number of ways taking into account "a base fee ... speed, density of infrastructure usage, wear and tear ... reservation fees, 'malus' fees and other fees" (p 65). NewRail agreed that the "general catch all of add-ons is far from clear" and concluded that not only are the levels of charges different but that "their underpinning logic differs wildly" too (p 36).
58. The Federal Network Agency also concluded that the Directive "does not give us any guidance" in this respect but argued that there is no need to change the law (Q 220). They recommended that clarity should be gained through more cooperation between regulators (Q 222).
59. EIM told the Committee "charges are one side of the coin, how you finance your network is the other side" (Q 58). CER made a similar point, arguing that infrastructure charges had to vary from one Member State to another so that differences in public financing could be reflected. Where public funding for infrastructure was not sufficient, infrastructure managers must be able to set higher charges (pp 97–98). The International Union of Private Wagons (UIP) noted that, depending on the funding provided by Member States, some infrastructure managers needed to recover 100% of their costs through charges and others only 10% (p 159).
60. The solution to this price variability proposed by some witnesses was to include in Community legislation a requirement for Member States to agree "multi-annual contracts" with their infrastructure managers to provide funding stability, the lack of which forces infrastructure managers to increase their charges to railway undertakings (EIM, Arriva, and Network Rail). EIM summarised this view as "if you are not sure what funding you are going to get, then you are going to price that risk into your access charge" (Q 58). The Commission has already recognised the benefit of funding contracts between governments and their infrastructure managers that cover a number of years. In Directive 2001/12/EC, governments are encouraged, but not required, to agree multi-annual contracts as a method of promoting efficiency in their infrastructure managers. In February 2008, the Commission published a Communication entitled "Multi-annual contracts for rail infrastructure quality". The Commission noted that "infrastructure

managers in some European countries have gained valuable experience in using multi-annual contracts. The Commission thinks it would be useful if this approach were applied more widely on the basis of existing best practices”³².

61. Network Rail highlighted multi-annual contracts as one of the key changes needed to the First Railway Package, along with effective regulation. They argued that from those two provisions solutions to other problems would flow (Q 19). EIM also argued that proper infrastructure funding is needed in addition to a liberalised market structure. They cited the example of Romania, which, despite having a separate infrastructure manager and new entrants accounting for 20% of the freight market, suffered low growth in rail freight due to poor infrastructure funding (Q 45). CER identified proper infrastructure funding as a tool to reduce charges (p 98) and, although they were not in favour of introducing new legislation, supported multi-annual contracts as a way of achieving such funding (Q 341). They went further than other witnesses in suggesting that proper infrastructure funding, rather than market liberalisation, was the key to increasing rail freight (Q 316) and in arguing that “the discrepancy in competition right now” was due to poor Member State funding (Q 328).
62. Lord Adonis argued in favour of multi-annual contracts and referred to the “vagaries of national governments’ annual budgeting process” leading to higher infrastructure charges (Q 525). However, he stopped short of calling for multi-annual contracts to be a requirement of the Package (Q 528).
63. EIM and the Belgian regulator considered that the EU should aim for standard charges, across specified freight corridors at least, but doubted that this was likely to be achieved soon (Q 58 and Q 297). EIM also said that multi-annual contracts would help infrastructure managers not to take “sub-optimal” infrastructure investment decisions (Q 54). Directive 2001/12/EC suggests multi-annual contracts as a method of encouraging efficient infrastructure managers. The Rail Freight Group argued that if infrastructure managers were both well funded and more efficient, infrastructure charges would not be very different (Q 86). Arriva also saw proper funding and regulation leading to harmonised charges (p 112).

Conclusions

64. We accept the need for infrastructure managers to have the flexibility to meet the circumstances and financial situations in different Member States. **The Commission should retain the existing flexibility measures in the recast of the Package.** However, we believe the Package lacks clarity concerning what constitutes a “direct cost” and this has led to excessive variation in charges. We believe that this situation has been an obstacle to growth in the rail freight market. **The Commission should include in the recast mandatory definitions of which costs can be taken into account and what mark-ups are acceptable.**
65. We believe that much of the variation in infrastructure charges is the result of variation in funding for infrastructure managers. In order to manage properly the infrastructure, infrastructure managers need to be confident of their funding. We believe that without multi-annual contracts infrastructure

³² COM(2008)54 final

managers will not be able to invest efficiently and infrastructure charges in some countries will remain high. This will continue to act as a brake on rail freight growth. **The Commission should include in the recast a requirement for Member States to agree multi-annual contracts with their infrastructure managers.**

Rail-related services and facilities

66. Rail-related services and facilities are those that freight operators need other than access to the basic network. These are often referred to as “last mile” facilities as they are usually used at the end of a journey. The relevant provisions of the First Railway Package are given in Box 2.

BOX 2

Directive 2001/14/EC

Article 6(1)

“Railway undertakings shall, on a non-discriminatory basis, be entitled to the minimum access package and track access to service facilities that are described in Annex II ... requests by railway undertakings may only be rejected if viable alternatives under market conditions exist.”

Annex II

“1. The minimum access package shall comprise:

- (a) handling of requests for infrastructure capacity;
- (b) the right to utilise capacity which is granted;
- (c) use of running track points and junctions;
- (d) train control including signalling, regulation, dispatching and the communication and provision of information;
- (e) on train movement;
- (f) all other information required to implement or operate the service for which capacity has been granted.

2. Track access to services facilities and supply of services shall comprise:

- (a) use of electrical supply equipment for traction current, where available;
- (b) refuelling facilities;
- (c) passenger stations, their buildings and other facilities;
- (d) freight terminals;
- (e) marshalling yards;
- (f) train formation facilities;
- (g) storage sidings;
- (h) maintenance and other technical facilities.”

67. EIM told the Committee, “the availability of non-discriminatory access to the last mile of infrastructure is vital for the competitiveness of rail freight transport” (p 12). However, a number of witnesses (EIM, Rail Freight Group, Arriva, EFRA and Freightliner) identified access to these services as a problem. Under the existing legislation, rail-related services and facilities

can be owned by a railway undertaking. This is the case in the UK as well as in other Member States (Office of Rail Regulation Q 142). In some cases witnesses argued that the owners of these facilities refuse access to competitor operators by “playing games” (EIM Q 65). This might involve keeping a train standing in a terminal in order to prevent access to a competitor (Q 65), operating very limited opening hours (Arriva p 6), allowing access to, but not use of, the services (Belgian regulator, Q 239) or providing the services listed in Box 2 but declaring “we are not going to provide toilets; you cannot use our toilets and you cannot use our telephone, even if you pay for it”, effectively making the annex II services unusable (Rail Freight Group Q 73). ERFA illustrated the problem of access to these facilities with the case of a Belgian new entrant having to establish its own fuelling facility because the national incumbent denied access to theirs (p 62).

68. Some witnesses also argued that high charges prevent access to services. Arriva said that services are sometimes only available at “excessive prices” (p 60). ERFA gave the example of Trenitalia (the Italian national incumbent operator) increasing the charges for use of its ports and terminals by 76% in 2008 and for shunting services by over 300% in the last three years (p 66). The Federal Network Agency said that they had experience that the German holding group Deutsche Bahn had offered special rates for the use of sidings but only to their subsidiary, DB Schenker Rail (Q 186). Even in the UK, where the market is fully separated, the Office of Rail Regulation spoke of operators of rail-related services giving access to their services and facilities “reluctantly” and having to resolve disputes (Q 142).
69. EIM argued that Directive 2001/14/EC did not give “sufficiently clear guidance on the circumstances in which the providers of rail-related services should be required to grant access to a competitor”. Part of the problem, according to EIM, was that the Directive did not define what a viable alternative was; the recast should give more information about the nature of a viable alternative (p 14). The Federal Network Agency also argued that regulators need “clearer guidelines, a clearer legal basis” (Q 216). As in other areas, however, they argued that this clarity should be achieved through greater cooperation between independent regulators rather than through EU legislation (Q 217). ERFA agreed there was a lack of clarity but proposed that rather than define viable alternatives the recast should “shift the burden of proof to the terminal manager [to explain] why their terminals cannot be accessed” (p 66).
70. The Office of Rail Regulation and Arriva said that the list of services specified in the Package should be extended to make the legislation clearer (Q 134 and p 66). The Office of Rail Regulation concluded, “areas where poor implementation has arisen are to do with perhaps vagueness in the original directives, in particular access to terminals and freight-related facilities” (Q 139). The Belgian regulator agreed saying, “What is access to the service? ... I am in favour of, let us say, an interpretation as large as possible so that as a regulator, I can deal with these complaints” (Q 240).
71. CER and Deutsche Bahn warned argued against changes to the First Railway Package in this area. According to CER, the experience of their members was that problems with access to rail-related services could be solved through “discussions and negotiations” (Q 312) and through proper implementation of the Package (Q 328). They concluded that the wording of Directive

2001/14/EC was clear and that “no further legislation is necessary at this stage”. They said that revision of the services listed in the Directive needed “further thought and experience: too hasty legislation could harm the market rather than foster its development” (p 98). Similarly, Deutsche Bahn argued that the existing provisions were adequate and that “regulatory intervention is not necessary and even detrimental if viable alternatives under market conditions exist” (p 153).

Conclusions

72. We believe that the wording of the Package has not ensured that all operators have access to necessary rail-related services and facilities and that it is likely that problems will remain in this area even if the recast requires such separation for all infrastructure managers. **The Commission should reconsider the list of services in annex II in the light of operators’ experience of the current provisions and should either remove the reference to viable alternatives or provide detailed guidance on its definition. The recast should also require all regulators to be given the powers to deal with these services as well as the infrastructure itself.**

Other barriers

73. We received evidence on other barriers to new entrants and distortions in the market. ERFA told the Committee that in some Member States while new entrants needed to go through an official process before being allocated track capacity; the incumbent freight operators were able to “get slots from the signal box and just drive on the infrastructure” (Q 154). Even where formal processes are followed, EFRA said that incumbent operators were given “better” slots and new entrants the “secondary or less attractive slots” (p 66).
74. Some witnesses identified the use of safety requirements to deter new entrants. Freightliner PL, a UK-based freight operator with a Polish subsidiary, told the Committee that in Poland their locomotives—Class 66 locomotives, which the Polish incumbent does not use (ERFA p 64)—were required to have two drivers to receive a safety certificate, whereas in other Member States the same locomotive was certified safe with only one (QQ 175–177). Arriva said that in Germany they were required to appoint a senior technical expert with knowledge of “the whole range of rail-related processes and procedures, even where such processes are not required or are not relevant to the operations in question”. According to Arriva, this requirement was a barrier to new entrants (p 111). ERFA reported that in Hungary the incumbent operator was not required to have valid certification whereas new entrants must go through “lengthy and unclear safety certification processes” (p 64).
75. CER and Deutsche Bahn, on the other hand, argued that the outstanding problems of safety and interoperability are ones requiring better implementation of existing legislation, rather than needing new provisions (p 97 and p 152). The Department for Transport also made the point that the recent changes to safety and interoperability Directives³³ were aimed at

³³ Regulation (EC) No 1335/2008 of the European Parliament and of the Council of 16 December 2008 amending Regulation (EC) No 881/2004 establishing a European Railway Agency (Agency Regulation), OJ L354 (31 December 2008) pp 51–59

improving cross-acceptance of safety certificates and bolstering the role of the European Railway Agency in developing harmonised safety and technical requirements. The Office of Rail Regulation agreed that these changes to the legislation would help both incumbent and new operators (p 54).

Conclusions

76. We believe that it is likely that the full separation of infrastructure managers from operators and the establishment of effective regulators will ease these problems. Therefore, **we recommend the Commission consider further legislation on these issues only once infrastructure managers are separated from operators and regulators have the powers and independence to implement the Package properly.**

CHAPTER 6: SHOULD THERE BE A RECAST?

77. The Commission proposed a recast of the First Railway Package following its 2006 study of the implementation of the package. Some witnesses, such as CER, argued that the Commission should focus on implementation of the existing legislation instead of recasting it. They argued that the Commission had “no valid experience of the effects of the First Railway Package on the market” (p 97). Furthermore, they said that the Commission would not be able to have a “clear picture” of the effects of the First Railway Package until the Second and Third Railway Packages have been fully implemented (p 97 and QQ 307–308).
78. Deutsche Bahn argued in a similar vein, saying that the “initiative for a recast of the First Railway Package is premature and should be rejected” (p 151). Whilst for CER the implementation of the package should be regarded as a “positive first step in the right direction even if the foreseen effects will necessarily be incomplete” (p 97), Deutsche Bahn’s position was that all obstacles to the market can “be tackled by means of a thorough application of the existing law” (p 151).
79. As noted in earlier chapters, CER made the point that many of the things other witnesses argued for including in the recast, such as multi-annual contracts and non-discriminatory treatment by infrastructure managers, were already in the First Railway Package (QQ 312, 347): “You can adopt more and more legislation but it is not going to change anything if you are building a house without foundations” (Q 311).
80. NewRail warned the Committee that the rail freight industry is “slightly shell-shocked with this continuing rolling barrage” of legislation (Q 94). They said that much of the legislation is too complex and that “a ‘First Railway Package for Dummies’ might have been a good idea, just to allow people lower down the pecking order within the railway industry to understand what was going on” (Q 105). Similarly, the Belgian regulator, although in favour of some changes to the Package, argued for “some stability in the legal framework” (Q 237).
81. However, the majority of our witnesses argued in favour of recasting the First Railway Package. Network Rail said, “a lot can and should be done on the enforcement side” but that it may “require a recast as opposed to just enforcement” (QQ 13–16). Similarly, ERFA said that the Commission should “take action on these problems by enforcing the current First Railway Package”, as well as revising its contents (p 60). Arriva recognised the importance of the other Packages but argued that “the biggest problems ... are definitely in the freight sector” and that the Commission should opt for a “two-step approach” consisting of recasting the First Railway Package and then addressing passenger rail issues (Q 404).
82. Lord Adonis welcomed the Commission’s “dual track strategy” of implementation and recasting (Q 500). However, he said that he expected infraction proceedings to take longer than a recast (Q 508). He also hoped that the recast would clarify the requirements of the Package and remove “any room for hiding behind ambiguity” (Q 509).
83. The Rail Freight Group argued more strongly in favour of the recast. Lord Berkeley told the Committee, “the First Railway Package is not fit for purpose” (Q 73). He said that the recast was needed “to put right what is

found to have been the mistakes” and to go “further on some of these things that had not been thought of” (Q 80). Moreover, there was a need to move fast. Lord Berkeley and Brian Simpson MEP said that rail freight liberalisation is “in the last-chance saloon” (Q 73 and Q 450). ERFA described the recast as an “urgent measure” (p 68).

Use of competition law

84. CER also argued that the use of EU competition law should complement the implementation of the First Railway Package, saying, “The law is there. Apply it. Why do you want to create more laws?” (Q 330) Similarly, the Belgian regulator told the Committee they were “surprised” that competition laws had not been used more (Q 260). Lord Adonis also said, “it may be appropriate” to use competition laws and that the Government would not “dissuade the Commission from using the full range of tools at its disposal” (QQ 510–511).

Regulation or Directive?

85. Lord Adonis addressed the issue of whether the recast should transfer some of the provisions into a directly enforceable Regulation rather than a Directive, which requires transposition into national laws. He said that the Commission should propose “whatever works best” (Q 512). Mr Kessel, an official who gave evidence with Lord Adonis, said that the Commission were considering using a Regulation. However, he said that a Regulation would be scrutinised more closely in negotiations than a Directive and may be “diluted to a significant extent” (Q 512). The Belgian regulator also said that it was more likely that a Directive would be agreed (Q 303).

Conclusions

86. We believe that the poor implementation of the First Railway Package demonstrates the need for the Commission to recast some elements. **We support the Commission’s intention to recast the package.**
87. However, we recognise the argument that the Package already contains many of the provisions needed for a genuine internal market in rail freight. **We recommend, therefore, the Commission focus the recast on strengthening the provisions concerned with the separation of infrastructure managers from railway operators; and on establishing the independence and powers of regulators.**
88. The Package lacks clarity in some areas, such as what costs should make up infrastructure charges, what powers regulators should have and what access to rail-related services operators are entitled to. Different interpretations of these provisions have restricted the growth of the rail freight market. **The Commission should use the recast to clarify these aspects of the Package to ensure that both the letter and spirit of the Package are implemented.**
89. We do not believe that the recast and the infraction proceedings are mutually exclusive. Although we believe that the Package needs strengthening and clarifying in the areas mentioned above we agree with witnesses that the Commission should continue with its infraction proceedings. **We recommend that where the Commission has grounds to take**

infraction proceedings forward it should do so in parallel with the recast.

90. We believe that greater use of competition laws could be made to combat distortions in the rail freight market, although evidence received on this matter was limited. **We recommend that the Commission explore the potential for the Package to be complemented by the use of competition laws.**
91. Given that a number of the problems identified by witnesses concerned differences in implementation of the Package, **the Commission should consider recasting some of the Package's provisions into a Regulation which would be directly enforceable in all Member States, rather than using a Directive, which requires transposition into national law.**

CHAPTER 7: SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

Infrastructure managers and railway undertakings

92. We believe that the option of having infrastructure managers and railway undertakings in separate divisions of the same company, no matter how well regulated, leaves room for unfair practices. Full separation is much more likely to remove that possibility and create the conditions necessary for increased rail freight. We recommend the Commission include in the recast a requirement for the full separation of infrastructure managers from railway undertakings. (paragraph 34)
93. We conclude that the lack of formal complaints to regulators in some Member States is evidence of the practical constraints on market opening. We believe this demonstrates the need for the Commission to press ahead with the proposed recast, to bring about a genuine free market that operates without fear or favour. (paragraph 35)

Regulation

94. We recommend that the Commission should use the recast to specify the powers and remits of national regulators. The Commission should also extend the provisions of the Package to require regulators to be independent of governments. (paragraph 49)
95. We recommend that the Government and the Commission work to ensure that proposals to require effective regulators are not weakened or compromised. (paragraph 50)
96. We welcome the requirements set out in the proposed Regulation on competitive rail freight for regulators and infrastructure managers to cooperate on cross-border issues. (paragraph 51)
97. We do not support the establishment of an EU-level regulator. We agree with the majority of witnesses that the creation an EU-level regulator would be premature. Cooperation between independent regulators and infrastructure managers should be sufficient to manage the cross-border problems highlighted by witnesses. (paragraph 52)

Infrastructure charges

98. The Commission should retain the existing flexibility measures for infrastructure charges in the recast of the Package. However, the Commission should include in the recast mandatory definitions of which costs can be taken into account and what mark-ups are acceptable. (paragraph 64)
99. The Commission should include in the recast a requirement for Member States to agree multi-annual contracts with their infrastructure managers. (paragraph 65)

Rail-related services and facilities

100. The Commission should reconsider the list of services in annex II in the light of operators' experience of the current provisions and should either remove

the reference to viable alternatives or provide detailed guidance on its definition. The recast should also require all regulators to be given the powers to deal with these services as well as the infrastructure itself. (paragraph 72)

Other barriers to new entrants

101. We recommend the Commission consider further legislation on other barriers to new entrants only once infrastructure managers are separated from operators and regulators have the powers and independence to implement the Package properly. (paragraph 76)

Should there be a recast?

102. We support the Commission's intention to recast the package. (paragraph 86)
103. We recommend the Commission focus the recast on strengthening the provisions concerned with the separation of infrastructure managers from railway operators; and on establishing the independence and powers of regulators. (paragraph 87)
104. The Commission should use the recast to clarify these aspects of the Package to ensure that both the letter and spirit of the Package are implemented. (paragraph 88)
105. We recommend that where the Commission has grounds to take infraction proceedings forward it should do so in parallel with the recast. (paragraph 89)
106. We recommend that the Commission explore the potential for the Package to be complemented by the use of competition laws. (paragraph 90)
107. The Commission should consider recasting some of the Package's provisions into a Regulation which would be directly enforceable in all Member States, rather than using a Directive, which requires transposition into national law. (paragraph 91)

APPENDIX 1: SUB-COMMITTEE B (INTERNAL MARKET)

The Members of the Sub-Committee which conducted this inquiry were:

Lord Bradshaw
Lord Dykes
Lord Freeman (Chairman)
Lord James of Blackheath
Lord Mitchell
Lord Paul
Lord Plumb
Lord Powell of Bayswater
Lord Rowe-Beddoe
Lord Ryder of Wensum
Lord Walpole
Lord Whitty

Declarations of Interests:

Lord Bradshaw
Member of the Stakeholder Advisory Board of Great-Western Train Company (part of First Group)

Lord Freeman
Chairman, Advisory Board, PricewaterhouseCoopers

Lord Paul
Chairman and Director, Caparo Group Ltd

Lord Powell of Bayswater
Director, Caterpillar Inc

Lord Walpole
President, North Norfolk Orbital Railway

A full list of Members' interests can be found in the Register of Lords Interests:

<http://www.publications.parliament.uk/pa/ld/ldreg.htm>

APPENDIX 2: LIST OF WITNESSES

The following witnesses gave evidence. Those marked * gave oral evidence.

- * Arriva
Cargo Rail Europe
- * Community of European Railway and Infrastructure Companies (CER)
- * Michael Cramer MEP
- * Department for Transport
Deutsche Bahn AG
European Association for Forwarding, Transport, Logistic and Customs Services (CLECAT)
- * European Rail Infrastructure Managers (EIM)
- * European Rail Freight Association (ERFA)
- * Federal Network Agency
- * Freightliner PL
Mr Henry Holbrook
International Union of Private Wagons (UIP)
Ministry of Transport, Slovakia
- * Network Rail
- * NewRail
- * Office of Rail Regulation (ORR)
- * Rail Freight Group
Mr J H Rees
- * Regulatory Service for Railway Transport and for Brussels Airport Operations
- * Brian Simpson MEP
Swiss Rail Traffic
Mr Andrew Woodcock

APPENDIX 3: CALL FOR EVIDENCE

1. In its 2009 Legislative and Work Programme³⁴, the Commission has again committed itself to proposing a recast of the First Railway Package, which dealt with rail freight.

2. The Internal Market Sub-Committee (Sub-Committee B) of the House of Lords Select Committee on the European Union published a report on rail freight³⁵. The Sub-Committee has now decided to conduct another inquiry into rail freight in the EU, with particular reference to the planned recast of the First Railway Package.

3. The Sub-Committee invites you to submit written evidence to their inquiry. The Sub-Committee would find it helpful if, in addition to any general issues you may wish to raise, you would focus on a number of specific issues:

- (a) Whether the provisions on the separation of infrastructure management and train operations are sufficient; whether they should be amended or whether they should be replaced with a requirement for full ownership unbundling.
- (b) Whether the current provisions are adequate regarding the staffing and independence of regulators and whether statutory independence from government is desirable.
- (c) Whether there remain barriers to entry due to factors such as safety certification requirements, and if so how these should be addressed.
- (d) Whether the current requirements regarding the setting of infrastructure charges are adequate, and if not how they should be amended.
- (e) Whether the existing provisions regarding allocation of capacity both on tracks and at terminals are adequate and if not how they should be amended.
- (f) How a recast First Railway Package should relate to other EU freight transport policies.

4. The inquiry will consider only issues relating to rail freight, not passenger services.

5. The remit of the Sub-Committee is to scrutinise EU legislation rather than specifically national issues.

³⁴ COM(2008) 712 final

³⁵ European Union Committee, 4th Report (2004–05): *Liberalising Rail Freight Movement in the EU* (HL 52)

APPENDIX 4: SPECIALIST ADVISER'S INTERESTS

Interests of the Specialist Adviser—Professor Chris Nash

Current Responsibilities:

- An EPSRC funded project on understanding rail costs and the role of technology in reducing them.
- A DGTREN project on road and rail infrastructure cost allocation.
- Advising DfT on the valuation of sensitive lorry miles.
- Advising the World Bank on rail investment in China.
- Advising the Chinese Ministry of Railways on the social costs of transport.
- Advising Network Rail on its study of New Lines.
- Advising the Community of European Railways on progress in implementing the 2001 White Paper and its impact.

Professor Nash is also a Fellow of the Chartered Institute of Logistics and Transport and a member of its Strategic Rail and Road Capacity and Charging Forums.

Professor Nash undertakes research and consultancy on rail transport issues financed by a wide range of bodies, including the European Commission, the Department for Transport, the rail industry and the Engineering and Physical Sciences Research Council. During the period of this enquiry, he specifically undertook work on rail track access charges as part of the CATRIN project funded by the European Commission, he prepared a report on EU transport policy as it affects railways for the Community of European Railways, he advised Network Rail on its 'new lines' study and he advised the Department for Transport on the impact of the European Commission proposals for a freight oriented rail network.

APPENDIX 5: GLOSSARY OF TERMS AND ABBREVIATIONS

Accounting separation: Accounting separation requires a company to keep separate accounts for infrastructure and operations whilst permitting it both to own a train operator and to manage infrastructure.

Capacity allocation: This is the process of allocating the capacity of the network between different train operators.

European Railway Agency (ERA): The ERA was set up to advise the Commission on development of common technical standards and approaches to safety within the rail industry.

European Railway Traffic Management System (ERTMS): ERTMS is designed to provide a single advanced signalling system throughout Europe, replacing those of Member States and increasing capacity and reliability.

Eurovignette: The Eurovignette legislation sets out the rules under which Member States are allowed to charge goods vehicles for road use.

Freight corridors: Freight corridors are key international routes for rail freight services for which special provisions regarding freight priority over passenger services are proposed.

Incumbent operator: The incumbent operator is the established, usually state-owned, dominant operator. For example, SNCF in France and Deutsche Bahn in Germany.

Infrastructure: The term infrastructure refers to the track, structures and signalling system of the main rail network. It does not include facilities such as ports, marshalling yards and terminals.

Infrastructure manager: The infrastructure manager is responsible for providing and maintaining railway infrastructure. This may also include the management of infrastructure control and safety systems.

Infringement proceedings: These are the European Commission's proceedings to enforce the implementation of legislation.

Legislative Work Programme (LWP): Each year the European Commission publishes its LWP outlining the work it will undertake in the coming year.

Malus fees: A penalty payment. A malus fee is the opposite of a bonus.

Marshalling yard: Marshalling yards are used to reorganise and assemble trains.

Multi-annual contract: A multi-annual contract sets out the terms and conditions for government funding to its infrastructure manager for a number of years. Under European legislation, such contracts should include incentives for infrastructure managers to operate efficiently.

Network statement: A network statement sets out in detail the general rules, deadlines, procedures and criteria concerning the charging and capacity allocation schemes. It contains the information required by operators to apply for use of the infrastructure.

Railway undertaking: A railway undertaking is a business that provides services for the transport of goods and/or passengers by rail.

Recast: A recast is used to consolidate pieces of legislation and to make substantive changes to the legislation.

Safety certification: For a railway undertaking to operate in a country it must be certified safe. Safety certification can be carried out by the rail regulator or the government itself.

APPENDIX 6: RECENT REPORTS

Recent Reports from the Select Committee

Evidence from the Ambassador of the Czech Republic and the Minister for Europe (8th Report, Session 2008–09, HL Paper 76)

Enhanced scrutiny of EU legislation with a United Kingdom opt-in (2nd Report, Session 2008–09, HL Paper 25)

Annual Report 2008 (32nd Report, Session 2007–08, HL Paper 191)

Evidence from the Minister for Europe on the June European Council (28th Report, Session 2007–08, HL Paper 176)

Priorities of the European Union: evidence from the Ambassador of France and the Minister of Europe (24th Report, Session 2007–08, HL Paper 155)

The Commission's Annual Policy Strategy for 2009 (23rd Report, Session 2007–08, HL Paper 151)

Priorities of the European Union: evidence from the Minister for Europe and the Ambassador of Slovenia (11th Report, Session 2007–08, HL Paper 73)

The Treaty of Lisbon: an impact assessment (10th Report, Session 2007–08, HL Paper 62)

Reports Prepared by Sub-Committee B (Internal Market)

Session 2008–09

Mobile Phone Charges in the EU: Follow-up Report (5th Report, HL Paper 42)

Session 2007–08

The EU's Target for Renewable Energy: 20% by 2020 (27th Report, HL Paper 175)

The Single Market: Wallflower or Dancing Partner? (5th Report, HL Paper 36)

Session 2006–07

Mobile Phone Charges in the EU: Curbing the Excesses (17th Report, HL Paper 79)

Television Without Frontiers? (3rd Report, HL Paper 27)

Session 2005–2006

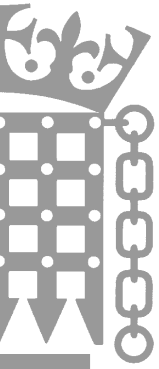
Inquiry into the European Commission's Green Paper, "A European Strategy for Sustainable, Competitive and Secure Energy" (41st Report, HL Paper 224)

The Services Directive Revisited (38th Report, HL Paper 215)

Seventh Framework Programme for Research (33rd Report, HL Paper 182)

Including the Aviation Sector in the European Union Emissions Trading Scheme (21st Report, HL Paper 107)

Completing the Internal Market in Services (6th Report, HL Paper 23)



HOUSE OF LORDS

European Union Committee

10th Report of Session 2008–09

Recast of the First Rail Freight Package

Volume II: Evidence

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NOTE:

The Report of the Committee is published in Volume I, HL Paper No 90-I

The Evidence of the Committee is published in Volume II, HL Paper No 90-II

Minutes of Evidence

TAKEN BEFORE THE SELECT COMMITTEE ON THE EUROPEAN UNION
(SUB-COMMITTEE B)

MONDAY 2 MARCH 2009

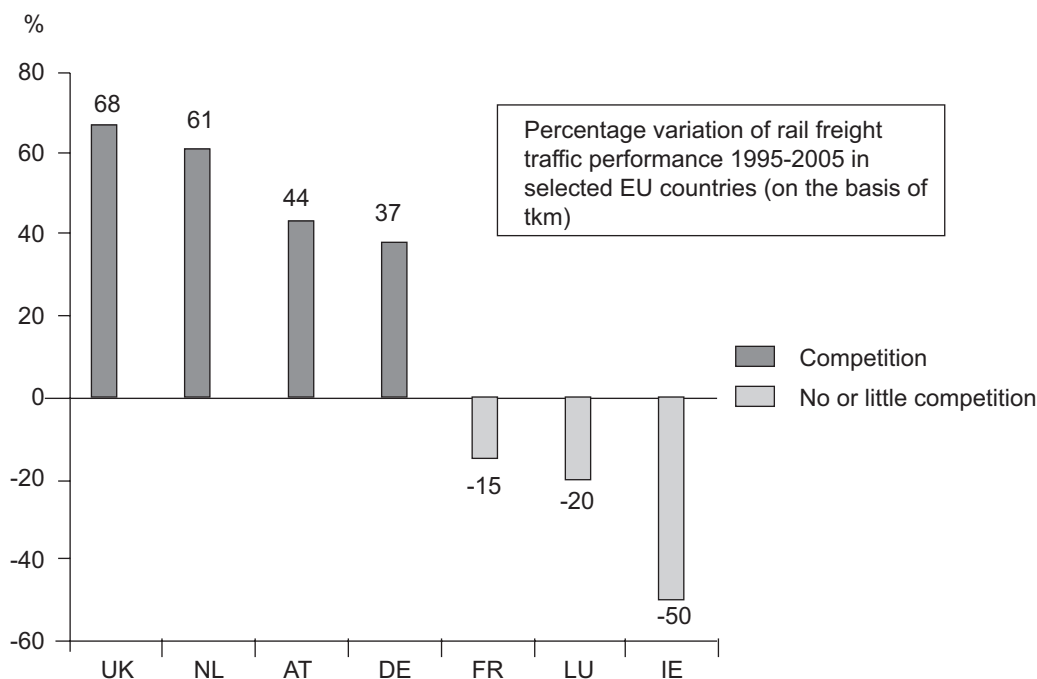
| | | |
|---------|------------------------|--------------------|
| Present | Bradshaw, L | Rowe-Beddoe, L |
| | Dykes, L | Ryder of Wensum, L |
| | Freeman, L (Chairman) | Walpole, L |
| | James of Blackheath, L | Whitty, L |
| | Paul, L | |
| | Plumb, L | Berkeley, L |

Letter from Network Rail

1. Further to the Sub-Committee's request for evidence in support of its above inquiry, I am pleased to provide the following submission on behalf of Network Rail.
2. This submission will seek to demonstrate that within Great Britain, the rail network is governed by a legal and regulatory framework together with an industry structure that supports the aim of EU market liberalisation and promotes competition. We believe that as a result, this country has a highly successful freight market supported by the strategies and investment needed to continue that growth.
3. Network Rail is committed to delivering these plans and investments in partnership with our customers. We hope that the approach we, together with government and the rest of the industry, have adopted, is one that is encouraged across other markets for the benefit of the European freight sector as a whole.
4. In summary, we believe that the success of freight is dependent upon effective asset management and long-term planning combined with the principles of effective regulation, transparent access and charging, and non-discrimination. The first package recast should seek to guarantee these principles across Europe, but with as light a touch as possible where these principles and the resulting success can be evidenced.

CONTEXT

5. Before considering potential changes in the provisions in the first package, it is instructive briefly to review the development of Great Britain's rail freight industry since privatisation, and the implementation during that time of measures consistent with the first package.
6. Prior to publication of the first package, the industry in Great Britain was already largely compliant with the package's directives by virtue of the Railway Acts establishing the current structure of the railway. The remaining elements of the first package were implemented in Great Britain in November 2005 through The Railways Infrastructure (Access and Management) Regulations 2005, and The Railways (Licensing of Railway Undertakings) Regulations 2005.
7. Since 1995, Great Britain has seen the fastest rate of rail freight growth of any major network in Europe—excess of 60%. Many of the other liberalised markets such as Belgium, Portugal, Spain and Finland also show growth in this period.



Source: DG TREN

8. Those countries without liberalised rail industries but with growth in rail freight are generally members of the Alpine Initiative, where legislation against road transport has been used to drive modal shift to rail. For example, the Swiss 2001 Traffic Transfer Act limits lorry movements across Switzerland from 2009 onwards to 650,000 lorries—half that of 2000.

9. Many of the factors that are cited by the Commission elsewhere in Europe as evidence of a restricted rail freight market do not apply to the British railway:

- The number of freight operators in Great Britain is growing—doubling to 10 companies in the past five years.
- The British market has grown—60% in 10 years and is projected to grow around 30% more in the next 10 years.
- We have a national strategy for growth in rail freight—Network Rail has worked with the freight community to bring together all the key issues facing rail freight in the UK & identify this strategy for growth.
- We are enhancing key freight routes—Network Rail is being funded up to £208 million towards the development of a strategic freight network in the next control period.
- Bottlenecks are being tackled—Government funding through the Transport Innovation Fund (TIF) is already being invested in these in order to grow freight in regions across the UK.

10. It is our contention that the manner in which the UK has embraced liberalisation of the rail industry is, as in some other states, in no small part responsible for its recent success. This relationship was summarised by Chris Bolt, Chairman of the Office of Rail Regulation (ORR), in his forward to the Rail Freight Group's 2007 report "Success and Lessons of Rail Liberalisation in the UK":

11. "We consider that some of the major factors contributing to this success are the total separation of infrastructure and train operations, medium term stability and certainty in rail policy, a contractual framework with clearly defined roles and responsibilities and the existence of strong and independent regulation. These factors continue to enable the companies involved to have the confidence to invest their time, expertise and money in the railways."

Chris Bolt, November 2007

12. Against this background therefore Network Rail would like to address the questions posed in the committee's call for evidence.

[Whether] the provisions on the separation of infrastructure management and train operations are sufficient; whether they should be amended or whether they should be replaced with a requirement for full ownership unbundling?

13. The first package leaves such latitude for implementation, that a wide range of models for transposition can be seen—some fully liberalised and others where no benefit has been delivered and separation is little more than theoretical.

14. If followed to their logical conclusion, the provisions do offer a clear route to an open and competitive rail freight market. However, it is clear that some member states have preferred to take a minimal approach in transposition, and that even then many have failed to implement the required changes.

15. In its 2008 assessment of the compliance of each member state with the first package, the commission identified the UK as one of the most compliant. Letters of formal notice were issued to 24 national permanent representations. While the Netherlands was the only member state with a railway not to receive a notice, the UK was the only member to have just one issue identified.

16. We understand the UK notice stemmed from a misinterpretation of ORR's timelines for its consultation and hearing process; the Commission did not account for the time taken to establish relevant information. Our understanding is that this has now been clarified and the ORR is compliant with the requirement to reach a decision on Track Access applications within the required two months following the gathering of such information.

17. Many other countries however were cited on the independence of essential functions or the actual competences of regulatory bodies.

18. The recast first package should seek to provide non-discriminatory access to the rail network. It will need to require a more practical separation of essential functions from train operations in many member states. These should ideally be required to be legally separated organisations to prevent any conflicts of interest arising in timetabling or operations, guarantee equal access to facilities, and prevent cross-subsidisation within owning companies by allowing operators to deliver with minimal margins.

19. The recast could also empower regulatory bodies or licensing authorities with the ability to carry out audits of the accounting separation provisions of railway undertakings and infrastructure managers if they are not fully separated. This would have no effect in Great Britain.

[Whether] the current provisions are adequate regarding the staffing and independence of regulators and whether statutory independence from government is desirable

20. In Great Britain, current provisions are more than adequate. We have a legal framework that provides: a fully independent regulatory regime; clear regulations governing access and management of the network; a regulator that both oversees competition issues and is empowered to set efficiency targets for the network operator; and clear regulatory independence from government. We are also years of underinvestment in the network and the regulatory regime helps to protect this.

21. Conversely, in most EU member states, Regulatory Bodies either do not exist or have unclear competencies. The Commission's 2006 implementation report identified issues with the independence of Regulatory Bodies, a lack of resources, and poor levels of market knowledge.

22. While the need for strong and independent regulation throughout Europe is clear, there is obviously a danger that the recast will result in prescriptive and bureaucratic measures that are unnecessary for successfully liberalized regimes such as our own. It also needs to be born in mind that as the freight market becomes more competitive and liberalized, the need for regulatory burdens such as performance regimes is arguably diminished; while contracts between the operators and infrastructure managers will address issues of compensation, the ultimate judge of performance will be the operator's customer base.

23. Where inter-state regulation is required we agree with the proposed regulation concerning a European rail network for competitive freight. In order to prevent uncontrolled regulatory burdens, we believe that powers to investigate should be limited to each nation's domestic regulator, but that regulators should be required to co-operate on cross-border matters.

24. Network Rail would prefer to see either an approach of empowering weaker regulators and requiring more independence, or a light touch approach in the recast railway package for member states, such as the UK, which already demonstrate an approach involving well developed competition and liberalisation. Areas

for consideration could include core competencies, budgets, powers of investigation and reporting requirements.

25. There is an issue with enforcement with regards to the Commission rather than the regulators. It is noteworthy that the first package is being recast at the same time as its first enforcement actions: Effectively, the existing law has not been enforced before the redrafting has begun.

26. While the recast should be welcomed for the opportunities it brings, the EU needs to show its commitment to the first draft of the package to engender further confidence in the recast having any effect.

[Whether] there remain barriers to entry due to factors such as safety certification requirements, and if so how these should be addressed

27. Across Europe, two of the main barriers to entry are open access and transparency—including that of charging. In the UK, these barriers have been removed and this is guaranteed by robust regulation. Additionally, interoperability and cost remain barriers to entry, particularly for cross-border operations.

28. With regards interoperability, Network Rail is working with European Railway Agency (ERA) through the Association of European Infrastructure Managers (EIM) to tackle many technical barriers through the development of European specifications and standards. Cost can arise from a number of other factors including the need to invest in safety certification.

29. The fact that so many additional operators have entered the British market suggests that as long as there is equal treatment for all, such barriers are not insurmountable. For its part, in terms of operational costs, Network Rail remains alive to the concerns of our funders and customers and is continuing to drive down the cost of the Great Britain's railway infrastructure, having reduced unit cost by over 26% in the past five years.

30. Finally, the complexities of dealing with a number of institutions on international routes, undoubtedly adds to the difficulties for new entrants. Network Rail is a member of Rail Net Europe and therefore has subscribed to putting in place a "one-stop-shop" for customers who would prefer us to make arrangements for international routes into or out of the UK. In practice however, customers prefer to handle these arrangements directly.

31. In the draft regulation concerning a European rail network for competitive freight, the commission proposes the establishment of international corridors to simplify arrangements. While we look forward to participating in such a corridor in the future, we would be concerned by any suggestion that we should harmonise at a lower standard of openness and transparency than currently exists. We would also be concerned if obligations were placed on the UK which were designed for less competitive markets.

32. An immediate improvement would be to have consistent principles such as independent regulation, transparent charging, and open access along each corridor.

[Whether] the current requirements regarding the setting of infrastructure charges are adequate, and if not how they should be amended?

33. The domestic requirements are adequate. Charges are required to be non-discriminatory, approved by the regulator and set following consultation with customers. Equally, the separation between infrastructure and any operator ensures that prices are not set in such a way as to favour any part of the industry.

34. This practice follows the framework set out in Directive 2001/14/EC which aims to ensure transparent and non-discriminatory access. While the Directive reduces much of the potential variation in the structure and level of charges, these can still vary widely depending on the market conditions and government levels of subsidy in each member state.

35. We are not able to comment in detail about the range of charges across Europe. However, it should be noted that freight charges in Great Britain are approximately half those found in other member states, and these are subject to efficiency targets agreed for each control period with the ORR to bring these down.

| <i>Infrastructure Manager</i> | <i>Charges include</i> | <i>Per train mile/km</i> | |
|-------------------------------|---------------------------|--------------------------|----------------|
| | | <i>£/mile</i> | <i>Euro/km</i> |
| ET Routes | Access + traction current | 37 | 35 |
| DBN high-speed routes | Access only | 16 | 15 |
| RFF high-speed routes | Access only | 15 | 14 |
| HS1* | Access only | 10 | 9 |

| <i>Infrastructure Manager</i> | <i>Charges include</i> | <i>Per train mile/km</i> | |
|-------------------------------|------------------------|--------------------------|----------------|
| | | <i>£/mile</i> | <i>Euro/km</i> |
| DBN classic route | Access only | 8 | 7 |
| NR classic routes | Access only | 5 | 5 |
| RFF classic routes | Access only | 1.6 | 1.5 |

* Commercially set short-term freight charge whilst long-term freight charges framework established

Source: HS1

36. Before seeking any forced harmonisation of charging, we believe that enforcing greater transparency of principles and procedures and the publication of clear criteria for track access would have a more beneficial effect.

37. Importantly, such an approach would retain the flexibility available in the way that charges equivalent to “costs directly incurred” are calculated. This flexibility would allow, as we already do, variable usage charges to be given to each vehicle type so as to encourage the consideration of vehicles that do less damage to the infrastructure.

38. Finally, it should be noted that the pricing of access charges is only one element of revenue for Infrastructure Managers; it is often dependent on the policies and level of subsidy or investment that each member states wishes to make in its infrastructure.

39. In Great Britain, the practice of funding over five-year Control Periods imports, for our customers, an additional security against any volatility in access charges from year-on year fluctuations in government support. The European industry would therefore benefit from any similar initiative, such as that contained in the Commission Communication (Feb 2008) on “Multi-Annual Contracts”.

40. This is important protection for our customers since it provides some assurance that funding for maintaining the capacity and availability of the network will continue in the medium term and that longer term decisions about this will be made in a transparent way. This issue is beginning to be addressed elsewhere through multi-annualised contracts.

[Whether] the existing provisions regarding allocation of capacity both on tracks and at terminals are adequate and if not how they should be amended

41. With regards to allocation of capacity on track, there is a high level of transparency and consultation in Great Britain. An open train planning process gives transparency to operators of each others aspirations, and through the Route Utilisation Strategies (RUSs) operators play a central role in the medium and longer term strategic planning of capacity.

42. In addition, the Network Statement lays out a clear set of rules regarding access to the network and its allocation. Should any customer feel that they are not being treated in accordance with conditions outlined within it, the ORR provides an independent procedure to resolve any disputes. The Network Statement is a flexible tool whose use we would not wish to see constrained by any tightening of procedures that would affect operating practice in the UK.

43. Off-network there has been historically less transparency and consistency. Access to rail related facilities is governed by commercial contracts that tended to be specific to each location, and pricing is a matter of negotiation between operators and the facility managers. While appeals can be made to the ORR, this is a seldom used route, although this is not necessarily a sign of success. The lack of case law in this area making reference to charges may in fact be a hindrance to development of the freight market and benchmarking may be a way of addressing this.

44. Access to these facilities is governed by connection agreements with Network Rail. Model Clause Connection Agreements were developed by the ORR on the same basis as the provisions in the industry’s model track access contracts. These provide a consistent structure and clarity on charges and liabilities. Network Rail now applies these principles whenever renegotiating connection agreements.

45. Where a particular facility is leased, or access rights are held for a customer’s facility and are connected to a business contact, and where a change of operator occurs, Network Rail will assist the customer and operators transfer access rights through Part J of the Network Code.

[Comment on] how a recast First Railway Package should relate to other EU freight transport policies

46. The recast of the first package could be used as a vehicle to introduce a number of other proposed pieces of EU legislation. We have already commented above on elements of the draft regulation concerning a European rail network for competitive freight, and the Commission communication on Multi-Annual contracts.

47. The recast of the First Railway Package also presents an opportunity for the commission to introduce its proposals for differentiation of track access charges depending on the noise emission characteristics of the rolling stock composing the train.

48. This legislation attempts to encourage the retrofitting of brake-blocks commonly used across Europe. Until such time as internalisation of external costs is introduced in the road sector, such penalties cannot be introduced on their own. The commission therefore proposes an initial period of a bonus-malus system in which higher charges for noisy wagons are off-set by discounts for quieter wagons. In the UK however, our historical use of quieter disc brakes is likely to upset this balance, and care should be taken to ensure that there is not a net subsidy from infrastructure to the wagon operators.

49. Matters to consider here include: the potential disincentive for modal shift and reduced CO₂ emissions; the justification of similar charges in rural and urban areas; the lack of vehicle testing facilities for assessments of noise to be made; and variations in noise output related to maintenance standards not reflected in charging rules.

50. Practical steps to achieving the goal of reduced overall noise could include: the incentivising of low track force wagons; the setting of higher standards for new build vehicles; and a simple provision of grants to convert existing vehicles. In addition, the benefits from the noise reductions from lorries achieved by modal shift should be taken into account.

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Examination of Witnesses

Witnesses: MR PAUL PLUMMER, Director, Planning and Regulation, Network Rail, and MR GARRY WHITE, Head of European Affairs, Network Rail, examined.

Q1 Chairman: Mr Plummer, thank you very much indeed for coming. Can you read the nameplates for the members of the Committee from where you are sitting, around the horseshoe?

Mr Plummer: I can, yes, thank you.

Q2 Chairman: You will hear me introduce the member of the Committee to ask the specific question. We have 30 minutes, so I have asked my colleagues to be as succinct as they possibly can, although some members will wish to ask supplementary questions, either during the course of the evidence session or right at the end. For the record, would you be kind enough just to introduce yourself and your colleague?

Mr Plummer: My name is Paul Plummer, I am Director of Planning and Regulation at Network Rail. To my left is Garry White, who is Head of European Affairs at Network Rail.

Chairman: Thank you, then we will start straight away. Lord Rowe-Beddoe?

Q3 Lord Rowe-Beddoe: Thank you. Good afternoon, Mr Plummer. In your very helpful paper, you describe the success, so to speak, of the growth in rail freight in the UK, talking of a figure of some 60%. Is this in your opinion a direct consequence of liberalisation?

Mr Plummer: I certainly think it is one of the important factors, absolutely, yes, in terms of the competitive market and in terms of the independence through the multi-annual contracts effectively that we have in the infrastructure, but also other factors like the improvement that we have seen right across the railway in the last decade are important as well, so there are a lot of things, but liberalisation is certainly an important one of them.

Q4 Lord Rowe-Beddoe: Could you rank a few others for me, in importance?

Mr Plummer: Well, in terms of the improvement that we have seen over the last seven years or so, I think that has been important in that period, but obviously the growth we have seen in rail freight demand has been way back beyond then, so that clearly has not been such a factor, but the liberalisation has been there for all of that period and that has been a consistent practice. I think you would have to say that was one of the very important things.

Q5 Lord Rowe-Beddoe: How much of this increase in growth is attributable to coal?

Mr Plummer: Coal has grown in proportion, in percentage terms, more than other traffic, but interestingly, in absolute terms, the growth in coal and non-coal traffic has been about the same over the last 10 or 12 years.

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Q6 Lord Rowe-Beddoe: To what extent is the growth the result of increased length of haul?

Mr Plummer: In the coal market, that was certainly a factor, especially a couple of years ago, that you had seen a lot of the growth in coal tonne-kilometres was because of length of haul, coming down from Scotland in particular. Since then actually we have seen that changing a bit, as we have seen coal coming in from different places in the country, and actually that is not so much a factor as it was then.

Q7 Lord Walpole: Do we get coal from abroad?

Mr Plummer: We do indeed.

Q8 Lord Walpole: Because I seem to remember the stuff that I burn on an Aga, anthracite, now comes from Germany. Is that possible, and why? Is it because you are not able to haul anthracite, or is none being mined in Wales any more?

Mr Plummer: In terms of the coal market, I think I would defer to others on that, but in terms of where we see the demand for use of the railway, that has certainly changed quite significantly in the last few years.

Q9 Lord Rowe-Beddoe: As a Welshman, I would be delighted to talk to Lord Walpole about the coal industry in Wales at any time. One of the other remarkable features, it would appear, of the UK in this situation is the increase in the number of freight operators. You talk of, I think, nine in your paper. To what extent actually do they really provide choice for freight customers?

Mr Plummer: I think very significantly. They are on a very level playing field in terms of the access to the infrastructure, so that is very competitive. You have seen growth in the number of them over the last few years, and changes in the market share as well. I mean, you can look at the overall market share, but actually in particular markets, there are obviously significant differences between different operators, but it is highly competitive from where we see it.

Q10 Lord Rowe-Beddoe: Could you give an indication as to the market share of the nine?

Mr Plummer: In broad terms, DB Schenker is around half, Freightliner is about a third, and the remainder is the other operators.

Q11 Lord Rowe-Beddoe: So there are about seven who have small pickings, so to speak. Are they relatively new?

Mr Plummer: Some of them are very new, yes, but a number of those others have been here for a few years, with relatively strong niche markets for some of them.

Chairman: Any colleague wish to follow up on those introductory questions?

Q12 Lord James of Blackheath: If you are 50/50 on coal and other freight at the present moment, how far out of balance would you be in the event of a serious downturn in the needs of coal transportation, reflecting a move towards renewable energy and the phasing out of coal? Would that leave you with an irrelevant 50% of your rolling stock, or is it flexible enough?

Mr Plummer: The forecast of demand that we have made in terms of planning our network, with the operators, taking account of what we think is going to happen there, I think would be pretty robust on that, in terms of how quickly things can change on the generation side, but we keep a close eye on that as well.

Q13 Lord James of Blackheath: Quite apart from that one issue, to what extent is a recast necessary at the present time on all the figures looking forward?

Mr Plummer: I think if you look across Europe, there are enormous variations in implementation of the first package, and I think, certainly in terms of the frustrations many people we know see with that in other countries, that suggests that there is certainly a problem, the question then is whether that can be remedied just by enforcing this existing package, or going further than that with a recast. We think that certainly a lot can and should be done on the enforcement side, but perhaps a recast to reinforce a couple of elements of that package is required as well.

Q14 Lord James of Blackheath: Are you having any particular problems in getting each separate nation to look at it through the same set of criteria?

Mr Plummer: I am not sure I quite understand your question.

Q15 Lord James of Blackheath: If you are effectively providing one great collation of what the whole of Europe wants, do you have difficulty in getting each separate state to give the same criteria of assessment?

Mr Plummer: I think if you look at the heart of what I see as the requirement of the first package, the underlying issue there I think is about requiring transparency, equity and fairness in the way anybody who wants to come in the market sees that, and if you ask, do all countries see it that way, and judge that on the way the package is implemented, I think you would have to say no.

Q16 Lord James of Blackheath: Is it an oversimplification to say the remaining problems that you are facing are really those of implementation only?

Mr Plummer: Broadly yes, I think that is right, but the question of what implementation means in that context, does it require a recast as opposed to just enforcement, I think is important, and I can go on in

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a minute if you like to a couple of areas where we do think it requires a strong steer.

Q17 Lord James of Blackheath: My final question to you: are there any problems of compatibility between the new joining members from the old Eastern Bloc, in terms of the compatibility of their rolling stock and their resources to fit into the rest of the network?

Mr Plummer: Certainly they come from a very different set of starting points, and I think that is a general point that applies in a lot of these areas to recognise and understand that, in terms of the detail, then I am not sure that I am ideally placed to comment on that, the precise rolling stock requirements, unless you want me to add something.

Mr White: I think that if you were to speak to a number of the Central and Eastern European railways, then what they would say is the introduction of multi-annual contracts, much as we have control periods here, would provide them with the security of knowing what their funding is, being able to look at reducing their costs, and looking at being able to give predictable access charges to their —

Q18 Lord James of Blackheath: My concern going back 20 years when I was operating the Simmering terminal in Vienna was that there was a total incompatibility between the traffic coming from the East to the West, as a result of which we ended up by throwing up the white flag, and everybody switching to the road, and clogging up the roads of Europe instead, and we do not want to see that happening.

Mr White: There are a number of initiatives taking place between EIM, I believe you are speaking to Mr Robson later on this afternoon, and the infrastructure group in the CER, who have also given some evidence to the Committee, which is a high level infrastructure management group, and that has identified a number of issues which the two bodies are working on jointly, including handing over of borders, international train numbering and so on.

Lord James of Blackheath: My Lord Chairman, thank you. On that last point, I think it is something on which we might invite our visitors today perhaps just to put down some little note for us, because I think it is a very important one.

Q19 Lord Ryder of Wensum: You have touched on this question in response to a previous one, but are there any specific issues that the Commission should concentrate on in the case of recast?

Mr Plummer: I think there are two main ones I would highlight, and I think that if those are addressed vigorously, then a lot of the other things that are talked about actually will flow quite naturally from that, in a way that deals sensibly with the differences in different countries, but actually gets us to a point

where you do have more of a liberalised market. Those are effectively pushing much harder towards genuine effective independent regulation, and again pushing vigorously towards effective multi-annual contracts. The reason I identify or highlight those two things is that I think that if those are addressed, then, for example, the issue around separation between the infrastructure manager and the railway undertakings, I think that will evolve progressively from that point. If you look at the history of regulation in this country, then that regulation in itself has forced that separation and actually forced the companies to want that separation, rather than applying a universal solution across all areas. I certainly do not think that it is right that a regulator is very intrusively involved in all the activities implied by that, and that is partly why I emphasise the multi-annual contracts as well, because I think in our case, for example, we play a very pro-active, I think, role in managing first the allocation, although ultimately the regulator has a role in that if there is a problem; we deal with the operational issues, and so on; we deal with many of the longer term planning issues. But if you have an effective regulator, I think it enables that to happen in the right place in the companies, and it incentivises actually the railways to want to separate the management of the infrastructure from the operations, because if they do not, the implied threat is that the regulator will do more and more of that, which, as I say, I do not think is the right answer, but having that possibility can change behaviour significantly.

Q20 Lord Ryder of Wensum: Thank you very much. Again, you have touched on my next question in relation to my last. You argue for a lightness of touch, and you obviously believe that you can get the right balance between the lightness of touch and effective legislation. Is there anything more that you would like to say about the balance?

Mr Plummer: I mean, I would say that part of the reason why I think it is valuable to focus on the establishment of effective regulation is it enables that bespoke approach, depending upon the nature of competition, so for example, if you have a very competitive freight market, then imposing a freight performance regime on those freight operators is actually perverse, it actually potentially makes the product more expensive and hinders competition with road, which is where the competition is here, but in a less liberalised market, that may be the right answer, and if you have an effective regulatory regime, it enables those decisions to be made locally, rather than at a Commission-wide level, where I think you would end up creating all sorts of horrible distortions if you tried to have one size fits all. You either create problems for the genuinely liberalised markets, or you go to the lowest common

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denominator which is not effective for those markets that are not really liberalised at all.

Q21 Lord Ryder of Wensum: Which countries at the moment do not appear to be appreciating your balance between lightness of touch and effective regulation?

Mr Plummer: I think probably if you look at the list of areas where the Commission has expressed concern with each of the countries, that probably gives you a pretty good steer with respect to the answer.

Chairman: Lord Dykes, any questions that you wish to elaborate on?

Q22 Lord Dykes: Just further to that, these are complex matters, are they not, but would you welcome it if the opportunity came from the recast of having a harmonisation of the infrastructure charges, or do you prefer the present system of variability to continue?

Mr Plummer: I think the key there is transparency, actually for two reasons: first of all, transparency in its own right is a big part of the problem here, and if that is required more vigorously then I think that helps everyone a great deal. Secondly, transparency, rather than dictating one solution from a Brussels perspective, actually I think will cause people to consider more actively and pro-actively, why is it that my charges are different from this one, and actually you would see a convergence over time towards what would be an oversimplification to say market outcome, but an outcome that is based on a detailed understanding, rather than, if you like, a centralist Brussels view.

Q23 Lord Bradshaw: Do I take it then that you do not really favour the European level regulatory body, but you actually prefer the national bodies to be, as you say, transparent?

Mr Plummer: That is absolutely right.

Q24 Lord Bradshaw: Secondly, turning to something a bit more important, and touching slightly differently, the Channel Tunnel, the powers of the rail regulator to bear down on the costs of operating the Channel Tunnel Rail Link are, I believe, limited; is that the case?

Mr Plummer: At the moment, that is the case.

Q25 Lord Bradshaw: Is there any negotiation going on to change that?

Mr Plummer: In terms of the discussion we are having around that, certainly that is one of the things we are talking about, but obviously HS1 and Channel Tunnel is part of that as well. Our role in there is very limited at the moment.

Q26 Lord Bradshaw: So the Government—I mean obviously, we are talking about international trains, and it is important we get them through the Channel Tunnel, because that is the link. Is it possible, this is another nasty question really, that in fact, the desire of the Government to get the most money from selling High Speed 1 is in fact interfering with the proper regulation of the railway?

Mr Plummer: We certainly believe it is important, critical, that High Speed 1 and indeed any other part of the railway is planned, developed, operated and managed as part of the network, that is absolutely fundamental from our perspective. That does not necessarily mean that it all needs to be owned in the same place, but we have to have effective and transparent arrangements such that people can use it, such that you do not get silly hand-offs, such that the operational issues work, that is critical.

Q27 Lord Dykes: Feel free to give us a personal answer if you prefer, I do not want to cause you problems, but in an ideal world, with the recast beginning to be effective at long last after such a delay, how many freight trains would you like to see going through the Tunnel per day?

Mr White: We currently reserve 35 paths a day to access Dollands Moor which is the point where services are handed over to Eurotunnel for it to run services. It would be nice if all those were being used. At the moment, roughly eight of the 35 slots a day which we have to enable trains to access the Eurotunnel network are being used.

Q28 Lord Plumb: You say in your evidence that you are concerned about harmonisation at a lower standard of openness and transparency. Does this fit in with the light touch approach? Are you really saying, “We do not want European legislation”?

Mr Plummer: No, I alluded to, in my previous answer, I think, that the issue saying here is two perspectives on that. One is that we would be concerned about regulations which are designed for very unliberalised markets being applied in liberalised markets and having very perverse effects. The other side of that equation, if you like, is when we are looking at a corridor, for example, applying the requirements for access to that corridor on the basis of the lowest common denominator. That is partly why I emphasise the need to actually look at the markets, to understand that, and an effective independent regulatory regime is, I think, the best way of dealing with that.

Q29 Lord Plumb: What about safety standards? How would they apply across the board? I am thinking of the 27 countries, of course.

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Mr Plummer: Yes, safety standards, all the countries are very focused on improving safety, and what we need to make sure, I think, in this context, is that that is not an unnecessary impediment to liberalisation and use of the network. I think we have done a great deal, and we have been very much in the front, I think, in the European context, of leading the development of common safety measures, as well as standards, but we must not use that as an inappropriate excuse for not liberalising.

Q30 Lord Plumb: What about the cost?

Mr Plummer: The cost of improving safety? Having answered that in the context of the UK to start with, where obviously we continue to try and improve safety in everything we do, but if there are major investments that we are looking at, where there is a choice, do we want to make this investment, then to an extent that is a public choice. So, for example, in the recent review, there were explicit targets set for the improvement in safety the Government wanted to see, that we then costed and then the regulator reviewed. I think that is an example of how a multi-annual contract can work effectively in those other countries as well, if we have that explicit and formal discussion about it in a way that does not actually happen in other countries.

Q31 Lord Bradshaw: Could I just ask a supplementary on that? The Channel Tunnel is a barrier to entry to the European market, so far as British people are concerned. How much of that is related to safety or alleged safety in some cases?

Mr Plummer: I would be happy to come back to you on that. I would rather do so than answer that directly.

Chairman: I think we would appreciate a note on that. I am sure Lord Bradshaw is partly referring to the recent fire, but also ongoing regulations.

Lord Bradshaw: Not necessarily the fire, but in fact there are all sorts of regulations, and I will take this one from the passenger field, you have to be able to divide every train in two and drive each independently out of the tunnel. I just wonder, it is not the sort of thing you find in Switzerland. I will happily have a note, thank you.

Q32 Lord Walpole: Final question then: how should a recast of the First Railway Package address the issues of off-network facilities, or should it not?

Mr Plummer: Again, I think the key issue or requirement here should be around transparency. That is not always, even in this country, very transparent, certainly even less so elsewhere, and I think that could help significantly. I think that then leads you into questions of where you put that in some form of network statement. Do you end up with multiple network statements, probably not very

helpful for people, and that would then perhaps lead you down the direction of requiring that information is provided to Network Rail, so that we can provide that in a single network statement, which would include these off-network facilities, perhaps.

Q33 Lord Walpole: Could I just ask one slightly frivolous question which does come in on one or two of the submissions we have had in from different bodies, do you think that English should be the second language on the network? Obviously when you are in a country, you use that country's language, there is no doubt about that. But when you are not, it has been suggested to us by several people that English should be the second language that everyone knows.

Mr Plummer: I find it very difficult to say anything other than yes, but I have not given thought to the question at all.

Q34 Lord Whitty: You have said in reply to earlier questions that you were not really in favour of a single European regulator, and improvements could be achieved by transparency in the existing national regulators. Transparency is all very well, but sometimes transparency, if it works, just proves that what you knew was wrong really is. Is not, for example, part of the problem of developing very long distance international freight across Europe that the allocation of slots is different between the different jurisdictions through which you have to pass, and therefore would not some sort of override be desirable in that regard?

Mr Plummer: I did not mean to give the impression it was just transparency of regulations necessarily, the regulator needs to be genuinely independent to be effective, and in doing so, I would expect them to be very transparent and indeed to require considerable transparency on the part of the infrastructure managers and others. That having been said, I do think you are right that there is a question as to what would happen if there are issues between Member States, between regulators, I think that is something that needs to be worked through, but I would think that should not be the norm. If there is more of a common and genuinely effective independent approach, then that I think would bear.

Mr White: The Commission has addressed that question in the draft regulation for a network for competitive freight, which I think really needs to be considered alongside the recast of the First Package. In that, its recommendation for a way forward is to require national regulators to have a responsibility to work with each other better and to improve communications, and much as they are suggesting infrastructure managers need to do that, they are suggesting that is the way forward for the regulators as well. The only other alternatives would be a second

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layer of regulation at a European level, or supranational regulation across borders by each country's regulators, and I do not think the Commission or the industry has suggested that either of those would be a suitable way forward.

Q35 Lord Whitty: No, but the gap is ensuring that the national regulators need to adopt a common approach. We are talking about a single market here, and relying entirely on national regulators without any even minimal override does mean that you optimise within a particular country, you do not necessarily optimise the behaviour of, for example, the allocation of slots across the whole of Europe, to maximise take-up of the freight, so there could be a residual regulatory/legislative requirement.

Mr Plummer: I think if they are genuinely independent, and if they have a duty on them to deal with those cross-border issues and co-operate with each other, I think that compared to where we are today, that would be a massive step forward.

Lord Whitty: That is my point really.

Q36 Lord Bradshaw: One last question, you may not wish to answer this either, but is it a fact that the law in Germany prevents the regulator in Germany at present having access to the information about the costs of maintaining the infrastructure in Germany?
Mr Plummer: Prevents, or does not provide for it?

Q37 Lord Bradshaw: Well, either way, he does not get access to the information which the rail regulator here has with Network Rail, you have to make the information available.

Mr Plummer: As far as I am aware, there is no equivalent of the information gathering powers that our regulator has.

Mr White: I know it is an issue of concern to the German regulator.

Q38 Lord Bradshaw: This seems to go right to the heart of it. Germany is a great lump in the middle of Europe, and if the law there prevents what —

Mr White: Yes, and the regulatory regime in Germany is effectively split between two different Ministerial teams.

Q39 Chairman: That is presumably what you mean by transparency.

Mr Plummer: Transparency, effectiveness and independence; if we have those things, I think these other things flow from it.

Q40 Chairman: Have you given any thought to the wisdom of a college of regulators or what will the role be of the European Railway Agency?

Mr Plummer: In terms of college of regulators, I believe in this country, there is a college effectively of regulators that meets as a group, and I have no doubt that if you had more effective independent regulators across Europe, they would meet periodically as a group; they do already, but I think it is a somewhat unbalanced group at the moment.

Q41 Chairman: And the European Railway Agency?

Mr Plummer: I see that as slightly different, in terms of being more focused on the technical aspects of the issues here, rather than the liberalisation issues.

Q42 Chairman: Final questions from any colleagues round the table? Very succinct, very helpful, thank you very much indeed. Please read the transcript and correct it, and I think you have promised two notes, but if there is anything else you want to follow up to help our deliberations, we are planning to produce our report in June.

Mr Plummer: Thank you very much.

Supplementary memorandum by Network Rail

WORK BEING UNDERTAKEN TO IMPROVE COMPATIBILITY

There are a number of activities underway by different industry bodies to improve the compatibility of systems. This is of course supplemented by EU legislation such as the Interoperability Directive and the various Technical Standards for Interoperability such as the TAF-TSI (Telematic Application for Freight).

As discussed, at an industry level, the infrastructure managers across Europe are delivering a range of initiatives together, both through the two associations of EIM and CER working together and through Rail Net Europe (RNE) an association set up by a majority of European rail Infrastructure Managers to enable fast, easy access to European rail, as well as to increase the quality and efficiency of international rail traffic. See: <http://www.railneturope.com/cont/index.aspx>

EIM and CER have identified three issues which they have prioritised in this area; improving system for real-time communication between Traffic Controls, TRAINIDENT a single European train identification system, and the definition of common parameters (train length, axle load, loading gauge) on key corridors. The associations have in fact asked RNE to take the lead in delivering these.

RNE has already made significant headway since its creation in 2004 in harmonising its members' medium and long-term planning, common marketing & sales approaches, operations, monitoring and reporting.

CHANNEL TUNNEL REGULATIONS AS A BARRIER TO ITS USE

There are two operators licensed to run services through the tunnel; Europorte 2 (Eurotunnel's own contract haulage company) and DB Schenker.

A potential operator wanting to run through the tunnel could either contact one of these operators or obtain its own safety equipment including all the relevant licences from the CTSA (Channel Tunnel Safety Authority). This would then provide them with haulage to Dolland's Moor (which, as a DB Schenker operated facility would require an agreement) after this point, onward planning would be undertaken with Network Rail.

While obtaining the necessary certifications and equipment may therefore be a barrier, an alternative option does exist. However, this would still leave other considerations such as cost to be taken into account.

The setting of regulations pertaining to the tunnel is the responsibility of the Channel Tunnel Safety Authority—an independent, bi-national body that reports through the Channel Tunnel Intergovernmental Commission (IGC) to both the UK and French Governments, on all matters relating to safety in the operation of the Channel Tunnel Fixed Link.

For information, the UK Secretariat to the Channel Tunnel Safety Authority is housed within the Office of Rail Regulation.

I hope that this further information is of assistance in the committee's deliberations, if I can be of any further help, please do not hesitate to contact me.

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Memorandum by the European Rail Infrastructure Managers (EIM)

A) Are the provisions on the separation of infrastructure management and train operations sufficient? Should they be amended, or replaced with a requirement for full ownership unbundling?

1. EIM believes that the provisions guaranteeing the independence of infrastructure management from railway operations are currently insufficient. This has been confirmed by the European Commission, which has recently taken steps to ensure proper implementation of EU legislation by launching infringement procedures against 24 member states. The lack of independence of Infrastructure Managers from Railway Operators was one of the main specific shortcomings identified by the European Commission in many cases.

2. Both the separation and the integration models are compatible with European Community law, which has led to a wide variety of separation models across European Member States. However, EIM believes that separation leads to a number of benefits in terms of improved efficiency, greater transparency, non-discriminatory access, and safety. EIM also observes that where fully independent infrastructure managers have been created, this has usually generated increased competition and traffic growth. In the UK, growth of some 30% in passenger kilometres is matched and more so by growth of 48% or more in freight tonne kilometres. Similarly good results have been recorded in Sweden with an increase of two billion tonne-kilometres between 2004 and 2006.

3. Whereas EU law has been implemented, there are still too many loopholes and gaps to achieve the stated objectives of the First Railway Package. Especially, the independence of essential functions in accordance with the requirements formulated in European legislation must be safeguarded, guaranteeing the non-discriminatory access to tracks and all service facilities related to rail freight operations. As shown by many complaints from undertakings entering the market which are in competition with "incumbent" railways, this is not the case at present. The European Commission has also had indications of discrimination related to last miles (eg track access to terminals, or in ports), as stated by Mr Castelletti at an ERFA-UIP conference on this topic in November 2008. The availability of non-discriminatory access to the last mile of infrastructure is vital for the competitiveness of rail freight transport. In particular, single wagonload traffic (ie 40% to 50% of EU rail freight) cannot be realised without direct access to sidings.

4. Cross-subsidisation within traditionally structured companies was not prevented, because parts of the route prices they paid flowed into the holding company instead of being used to benefit the infrastructure, which not only improved their results but also enabled them to provide their service more cheaply on the market. These examples become even more apparent when access to rail related services is analysed. For instance, regarding access to freight terminals, shunting and maintenance facilities, capacity constraints (saturation) make access often difficult, possibly giving first right to incumbent operators. On this issue, EIM also wishes to refer to reports by the European Commission¹.

B) Are the current provisions regarding the staffing and independence of regulators adequate? Is statutory independence from government desirable?

5. The common situation in most Member States, is that Regulatory Bodies do not exist or they do not have any real working procedures, their competencies are unclear or they not have sufficient human and financial resources.

6. The majority of the countries have only implemented the minimum requirements as set out in EU law. According to the findings in the 2006 IBM Study “Rail Regulation in Europe,” there are six countries with an independent specialized “special regulatory authority” with decision-making powers: Austria, the UK, Germany, Italy, Latvia and The Netherlands. The Commission implementation report from 2006 states that current functioning of the Regulatory Bodies is potentially not independent as a consequence of their structure (part of Government), and lack of resources and information on markets. Credibility of functioning should be assessed by looking at decision-making capacity, available budgets, ability to request information from all players, and reporting obligations.

7. The objective of a regulatory body is to ensure fair and non-discriminatory access to the rail network and to services. However, EIM is concerned about the structural weakness of some Regulatory Bodies, which can hinder private investment in the infrastructure or rolling stock due to insufficient protection of the investment. The fact that a body may be attached to a Ministry could, in practice, undermine its independence if a dependency exists between that Ministry and the incumbent railway undertaking.

8. In other cases, it may be considered that, while a body has been formally set up, it is not operational and does not have enough human, administrative and financial resources to be able to play an active role in the operation of the market. However, it is essential that this body should have credibility with market actors given that, when a railway undertaking encounters a problem concerning access to infrastructure or to ancillary services, it is important that the regulatory body is able to intervene to resolve the problem in question.

C) Do barriers to entry remain due to factors such as safety certification requirements? How should these be addressed?

9. The lack of interoperability in Europe remains a major barrier to entry, as it makes it much more difficult to start cross-border operations. It also entails much higher costs and makes rail transport less competitive compared to other modes of transport that can effortlessly cross borders and operate in any country. In this respect, EIM supports the work of the European Railway Agency (ERA) to overcome technical obstacles by developing European specifications and standards for the different parts of the rail system together with all rail stakeholders. EIM and its members believe the work of the ERA is essential in the creation of an open competitive railway industry in the European Union.

10. There needs to be a clear separation of the body or sub-contracting bodies responsible for issuing safety certificates from the incumbent railway undertaking.

D) Are the current requirements regarding the setting of infrastructure charges adequate, and how should they be amended?

11. As stated in the joint EIM/CER brochure on rail charging schemes in Europe, the current provisions on infrastructure charging are generally adequate, but there is scope for change in a number of areas to ensure the long term stability of Infrastructure Managers, as well as to ensure a level playing field between transport modes.

12. Infrastructure charges can account for a significant part of the costs of a railway operator. The levels and structure of the charges are therefore crucial in determining the competitive position of rail transport in relation to road transport.

¹ European Commission, Report on the *Implementation of the First Railway Package*, COM(2006)189, 2006.
European Commission, Communication on monitoring development of the rail market, COM(2007)609, 2007.

13. EC policy on infrastructure charging is based on the “User Pays” concept. In addition, charging regimes should provide the necessary incentives to promote a more efficient use of infrastructure, to reduce congestion and pollution (the “polluter pays” principle), to rebalance the modal split and to decouple transport growth from economic growth. Pricing must also ensure an adequate level of revenue for Infrastructure Managers. EIM therefore supports the work of the EU to ensure that all modes of transport fully and fairly account for their external costs. The current proposed revision of the Eurovignette Directive is a positive step in this regard. The recast of the First Railway Package could also present an opportunity to ensure the internalisation of external costs.

14. Directive 2001/14/EC provides a general framework for setting rail infrastructure charges for the use of domestic and international services. The Directive aims at reducing the variation in the structure and level of railway infrastructure charges and to ensure transparency and non-discriminatory access to rail infrastructure.

15. Charging systems vary widely across Europe, depending on the market and political conditions prevailing in each country. The level of government funding has a direct impact on the setting of infrastructure charges. In addition, costs largely reflect the size of the network and the workforce as well as equipment used.

16. Infrastructure Managers welcome any initiative that would provide a higher degree of certainty as to funding levels, which would help to improve medium term planning. The European Commission Communication (February 2008) and the Council Conclusions (date) on Multi-Annual Contracts (medium term contracts between Infrastructure Managers and the State) are thus welcomed. These agreements should include provisions on performance and productivity objectives, monitoring provisions and sanctions in the event that targets are not met. EIM calls for the use of Multi-Annual Contracts to be made mandatory throughout the EU. The regulatory measures mentioned in the current text of the First Package could in theory ensure the long-term stability of the network, but in practice only if they were made multi-annual in nature. EIM would like this to see the recast of the First Package include provisions on multi-annual contracts in Directive 2001/14, Article 6. This is especially important for Infrastructure Managers from Central and Eastern European Member States.

E) Are existing provisions regarding the allocation of capacity on tracks and at terminals adequate, and how should they be amended?

17. Directive 2001/14 does not give sufficiently clear guidance on the circumstances in which the providers of rail related services should be required to grant access to a competitor or other third party. The Directive does require services to be supplied, unless “viable alternatives” are available, but without clearly defining what a viable alternative is. While the text of the Directive proposes that a market based test be used to determine when access should be granted, EIM calls for the recast to add a provision to ensure that the Regulatory body monitors compliance with this principle, and to develop recommendations on viable alternatives. Additionally, to guarantee non-discriminatory track access to service facilities and supply of services, the conditions of access should be described in the Infrastructure Manager’s Network Statement.

18. In some Member States, entities other than railway undertakings, known as “authorised applicants” can be allocated train paths. By gaining control of the whole logistics chain, clients (such as freight forwarders) will be more motivated to choose rail transport. This will enable the development of solutions for congestion of rail infrastructure and a more efficient organisation of co-modal transport and could help promote modal shift from road to rail.

19. The fact that not all Member States recognise authorised applicants means that their advantages cannot be leveraged in international traffic. To overcome this, the recast of the First Package should require Member States, at a minimum, to introduce the concept into national law.

20. It is crucial that terminal operators and Infrastructure Managers work together on capacity issues. The Commission’s proposals on developing a Freight Oriented Network should be helpful in this regard.

F) How should a recast of the First Railway Package relate to other EU Freight transport policies?

21. The Commission has recently embarked on a number of initiatives in the field of rail transport, including the infringement procedures launched against 24 Member States, the publication of a proposal for a regulation on Competitive Rail Freight and actions in other areas such as noise and the internalisation of external costs.

22. While generally supporting these measures, EIM feels that they would be more usefully included within the framework of the recast of the First Railway Package, since it forms the primary basis of regulation in this area and has a binding effect at Member State level.

23. EIM is fully supportive of the proposal to recast the First Railway Package, which will provide an opportunity to overcome the barriers to market integration at EU level identified by the European Commission in its Communication on monitoring the development of the rail market of September 2007. The rail mode can only achieve its full potential when national and international modes are fully open to competition, and Infrastructure Managers can operate in an independent and non-discriminatory manner. These conditions can only come into force if the first railway package is fully implemented in all Member States. The recast of the First Package will help to reinforce the legislative framework necessary for an efficient and competitive rail network in Europe.

9 February 2009

Examination of Witnesses

Witness: MR MICHAEL ROBSON, Secretary General, European Rail Infrastructure Managers (EIM), examined.

Q43 Chairman: Mr Robson, thank you very much for coming, we have allowed about half an hour, if that is convenient to you. Perhaps if you would just introduce yourself and your responsibilities for the record, and I hope that you will be able to see the nameplates of those who will be asking questions, of which we have already largely given you notice. Mr Robson?

Mr Robson: Thank you. Well, Michael Robson, I am the Secretary General of the European Rail Infrastructure Managers Association, based in Brussels. Essentially, we are a lobbying organisation on behalf of infrastructure managers, of which Network Rail is one of our members, we also work very closely with the European Railway Agency, in terms of technical specifications and culpability and promote the development of rail in general.

Chairman: Thank you. With your agreement, we will go straight into questions. Lord Rowe-Beddoe?

Q44 Lord Rowe-Beddoe: Mr Robson, good afternoon. In your paper, you are at the outset heavily critical, if I may say, of the lack of independence of the infrastructure management of railway operations. You obviously believe this is a main driver. Is it the main driver, or are there other drivers that are behind the slow progress of rail freight liberalisation in the European Union?

Mr Robson: My Lord, I think there are a number. I think if you want to open a market, you have to make it easy for people to enter a market. By having an independent infrastructure manager, it is very easy, because his remit is to ensure that the infrastructure is used in the most effective manner, and in effect, providing the operator is safe and has an access agreement, there is no reason why they should not operate on the network. Because independent infrastructure managers have been set up with a more diverse mix of senior management, they are also more business and open-minded, whereas in a number of railways where the group holding structure is there, there are a number, if I use the term, of old-fashioned railwaymen in there, who are perhaps not so business alert, or perhaps have other interests than making sure the network is used most effectively.

Q45 Lord Rowe-Beddoe: Can you comment a little further on the very slow progress that there has been in a large number of countries with regard to liberalisation?

Mr Robson: Yes, if I take France, which interestingly enough has a separate infrastructure manager, however, most of the responsibilities of the infrastructure manager are then re-delegated back to SNCF as the main railway undertaker. Therefore, it is difficult to gain a licence to operate in France because also some of the responsibilities of the regulatory body and the safety body, to gain approval for your locomotive or your vehicle, are again sub-delegated back to SNCF, and you may ask what incentive SNCF has for competition. On a positive note, France has actually made a decision to set up a proper regulator; they have had a regulator of sorts for a period of time, but actually, a proper regulatory body, and we hope that will enhance. As another example, if I took Romania, where there is a separate infrastructure manager, and there are new railway undertakings in place, and they have won approximately 20% of the market, the problem in Romania is the state of the infrastructure, and actually getting funding to develop the infrastructure to allow traffic to grow, so there are two different things. But I would suspect if there had not been an independent infrastructure manager, you would not have 20% of the freight market in private hands, and that 20% would probably have disappeared on to the rail industry.

Q46 Lord Rowe-Beddoe: What is your understanding of the timing between the announcement in France and the implementation?

Mr Robson: Well, My Lord, that is a very difficult one to answer, but I would hope that some time this year, they will actually have a rail regulator with some teeth in force.

Q47 Lord Rowe-Beddoe: Do you think the current legislation goes far enough in the degree of separation between infrastructure and operations?

Mr Robson: We do not. We believe that it should be very explicit between infrastructure managers and railway undertakings and not continue with the

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ability to have a group structure. However, we are very, very frustrated that this view is not held universally, obviously within Europe and particularly within the Commission, and other industries where you have, for example, electricity distribution and generation and selling within one company.

Q48 Lord Rowe-Beddoe: We note in your written evidence that you say there are still too many loopholes and gaps to achieve stated objectives. Any further comment on that?

Mr Robson: In the structure of an integrated company, although you may have separate holdings, as in Deutsche Bahn or various others, there is a lot of money that it is very easy to pass through the books and cross-subsidisation, which may not be apparent just looking at it, and indeed, the Commission has started a study on accountancy within the whole railway industry, to try and discover whether they can find any of this cross-fertilisation of funds, which I am sure they will find, but then obviously that has to be properly explained. It can be very also detrimental, where the funds are used, for instance, from a freight business to subsidise a passenger business, because the freight charges are then much higher than they need be, and in fact they act as a barrier to transferring road traffic to rail, so it is not a truly open market.

Q49 Lord James of Blackheath: Are the regulators who you are dealing with robustly independent enough to hold their ground or are they manipulated by their own markets?

Mr Robson: My Lord, I think there are very different regulators in very different countries, and they have very different structures. We believe that in some countries where the regulator is very much part of a Ministry of Transport, and the Ministry of Transport is still the main shareholder of the railway undertaking, then we find it very difficult to understand how a fair judgment can be made. In other countries, for example, the UK, the regulator is independent, and can make quite independent decisions, which is the way that we would like to see it in other countries. There is also a move in some countries to move regulation of different infrastructure groups into one big super-regulator, so you have a regulator that does roads, rail, airways, electricity, all one regulator, and we are waiting to see if that is as good as having a separate regulator looking at railways in particular.

Q50 Lord James of Blackheath: Would you identify any particular problems at the moment resulting from the different styles of regulation from one country to another that are going to cause you severe difficulties?

Mr Robson: I think, My Lord, that comes through in a number of ways. One is about priority rules along corridors, and actually thinking about how you want to improve the performance of the train service along a particular route, because currently, if you have an infrastructure manager in one of four countries along a route who is perhaps forward thinking, they have some very good ideas with the infrastructure manager, but perhaps the other three regulatory bodies along that route are not as forward thinking, and therefore you do not get a clear decision along the route which is bad for the performance —

Q51 Lord James of Blackheath: Would you see any grounds for an approach to Brussels to try to impose some stronger single discipline on the process?

Mr Robson: My honest view on that is: better co-ordination of the regulators, yes; a super-European regulator, no. The regulatory bodies working much closer together I think is important.

Q52 Lord James of Blackheath: I think we can sum you up saying you are happy to live with your difficult life.

Mr Robson: I would not quite say that.

Q53 Lord James of Blackheath: It sounded like it.

Mr Robson: We want to work to make regulators work better together with the infrastructure managers and all the other players along the corridor, and the example of setting up corridors, as an example from Rotterdam to Milan, with the Member States and the infrastructure managers signing up to achieve the same objective, is a huge step forward, and in that, the regulatory bodies then need to be part of it. We would like to see that concept particularly for freight rolled out across other corridors in Europe, so that we get some commonality along the corridors, as a first step.

Lord James of Blackheath: Mr Robson, thank you for a very interesting response to the question.

Q54 Lord Dykes: Ensuring financial stability of the infrastructure managers is a key objective. Do you feel that all Member States are working hard to achieve that, and do they also work hard to respect the very solemn requirement to pay for public service obligations?

Mr Robson: My Lord, that is a very good question, with two little different parts to that. In terms of infrastructure management, we do not believe that all infrastructure managers are adequately financed and supported in order to carry out the requirements of the existing directive, and indeed, in some Member States, the settlement—because all infrastructure managers receive some funding through track access charges, from grants, from government; in some cases, the funding for the current year we are in has

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not yet been agreed. Therefore, it is very difficult to plan your investment, your maintenance and your development of the network if you are not sure what your funding is, which can lead to very sub-optimal decisions on how to invest. So that is not very good. The other part can come where in a number of our Member States, as I mentioned before, there is no passenger service obligation, and the passenger services are subsidised from freight or from inter-city routes, and some of that money may eventually come to the infrastructure manager, but again, it is very hit and miss, and it distorts the market in terms of the access charges.

Q55 Lord Dykes: On the financial stability of infrastructure managers, do you think that progress in multi-annual contracts is a way of resolving problems in this area, or is it very limited?

Mr Robson: I certainly think that is the way forward. The UK has a very good example of that. Belgium has started, and indeed France has just signed a service level agreement, we call it, but in essence it is the same thing. I think it is very important that the funding is linked to a form of performance indicator, whatever that indicator is, whether it is delays to traffic or amount of track renewed, et cetera, et cetera, but in order for that to be effective, I also think that those indicators should be agreed across different Member States, so we are not comparing apples with pears, we are agreeing the same thing, and if I take something which I think most people could relate to, if the track requires to have a speed restriction put on it, because there is a defect or something, you could count the number of speed restrictions and divide them by the kilometres of track, that would give you key performance indicators, but if I took the UK as an example, the UK publishes every speed restriction, even if it is only on for a few hours, it is published in some manner, and they are all counted. If I went to France, they only count speed restrictions which are on for more than seven days, so you get a very distorted figure, so it is very important that the base that you use has been equalled out.

Q56 Lord Dykes: Would you say also that all these objectives put together are hampered by inadequate investment in rail infrastructure, and perhaps you might care to mention individual examples of that, but is it going to be adequate in the future? What needs to be done to improve the investment in basic infrastructure?

Mr Robson: My Lord, I think there needs to be a lot more investment in rail, but I would also say targeted investment, being very clear what we are trying to achieve. For example, rail gets investment from the TEN-T budget, it gets it from cohesion funds, it gets it from various other sources, but sometimes Member

States have their own agendas in terms of investment, and the investments across a corridor or a route do not always add up. That is why I think targeted, because if we agree that a corridor between two points is important, we should both nationally and European-wide look to invest to develop that corridor, so I think that is important. I think the other thing that is important is that the Member States live up to their existing obligation in terms of financing the infrastructure manager to develop, but we also move away from just replacing like for like, because in some investment cases, as an example, you replace a crossover which currently is 20 miles an hour and was built in Victorian days, you might actually want it to be 60 or 65, 70, something like that, miles an hour, but if you increase the cost of it, then that is not like for like replacement. So it is a very different business process to get that, but the right business decision could well be to relay that crossover in modern equivalent form for not just the traffic we are dealing with now, but the traffic we might deal with in the future. My other comment is to think about how we alleviate bottlenecks on the network, and that could be improving the facilities at a junction or quadrupling the track or something, but it might also be upgrading another route which can be used as a diversionary route or as another route for the same type of traffic, and that is not always thought of in terms of investment planning, when you are looking at that first route, so you have to bear in mind those two things.

Q57 Lord Dykes: By definition, dedicated new track for freight particularly has a limited set of examples, but were there any good lessons to be learned from the Holland to Germany dedicated freight line?

Mr Robson: My Lord, in terms of the Betuwe route, that is an excellent route, it works superbly well now that the signalling has been resolved as far as the German border, but then the agreement to improve the track on the German side of the border has not yet materialised, so we have moved the bottleneck from the port of Rotterdam to the German border, and if we go back to what I said about joining investments up and targeting them, the logic would be to have done that corridor throughout to get the benefit from it. At the moment, the Netherlands are having a great benefit, but it is stopping there, so the overall benefit to the network has not been achieved.

Q58 Lord Plumb: You have already made it quite clear to us I think your concern about the degree of variation at all levels, particularly between countries. Is therefore the degree of variation in the level and structure of infrastructure charges around Europe a problem for the industry? If so, would this be a matter for guidance from the Commission, or does it require further legislation?

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Mr Robson: My Lord, it is a very interesting question, and I always say charges are one side of the coin, how you finance your network is the other side of the coin, and if we take two examples, in Norway, the access charges are virtually zero, because they finance their railway another way, and if we take Latvia, they have to get all their receipts through access charges, so there is a huge difference and huge variance. So I think we have to decide how we want to finance our networks, and then the charges that we charge for them. It causes difficulties for our freight operators, having very different charges. I think it is possible to live with those charges if there is some certainty as to how long those charges are going to be there, and that comes back to the point about multi-annual contracts. If you have a contract and you know what you are going to deliver for your infrastructure over a period of years, you can give some certainty to the access charge, whether it is a high one or a low one, you can give some certainty to it. If you are not sure what funding you are going to get, then you are going to price that risk into your access charge. To get a standard or similar access charge along a corridor is something we would like to move to, but we recognise that that will require a lot of effort from the Member States in terms of agreeing that that is something that we should do, and we need to measure the benefits of doing that, if that would improve freight traffic along that corridor. A complicated issue, but it goes back to the first thing, how you fund the network.

Q59 Lord Plumb: Could or would the economic climate at the moment have a delaying effect on final decision-making?

Mr Robson: Well, my Lord, at this present moment in time, I stress that, the answer is it has not. Whether it will in the future, I think remains to be seen, although having been at a conference last week in Berlin, in talking to the European Investment Bank, they were pressing the railways to put forward good quality infrastructure schemes for investment, because they had plenty of money, those were his words, available to support good schemes. So I think there is still money available, we have to have good quality schemes, we have to deliver them in time and on budget, and if we do that, I think we will continue to get money, because also in the Member States, it is a way of generating employment and keeping industries operating.

Q60 Lord Plumb: To what extent has the aim of the one-stop shop for freight operators seeking international paths been realised, where are the problems, and what should be done about them?

Mr Robson: The one-stop shop is operating in some countries well, and in other countries, it is not operating well at all. Part of it depends on —

Q61 Lord Plumb: Would you like to name any of those countries?

Mr Robson: I would say that in Germany it does not operate particularly well, and I would say that probably in the Netherlands, it operates well, as two examples. Some reasons why it does and does not operate well is to do with the amount of competition. If you are a new entrant into the market, if you go to a one-stop shop and it is performing well, it should be able to help you very well, whereas some of the older incumbent operators prefer to go round the corner and speak to their friend in different countries to get their path. There is not the total transparency, perhaps, that there should be, to make sure that people go towards one-stop shops. In our responses to the consultation on freight networks, we would very much like to see one-stop shops developed and also to look at whether they should be developed to include ports and terminals in terms of origin and destination points of traffic, at least as a source of information, not necessarily being able to book your slot in the terminal or the port, but as part of that, to make the logistics chain easier for the people. It is also about, in one-stop shops, most of the people who recruit the one-stop shops, who are in the one-stop shops, have come from within the industry. So in Germany as an example, they are Deutsche Bahn people, and they feel their loyalty is to Deutsche Bahn, whereas in the Netherlands, they are ProRail, they are a different company, they are a new independent infrastructure manager, they feel their loyalty is to generate business for the railway, not whether it is NS or Deutsche Bahn or anybody else. That is a very different culture.

Q62 Lord Paul: In the matter of allocation of slots, do Member States give sufficient priority to the international freight services?

Mr Robson: My Lord, it depends where you are in Europe. The directive is reasonably clear on the subject, which says that 11 months before the timetable, we should have agreed international train paths and should not change them unless absolutely necessary, and basically I am paraphrasing. One of the problems we have is that unfortunately, a lot of international freight train requests are not received at that point in the timetable process, they are received about June of the year, so already, they are five months behind the passenger timetable for international services you put there. I can understand that, because obviously freight traffic is flexible, and your demands come in later. What I would like to see is freight operators, where they have a known demand for an international service, to make their request at the same time that the passenger operator does. If you take the UK for domestic services, all bids are dealt with at the same time, they are not separated out, and we believe that by doing that, we

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would get some much better quality international train paths. The other proposal is that infrastructure managers should reserve capacity for bids for train paths which we would be happy to do, provided it was not too much capacity, and obviously, if the paths were not requested, then we would use them for other means, but I think it is more to do with, in this case, RailNetEurope, which is the international train path co-ordination body, gripping that, it already has a process, it is making that process work, and I think our freight operators have a role to play in it for business they know is long-term business, to help them.

Q63 Lord Paul: Do you think sufficient progress has been made towards that, or there are still some hiccups?

Mr Robson: I think some progress is being made, because the computer system that is used for that, a system called Pathfinder, is being developed and I believe is working much more effectively. I think there is still an education process to go, particularly to help new entrants into the market to understand the process, and one of the things we have said is that is something that infrastructure managers can help with, because a new person who wants to run a service comes to the infrastructure manager, and we should be clear what the international processes are for.

Q64 Lord Paul: Is progress on interoperability and harmonisation of safety standards satisfactory, and is it going to be achieved at an acceptable cost?

Mr Robson: Safety and interoperability and the technical specifications are all subject to a cost benefit analysis by the European Rail Agency. Member States, on chapter 7 of most of the TSIs, have another opportunity to have a cost benefit analysis. I do not think interoperability is being achieved quickly enough, but by the same token, I do not believe that all interoperability needs to be achieved through TSIs. There are operational practices at borders which are not on a TSI which could be simplified and in some cases they relate back to the old structure of different railways in different countries agreeing a process. If I take you back to this country, in British Rail days, we had different regions, and the procedures did differ between the regions, and it is exactly the same in Europe, and you can sort out some of those operational procedures without writing a new technical specification on interoperability. All that should be is a very high level specification. I think the cost of doing it should be looked at and is being looked at by each Member State in implementing it. As an example, however, Sweden will implement the TSIs over all of its infrastructure, that is their plan to do that, they will not have national standards, because that can be one

of the benefits of interoperability, you have one set of standards for everything, but again, a cost benefit analysis would need to be done to decide whether that was right for your country or not. In terms of safety, I think it is starting to bear some fruit, in terms of making the process very transparent to get a safety certificate, and once you have a safety certificate, let us say a driving certificate, then that is now accepted in more than one Member State, and that is good, because if we want drivers to drive across borders, we do not want them to have a pocketful of different licences for whichever country they are in. The first one, the main part of the certificate, has now been accepted, so some progress, but again I think we have to be careful that we do not create a massive safety bureaucracy which actually moves us back and makes safety more prescriptive. Everybody in the railway industry wants a safe industry, but there has to be a degree of risk assessment, in assessing the level of safety that you provide.

Q65 Lord Walpole: Is access to ports, terminals and depots a significant problem, and if so, what should be done about it?

Mr Robson: My Lord, it is a problem in a number of ports and depots, particularly where the last mile of the track does not belong to the infrastructure manager, or the last few kilometres does not belong to the infrastructure manager, and is operated by the port itself. Sometimes getting from the marshalling yard that the vehicles are left in into the port is (a) very expensive and (b) perhaps is prioritised to the customer that pays the most, that is one of the things. The other thing is that there are a number of terminals for dealing with containers or intermodal business, which are full to capacity, but in some cases, that capacity is taken up because a train is standing there for eight hours, which is effectively a way of blocking another entrant from getting into the terminal, so part of the proposals under the freight quality is that the management and co-ordination of access to and from terminals on the infrastructure should be dealt with by a corridor management group, which consists of the infrastructure managers in the Member States. Hopefully that will start to determine which terminals are actually congested, and physically you cannot operate more traffic, and which are congested by playing games, if I phrase it that way. For those that are genuinely congested, and I believe there will be some, we need to look at alternative ways of financing more terminals, probably through private investment, and you operate it as a business open to everybody who wants to pay to come into your terminal. The other area which is quite specific is that in some countries, if you close a marshalling yard, the infrastructure of the marshalling yard does not belong to the infrastructure manager, it belongs to who the

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incumbent operator was, and the incumbent operator sometimes either does not allow any access to it, or puts a huge high price on access, and there is no effective regulatory body to then challenge that, so you do not have the checks and balances which you would have in a properly working market.

Q66 Lord Walpole: I see you say in your paper, I had not actually realised this, that 40/50% of EU rail freight is in fact on single wagon loads. I had no idea about that. There must be an amazing marshalling problem, must there not? Or is there not?

Mr Robson: My Lord, there is a problem, it is very, very expensive to operate marshalling yards.

Q67 Lord Walpole: I am sure it is.

Mr Robson: Some countries do it very well, Austria being an example of a country that does it very well. Other countries did it very badly, which is perhaps why they are closing marshalling yards to reduce their costs. Single wagon load business currently is not particularly profitable, as it was not in BR days, there is no magic formula to this, unless you can squeeze the costs out, and what is happening now is some of the big railways in Europe are trying to co-operate closer together to squeeze those costs out, and an effect of that is closure of marshalling yards, but what you might want to see is new entrants coming into the market, not wanting to operate single wagon loads but sections of four or five wagons and joining them up on a section train, and they are being denied access to the marshalling yard which they could lease some sidings to do that to, so in essence it is the frustration of their business but single wagon load across from east to west and north to south is still a big business particularly for chemicals.

Q68 Lord Walpole: And presumably things like whisky as well.

Mr Robson: Whisky, I think, travels more in containers from Scotland. I do not think there is many of it in single wagon loads, although I used to load it at Markinch many years ago.

Chairman: I am sure Lord Walpole would like a personal inspection of the whisky trains.

Q69 Lord Bradshaw: Very quickly, the paths on the international railway, they used to be occupied by a lot of trains with grandfather rights. Has it effectively

got to a situation of use it or lose it, if people do not use a path, it gets taken out of the timetable?

Mr Robson: My Lord, in terms of the directive, that is allowed. Some Member States have set a threshold that says if you do not use path one 25% of the time during the year, it can be removed. Others, if their infrastructure is not congested, have not set any thresholds. I think there is more of a move to use it or lose it, because infrastructure is becoming more congested because of demands from passenger and freight, but in terms of pure grandfather rights as you understand them, they are coming out, you can buy, and have an agreement with an infrastructure manager for 10 paths every day, but not necessarily at a specific time, sort of on the hour or something like that, unless you negotiate an access agreement and they are agreeing the regulator should have a view on that, because if you put passenger trains on the graph exactly on the hour, you are then setting your timetable for the whole of the day which might not actually maximise capacity.

Q70 Lord Bradshaw: One other question: what would you most like to see come out of the hearings of this Committee and eventually out of any recast of the First Railway Package?

Mr Robson: I think very strong support for the separation out of infrastructure; the ability to access facilities, which I think is very important; multi-annual contracts in all Member States; and regulatory bodies. I think the things about investment, I think we can do some work with the Commission on that, but at the end, most of the investment in European railways comes from the Member States, and if the Member States do not believe in their rail transport system, they will not invest in it. We can lobby very hard for the Commission to spend more money, but the Commission will say, "We will fund 50%, 20%, 30%", but that other part has to come from the Member State, and that is the important thing, getting over the environmental advantages of rail traffic.

Q71 Chairman: A very appropriate moment to conclude, thank you very much for excellent evidence, very clear. Please read the transcript, any clarification or corrections needed, please contact the clerk, and we hope to publish some time in June.

Mr Robson: Thank you very much, My Lord Chairman.

MONDAY 9 MARCH 2009

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| Present | Bradshaw, L Dykes, L Freeman, L (Chairman) James of Blackheath, L Paul, L | Plumb, L Powell of Bayswater, L Ryder of Wensum, L Walpole, L Whitty, L |
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Memorandum by the Rail Freight Group

1. Rail Freight Group (RFG) is pleased to submit evidence to the House of Lords Select Committee on the European Union Inquiry into the recast of the First Railway Package (FRP).
2. RFG supports firmly the principles of rail liberalisation as enshrined in the First, and subsequent, railway packages. A number of RFG members now operate in other member states (MS), as train operators, contractors, suppliers, financiers and in consultancy fields. Many find it difficult to operate in member states where the regime is very much less liberalised than it is in the UK. Some question why the European Commission has not done more to require full liberalisation so that the opportunities for companies based in other MS to do business in the UK are not available to them when they wish to operate elsewhere in the EU.
3. The liberalisation packages, which started 18 years ago with Directive 1991/440, are proving to be insufficient to create the fully liberalised rail freight market across Europe that was envisaged. The legislation has proved to be insufficient to achieve the necessary change, and it has been transposed into domestic legislation in MS in very different ways.
4. Some member states have chosen to do the absolute minimum to comply with the European legislation, some have done even less, and this resulted in the Commission starting infringement proceedings against all member states who have rail networks (except the Netherlands). RFG has welcomed the Commission's action and trusts that it will be continued until all member states comply fully with existing legislation.
5. However, as stated above, this is not sufficient to achieve full liberalisation and we also welcome the Commission's intention to consider a recast of the FRP. We therefore set out below what changes we believe need to be considered.

General Comments

6. Since privatisation, rail freight has flourished in the UK. Volumes have grown by over 60% and there are now eight companies or Railway Undertakings (RUs) with operating licences. Service quality is generally good, with some customers quoting 98% of trains arriving on time at their destinations.
7. One good measure of liberalisation is the proportion of traffic not held by the largest operator. In the UK, the largest operator has about 58% of the market, compared with between 90% and 100% in countries such as France, Spain and Italy. The European Commission has demonstrated a clear link between the degree of liberalisation and the growth or reduction in rail freight. Over the same period that the UK traffic grew by 60%, rail freight in France dropped by 40%.
8. We believe that this success has been possible in the UK because the rail structure here enshrines both the legal requirements of EU regulation and also, to the largest extent, the spirit of liberalisation. With few exceptions, companies engaged in the rail freight sector are actively promoting open, competitive services, whilst Government, Network Rail and ORR are developing and refining supportive frameworks for open access freight operations. Whilst there are still areas for further work, these are not generally linked to a failure of liberalisation in the UK market.
9. The same however cannot be said throughout Europe. In certain other countries the dominant operator has been successful in growing volumes, but often at the expense of the competitive market place. More generally the growth of open access freight traffic has been frustrated by non compliance with both the letter and the spirit of the FRP.

Specific Questions

Whether the provisions on the separation of infrastructure management and train operations are sufficient; whether they should be amended or whether they should be replaced with a requirement for full ownership unbundling.

10. It is an imperative of liberalisation that all operators are offered equal opportunities of access. Models where the infrastructure manager (IM) and principle operator (RU) have common ownership are failing to deliver, not least because they fail to achieve the necessary levels of cultural change. There remains a perceived lack of independence between the parties and generally a lack of transparency as well.

11. Whilst various models of ownership are possible, the structure must ensure that:

- The allocation of access to track and terminals is undertaken by a body which is wholly independent from the principle RU. Independent regulation of access will help but, since an IM is inevitably involved in some aspects of capacity allocation, it is almost inevitable that it will give, or be thought to give, priority to its related incumbent RU, creating unfair competitive advantage over other operators.
- Charges, for example for electric traction power, must be common to all operators, and not supplied by monopoly suppliers linked to one RU, as in Germany, especially when this RU gets preferential rates.
- Agreements (for example on cross border operations) must be available on equal terms to all operators and must not be bilateral. In many instances, rail border crossings between member states are covered by treaties signed many years ago which limit the train operators to the two incumbent RUs. These treaties should have been cancelled as part of the implementation of the First Railway Package, but many were not. This can result in new entrants not being able to operate cross border traffic and having to use their incumbent competitor for a few miles across a frontier, inevitably adding cost and delay.
- There is full transparency of financial transactions between the IM and RUs. Where there is common ownership there is always a suspicion of the RU receiving unfair subsidy or state aids from the IM.

12. Thus, we consider that only full separation and unbundling between IM and RU can deliver such outputs. One solution is to create separately owned companies; in particular, the option of selling the incumbent freight RU should be examined.

Whether the current provisions are adequate regarding the staffing and independence of regulators and whether statutory independence from government is desirable.

13. The role of the regulatory body (RB) is not well defined in the FRP (Art 30 of 2001/14). Although this Article states that the RB should be independent of any IM, charging body, allocation body or applicant, it says nothing about ownership of the RB. The RB may in fact be part of the ministry of transport which, of course, is likely to own the infrastructure as well as, in certain member states, the incumbent RU. A RB owned by the same organisation as the infrastructure and/or train operator cannot be independent.

14. For a liberalised market to operate effectively, these are a number of important regulatory work streams.

- *Access charges:* The fixing of infrastructure charges of a monopoly supplier is necessary. To fulfil this role the RB needs the right to access any information it might need in considering the charges. At present, many national RBs set charges based only on information provided by the IM. They have no powers to require information to be provided and they cannot challenge information. We also consider that RBs should be entitled to require efficiency savings from the IM which are then passed on to the RUs as lower charges.
- *Access regulation.* An important role for regulators is to approve applications for access to the network or terminals and the essential facilities therein. At present, in many member states, access is regulated either by the incumbent RU or by the IM who is financially linked to the RU. Of course, this cannot be fair on other operators. The only solution is to have the allocation of capacity undertaken by a body that is totally separate from both the IM, RU and the Government.
- *Appeal body.* It is important to have an appeal body when there are disputes between different parties. The ORR fulfils this role in the UK and, in ten years, there have only been three appeals to a high court as a result of the failure of parties to accept an appeal's ruling. Compare this with Germany, where much of the regulator's time is spent defending actions by the incumbent in

court. An independent appeals process, which is quick, cheap and easy to use, is an essential element in providing the comfort to new entrants that they will be treated fairly.

15. The importance of independent regulation cannot be overemphasised. In the UK, there is clear evidence of the difference between an independent regulator (ORR) which is requiring a 50% cost reduction by Network Rail over ten years, with the UK Government as regulator of its own High Speed 1 awarding a contract for operation and maintenance of the line with an 80 year cost plus contract. Governments are not good regulators!

16. Even when a MS complies fully with the FRP, we believe that the current provisions do not give Regulators sufficient powers to be truly effective. In many cases, whilst the regulatory function formally exists, RBs have no pro-active role, their powers are limited and they may not be independent either of Government or some IM/RUs

17. Further, there are issues in many cases with staffing levels and competence which can make the regulatory function inaccessible to operators. This seems to be particularly acute where the regulatory function is simply an arm of Government. In France, up to now the regulatory body consisted of one person advising the Department of Transport. A new RB is proposed but it is not clear that its scope will be sufficient to comply even with the FRP requirements

18. In summary therefore the weakness of the regulatory function means that

- There is no effective or consistent framework for open access in many countries
- There is no consistent approach to price setting
- Operators have little ability to challenge anti competitive behaviour by infrastructure managers or other operators
- Regulatory behaviour can be unduly influenced by other elements of national policy.
- Charges may be too high and are not independently assessed.

19. We therefore suggest that the recast should include a specific requirement for regulatory independence. Their powers should be broadened as suggested here.

20. We would also like to see mechanisms developed for sharing best practice and developing competence across national regulators. A European RB may need to be considered if the present system does not improve.

Whether there remain barriers to entry due to factors such as safety certification requirements, and if so how these should be addressed.

21. A number of member states use safety rules and procedures as a technical barrier to opening up the market to competition. The EU legislation is supposed to reduce the need for national safety regulations in favour of Europe-wide ones, administered by the European Railway Agency.

22. Unfortunately at this time of transition, many national safety regulations remain in place and, since the national safety regulators are often staffed or operated by the incumbents, new entrants and their suppliers can face a very uphill task in achieving homologation of their equipment and safety approval in a particular member state.

23. Member states can also abuse their role of safety appeals body to prevent new equipment or operators starting business if this is thought to provide competition for a state owned RU. In some cases, homologation of a new locomotive takes two years and costs two million euros per country.

24. There is also the problem of cross-acceptance of standards between different countries. There is only one MoU in place—between two adjacent national safety authorities (France and Germany) and only five crossings where cross-acceptance is even partly in place.

25. Thus, an RU wishing to operate across several member states will face high costs and delays if he wishes to use one locomotive and driver for the complete journey. Incumbents do not want to make it any easier for new entrants to cross frontiers because it will reduce their own competitiveness still further. Sadly, it also reduces the volumes of freight carried efficiently by rail and affects its growth prospects.

Whether the current requirements regarding the setting of infrastructure charges are adequate, and if not how they should be amended.

26. The requirements on freight charges are set out in Articles 7 and 8 of 2001/14. They clearly state (Art 7.2) that charges “should be set at the cost that is directly incurred as a result of operating the train service” whilst other sections allow additional charges if the market can bear it. For freight, this means short run marginal cost (SRMC) as a minimum.

27. There are a number of different elements to be considered on the issue of infrastructure charging for freight;

- It is necessary to know what are the charging elements that go into the SRMC make-up. For example, track wear caused directly by freight should be included, but painting a bridge on the mixed use railway should not be included since it has to be done whether freight trains run or not. There should be some consistency across Europe about which elements of charge should be included in freight SRMC and how the proportion of charges should be shared with passenger traffic.
- It is also necessary to determine what is the reasonable cost charged by an efficient operator for the relevant work. There is a strong argument for suggesting that this charge should be set on a Europe wide-basis since efficient infrastructure management costs should not vary much between different member states. They do vary now because some IMs are more inefficient than others and, as set out above, not all RBs are able to set efficiency targets in respect of such charges.
- There is the need to have a consistent method of allocating costs to different types of freight trains (for example variations for different axle weights, train lengths etc). The allocation needs to be simple and straightforward and again, a consistent European approach is highly desirable.
- There also needs to be a more consistent approach to how much, if any, the freight market can bear over and above the SRMC. This should be determined by reference to the competitive position with road and we suggest that on the general European rail network, the answer is zero. This is effectively what the ORR decided in respect of the UK Network on all except certain traffic (coal and nuclear) on freight only lines.

28. There is a provision, in Article 8 of 2001/14, for IMs to add a premium charge for traffic using major infrastructure and new projects, such as the links between Denmark and Sweden, the Channel Tunnel and the high speed line (HS1) in the UK. The justifications for these higher charges is to enable some or all of the costs of financing these links to be recovered through access charges. Unfortunately, the IMs set such high charges as to exclude almost all rail freight off the market, in the mistaken belief that higher charges mean higher revenues. As rail competes with road, and is generally the price taker, higher charges generally mean little or no revenue. We believe that these articles need some further changes to enable freight to operate on these new lines in fair competition with road freight.

Whether the existing provisions regarding allocation of capacity both on tracks and at terminals are adequate and if not how they should be amended.

29. As we have stated above, we do not believe existing provisions regarding allocation of capacity on track, terminals and access to the essential services is adequate. This is partly a failure of regulation in providing fair access between different operators, but there is also a particular problem about access to terminals which are frequently owned or operated by incumbent operators. Other operators are frequently denied access or, if granted, essential services such as shunting, IT, refuelling etc are either unavailable or charged at prohibitive rates.

30. We are heartened that this has been recognised in the Commission’s new draft regulations on a freight orientated network (FORN) where strategic routes are being required to connect to open access terminals.

31. Alongside this, we believe that the only solution is to ensure that access to terminals and a defined list of essential service therein is regulated in the same way as access to the network—by an entirely independent RB. Applying to both track and terminals, there should be strengthened use of the ‘use it or lose it’ provision (UIOLI) which will enable other operators to obtain access which may be allocated to a train operator but is not used.

How a recast First Railway Package should relate to other EU freight transport policies.

32. It is clearly essential that a recast first railway package is closely linked to other EU transport policies. These include the Eurovignette proposals which should provide a consistent competitive framework between road and rail, taking into account the environmental benefits of rail transport.

33. State aids rules were updated in April 2008 by the publication of a new state aids guidance by the commission. RFG welcome this and sees it as a good means of preventing unfair competition between state owned companies and the private sector. We urge the Commission to monitor this closely at a time when many companies will be seeking state aids or rescue as part of the recession survival package. Such measures should not be seen as bolstering inefficient operators at the expense of those who are able to provide a more efficient service at a more competitive price.

Conclusion

34. The failure of MS and the Commission to achieve full liberalisation in the railway sector is a serious constraint on rail freight growth. This failure compares very unfavourably with the degree of liberalisation achieved in the road freight sector and in air. In neither of these sectors would the kind of technical, commercial and legal barriers which still remain on the railways be considered acceptable by the operators or governments since they recognise that liberalisation has brought growth, better service quality and more competitive charging.

35. Because of the continuing resistance of member states even to the existing first railway package, there is a very strong argument for the reforms outlined above.

February 2009

Examination of Witness

Witness: LORD BERKELEY, a Member of the House, Chairman, Rail Freight Group, examined.

Q72 Chairman: Lord Berkeley, thank you very much indeed for coming to give evidence on behalf of the Rail Freight Group. We thank the Group for its written evidence, which colleagues will have read. From your vantage point, can you see the nameplates for everyone?

Lord Berkeley: Yes, thank you very much, Lord Chairman.

Q73 Chairman: We have allocated the questions, which I think you have had notice of. I know that you want to make an opening statement, which I would welcome. I have asked colleagues that if any of these particular questions are properly covered earlier on, either by your opening statement or if necessary by answering other questions, that they may need to recast the questions. For the record, could you introduce yourself and then please make your opening statement?

Lord Berkeley: Thank you, Lord Chairman. I am Lord Berkeley, and I am Chairman of the UK Rail Freight Group, which is a representative body of the rail freight industry in this country. I have recently been elected President of the European Rail Freight Association, but I thought it better to let the Secretary General with another witness give evidence, as I have only just joined, and I think she would do rather better than I would do in that respect. If I may make an opening statement, please: first of all, clearly we welcome this inquiry by your Committee because liberalisation in the UK has gone

well, on the whole, for freight. It has enabled traffic to grow by about 60 per cent in 10 years—before the recession started anyway. The key to that is customer service and competition. Both of those generally result in more competitive pricing. But when you get a major customer, like a shipping line, saying that the rail freight deliveries are 98 per cent on time, your Lordships will recognise that that is rather better than some of the passenger franchises achieve, and the customers tend to be happy. If they are not happy with one operator, then they can go to another one. That is no different to the road freight industry or any other industry really; it is a demonstration that the single market is working. In terms of where the first railway package has got to, it is worth recalling that this liberalisation started in 1991, which is 18 years ago. The First Railway Package has been since 2001, still eight years ago. Apart from in the UK, its application is very, very variable throughout Europe. If it was just bad in a single sense across Europe, it would be much easier for the train operators to cope with it; but the problem is that it is different in every Member State, just about. You will hear that some of our UK companies that try and work in Germany and in France—they have not tried Italy yet because that is one of the worst—find that the structure is different, and the regulatory regime is different, if it exists at all. They find that if in one Member State there is a problem in getting access to a terminal, or getting the right price for going down a track, you will find that in another Member State it is a technical

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issue, because one of their wagons would not be approved to operate in a Member State because the organisation, the safety authority usually, that gives the approval for wagons to run is populated by people from the incumbent railway. Naturally, if they cannot have a commercial monopoly they will try and have a technical monopoly, but it has the same result. These UK companies and the Continental ones are in the private sector, and therefore do not have unlimited resources to spend chasing bureaucratic procedures. The Committee will be aware that the Commission instituted infraction proceedings against Member States last June, and wrote letters to all the Member States that have railways, except for the Netherlands—the ones in the UK, which are minor—asking for responses. I still do not know what the answer is, but each Member State got a separate letter setting out what the Commission thought was wrong with the way they had implemented the First Railway Package. The response from German Railways was 200 pages long, which says something about the number of lawyers they must be employing, but it also demonstrates that even if everybody responded positively to the Commission's letter, saying "you need to put this, that and the other thing right", the First Railway Package is not fit for purpose. It probably was at the time, but the experience of dealing with it, the different ways Member States have applied it, and what is happening on the ground, indicates that there does need to be a recast. One of the most worrying things I heard in the last week was a story that the Commission is considering delaying the recast now until it can combine it with a recast for the passenger legislation—which I do not think is actually complete yet, so how you can start recasting it before it is complete, I do not know—but that will put things back five years, and I should think most of the private sector will walk away from it. I would like to suggest to the Committee that it might like to ask the Commission some questions on that when it gives evidence. For me, there are two major principles that need to be got right in First Railway Package across Europe, and to some extent in the UK, although it is mostly done. The first is the separation of the infrastructure manager and the train operators. Here, Network Rail, as the Committee knows, cannot own the train operating company; it is illegal. If they did own National Express, what would the other operators on the East Coast Mainline have to say? They would claim collusion; they would claim that there had been dirty deals done between Network Rail, the infrastructure and the operator, whether there had or not. That is what happens in many other parts of Europe, because there is still no separation. There is no transparency and there is no transparency of the movement of funds between an infrastructure manager and a train operator. How can you have fair

competition above the track if you think that the incumbent train operator is being unfairly subsidised by the infrastructure manager or one of the local authorities that is funding it? All train operators must be seen to be treated equally. As the Committee will know from UK experience, one of the things that the legislation required the regulator and the Government—and it has moved on to Network Rail now to do—was to encourage competition and a growth in rail freight, and passengers, and actively encourage it and support new entrants. Network Rail has done that. It did not come out in the evidence last week. Maybe in Railtrack days—but one of the first things they did when there were just two operators in this country was to ensure that GB Rail Freight was about to start, and they gave them a contract for moving the construction trains around for maintaining the network, to give them a steady flow of income so that GB could then get the finance to buy new locomotives and start their business off. I am sorry, Direct Rail Services of course was running then, and GB was the fourth one. Encouraging new entrants is terribly important! The second major requirement is independent regulation. We take that as a matter of course here, but when the regulator is owned by the Department of Transport, which has a financial interest in the amount of money it puts into one of the train operators, it is impossible for it to be independent, in my view; or certainly it is impossible for it to be seen to be independent. There are three issues that the regulator should look at—again he does in the UK. One is access to the network. The next thing is access to terminals—and I have to point out to the Committee that terminals are no different to stations; if you have not got passenger stations, you cannot run passenger services because people cannot get on and off! It is trite to say so, but one has to just make that point. If you have not got terminals where the goods need to go, you are not going to be able to put it on the rail. What has come out of the European legislation so far is that although terminals are required to be effectively open access, assuming that they have capacity, there is no requirement for the services that are essential to make a terminal function for the open access; so if you want to go to a terminal in France owned by SNCF, which they say is full but there are trees growing through the track so you know there has not been a train for 10 years—but it is still full—but if you chopped the tree down and went in, they would say, "right, well, you are in the terminal, but we are not going to provide shunting facilities; we are not going to provide toilets; you cannot use our toilets and you cannot use our telephone, even if you pay for it, because it is not in the First Railway Package." You have to be sensible about these things, and I am afraid people are not being sensible. I happen to have been with people from Polish Railways at lunchtime today at

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1 Victoria Street, and I got that same message from the minister there: “We cannot open terminals because they are owned by somebody else; and, anyway, there is no legislation that says if you go in you can do anything there like shunting.” If you cannot shunt a train in a terminal or unload it, it is not a lot of use. The second thing is the regulation of the costs of the infrastructure manager. You will be aware of how our regulator, through two periodic reviews, has got Network Rail to drop its costs by 50 per cent over 10 years, which I think is fantastic. It needed to happen because Network Rail needed to drop its costs because, again, if the costs go down the charges go down. That means you can get more freight. In many countries, the regulation does not have any rights, either to say what the charges should be, or to obtain the information from the infrastructure manager that would enable him either to suggest that the charges are too high, or to assess the charges properly. If you think that does not matter very much, I do have to compare what our regulator does on the basic network and what the Department of Transport is still doing on the Channel Tunnel rail link High Speed 1, where it is still the regulator for historic reasons. It awarded Network Rail a management contract to maintain and operate the High Speed 1 line for 80 years on a cost-plus basis. Government may say that the regulator here is doing well to regulate Network Rail and the rest of the network the way it has, but it is not doing very well itself. It results in a charge for freight that is six times per train mile what it is on the rest of the network. I am fighting it, but that is where they start. That is because the Government is also owner of the High Speed 1 and wants to sell it off to the highest bidder; but if he wants to encourage freight, he will not do it at six times the cost because nothing will happen at all. Behind all this, the private sector, which is involved in all this, needs the comfort of the fair treatment and consistency to invest. Lord Chairman, I have taken the opportunity of having a look at some of the other written evidence submitted to your Committee and I would like to mention two things. Both DB and the Community of European Railways are arguing that it is too soon to recast the First Railway Package because the letters of infraction have only just gone out and they need time to work through the system. I believe that there is enough evidence, which I am sure the Committee will get from other people, that the First Railway Package is not fit for purpose in its entirety; and there is absolutely no reason why one should not go ahead with a recast, while at the same time try to make Member States comply with the original First Railway Package, because it will take a long time to get new directives, probably two or three years, and then it is a couple of years for them to be implemented. As I said, it is eight years since this

started, the First Railway Package, and there is still no sign of a single market in rail freight. There is in roads, as you all know, but with rail freight it is a series of national monopolies. The second thing is this question of obstruction. You are never going to get a single market unless there the Member States and the Commission stop the obstruction by the incumbents, infrastructure managers or train operators, who one might call monopolists, honestly. Technically, legally and commercially they have all got good ways of obstructing; and if they cannot do it within their own Member State, they will try and do it at the frontier and try and stop other operators getting across the frontier. We have not got it right here yet between getting from Network Rail’s network on to the High Speed line, on to the Channel Tunnel and into France. There, you have got four different infrastructure managers, all with different rules, all with different charging structures. To be fair, they tend to operate quite well together—but they might not; and I think that this Thursday we may see the first freight service through the Channel Tunnel in competition to the people who have been doing it for the last 10 years. That is good news, but there are still a lot of technical barriers there. We are better than most other people, but we are not right. Lord Chairman, to finish my introduction, I believe we are nearly in the last-chance saloon for liberalisation of rail freight in Europe. I was very impressed with the written evidence of the Department of Transport to your Committee. I have been very impressed with what they have been doing to support the freight orientated rail network, which I see as a precursor to the recasting of the First Railway Package, which is going through the European Parliament and the Council of Ministers at the moment, again with serious opposition particularly from Germany. I will be writing to Lord Adonis, our Minister of Railways, and I hope that perhaps the Committee will consider a similar bit of advice. I think that our Government, because of what has happened in the last 10 or 15 years with the railways and the success that rail freight has brought, has a unique opportunity to take the lead in encouraging other Member States to really get a grip and go for this recast, and end up with a real single market of rail freight across Europe. Thank you very much.

Q74 Lord Ryder of Wensum: Lord Chairman, I think that Lord Berkeley really has ranged over the ground covered by the first question, but the question I was going to ask is why liberalisation has been so slow across Europe. You said, Lord Berkeley, in your opening words that it was variable. Would you like to add anything to your opening statement about the reasons why liberalisation has been as slow as it has? I appreciate that for the purpose of brevity you have covered a lot of this ground already.

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Lord Berkeley

Lord Berkeley: Thank you. I think the real problem is that whereas freight is virtually all in the private sector apart from the incumbents who are left, the passenger services are nearly all state-owned in some way or another, as is the infrastructure. I would not complain about infrastructure, because the roads are state-owned, and one would accept that. Passenger liberalisation is starting next year for international services, and the Committee will have seen this interesting debate as to who should buy Eurostar UK, whether it is German Railways or French Railways. The great thing for me is that there will be a bit of decent competition. They failed to separate out the freight side of it, which is in competition with mainly road freight but also sea freight and sometimes air freight, and they try and keep the ownership together with all the social problems that the railways have had over the years, and they tend to then look at the whole railways as one big social issue. I can give you one example of a Commission regulation two or three years ago that required all train drivers on international journeys not to spend more than one night away from home, and that had to be in a three-star hotel. That may be all right for the incumbents, who have got lots of drivers who get to the frontier, and when the driver shows up from the next country they go on and other one goes back; but for the new entrants who might want to go all the way through with two drivers and a cab, that is a very, very serious barrier to competition. The road freight industry is not required to do that; so why should the railway? They are both driving in a safety-critical environment. This regulation is coming up for review now, and I hope that our Government will be robust in saying, "Come on, if you are going to do it to rail, you had better do it to road." There would be an outcry.

Q75 Lord Paul: You have talked already about some of the problems of the infrastructure, especially the terminals. In order to get that problem solved do you need better or more legislation, or better implementation of the present legislation?

Lord Berkeley: I think you need both. Certainly the existing legislation needs to be implemented consistently across Member States. As I said earlier, that is not enough in itself. There need to be open access terminals, wherever there are enough customers that want to bring in and take out freight. This includes ports as well. You will see that in this country there is a trend towards the ports or shipping lines buying or trying to use on their own account inland terminals because of such a pressure of congestion at ports that they need to get the boxes away quickly, and then they can sort them at leisure—the urgent and the non-urgent inland. The Commission has already identified this problem, both in respect of the essential services I mentioned

but also where the freight orientated network regulations, which I can pass to the Committee, have a requirement that any of the routes used for freight, which is basically the trans-European network route—some of them—must have terminals at regular intervals, accessible to anyone who wants. I have asked some of my MEP colleagues to put down some amendments to say that not only must there be terminals, but the corridor management people must actively encourage the creation of these terminals, with finance if necessary, just to make sure they are there. I am afraid that the answer to your question is "both".

Q76 Lord Paul: Does the current legislation go far enough in separation of infrastructure and operations?

Lord Berkeley: I do not believe it does. I have mentioned some of the issues earlier, but I think the key is that the infrastructure and the train operator is owned by the same holding company, with the same pension arrangements, with the same e-mail address, and they all go and drink in the same pub in the evening—because the quiet word in the ear, which can be extremely damaging competitively to other entrants, is extremely difficult to prove. Nobody is going to go to law to prove things like that. I remember that I took a group of parliamentarians to Germany about five years ago, and we went to BASF, the very big chemical company's works at Ludwigshafen, and we met one of the then new entrants who had been asked by the company to run another train to Berlin every day. He said: "Yes, okay, I will ask for a train pass." He phoned up DeutscheBahn in the morning and said: "Can I have another train pass, and what can you offer me?" Within 12 hours the customer had been phoned back by DB Cargo, saying, "I hear you want to go to Berlin; can we offer you a price?" That is not the way the market should work. I am sorry, but I have been studying this for some time, and I am convinced that total separation is the only answer.

Q77 Lord Dykes: We have all seen that you are painting somewhat of a gloomy picture about what is likely to happen in the near future with your suggestion that the Commission might for various reasons feel obliged to postpone the recast and the document coming from that. Presumably, under the laws and procedures, they cannot go for more primary legislation by having Regulations about these matters. They have to stick to Directives. If you were asked by the Commission to hurry to Brussels to give them some advice about the various things that need doing, what would you ask them to focus on to get this process kick-started again because of the sluggish nature of what is happening right now? What actual form of Directive would you like to see?

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What should the first Directive contain for this recast?

Lord Berkeley: That is a very interesting question. First of all, addressing the question of the difference between a regulation and a directive, I am no great expert on the difference. This freight orientated network is a draft regulation, which means that the Member States cannot fiddle with it and just have to implement it. However, there is either custom and practice, or something in the Treaty, which prevents a regulation being used for certain pieces of legislation, but I am afraid I do not know the answer to that. The problem with what has happened already is that it has been all directives, and the directives have been interpreted in very different ways by different Member States, I think often for reasons to suit their own political objectives, in other words to make sure it does not happen properly. It may be a bit hard to say that—some Member States have tried very hard—I think the UK has tried very hard; but in many others they have taken the advice of the incumbent and said, “Well, let us do it this way and keep them out.” France does not have a regulator eight years on; they are thinking about it now and there may be legislation some time next year; but there is one person who advises on regulation, who sits in the Department of Transport. She is terribly nice and very helpful, but she does not have any powers, and there is only one of her! As to what should be done, the first thing is to implement all the First Railway Package consistently across Member States, as the Commission has tried to do with these infraction proceedings. It may be that they are going to have to end up in the European Court for some Member States, which will take a very long time, as we all know. Things I would like to see, without stating if they can be done by regulation or not—because I do not know—are the two issues I mentioned earlier: separation of the infrastructure manager and all train operators and independent regulation, with the three pillars to that: access to the network terminals and essential facilities, regulating the cost of the infrastructure managers, and being an appeals body. Our regulator has had, I believe, three appeals against him, which went to court, in the last 14 years, because he has resolved most of the issues himself. You may wish to ask the German rail regulator the same question! You will not get the same answer!

Q78 Lord Dykes: The German example you gave us is quite vivid and striking. Would you, nonetheless, say that this is a developmental stage, an interim period; there will be full development of the separation in due course but we have to see how different countries do it differently so that the operators should say that they could purchase that contract offered by DB as a principle and have their

own profit revenue therefrom as well? In other words, if DB were to offer them a price, then would they be charging the customer price-plus to get their own revenue?

Lord Berkeley: There is a lot to be said—and it is not the right time to achieve this in the present economic situation, but one has to ask the question: why should any of these rail freight companies be owned by the state? The Hungarian incumbent was sold off last year, admittedly to Austrian Railways, which is owned by the state of another state; and former EWS is owned by DeutscheBahn which is owned by the German state, effectively. Competing in the freight market, you do not need to be owned by the state. I would recommend that they should be sold off, and if the DBB privatisation had gone ahead it would have been much better if they had sold them off as a separate entity—floated them if they wanted, or whatever. That would leave the infrastructure manager to cope with the infrastructure, and that should apply all the way across.

Q79 Lord Powell of Bayswater: Lord Berkeley, you were saying the Commission should not hang around, waiting for countries to commit the first package, and they should get on with recasting it—and I have a lot of sympathy with that; but is there perhaps not a danger that the Member States will say, “If there is going to be a recast package, we might as well wait for that before we get on with implementing anything”, and you will end up an even longer timescale than we are facing at present?

Lord Berkeley: I think, a recast is called a recast but it could equally be called a fourth railway package because there have been three already; it is just that the Commission has chosen to call it a recast, which is basically to mop up the freight issues which, from experience, have been found not to work. My argument is that there is not enough time to have experience of where the passenger legislation has got to; it is not complete yet and is not implemented yet. The other reason for hoping that they would be kept separate is that there are going to be enough problems getting a recast through. We have a very long list of things to go into the detail, which I would not want to bore the Committee with; but there is an awful lot that needs to be done, and there is more than enough to do a recast for freight on its own and get that finished in the next couple of years, hopefully, and then do a passenger one as and when it is judged for that to be ready.

Q80 Lord Powell of Bayswater: I see that, but I suppose it depends in part on whether you expect the Commission will come forward with a recast that adds in substance to the original railway package, or whether they are simply going to re-state it in somewhat more terrifying terms. If it is only the

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latter, then you might argue that it is better that they get on with taking Member States to court to implement the existing legislation first.

Lord Berkeley: I think that is a very good question, but from my discussions with the Commission I know they would like to go further in two ways. One is to put right what is found to have been the mistakes or errors—that is perhaps too strong a word—but things wrong with the First Railway Package. The second is to go a little bit further on some of these things that had not been thought of. I know that they could do it if the political will were there. I think it is probably, already, but there has to be a political will both within the Commission and within Member States to go ahead with this, and then it could happen. I hope it will.

Q81 Lord Powell of Bayswater: Without suggesting that you go into it now, it would be quite helpful to have a little note as to what you think ought to be in the recast package, the main things you would like to see in that, so that we have some idea as to what may be in store.

Lord Berkeley: Lord Chairman, I will certainly do that. I may repeat some of the things I have said, but that is fine, yes.

Q82 Lord Whitty: You have promised Lord Powell a list of things that would be included in the letter of the new package and you in general referred to the UK's relative success in this area as being due to the general spirit of liberalisation. Are there some non-legislative things that you think the rest of Europe should take on board?

Lord Berkeley: There are things outside the First Railway Package that do need looking at. The two I would focus on would be competition issues and state aids. In state aids, the Commission produced a very useful paper last April, setting out under what circumstances, and for what, state aid could be given to the railways. Basically it said you could get state aids for infrastructure but you cannot get state aids for running freight trains except under very specific things. In the UK, as you know, there are rail freight grants for certain flows but in general you cannot get state aids for that. That resulted largely from when SNCF about five years ago got awarded €4 billion to restructure its freight department and buy new locomotives; and those of us who travel in France will have seen these lovely red locomotives hauling passenger trains ever since, so they were not used for freight, and since then the traffic has gone down! The Commission, quite rightly, has narrowed that, and with the recession everyone has to be very careful in watching state aids that might be doled out to train operators. Competition is a very difficult issue. Is there an abuse anywhere of a dominant position—that is assuming everybody gets treated the same

way—and how do you define a market? We are still struggling with that and I think the Commission is still struggling with it. Is the market covering the whole of Europe in rail freight; is it intermodal separately from building materials or separate from coal; is it on one particular route from London to Italy? The smaller the limit becomes, the easier it is to demonstrate that there might have been an abuse of dominant position. I keep on asking the Commission whether they would like to set some guidelines so that when a company buys another company you can judge whether that would create a possible dominant position, even before you get into deciding whether there has been an abuse. Those are the two particular things. The general thing is that in some parts of Europe nobody thinks of competition as a particularly good thing. We have always done it that way. If we live in France, we buy a French car even if it is made in Coventry or somewhere else—it has got a French name on it! It is part of the fun of being European, I suppose. It is difficult.

Q83 Lord Bradshaw: You have covered most of the things that in your view a regulator ought to do. What is, in your view, the prospect of getting any fairly immediate change in the present arrangements?

Lord Berkeley: I think the regulatory requirements such as they are in the First Railway Package are probably some of the least well implemented elements in the First Railway Package. It may be because many Member States do not understand the concept of an independent rail regulator, or an independent regulator at all. “What is he there for? He must work for the government because the government is everything!” The key in the First Railway Package is that no organisation which has a financial interest in a train operator should be allowed to allocate capacity, because, clearly, it would not be fair. You can look at many Member States on the Continent—the French model is quite extraordinary because you have SNCF as the operator; a separate company called Réseau Ferré de France, is the infrastructure manager, but under its legislation it is required to sub-contract all its maintenance and access arrangements back to SNCF, and even if it wanted to give it to somebody else it could not. That is about to get changed. Whichever way you look at it, there is a circularity about this. While the state has a financial interest in the railways, which they all do, they will be, I suggest, incapable of providing independent regulation in a way that provides the comfort to the private sector that might want to run passenger trains or freight trains, or do anything else on the railway, to invest. That is a big problem. It is a new concept, and one of the things that I am trying to do is encourage regulators across Europe to get together informally and exchange notes and learn from each other. We are

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not perfect here, but our regulator is very keen on this, and so are some of the others. This is in addition to what the Commission does—they organise regular meetings with regulators, but it is just meeting up and learning from other people's experiences. It is a very new concept.

Q84 Lord James of Blackheath: Lord Berkeley, in your evidence you have made a case for the creation of a pan-European regulatory body, but what powers would you want it to have, and what do you see as the priority agenda that it would undertake?

Lord Berkeley: This is a very difficult one because none of us likes extra bureaucracy, and none of us likes European bureaucracy particularly unless it is necessary. This suggestion of ours was put forward I think in a sense of frustration, that if you cannot get European regulators to work together in a sensible way—and they do need to work together—then possibly you need some over-arching agency perhaps which would set the ground rules. I do not think that it should do all the things that a national regulator—certainly here does, but somebody needs to make sure that the ground rules are consistent across all Member States. That was one suggestion. There is already what you might call a technical regulator, the European Railway Agency. I do not think it is a technical regulator, but it is set up by the Commission to deal with technical and safety matters. It is subject to the same challenges and problems that the Commission has in getting in and not moving very fast on many things because it has so many pressures. The same thing happened with the European regulators. To some extent, it was a way of saying, “Surely the time has come to have a single market in rail freight that involves the infrastructure managers talking to each other and being regulated in the same way?” It would be nice if they all charged the same amount—but that is probably a step too far at the moment—if access arrangements were the same and if technical arrangements were the same, so that you could really get a European network working in the way that it does in the United States. Whatever one says about the United States and railways, they have an American system that works reasonably well from one shore to the other.

Q85 Lord James of Blackheath: Would you see the pan-European body having the power to direct the agenda for the national regulatory bodies?

Lord Berkeley: I think probably *in extremis* that will have to happen. If you are going to have one Member State that resists it—whether it is done by a pan-European body or through the Member State, this is becoming highly political. We were complaining in the last 10 years, along with Spain and Portugal, that the arrangements for competition and open access in France were so bad that effectively in the UK we were

cut off from the rest of Europe by France. It is a very hard thing to say, but if we want to have a pan-European network we have all got to abide by the same rules, and there has to be enforcement somewhere.

Q86 Lord Plumb: I think harmonisation follows the regulators, because you make it clear in your written evidence, and you made it clear in your statement today, that there is a total lack of harmonisation between all those who are concerned? One of the things that you did not mention is harmonisation of the infrastructure charges. Would you therefore recommend that that be dealt with at European level? Should that be dealt with separately at national level? Who Should deal with it? Would it be part of the recast if that eventually came about?

Lord Berkeley: The first thing to say is that we know it is all done on a Member State basis at the moment. It is always supposed to be done for freight on the basis of short run marginal cost, which is in Article 8.1/8.2 of Directive 2001/14. That means that freight is only paying, as a minimum, the wear and tear costs that it imposes on the network. It is possible for infrastructure managers to charge more under that legislation if it can demonstrate that the market can bear it, but nobody has tried to do that yet. I would then submit that the cost of wear and tear on a track is not that different across Europe, taking into account different wage rates and things—and I will come on to eastern Europe at the moment—but it depends on the efficiency of the infrastructure manager. Network Rail has come up with a calculation of what it should be with the regulator, which the rail freight industry in this country is pretty happy with; and that may well be the kind of figure that could be applied across Europe. The problem is that in central and eastern Europe, the newer Member States—when they were under the communist rule there was a general policy across there that freight subsidised passenger trains, because there was no road freight so all freight went by rail, and how much it paid did not matter very much in the communist system. The passenger trains were subsidised on their track access charge. This situation has survived to this day, mainly because those Member States just do not have the money to do it any other way, and if they are going to suddenly double the access charge for passenger trains life will become even more uncomfortable for them than it is at the moment. So they are not complying with the Directive at all, but politically it is very difficult for them to do so unless somebody provides them with some money. I believe that it is quite possible for the same charge to be applied for the same train anywhere in Europe but there is going to be a cost of getting there. There has to be a cost also, or pressure also, to get the infrastructure managers to be more

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efficient and reduce fare costs. Then I think it will work, but we are quite a long way away from it, certainly over the whole of Europe. It would certainly be a good thing to have and it would help rail freight dramatically.

Q87 Lord Plumb: Lord Chairman, the words “light touch” were used in previous evidence we have received. “Light touch” to me, means “do nothing”. Therefore, it is a question, surely, of getting the balance right, in the way these things are applied, so that everybody at least conforms to an understanding they have between themselves! I rather liked your approach of getting these people together to at least talk about it, to see where the problems are and whether people cannot benefit from each other.

Lord Berkeley: I believe a light touch has been tried and found wanting. There are some people who just do not want this to happen. It cannot go on for ever. The Commission, three or four years ago, changed its policy from direct encouragement of rail freight to a way of encouraging the most effective and efficient freight, because it just got frustrated with the lack of progress on the railways, and that they do not want the business; but we can demonstrate from a UK experience that growing rail freight by 60 per cent in 10 years could happen all the way across Europe whereas I think overall it has stayed about the same at the moment. The volume of extra freight carried by rail and therefore reduced off road, if you have this competition and the service quality, would be absolutely dramatic. However, the operators and certainly the monopoly operators do not see this. What has really pleased me in the last week is that in a bit of a campaign to the Parliament and Council of Ministers for this freight-orientated rail package, we managed to get together all the shipping lines, all the logistics companies, all the freight forwards, the independent train operators, the wagon leasing companies, and basically all the customers that want this to happen. The only people not wanting it to happen are one or two rather large railways as far as I can see—but there we are!

Q88 Lord Walpole: Having spent quite a bit of last weekend driving up and down French motorways, which are a delight to drive on because there is nothing else there, in my Swedish car—or is it American and it was made in Austria anyway—looking at all these French cars which, as you say, are all French names even though they are not necessarily made in France, I was going to ask you questions about rail-related services such as terminals and last miles and all the rest of it. However, you do seem to have covered that fairly well. There are two things that interested me. I cannot remember how you were involved, if you were, in the last report that this Committee did—I think I am the

only Member who survives from that. I was just absolutely shattered at the efficiency of going to Daventry and seeing how trains are dealt with. Somebody, possibly even you, told us that 50 per cent of goods carried by train are in trains and 50 per cent are in trucks—in other words, smaller units have to be sorted out and marshalled and all the rest of it. As somebody who grows sugar beet and sends it into Cantley factory by forking it on to the trucks, before Mr Beeching got rid of all our railway lines I do know that every single station in Norfolk had sidings for trucks for sugar beet. Would you like Europe to be the same so that there is the ability to get trucks or even trains into practically every single sensibly-sized town in Europe and not have any problems at ports? I am not putting this very well, but I do think we want to go back to a lot of things that were done before that were extremely efficient.

Lord Berkeley: I cannot comment on a Swedish car going up French motorways. There is a toll on the motorways and that is probably why they are less full than some of ours. However, sugar beet can be transported by rail, but what is inefficient and does not work is having one wagon with a locomotive in the front going a long way. That tends to be called across Europe “single wagon traffic”.

Q89 Lord Walpole: I did pass a train today with one container on it. You might like to explain that one as well.

Lord Berkeley: That is, I am afraid, something to do with the recession. These container trains run to a timetable because the customers ask them to, and if the customers do not fill it who takes the risk on that train? I would have to know more detail. Sometimes it is the train operator and sometimes the shipping line or sometimes the port. It hurts me to see empty trains running around. You see them on the passenger services sometimes. I do not like seeing it in freight, but that is the way it is with the recession. It will not go on for ever; they will cut the trains. Seriously—the single wagon market is about 50 per cent of the European rail freight. There is not much of it in this country, although there is some. Then you have to divide single wagons into a full long train of wagons, going from A to B, and that is fine—that is economic and it happens. A lot of the automotive traffic goes in things that you could call single wagons if not containers. Sometimes it gets shunted off into smaller sidings, but not usually very much. On the Continent the chemical industry and the steel industry in particular use wagons for shunting within these enormous chemical or steelwork complexes, and they use them for storing material in until they use it, and they have their own railway services. BASF that I mentioned has probably got several hundred miles of track in there, which they operate. There is still a market for what you might call sending

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the odd wagon or the odd three or four wagons across Europe, using marshalling yards. The problem is that they are all run by the monopolies. The private operators are not allowed into these. They are not allowed to do the shunting. If they were, and if they were open access, they would do it quite effectively and efficiently. They are not allowed to run individual trains into the siding twenty miles, which in the States is called a "short line". In practice, the whole single wagon market on the Continent is not accessible to independent operators. Then you will get the customers complaining about the service that they get. If they opened it up to competition, not only would the single operators probably be more efficient and bring the price down, but actually incumbents would learn from this. This is already happening, where the competition comes in and the incumbents learn, so the competition gets even better. However, it will not work while all these big marshalling yards are just under the control of one operator. There was a customer in Madrid about three years ago who asked to send three or four boxes, single wagons, to Brussels. The railway said it would do a trial and did

a trial. They had a meeting afterwards and the customer said: "How long did it take?" "It took three weeks, 21 days." The customer said, "That is not very good. A truck can do it in three days. Could you try again?" They did, and they had a meeting a couple of months later, and the customer said, "What happened?" The train operator said: "Oh, we have done much better; we shortened the time." "What is it now?" "Nineteen days." You cannot do it unless there is competition. Where is the incentive? This is where the road freight logistics industry is always trying to do better, to find shortcuts, sometimes stretching things a bit as some of us know, and sometimes not, but they are always looking for shortcuts. This does not happen with incumbents, and this is where you need competition. It will not happen unless we have got terminals open with all the facilities, et cetera. I am sorry, Lord Chairman, I have been going on a bit too long.

Q90 Chairman: This is, I think, an appropriate moment to draw to a conclusion, particularly on the point of competition. Thank you very much indeed.
Lord Berkeley: Thank you, Lord Chairman.

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| Present | Bradshaw, L Dykes, L Freeman, L (Chairman) James of Blackheath, L | Paul, L Plumb, L Ryder of Wensum, L Walpole, L |
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Memorandum by NewRail

This submission has been prepared by NewRail (University of Newcastle upon Tyne) in response to the invitation from EU Sub-Committee B (Internal Market) to submit a position paper on rail freight issues in following from the European Commission's stated intention to recast the First Railway package (FRP). NewRail very much welcomes the opportunity to make such a submission. Recent direct involvement and experience with a multi-lateral rail freight project (EU RETRACK research project <http://www.retrack.eu/>) has given useful direct exposure to the evolving rail freight position in Europe. In addition exposure to the results of an additional European Commission funded project (EU REORIENT <https://www.reorient.org.uk/>) has reinforced concerns over the effectiveness of the packages of railway reforms at a strategic and detailed level.

OVERVIEW

NewRail has secured access to the previous House of Lords report (EU Committee 4th Report (2004–05): Liberalising Rail Freight Movement in the EU (HL52) and to the European Commission's summary statement in relation to intentions to recast the FRP. These documents provide a useful backdrop to NewRail's individual commentary on the workings and limitations of the FRP. The proposed simplification of the legislation is welcomed as a means of securing homogenous applications of the provisions of the FRP. The general reinforcement of the regulatory bodies is also welcomed and will be commented on further. There are also additional detailed items to follow on this issue flowing from the RETRACK project.

GENERAL OBSERVATIONS

The intentions of the FRP in relation to:

- Separating infrastructure management from train operations (originally intended as a financial device only).
- The adequacy of staffing and the full and transparent separation of Rail Regulators (RR) from government and the incumbent railway operator.
- Barriers to entry including safety certification and insurance.
- The methodology of formulating access charges.
- The methods and processes for the allocation of capacity (tracks & terminals).
- The relationship of the FRP to other freight transport policy proposals.

have not been fully met and present a mixed and muddled picture of application in extent and in depth. Experience gained in the RETRACK countries (The Netherlands, Germany, Austria, Hungary and Romania) identifies full compliance with the objectives of the FRP in only one country (NL) and wide variability in the remainder.

SEPARATION OF FUNCTIONS

Models of separation vary from the pattern in NL where there is a full separation of function between the infrastructure activities and train operations through compromised and fudged positions in both Germany and Austria to the still developing and confused positions in Hungary and Romania. The NL model is one that could readily be replicated in other domains.

The position in Germany where the infrastructure component is nominally separated from train operations is a national compromise whereby the two functions are effectively still inside one organizational tent with the remaining concerns that this position will always favour the incumbent. This lack of transparency and a full

separation of duties has created and can create problems for new market entrants in terms of securing quality train paths as required, competitive routing and the apportionment of disruption resulting from infrastructure maintenance at short notice. A similar position prevails in Austria where the incumbent uses its muscle to disable or compromise competing new entrants through a range of commercial and operational tactics.

The situation in Hungary is that there is nominal recognition of the requirement to separate the functions but there is evidence of the involvement of government, government agencies and the incumbent railway operator that dilutes the realization of the European Commission aspiration. Romania is even less well advanced in the achievement of the required position again with close linkages between the government and incumbent.

SUMMARY AND CONCLUSIONS

The separation measures had and retain integrity in their own right. They also act as a very clear message to the incumbent railways, national ministries and government that major change within and between the railways was and remains necessary to make them commercially focused and more competitive. The ability to identify costs and revenue streams is vital to achieving that end. The original intentions need to be reinforced and in the view of NewRail full and transparent separation from the incumbent railway and national government is now required. The models from the UK, Sweden and The Netherlands might be usefully followed. Siren voices advocating the retention of the vertically integrated model as used in North America and other domains would be a catastrophic reversion and not put down the required markers to drive through other reforms that are built on this first key step.

EFFECTIVE REGULATION

Based upon direct interviews and meetings with all the rail regulators on the RETRACK corridor only the Dutch model has the integrity to undertake such duties in a fully independent, objective and impartial way. It is proactive and responsive to any complaints on discrimination.

The position in Germany is less clear. The German RR is part of a wider national government regulatory domain. Initial contact suggested it was a complex and bureaucratic structure and closely tied to government and therefore by default to the incumbent operator DB. More recently the posture of the RR in Germany has become more aggressive towards malpractices and discrimination in relation to the rail network and to terminals and servicing facilities. The RR is also focusing on commercial malpractices (power supply charges, pricing including below cost discounting and the use of infrastructure maintenance to constrain the activities of new entrants excessively. This move into the commercial arena could be potentially controversial but may be required to contain the massive power of the incumbent. The aggregation of regulatory bodies in one group by the national government is the option that has been selected and it may be difficult to move one regulatory function (railways) away from this.

Regulation in Austria is on a wholly different model. It is much more focused on consensus and negotiation for the resolution of disputes and allegations of malpractice. It retains nominal independence from the incumbent rail operator but concerns were expressed during research on the RETRACK project that the RR in Austria was not perceived as being powerful or proactive to prevent discrimination against new market entrants. The use of commercial and operational devices to block or diminish the performance of new entrants has been alleged. This is worrying within the national railway domain and also in view of the fact that OBB has acquired the freight component of the Hungarian railway network. The need for a more visibly and practically independent RR in Austria is justified.

Hungary was in the process of establishing a RR structure at the time of the RETRACK project field work. The very small and capably led team that had been assembled was certainly well briefed, appeared competent and was involved in matters of discrimination alleged against the incumbent. The Hungarian RR reported directly to the Prime Minister. Within weeks of the site visit this was all changed and the RR had been dismissed. The implications of this were that the RR was proving to be effective and had to be stopped from further intervention. There was a lot of "political" noise around all of this. Given the incumbent Austrian railway operator has acquired MAV cargo the need for robust reform is needed. Full separation from ministries and government is required.

The position in Romania is still evolving. The interlinking of the incumbent railway, ministry and the national RR may be a transitory phase but there are concerns that this may be retained. Full and transparent separation of duties and reporting lines is required. This may take some time as the complex and sophisticated issues any RR has to resolve are recognised, accommodated and a body of relevant knowledge and expertise is established.

SUMMARY AND CONCLUSIONS

Rail regulation within the five countries examined in detail resembles a curate's egg. The Dutch position is by far the most developed, advanced and compliant model. The German position still has a resonance of ambivalence and protection of the incumbent. The model used is evolving with some robust intentions to move away from the consensual position to one of more intervention in commercial, technical and operational matters. How this works in practice remains to be seen. Securing full independence from government may prove complicated.

The Austrian position is very different but appears to be in thrall to the incumbent operator and has not fulfilled the position of being independent, objective or impartial to allegations of malpractice and discrimination. The Hungarian position appeared to be developing along positive lines but was effectively wrecked for internal industry and national political considerations. Subsequent developments are not known. The Romanian position has a long way to go to achieve the sort of capability, integrity and independence the FRP requires of this function.

BARRIERS TO ENTRY

Barriers to entry for new market entrants are considerable. They include the need for an application for a licence to operate, the development of a credible safety case, retention of qualified and certificated staff plus insurance. All this comes before the acquisition of traction and rolling stock resources which must also be certificated and compliant. The insurance requirement can be a major issue in terms of cost compared to the incumbent state rail operators backed by government.

Certification processes remain nationally focused so compliance in detail can be seen as a constraint until full common interoperability is in place as the recognised standard. The adherence to national standards has been used to delay the deployment of locomotives despite their certification use on each side of national borders and is patently nonsense. The Reorient report identifies a raft of other devices and stratagems that have been identified as barriers to entry. These need to be addressed across the EU as a means of exposing the protectionist stance being taken by incumbents and their owners.

SUMMARY AND CONCLUSIONS

Barriers to entry remain in terms of technical, operational and financial hurdles. Any new entrant needs to be competent to deploy and operate trains and have adequate financial resources to sustain services. There are models from other domains (UK aviation) that might be usefully explored for possible development of the rules governing the admission of new market entrants. It is also desirable that differentiation is made between new entrants with large volume ambitions are treated in a separate way to localised small scale operators (yard or terminal shunting). Some form of graduated entry fee or license based on reported turnover might be considered as operations fluctuate.

ACCESS CHARGES

This is without doubt a complex and contentious area. There is extensive coverage in the literature on this topic arguing the basis upon which access charges are compiled, their validity, comparability with other modes, comparability between countries and much more Directive 2001/14 set the rules governing the pricing of access to railway infrastructure. The governing principle is that prices should be set at marginal costs with some provision for add-ons to marginal costs being allowed. This basically allows almost any pricing position to be established.

How each railway determines its measure (and understanding) of marginal costs plus the general catch all of add-ons is far from clear. In practice the present position allows tariffs to vary between marginal infrastructure costs (wear & tear on track, signalling, power supply etc specifically attributable to freight train operation) and the full "average costs" including interest on capital invested. In the case of linear marginal cost charging the revenues accruing to the infrastructure operator/manger are not aggressive which reflects the fact that the share of marginal costs as a proportion of total costs is very low. This is reflected in the charging regime in Sweden. When mark ups or two part tariffs are used the revenues to the infrastructure operator grow and drive the cost recovery ratio to much higher levels. The different ratios of cost recovery demonstrate that the magnitude and basic structure of rail track charging vary significantly between the member states. In effect individual national charging schemes and their underpinning logic differs wildly.

SUMMARY AND CONCLUSIONS

The position on access charges is heterogeneous across the European railway network despite the efforts of the European Commission to harmonise tariffs and structures. The direct inference from this is that the infrastructure operators are not interested in co-ordinating their tariff structures because they are pursuing different goals through their tariff mechanisms.

The variability of tariffs compromises moves towards inter-operability in that it creates differential conditions for infrastructure use. This then triggers the need for expenditure to identify optimal routes for new services on the European network and this undermines competitiveness and reliability between rail operators and with other modes of transport. The pricing system *in situ* discourages newer, smaller, market entrants to develop and deploy new services and niche applications. There is an overwhelming need for transparency and balance and a more sensible common basis upon which tariffs are set.

CAPACITY ALLOCATION

The position in relation to this provision in the FRP is as mixed as others. The RETRACK project field work encountered different models used to execute this with varying degrees of transparency and separation from government. The position in NL is fully established and operates in an equitable and transparent way. In both Germany and Austria there are nominal structures in place to manage capacity but the models of “ownership” and linkages to ministries and government give rise to concerns that capacity allocation may be used to protect the interests of the incumbent from predation or competition from new entrants. There is a nominal capacity allocation function in place in Hungary but this has overt linkages to government and to the incumbent train operator. The Romanian position is also a mix of unreformed and transparent linkages.

A major issue that needs to be addressed is to what level freight train schedules and movements in real time are compromised by other, mainly passenger, priorities. The RETRACK corridor traverses some exceptionally rail rich centres of activity with large numbers of international, national long distance, regional and local passenger trains in circulation on the infrastructure. These are operating in response to a mix of commercial and socially justified needs. This position contrasts very strongly to that prevailing in the US from where siren voices suggesting the re-adoption of vertical integration is the preferred business model. The differences in context and approach as well as the competitive forces ranged against rail are very different.

SUMMARY AND CONCLUSION

Capacity allocation is not as transparent as required. Apart from NL the situation is opaque with the real risk of the incumbent operators being defended by the nominal capacity allocation bodies or government ministries. There is a clear need for the fullest separation to be made in organizational terms and for their operations and processes to be clear, impartial, objective, independent and open to scrutiny and routine review. Without this the real risk is that the reforms required under this and other railway reform packages will be fatally weakened.

FRP AND OTHER TRANSPORT POLICIES

The relationship of any re-cast FRP to other freight transport policies needs to address a number of key issues:

1. The failure to implement the railway reforms by the incumbent railways and their supporting ministries needs to be challenged and resolved such that the reforms are fully and rapidly implemented. Failure to comply (to be ensured by regular and routine management audits) should carry onerous penalties. A definitive time for adoption needs to be laid down across the EU with no exceptions and fudging of issues.
2. The foot dragging on reform by the incumbent railways to fully separate their operations from infrastructure must be addressed.
3. The railways themselves should not be reliant upon the pressure from the European Commission on compliance with directives to modernise and re-position themselves in relation to international and domestic freight. The initiatives should be coming from the railways themselves rather than being perceived as being reluctant to adopt the required measures and also to generate their own innovation programmes to allow them to compete.
4. The co-modal policy being developed needs to be addressed in relation to rail as this potentially gives other modes (road transport) a huge advantage overnight in terms of new vehicle weights, size etc with infrastructure being met from general taxation thereby endowing a further competitive edge.

5. The cross border driver certification issue needs to be ramped up as this is not being exploited to anything like the same degree as on road. Measures to accelerate driver training, route knowledge (this may be supplemented and reinforced by aircraft style ILS measures adapted to rail), crew allocation etc need to be developed much further. The existing methods are a major constraint on the competitive stance of rail freight.
6. Inter-operability has become a drag anchor in relation to innovation in terms of train technologies and certification times and cost. It is developing into a huge and burdensome superstructure of administration that does little to drive forward rail's capability to innovate.
7. There is a real need for a level playing field on competition (emissions/driver hours/external costs/access conditions and driver competence/insurance and safety) between the modes of transport deployed in Europe. Rail operates under an increasing burden including multiple tiers of safety related bureaucracy that is not required as it is an inherently safe guided and controlled mode of transport.

OVERALL SUMMARY AND CONCLUSION

The FRP was a major gesture to the incumbent railways and their "supporting" ministries that the future in terms of structure, operations, management, funding and supervision was not going to be a perpetuation of the cosy opaque position that characterised things before the FRP and preceding measures were announced. It put down markers that the railways must accommodate stringent and sweeping reforms that were aimed to galvanise them into a different sort of future that was not umbilically tied to the public purse endlessly pumping in capital and operating subsidies.

That these reforms have been adopted on such a piece meal basis gives cause for concern that the incumbents have resisted or evaded these measures through organizational sleight of hand or a sheer failure to recognise and comply with the requirements of the package. The major continental incumbents (DB & SNCF) are the major offenders and do a disservice to the rail freight sector by their respective failure to comply.

The European Commission FRP has been weakened by the actions of several incumbent rail freight service suppliers and their respective national government owners. The open ended time line to adopt the measures included in the FRP was a significant failure and needs to be corrected with the real threat of penalties for non-compliance. The experience of the RETRACK project field work and the contemporary Reorient project, both sponsored by the European Commission, make for concerning reading on this. That the European Commission has absorbed all of this material and taken so long to recognise the deficiencies in the application of the FRP legislation and derived measures in itself another major cause for concern. The separation of the legislators and their general aspirations from the harsh commercial realities of operating domestic and international train services is a further worrying facet.

9 February 2009

Examination of Witness

Witness: MR PHILIP MORTIMER, Research Associate, NewRail, examined.

Q91 Chairman: Good afternoon. Mr Mortimer, we are very grateful to you for coming at very short notice.

Mr Mortimer: Pleasure!

Q92 Chairman: I hope that you can see the name plates of the Members of the Committee. We have allocated questions but colleagues will come in with supplementaries. Would you like to make an opening statement?

Mr Mortimer: No. The only point I would make is that when we responded to the initial request for some views to be put in about the First Railway Package, we responded on the basis of the work we had done on a European project called RETRACK. That basically forms the basis of our submission. Interestingly, we received a response back from you

saying well, that is okay, and some supplementary questions which have slightly moved away from that preliminary focus but we have addressed those as well, so I hope we can give you a reasonably coherent and competent answer on the first set of questions and anything else that has come subsequent to that.

Q93 Chairman: Thank you very much. Would you just like, for the record—and please correct the record when it is sent to you in due course—to introduce yourself and, more importantly, tell us not only about your good self but also about NewRail.

Mr Mortimer: I am Phil Mortimer. I am a Research Associate at NewRail, University of Newcastle. It is part of the School of Mechanical Engineering and Systems. It covers a multitude of disciplines. There is a freight and logistics team, of which I am part. There

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is materials, wheel-rail interface and materials crashworthiness, that type of thing, a lot of it to do with the structure of rail vehicles, their performance in service. A lot of that expertise moved from Sheffield four or five years ago. The department is well established. The freight and logistics team is only three core people but we get mainly involved in European projects. Our experience and expertise in the UK in terms of research projects is less than our involvement in Europe. We have done very well in Europe rather than the UK. I think that is just an accident of history, contacts, and it has led to subsequent projects and that is what we have been doing. That is where we are.

Chairman: As you probably know, this Committee is hoping to produce a report in June, and we understand that the Commission is going to return to this subject either at the end of this calendar year or early next, so we are well in advance of further thinking and we intend to go to Brussels to talk to the Commission and explain what our conclusions are. Unless you want to say anything to begin with—and please, if you do not think the questions are directly relevant to your experience, please say so.

Q94 Lord Ryder of Wensum: Good afternoon. What are the main failures, do you think, of the First Railway Package? To what extent do those failures damage a more competitive rail freight industry?

Mr Mortimer: Just focusing on the first one, they are part of a panoply of others. I think that has been part of the problem. They have streamed out and I think over a period of time people become slightly shell-shocked with this continuing rolling barrage of these things coming out. I think they are too complex in many cases. The actual objective, what is required, in many cases is buried under a torrent of words and complications. A key thing, I think, is that there is no time limit for implementation. I think there should have been a deadline. Having it open-ended, knowing there is no penalty for non-compliance, or not really, in the medium term, was an issue and, with lots of evolving models of privatisation and liberalisation going on, I think expecting there to be a completely modernised approach across the entire patch was likely to be wildly optimistic. I think this is why we have this divergence of application and the results that are coming from that. Going back to the RETRACK operation, which is looking into private rail operation from Rotterdam to Constanza, going from north-west Europe right the way through, you are covering the entire spectrum of compliance with packages, i.e., the Netherlands—the Dutch have done it brilliantly—to varying degrees of non-compliance or basically, not even knowing where to start, the further east you go, I think. Hungary and Romania—Hungary probably better than Romania. Romania still seems to be just getting into gear, in my

view. This is based on fieldwork done two years ago, summer 2007.

Q95 Lord Dykes: Thank you very much for coming today, Mr Mortimer. Is the correlation between competition and growth in rail freight traffic in the UK demonstrated with clarity, depending on what has happened so far? How much of the UK's growth in rail freight would be directly attributed to the UK's market structure rather than, for example, to changes in the coal and electricity sectors, which would have happened anyway? Are there other factors that might be involved?

Mr Mortimer: That is an interesting one because I was involved with the power supply industry when this was all beginning to take place, and the acquisition by the generator of its own railway equipment in the early to mid Nineties. I think my take on this is that railways have historically under-performed in certain key markets. The higher value, time-sensitive traffic they have done beautifully badly in. I ran that off yesterday, (*indicating*) the Department for Transport statistics. If you look at the commodities, the main flows are in the heavier end of the spectrum and the lower value commodities. They do very poorly in the higher value, time-sensitive stuff. The change in railway tonne kilometres, that was a function effectively of the differential in shipping rates for coal to bigger ports in Scotland or the east coast ports of the UK. Remember, the CEEGB used to import coal from Rotterdam. So basically, you went from domestic coal production to imported coal production, and I think the tonne kilometrage grew because the traffic is flowing south from Scottish ports into northern England for power generation. A lot of that growth was accounted for there but, having said that, I think the key thing was the changes taking place; the sea change was to institute change, to break away from the state-owned monopoly which had lost contact with its markets, was failing. It is getting better but it still has a long way to go, in my view. Playing with organisational issues is one thing. Making it competitive, profitable, acceptable and attractive to shippers is a whole different set of propositions. They flow from it but just changing the goalposts in itself will not necessarily make the changes.

Q96 Lord Dykes: We noticed some of the things you were referring to in your first answer in Constanza during a visit last summer, that kind of phenomenon you were referring to. Understandably, in the UK we feel—not smug but rather pleased with the fact that we are leading the way. There are nine freight undertakings already. There may not be even distribution between them but there is a certain amount of competition. In fact, there may be quite considerable competition. Are you pleased with that

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progress so far? Do you feel there are gaps and problems in it?

Mr Mortimer: Again, I think we can take some comfort in that we do have a competitive environment. We still have the two big incumbents, Freightliner and EWS, and they dominate the market. There is no question about it. We have GB Railfreight and Direct Rail Services there as well, and some other additional players coming in. I think it compares markedly with places like Germany and Poland, where you have hundreds and hundreds of new entrants but in many cases it is one man and a shunting engine in a very small siding somewhere in the back of beyond but it is a private railway undertaking, and people have taken advantage of that. I am not sure there has been the same uptake of that in the UK. The barriers to entry are still significant in terms of the cost to become a new rail operator in the UK—insurances, training, competence, acquisition of kit, some barriers to the acquisition of kit, some of which are still there, some fairly dog-in-the-manger attitudes about release of old equipment but we will not go into that at the moment. I think we could be encouraging a great deal more liquidity in terms of people entering the market. There may be some measures that need to be taken to bring that into play. I have to say, I was always slightly concerned by the growth of EWS as the monopoly, big, heavy-haul operator from the three previous small ones which were broken out, and I have never quite understood the rationale as to why they were brought back together and sold off quickly. I suspect there are all sorts of other reasons for that and we will not go into those now. Basically, I think we are moving in the right direction. We also need to look much more at not only the structural issues but also at innovation in terms of technologies, operations and management, which I think of themselves are taking far too long to come through in the UK railway context. We are still effectively running a very orthodox railway. There are lessons to be learned from the trucking sector and the aviation sector, in my view, in terms of capacity management, the way we deal with a lot of issues, and the timescale in which we deal with those things. We are still moving at a fairly pedestrian pace on lots of those and I think we could speed that up. The lack of real innovation in some cases, I think, is worrying. A lot of orthodoxy replicates itself. If you look at the new entrants, they all bought classic locos, rakes of very similar looking wagons. It is almost “that’s the way you do it” but is that also a self-limiting point in the market?

Q97 Lord Walpole: Could you just remind us of the attitude of the old Communist bloc towards putting freight on the rails?

Mr Mortimer: They wanted mostly as much as possible.

Q98 Lord Walpole: They did?

Mr Mortimer: Absolutely, yes. I spent a year in Moldova on a railway reform position there. The railways were used for a lot of basic freight, for agricultural products, fuel, everything. They were very much the dominant force and they were also used as a piece of social engineering as well; they were employing huge amounts of labour for fairly poor effect.

Q99 Lord Walpole: Would you not have thought that this colours their attitudes at the moment, or does it not?

Mr Mortimer: To a degree but I think at some point reality kicks in. You can keep on employing people to do pretty poor, minimalist jobs for a certain period of time but it becomes very difficult to sustain those things. Having said that, I spent a year in Moldova, which is a pretty run-down country now. Railway reforms are vital there, in my view, but they have elected not to do it because it is sustaining jobs, because the rest of the economy is collapsing around their ears.

Q100 Lord Walpole: That is helpful but it does not really answer the question.

Mr Mortimer: Getting back to the point, certainly, the former Eastern Bloc countries were very much in favour of using rail as the dominant mode. Road transport was less well developed. The road infrastructure was less well-developed. Railways were part of the control culture as well. Moldovan railways were controlled from Moscow prior to 1991–92. The absence of that control was a major problem when it was taken away.

Q101 Lord Walpole: That has presumably happened in the other Eastern Bloc countries as well?

Mr Mortimer: To a lesser degree, I think. In some it has; the further west to come, the less of a problem it is. The Romanians are already starting to move away from that and they have done so quite well. They still have quite a long way to go. They are still a very orthodox, traditional railway entity. They are in catch-up mode. I think they will catch up. They have some useful kit and they have some useful money spent on some interesting projects. Putting ERTMS as far down as Romania—I am not sure that was a justifiable decision.

Lord Walpole: That is extremely helpful. It has cleared my mind somewhat.

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Q102 Chairman: Can I just go back to one comment you made about older equipment not coming forward to new entrants? That was the implication of what you said. Could you just expand on that?

Mr Mortimer: When surplus equipment is available, an entity has been created to operate in a railway environment—take the UK, for example. The new incumbent came in, and has bought a lot of new equipment. The old equipment it did not need in many cases it elected either to chop up or somehow not make available for new entrants. I think that was a bit of a limitation. There was no liquidity. Compared to the aviation sector or the road transport sector, there is not the same liquidity of market whereby equipment was least, bought, sold—albeit fairly old kit, it would have probably allowed other entrants to come in. An awful lot of equipment was broken and scrapped which I think could have been retained. Maybe, just maybe, there was a case for the sort of thing you have in the States and Canada, these regional, local lines, which are very much more simplistically operated routes, with older kit, multi-tasking staff, and they work very well. That is a model we have not adopted. I think there might have been cases for some parts of the country, possibly the Celtic fringe, maybe elsewhere as well, where it is possible that would have worked as an entity. We have not elected to go down that route and it may be to our loss. I think the loss of a lot of kit, almost as a dog-in-the-manger thing, and there are still residual echoes of that even now, with kit being held by people and not being released.

Q103 Lord Bradshaw: You have mentioned Moldova at some length, and Romania and Hungary, but actually, so far as Great Britain is concerned, it is France and Germany that matter because that is where the bulk of the traffic goes. You used the expression “torrent of words” but it could be applied to some of the more esoteric places you have spoken about. What is wrong in Germany and in France, and is it partly or wholly the responsibility of the trade unions and industrial relations?

Mr Mortimer: I think that is an element of it. It is part of a national, cultural thing in both countries. They are both national treasures. The railways are seen as huge national pieces of infrastructure which have developed over long periods of time and I think they find it difficult to concede that there are alternative ways and methods of operating the railway: splitting the responsibility for infrastructure from government, and the infrastructure and train operations split, then operations split, passenger . . . It was very difficult, I think, to accept those arguments that there was the need for transparency and also to find out basically where the money was going. They are not alone in that. I have worked in Canada for three years and CP Rail, one of the best

run operations in North America, had difficulty tracking the money it was spending on infrastructure. It had to find out by putting a task force in place. The fact that these state-run entities do not know where their money is going is the biggest need for reform, because if they are just reliant on an endless tranche of taxpayers’ cash all the time, with all the ups and downs and limitations that implies as well, it is a problem.

Q104 Lord Bradshaw: Would you say Network Rail is a problem because they do not seem to know where the money is going either? There is a lot of it.

Mr Mortimer: There is a lot of it. I was at the conference at Earls Court last week, and the rail regulator was there and made the case for a fairly firm long-term programme for investment, which they have now established. I think you need stability in that. Having these ups and downs over a four to five-year cycle is a bit of a problem. You must know yourself the feast and famine scenario over the past in BR.

Lord Bradshaw: Mostly famine.

Q105 Lord Paul: In your evidence you welcomed the simplification of the First Railway Package. What aspects of the package do you think require simplification and what do you suggest?

Mr Mortimer: I have a note to myself on this: just make the language of the documentation more comprehensible, more understandable, to those who are responsible for implementing it. It just takes an awful lot of time to pick your way through what the intention of a lot of this stuff is. I am a great believer of saying in 25 words or less what you really mean school, and that normally tends to work fairly well. I think a lot of it is made far too complex. The objectives become buried. Just the understanding across the piece, looking at the European countries in their totality, it is a problem. The level of understanding and the formalisation of it and the priority being attached to certain parts of it is a bit of a problem. Also, I think, as I said before, there should be a time limit on this. When these measures were introduced there should have been a firm timeline saying we have to have these things 99 per cent in place by date X or penalties will accrue. That was perhaps a bit of an omission, that it was not as clearly set out as it might have been. Having the usual how, why, where, when and who-type approach to getting these things implemented, almost like a “First Railway Package for Dummies” might have been a good idea, just to allow people lower down the pecking order within the railway industry to understand what was going on. This is in many cases going in over the heads of a lot of people running the day-to-day railway. They are aware of these things

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going on but, at a very strategic level, it is difficult for them to appreciate exactly what it implies.

Q106 Lord James of Blackheath: Could you describe what you actually hope to achieve by the unbundling process and what you see as being the critical first priorities that you are going to achieve?

Mr Mortimer: Directive 91/440 was the first step, and then the ensuing Directives that flowed from that. I think separating the management and accounting of infrastructure and operations was the first key step, and everything has flowed from that in terms of the First Railway Package, in terms of getting the infrastructure and the operations separated and then the operations themselves separated.

Q107 Lord James of Blackheath: It sounds as though you are saying that your first objective is to reduce the bureaucracy, not to streamline the operations.

Mr Mortimer: Well, both.

Q108 Lord James of Blackheath: Does one necessarily lead to the other?

Mr Mortimer: It could do, possibly, yes.

Q109 Lord James of Blackheath: Are you quite satisfied that the unbundling of the bureaucracy will not leave exposure to difficulties in monitoring and controlling the residual parts of the business?

Mr Mortimer: No, I think those safeguards would have to be in place. In my view, it has been quite a complex process, a difficult one to understand. The drivers behind it, I think, were quite clear. The implementation process has been, in my view, the complicating factor.

Q110 Lord James of Blackheath: I have done a great deal of unbundling in my time and I have a huge and horrible memory that usually, however well you control the unbundling, you find that bits that lay beneath the surface have all come apart and fail to function together any longer.

Mr Mortimer: Yes, there is always that risk.

Q111 Lord James of Blackheath: Can we take any steps to try and ensure that residual control remains for the striking down to the lower roots?

Mr Mortimer: I think it depends what sort of monitoring and regulatory regimes you are putting in place to monitor the progress of this sort of thing. If you are putting some sort of regime to monitor and regulate, one would assume it would have the sort of powers to be looking for those sorts of hidden issues and areas that you have just highlighted.

Q112 Lord James of Blackheath: Is the unbundling process primarily aimed at achieving financial savings or is it aimed at improving the services?

Mr Mortimer: I think it has to do both. It has to.

Q113 Lord James of Blackheath: I accept the principle. I am just wondering how reliably they can both live together.

Mr Mortimer: I think they can be made to cohabit, yes.

Q114 Lord Plumb: Following your welcome words on simplification in bureaucracy and coming to the regulator, if there is to be a strong regulator, how can vertical integration work? In other words, how can each of the nations work within it if there is going to be the strength of regulation there? Is there evidence of the existence of discriminatory behaviour in those two countries, Germany and Austria, despite the efforts, which you will know, of the rail regulator?

Mr Mortimer: I think it is possible you could have a vertical integration and some measure of regulation as well. They are not necessarily incompatible. It is not a model that I would particularly favour. There are siren voices from across the pond in North America that we could have vertical integration and keep it that way. That is fine in the context of North American operations. I am not sure it is altogether the model we would want in Europe because we are looking in the context of a large, dense railway network with a mixed traffic operation, basically covering the whole thing. The evidence in Austria particularly came to us. We were not hunting for it. We were in discussion with various people, the ministries, the rail regulator, other authorities, shippers, train operators, and it was certainly evident that all was not well. The incumbents seemed to be using a lot of power to basically defend their position, and using a range of tactics to do that, including blockage, various pricing mechanisms, which I think really would not stand close scrutiny in the UK if the same regulatory regime and model was applied in Austria. The regulatory position in Austria is very different. It is all done by consensus and deliberation and it is less—what is the word?

Q115 Lord Plumb: Bureaucratic?

Mr Mortimer: No, no, no, no. It is less . . . It does not stand strong comparison to the regimes in the UK and Netherlands, in my view. I think we have a better method of operation than the Austrians have. The German position is interesting because of the two sessions we have met with them, the first session was not particularly helpful. The second session, with a newly appointed rail regulator, was intent on really going hard after the incumbent because I think, again, there is a feeling that they are using their dominant power unwisely in many cases. They are restricting competition. There is discrimination going on. In some cases it is buried, in some cases it is much more overt: power charges, access charges,

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instigating infrastructural works at very short notice that hit the new operators and not the incumbent. They are playing a very strange game, but they do, and this is how it goes on. Again, we encountered this without any real problem; the information came to us. I think the regulatory regime in both Austria and Germany needs tightening but I think the German one is improving significantly compared to where it was. It still has some way to go but the Austrian one, in my view, is a problem. It just does not have the strength to take on the incumbent.

Q116 Lord Plumb: How would the new member countries fit into this? Do you think they would welcome a degree of vertical integration?

Mr Mortimer: No, on the vertical integration issue, I think there is a need for a sea change. This is a problem. Moving away from vertical integration is the major break. You are moving things into areas of responsibility which it is possible to define very clearly and, yes, to attach funding and money to it, and performance monitoring as well. Having it all inside one tent, it all gets a bit fudged. I think that has been the problem. It is also driven by considerations of national government policy, with all the ups and downs that go with that. I think with the move to the Railway Package, a sea change has been the key thing. It has brought a difference in mindset. It has broken the mould and I think that is to be welcomed.

Q117 Lord Dykes: On the example you gave in Germany, have you seen a similar phenomenon in France with SNCF?

Mr Mortimer: No, France has not been part of our territorial brief. We have stayed away from that.

Q118 Lord Dykes: Why?

Mr Mortimer: Just accidents of projects, to be quite honest. We know some of the issues. It is problematic territory. I think the successive reforms of rail freight seem to have turned over several times. There is a new announcement today about another reform of freight and logistics on rail in France. They seem to be having these on a repeat basis but going nowhere, and the market share is dropping. I think that is the key thing to worry about all the time, that rail's market share is under pressure in all these areas. Unless reforms are brought through properly, rail is out of the market.

Q119 Chairman: Can I just follow that very helpful answer to Lord Dykes's question? We are searching for perhaps an academic source to answer the key question which the Committee is still wrestling with, which is what evidence we have to present our colleagues, particularly in Germany and France, that liberalisation, unbundling, the reforms we have seen—you referred to the Netherlands and the UK—

genuinely have produced incremental freight. The coal traffic which you have just referred to coming into the Scottish ports would probably have come by rail anyway.

Mr Mortimer: Indeed. Yes, I think the bulk of that would have moved. It is a production function of the additional tonne kilometres: the same amount of coal is travelling a greater distance. My own take on this is, I think rail really has to reposition itself if it wants to go after the other elements of the market. Again, if you look at the commodity statistics, which I have attached to all this lot, it just under-performs very badly in the higher value, time-sensitive markets, which are locked up by the road operators. They have the dominant share of that spectrum of the commodities, and rail at the moment just does not seem able to perform or willing to perform to go after those markets. This is a very personal view, not necessarily reflecting NewRail, but I do not think it has the mindset or the ability to identify that market and, secondly, the technology, the techniques, systems and management skills to go after it. The truckers do. Basically, what that component of the railway needs is to be run by some truckers, in my view.

Q120 Chairman: But that is an opportunity.

Mr Mortimer: It is an opportunity they have elected not to take, I think.

Q121 Chairman: I come back to my key question: from the research you have done at Newcastle, can you provide us with any help, any examples?

Mr Mortimer: I think we can probably dig up something. The evidence for growth in some areas other than the core commodities, such as coal and stone, yes, we can probably dig something out. It is not going to be very big though, because of the huge weight of coal traffic; it dominates the railways, and it always has done.

Q122 Chairman: But you have referred to market share, I think in France, and I think you have probably indicated other countries as well in which market share has been falling.

Mr Mortimer: Yes. It depends how you measure market share. Again, let us be very careful of our ground here. Originating tonnage, tonne kilometrage or revenue share—I think you need all three indicators there. Revenue share is no longer publicly available, I fear. It is no longer part of the government's statistics. It used to be but it is no longer because of its commercial confidentiality. All you get is the tonnes and tonne kilometrage, and the commodity spread is quite crude. You have to almost start to burrow down into individual accounts or port information, and that can take some time to amass. It is not that readily available—others would claim it

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is but I am not sure it is—in detail. Compared to the North American position, it is not a good position to be in.

Chairman: Any help you can provide us with would be much appreciated.

Q123 Lord Paul: Are the provisions of the existing Directive concerning multi-annual contracts between national governments and the infrastructure managers adequate or is something further needed in the First Railway Package?

Mr Mortimer: Again, when preparing my answers to these supplementaries, my first response was that I think the provisions need some time to be understood, absorbed and then put into play. I think expecting a transformation overnight from one scenario to another was probably ambitious. Having said that, I still think there was a requirement for a time frame to be in place and, basically, somebody to sign them off. What it also requires is some form of forward programming, an investment programme. The individual railway administration or railways, the infrastructure people particularly, know what the intentions are within their own domain, and possibly there is a need to link those up across the peace with their neighbours, and certainly there is a cross-border scenario as well. I think there is a need for better planning now at a European level rather than individual national railway infrastructure budgetary provisions.

Q124 Lord Walpole: I would like to ask you about what measures the recast should introduce to promote access to marshalling yards, ports and terminals. Could you also explain the very last sentence of the one you gave us about yourself¹—I assume it is on the same subject—that “the big train concept is not the only approach”, which I rather liked?

Mr Mortimer: I will go into salesman mode, if you are not careful, on this one! On the terminal issues, again, jumping back to RETRACK, because it is a train traversing many countries, it was going to be calling at a number of intermediate points, where the locomotive would have to be detached and the train shunted. The issue was what to do with the loco once it had been detached from its train. Where would it find a home for a period of time whilst the train was being serviced? It became very clear that the incumbent operator could charge you an awful lot of money for just basically have a loco parked on his territory. It is like having a taxi; the meter goes down and you are thinking, “Well, okay.” So there is not freedom of access to use the infrastructure. There is still the sort of “Well, it is mine. You can use it and I will charge you for it” approach. That was worrying,

¹ A brief biography of Mr Mortimer was circulated to members before this meeting.

and it was not clear upon what basis the charges were made either—a random number table; you could almost charge anything you liked. It was difficult to get a really serious answer to that, to be quite honest. Yes, I think we should be basically looking to open access for yards, ports, and terminals. I think a classic case is somewhere like Felixstowe, which was open to freight only at one point, six trains a day. Tony² will tell you how many trains a day they are now running out of there, and how many different operators are in and out of that port terminal. You have open access. It has made a heck of a difference.

Q125 Lord Walpole: You will have to be careful with me. I share that railway line with a goods train, so I always have problems going through Ipswich. We beat them today because we were in early.

Mr Mortimer: Fair enough. I ought to say I think it has made a heck of a difference from being a maximum of six trains a day. I do not know what the latest figures are. It is probably into double figures, I think, and the same could equally apply at other ports as well. I am told it is 17, so you have effectively tripled it.

Q126 Lord Walpole: Yes, and once they have done the other bit between the end of the tunnel that they have extended and the Midlands—there is another 12 or 14 km to go—it will be even better, we hope.

Mr Mortimer: I do not know the technology of that particular neck of the woods particularly well but I suspect a lot more could come out of it. I would like to see a lot more coming out of Felixstowe and going back into Felixstowe port. I think a lot more could have been done a long time ago. It seems to have taken an age to get that position established but okay, it is there and we should take full advantage of it.

Q127 Lord Walpole: There are still too many lorries on the A14.

Mr Mortimer: I agree. On the small train . . . (*Document handed in*)³ I will leave that for you to read at your leisure.

Chairman: For the purposes of the record, Lord Walpole, would you just read out the title for the Shorthand Writer.

Lord Walpole: *Real Innovation In Freight.*

Q128 Lord Bradshaw: You have described a lot of the barriers which exist, and there appear to be many of them.

Mr Mortimer: Yes. Can I just interrupt? If you have not already seen it, there is an extremely good project report from the European Commission project called *Reorient*. There are over 1,300 pages of it. I would not

² Lord Berkeley attended this session, sitting in the public seating.

³ *TruckTrain: real innovation in freight* (TruckTrain Knowhow Ltd)

16 March 2009

Mr Philip Mortimer

suggest you read the whole thing. I have, for my sins, but it is well worth looking at because it does elaborate the barriers to interoperability and barriers to entry as well. It does elaborate those in considerable detail. It was done by a group made up of academics, consultants, operators, cargo interests, but it is an extremely good report and it is available through the Internet. It is an interminable read. Chapter 5 is the one to read.

Q129 Lord Bradshaw: I am going to come back to what I talked to you about before. We particularly want to open up—if that is the right word—France and Germany. What are the major links that have to be done? I am not really interested in ERTMS or things like that, because they are for the birds anyway. I am talking about the working practices which will enable freight trains in this country to go expeditiously over long distances.

Mr Mortimer: It is a many-headed Hydra, I think, the French scenario, probably to a lesser degree than Germany. I think Germany, DB, is waking up to the fact, albeit belatedly, that it is under competitive pressure from other rail operators. My worry about a lot of this legislation is that it is rail on rail reform. That is fine. The biggest problem is not necessarily that; it is the competition from the other modes, particularly the road boys, who have had an extremely good run and are still the biggest and most aggressive competitive force. Passing the family silver around within the railway fraternity without growing the market is getting nowhere. Unless they are taking traffic from the road operators, in my view, it is not really a particularly useful thing to do. If they are taking that traffic away from the road boys, a two or three per cent switch would be a significant move away. That business is there to be had. There is some reluctance, I think, to take it on. In France, my experience and knowledge of that is that it is a deeply social concern; there is social legislation governing lots of things: driver retirement ages, benefits, all that sort of stuff. I think also productivity on SNCF is appalling, in terms of asset utilisation; the assets they have are just badly used. I do not think they are really commercially focused, despite everything they say. They are just running a very orthodox, almost 1960s type railway still, and they have not moved on. They still think, basically, the railways are a good thing and the traffic should automatically come to them. It will not.

Q130 Lord Bradshaw: I take it you feel our fire should be concentrated on the rail regulator in Germany. Who do we concentrate on in France?

Mr Mortimer: I think you have to go literally from the top, through the ministry, right down through SNCF. Probably all. My reading of the scenario though is that they just do not seem to be able to recognise the changes that are required. There is an unwillingness to accept that the market has moved significantly away from them, and what they are putting into the market the market does not want.

Q131 Chairman: A final question. You have talked about and you have had questions about unbundling. If we go for recasting the First Railway Package, could you say a word for the record about charges in particular, the transparency level, how you calculate them, and the regime that in your judgement should be included in the recast of the package?

Mr Mortimer: There is an extremely interesting report written in *Intereconomics*, November/December 2006, by a very good professor of economics in Germany. He sets out a comparison of track charges and competitive situations in a number of countries. He sets out how they set up their charging regime and how much costs they recover; there is what they call a linear tariff or a two-parter, fully distributed costs or marginal costs. It seems to me there is no commonality in a lot of this. They have all gone off in differing directions. It is the 100 yards dash but there is no sense of direction. They have all shot off in different directions and done different things. The cost recovery ratios vary from as low as five per cent in Sweden to 91 per cent in Poland. Also, the number of operators varies. There is a very useful block of work there, which I can pass across if you wish. The mechanism for that and the basis upon which it was all done I think leaves a lot to be desired. It could probably stand a further review. Whether it is possible to get any level of commonality in it, or a common basis for further development, I do not know. I wrote on my notes to myself here: “This is a happy hunting ground for economists.” It has been for 150 years!

Chairman: We would be very grateful if you could leave that, or at least leave the reference with the Clerk. I am just going to ask my colleagues before I conclude the session if there are any other questions. If not, thank you very much indeed. You have been with us for an hour and it was a heroic performance. Thank you very much. Do look at the record to make sure if there are any corrections needed. The meeting is closed. Thank you.

Supplementary memoranda by NewRail

The stream of material that has flowed from Brussels on railway liberalisation and reform has been enormous and complex. The intentions of the individual components and their interaction as part of a coherent strategy are masked by the large number of documents, their contents and tenor. There was a failure to set a time limit for compliance with the requirements of the First Railway Package (FRP) and to set onerous penalties for non-compliance. There was a failure to recognise the differing models of liberalisation and reform being applied across the EU and some railway authorities, incumbents and governments have used this as a device to slow the pace and scale of required reform measures.

The DfT statistics on freight by rail and other modes of transport point out areas of underperformance by rail. Traffic has moved from rail as a result of modal competition, concerns over inadequate product and service provision, changing requirements set by shippers and cargo interests (eg JIT) and the relative inflexibility of the railway supply side offers into the market. Rail has a very low level of participation in the high value time sensitive commodity and market sectors which demand a wholly different approach and response to the imperatives set by shippers/receivers operating in these areas. Road transport dominates these sectors and rail has no real competitive product or service to compete in these areas. Rail concentrates to the point of overdependence on large flows of coal and aggregates or containers moved in large blocks and appears to be incapable of recognising the sheer scale of the market and its requirements.

On power station coal the growth in rail's tonne km measure was a reflection of changes in the purchase of coal by the privatised power generation companies. Domestically sourced coal moving relatively short distances between pits and power stations were displaced by imported coal traffic moving from Scottish deep sea ports (Hunterston) to power stations in the north of England. The key driver behind this was the relative saving on ocean freight to allow the biggest ships to transport imported coal. The growth in tonne/km (a production function) grew as short distance coal transport was replaced by imported product but moving longer distances to the point of use. This might be good for railway tonne km measures but reinforced the dependency on coal as base traffic. The actual amount of originating import traffic moved within the UK has varied as coal was sourced from a wider international market but all of this is outside the gift of the railways.

Container traffic has remained stubbornly at around 22–24% of the total domestic movement of international (ISO) container traffic largely as a result of the retention of the large port/large train/large terminal model which imposes its own limits on market share. Any traffic that does align with the railways supply side offer has little alternative to use road transport.

The heavy haul and container markets are still dominated by the major players (EWS & freightliner) although both have poached each others business (coal, heavy haul and containers). Whether this has expanded the market or led to a passing around of the family silver is almost impossible to identify from official statistics. The big players have, in the past, used their market presence to constrain competition (eg late release of unused train paths to thwart competition). GBRF and DRS are much smaller niche entities and below them are further smaller players offering a range of bespoke services. Others are known to be examining market entry. Compared to central and eastern Europe the number of new entrants is smaller in the UK although in Europe there are many very small localised operators linked to specific railway activities. The UK position is very different in that we have adopted the full panoply of measures and got on with it. European experience is varied and there are cross currents of international acquisition that further complicates things. The UK borders are different with only one fixed link for rail operations to and from France. This actually has proved to be a commercial failure for a series of well known reasons. The two main rail operators have seriously neglected the Anglo European rail freight dimension including inter-modal and rail has a pitiful 2% volume share of the market. This compares badly with the position in the past when FL had a frequent SSS operation between Harwich Zeebrugge. EWS appears to have woken up to this market potential under their new owners.

In my view there is a serious case for making the language of the documentation describing the FRP more comprehensible and understandable to those responsible for the implementation. The objectives have been buried under a torrent of words. It might have been sensible to put a time limit on full scale implementation (subject to external verification by impartial, objective and independent auditors) with an indication of the penalties for non-compliance (% of annual turnover). The underlying reasons for the development of the package and the description of this in the “how/why/when/where/who” format might be a useful start point in making the FRP more recognisable. It is possible that the international freight market was the most difficult target or start point for these reforms given the welter of other issues (technology/power supply/operations/management/standards/other agency involvement) plus the complications of border crossings not all governed by common protocols.

Getting the infrastructure and operations separated for accounting and management purposes into a clear and transparent position was a good start point as this has been a black hole for the most efficient of railways/railroads including the Class 1 operations in North America. This would enable the identification in detail of the allocation of funds to infrastructure maintenance and projects and provide a known basis for charging access to the rail network for the TOCs, levels of support for socially required services etc. The aspiration to achieve a clear separation of functions between member state governments and the infrastructure manager and then between the infrastructure manager and the TOCs was well intentioned. The complications have arisen from the disparate ways in which this has been interpreted and implemented and the length of time it has taken (at no risk of penalty for non-compliance in whole or in part) to achieve a common EU wide position. The specified terms for operators sets a common threshold and point of entry for new market entrants but probably needed to recognise that there was a wide range of potential players with differing skills and aspirations.

Capacity allocation methods and systems to minimise any discrimination required and still requires a commonly founded strong independent regulatory regime with teeth to impose sanctions for non-compliance. The gap between the infrastructure owner/operator/manager, capacity allocation function, government agencies and the incumbent train operator is still not consistently transparent across the countries visited on the Retrack corridor. The variability in the scope and role of the Rail Regulators is a cause for concern. The implementation of the requirement to establish a regulatory regime on a common basis that ensures objectivity, independence and impartiality as well as being user friendly should have been an adequate start point although some greater definition or outline of a possible model for adoption on a harmonised basis might have been useful. Stronger regulation may be required if the present model is seen to be failing to deliver across a common requirement. The phasing of the railway reform packages and the implied interlinkage between them may be less valuable than an insistence on compliance with what was specified in the FRP and achieving a common level of application by an agreed (short) time limit.

Vertical integration (VI) and rail regulation (RR) are not incompatible but this is not the model that has been adopted in Europe. It required a sea change to break the long standing model integrated but opaque model of ownership, operations and control within one tent plus the implied links to governments for financing. The model of VI in the US is a reflection of history, technology and evolving patterns of ownership and regulation (ICC) and is not fully compatible with a large and complex mixed traffic railway carrying freight and passengers over varying distances at differing levels of priority. The VI model with infrastructure and operations within one organizational boundary was the very model that was sought to be changed by making the functional and organizational splits with all of the transparency and clarification implied. The fully integrated railway tends to behave as a monopolist and constrain traffic operated by others (competitors/new entrants/specialists) unless there is a system of trackage rights (common in the US & Canada for freight) that are well policed and administered. The biggest problems with the FRP are in those countries that have not adopted by design or default the measures to separate the key functions and to regulate them adequately. The issue in Europe was that the vertically integrated railways were owned by the state and were placing great pressure on the public purse for investment, renewals, incurring growing losses on both freight and passenger traffic and had lost touch with developing market requirements. A commercial VI model in Europe governed by national borders would have been a problem to operate and probably acted as a deterrent to international traffic development. Effectively the regulated model offers a neutral network for competing operators to offer services and operations on with clear rules of engagement and robust policing to ensure its success. That this has not happened on a consistent basis across the EU in a harmonised way is a cause for concern.

Information garnered during field work in both Germany and Austria suggested the power of the incumbent train operators was still to be reckoned with in terms of sheer national market presence, demand for train paths compared to new entrants, access to equipment and facilities and the ability to apply subtle pressure on new entrants (short term operations and maintenance works hit the newcomers more than the incumbent plus constrained access to terminals. The German RR was planning to take a more robust stance than previously on a wider range of discriminatory issues including commercial infringements as well as operational and other matters. In Austria project partners made it very clear about the use of hostile pricing measures to ensure traffic was retained by the incumbent and operational matters to constrain the competitiveness of new market entrants. This is potentially worrying given the high proportion of transit traffic that may be constrained because of this type of activity. There appears to be a deep hostility to changing from the incumbent VI model.

The weaknesses identified lies in the definition and compilation of the service charges. It is an economist's paradise. The wide variability in the method of the compilation of these charges and the wide room for additions is the cardinal problem the variability is a problem for train operators providing or attempting to provide international services. There is a need for greater transparency and commonality in the methods of computing these charges. How individual railways derive charges for terminal access, access to maintenance facilities, holding and stabling points remains unclear. The EC should have been clearer on this in its stipulations on this before allowing the bizarre position that now exists to develop.

The provisions of the FRP needed some specified time to be accommodated by the infrastructure managers and operators and the train operating companies but not the excessive overrun that now prevails. Possibly some form of incentives or targets could have been specified linked to real identified increases in lifted tonnage, tonne/km and revenue market share indicators could have been attempted. Short term contracts could destabilise further the already complex and fluid relationships when what is clearly needed is a clear and firm basis for development with clearly specified aspirations and intentions linked to a recognised launch point for on going performance monitoring and calibration.

The availability of totally open access to all parts of the infrastructure including yards, ports and terminals should have been mandated. The threat of competing services usually drives up capacity (see UK example of the number of train services operating through the Port of Felixstowe originally constrained by FL to six services. The current capacity is nominally 24 with 17 trains operating per day at present). More could be done on existing service structures, operational and management to make these work effectively before leaping at new technologies although lessons could be learned on this from the aviation sector in terms of dynamic control. New entrants should be able to use the previously national infrastructure including ports and terminals. Access agreements and operating routines used in the US and Canada might be usefully investigated.

The comments on “patent nonsense” were aimed at the use of interoperability technical issues as a barrier to entry or constraint on new services being implemented (eg common locos used by the incumbents on both sides of a national border but not allowed to cross that because of inadequate or non-existent cross acceptance and technical rectitude by the individual national railway administrations.

Inter-modal has proved to be uncompetitive with standard road trailer hauled traffic on cost, service, responsiveness, quality and general product acceptability in many cases when compared to the rail service offer. The high cost of terminal lifting, terminal delays, train service times and overall transit times are major drawbacks when compared to direct door to door road transport which has exploited this capability. The other issues are the relatively low load (eg volume capabilities of ISO dimension containers) and the incompatibility of European dimensioned containers with parts of the European and UK rail networks. As a component of total European freight traffic inter-modal is a small component. The preferred module is the tri-axle road trailer which can be moved by rail in some parts of Europe. Operationally and managerially inter-modal is more complex because of the involvement of disparate players with differing technologies, operating methods, documentation, IT systems and the preferred method of using very large trains between ports and inland terminals. The railways preference of the large train/large terminal and large port method of operation effectively deters traffic that does not align with that model of operation leaving cargo interests with little option but to use road transport. The longer transit distances in Europe for international traffic should potentially favour rail but this is a fallacy as rail still defends a supply side offer into markets that require a wholly different approach that is well satisfied by the truck operators.

April 2009

RAIL FREIGHT TRAFFIC POST PRIVATIZATION AND LIBERALIZATION

Building on the response made to Sub-Committee B on the Internal Market in relation to the First Railway Package NewRail offered to undertake a limited review of the impact of reform and privatization of the performance of rail freight since these measures were introduced. The following note summarises the findings of limited research work undertaken to comply with submission deadlines.

The key issues that have been identified are as follows:

1. The position of UK rail freight prior to privatization
2. Commercialization and privatization
3. Changes in external markets that had an influence on rail's performance
4. Statistical reporting of UK surface freight activity—strengths & weaknesses
5. On-going changes in the market structure, regulation and infrastructure provision

1. The position of rail freight in Britain prior to privatization

Rail freight operations were with few exceptions monopolised by services provided by British Rail, the nationalised rail incumbent. Rail freight services included heavy haul covering coal, aggregates, metals, automotive and petroleum products largely conveyed in block train formations. Merchandise traffic was operated under a network operation between key rail hubs with scheduled trains moving between them on a

scheduled basis. Inter-modal services were provided by Freightliner between major ports, inland terminals and depots with some services by sea into Europe. Postal services were still retained to rail.

There was a major privately sponsored operation using US derived traction technology for the movement of aggregates from the West of England to various regional distribution depots. Other organizations including at least one of the newly privatised power generators acquired traction and rolling stock as a means of moving its coal and other material requirements on a more cost effective basis and as a marker to the incumbent operator about intentions, capabilities and service levels.

In market share terms rail was falling in relative and absolute terms of both originating tonnage (lifted tonnes) and production (tonne/km) from the 1960s with occasional spikes of activity. The Transport Statistics Great Britain 2008¹ (see table 4.1) details this and includes the primary competing modal performance. Goods moved by rail fell to an all time low in 1994/1995 (13 billion tonne/km). The low point in cargo lifted was recorded in 2003 (87 million tonnes). No time series is now produced or readily available on the revenue share of the domestic freight transport market.

Rail freight was experiencing a series of compound shocks including recession, changes in the energy sector which eliminated some domestic coal movements, the withdrawal of the “loss-making” merchandise services, retrenchment in the inter-modal sector including the withdrawal of European services and the opening of the Channel Tunnel upon which high hopes rested. Traffic lost to pipe line (oil/petrol/aviation fuel etc.) was significant as the oil companies invested in this option.

In terms of modal competition road transport was rapidly rising and emerging as the dominant mode of transport. Goods moved more than tripled in the period from 1960 to 2007 and the originating tonnage grew by 65% in the same period. Rail was experiencing a falling share of rising transport market. The reasons for this included changing energy and power generation, changing patterns of industrial production and distribution and the emergence of manufacturing that required much more by way of precision, reliability, security and in transit monitoring than rail was able to provide. In effect rail had either been ejected from or abandoned markets it was not able to service using the prevailing technical, operational and commercial model it presented to the market.

2. Commercialization and privatization

Once the process of commercialization had been initiated as a transition towards privatization in the early 1990s a further set of complications hit the rail freight sector that also dogged its performance under nationalised colours. The bulk sector was split into three separate entities with a loose regional underpinning and the inter-modal sector remained intact under Freightliner. This model was recast with the purchase of the re-aggregated bulk operators to a US based rail road entity (Wisconsin Central) as a composite job lot plus the parcels and mail business. The rationale for this was and remained opaque and appears to have been driven by a compulsion to get the rail freight sector off the government books irrespective of the longer term outcome and future prospects of the rail freight sector.

EWS as the UK subsidiary of WC embarked on a major review of the assets acquired, ordered in a significant tranche of new traction and rolling stock (some of which incorporated US equipment and running gear) and attempted to stamp a large heavy haul format on its new operations. Existing traction fleets were reviewed and some resources disposed of (scrapped) and not released into a liquid market for onward competing purposes.

The market performance by rail at this point (mid 1990s) was at its nadir but tonne km began to grow rapidly in response to changes in traffic (largely coal via the Scottish ports to power plants formerly fed by local pits. Growth from a small base always looks spectacular but it should be remembered that rail’s share of traffic moved had fallen almost continuously from the 1960s to a very low level. How much of the turn around can be attributed to new methods, new equipment and private sector competitiveness is difficult to identify given the paucity of the DfT statistics.

The growth to 21 billion tonne km moved by rail in 2007 (last reported statistics) was last matched in 1976. Recovery was identified in 1996 and in relative terms demonstrates a 40% growth but from a very low base from this point on until checked in 2007. The impact of recession in 2008 is not yet identified.

FL was sold off to a management buyout as a going concern in the inter-modal sector. FL developed into the bulk market formerly monopolised by EWS and has secured a significant chunk of inland coal traffic. EWS countered by offering container services. Arguably both examples of rail on rail competition did not grow the market and largely benefited the power generators in the bulk sector. Within the inter-modal market rail in total retained a volume share of 22–24% with absolute volume fluctuating with economic activity. It has not

¹ Statistics published by the Department for Transport at <http://www.dft.gov.uk/adobepdf/162469/221412/217792/421224/transportstatisticgreatbrit.pdf>

been able to expand the share of this market held by rail largely because of the constraints of the prevailing business, operational and technical models deployed.

The privatization of the rail freight sector certainly has produced some valuable results in terms of investment and some modest growth in traffic. EWS (now DB Schenker) orchestrated a significant traction investment programme to replace ageing fleets of locomotives that were proving expensive to operate and to maintain. Freightliner also adopted a programme of acquisition of locomotives virtually identical to those selected by EWS. This model was also followed by other new entrants. The down side of this development was that the rail freight product and service offer was built around these new locomotives and wagon formations that were attractive in block train loads of 20+ wagons and this effectively blocked rail from aggressively making serious and sustained inroads into commodities and market flows that were not aligned to this supply side model. There has been little real innovation in approaching this market segment which is more demanding and driven by imperatives to which the conventional rail services cannot competitively respond.

As well as the two still dominant players (EWS & FL) two smaller operators have sustained a market presence based on niche applications that then allowed them to develop more general freight activities. GBRF & DRS have operated as “mezzanine” operations in a variety of traffic including coal, inter-modal and infrastructure support activities. They have also adopted the Class 66 locomotive and large wagon formation as their primary traffic offer to the market. The previous remarks about this being a self limiting model apply here also.

A number of smaller operations have come into being and faded either due to financial difficulties or merged into other groups. These have largely used preexisting equipment (traction and rolling stock) to service their operations. The cost of securing access to the network as a freight train operating company (FTOC) is a potential barrier to the entry of new players into the market and this may need to be examined as a limiting factor. Full compliance with safety, competence, insurance and asset acquisition needs to be maintained but it is a significant barrier to new entrants. The market for previously used traction is also less liquid than it should be or should have been. The deletion of resources or the prevention of resources being re-cycled by other users in a competitive stance is a worrying development. Rail’s performance in traffic terms has grown but it has grown from a very small base. The deployment of new traction (1970s derived locomotives shoehorned into the UK loading gauge) has brought a greater level of reliability to operations but rail is still not able to compete in key markets largely because it continues to deploy resources in product and service offers that are not aligned with shippers or receivers requirements. The rail freight sector still does not appear to undertake strategic marketing activities or address the fundamental reasons why it holds a minority position in the market (however measured including the revenue share) and cannot secure and retain greater acceptance on merit and profitably. Rail is still dominated by large flows of low value commodities such as coal and aggregates and inter-modal traffic between big ports to big terminals using big trains. The over dependence on coal as a base load traffic long term gives cause for concern. That virtually all the new market entrants have sought to participate in coal traffic to provide base business is also a concern.

3. Changes in external markets that had an influence on rail’s performance

The process of commercialization and privatization of the rail freight business was undertaken in a period of economic recession and recovery from that plus the impact of the privatization of the power sector and the virtual demise of the domestic coal mining industry. Rail had retained, as mentioned earlier, an over dependence on coal as a source of base load revenue. In the past this had been used to cross subsidise other traffic activities including merchandise services in various guises until the losses incurred on these became too significant to ignore. The high cost base of these operations and the maintenance of methods, systems and models of operation, technology and management made them hopelessly uncompetitive in product, service and financial terms. In effect rail had failed to recognise the evolving requirements of cargo interests and develop new technologies and processes to make rail acceptable, competitive and profitable. Rail shrank back into a block train operation operating on a point to point basis. The withdrawal from wagon load services effectively signalled a surrender of commodity flows (higher value and time sensitivity) in favour of large formations of low value commodities that were governed by other imperatives.

The privatization of the power sector and the collapse of domestic coal mining to provide fuel for power stations led the newly privatized generators to source their fuel from international sources. Although the CEGB had sourced some coal from the international market and retained reserves in European stockpiles the private generators elected to move to a much larger reliance on cheaper imported fuel delivered by the largest ocean going dry bulk vessels into ports able to accommodate them on a routine basis. The margin on the sea freight was such as to outweigh potentially longer hauls by rail in maximum sized trains to the consuming power plants.

The implications of this, together with the impact of the dash for gas fired stations from the late 1980s, was that less coal was travelling further which drove up the tonne/km measure. Rail was carrying less originating (about 50% of that in the 1970s) but that traffic it was carrying was moving further. This has reinforced the view that rail is only competitive over certain threshold break even distance sectors. This conveniently overlooks the fact that rail was used routinely for some traffic flows (pit to power plants) of < 20 miles under the BRB/CEGB/NCB arrangements. Whilst rail's market was declining and then recovering albeit at a glacial and very low level through the 1990s and early 2000s road traffic continued to grow virtually unchecked. In general terms rail was losing market share in terms of volume (originating tonnage) and production (tonne/km) in a growing market for domestic freight transport. The welcome but small recovery of traffic activity by rail needs to be seen in this context.

The key questions that arise are:

- Whether privatization and liberalization contributed to the modest recovery of rail's performance.
- Whether the impact of privatization masked a failure to address fundamental underlying issues relating to low asset and resource productivity and a high cost base which still made rail an unattractive option for the vast majority of shippers.
- Whether rail can compete successfully in the other commodity and market sectors which it has been unable to do so far.

Certainly privatization led to a rapid period of high investment in traction and rolling stock to introduce greater cost effectiveness and reliability. The changes in the power sector's fuel purchasing model linked to the impact of the dash for gas fired power plants had a significant impact on how rail responded to service the evolving traffic patterns. Longer hauls from deep sea ports replaced a complex mix of medium and short haul flows from the coal fields to the power stations. The question of how the nationalised operation would have responded is largely academic. Suffice to say new traction had been acquired by the BRB ahead of this development in response to concerns over reliability and the cost of domestically sourced traction resources. Privatization did induce a sea change in the thinking and posture of the rail freight service providers to think and act "commercially" but it did not make rail any more competitive in those markets where it was poorly represented (the logistics and high value time sensitive traffic flows) and preferred to remain as a largely wholesale function. The failure to identify the requirements of shippers in detail and to provide adequate competing products and services is one of the major criticisms of the privatization process. Rail remains committed to the bulk commodity market and uses the big train model as its main product and service offer and appears to have little willingness or ability to move from this stance.

4. *Statistical reporting of UK surface freight activity—strengths & weaknesses*

The reporting of the performance of rail and other surface modes by the DfT is a serious cause for concern. The DfT publishes annual tables covering domestic freight transport activity by mode (table 4.1 1953–2007), domestic freight moved by commodity grouping on an annual basis and a short (10 years) analysis of transport production (tonne/km) by the various modes of transport including rail.

The statistics are useful as a general overview of performance but there are serious limitations on them. The privatization process and a series of other technical measures in reporting and recording complicate and disturb the integrity of the time series statistics and from a user perspective make comparisons drawn from them more tentative than should be the case. The deletion of the revenue share of the domestic freight market by individual modes of transport is also worrying. The defence that this is commercially confidential does not stand close scrutiny to the statistics produced by the US authorities on domestic and international transport activity. The commercial confidentiality argument in the UK founders on this counter position within a nation (US) where the commercial rail business operates under more open reporting requirements.

The commodity share statistics are valuable but also the target of criticism. They demonstrate rail's chronic over dependence on coal for over 36% of the total tonne km generated in 2007 (latest statistics available at the time of writing) with a significant input also from the aggregates sector. These two commodities amount to almost half of rail's traffic activity and point to an excessive focus on this type of traffic at the expense of more demanding sectors. Rails absence in the chemicals, machinery, transport equipment, manufactured and miscellaneous articles category is an indictment of its failure to secure any presence in these commodity flows which are four times rail's total recorded activity.

There are qualifications in the time series which make for complications in the analysis and comparison of the statistics. The absence of any sensible revenue share linked to commodity participation is a weakness in the reporting.

The production of Table 4.3 (Domestic freight Transport by mode 1997–2007) clearly demonstrates that in both production and activity terms rail's share of the market remains modest. From 1997 to 2007 rail held on average over the period a 7.54% share of the freight tonne/km and an average of 4.63% of the originating tonnage. A revenue share time series would be a useful appendage to this analysis.

Rail's share of tonne km peaked at 9% in 2006 based on the latest material published from a 7% level in 1997. Participation in originating tonnage has averaged 4.63% throughout this period with very little movement in the period since privatization. The continuing growth of road transport masks any gains rail has achieved.

5. On-going changes in the market structure, regulation and infrastructure provision

The model that emerged in the 1990s with a dominant player in the bulk and inter-modal sectors has evolved as each of these players has entered the others market to varying degrees of success. It is seriously arguable that the main beneficiaries of this have been the power generators trading off the two big players plus the smaller later entrants into coal hauling activity. The inter-modal market remains stubbornly limited to a 22–24% level of participation by rail in inland container movements. Any volume growth on rail has largely been as a result of the retention of this share on a rising market and not on the transfer of traffic from road to rail despite a lot of noise about exactly this. The railway companies have been competing amongst themselves but failed to recognise the inexorable growth of road transports share of the market making rail a small bit part player.

New entrants have arrived and some have failed. The ability to enter the market and to compete is a laudable development but this freedom is also constrained by high entry costs and complex scrutiny procedures (compare this with road transport!). Rail has offered new services and networks but has still not punched through to much higher levels of traffic participation. Being green and energy efficient will not in itself suffice if the competing modes are significantly able to outperform rail on virtually every aspect of product and service measures.

The regulatory regime in the UK complies with the requirements of the EC within the various railway packages. It does intervene and has penalised at least one of the major players for discriminatory activity (late release of unwanted train paths). The rail freight sector is a largely privatised entity (it does receive some support in the terms of freight facilities grants for terminals and various revenue support schemes have been exercised to support cost competitiveness for inter-modal services (this speaks volumes!). It has to co-exist with franchised passenger services of varying scale, competence and performance capability. Freight does suffer from lower operational prioritization in general and this can have an adverse impact on reliability and time keeping. The underpinning rationale for this in terms of the inability of orthodox rail freight equipment to interact with streams of fast moving passenger trains with a minimal delay or impact on the latter is something which appears to have evaded the main UK rail freight operators who seem intent on operating longer and heavier trains. Whilst this may be good for the low volume bulk commodity model it is not appropriate for easy interaction with passenger trains and the requirements of the logistics sector which is focused on the frequent and routinely reliable delivery of services with high levels of precision.

Rail freight access charges have fallen significantly in the past few years and rail freight should benefit from this but the retention of the large train model favoured by the private operators may mask this. The unwillingness to countenance anything other than the existing model of train operation is a key constraint.

Capacity limits on the network and the ability to operate more trains is an issue that is raised routinely in the rail technical press. On a mixed traffic railway the speed, acceleration and braking capability of high speed inter-urban passenger trains is at odds with that of the larger freight train formations which consume large amounts of track capacity as a consequence of the technology employed. The impact of this on disrupted train services or sequences is clear. The absence of adequate siding lengths (before any proposed train lengthening), loops, crossovers etc. can create problems. Running large formations in high passenger activity areas at peak times poses limits to freight train scheduling as a consequence.

The running of freight trains at night is increasingly compromised by the requirements of engineering possessions and new capital schemes (eg CrossRail) and this could have a deleterious impact on rail's capabilities. That said there does appear to be capacity on the network on a significant number of lines outside the passenger peaks and in the night hours. Opinions within the industry are divided on whether these are real constraints or whether determined action on the part of the FTOCs to push back this type of constraint is being adequately exercised. The ability to secure train paths at a much shorter lead time with paths, resources, schedules and timings completed as a composite screen based trade able transaction (as other transport industries routinely do) is something to be aspired to.

MONDAY 23 MARCH 2009

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|---------|---|---|
| Present | Bradshaw, L Dykes, L Freeman, L (Chairman) James of Blackheath, L Paul, L | Plumb, L Powell of Bayswater, L Rowe-Beddoe, L Walpole, L Whitty, L |
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Memorandum by the Office of Rail Regulation (ORR)

SUMMARY

- Statutory independence is critical to regulatory effectiveness and to creating a stable environment in which investment and competition can flourish.
- Our experience is that rail liberalisation in Great Britain has been successful, with an increase in freight volumes of over 60 per cent in the last 10 years.
- Charging and capacity allocation principles under current EU legislation are adequate.
- Changes to the current legislation should provide for strengthening the independence, competences and powers of regulatory bodies in all Member States.

INTRODUCTION

1. The Office of Rail Regulation (ORR) is the safety and economic regulator for the rail industry and is also the rail sector competition authority with powers concurrent with the Office of Fair Trading. It is a statutory body, with defined functions and duties set out in statute (the Railways Act 1993, as amended—most recently by the Railways Act 2005). It is led by a Board with a balance of non-executive and executive members, and funded by a safety levy and licence fees from the industry. The Board has the statutory freedom to balance the achievement of the objectives in the way that they think is best calculated to promote the public interest.

2. We would like to take the opportunity of responding to the call for evidence to provide our views on the proposed recast and areas where we believe the European Commission can best add value. We base our response on the points listed in the call for evidence.

3. Great Britain (GB) has been supporting the European Union's (EU) actions in opening the rail transport market. The full enforcement of the "acquis"¹ and proper functioning of the market should be the highest priority. The recent infringement procedures initiated by the European Commission against a large number of Member States should facilitate the development of a genuine free market in the relevant industry sectors. If properly implemented, existing EU legislation should foster a successful opening of the market.

4. GB rail freight since privatisation is demonstrably a success; its market share of land transport has risen from 8.5 per cent to 12 per cent, and the volumes of freight moved have increased by more than 60 per cent in the last 10 years. Total freight moved in 2007–08 was 21.18 billion net tonne kms;² this is primarily because the private sector industry has been able to compete, come up with creative solutions and generally seek to provide the services that the customers want. There are now nine freight train operators that compete on price and performance.

Whether the provisions on the separation of infrastructure management and train operators are sufficient; whether they should be amended or whether they should be replaced with a requirement for full ownership unbundling

5. The structure of the GB rail industry reflects full separation between infrastructure management and train operation, and full unbundling has been important to the liberalisation of the GB freight market. The freight market has been liberalised in GB since 1994. There are now nine freight operators running regular services, compared to three at the time of privatisation.

¹ The "acquis communautaire" is the combined body of EU laws, practices, principles and obligations, which is constantly evolving as it is developed further.

² Taken from *National Rail Trends 2007–08 yearbook*. This document can be found at <http://www.rail-reg.gov.uk/upload/pdf/375.pdf>

6. We share the objectives of the European Commission's transport policy in promoting more transparency, cost efficiency, non-discrimination, increased level of competition and reliability for freight. What is important is guaranteeing the independence (and transparency) of the infrastructure manager. Statutory independence is critical to regulatory effectiveness and to creating a stable environment in which investment and competition can flourish.

Whether the current provisions are adequate regarding the staffing and independence of regulators and whether statutory independence from government is desirable

7. We do not believe that the provisions in existing Directive 2001/14/EC are adequate regarding the independence and competencies of rail regulatory bodies.

8. We would strongly welcome a Commission proposal to enhance the independence and enforcement powers of rail regulatory bodies in EU member states where the position of the regulatory body is not well-established and is under-resourced.

9. We strongly believe in the benefits of having an independent regulatory body with adequate and proactive monitoring and enforcement powers. Independent regulation is crucial to the creation of a stable environment that attracts investment and promotes efficient delivery and in which competition can flourish where appropriate. It enables the regulator to pursue public interest objectives even where these conflict with shorter term and political objectives and provide the discipline to keep costs down. The funding arrangements reinforce this. In GB, third party investment in the railways is running at record levels currently.

10. Functional independence of the regulatory body already exists in GB. ORR is independent of ministerial control and is funded by a licence fee and a levy on the rail industry. We receive cost information from Network Rail as well as performance data on a regular basis and has powers to request any information it might need under the Railways Act.

11. Having regulatory bodies with adequate competences and powers will facilitate cooperation. In GB, domestic regulations cover cooperation with rail regulatory bodies and require ORR to exchange information about its work, decision-making principles and practice with other national regulatory bodies for the purpose of coordinating decision-making principles across the European Union.

Whether there remain barriers to entry due to factors such as safety certification requirements, and if so how these should be addressed

12. The European Railway Agency (ERA) is preparing proposals for the European Commission on a range of workstreams from the second railway package which are designed to help create an integrated rail area and reduce incompatibilities of national systems. One of the main initiatives is the preparation of harmonised criteria for the assessment of safety certificates. Although ERA has published draft criteria, the final version of these will not be agreed until 2010. Progress has been made in achieving mutual acceptance of certificates by different countries but it will take some time before the different approaches across Europe can be harmonised. GB has well developed assessment criteria for safety certification and ORR has been influential in the development of the proposals for a European-wide approach.

13. Recently agreed revisions to the second rail package directives on railway safety and interoperability and to the associated regulation setting out the remit for ERA will also go some way towards helping existing and new rail freight operators in the European market. The revised railway safety directive introduces a system of certification for "entities in charge of maintenance", designed to ensure that freight wagons are properly maintained and facilitating their cross-acceptance throughout Europe. The revised interoperability directive contains provisions to facilitate the placing into service of vehicles and reduce administrative burdens. This includes a provision for authorisation of vehicle types which will simplify the authorisation process.

14. In compliance with the Railway Safety Directive,³ we now issue safety certificates to duty holders in two parts. Part A certificates confirm acceptance of the safety management system of the railway undertaking. The Part A certificates should be accepted across all member states. Part B of the certificate confirms acceptance of the railway undertaking's provisions to meet network-specific requirements for safe operation. GB recognises Part A safety certificates from other member states, and applies only those checks required for Part B certification, as well as checks to ensure that rolling stock is compatible with the GB network. This approach is compliant with the Railway Safety Directive. In accordance with the Safety Directive, we issue certificates within four months of the submission of all information.

³ Directive 2004/49/EC, recently revised by 2008/110/EC.

15. Barriers to entry throughout Europe are also caused by the different and varying level of implementation of the First Railway Package across EU Member States, insufficient administrative capacity and powers of regulatory bodies, the lack of technical and operational harmonisation, and the failure to provide open access to service and terminal facilities across the whole of Europe.

Whether the current requirements regarding the setting of infrastructure charges are adequate, and if not how they should be amended

16. We believe that the current requirements regarding the setting of infrastructure charges are adequate. In general, this allows variable charges to be set on the basis of the costs directly incurred, with additional charges allowed in specific circumstances. We consider it important to retain the flexibility available in the way that charges equivalent to “costs directly incurred” are calculated and the methodology underpinning their calculation.

17. In general open access passenger and freight operators in GB pay variable charges, with some segments of the freight market paying an additional charge to recover some of the costs of freight only lines. Franchised passenger operators pay both variable and fixed charges.

18. The existing European legislation covers circumstances when higher infrastructure charges can be levied. We have some experience of the application of higher charges being considered by the infrastructure manager. We do consider that the current drafting of Article 8 paragraph 2 of Directive 2001/14/EC could be made more flexible to ensure that the charging mechanism does not prevent infrastructure improvements proceeding.

Whether the existing provisions regarding allocation of capacity both on tracks and at terminals are adequate and if not how they should be amended

19. With regards to track access in GB, we believe in the principle of clear and transparent principles and procedures, and we publish clear criteria for capacity allocation. We consider that the reasons for cancellation and modification of paths must be made clear. Criteria should be developed in advance and made public to all interested parties, perhaps through the Network Statement.

20. We would support a proposal by the European Commission to improve non-discriminatory access to service facilities and foster competition. In GB, there is a presumption of access for any applicant seeking access to rail facilities and services for the purpose of operating rail services. Applicants are entitled to services comprising the minimum access package as set out in the Directive and track access to service facilities and the supply of services. In relation to the main network, the infrastructure manager provides the minimum access package services through the framework agreements which are approved by the regulatory body. A number of facilities on the GB network (including terminals) are currently exempt from the access requirements of the Railways Act 1993 by virtue of The Railways (Class and Miscellaneous Exemptions) Order 1994.

21. An applicant is defined as a railway undertaking, an international grouping of railway undertakings or a body with public service or commercial interest in procuring infrastructure capacity and shippers, freight forwarders and combined transport operators. Access to services and facilities can be refused only where there is a viable alternative by rail under market conditions. Chapter IV, Article 30 of Directive 2001/14/EC gives ORR the power to determine appeals (made under Regulation 29 of the Railways Infrastructure (Access and Management) Regulations 2005) against a refusal to grant infrastructure capacity. In our guidance on Appeals,⁴ we have outlined our interpretation of the concept of viable alternative and market conditions.

22. That said, we have had no experience of determining an appeal made on the basis of (discriminatory) allocation of freight capacity and therefore its involvement in capacity allocation (for either terminals or track) has been limited.

23. We understand that other Member States may have taken a different interpretation in some of these areas, and we believe that access to rail-related services is a subject where it might be valuable to have a common approach.

⁴ *Guidance on Appeals to ORR under the Railways Infrastructure (Access and Management) Regulations 2005* can be found at <http://www.rail-reg.gov.uk/upload/pdf/275.pdf>

How a recast First Railway Package should relate to other EU freight transport policies

24. The First Railway Package focuses on rail and does not address interfaces with other modes.
25. We are aware of two recent initiatives of the European Commission:
- A draft regulation concerning a European rail network for competitive freight; and
 - A Greening Package including a strategy to ensure that the prices of transport better reflect their real cost to society in terms of environmental damage and congestion; a proposal to enable Member States to help make this happen through more efficient and greener road tolls for lorries; and a proposal for reducing noise pollution from rail freight.
26. With the growth forecast in rail freight across Europe, encouraged by the above initiatives, it is important that capacity allocation on the rail network takes place in a fair and non-discriminatory manner. Pre-approval of access contracts by the regulatory body can help ensure transparency and non-discriminatory access to rail infrastructure for all rail operators.
27. To conclude, we do not believe there should be significant changes to the First Railway package with regard to charging and capacity allocation principles.

6 February 2009

Examination of Witnesses

Witnesses: DR BILL EMERY, Chief Executive, and MR BRIAN KOGAN, Deputy Director, Access, Planning and Performance Directorate, Office of Rail Regulation, examined.

Q132 Chairman: A very warm welcome to you, Dr Emery from the Office of Rail Regulation, for coming along. I hope you can see the nameplates of the Members of the Committee. We have allocated not all the questions that you have had sight of before, and because we have got three lots of evidence sessions this afternoon we are going to be quite succinct in the way we ask questions and perhaps you would help us by being succinct also. Would you like, for the record, to introduce yourself and your colleague and then we will commence.

Dr Emery: I am Bill Emery. I am the Chief Executive of the Office of Rail Regulation, that is the independent safety and economic regulator of Britain's railways. My colleague here is Brian Kogan, who is our Deputy Director in our Access, Planning and Performance Directorate and who has a considerable amount of information and knowledge about dealing with the freight aspects of our work. He also is interested and involved in our European policy work.

Q133 Lord Whitty: The main remit of many regulatory fields is in competition, but can we demonstrate the correlation between competition in the UK rail freight market and the growth of that market, or can the growth be due to other factors which can be directly attributed to the market structure, for example the changes in the coal and electricity industries, much of which would have happened anyway, and are there any other factors besides the regulatory competitive framework that we should take into account?

Dr Emery: We consider there is some correlation between the improved competition in the rail sector and the growth in traffic. It is not absolutely

definitive, particularly in terms of the heavy haul sector given the scale of the growth in coal and its moving from Scotland down in to the coal stations. Since privatisation, when this regime was brought into place, the rail freight market share of land transport has grown from around 8.5 per cent to 12 per cent in the last 10 years. There has been a substantial amount of growth in rail freight and volumes of freight moved are up by 60 per cent. We think there is a clear correlation between that and the competition which has come about in the rail freight sector. There is a whole series of reasons for that increase in traffic and in a sense the growth in the number of freight companies responding to liberalisation has been one of the many contributory factors. I can go on at length about these things. I think there are many factors, but primarily the improved competition, the creation of the regulatory model, which clearly provides a means by which there is certainty for the freight sector, and choice for freight customers, which is, I think, a major aspect as well.

Q134 Lord Powell of Bayswater: Coming on to the general issue of the recast of the package, is this really necessary or is it not just enough for the Commission to get on with enforcement proceedings and make people implement what they have already agreed to? It seems to me there is a danger that a recast just gives people an excuse to say, "Well, there's no point in implementing what we've agreed to because it's all going to be recast anyway and we can wait until that happens"? Is that a risk you share?

Dr Emery: We are very fortunate in this country to have a regulatory model which has been developed for the purposes of a privatised railway. It is quite

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clear that we are, as a regulator, in favour of an early recast of the package. We support the proposals to strengthen the enforcement powers competences and independence of regulatory bodies. We see there is merit in enhanced cooperation. We support extending the scope of the minimum access package to ensure full open access to all rail-related facilities. We see there is merit in establishing a clear separation between the infrastructure managers and the train operators, implementing incentive-based performance regimes and for greater transparency. All those things could be helped by an early recast to give us more clarity across Europe and to provide a climate which the freight operators can then exploit for the benefit of freight customers across the whole sector. We do not see any reason for delay. We think it would be useful to have some clarification in certain areas, so we are in favour of getting on and doing it, and doing it quickly.

Q135 Lord Powell of Bayswater: There is no risk of other countries using this as an excuse to delay? They know what they are supposed to be doing now, but they just are not doing it, a lot of them.

Dr Emery: You will hear lots of evidence, my Lord, on these things from other players. We hear it second-hand through our discussions with a number of the freight operators and through the Rail Freight Group and even from the privileged perspective of being a regulator who is looking at a liberalised market, working properly, we think there is scope to re-energise this provided the European Commission does not delay.

Q136 Lord Paul: Unbundling has been described as a “key first step”. How far will solutions to other problems in rail freight flow from that unbundling?

Dr Emery: I think that separating infrastructure from operations has certainly been important to the successful liberalisation in the rail freight market and we think it is quite important to have a strong and independent infrastructure manager, together with a regulator who is properly resourced and competent and who uses its powers effectively. Whether or not it is a critical first step, from the evidence we have got here that must be, I think, one of the factors why we have a dynamic freight market in Britain. There are other methods, but those are for other Member States to resolve.

Q137 Lord Paul: I was going to come to that. Do other areas need regulating, and if so is this recast First Railway Package the right medium to address these issues?

Dr Emery: As I said in answer to Lord Powell, we support various parts of the recast and I think it covers the main areas requiring regulation, and with clarifications will be sufficient. The risk as with all

European legislation, is that it is trying to cover everything in a single initiative and that can involve delay. It is unnecessary. I think clarification would be useful. It would provide a spur. Other Member States can, and do, look to our experience and we are very happy to cooperate with and help them, to share our experiences so that they can pick the best bits that could be transferred and learn from that.

Q138 Chairman: May I just press you on how quickly this needs to be implemented or recast? Do you believe there is enough evidence which the Commission has already gathered or needs to gather to permit a decision being made on the recast this calendar year, or in your judgment is this likely to slip because of the complexity of the problem?

Dr Emery: I am not terribly close to this and I will ask Mr Kogan to answer it in a bit more detail, but the advice we are getting is that there is sufficient evidence and there are useful things that can be done, and there is no real reason in our minds for delay. That is where we stand.

Mr Kogan: What I would add to that is that plainly we do not know precisely what evidence the European Commission does have, but we do know it believes it has enough evidence to launch infraction proceedings against nearly all of the Member States. That must be a very serious concern to the European Commission. It must be said that there is a number of areas where implementation has fallen short of the requirements, so that made it quite urgent that things be done quickly.

Q139 Chairman: You would argue for recast rather than prolonged infraction proceedings?

Mr Kogan: Because some of the areas where poor implementation has arisen are to do with perhaps vagueness in the original directives, in particular access to terminals and freight-related facilities where there is absolutely no point having open access to the lines if they cannot get into a facility at the beginning or end of the line, we think it would be very important to have that confirmed and clarified.

Chairman: That is a very important point. I am grateful to that. Lord Powell has got a supplementary.

Q140 Lord Powell of Bayswater: I was going to build on that. Your answers are fine as far as the UK is concerned, we have no problems with that, but you take a pretty charitable view of the activities of some of the other countries and their railway industries. Do you really think that many of them want to embrace the sorts of changes which you have been talking about and which you would hope to see in a recast package? My impression is that several of them will hate it.

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Dr Emery: We get quite a lot of comments from colleagues in the rail freight sector that reflect your view and in that sense a much clearer recast of the first package would remove some of the implied flexibility there and would in fact possibly force the issue a little bit. A lot of people within the British railway sector would have been very strongly against the kind of liberalisation which has delivered a railway which today is performing at greater levels of punctuality than ever before and passenger satisfaction is at a greater level than ever before. This is a system which, after some problems in the early part of this century, is actually getting its act together.

Mr Kogan: I think we have got to remember—it is a statement of the obvious really—that liberalising access to the network and making people become more efficient is not going to be a very pleasant process for a lot of people, but it does involve them doing things more cheaply and better, so it is inevitable that people will object to that kind of change, which is why it is the sort of thing which requires legislation.

Q141 Lord Plumb: We seem to have different opinions on the strength of the regulator. Can vertical integration work if there is a strong regulator; and if not, why not?

Dr Emery: In principle, I am sure that with a strong, properly resourced regulator which is prepared to utilise the information it collects and the power it has to force the vertically integrated railway to provide proper access to third parties who want to use it, then it is possible. In some of the areas where we still have some vertical integration we are seeing that it is quite difficult—and, of course, if you are going to use all those powers then it will become increasingly problematic for the vertically integrated enterprise to actually comply with all the rules and it will probably move towards wanting to separate itself anyway. That has happened in other sectors. What we have seen in Britain is the importance of having an independent regulator, one which is properly resourced and which uses that information, has access to good information and can hold the infrastructure manager to account and can act to make those difficult choices regarding the use of capacity on the railways which would not be made so easily if there was a vertically integrated model.

Q142 Lord Plumb: Do you believe you can achieve that?

Dr Emery: I am in a position where, fortunately, Parliament has decreed a model here which makes it easier for a regulator who is dealing with an unbundled railway.

Mr Kogan: I think it is important to note that although Network Rail itself is not vertically integrated, indeed it is only able to run trains if we

consent to that under its licence, we do have a lot of examples of railway facilities which are run in this country by train operators who are then required to allow their competitors to use those facilities. So, for example, both DB Schenker and Freightliner own and run freight facilities which they allow, sometimes reluctantly, their competitors to use. Equally, on the East Coast Mainline, National Express East Coast allows Grand Central to use York station. In those cases there have been arguments and those are the type of cases where arguments arise. Those are the kinds of cases where we get involved and we have to decide the dispute, and we are able to do that.

Q143 Lord Rowe-Beattie: Dr Emery, do you consider it necessary to have an EU level regulatory body specifically to oversee cross-border activities?

Dr Emery: Our position is that this would be premature. We do not rule it out, but it is premature in the sense that we believe there is a number of reasons, given the type of railway access issues and the local nature of some of those issues, to suggest that action should first focus on close cooperation between national regulatory bodies, properly established, properly resourced. This would be the preferred course.

Q144 Lord Rowe-Beattie: You do not think it would be helpful to have an established body to oversee?

Dr Emery: I am not certain that it is necessary and I think it would bring other things as well in the sense of how you deal with, not only cross-border issues but also all the local bits and pieces which have to be resolved. So I think the first step should be to have empowered and competent national bodies and build on that. IBM did a report on these matters a few years ago and identified a whole series of characteristics for these bodies. That would be our preferred course.

Q145 Lord James of Blackheath: How far do you think it is possible for the regulators to work together across national boundaries and what objectively can they achieve together to facilitate the operations for the freight operators?

Dr Emery: I think there is quite a lot of potential for cooperation. We are under a duty to cooperate and we do cooperate. Mr Kogan does a lot of that, so I will probably ask him to give some examples of this cooperation.

Mr Kogan: I think it is essential for two reasons, actually. The first reason is that it is extremely helpful for different regulatory bodies to speak to each other about the way they do things, because we are all trying to discharge the obligations placed on us by European legislation and in many ways because we have been doing it rather longer in GB, we have developed an approach to some of these problems in a way which is helpful to our colleagues in other

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countries. That is one reason. The second reason is that plainly for international services it does not make sense to deal with issues purely in one Member State without thinking about the knock-on effect in adjoining Member States. So it is essential in those cases that Member States do get together and I know that the existing directive already requires regulatory bodies to cooperate. This requirement is also formalised in the proposal for the freight-oriented network regulation.

Q146 Lord James of Blackheath: I think you are saying there is goodwill and determination amongst regulators to make it happen?

Mr Kogan: In many Member States, yes.

Q147 Lord James of Blackheath: But not all?

Mr Kogan: I think you have to look at the different circumstances in the different Member States. In many cases regulatory bodies do not have full independence, which we do. They do not have the kinds of resources and funding which they need to discharge those responsibilities, so it is actually quite difficult for some of them.

Lord James of Blackheath: Thank you. I think your answer is going to be a little deeper on reflection.

Q148 Chairman: Before turning finally to Lord Bradshaw, can I just ask a question about the distinctive problems of track access as opposed to freight train path allocation. These are different problems. Which, in your judgment, is the bigger problem that we have to address within Europe?

Mr Kogan: These are two completely separate problems. I am not sure I could say that one is more important than the other; they are both important. Capacity allocation is to do with the way in which the timetable is put together in the first place and it relies on the kinds of contractual rights which are contained in framework agreements. That is to do with the actual paths that are put into the timetable. Train regulation is something which happens on the day when there are problems or difficulties, which as we all know happens most days, and it is to do with the kinds of priorities applied by the infrastructure manager. Put shortly, which train will you allow to go first? If there is a problem, do you allow the freight train, the express train or the local commuter train to go first? Our view on that is that it is really important that the infrastructure manager has transparent criteria which it provides to the signalman so that he or she can decide which of those trains should actually be signalled to run first. In some Member States it is a very simple rule and the rule is that if there is a delay, the freight train waits. That is something we would be opposed to. It should not automatically be the case that the freight train or the local commuter train waits; it should depend on the

circumstances; in the case of freight to do with the type of freight, the type of journey and the type of contractual rights that the train is run under.

Q149 Chairman: That may be right, but how would we ensure that the very simple rule that you envisage, or at least a rule that you would not like to see implemented (which is that if there is a delay, the freight waits)—how should more enlightened regulations in terms of allocation of paths be made on a European basis? Through a directive?

Mr Kogan: Again, we are talking about two different things. The allocation of paths is something which is done ahead of the day when the paths run, and those again should be based on established criteria. That is the requirement of the current legislation. That is the way it is done in this country and I do not know exactly how it is done in other Member States.

Q150 Lord Bradshaw: Just taking up that point, of course what you said is that train paths can be contractually planned and then operated on the day, but there is considerable evidence that a great deal of capacity is wasted because train times are slack in order that contractual agreements can be honoured and therefore you are getting many less trains through a piece of railway than you could do if you had a more dynamic system. The question is about ERTMS. I have got evidence from somebody else that the freight business is hoping to run heavier, longer trains if the signalling system is brought up to the standards of the European Rail Traffic Management System. This system has been in the offing for 35 years and I believe is only working in about two places in Europe, and not here. As you are the safety regulator, how much confidence can we have that this is happening?

Dr Emery: The progress on the ERTMS roll-out within this country is relatively slow, I will agree with that. The Cambrian trial is on-going in its roll-out and it will take many years, and if you look at the programme to get it installed across the country it is going to take decades to do that. You are right to say that there are areas on Britain's railways where there is growing congestion and where there is a greater number of applicants than there is access available in the normal way. This has been clearly the case on the East Coast mainline, where we have had to deal with a number of competing applications for access. There is considerably more capacity even on the basis of more conventional methods of timetabling than was thought originally. Pressures exist and the regulator is in a position to request a proper study of these matters, and that is what we are doing. As the network becomes more congested in this country, then those capacity issues are likely to spread wider. Across Europe, I think it is a big issue and if the aspirations of the freight industry and the aspirations

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of passenger train operators are met and we get growth, then we are going to have to deal with how to maximise the potential of running trains down the mainline railways. That is the only way you are going to grow passenger numbers and grow freight and get it off the roads. Those are all laudable ambitions. The railway has got quite a challenge to do that. We have set them quite a stern challenge here through a determination to improve performance, to cater for increased growth both of freight and of passengers, and improve the cost-effectiveness. Those are key challenges for all in the rail industry to rise to over the next five years. Long-term there are some really big challenges.

Q151 Chairman: The last question, at least from myself, is that just for the record I think it would help the Committee if you could describe the relationship which you, as chief executive, have with other colleagues in the office, with the chairman, with ministers and with other agencies within the UK Government simply to underline the degree of independence you have?

Dr Emery: The Office of Rail Regulation has an independent board and that board has a non-executive chairman. The board membership is 11; there are five non-executives and five executive

directors on it. They are appointed by the Secretary of State, but having been appointed we are then left to deal with how we carry out our duties which have been set down by Parliament. I lead the office and in a sense once the board has decided upon its strategy and the business plan, then I leave the office—and we have around 320–325 people at the moment—to deal with safety and economic regulation matters for Britain. We think it is absolutely essential that there is a regulator. We keep in close contact with the governments, both in Scotland and in Westminster, because they are critical funders of the railway, so there is a dialogue between us on a regular basis. The railway is characterised by numerous meetings between lots of parties on all things, and that is a feature of the railways in Britain. We have a meeting every week where we go around the table and it will be a rare week when there are not 10 or 15 meetings on different topics going on between different parts of the railways. That is part of the way the railways work. We are independent. We report to Parliament. We occasionally have taken diametrically opposed views in carrying out our duties from what would be wished by ministers and officials in DfT.

Chairman: That is an interesting point to end on. Thank you very much indeed for very helpful evidence from both of you. Do, please, remain if you wish for further evidence from others. Thank you.

Letter from the European Rail Freight Association (ERFA)

1. ERFA, the European Rail Freight Association, representing the independent and private rail freight operators and shippers, is very honoured to be invited to submit evidence to the House of Lords Select Committee on the European Union Inquiry into the Recast of the First Railway Package regulating market access rights.

2. ERFA was set up in Brussels in July 2002 to represent the interests of the new independent and private “open access” rail freight operators and shippers. Today, ERFA comprises 21 rail freight operators and customers as well as seven national rail freight associations from 17 countries in wider Europe. ERFA’s main objective is to open the European rail freight market, to make it fit for competition and thereby expanding the market share of rail freight. ERFA’s activities span all aspects to achieve this, from legal over technical to administrative and social issues.

3. All our company members offer international rail freight services and products, at least across one border. The problems they encounter are manifold and range from excessive waiting times at cross-border stations, no or limited access to rail related services, low quality or changing train paths, energy supply at excessive prices, little guarantee that their commercial data is protected when dealing with an infrastructure manager (IM), etc. Since 2005, ERFA has urged the European Commission to take action on these problems by enforcing the current First Railway Package as well as to revise its contents so as to allow unlimited access to the entire market by all rail freight operators and not only the incumbents. In November 2005, the European Commission published the results of a first study called “Railimplement” into the implementation of EU Directives of the First Railway Package, namely 2001/12/EC, 2001/13/EC and 2001/14/EC. Most of the stakeholders interviewed within the framework of this study “see the market opening process as far from complete, requiring the preparation and adoption of legislation aimed at strengthening transparency and fairness to enable new entrants to compete with incumbents.”⁵

⁵ p. 33 of Railimplement Study, Final Report, Steer Davies Gleave for the European Commission, November 2005

4. This study was followed on 3 May 2006 by a Communication on the implementation of the railway infrastructure package Directives (“First Railway Package”), COM(2006) 189 final.
5. In December 2006, the European Commission adopted a more dedicated study “Servrail—Assessment of present and likely future conditions of providing rail related services”.⁶
6. Following the studies and reports into market liberalisation, the European Commission launched two almost parallel initiatives, the first one being the “infringement process” which was started on 26 June 2008 by sending out letters of formal notice to 24 Member States regarding their failure to implement the First Railway Package legislation properly;⁷ the second one being to start the so-called “Recast of the First Railway Package” via a third study to assess key options for developing the rail market from an economic, institutional and legal perspective which will serve as a basis for the Recast exercise within the EC. This study was launched in autumn 2008. The first findings of this Recast study show that eight years after the adoption of the First Railway Package, only 10 EU Member States have implemented more than 50 per cent of the EU measures. The next milestones of this recast exercise foresee the finalisation of this study by February 2009, followed by an inter-service consultation of the European Commission services and a sector consultation in April 2009. The draft legal text is expected to be published in June 2009 and the adoption of the final legal text for October 2009. The timeline for both, the infringement and the recast exercise is shown in annex 1) to this letter. It is based on information provided by the European Commission.
7. The further market opening is considered as absolutely essential by all members of ERFA but also customers and shippers. The current legal framework has led to a market where 45 per cent of the market is fully open to competition, ie block trains running between a given start and end point. A further 15 per cent of the market is made up of intermodal traffic, which is liberalised as long as open access to terminals or shunting yards is possible. The remaining 40 per cent of the market, ie single wagon traffic, is fully dominated by the incumbents as this type of business involves a high degree of rail-related services (shunting services) and facilities (train formation facilities), where new entrants continue to face obstacles. This segment has by far the highest growth potential and the customer demand in the entire EU is exceeding by far the offer (of the incumbents).

SPECIFIC ISSUES

A) *Whether the provisions on the separation of infrastructure management and train operations are sufficient; whether they should be amended or whether they should be replaced with a requirement for full ownership unbundling*

8. The separation of infrastructure management from train operations is the main feature of the European rail market opening. The idea behind this form of market organisation is to create IM's which are, at least in their working structures, independent and neutral. In principle, this should provide them with important incentives to market their infrastructure effectively and vis-à-vis all “clients”, independently of their size, origin or organisation.
9. Although incumbents argue that the type of separation does not have any influence on the traffic growth or the degree of market opening (measured in the quantity of new entrants on a given network competing against the national flag carrier), and with individual incumbents even arguing that being in charge of the infrastructure would place them at a competitive disadvantage vis-à-vis those who do not have to manage a network, the motivation to keep control over the infrastructure can only be understood as an instrument to maintain control over a monopoly asset and the relevant subsidies going along with this.
10. It is highly questionable whether the so-called independence or so-called “Chinese wall” between an integrated IM and its national flag carrier (incumbent) can be regulated within an integrated model (holding structures, delegated infrastructure manager) and in a manner and at an acceptable cost, that would be satisfactory to all non-incumbent operators, especially in terms of protection of sensitive data. The dawn raid of the French competition authorities on 20 November 2008 on SNCF and its subsidiaries provides evidence that a stronger independence is essential to provide for equal and fair market access conditions and information. The allegations against the SNCF group involve: abuse of power by SNCF as delegated infrastructure manager to the disadvantage of its competitors (abuse of commercial information of its competitors to the advantage of SNCF via common IT tools of SNCF and SNCF's infrastructure department), delayed communication of technical information to competitors and customers (essential

⁶ SERVRAIL study—Assessment of present and likely future conditions of providing rail-related services report, Steer Davies Gleave for the European Commission, December 2006

⁷ The main shortcomings involve: lack of independence of the infrastructure manager in relation to railway operators; insufficient implementation of the rules of the Directive on track access charging; performance of the railway network and the lack of incentives of the Infrastructure Manager to reduce costs and charges; failure to set up an independent Regulatory Body with strong powers to remedy competition problems in the railway sector.

facilities, reference documents) and foreclosure of locomotive and wagon rental opportunities (by delaying homologation procedures or taking off certain wagon types from the market).

11. Another argument against integrated structures is the fact that due to the current legal framework in the EU with integrated models and monopoly energy supply, more than 40 per cent of the costs of new entrants are directly influenced by their competitors (infrastructure charges, energy prices).

12. Furthermore, infrastructure facilities and services essential to run intermodal or single wagon traffic which are operated by a national flag carrier are mostly not open to new entrants or only at excessive prices. In several countries, there are regions which are dominated by the national flag carrier via preventing access to or excessive pricing of these facilities. A frequent example is access to and pricing for the use of diesel fuelling stations⁸ or traction energy supply. Furthermore, flag carriers in a holding model can—quite legally—obtain infrastructure or energy prices at a reduced cost because of the holding structure, therefore providing them with a considerable competitive advantage over their external competitors.

13. Finally, even if operational problems may have been solved to some extent, a more general problem continues to exist, ie the conflict of strategic interests. There are cases, in which the more general interest to grow transport may not coincide with the very interests of integrated incumbents. ERTMS⁹ (European Railway Traffic Management System) investments benefit all operators, incumbents but even more new entrants with smaller fleets. The ERTMS deployment has so far especially been made in those countries where there has been a very strong independence of the IM from the RUs (unbundling), such as The Netherlands, Spain. The vision of the IM in terms of bringing more rail freight on their network for the benefit of all is clearly distinct from the one in other countries.

14. Therefore, the current organisation separation (eg the German holding model) is not sufficient to prevent abuse of a dominant position of the national flag carrier over its direct competitors. This can only be achieved by full ownership separation (eg UK model).

B) Whether the current provisions are adequate regarding the staffing and independence of regulators and whether statutory independence from government is desirable

15. The current scope of competence of a Regulatory Body (RB) according to Directive 2001/14/EC encompasses:

- Network statement.
- Criteria in network statement.
- Allocation process.
- Charging scheme.
- Level of infrastructure fees.
- Safety certificate and standards/rules.

16. Furthermore, the same Directive requires the RB to be independent in its organisation, funding decisions, legal structure and decision-making from any infrastructure manager, charging body, allocation body or applicant.

17. Unfortunately, the situation in most EU member states is not compliant with the EU Directive. The infringement procedure launched by the EC in June 2008 against 24 EU Member States encompass all aspects of the RBs:

- Regulatory Body does not have sufficient powers to prevent and stop anti-competitive behaviour of all market actors.
- Insufficient accessibility of the Regulatory Body.
- Insufficient independence of the Regulatory Body from the (incumbent) Railway Undertaking and/or the Infrastructure Manager.
- Regulatory Body does not have sufficient powers to enforce its decisions and requests for information.
- No provision for participation of the national regulator in international cooperation of regulatory bodies. This requires art. 15 and 31 of the Directive to be almost identical. RB's need legal guarantees for the exchange of information relating to specific processes, eg conflicts for cross border train paths.

⁸ In Belgium, a new entrant had to set up its own fuelling station because of the refusal of access to the facility of SNCB (although financed with public money). In France, the access and service quality varies daily.

⁹ For more information about ERTMS, please refer to: <http://www.ertms.com>

- Insufficient powers and resources of Regulatory Body to monitor competition in the rail service market. This requires to clarify Directive 91/440 that this is a clear and distinct task of the RB and that the latter has to publish the result.
- Insufficient supervision by Regulatory Body over negotiations between applicants and Infrastructure Manager concerning the level of infrastructure charges. The risk of the main user (incumbent) interfering with the pricing/pricing conditions/timetables, etc. of infrastructure and its related facilities in integrated structures can be prevented by including the RUs in these negotiations as well.

18. As a matter of fact, it is especially in those Member States, where the RB has met the requirements of the European legislation (UK, D, NL) that rail freight volumes have increased considerable over the past decade: UK + 74 per cent, NL + 72 per cent, D + 52 per cent.

19. As the RB is meant to be an appeal body against discrimination and market failure, there is an urgent need for not only enforcing the current legislation regarding RBs but also for extending their competence from an *ex-post* to an *ex ante* control of and decisions on all rail freight related aspects. Furthermore, the competence of RBs should be extended so as to deal also with cross-border aspects (eg refusal of access to cross-border stations or closure of these stations in line with the traffic timetable of the relevant national flag carrier). In addition, a much stronger consultation and reporting of the RB is necessary. This also includes its full independence from the Transport Ministry.

20. According to ERFA, an effective RB would fulfil the following criteria:

21. In general terms:

- The RB is “visible” and accessible (google, website, publications, etc).
- The RB is clearly independent according to Article 30.1 of 2001/14.
- The RB is managed according to corporate governance rules (management, processes, output).
- The RB communicates informally and actively with market actors.
- The RBs cooperate stronger on EU level to exchange best practice and experience.

22. Competences:

- The role and competencies of the RB are clearly defined and made public. They are identical throughout the entire EU.
- The RB is fully independent from the Ministry of Transport to avoid any potential conflict of interests. Alternatively, instructions of the Ministry of Transport to the RB should be published and eventually be notified to the EC.
- RB’s monitor market development and competition in the rail services market (eg supply, energy, etc.) and all issues for which it is responsible, especially but not only those under 2001/14 Article 30 (network statement and its criteria, capacity allocation, charging, safety certificates, enforcement and monitoring of safety standards and rules). One of the main tasks is and must remain the full independence of the IM from any RU (unbundling).
- RB’s are given the necessary power to honour relevant EU law. This implies that they have genuine legal powers and their decisions have immediate effect.
- The RB has a real legal, economic, technical and practical understanding of rail.
- The RB staff receives all necessary training and consultation powers to acquire this knowledge.
- The RB deals also with cross-border aspects, especially cross-border agreements. So far, they are allowing the respective national incumbents only to cross borders without further stops or problems.
- The RB is legally reliable for correct EU implementation in its relevant Member State vis-à-vis its government and the EU. To allow any RB to ensure this role, it should have the right to impose and fine delayed, incorrect or incomplete information to be delivered to the RB. This includes also legal measures against any market actor refusing to give information at all.

23. Procedures and decisions:

- The working procedures of the RB are clearly defined and made public.
- The RB has a legally enshrined *ex ante* power (consultation and decision) as well as an *ex post* role power (appeal).
- Decisions of the RB are made public.
- Scope, procedures and follow-up of complaints and sanctions are clear to all market actors.
- The RB is entitled to select & hire its own staff. By doing so, it will not see former or still active RU staff imposed on its own structure.

24. Publications:

- Up-to-date public register (licences, certificates, access, charging, agreements, exemptions, enforcements, penalties, administrative issues,).
- Examples of “best practice” are made public to all (including the EC).
- Annual Report, including a market monitoring chapter.
- The information should not only be delivered to the Ministry of Transport, but also to the national Parliament and the EC.

C) *Whether there remain barriers to entry due to factors such as safety certification requirements, and if so how these should be addressed*

25. The possession of a safety certificate is a prerequisite for operating rail freight services in the EU and it is also a prerequisite for obtaining a licence. In most of the EU Member States the body in charge of allocating safety certificates (often the NSA) pertains on the Ministry of Transport. The most frequently encountered barriers to safety certification are set out below.

26. The available resources and competences both with the Ministry of Transport, the National Safety Authority and the Regulatory Body are not sufficient to produce legally stable processes and competent decisions. In some member states, the National Safety Authority is in charge of both, producing a national law and controlling its implementation, and sometimes the Ministry fully depends on its infrastructure manager for safety advice.

27. The information of the authority is often available in the national language only and is also too complex. In some countries, an applicant RU has to consult over 150 legislative texts and regulations. A single package with all relevant texts should be made available to all applicants.

28. All information of the RU has to be translated into the relevant national language, including elements which are already certified in another EU Member State (eg part A of the safety certificate). English should be a fully recognised 2nd language in order to speed up and facilitate access to foreign networks.

29. The financial conditions for obtaining a license or a certificate are often not known.

30. The timeframe for certification processes varies between the different EU Member States, ranging from four months to one and a half years. Comparable processes with clear milestones and deliverables throughout the EU would reduce cost and time for RUs wishing to run cross-border services. For the sake of transparency, a benchmarking should be introduced that allows a direct comparison between the procedures and their duration between all Member States.

31. As the safety certification encompasses three elements (technical, personnel and rolling stock approvals), different bodies are involved in this process (National Safety Authority, Regulatory Body, Ministry, Infrastructure Manager) delaying and complicating the process. A one-stop-shop approach with open and traceable processes for the applying RU is necessary in each Member State.

32. With integrated structures, like eg in France (delegated infrastructure manager, SNCF GID) competences are split artificially or are not logical. Whilst the infrastructure manager RFF has mainly a conceptual opinion on safety, it only acts as a coordinating and monitoring body for the optimum slot allocation and investments and projects development. The infrastructure part of the main incumbent SNCF (SNCF GID), however, provides safety advice to the French safety authority EPSF. Although RFF has set up a one-stop-shop, the split of competences creates competition and confusion. As already mentioned under question a), integrated organisations should be dismantled and the tasks especially for safety certification processes clearly attributed. The exclusive commercial contact for all RUs should be the IM only but not a branch, department or a controlled body of the incumbent.

33. In some Member States, safety certification is abused as an instrument to foreclose the national market (eg Poland requiring double drivers first on the new generation of Class 66 locomotives of a new entrant and then for all Class 66 generations. NB: the national flag carrier does not run Class 66's). There is no appeal body to prevent Member States and their public authorities to abuse safety for anti-competitive purposes. To prevent this, the competence of ERA (European Rail Agency) should be extended accordingly. In some Member States, the national flag carrier is even tolerated to operate without a valid safety certificate (eg Hungary) whilst new entrants are forced to go through lengthy and unclear safety certification processes. There is no appeal body for safety-related matters prohibiting this abuse.

34. A further serious problem is the restriction of the safety certification for RUs to single or a restricted number of lines of the network (as it is the case with Belgium or France). The Member States and their respective IMs should be requested by the EC to justify the reasons for this approach.

35. Almost all RUs wishing to operate cross-border traffic have problems with the certification of their rolling stock. This is due to the fact that safety rules are still national and cross-acceptance or harmonised certification procedures on EU level do not exist. Furthermore, safety falls under national competence and Member States still have the right to impose national rules which are not in line with eg EU TSIs (Technical Standards of Interoperability) or which foster cross-border operation. The competence of ERA in speeding up and harmonising EU-wide cross-acceptance and homologation procedures for rolling stock is crucial in this field.

36. In the case of cross-border agreements between flag carriers for accepting their relevant locomotives, these have to be abolished or made accessible to all RUs. So far, certain cross-border sections are operated by the relevant national flag carriers only. This would entail a more extended scope of the Regulatory Body to deal with cross-border issues as well.

D) Whether the current requirements regarding the setting of infrastructure charges are adequate, and if not how they should be amended

37. For the pricing of infrastructure charges, the provisions in art 7 and 8 of Directive 2001/14/EC apply. They allow for:

- Track access charges covering the directly incurred costs.
- Scarcity costs during congested periods.
- Cost recovery mark-ups (if the market can bear this).
- Compensation schemes for unpaid environmental, accident and infrastructure costs.
- Specific investment mark-ups.
- Performance schemes.
- Reservation charges.

38. The charges are to be collected by a charging body that is independent in its legal form, organisation and decision-making from any RU.

39. The main problems with infrastructure charges are listed below:

40. Currently, it is left to the Member States to require the IM to provide all necessary information on the charges imposed.

41. National charging systems are sometimes too complex, not allowing RUs to calculate the correct price for a route. In several cases, special software tools are necessary (provided by the national IM). However, the timely provision and updating of this software has been problematic leading to situations in which new entrants were informed late or not at all about price changes or IT updates. This has caused loss-making business to certain new entrants.

42. The GTC's (general terms & conditions) of IMs for access to their network include "blanket clauses" allowing different interpretations and giving the IM a discretionary power. Such power allows for discrimination between the different RUs because of the lack of documentation or further information on the interpretation of these clauses and the inability of the RU to calculate the exact track access charges.

43. EU infrastructure charges are calculated in many different ways. They consist in a base fee, plus individual fees (speed, density of infrastructure usage, wear & tear), plus reservation fees, "malus" fees, other fees, etc. The EC must work towards the harmonisation of the structure of infrastructure charges via different legal initiatives, ie the Recast of the First Railway Package, the adoption of multiannual contracts for rail infrastructure quality and the EC proposal for a regulation concerning a European rail network for competitive freight.

44. EU infrastructure charges vary in their scope: Sweden 0.371 to Poland 5.9 €/train-km—the CEE charges are widely prohibitive to new entrants. A unique scheme of track access charges is attainable and desirable—levels of charges should converge in the long term.

45. Member States charging high fees for the use of rail infrastructure are generally those which do not charge anything for heavy duty vehicles use on national highways. As an example, the highest rail infrastructure charges are collected in Central and Eastern European countries whereas most of them do not impose any fee for road usage. This means that in case of changes of these provisions Member States will have to require their IM to balance their accounts with a long-term vision to self-financing. This may have a detrimental effect for the attractiveness of rail in comparison with other modes of transport.

46. The EC Directive allows for discounts, provided they are available to all users on the infrastructure, for specified traffic flows or specified infrastructure section. In several Member States, especially with integrated organizations, quantity discounts are allocated to the national flag carrier only. It is also not clear whether the flag carrier has to pay any infrastructure charges at all.
47. The border mark-ups are not transparent. Uncoordinated setting of mark-ups risks losing freight to other modes. IMs should join to negotiate mark-ups along international corridors.
48. Specific mark-ups for shunting or terminal access have increased and exceed the level of what the market can bear. In Italy, Trenitalia has increased its prices for the usage of their ports & terminals in 2008 by + 76 per cent and for shunting services in the past three years by + 300 per cent. There is no reason why the market can bear that the EU rules are not correctly applied as they create a major barrier to market entry.
49. Performance schemes for IM's are highly desirable and should precede performance schemes for operators. However, they are only applied in a few EU Member States so far and are very complex (not user-friendly).
50. In some countries, the reservation fees are used as an additional income for the IM by not reimbursing to the RU the reservation fee after the effective usage of the slot. A striking example is RFI, the Italian (integrated) IM which does not reimburse these fees after the slots have effectively been used. The argument of RFI was that "it needed the additional income". This practice should be prohibited by the EC and the national RB.
51. There is a massive cross-subsidization of passenger transportation via excessive rail freight charges, especially in the CEECs. This must be prohibited by the EC.
52. Regulatory Bodies have an important role to play to ensure fair, user-friendly and understandable access pricing.

E) Whether the existing provisions regarding allocation of capacity both on tracks and at terminals are adequate and if not how they should be amended

53. Directive 2001/14/EC, art. 14 stipulates that the allocation of capacity should be done on a fair and non-discriminatory basis. Access to and usage of all infrastructure-related facilities exceeding the minimum access package according to Directive 2001/14/EC is subject to certain conditions, eg the existence of viable alternatives or the willingness of the IM to supply these services. Furthermore, IMs shall cooperate to enable the efficient creation and allocation of infrastructure capacity which crosses more than one network (art. 15). Within this context it is important to ensure a regulatory monitoring of RNE (Rail Net Europe) in order to avoid that IMs "outsource" processes which are relevant and essential for the access to a network, to third parties. By doing so, the role of any European cooperation of IMs, such as within RNE, would be made more transparent and accessible.
54. Ad hoc requests for individual train paths shall be dealt with by the IM as quickly as possible but not longer than within five working days. In the case that the infrastructure has been declared congested, the IM may employ priority rules, especially for international freight services (art. 22).
55. Today, new entrants experience a variety of problems with capacity allocation, both on tracks (network) and at terminals (infrastructure facilities) which are due to legal, technical and operational issues:
- The allocation of capacity is not always transparent and fair. In many EU Member States, the "better" slots are given to the national flag carrier first whilst secondary or less attractive slots remain for the new entrants.
 - Access to and usage of infrastructure related facilities exceeding the minimum access package proves to be excessively difficult. Either the notion in the Directive "viable alternative" is not applied or correctly interpreted, or the facility is declared "full" although this is often not the case. The access to and the usage of these facilities is also artificially reduced by excessive pricing or very limited opening hours.
 - Market segments requiring a high degree of these facilities (eg for shunting) to offer single wagon traffic remains totally dominated by the national flag carriers as they are the only ones having access to all these facilities. This problem can only be solved by extending the current minimum access package to all rail-related services and facilities.
56. Another option would be the elimination of the "viable alternative" principle and shift the burden of proof to the terminal managers why their terminal cannot be accessed to. Furthermore, the introduction of a legal obligation to actually use the facility and if not to lose it by eg leasing or selling it to potential applicants, is considered as very helpful. This concept should go further in obliging the relevant operator to sell or lease out

these facilities to a third party (under the supervision of the Regulatory Body). In case of facilities which received public funding, this funding needs to be maintained to the new operator as well.

57. Changes in the capacity (due to works or incidents) are not communicated or at a very late stage. This sometimes involves a longer route increasing time and costs for the user. Legal obligations for the IMs to provide for a high quality and user friendly infrastructure do not exist. Performance criteria for IM are therefore essential and urgently needed. A potential solution to this problem could be multiannual financing contracts between the Member States and the IMs and the proposed regulation concerning a European rail network for competitive freight.

58. If there is a disruption in the network and a RU has to take an alternative route, it should only be charged for the original route and not the longer alternative one. Inefficiencies of the IM should not be passed onto the RUs.

59. *Ad hoc* requests are not dealt with quickly, they take the legally allowed time frame of five working days. Therefore, the maximum allowed time should be reduced to two days. Ideally, a business-oriented IM would be ready to provide slots (if available) as soon as possible, even within several hours. There should be an incentive for highly efficient IM's for quick and reliable customer service and problem fixing.

60. Priority rules are not applied in a consistent manner and especially not for international traffic. (NB: international rail freight priority rules will be introduced with the proposal for a regulation concerning a European rail network for competitive freight). The current Directive 2001/14/EC does not provide for any incentives to the IM to apply priority rules as this would mean that their infrastructure is congested and that they have to conduct a capacity analysis in order to increase capacity. In any case, the criteria for national and especially international priority rules are not clear and sufficiently described in the current legal texts. These rules must not only serve to solve conflicts with slot allocation but also during the actual cross-border operation of RUs.

61. In this respect, networks should provide services around the clock, as already short delays may have a "snowball" effect on the remaining traffic of the same RU but also other RUs.

F) *How a recast First Railway Package should relate to other EU freight transport policies*

62. The First Railway Package is the very pillar regulating the quality and quantity of market access. This market access is not only determined by legal components but also by financial and technical ones. Therefore, the concept of open and fair access must go hand in hand with these aspects and also with "commercial" access.

63. The most relevant EU freight transport policies are:

64. Eurovignette: Whilst the Recast of the First Railway Package is of utmost importance for intramodal competition, intermodal competition is important as well. Infrastructure charges especially for road and rail should reach comparable levels in order to provide for an undistorted transport market. Also, if external costs for rail, such as noise differentiated track access charges, are foreseen in the future, similar provisions should be included for road prices. This also includes congestion costs (already allowed by EU legislation for rail but not a reality in road freight).

65. State Aid Guidelines: The revised Community guidelines on State aid for railway undertakings as published on 30 April 2008 are a decisive step into the right direction in terms of transparency and eligible aid. State aids for debt take-overs or restructuring for national flag carriers will now be linked to very strict conditions. This reduces the possibility for the Member States to sustain unviable business models and/or anti-competitive behaviour of their flag carrier. However, the permissible aid for the purchase and renewal of rolling stock in rail passenger transport is not supported by ERFA as it does not explicitly allow for open access to this aid by all passenger operators. Furthermore, subsidised rolling stock will be allowed to run in rail freight transport for a further period of 10 years, thereby continuing the potential competitive distortions in this market segment. There should be a prohibition of the usage of any such subsidised rolling stock for its entire life-time.

66. European rail network for competitive freight: The proposed Regulation concerning a European rail network for competitive freight should contain more open access elements of the Recast. As the proposal is meant to provide for seamless and competitive international rail freight services and products, the still existing legal, technical, operational and administrative bottlenecks & barriers must be abolished. The suggested improved development and management of intermodal terminals in this proposal should be fully open and fairly accessible to all.

67. ERTMS: On 4 July 2008, ERFA signed the 2nd Memorandum of Understanding concerning the strengthening of cooperation for speeding up the deployment of ERTMS (European Rail Traffic Management System). ERFA fully supports the coordinated deployment of ERTMS along important freight corridors and the ultimate deployment on the whole TEN-T network. However, the progress with ERTMS deployment is patchy and too slow, thereby creating technical barriers to interoperability and problems for RUs to plan long-term investments for ERTMS-compliant rolling stock. Furthermore, ERTMS is the condition *sine qua non* to enable longer and heavier trains, more capacity and more efficient operations as intended via the proposal for a European rail network for competitive freight. This requires in particular full open access to ERTMS rolling stock, no barriers to homologation and cross-acceptance and information on the ERTMS requirements in the network statement.

68. Investments: Especially in the EU-12, sufficient financing for rail infrastructure will be necessary so as to allow for the competitiveness of rail transport in comparison with other modes, notably road. These investments should be linked to clear objectives, both in quality and quantity terms.

CONCLUSION

69. The Recast of the First Railway Package is an urgent measure which is long awaited by the new entrants and also the customers and other market actors. As outlined further above, national flag carriers and their integrated or delegated infrastructure managers still determine to a large extent the business of new entrants, especially their price structure. Furthermore, legal, technical and administrative obstacles do not support the overall EU objective, ie creating a single EU transport market.

70. The Recast, like many other legal initiatives of the European Commission, needs to be supported and take the form of a European Regulation, thereby reducing the scope for different interpretations of its contents by Member States. The European Commission has received and collected itself sufficient evidence about the failures to full market opening. The Recast is considered as an urgently needed signal to investors in the rail freight market. This exercise will also close or reduce the gap between fully open markets, such as the UK one and the continental markets.

71. The Inquiry of the House of Lords into the Recast of the First Railway Package is considered by ERFA as a strategically important initiative, supporting the activities of the European Commission.

10 February 2009

TIMELINE OF EU INITIATIVES (INFRINGEMENT AND RECAST)

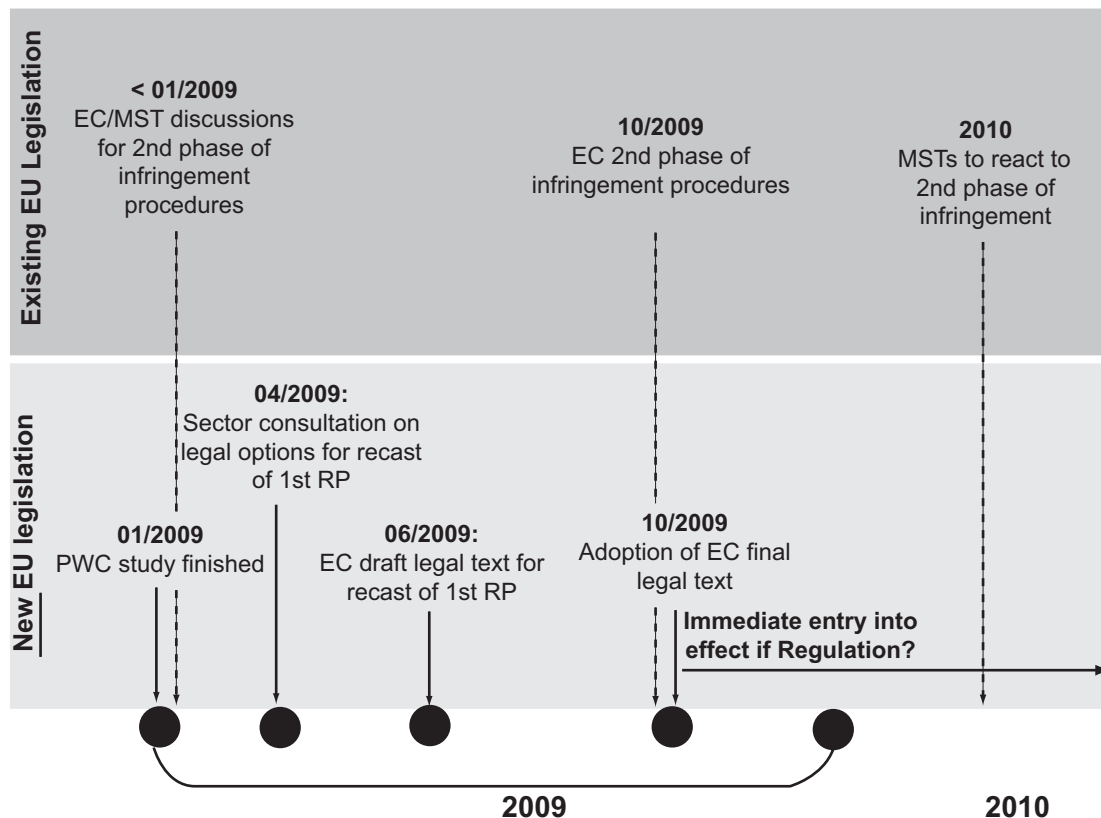


Chart: ERFA

Examination of Witnesses

Witnesses: Ms MONIKA HEIMING, Secretary General, and Mr RONNY DILLEN, Director, European Rail Freight Association, examined.

Q152 Chairman: Good afternoon. Thank you very much indeed for coming. Ms Heiming, perhaps you would be kind enough for the record to introduce yourself and your colleague.

Ms Heiming: Thank you very much. I am very grateful to be allowed to speak here. My name is Monika Heiming and I am Secretary General of the European Rail Freight Association, which was set up in 2002. I joined ERFA, the European Rail Freight Association, at the end of 2004. The main issue for ERFA is competition in technical, legal and administrative aspects. I am here today with one of my directors from Belgium, Ronnie Dillen.

Mr Dillen: It is nice to meet you. I am also Chief Executive of Crossrail, which is a Belgian company with five safety certificates in Belgium, the Netherlands, Germany, Switzerland and Italy. We are privately owned completely and we operate trains on the Continent.

Q153 Chairman: Thank you. Could you speak up a little? The elderly Members of the Committee at this end find it difficult sometimes to pick up every comment! We will go straight into questions, unless you wish to say something by way of an opening statement? Shall we go straight into questions?

Ms Heiming: Go straight into questions.

Q154 Lord Paul: It is nice to see you both. The unbundling has been described as a “key first step”. How far will solutions to other problems in rail freight flow from unbundling?

Ms Heiming: Unbundling for us is one of the key issues to deliver a real market. What is a real market? It is a market with equal rules for everybody, so that everybody gets a fair chance. So if you have, or expect to have, or you are suspected to have the slightest advantage in terms of access to information, access to facilities, access to lower fees, whatever kind of

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advantage you have, I am very strict we do not have a market. It is a distorted market and with the current economic situation I am a bit afraid that such a kind of market does not attract the necessary investment any more. You can have a higher profit rate in other kinds of markets. Unfortunately, the profit rates in rail freight are extremely low so we have to do everything to make that market as attractive as possible, but maybe my Belgian member would like to say something because he put some private money into his hands and he has invested in that market.

Mr Dillen: Yes. I am talking specifically about the Belgian case, because I am from Belgium, where you have still the holding structure, that seems to be on the passenger and freight division and on the other side the infrastructure manager, where you still have a lack of invisibility, how money is transferred, how locomotives are used, for instance. It is not clear how these locomotives go from freight to passenger traffic. It is subsidised by the government and you do not see the cost of the infrastructure side, so you have a lot of suspicions about what has gone on internally on this side. Also, people are affected by the holding, SNLB holding, and that was going down to both sides, which they can switch to. Maybe not on a high level, the directors' level, but on the ground level we always have cases where people say to me, "Look, we have to be careful. One day we work on the other side, on the ground level." So people know each other fairly closely and this always gives for the private sector a little bit more resistance on the ground level to get into the business. So there are different cases, a lot of practical examples which goes a little bit too deep into the matter.

Ms Heiming: May I add something? What is really concerning is actually the costs, so I think if you unbundle you have distinct systems. I think the abuse of, let us say, non-eligible financial flows is diminished to a great extent. Today it is very, very, very difficult to actually audit consolidated accounts. I am not an accountant, but it is very, very difficult actually to get true cost transparency, so when he is taking private money into his hands to actually set up a fuelling station, he is actually paying for every single service he is asking from the public system, you do not have the same, let us say, solid information that you feel the national incumbent is doing the same. Do they really fund the parking slots? Do they pay for them? Do they really have to bear the same costs? Do they get rebates? So in a common system, in a very solid system, it is impossible to trace down what has been spent on what.

Mr Dillen: If I can add to that, I give you an example where on the lower level the signalling force can provide train slots to local people of the national income band. We have to ask officially for a train path at a certain instance, which you are officially given, writing your train path. I know that there are

some cases where train drivers get slots from the signal box and just drive on the infrastructure, which questions also about how is this invoiced, how is this charged on certain goods, especially in the last mile of activity, especially there where the infrastructure mentioned has no authority about it. Let us say the network stops there and then the last mile—let us say the example of the event where you have a lot of local shunting yards, how it is done there, how they pay for infrastructure. It is invisible; it is not transparent.

Chairman: That is very clear.

Q155 Lord James of Blackheath: How far can vertical integration work in the presence of a strong regulator? For example, would the French system described in your evidence have worked if there had been a strong regulator there and how far is the discriminatory behaviour described for Germany and Austria due to the regulator there?

Ms Heiming: A strong regulator, which we all want, I think, is very good. If you have a comparable set of regulators with comparable powers on the Continent, lovely. It could very well look like the British regulators, no problem with that, but a very, very strong regulator will never be able to counterbalance a bad market. It is impossible. I have looked it up over the weekend to explain to you why I am saying that. I think there are three elements. If the system is very integrated, so it is not very open, the regulator has to compensate that. He has to compensate that by interfering very early in the processes, the earlier the better, just to prevent that more harm is done to others, but the risk of him coming too late is extremely great because he does not have full transparency on all the processes. The second problem I see is the resources. You start to over-staff because you have to mirror all the processes that are going on and you do not always know them. So you have a risk of inefficiencies blowing up this regulator. The last thing, I think, is when you have a very powerful regulator he has to control and analyse an extremely large variety of aspects, so he becomes over-intrusive. I am not playing the Devil's advocate because there are others who say, "We would prefer a weak regulator." I do not want to have a weak regulator, I just want to have both the perfect regulator and the perfect market, so I am just challenging a bit the system. The French system is a very nice one. It is like high fashion, you see. It is very beautiful, but you have to look at the tiny detail. So the French regulator today does not really exist. It is a paper-based regulator. The lady is very, very nice. I like her very much. Sometimes I ring her up to see if she is still alive! But she is not really working. She has no power. She has an advisory role. The problem with the French system is that you have no clear responsibility, it is split between SNCF and RFF, which is the infrastructure manager. You do not

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know who is in charge of what and who is actually pulling the strings. You have a commercial competence, unfortunately, with SNCF or the infrastructure branch of SNCF, which is very nasty. There has been a dawn raid last year, which I liked personally quite a lot, because of an abuse of the kind of commercial information they had access to. You can not even blame the people there, I mean it is tempting to do that, and of course a safety competence is held with SNCF in the last resort because on the ministry level there is no so much competence. I would like to ask Ronny Dillen, because he is now on the safety certificate approach with France. Ronny, how it is going?

Mr Dillen: Very, very slowly because you cannot get a grip on the documentation or files. I want to make the comparison with the Belgian legislation. You have a regulatory body in Belgian, it is five members, but I do not think that they had in 2008 one complaint and you only can give advice. So if you are talking about a strong regulation, you have to put in the bottom national government and already I said before in implementing the legislation from the European Commission into the national legislation, there you have to put it so that you can watch it. In the previous meeting here it was said that getting the regulatory bodies aligned internationally—I think they have to learn from each other where it went wrong and by that making advice to the European Commission how it should be and not being the slave of the government, giving only advice.

Q156 Lord Walpole: What are the problems with the infrastructure and rail-related service charges? In your evidence you say that abuse of charges can only be prevented by full ownership separation. Is that all that is needed, or do you want to go further than that? Should it be included in the First Railway Package or in other measures?

Mr Dillen: I will give you an example again from the Belgian case where the European Commission has put into the legislation access to fuel stations. So the infrastructure in Belgium, they have put this into the legislation as access to the fuel station, meaning you cannot get fuel, you cannot get prices in, so it is blocked there. A few years ago in Belgium the government took the decision to split up the whole infrastructure by the freight division and infrastructure manager, so they just split it up by Royal decree, and that was it. So we still do not know today, the ports in Belgium, what is belonging to the freight division, what is belonging to the infrastructure manager, and often there are conflicts with each other because it was done like a knife in two. So you cannot have access to these locations. Another example is the infrastructure stops. The three part allocation is done by the infrastructure management on the network where they have their

rights, which they own, which means that if the last mile does not allow access—and the last miles are often controlled by our national competitor—you cannot get in. We have an example where you have to drive five kilometres and it takes one and a half hours to get there because local management, which is our competitor, is dealing with that and is playing the police agent. Also, safety, conflicts of interest, this kind of behaviour, does not promote clear transport.

Q157 Lord Dykes: This is not only in answer to those questions, Mr Dillen, but on your previous point as well, and your colleague's. Is not the inevitable logic that to have the perfect market may be asking for too much, but say something getting better each time so that it becomes quasi perfect as soon as possible? That must be feasible, depending on how long it takes, but is it not inexorable logic that to have a single market in rail freight services you need a single European regulator allowing for the national regulator to have full say in their own territory about entries and exits, and so on, but nonetheless a full European regulator? There is no alternative, is there?

Mr Dillen: I agree with that. I think the national regulators are not sufficiently equipped, do not have enough resource, do not have the money, do not have the power and they just obey the national laws, which means they are at the bottom of the chain and not at the top of the chain.

Ms Heiming: I am not of the same opinion, but we are on the same lines, do not worry. For the moment what we have is an imperfect system, so an imperfect regulatory body which is duplicated in all the Member States. I was looking up actually the infringement procedures and 80 per cent of the Member States got an infringement notice. Actually, there is a regulatory body on paper which has not enough powers, so if you put a layer on top—the Belgian one is always a power of this type—you cannot really improve the system. I think you have to do the ground work first because otherwise the European one will just be an empty shell because what would be his legal competence? I am not against a European regulator, especially if he is speaking about creating a single European network and it comes into play. This is absolutely logical, but today I think it is a bit premature to put the effort on the European one and make it perfect because it cannot be perfect as long as we have no, let us say, enforcement of what is in the First Railway Package in terms of duties and then extend that in the recast, actually to make it also work on the black boxes, especially those which are cross-border issues where we have plenty, plenty of problems. My members, therefore, are 100 per cent international traffic—the incumbents are not that much, only three or four—so I am very much interested in having an enforcement of the existing law on the regulatory bodies at the

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national level and then to extend their scope as quickly as possible, and then come to your European regulatory body, and we are fine, let us say, in five years' time. I hope I am right.

Q158 Lord Rowe-Beattie: Multi-annual contracts between infrastructure managers and national governments: are the provisions, in your opinion, adequate, and if not what would members of your association like to see?

Ms Heiming: The current provision in Directive 2001/14 gives a tiny bit of it. It does not prevent it, but it does not really say it is mandatory, you should propose it, have a systematic roll-out in every single country. It does not prevent it. It says, okay, the Member States should reduce the costs, increase efficiency, but it does not really say or explicitly refer to a multi-annual contract. I looked up which Member States actually have multi-annual contracts in place. Let us say there are half of them who have it in place or are about to revise it, like the UK is one. The other ones do not do anything about that. To have the multi-annual contract in place you have to recast the Directive because otherwise you will get nowhere. It is not clearly defined. What is important, of course, is that it should be made mandatory. Why do we want to have it mandatory? Because we want to have the highest efficiency possible of the network. Without the network we cannot run anything. We are highly dependent on the quality and the performance of the network, especially on the European scale, so we always fully support quality indicators for infrastructure managers. We are the customers. We have to remind them very consistently, but we are the customers and so we want to have the service for the money we spend, so we would like to understand what we are paying for, what we are getting and what are the appeal mechanisms if we do not get it. So if in turn the infrastructure manager says we cannot plan properly because the planning period is too short and the infrastructure projects are lasting too long, which is absolutely understandable, we say the multi-annual contract should provide for the planning and investment safety, and a longer period. It hopefully contributes to keep the infrastructure prices stable over a longer period of time. I have understood it is four or five years here in the UK, which is a very interesting period, which also certainly pleased my Belgian members. What we also would like to see with the multi-annual financing agreement is that we get more cost transparency, what goes into the infrastructure and what is done with that money. In certain countries you do not know it. They get the money, "Here it is," and then the national incumbent, for example, just decides on his own. So you see that in Germany there is a lot of construction sites suddenly popping up everywhere because people got extremely frustrated: "What are they doing with the

money? Do they spend it or do they put it in a bank account to get more interesting values for the floating?" things like that. So we have to have more transparency over what is done with the public money and we would like to see the multi-annual contracts harmonised so that we are speaking about the same thing. Again, we are coming back to the European network. So if you have a corridor and alongside one corridor comparable harmonised multi-annual financing contracts, it would be lovely. So then you can compare the performance. Did you want to say something, or did I say everything?

Mr Dillen: I agree!

Lord Rowe-Beattie: Thank you. Your position is very clear.

Q159 Lord Bradshaw: I am going to take you away from this to something quite different. You have worked through Switzerland. Switzerland is admired by many people as being a very efficient railway. It is also very, very well used. Do you find all these problems in Switzerland or do the train paths you get there actually materialise?

Mr Dillen: No, Switzerland is a transit country which is subsidised also for a lot of international freight. It is not specifically Switzerland which is forming the problem, it is more Italy, Germany and Belgium, not the Netherlands, where also on freight corridors it is not aligned. You have lots of stops and delays at the borders and such kind, so different corridors are not aligned with each other. There is a lot of difference between network charges in the different countries also which is not aligned. It is very unclear to see why it is and how they make up the price structure, and also where does the money go. So it is like Monika said, you have a lot of performance indicators which are top-down from infrastructure management.

Q160 Lord Bradshaw: I understand that, but do you get the train paths that you pay for in Switzerland?

Mr Dillen: Yes, in Switzerland you get that. Even in Switzerland it is quite highly occupied. It is a policy. It is the mentality of bringing trucks to a train and this, which is also environmental, they need to do this and they look over the borders for that, which other countries, unfortunately, are not looking at, they are only looking at the national countries.

Q161 Lord Bradshaw: So although it is small, the Swiss model of doing things does actually work for your company?

Mr Dillen: Yes.

Q162 Chairman: Just for the record, I wonder if we could come back to your evidence, and indeed the evidence from a couple of other witnesses. It is the phrase "direct costs" which are charged by infrastructure managers which is capable of different

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interpretations. Should this be replaced, and if so are we talking about direct marginal costs or should the costs which go into the calculation be carefully defined?

Mr Dillen: It is a difficult question. I only see that despite what you pay for infrastructure on slots on train paths which you actually drive you have a lot of measures by the different national infrastructure managers which firstly are different, and secondly we see it more as a way of trying to get more money inside. I give you an example. Germany and Belgium do a cancellation of train paths. You can cancel train paths in advance. They penalise you for that if you do not do it enough time in advance. In Belgium it is the case that you have to cancel a train 30 days in advance to avoid overcapacity demand on the network. No customer we have can already predict 30 days in advance what kind of traffic he has, so this means the system is not working. It is a way of collecting money and using ways of pushing down, especially the private sector. We have in Germany with DB a key account manager specially appointed for us and he does everything for the trains which we do in Germany, maybe 7,000 a year. Clearly, that is much, much more, maybe up by about 20, 30, 40, I do not know how much. They do not have a key account manager who really focuses and collects the money and sees that he gets in the money. So it is a different approach.

Q163 Chairman: We heard evidence last week on the problems that wagon load business has. If access issues are resolved to services, marshalling yards and goodness knows what else, do you see wagon load business growing significantly, or should the regulators be looking at the prospects for train load?

Mr Dillen: I think we should look at train loads. A single wagon market is, I do believe, still highly subsidised, it depends on the location, but compared with trucking it is not useful. I think we should focus on long distances, international corridors, and trying to optimise these train loads. This is not only with ERTMS, this is also, if you talk about Belgian 600 metre trains, Germany 700 metres, France 750 metres, aligning these. A Belgian train cannot run with 700 metres, so this means it is not only ERTMS but also the side tracks to let the passenger train go first, side tracks where you can put a 750 metre train. So this is a lot of massive infrastructure work. This is the way forward in globalisation. This is where you should focus and try to use this as much as possible to bring on the load from the block train.

Ms Heimig: For me the single wagon business is actually a symbol for, let us say, that the market is not opened up at all. It has the highest growth potential. For the moment it is not very sexy to do it. You can only do it when you have, let us say, a massive amount of block trains and inter-modal trains to

compensate for the losses of single wagon business. So your question was right. Would we as private operators go into that business? Those who do long-distance traffic might not be interested to have a very local product, but what I have always said is that there is a market if there are companies willing to do the short hop, bespoke idea, let us say assemble trains or groups of wagons, bring them to customers—and we have plenty of them in Belgium—actually do the distribution, if the system was not so expensive. So a single wagon costs almost as much as a full train. The logistics is absolutely the same. You have to have the same problems with the driver, the same problem with getting your local running on the network, and then you have to have access to these facilities. There have been members of a firm who have been crazy enough, I have to say, to offer single wagon products on a very small scale and then suddenly the national incumbent said, “Oh, finally I’ve changed my mind. You cannot have access to my facility,” so the contract could not be served. So this company today is sold to another one, but this is actually the problem. There is a demand for, let us say, specialist companies to offer this kind of product provided the system gets cheaper and you get full access to everything you need.

Mr Dillen: If I may add to that, you have to subsidise. In Belgium the government gives €25 million every year for the national traffic but that is going to the industry. It is going to the end customer. It is not going to, say, labour where you have internal activities sponsored and subsidised to get it really done in the short distances, the very short distances. It is a different approach to protect national incumbent, not to stimulate the shift.

Q164 Chairman: One final brief question, which is really to seek your advice about the urgency of this Committee coming to a conclusion. We are planning on trying to produce our report for publication on 2 June. We report to the House of Lords, that is our job, but we are trying this year, as a new initiative, to present as a matter of courtesy to all those who have given us evidence from the United Kingdom our report, almost a press conference but a public conference, and perhaps the same also in Brussels. I think most of the MEPs will be off, obviously, campaigning or thinking about campaigning if they have not already started, but certainly to the Commission. How urgent do you think this is? Do you believe the Commission is likely to put off decisions about recast until 2010, or even 2011 as some commentators have forecast, or do you think this is a current issue taken seriously in Brussels and we ought to get on with our report?

Ms Heimig: For ERFA there is a great concern about delay indeed on this issue. ERFA has been set up explicitly for that purpose, to set the market free.

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There is now an institutional issue, actually, with the referendum of Ireland, so actually the Commission might sit in office a bit longer. The EU Transport Commission, unfortunately, said that okay, it will be postponed to 2010. This is very dangerous because there are other stakeholders who do not wish the recast or any other market-opening measures to go forward at this stage, so they are trying to delay it and combine it, for example, with liberalisation of the passenger markets, or let us say whatever package is still on the market. We, as ERFA, actually will write to Mr Tajani on Thursday this week to (a) urge in that matter—and it is very, very urgent—that we get the right message to potential investors, that we get the market free and up in 2010 and onwards now. It is very, very urgent. and I would highly appreciate it if

you would do a press campaign in the conference in Brussels because it is very much needed.

Mr Dillen: I can agree on that. As a private operator, I can see what in the last two years is happening. It is the monopolisation. The private sector on the Continent is disappearing completely by the national incumbents buying the private up because the margins are not high enough, because the market is not open enough, because there is a lot of political gain, so they leave the sector at the moment.

Chairman: Time is up. Thank you very much indeed. We are now coming to the last evidence session. Do please remain if you wish to, but thank you very much for taking the trouble to come. Do look at the record to make sure that we have captured precisely in the record what you have said.

Examination of Witness

Witness: MR KONSTANTIN SKORIK, European Business Development Director, Freightliner PL, examined.

Q165 Chairman: Mr Skorik, thank you very much for coming and also for having the patience to sit through the earlier two evidence sessions. Perhaps you would introduce yourself for the record.

Mr Skorik: Thank you, my Lord Chairman. My name is Konstantin Skorik. I am Director for European Business Development in the Freightliner Group, based in London, and I am responsible for our subsidiary in Poland, which is operating in Poland and in Germany as well with some partners. I do have actually a brief opening statement, if you will allow me. The First Railway Package clearly built a very strong foundation for market liberalisation and Freightliner was arguable a success story of the liberalisation of the market in the UK. As previous speakers suggested, there is strong evidence between the degree of implementation of the package and growth of the rail freight market. Likewise, there is evidence of sterling growth of the railway freight market in the country where the package was not fully implemented and very clearly the level of implementation of the package is very, very different in different European countries. We have first-hand experience of comparing the way we operate in the UK and the way we operate in Holland. Essentially, the failure of some Member States to implement the package separates infrastructure managers and railway undertakings for incumbent operators, failure to implement effective and decisive regulation and existing political and institutional support for state-owned operators led, basically, to slow growth of the market or a lack of growth of the market in those countries and led to abuse of a dominant position by its incumbents. From our perspective, there are some issues which need to be addressed very promptly and those issues are implementable. It would be nice to hope that, say, in Germany the

unbundling will be done next year, but it is unrealistic, so the issues which I am going to list we believe are quite realistic and could be promoted by the recast package. The issues are to sort out access issues to crucial rail infrastructures such as yards and sidings and hence could be with the train regulators to allow them to deal with the issues and promote level playing fields in their countries, and impose efficiency measurements on railway infrastructure managers like is done in the UK and allow railway infrastructure managers to have longevity of the access charges, because at present essentially in the countries where we operate on the Continent access charges are changed year on year and it creates commercial problems with the end customers because we cannot really enter into a long-term contract because we cannot guarantee the customer the level of prices in one year's time. In addition, the First Railway Package from our perspective does not fully address issues which emerged in the markets over the last three, five, seven years and it is not sufficient to build or develop the pan-European rail freight market and essentially a recast should provide new instruments to improve and increase slow border traffic and resolve issues with cross-country equipment certification, promulgation with access to border facilities and easy use of cross-country regulation. So generally speaking, to sum it up, we do support a recast and we do support a speedy recast of the package.

Chairman: Thank you. That was very clear indeed.

Q166 Lord Paul: Mr Skorik, this aim of a one-stop shop for rail freight operators seeking international paths, to what extent has this aim been realised and if there are any problems still, what should be done about them?

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Mr Skorik: From our perspective—and we operate lots of trains between Germany and Poland and have been operating these trains for the last two years. One-stop shop services—a one-stop shop for border crossings simply does not exist. Essentially, when we need to run a train from point A in Germany to point B in Poland we have to separately go to a Polish infrastructure manager, a German infrastructure manager for our partners in Germany because we do not have our own safety case in Germany, at least we do not have yet, and then the infrastructure managers are talking to each other and coming back to us with a confirmation of the pass. Now, in the market where we operate, the cross-border trains, any old timetable is just not workable because the customers cannot really predict what will happen in three or six months' time. So we operate these trains on a spot pass basis and I have to say with the right assets actually the traffic works and we do cross borders in 10, 15 minutes because we have multi-country locomotive, we only need to change the drivers, but a one-stop function would eliminate some of the petty problems on the ground. For instance, when you need to change something in a train timetable for a Monday, we cannot do it on a Friday, or in fact on a Wednesday of the previous week because they have specific timescales for making decisions, it takes time for them to coordinate and simply people who are responsible for cross-border traffic go home at, whatever, 3.00 or 4.00 pm on a Friday, while national operators operate more 24/7.

Q167 Lord Walpole: What are the problems with infrastructure and rail-related service charges? How should they be addressed? Should they be addressed in the First Railway Package or by some other measure?
Mr Skorik: The overall problem with the charges is, as I have already mentioned, they are not necessarily set out in the same way in all countries. They are supposed to be set up at the level of the marginal costs, but there is no clear instruction how the railway infrastructure managers should count their marginal costs. The result is that the Central and Eastern Europe charges are, generally speaking, much higher than in the rest of Europe and it puts the operator at a disadvantage. In addition, as I said, charges are not set up in, say, a five year or three year period, they change every year and infrastructure managers are not being pressurised by the regulators to implement efficiency measures and to reduce their costs like you have done in the UK.

Q168 Lord Walpole: So you think they should get better if they were properly managed?
Mr Skorik: Well, basically, yes.

Q169 Lord Walpole: If the regulator is working properly?

Mr Skorik: Well, if the regulator is working properly, unless of course the regulator has enough powers to change the status quo which exists in a country, but the implementation of efficiency measures, which exists in the UK and works quite well in the UK—the concept is non-existent in Eastern Europe.

Q170 Lord Bradshaw: Is the construction of railway timetables, in your view, a defensive operation or is it an aggressive operation which seeks out new business?
Mr Skorik: You mean the construction of timetables by the —

Q171 Lord Bradshaw: By whoever constructs them.
Mr Skorik: From our perspective in Poland, the only problem with construction of the timetable is that the quality of pass is poor. The average train speed is 20, 30 kilometres, if you are lucky, but the same applies to other operators, so generally speaking we do not see much or any discrimination in terms of classification of the main network, so that element specifically in Poland works quite well, but again the quality is poor and I come back to my efficiency argument because should the infrastructure manager be forced to increase efficiency, he will be forced to increase the speeds of the network and pass quality.

Q172 Lord Bradshaw: Take Germany. I accept what you are saying about Poland, but what goes on in Germany is the construction of the timetable in Germany, one which seeks to create extra traffic, to speed up the traffic, or is it largely defensive of various interests?

Mr Skorik: We do not have the first-hand experience of applying for track access or pass rights in Germany because it is done by our partners, but from what we have seen I would say that the infrastructure operator is not trying to promote longest, heaviest trains. As a specific example, we started running this cross-border service for a customer and we have been told that we only can run 31 wagons on this pass, on this specific stretch of the infrastructure. Later on we found out that we could actually run 35 wagons and by trial and error, through different passes, different border crossings, we increased the traffic to 42 wagons. The capacity effect of increasing the length from 31 to 42 was huge, but it was all driven by the operator, not by the infrastructure manager.

Q173 Lord Rowe-Beattie: I have been listening attentively to your opening statement and I think I probably know how you are going to answer this question. Are international freight services receiving sufficient priority in the allocation of slots, in your opinion, in all Member States?

Mr Skorik: Again, I could speak for Germany from our experience in Germany and Poland. I would say that there is no specific priority. The infrastructure in

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the areas we operate is not terribly congested and we can get passes on an ad hoc basis. The other question is that border crossings may be constrained and we have to be very selective about the stations or border crossing points that we are using. With experience we have basically developed optimal ways for us which work, and they work. On the long-term basis, again we are talking about crossing two countries and one border, so if you want to plan something on a long-term basis crossing more borders—I mentioned the time constraints, the number of days in advance one needs to apply for a pass—for one border it is normally five days but for a number of borders it could be up to 15 working days and the net effect is that from an end customer's perspective they may not be willing to wait for 15 days. They might just put their stuff on a truck and go by road.

Q174 Lord James of Blackheath: Mr Skorik, safety standards: how far are you satisfied with the harmonisation and interoperability of safety standards so far?

Mr Skorik: If you mean the application of safety standards to promulgation of assets, or locomotives specifically, where it is satisfied—or you mean something different?

Q175 Lord James of Blackheath: I was thinking in terms of how far the safety standards are accepted by each of the operators and whether they present any particular difficulties on their own personal style and methodology?

Mr Skorik: I suppose from the methodology point of view, again if there is a set of standards in place all we have to do is to adhere to the standards, but what is a problem for us is when different standards are applied to different operators and we have a long procrastinating debate in Poland with the regulator—sorry, I will have to go into detail there. We brought new diesel locomotives into Poland, the locomotives which run in big number in Germany, the Netherlands and in the UK, so-called Class 66, and the locomotive was certified after, whatever, six or seven, or eight months of proceedings, and after the certification all of a sudden the regulator decided, on safety grounds, that we need to run locomotives with through drivers at all times. The argument was the visibility of the signals is not good from the existing driver position, so we need to have another one.

Q176 Lord James of Blackheath: That must have carried significant cost implications?

Mr Skorik: Exactly, so we are running all of our locomotives with through drivers. The effect is that the market got scared of this locomotive type because they see this sort of locomotive as unreliable and we have a lengthy dispute with the regulator, now

involving the European Union, but the railway regulators say, “We believe this locomotive has to be run with through drivers and we don't really care about the situation in Germany or the Netherlands or a number of other European countries” —

Q177 Lord James of Blackheath: Surely that cannot become the permanent state of affairs? That would be very unsatisfactory to everybody.

Mr Skorik: It may become a permanent state of affairs. We hope that they will get back together and change the regulation. In the meantime, we have three independent expert opinions that one driver is okay, it is safe, and they have one expert opinion that two drivers are necessary. I do not want to speculate on the reasons for the decision.

Lord James of Blackheath: We understand the problem but, like you, we do not understand the solution, I think!

Q178 Lord Powell of Bayswater: Mine is going to be a rather more general question. I think a lot of the evidence we have heard this afternoon, and indeed on other occasions, shows that the rail freight market in Europe is a “rigged” market, a shamefully rigged market, rigged by national operators aided and abetted by national rail authorities and weak regulators. The first railway package has done nothing to break that in most countries. I think the UK is an exception, and the Netherlands, but in most countries it has not worked, yet rigging the market is illegal in the European Union and there are competition laws in force in Europe. Do you think the Commission should make more use of those laws? After all, it frequently tackles the chemical industry or other industries and imposes vast fines on them. Why does it not do this in the railway sector?

Mr Skorik: It is an interesting question which from an operator's perspective is quite difficult to answer! Typically, the Member countries—as I say, if the incumbent operator wants to rig the market or do something which is not in line with the railway package, they do it in a way which is quite sort of—I will put it this way: it is not going to serve a purpose to go deeper into the details and probably the creation of a pan-European rail regulator which can manage the issues of equipment certification or which could be an appeal body on economic regulation matters and at the same time which could promote cross-border services might be an answer. Whether a big fine would be an answer, I am not sure, because what we see on the ground, especially in the current economic climate, is national governments preparing large subsidy packages for their vertically integrated monopolies and if, say, a billion euros goes towards the PKP Group in Poland we would not have any way to determine whether part of this money went to the incumbent operator or not and if the incumbent

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operator will be fined by the European Union, they could see it as another reason to go to the government and ask for more cash.

Q179 Lord Powell of Bayswater: I think my point is that none of this actually requires a recast first railway package. The Commission has powers to do this sort of thing. It applies those powers to other industries. It mounts dawn raids and gets people up, takes evidence and fines them, all within the space of a year or 18 months. We have heard this afternoon that the recast railway package probably will not even be issued until next year, and goodness knows when it will be implemented. Why does the Commission not use these powers? It is more of a rhetorical question, I am not expecting you to have an answer to it, but I find it a very frustrating question.

Mr Skorik: I suppose it is frustrating for an independent private operator. Put it this way: it is not all doom and gloom. We operate on the Continent and we succeed, and I would probably say that markets would grow faster and private operators

would be more successful if the Directive is implemented or the Railway Package is implemented.

Q180 Lord Powell of Bayswater: That is the whole point of the EU competition law.

Mr Skorik: I suppose private operators are developing despite blocks, obstacles and not complete implementation, but still I suppose it would not be harmful to refine the law and issue the recast because doing nothing is probably not an answer and there was no decisive action from the side of the Commission imposing things like big fines or the Competition Act, which you have mentioned.

Lord Powell of Bayswater: But they should be, is my point.

Chairman: I think we will end on that note. Thank you very much indeed for coming. It was very clear evidence, particularly with your practical experience on the ground with Freightliner. Thank you very much for coming. We look forward to you correcting anything you would like in the text and perhaps we will see you again.

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| | | |
|---------|------------------------|------------------------|
| Present | Bradshaw, L | Plumb, L |
| | Dykes, L | Powell of Bayswater, L |
| | Freeman, L (Chairman) | Walpole, L |
| | James of Blackheath, L | |

Memorandum by the Federal Network Agency

I shall give you an overview of experience in the field of rail regulation, as far as the Bundesnetzagentur für Elektrizität, Gas, Telekommunikation, Post und Eisenbahnen (Federal Network Agency for Electricity, Gas, Telecommunications, Post and Railway) is in charge, following your line of questions.

(a) *Whether the provisions on the separation of infrastructure management and train operations are sufficient; whether they should be amended or whether they should be replaced with a requirement for full ownership unbundling?*

The rail regulation department of the Bundesnetzagentur monitors rail competition and is responsible for guaranteeing non-discriminatory access to railway infrastructure. Observance of the provisions on the separation of infrastructure management and train operations, however, is the responsibility of the Eisenbahn-Bundesamt, the national safety authority. Please accept our apologies therefore for not being able to provide you with information on the scope and effect of unbundling provisions.

(b) *Whether the current provisions are adequate regarding the staffing and independence of regulators and whether statutory independence from government is desirable?*

The Bundesnetzagentur acts as an independent authority. It is impartial and independent of political directives. In this regard, the requirements of Article 30 of Directive 2001/14/EC have been fully implemented into German law.

To ensure objective decisions the Bundesnetzagentur aims not to select its employees from the rail industry. Currently, 45 legal experts, economists and railway experts are employed in the railway department. One division is in charge of legal and economic policy issues, another with market monitoring and statistics. Three operational divisions deal with access to railways, access to service facilities and infrastructure charging. The intended establishment of so called "ruling chambers" for rail regulation will improve the Bundesnetzagentur's decision-making further and thus increase regulatory effectiveness and independence.

(c) *Whether there remain barriers to entry due to factors such as safety certification requirements, and if so how these should be addressed?*

The Bundesnetzagentur is currently concerned with lead periods for framework agreements for incumbents and competitors as possible barriers to market entry.

Under German law, the infrastructure managers determine the duration of application for framework agreements. The deadline foreseen by DB Netz AG in its network statement for the next five-year framework agreement period beginning in December 2010 is mid October 2009. The framework agreements are then concluded in spring 2010, ie nine months before the framework agreements take effect at the beginning of the respective period.

The Bundesnetzagentur has conducted a market survey to find out if the early conclusion of framework agreements, ie long before the transport service is first provided, would facilitate entry. Since the railway industry requires up to 30 months for the delivery of locomotives, newcomers to the market, in particular, want an early conclusion of framework agreements to give them legal and financial certainty. The survey revealed the need for differentiation between the various modes of rail transport. While both passenger traffic and the railway industry in general favour time periods of up to two years, freight traffic considers shorter periods sufficient and necessary for investment security and for planning their own services. The tendering procedures for regional rail transport services usually need a forerun of around two years. Nevertheless the Bundesnetzagentur is convinced that solutions on the basis of current law are possible.

(d) *Whether the current requirements regarding the setting of infrastructure charges are adequate, and if not how they should be amended?*

The setting of infrastructure charges is, under German law, first of all in the remit of the infrastructure managers and the managers of service facilities. They have to create their pricing systems under their own responsibility. Subsequently the infrastructure managers have to inform the Bundesnetzagentur about their intended pricing systems and principles, observing the time limits that German law stipulates. The Bundesnetzagentur has to be informed before the network statements, pricing principles and pricing systems come into force and the railway timetable is scheduled.

German law gives some guidelines and hints as to what the infrastructure managers' prices may include and how they should be set. First of all, prices must be non-discriminatory. They have to include the costs connected with all the legal duties of the infrastructure managers and an appropriate rate of return.

The Bundesnetzagentur has *ex ante* and *ex post* competences for pricing and cost controls. It is empowered to check all the cost positions. This includes comparing total costs and revenues and reviewing the activities that are reflected in the different cost positions. If the legal requirements for the price calculation are not met, the Bundesnetzagentur can demand price cuts. At the moment, it is examining the pricing systems of DB Netz AG and DB Station&Service AG.

Cost increases due to inefficient performance can be factored into the infrastructure managers' prices, as the legal framework only specifies full cost recovery for the infrastructure managers. The Bundesnetzagentur is, however, not entitled to demand improvements in efficiency.

Plans for incentive-based regulation are under discussion. They would allow a more efficient pricing system as a result of regulatory enforcement of general productivity gains and the closing of individual efficiency gaps. To implement such a regulatory system, changes in national railway legislation would be required.

(e) *Whether the existing provisions regarding allocation of capacity both on tracks and at terminals are adequate and if not how they should be amended?*

German law has extensive provisions on drawing up the yearly timetable and on resolving conflicts in the case of identical train path requests. The handling of ad hoc requests is also detailed in German law. These provisions have to be respected by the infrastructure managers.

The Bundesnetzagentur has extensive competencies to review capacity allocation. Here, it is authorised to take *ex ante* as well as *ex post* decisions.

The power to take *ex ante* decision goes beyond the requirements of the EU Directive. If an infrastructure manager intends to reject a train path request it is obliged to convey this decision to the Bundesnetzagentur for review before the decision takes effect vis-à-vis the applying railway undertaking. If an infrastructure manager's intended decision does not comply with the requirement of non-discrimination the Bundesnetzagentur may object within ten working days. Infrastructure managers' planned rejections of non-scheduled services must be reviewed by the Bundesnetzagentur within one working day.

Besides *ex ante* review, any decision within the capacity allocation process may also be reviewed *ex post* on the basis of either a complaint or *ex officio* investigations.

With regard to capacity allocation, the Bundesnetzagentur has effective instruments to detect and solve conflicts on a case-by-case basis to ensure non-discriminatory access to infrastructure.

(f) *How a recast First Railway Package should relate to other EU freight transport policies?*

Remit of the Bundesministerium für Verkehr, Bau und Stadtentwicklung (Federal Ministry of Transport, Building and Urban Affairs).

Examination of Witnesses

Witnesses: DR IRIS HENSELER-UNGER, Vice-President; PROFESSOR DR KARSTEN OTTE, Director and Head of Department of Rail Regulation; and MR HORST-PETER HEINRICHS, Head of Division of Legal and Economic Policy Issues, Federal Network Agency, examined.

Q181 Chairman: Thank you very much for coming and making the effort to assist our inquiry. We intend to try and produce a report for publication on 2 June. Would you be kind enough to introduce yourselves for the record?

Dr Henseler-Unger: Thank you very much for your kind invitation to present you with the position of the German regulator with regard to the planned amendments to the European directives. My name is Iris Henseler-Unger. I am Vice-President of the Federal Network Agency, which is responsible for regulation of railways, but also electricity, gas, telecommunication and postal services. I think my colleagues would like to introduce themselves.

Professor Otte: My name is Karsten Otte. I am Head of the Rail Regulation Department at the Federal Network Agency.

Mr Heinrichs: My name is Horst-Peter Heinrichs. Many thanks for your invitation. I am the Head of the Division of Legal and Economic Policy Issues.

Chairman: Thank you. We are now going to go into questions. I hope you can see the names of my colleagues. Please take your time. We aim to finish at about five. I am going to ask Lord Bradshaw to ask the first question.

Q182 Lord Bradshaw: DB now owns a very large freight company which has access rights, obviously in Britain but also in other countries. Do you think it will be able to realise its potential in many countries of the European Union, including Germany, if the present restrictions on entry to the market apply?

Dr Henseler-Unger: Thank you very much for the question. I think regulation and the obligations ensuing from regulation enforce competition, and I think competition plays an essential role in making a company realise its strength and its potential and this is also what makes it competitive in the international arena. If I look at the European situation, I would recommend that other countries introduce regulation as Britain and Germany have done. Regulation there is characterised by an independent regulator which is seeking to create transparency and non-discriminatory access to the infrastructure.

Q183 Lord Bradshaw: For example and I am not picking them out the French market appears to be a particularly difficult one for countries outside France to penetrate. Are you hopeful that the French will in fact introduce the climate which is necessary for competition?

Dr Henseler-Unger: We see that regulation is being introduced at the moment. We also see a discussion in which Deutsche Bahn is looking forward to a French

regulator being established that is comparable, for example, to the German regulator. They approached us and discussed the matter with us and I hope that this route will be taken by the French side. Let me make one further remark. I have observed that the telecommunications regulator in France started successfully opening up the French market but is now one of the strongest regulators in Europe. I think this is also the route the French railway regulator could choose.

Lord Bradshaw: Because you will appreciate in Britain we are very much dependent upon the attitude of the French, being the only way we can get into Europe.

Q184 Lord Dykes: Thank you very much for coming today. You have got continued vertical integration at Deutsche Bahn. Does that cause you, as regulators, particular problems that would not be prevalent elsewhere?

Dr Henseler-Unger: We were asked last year, “Do you want the privatisation procedure?” “What is the position of the German regulator?”, and our answer was: “Look at the markets which we regulate. Look at the energy market, where we have a strong separation obligation. Look at the telecoms market, where we have no obligation to separate. In both cases, we have been successful, especially in the telecoms market where there is no strict separation or unbundling rule.” The success is open to every model. The consumer can see that. I think what we need, if we do not have a strong unbundling or separation obligation, is strong regulation. This means cost regulation and access regulation, which is really a powerful tool. So that is what we are pleading for.

Q185 Lord Dykes: Do you feel that the present percentage taken by other freight operators than Deutsche Bahn is too small?

Dr Henseler-Unger: Well, as I am in favour of competition, I think the present percentage taken by other freight operators is too small. I am hoping for a better quota. But look at the quotas we have already. That represents 20 per cent of the freight market and I think the new figures today are going in the same direction as last year, 2008. This means a large percentage, especially in the freight market, is structured or influenced by competitors. Also, if you look at the local passenger rail transport, competitors have a ten per cent share of the market. That is also a strong quota.

Q186 Lord Dykes: So you are convinced that DB Netz does not give too much of a special advantage to Deutsche Bahn?

Dr Henseler-Unger: I would say Deutsche Bahn is not as strong as your question implies. But, I would say we do not need a regulator. Yes, we need a regulator in Germany because Deutsche Bahn is still influenced by a holding structure and also by state ownership. There is also a tendency to give preferential treatment to their own subsidiaries, rail, freight, passenger transport, and a lot remains to be done if we look at the situation. We have 300 cases which we pursued for non-discrimination. We had strong cases, especially in recent times. We had a special charge for sidings. In times of recession, a special rebate was offered to freight companies for sidings. What happened was that these special charges could only be requested by DB Schenker, DB AG's rail freight subsidiary. So this was a clear case of discrimination and it was clear that we examined the matter and we banned this behaviour.

Q187 Lord Dykes: On the new dedicated freight line between Holland and the western side of Germany some people observing the scene do say that it works pretty well, although it is still new on the Dutch side, but then the disutilities and the power of the existing monopoly operator do seem to slow things down when they get into German territory. Do you feel that is a fair judgment?

Dr Henseler-Unger: I am not quite sure. What I have heard, and I am perhaps less familiar with the case, is that there is a problem with the line, the construction of the line and with a population which is not too keen to have a freight line near houses and gardens. That is the crux of the case.

Q188 Lord Dykes: You think it is that rather than operational matters?

Dr Henseler-Unger: I would say so, yes.

Professor Otte: May I add in answering your previous question, I think the German regulator has had clear evidence of preferential treatment being accorded to DB subsidiaries by DB Netz in the past, that we think we should stop. After all, there is still evidence and, in our experience, also grounds for suspicion that there is hidden preferential treatment. So we cannot ignore this issue.

Q189 Lord Bradshaw: I think you have dealt now with the question of access to sidings, shunting terminals and safety. Are you saying that your aim is to ensure that there is no discrimination in any of these fields?

Dr Henseler-Unger: Yes.

Q190 Lord Bradshaw: Could I just take up the question of the Betuwe line from Holland. That has been in the building for 25 years. It has been a very, very long process. Are you saying that there are still

problems that were not foreseen on the German side of the border?

Dr Henseler-Unger: We need to consult our expert in railway-related matters.

Mr Heinrichs: It is in the planning process, but DB Netz says there is no need to rebuild the line or to build more capacity. That is why the Betuwe line ends at the border.

Q191 Lord Bradshaw: I am just suggesting that the Dutch have built this line. It has taken them 20 years of very, very hard work, and it seems very odd that you should run up against problems at the border which should have been foreseen.

Dr Henseler-Unger: To come back to the answer which I gave before, we have problems with the population who object to the train paths in the proximity of gardens and houses. In the past decade there has been no traffic on these tracks and there should be heavy traffic now, so we are having huge problems with the population. That is one matter. We have also, I think, a small part which is the interlinkage between the Betuwe line and the rest of the network which is a difficulty. I agree. It is hard to understand that the problem was not foreseen.

Q192 Lord Bradshaw: Lastly, could I just ask about prices for haulage. Is there any discrimination? Obviously the price is set by the person making the offer, but is there any chance that that price can be undercut by DB once they know that this entrant is going to come into the market? The question is really, DB, as I understand it, construct the timetable?

Dr Henseler-Unger: Yes.

Q193 Lord Bradshaw: Therefore, it is necessary for somebody who wants to carry steel, if you like, from England to Italy (if it is coming via Germany) to go to DB and say, "I want a price." Is there absolute confidentiality that DB will not go and offer the person a lower price?

Dr Henseler-Unger: I think the discussion in the German market is not about charging the competitor a lower price for access to the infrastructure. The real issue is that there might be a higher price for train paths requested by the competitor. Also, there are sometimes hints that DB does not have Chinese Walls. So if there is a demand for a train path by a railway operator then it is quite clear which customer will be served. So DB-Cargo, the freight subsidiary might cut the price. It is a possibility, but that has to be proven!

Q194 Lord Bradshaw: I realise it has to be proven.

Dr Henseler-Unger: At the moment, there are no clear cases which I am aware of, but it would be interesting to know of any such cases, not only for the regulator but also for the competition authority.

Professor Otte: Of course we are very keen to have the same price level for all competitors and we are trying to control price levels in the train path pricing system as well as in the station price systems. Sometimes we think we detect, kind of “loopholes” for instance, in the Network Statements like certain expressions, sentences and clauses that allow the infrastructure manager to negotiate special prices bilaterally. They give the infrastructure manager bargaining power. We are trying to eliminate this bargaining power in order to create equal conditions for all competitors. So there have been several incidents of potential (hidden) discrimination regarding the control of Network Statements.

Dr Henseler-Unger: Let me come back to the question, because it is part of competition that prices for transport services are falling. If I look at my figures, especially in rail freight transport, I notice that prices have fallen by about seven per cent. That is what we are looking for if we look for competition. So not every price decrease is a signal of some kind of discrimination or cross-subsidy, or whatever it is, it might also be competition.

Lord Bradshaw: I am sure it is.

Q195 Lord Bradshaw: Do you believe that you need to create more efficiency from infrastructure managers and should the recast of the First Railway Package include this requirement? I would read into your answers that actually you think it should.

Dr Henseler-Unger: Yes, the regulator is looking for incentives for the incumbent and railway infrastructure companies to enhance their efficiency and. What we are looking for is better instruments, especially concerning the charging scheme. We propose, for example, to ensure cost regulation is managed by the goal of efficient costs, which is a concept we also know from telecommunication and energy. This means that every time charges and overriding costs are raised, we can reduce charges down to an efficient cost level. What we propose is to introduce incentive-regulation to improve regulation in that field. I am not quite sure whether we need European regulation in this field or a European Directive. What I would like is for the national government, the national law, to incorporate this goal of efficiency into the Railway Act as it did in the Telecommunication Act.

Q196 Lord Bradshaw: Do you think the First Railway Package is adequate?

Dr Henseler-Unger: Well, the First Railway Package is really open. It also incorporates efficiency costs and different cost concepts. There could be one solution in this situation to make the European Directive clearer and more precise. The other option would be to leave the European level as it is and to provide the national regulator with a national law which improves this regulation. I think this is the better option because I believe that the national

government should look for efficiency and focus on the regulatory issues.

Q197 Lord Dykes: Going on from the consideration of prices to other things like non-discriminatory track allocation, I think I am right in saying your evidence points out that your national legislation for the Federal Network Agency already includes powers which are stronger in a way than those which would be found in the EC legislation, I imagine, or in any future drafts of the Directive? Do you feel that is so, and is that actually working? Is that having an effect, therefore?

Dr Henseler-Unger: I think so, yes. Let me say first of all that I think it is most important that the regulator be independent because it is then free to make propositions and make decisions. That is the first thing. The second thing is that we have ex ante regulation. That means we can prevent misuse before it happens, as we did with the sidings which I talked about. There we acted ex ante, preventing this scheme. The third point is that we can act on the basis of ex officio investigations. That means we do not have to wait for a complaint to be filed. It means that we can act in advance or even if we feel that the market is displaying some irregularities. Sometimes we find parties do not complain because they are dependent on the infrastructure managers, so they are not quite sure whether they should officially complain. So you can act ex officio. Most of our decisions have immediate effect because legal actions taken against our decisions do not have suspensory effect. That means we decide and the decision is in the market.

Q198 Lord Dykes: It is an administrative decision which is in the market?

Dr Henseler-Unger: Yes. I think it is all three things, ex ante regulation, ex officio investigation and immediate effect. I would recommend it to other regulators.

Q199 Lord Dykes: One has the whole background of the history of railways and their traditions, and so on, and when one starts this open market and regulation, and all the rest of it, it does take some time to change habits. One sees that sometimes in the East European countries and new Member States in the EU now where they are not yet reaching the stages of some of the West European countries. When you meet the national regulators in many other countries, including this country, do you advocate the extra strong powers which you seem to have in German legislation for them as well, or do you say to them, “Leave it to the community to provide the European-wide legislation”?

Dr Henseler-Unger: No. Well, I recommend strongly that national governments and national regulators follow this line -and the legislators first of all to follow this line. Because I believe the national regulator is

the strongest and the best because it is close to the market and is more familiar with the national market than a European regulator. So my recommendation is not to wait for Europe.

Q200 Lord Dykes: Do you feel Britain is a good example, a middling example or a bad example of the use of open access?

Dr Henseler-Unger: I think I should be polite, but to be honest -

Q201 Chairman: You do not need to answer Lord Dykes. It was a leading question!

Dr Henseler-Unger: No, but I do think the British regulator is a good regulator which has other strengths than we have and in other fields. We look to the British regulator for example. We wish to have the same competences the British regulator has, so I think it is a good basis for comparison, a benchmark.

Q202 Lord Dykes: Do you think Deutsche Bahn has had any complaints about EWS in Britain and how it functions, or is that going well?

Dr Henseler-Unger: I am not quite sure, but I think at the moment Deutsche Bahn is complaining about the French situation and they came to us, demanding that we advise the French Government to create a regulator such as the German regulator in France. It would be happy to have that there.

Lord Dykes: Thank you very much.

Q203 Lord Powell of Bayswater: You are not the first person we have heard that comment from. It is quite common. Thank you very much for coming to give evidence. It is extremely useful. You have talked quite a lot so far about national regulators, about yourselves and other national regulators. Some of our witnesses have said there ought to be a European regulator. Do you think that would add anything, or do you think it is actually quite unnecessary?

Dr Henseler-Unger: I would say it is unnecessary. I think we should first establish independent regulators in each European country and there is a long way to go, not in the UK or in Germany. But in other countries there is a long way to go for independent regulators, also in terms of creating more transparency and information and freedom which the regulators should have. If you look at the discussion which we had with the other sectors, telecommunications and energy, in both cases we discussed the possibility of establishing a European regulator quite openly with the European Commission: What would be established at European level would not be an independent regulator. There is no way an independent European regulator can be established. It does not really matter what you call it, it is always going to be an agency, and an agency is always going to be dependent upon the Commission. If you look at the "political deals" struck at European level, we have seen that in the

telecommunication sector and with milk quotas. That does not lead me to the opinion that an agency dependent on the Commission would always result in neutral market-oriented decisions. I think, also, there is no need for an agency. You need a common institution if you have to resolve trans-European issues. For example: Let us look at electricity supply. A problem in the German electricity system might also lead to a blackout in Spain, you need a European institution which regulates this safety. Another example is again the telecommunications sector: If you look at satellite frequencies, yes, that is a European issue. But the rest, that is not a European issue should be tackled at national level because it is closer to the market, closer to the situation, closer to the legal situation of the specific market.

Q204 Lord Powell of Bayswater: That is very much in tune with my own views, I am glad to say, but how are we going to get these strong independent regulators in the countries which do not have them? Do you think it requires the Commission to take enforcement action?

Dr Henseler-Unger: I think that it would be a good step if the European Commission was in favour of having independent regulators and enforcing them. The other thing is I recommend that the regulators themselves create a group of independent regulators because then they can develop, let us say, best practices, they can benchmark against each other, they can exchange their views, making the regulators' group itself stronger. It is a bottom-up approach, not a bottom-down approach.

Q205 Lord Powell of Bayswater: So that you have a sort of college of European national regulators?

Dr Henseler-Unger: We do have that in the telecommunications sector, we do have that in the electricity and gas sector, but we do not, at present, have it in the railway sector. I strongly recommend it.

Q206 Lord Powell of Bayswater: Do you think it could be constructed, even though some of the existing national regulators are not, frankly, independent? Would you have to exclude them to start with so that they would have to apply to come in when they are properly independent?

Dr Henseler-Unger: That is a difficult question. You start with a nucleus of independent regulators and then try that to create an incentive. To become part of the group you have to be more independent than you are today. So I think there is also, let us say, some tendency and movement created by this start.

Professor Otte: Maybe the Commission could help this idea by recasting the Directive and thereby providing for more independence of national regulators, generally.

Q207 Lord Powell of Bayswater: Do you think that is their intention in this recast of the Railway Package? You have no evidence?

Professor Otte: I do not know, yet.

Q208 Lord Dykes: In fact when you said that telecommunications and electricity were not examples, they would be in respect of the trans-European networks for freight railway lines, for example, so would that not be the ideal territory for the college of national regulators working together to make sure they did have benchmarking and common standards? That would be, presumably, blessed and approved by the European Commission, so it is the same thing really, is it not?

Dr Henseler-Unger: Well, I think a trans-European freight system could be established by a national regulators' group, those regulators who have to deal with access to the networks in the special case, bilateral or trilateral, depending on which corridors you are thinking of, and I think that is better dealt with than at the European Brussels level.

Q209 Chairman: Can I just ask a supplementary question to the main question from Lord Powell, perhaps directed at Professor Otte. What connections or relations have you got with other regulators? Without disclosing any confidential information, how regularly do you meet with some of the other rail regulators?

Professor Otte: The rail regulators meet regularly. First of all, there is the working group of rail regulators under the aegis of the Commission. We meet about six times a year, mostly in Brussels but also different places within Europe. With the working group there are task forces that prepare the working group's meetings. -

Q210 Lord Bradshaw: How many members actually attend?

Professor Otte: These working groups, let us say -

Q211 Lord Bradshaw: All the regulators?

Professor Otte: Very often, almost all of the regulators participate in these working groups and no-one is excluded. It may incidentally happen that one or the other is not present, however cooperation is very intense and close. We work together on very, very interesting, sometimes even crucial issues of rail regulation that concern more than two regulators and, let us say, infrastructure issues and cross-border issues. In addition to that, bilateral meetings are held on an irregular basis, partly within training programmes, partly simply to inform each other about issues of mutual interest.

Chairman: That is extremely helpful.

Q212 Lord James of Blackheath: How far has the aim of a one-stop shop for rail freight operators seeking international paths been realised so far?

What problems have arisen and what do you see as the solutions?

Dr Henseler-Unger: As far as we know, there is hardly any rail transport undertaking that has used this one-stop option until now. There is an IT-tool, Pathfinder. It can only be used on the basis of the yearly timetable but freight often relies on short-term contracts. That is one thing. What we are thinking about is also the lack of transparency, other European regulators also see that there is a lack of transparency. You do not know how this IT tool Pathfinder really works and you do not know, and I think this is especially important for undertakings, how it handles sensitive data.

Q213 Lord James of Blackheath: So you do not think it is actually working at the present moment, but that is because the operators themselves are not either finding its availability or seeking to make it work?

Dr Henseler-Unger: First of all, there is no need or real advantage for them because they are working not just on the annual time schedule, they are also working on other short term time schedules.

Q214 Lord James of Blackheath: Would they not find the need if the availability was established?

Dr Henseler-Unger: I think that would be better. Then you have still to solve the question of sensitive data, the entrepreneurial data which you have to fill in on this IT-tool Pathfinder. You may not wish to show sensitive data to your competitors. So it boils down to the question of how this IT tool Pathfinder really works. There is a lack of transparency and the regulator does not really know whether it is non-discriminatory or not.

Q215 Lord James of Blackheath: So you are saying the database is itself very price-sensitive to the operator and that would be a competitive factor?

Dr Henseler-Unger: I think it is not a question of price sensitivity, it is a question of the sensitivity of the data itself. We talked about which track I am looking for and -

Q216 Lord James of Blackheath: The operational practicality, yes. What problems are you having with the infrastructure and rail-related service charges?

Dr Henseler-Unger: What problems are we having? We think the schemes, the tariff and the finance schemes, are not really clear. We would prefer to have clearer guidelines, a clearer legal basis. We look critically at the limited possibilities, in particular concerning the capping of infrastructure company's pricing scope. It must be asked: can we reduce costs to efficient costs? Can we look into the charges calculation schemes? What is done with the costs of capital? Which capital is introduced in the charging schemes? That is why we insist on more precise

wording in the national law and perhaps also in the Directive.

Q217 Lord James of Blackheath: Are these issues which should be addressed in the First Railway Package or by other measures?

Dr Henseler-Unger: I think the first step should be to incorporate it into national law. There are a lot of open questions, for example, on how costs are allocated. I think these allocation schemes should be based on the national historic situation, which varies greatly from country to country. So I would like a signal from European level that it needs to be clarified, but I would leave it up to the national legislator to clarify this. There would be also scope for this group of independent regulators getting together to find some benchmark, to find some guidelines, common principles on these issues. To give you some other ideas of what still needs to be solved: returns, cost competence, the definition of marginal costs, regarding the allocation of costs what is the situation with mixed financing schemes, and so on. If you look at that altogether you see that there is a lot of uncertainty in the system.

Q218 Lord James of Blackheath: I have a supplementary, I am afraid. Does DB Netz have to seek approval from the regulator for its charges?

Dr Henseler-Unger: It has to seek approval for the charging schemes and we can also look ex-post at the charging schemes. We do that at the moment for the train paths and also for the railway stations. We are now looking at the actual charging systems. Up to now, we have done so only in special cases, for example we looked at the charges for sidings, and also at charges for an ad hoc train path requests. But up to now we have not looked at the charging scheme itself.

Q219 Lord James of Blackheath: Are you satisfied that the charges are always consistent with Directive 2001/14?

Dr Henseler-Unger: The special charges for ad hoc passes and the charges for sidings have not been consistent with the Directive. Whether the German charging scheme per se totally for all train paths and for all stations is in line with the Directive we do not know. But there is a case of investigation which we are currently dealing with.

Q220 Lord James of Blackheath: The Directive requires that charges should be based on the direct cost plus mark-ups. Is that being applied?

Dr Henseler-Unger: No. To come to the underlying question is not only the cost, but it is also the question of what actually represents costs. We cannot accept all costs, for instance, costs which are spent on a football team. If DB Netz financed a football team, could it incorporate these costs yes or no? The European Directive does not give us any guidance. I

would say no, but to find a legal provision which allows you to exclude this football team from the costs claimed would be quite difficult.

Q221 Lord James of Blackheath: If you have the difficulty that you articulate there, how does the regulator check the cost to his satisfaction?

Dr Henseler-Unger: We are looking at the cost calculation, the balance sheet, and so on, and that is hard work.

Professor Otte: What the regulator does first and foremost is to verify the scheme of full cost control, that is the basic cost plus mark-ups. The prices have to reflect the full costs plus a reasonable rate of return. We are trying to find out whether the prices reflect these full costs, whether the costs are being allocated to the services rendered that have something to do with railway services. This is our first control. There is no incentive, as we mentioned already. In addition, we can control whether the prices are discriminatory, and then we can control whether they are not too high (reasonable rate of return; abusive price levels). But what is adequate and what is too high? There are no schemes for figuring out what is meant by "too high". And, as to the price components of basic costs plus mark-ups, the mark-ups are *optional* in the Directive, as they are in the German law. So all we can do right now is to ask the incumbent to make it for us, the regulator, as transparent as possible what criteria they use to compose their prices and what their components are. In case of sufficient transparency, the infrastructure manager can vindicate itself of the reproach of discrimination. Altogether, that is presently the only price control we can achieve right now.

Q222 Chairman: If I might ask a supplementary, we have had evidence from others who have been kind enough to give oral evidence and also written evidence that they would like to see in a recast of the Railway Package greater clarity in terms of the basis for the national regulators to charge on a consistent basis with other regulators the costs of access to track. Would that be helpful, or do you think it is entirely a national matter, greater consistency in defining what is a charging scheme?

Dr Henseler-Unger: My answer would be, first of all, you need a national legislative to give us guidance as the regulators, to give us a strong law to look at costs. The second answer is to establish this group of regulators which can exchange best practices or benchmarks. I do not think that we need a lot of change in the European Directive. Perhaps, but I think it is already in the Directive, there should be something like efficient costs as the quotation there.

Chairman: That is a very clear answer. Thank you.

Q223 Lord Walpole: Could we go on to the next question, which is on the progress on interoperability and harmonisation of safety standards. Is

this satisfactory and is it being achieved at an acceptable cost? What I was not clear about a few questions ago is, are you talking purely about freight transport or are you talking about the integration of freight with passenger? Presumably you are talking about the integration, are you not?

Dr Henseler-Unger: Yes. In Germany we do have a mixed system which means we always have to talk about integration of freight and passenger transport. It is the same tracks which are being used, so we have to find some integration. But if you are talking about safety issues, to make it quite clear there is another authority in Germany which deals with safety issues, that is not us. What we can say is that all safety issues are quite complex, lengthy procedures that take a lot of time because all stakeholders are integrated into the system. So if you look at it from the regulator's perspective, trying to encourage competition, there should be more effective implementation and harmonisation of these issues, which is just a quick start to new safety measures in the market.

Q224 Lord Walpole: Presumably you do not want vehicles that are unsatisfactory on your beautiful lines, do you? That must be the case. Should the Commission address these particular issues in the recast package, or do you think they are there already, or not there already, for safety?

Dr Henseler-Unger: What I would recommend is that the European Commission look for an efficient system. I am not looking for a compromise between safety and competition, but I am looking for quick procedures, less red tape, and so on.

Q225 Lord Plumb: We almost go back to Lord Bradshaw's first question, I think, and you then made it perfectly obvious that you are keen supporters of competition. You would add, I am sure, fair competition between the various states, but we have received evidence from a few people that safety and certification requirements are used or are being used as barriers to new entrants. Do you have any experience of this, and is the existing competition law adequate to deal with it?

Dr Henseler-Unger: Our impression is that it is more or less the implementation and the transparency of the safety issues which is preventing competitors from taking part in competition. We have cases of GSM-R, that means mobile telephony in the sector. Deutsche Bahn and its subsidiaries were simply ahead of their competitors as far as information about the system was concerned. Their competitors took a long time to get all this information, so again: quick implementation and more transparency would help.

Q226 Lord Plumb: How would the transparency come? I think this has been the thread between a lot of the questions which have been asked. If you get that transparency, you having made it absolutely clear

that you do not want a European regulator, you want strong regulators nationally, if that is going to happen then obviously transparency is going to be extremely important so that each can see what the other is doing. Does that tie in with your sort of college of regulators when you said that already the operators meet together, I think you said possibly six times a year? Those are people who are involved in the business. Who are these regulators going to be if you have a college of regulators? Are they going to be independent people? Are they going to provide the transparency?

Dr Henseler-Unger: My concept would rely on independent regulators and the independent regulator would look for competition and also for transparent procedures, publication on the website, transparent consultations, and so on. So I think a group of independent regulators and the independency of the regulation itself would strengthen the tendency to create transparency.

Q227 Lord Plumb: They would be appointed or elected by the respective governments, would they, in each country?

Dr Henseler-Unger: In each country, yes. I think there are examples in Great Britain, as there are in Germany, and also in the other sectors which we regulate.

Q228 Lord Bradshaw: In Britain freight is conveyed on the basis of access charges based on short-term marginal costs. Do you have any sort of concept like this in Germany where freight therefore gets a fairly cheap ride on the infrastructure?

Dr Henseler-Unger: We have one price in the market and for that price you can, rent a track. We do not have any rebate or scheme like that for short-term contracts.

Q229 Lord Bradshaw: Or to discriminate between passenger and freight?

Dr Henseler-Unger: Not on the same track. There is no discrimination. What we are examining is whether the prices for different tracks are set in a discriminatory way.

Q230 Lord Bradshaw: I mean on the same track, where freight and passengers share the same track, where freight pays the short-term marginal costs and the fixed costs are picked up by the passenger. You say you do not?

Professor Otte: Within our train path pricing system we do not make any such distinction, but we have a system that allocates the prices for usage of tracks according to different categories of tracks and then multiplies it by certain product factors (categories of passenger and freight trains and their speeds). We do not have any such scheme of short-term marginal costs. The track pricing system in total, however, can

be understood as a pattern or a model for a mixed financing system.

Dr Henseler-Unger: If you look at investment in infrastructure you should not look at marginal costs, you should look at some long-running incremental costs, for example, to finance investment.

Lord Bradshaw: I was explaining what happened here in Britain rather than saying it was good or bad.

Q231 Chairman: If we are not careful, Lord Bradshaw will give us an hour's lecture on the difference between short-run and long-run marginal costs! Two final questions, if I may. First, just to clarify for the record, where you have legal powers to obtain from the infrastructure operator all the information principally related to costs but operation of the track, have you got German legal powers to obtain it?

Dr Henseler-Unger: Professor Otte says "yes". I say perhaps! That is a question we are looking into now. We have, let us say, a pilot at the moment and we are discussing with Deutsche Bahn the information which we may request. We have many possibilities, in special cases. We can investigate special cases to the end, down to the penny- after some discussion, as you may understand, the objects of regulation are not really too keen on regulation). In these cases we agreed and we got all the information. But we need even more information. What we need is some kind of monitoring. Sometimes you can only consider an action to be discriminatory or not if you have background information on the market and you can also only analyse whether your regulation is successful or not if you get general background information. That is a particular problem in German law. We want to have a better grounding and clearance in German law to get this background information. It is a question of monitoring.

Q232 Lord Dykes: Just on the actual details of the law then, the Federal Network Agency was set up, as you said, sometime ago. I have forgotten the actual date now, but that was in particularly Gesetze from the Bundes, I imagine?

Dr Henseler-Unger: We were set up in 1998 as the regulatory authority for telecommunications and personal services. We took on the remits of energy in 2005 and railways in 2006.

Q233 Lord Dykes: Thank you very much indeed. Would that Gesetze, now a law, be modified and changed ahead of any new recast rail package coming from the European Commission?

Dr Henseler-Unger: We hope so.

Q234 Lord Dykes: Is there a date set for that, possibly, depending on experience and so on?

Dr Henseler-Unger: We hope so. We have demanded clearer provisions concerning monitoring and the requirement of efficient costs structures. We have also demanded the introduction of ruling chambers, as we already have in the other regulated sectors. A ruling chamber is a body made up of three persons which decides on a special case. A ruling chamber is even more independent than the regulator itself is. We were hoping that the German Government and the legislative parliament would introduce that last year, together with the decision about privatisation. But as you know the German discussion about privatisation was postponed. Now we are awaiting elections. We are hoping that in the next parliamentary term all these ideas about strengthening the regulator and clarifying our rights will be part of the governmental decisions.

Lord Dykes: Thank you very much indeed.

Chairman: That concludes the session. Thank you very much indeed. The meeting is closed.

MONDAY 6 APRIL 2009

Present Bradshaw, L.
 James of Blackheath, L.

Powell of Bayswater, L. (Chairman)

Examination of Witness

Witness: MR LUC DE RYCK, Director, Regulatory Service for Railway Transport and for Brussels Airport Operations, examined.

Q235 Chairman: We are part of Sub-Committee B of the European Committee of the House of Lords. We look after the internal market—transport, energy, that sort of subject, and we are conducting an inquiry into the recast of the First Railway Package. We have taken quite a lot of evidence already in the UK from all the interested bodies there except our Minister, whom we will see in about two weeks' time, and we are in Brussels today and tomorrow to talk to experts about their point of view. We take formal written evidence and you will have a chance to see the transcript and make any comments or changes you would want, and then we annex the evidence to our report. We will produce the report, we hope, by the beginning of June. Can I now formally welcome you here and say we are very grateful to you for coming to give us evidence. Perhaps you would first give us your name and function so that they are on the record.

Mr de Ryck: Thank you for the invitation. My name is Luc de Ryck. I am the head of the Belgian regulatory body which is officially called the Regulatory Service for Railway Transport and the Economic Operation of Brussels Airport. I am sorry for that impossible name but it was not chosen by us. It means we regulate all railway transport and Brussels Airport. We have been operational since 1 March 2006, so we were probably one of the last regulatory bodies to become operational in Europe. I am not proud of that but it is due to the government.

Q236 Chairman: Would you like to make any sort of general statement about the railways package or should we go straight to questions?

Mr de Ryck: We can go straight to the questions.

Q237 Chairman: Let me set the ball rolling. To what extent is a recast of the First Railway Package necessary? One might say that all one needs to do is enforce it rather than recast it because clearly it has not been implemented in full.

Mr de Ryck: Let me start by saying that it may not be very wise to change fundamentally again the European legislation. We have already had a lot of changes in the last decade, so maybe it is time to get some stability in the legal framework. Nevertheless, I think some changes are necessary. First of all, there still remains the problem of correct implementation in some Member States. That is a problem we are not

going to solve with the recast but it is work that will be done by the Commission, I think, and the European Court perhaps. There are some remaining problems, however, which require some action at the European level by way of changing directives, creating new directives, imposing regulations and so on

Q238 Chairman: What are those elements you think need to be dealt with in the recast?

Mr de Ryck: The main problem we are experiencing at the moment, which is mentioned in another question, I think, is the free operation of competition in marshalling yards, sidings, the last mile problem and fuelling stations. That is the one thing which is mentioned most by railway undertakings at the moment. However, I have to say that they have not filed formal complaints about this. Although we are able to deal with such complaints we have not received any formal complaints, but informally they say there is still a problem, especially in Belgium, but I think it is a problem in other European countries too, if I am well informed by my colleagues from other Member States.

Q239 Chairman: So you think these elements ought to be included in the recast of the First Railway Package because they were not clear enough or obvious enough?

Mr de Ryck: I think so. The only thing which has been dealt with in the First Railway Package is the access to such services but not the functioning of those services, and that is a problem, because in a lot of countries, and it is the case in Belgium too, these things—marshalling yards, sidings, are mostly operated by the incumbent with some severe problems sometimes. It is especially the case in marshalling yards though I have to say that, for example, in the Port of Antwerp, which is our main port and one of the leading ports worldwide, there is now a sort of test going on in one of the main marshalling yards where every railway undertaking can use its own trains, so they do not have to rely on the incumbent any more. I understand from Infrabel, the Belgian infrastructure manager, that they are now doing an evaluation of this test project and they will soon be making some recommendations or maybe applying that same project to all the main

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marshalling yards. Things are developing, so it is not impossible that every railway undertaking which wants to operate itself in a marshalling yard will be able to do so. Technically it is possible and probably operationally it will be possible too in the future.

Q240 Lord Bradshaw: We have anecdotal evidence from some operators of problems. I am not talking about Antwerp now but problems generally. Is it your opinion that these people should put those complaints into a formal process if there are complaints about access to fuel, technical complaints, availability of labour or train paths? Should they form the subject of complaints to the regulator?

Mr de Ryck: If it is really a problem of access to those services I think it is to their benefit to file a complaint with the regulator. However, it is not generally a problem of access to the service but the service itself. What is access to the service? If you look at the directive, "access" means you can get to the place where the service is located. That is not a problem. The problem is the service itself. I am in favour of, let us say, an interpretation as large as possible so that as a regulator I can deal with those complaints. I am not sure I can treat a complaint completely. That is the problem.

Q241 Lord Bradshaw: But you are saying that rather than complain they should come to you with a formal complaint, whatever service they want is being denied to them or if the cost of it is high?

Mr de Ryck: I think it would certainly be in their interest, because even if we cannot treat the complaint completely we can always give advice to the minister to change the legislation, for example.

Q242 Lord Bradshaw: But that takes a long time.

Mr de Ryck: That is true, but I have to say that the minister on duty is inclined to be more flexible and more ready to comply in a better way with European directives than the former one. I have to admit that Belgium has not always been the best one of the class, although that is changing now.

Q243 Lord Bradshaw: Looking at the position as a whole, do you think it requires the unbundling or separation of infrastructure from operations? Does any recast require that to happen or, in your view, can a regulator deal with the problems?

Mr de Ryck: I do not think a regulator can fully treat the whole problem because those structures are very complex to deal with. I am inclined to say that I am in favour of unbundling and I think it advisable in a recast of the package for the European Council to take a decision in favour of complete unbundling. It would be better and clearer for everybody. It would prevent a lot of complaints, I think, and it would be

better for the development of the railway market in general.

Q244 Lord Bradshaw: As a regulator do you have any responsibilities for the efficiency with which the infrastructure is managed by the incumbent? Can you reduce the amount of money he has got or criticise him in any way?

Mr de Ryck: No, we cannot reduce the amount of money he gets but we can give an advice on the planned investments.

Q245 Chairman: Before we move on could I ask one clarificatory question for our report? What exactly is the relationship between Infrabel and SNCB?

Mr de Ryck: Do you mean SNCB, the railway undertaking?

Q246 Chairman: Yes.

Mr de Ryck: Both of them are subsidiary companies of the holding company but there is no relationship at all between the two.

Q247 Chairman: So they are just parallel subsidiaries?

Mr de Ryck: Yes.

Q248 Lord Bradshaw: And you are independent of them?

Mr de Ryck: Yes, completely. It is written down in law that we cannot have any relationship with the infrastructure manager, nor with any railway undertaking.

Q249 Chairman: Just going back to your answer to the first question, I understand you do not formally register complaints. Is there a reason for that, or am I just wrong in my assumption that you do not register complaints if somebody approaches you with a complaint?

Mr de Ryck: No, we do. We accept formal complaints from any railway undertaking or the infrastructure manager but at the moment it does not happen very often. In 2007 we only received three complaints and there we were not competent because it was in fact a problem of the training of train drivers and a problem of legislation, and the regulator cannot change legislation; the minister has to do so, but we gave advice and finally, also under pressure from the Commission, the legislation has been changed, to our great satisfaction.

Q250 Lord James of Blackheath: Should the recast be seeking to introduce enhancements for both the independence and the competence of the regulatory body, and just what exactly would you like to see in terms of the regulatory powers?

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Mr de Ryck: If I may start with independence, I think an independent juridical statute is preferable in order to exclude any form of influence by other parties, and I mean not only by the infrastructure manager or railway undertakings but also, for example, the administration. I am in favour of a regulatory body which is completely independent of the administration because some of the problems we are dealing with have to do with the minister and his administration, which creates problems for free access to services.

Q251 Lord James of Blackheath: If that were to work satisfactorily for you would you not have to have to rely on every other regulatory body having exactly the same independence?

Mr de Ryck: I do not completely understand the question, I am sorry.

Q252 Lord James of Blackheath: It would be surely no good for you in one country to have that state of independence unless it was the universal standard so that everybody worked to the same standard.

Mr de Ryck: Yes and no, I would say. In the first place it is interesting to have it because of national requirements, but it would be better, I think, if every regulatory body had the same independent format.

Q253 Lord James of Blackheath: The point I am coming to is that you might very well like to be independent, we all would, but if you were more independent than others would it not be an unequal field on which you were playing?

Mr de Ryck: For the moment there are quite a lot of different forms of regulatory bodies in Europe but it does not prevent me from co-operating with them.

Q254 Lord James of Blackheath: You are quite sure it would not?

Mr de Ryck: Yes.

Q255 Lord James of Blackheath: What would you like to see any powers for regulators that are not there at the moment? Are there any particular powers you would like to see?

Mr de Ryck: First of all, if I may just add something about independence, I have to say that at the moment in Belgium as a regulatory body we are within the administration but not formally part of it. We have complete independence when we are taking decisions. The minister cannot change our decisions. We have to look carefully not only at the juridical form of the regulatory body but also at its independence concerning taking decisions, so the juridical form is not the only point. There is in Belgium, for example, a regulator in the energy sector which is independent in its form but some of its decisions can in certain

ways be overtaken by the minister, so be careful, I would say.

Q256 Lord James of Blackheath: What powers would you like to see changed for the regulatory body in any recast?

Mr de Ryck: The main problem we are dealing with at the moment concerns access. We have enough competences, I would say. We can impose sanctions, we can impose fines; I do not think there is a problem with that. The problem is that we would like to have full competence in the field of, let us say, the functioning of the railway market, problems of distortion of competition and so on. We do have a competition authority but I think it lacks the technical experience and I think also that the market is fairly complicated, fairly technical, so in order for them to take the necessary action it is not evident that it would be possible for them to completely understand a complaint. I have to add that in the past also the competition authority dealt with complaints in the energy sector and a complete file was prepared by our colleagues in the energy regulator and in the end they decided completely the other way round. They did their own research, so I am not quite sure that it would function if we filed a complaint to the competition authority. That is why I am in favour of complete competences concerning market problems.

Q257 Lord Bradshaw: How many foreign freight railways use railway lines in Belgium? *Mr de Ryck:* Foreign ones?

Q258 Lord Bradshaw: How many ones that are not SNCB use the railway lines in Belgium?

Mr de Ryck: At the moment we have eight railway undertakings which have a safety certificate. Six of them could be operational but one is not because of a lack of train drivers and material; that is ERS, which is Dutch/British, I would say, and Danish in part. Apart from SNCB we have Crossrail, which is Belgian/Swiss, we have SNCF, the French incumbent, we have Rail4Chem, which is part of Veolia, and we have Transport, which is a small Belgian company but is partly owned by the German Rurtalbahn.

Q259 Lord Bradshaw: So there is some entry into the market?

Mr de Ryck: Yes, and, if I can add some data, the market share of the incumbent has dropped significantly in the last month due to the economic crisis, but it is still 92 per cent.

Q260 Chairman: While we are still on this competition point and slightly taking questions out of order, we had a question about the competition powers, thinking more of the EU Commission than

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of your national competition powers, but does it surprise you that the Commission have not used the pretty extensive powers they have on competition grounds to try to get a better and more open market for the railways?

Mr de Ryck: Yes, in a way I am surprised by that because the competition powers are general but they do exist.

Q261 Chairman: And they are very widely used, are they not?

Mr de Ryck: They are widely used in other sectors.

Q262 Chairman: We have seen examples of companies being fined huge sums of money in different sectors and yet somehow the competition authorities have steered away from the railways.

Mr de Ryck: Yes, I think that is a problem. I think they should decide whether they are going to use the competition powers they have under the directive, Article 82, I think it is, or they should decide to get more of those competition powers themselves than give them to the regulatory bodies. It should be a clear choice because at the moment, as you say, they do not use the powers they have.

Q263 Chairman: It does seem as though the railways lag almost every other area in Europe when it comes to opening the market. There has been quite a lot of progress in energy and mobile telephones and so on in recent years but the railways seem impervious to some of the pressures, and indeed the directives from the Commission.

Mr de Ryck: I agree with you, yes, it is a problem. I think the Commission most of the time, especially in the last few years, has been dealing with the technical problems of interoperability and safety and so on, which are important problems and which also are a problem for developing the European railway market, but next to this there is the problem of competition and opening the market, so it is also one of the huge problems and it has to be dealt with.

Q264 Lord Bradshaw: Do you think the technical things which you have just referred to are much less important than competition because basically most of the railways, certainly in western Europe, run safe railways and they run them competently? There are arguments about interoperability and a future signalling system, but are these being used as obstacles to making progress? Are they being put on the table and diverting attention away from the main issue, which is opening the market?

Mr de Ryck: I think they can be used as an obstacle, and as a regulator we are aware of that problem. We also want to know all the developments which are going on in the field of safety and interoperability because we are aware that this might be an obstacle,

but I am not saying that we should not be dealing with those problems because technical problems are still a burden for railway undertakings in getting profitable operation of railway services. I think we should be treating them in parallel, but the focus should perhaps be a bit more on competition and a bit less on the technical side.

Q265 Lord Bradshaw: Because the technical people always blind you with all sorts of arguments.

Mr de Ryck: Yes, I know. I am not part of those technical people.

Q266 Chairman: Just coming back to what you were saying about unbundling, can you point to any examples of unfair practices by the Belgian holding company? We hear lots of complaints about the situation in Germany. Are there valid complaints, for example, about the holding company?

Mr de Ryck: I do not think there is any interference with the daily practice of the infrastructure manager. They do not interfere with the allocation of capacity of slots or the fees an undertaking has to pay; that is not a problem. There are several problems. One of them is that all the staff of the infrastructure manager are in fact under the holding company but are at the disposal of the infrastructure manager; they can go back to the SNCB holding company or the SNCB railway undertaking, so that might be a problem. One other thing is that the financing passes through the holding company, which might also be a problem. There were some problems because the holding company was also dealing with safety questions and giving advice on the safety system of other railway undertakings, but this one, after advice from our service, has been abolished by the present minister and we are very pleased about that. There is a problem also in that the holding company is doing all the ICT system of the infrastructure manager, which might be a problem when it comes to confidentiality of data and so on. Let us say there are a lot of potential problems but for the moment there are few or no complaints on that because I think it is also very difficult to get the necessary information because it is a very closed company.

Q267 Chairman: Although the Chinese walls sound as though they might be quite thin.

Mr de Ryck: Sometimes a wall can collapse very quickly, yes. You need a little earthquake.

Q268 Lord Bradshaw: Could I take you on to the question of the international sphere of your regulation? Belgium borders on Holland, Germany and France.

Mr de Ryck: And Luxembourg. Do not forget!

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Q269 Lord Bradshaw: What sort of contact do you have with the regulators in the other countries and can that be developed to be more productive?

Mr de Ryck: To answer the second part of your question, I think yes, it can be developed. We have regular contact, two or three times a year, in the European framework under the Commission, so with all the Member States, and last year we also had a meeting here in Brussels with the regulators of all the neighbouring networks. We are also co-operating in one specific project called ROLY, which stands for Rotterdam-Lyon and which aims at the development of a north-south corridor through The Netherlands, Belgium, France, Luxembourg. As regulators from the four countries we are part of this working group.

Q270 Lord Bradshaw: Can you see that developing? Are there more meetings and is there more international co-operation?

Mr de Ryck: I would say yes, not least in order to exchange information and best practice and so on. There are a lot of problems with international train paths, for example. I think on that problem we might also take a more active approach in order to deal with that kind of problem.

Lord Bradshaw: You are quite right.

Q271 Chairman: In the same context, there is quite a lot of talk of Europe-wide regulatory bodies, colleges of regulators and so on. Do you think there is scope for that to operate in the railway area? I am not talking about a single European regulator, which I would say none of our witnesses has expressed support for, but a wider group.

Mr de Ryck: One of the problems is that most, if not all, of the legislation remains national because we all have to transpose directives, and also the technical situation with regard to the national networks is quite different among the different Member States. I do not think it is useful to have a European regulator, and it is also difficult most of the time to implement a solution that works in one Member State into another Member State. It is also quite difficult when we are talking with other regulators to compare situations because there are such differences at the moment in the European railway landscape that it is not always easy to find a common base.

Q272 Chairman: But if you had a college of regulators, of each national regulator, meeting fairly regularly, surely you would encourage a trend towards harmonisation of these conditions?

Mr de Ryck: Definitely, I would say, yes.

Q273 Chairman: It has been found useful in other sectors.

Mr de Ryck: It could be useful. I think perhaps we should sit together more regularly. I am not going to say that this is going to solve every problem but it would be useful, I think.

Q274 Lord James of Blackheath: Are there any issues of safety and interoperability arising from the recast which are not dealt with adequately by the European Railway Agency and other legislation which you would like to see addressed?

Mr de Ryck: As these aspects are now treated in separate directives and regulations I do not think it is preferable to include them in a recast of the First Package. I think they should be working more on the opening of the market and so on. That is on the technical side, I would say.

Q275 Lord James of Blackheath: So you are saying at the moment you think they are pretty well okay?

Mr de Ryck: On safety and interoperability?

Q276 Lord James of Blackheath: Yes.

Mr de Ryck: I think one of my first remarks applies here. With the amendments on the Second Package and all the directives now being transposed for the moment, I think in the field of interoperability and safety a lot of work has been done and maybe it is time to wait for a couple of years to see how things develop. A lot of work has been done and maybe we should take a little rest and see how things develop.

Q277 Lord James of Blackheath: Safety certification was noted by the CER as one of the three issues of concern. Does that have any resonance for you?

Mr de Ryck: What do you mean by this?

Q278 Lord James of Blackheath: They just made a general comment to the effect that safety certificates was seen as being an issue, given the varied nature of the rolling stock through Europe and the incompatibility of some of the resources available to freight.

Mr de Ryck: Concerning safety certificates, it is true that the procedures in a lot of Member States are fairly complicated. It takes a lot of time to get a safety certificate. Maybe there we can do something to facilitate this process.

Q279 Lord James of Blackheath: The way you put it it sounds more like an administrative or procedural concern than a practical safety anxiety.

Mr de Ryck: I am convinced that perhaps some procedures are too complex and in reality you can do the same thing more quickly and with the same safety standard.

Q280 Lord James of Blackheath: So without endangering anybody more you can do it?

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Mr de Ryck: Right.

Q281 Chairman: But there is a perception in some quarters that safety requirements are sometimes used as barriers for new entrants. Do you think there is any justification for that?

Mr de Ryck: Yes, they might be. I cannot speak for other Member States, but there are some other problems. I am not saying that they are putting barriers up deliberately in order to prevent railway undertakings from getting into the market. It is another problem, that when you are separating some functions in the field of safety you get the safety authority and you get the infrastructure manager. I see in the Belgian situation that they are trying to get rid of some of the responsibility or take as little responsibility as possible. That is a problem because then you have a tendency to get in Europe all the necessary procedures but no-one is responsible for what another one is doing.

Q282 Lord Bradshaw: Passing the blame.

Mr de Ryck: And that is a problem because this lengthens the procedures which tends to make them more complicated. I suppose that is a problem in the whole of Europe.

Q283 Chairman: Moving on from that, do you think there is a need to strengthen the provisions to ensure new entrants and international freight services generally get adequate priority and track allocation?

Mr de Ryck: I suppose there you are also referring to the recent proposals for a freight network.

Q284 Chairman: I am.

Mr de Ryck: It is quite a complex question. I think in general it should be possible to define some corridors where priorities should be given to freight transport, but also I am convinced that this may put a burden on passenger transport, especially for those networks where passenger traffic is very dense. This is the case in Belgium, in The Netherlands, in parts of Germany and France and so on. In Belgium, for example, passenger traffic has risen by 25-30 per cent in the last five years. It would be a pity if it were difficult to continue this evolution due to the priority given to the freight network, but I think it is possible because we have already some corridors in Belgium. The main problem is not with the corridor itself but those points where they have junctions with the other network, which can be solved, I think, by some infrastructural measures, but it takes some time so I hope the Commission also takes into consideration that it might take some time to bring together all the infrastructures so that you really can create some freight corridors and so on.

Q285 Chairman: We have heard some complaints that foreign companies are denied or held back on track allocation. I am not talking about Belgium; I am just talking generally in Europe that this happens.

Mr de Ryck: It does happen, though I have an interesting example of something of the opposite taking place also. A year ago Belgian SNCB asked for a new train part for a local train service on the line from Antwerp to Gent, but this is also a very busy line for freight transport, given the fact that there are two ports. If the infrastructure manager would allocate the train part for this second local train service it would mean that virtually no freight train would pass any more on the line, given the fact that the local train is consuming a lot of capacity, so the infrastructure manager said to SNCB, "You would be the first victim of this because you are the one which is operating most of the freight trains, so what do you prefer—a local train or a lot of freight trains passing on the line?". They chose the freight trains, so problem solved.

Q286 Chairman: Do you think it would have been the same had it been an international operator which was asking for more access and more track allocation?

Mr de Ryck: I think the infrastructure manager would have taken the same decision because they are quite aware of the importance of freight traffic, so they are playing the role in a fair and correct way, I would say.

Q287 Lord Bradshaw: You mentioned a few questions ago the question of the difficulty of getting international train paths, which is the point that Lord Powell has made. Do you or any of your staff have any expertise in the subject of train pathing or construction of timetables, or are you totally dependent on the infrastructure manager to do it?

Mr de Ryck: I cannot say that I have a specialist on that at the moment. I would like to have one. It is very difficult to get one. In general it is very difficult for us to convince railway people to work for the regulator because the contracts and the income and so on in the railway undertakings are very interesting concerning wages and all the extra legal advantages and so on. I have just got one, a lawyer, who came from the railway undertaking to my service. That is one of the points we can solve when we have a more independent statute because then we will have the advantage that we can offer all sorts of contracts and we can also offer them more financially, so maybe then we can convince railway people to work for the regulator.

Q288 Lord Bradshaw: It is a very specialist job, reading railway timetables. It is akin to thatching or bell ringing or something like that, but the capacity of a railway is dictated by the timetable and the

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timetable is not an absolute science, it is a dynamic science; one person will get more trains through than another. I think it is very important that a regulator is able to examine closely the way the timetable is constructed, how often the trains run, whether they just run in the summer or in the winter. Is there really a shortage of space? Can the trains be longer? Can they accelerate better? There is a wide range of things. Do you feel that you really ought to be knowledgeable about these things?

Mr de Ryck: In the future, definitely, yes, but the problem is not for the moment because we are constantly asking the infrastructure managers whether they can handle all the demands for capacity. They say, "Yes, we can still do so", but at the moment they do not have any problem solving that.

Q289 Lord Bradshaw: But there are problems in international trains going, say, through Germany, or so we are told.

Mr de Ryck: The main problem that the infrastructure manager has at the moment is that contact with other infrastructure managers to get connecting train paths can be extremely difficult, for example, for the Germans. I think with France it goes a little bit better, for the Netherlands it is all right, I think. It is still a problem. They should contact each other. They make a proposition, they get another proposition back, so it takes a lot of time to construct the true train path so that you get the connecting train paths.

Q290 Lord Bradshaw: In the meantime the track on which the train is to run has presumably been a contract agreed with some road haulier or some operator on the waterways to carry it while this process goes on.

Mr de Ryck: It is possible, I think, that they will lose some traffic if they cannot solve the problem of proper train paths.

Q291 Lord James of Blackheath: In the Annual Legislative and Work Plan the Commission has said that the recast should give priority to clarification, and it seems to imply clarification of issues rather than re-definition and change of issues. What do you think requires most clarification?

Mr de Ryck: I have been thinking several times about this question and I cannot find anything which should be clarified more.

Q292 Lord James of Blackheath: That was not very clear to you. What do you think might not be clear to others?

Mr de Ryck: The main things in the First Package are about access to the network, access to services. I think there the targets are quite clear.

Q293 Lord James of Blackheath: You do not see any problems arising out of people's confusion or understanding about what is there then at the moment?

Mr de Ryck: No. Maybe in other Member States but for the moment I cannot find any.

Q294 Lord Bradshaw: Can I go to another area altogether? The price which the railways can ask in the market for carrying goods or freight is really the price at which a road haulier or an inland waterway operator would carry it. In other words, the railway is a price taker, not a price maker. It is no good the railway going to somebody and saying, "We will charge you three times what the road haulage is", obviously. In Britain fairly recently it has been established that the rate for freight transport, the price at which they have access to the network, is the price of short-run marginal costs, that is, short-run marginal costs on what is basically a passenger railway plus any extra bits which are added on for freight. How is rail freight charged for use of the network here in Belgium?

Mr de Ryck: I think they are in a fairly good position at the moment because the fees for using the network for freight transport in Belgium are one of the lowest in the whole of Europe, the second or third lowest. That is because of the decision of the government. In fact, one should say that freight transport is partly being subsidised by passenger transport because the fees for passenger transport are fairly high. I think this has been done to give some advantage to the incumbent operator, but all the other operators are also taking advantage of this.

Q295 Lord Bradshaw: The other operators get charged the same amount?

Mr de Ryck: Of course they are charged the same amount.

Q296 Lord Bradshaw: When you are talking about international traffic going over borders, what sort of charges are levied in other countries? Do you know what the basis of charging is when that train goes across the border, or do you not know that?

Mr de Ryck: Do you mean the levels or the basis of the charge?

Q297 Lord Bradshaw: Both, the basis and the levels.

Mr de Ryck: I know it is fairly different. I do not know them all by heart. I would say it would be better if they were harmonised in the medium term. In the short term it is difficult, I think, but in the medium or long term they should be harmonised, let us say, on a cost basis. This is a very big discussion because you also have to take into account the other transport modes and so on.

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Q298 Lord Bradshaw: You do, but I think it would be generally accepted that road transport gives rise to a lot of costs which are not captured through the licence fees—cost to the environment, cost of accidents and this sort of thing. In addition, the level of compliance with the law by road hauliers is certainly very low in England and I imagine it is throughout Europe, so having a low charge for freight does act as some sort of compensation for non-compliance and some stimulus to the use of railways, if that benefits the environment.

Mr de Ryck: It is certainly a stimulus for freight transport by rail at the moment. One should be aware of that problem when proposing to raise the level of charges for using the freight rail networks.

Q299 Chairman: Could I ask a couple of more general questions? The Netherlands seem to be the blue-eyed boy of the European railway system since they are the only ones, I think, who have not received an enforcement warning from the Commission.

Mr de Ryck: It did surprise me a bit, not that they are not doing well but just one exception is a bit strange. They can have it.

Q300 Chairman: What would Belgium have to do to bring itself into line with The Netherlands? Are there things that you are not doing which are very obvious that fall short in the Commission's eyes of what The Netherlands are doing?

Mr de Ryck: I cannot remember all the remarks but I do remember some remarks about the position of the regulator, for example, because they said we lacked some independence, so that is one of the points the Commission made.

Q301 Lord Bradshaw: And that has been put right now.

Mr de Ryck: Yes, we are working on a different form for the regulator. We are going to work in two stages—one, in order to comply with the remarks of the Commission, and, two, to comply also with the third railway package, but they also made a remark about the regulatory body. In the second stage we will get our own legal independent statutes. It is going in the right direction, I would say.

Q302 Chairman: Was that the Commission's only significant objection?

Mr de Ryck: No, there were some remarks also about the independence of the infrastructure manager, and as a result of those remarks there is still no political majority for unbundling, for breaking up the whole system. They have decided that people on the board of the infrastructure manager cannot go straight back

to the railway undertaking for a job though they are members of the same holding company. That is in order to enforce the independence of the infrastructure manager. It is especially for those people who are dealing with access to the network which is a separate division within the infrastructure manager. If it interests you I can give you the full range of remarks.

Q303 Chairman: If you are able it would be very kind of you to send them to us; we would appreciate that. Secondly, do you think that the recast should be made in the form of a Directive? This is not an area (not yet anyway) where the Commission could envisage regulations?

Mr de Ryck: It is a political agreement for imposing a Regulation. I suppose it would be a Directive. I think that would be the most realistic.

Q304 Chairman: Is your impression that the Belgian government is on the whole in favour of a recast of the Railway Package?

Mr de Ryck: I am quite sure the present minister dealing with the legal framework for railway transport is. I think maybe he can convince the whole government. It has been different in the past where, let us say, France, Belgium and Luxembourg were always the ones to oppose new rail packages or changes to the packages. I think it is different now. I will give you an example. When transposing the directive of 2007/58, the realisation of international passenger transport, maybe you remember that there was a whole debate about the possible influence of international passenger transport on a national public service contract and that had the possibility to impose a mechanism of rebates. It is only a possibility but now Member States can apply this mechanism. They are not obliged to do so, and after a fairly quick discussion we decided not to apply this possibility, so everyone that is proposing an international passenger service can run it into Belgium regardless of whether this has an influence on the public service contract. That is interesting because in the past I think Belgium would have been against applying the directive without conditions.

Q305 Chairman: So the trend is towards liberalisation, in effect?

Mr de Ryck: The trend is more towards liberalisation, but, again, directly applying the European directive.

Chairman: That is very helpful. Thank you very much indeed for coming and giving us evidence. It has been very helpful. We have been very impressed by your clarity and we wish you every success in the task you have taken on. We will send you our transcript and in due course our report as well.

MONDAY 6 APRIL 2009

Present Bradshaw, L. Powell of Bayswater, L. (Chairman)
James of Blackheath, L.

Memorandum by the Community of European Railway and Infrastructure Companies (CER)

The Community of European Railway and Infrastructure Companies (CER) is the leading European railway organisation. It brings together 72 railway undertakings and infrastructure companies from the European Union, the candidate countries (Croatia, Macedonia and Turkey) as well as from the Western Balkan countries, Norway, and Switzerland.

CER is based in Brussels and represents its members' interests vis-à-vis the European Parliament, Commission and Council of Ministers as well as other policy makers and transport actors. CER's main focus is promoting the strengthening of rail as essential to the creation of a sustainable transport system which is efficient, effective and environmentally sound. Within this framework, a key priority is the achievement of a more balanced modal split in the transport system, eliminating high external costs to society and improving economic efficiency. In parallel to the railways' own initiatives for improving the quality of rail services, CER sees mobilising adequate investments in rail infrastructure as a prerequisite for achieving a sustainable modal split. CER's portfolio covers all policy areas with a potential impact on railway transport offering advice and recommendations to European policy makers. Its interests span the whole spectrum of European transport policy: infrastructure planning, passenger and freight services, public service, the environment, research and development and social dialogue. In close cooperation with its members, CER monitors and evaluates the implementation of policies. In permanent dialogue with policy makers it proposes calibration of legislation to address remaining problems. Two railway companies from outside the immediate European area (Georgia and Japan) have become CER partners, opening up cross-fertilisation opportunities on best practices and lessons learned with other regions.

In its role as a major railway stakeholder, CER has been involved in the Commission discussions relating to the project of recast of the First Railway Package. CER is happy to contribute to the inquiry of the House of Lords on this matter and remains at its disposal for any further comments or input. This paper aims at summarising some of the issues of concern of CER along the lines of the House of Lords' inquiry.

1. CER GENERAL COMMENTS ON THE OVERALL COMMISSION OBJECTIVE TO RECAST THE FIRST RAILWAY PACKAGE

CER acknowledges that the European institutions adopted many pieces of legislation over the past years intended to open the Rail market and create a common European Railway Area. CER supported these initiatives in as much as they were necessary to attain the objectives pursued. CER opposed specific measures when the objectives pursued were best tackled by market forces and when their adoption was likely to stiffen the already difficult commercial situation in the market (see in particular the Commission proposal on compensation in cases of non-compliance with contractual quality requirements for rail freight services within the context of the Third Railway Package).

The European Commission has been complaining that measures included in the First Railway Package have not produced their effects. The Commission therefore wishes to reinforce the First Railway Package provisions by adopting further legislation in a so-called recast of the First Railway Package.

CER has repeatedly supported the European Commission in considering that the railway packages must be fully implemented. However, CER has serious doubts about the appropriateness of a recast at this point in time, when the implementation of the First Railway Package appears to be unsatisfactory and therefore, there is no sufficient evidence that market forces cannot develop as expected.

In this context, CER wishes to draw the attention of the House of Lords to the following:

- It is a fact that some Member States have been very slow in implementing in practice (not only on paper) the First Railway Package. CER agrees that the Commission cannot let this situation last further if it wants to see concrete changes on the market.
- It is, however, important to note that such changes concern both freight and passenger transport. In this regard CER regrets that the inquiry of the House of Lords focuses on freight transport only. Moreover, it is common knowledge that measures included in the three railway packages are *closely*

interrelated. In other words, measures included in the First Package will **fully** produce their effects **only** when the Second and Third Railway Packages (as regards passenger transport in particular) will also be fully and adequately implemented in practice throughout the EU. Nevertheless, CER recognizes that the full and adequate implementation of the First Railway Package constitutes a positive first step in the right direction even if the foreseen effects will necessarily be incomplete.

- It should also be recalled that the three Railway Packages are essentially composed of Directives which leave a certain margin of manoeuvre to Member States when implementing them. Moreover, the choice of Directives was knowingly made at the time: it was a political choice to grant Member States a certain margin of manoeuvre in attaining the overall objective of the Directive. Therefore, a certain variation in the implementation measures should be expected and considered normal.
- The European Commission has launched in June 2008 formal infringement procedures against 24 Member States for not having or having partially/incorrectly implemented the First Railway Package. This means in practice that the effects of this package cannot materially be known as this paper is drafted: there is therefore no valid experience of the effects of the First Railway Package on the market as of today.

In this context, CER questions the appropriateness of seeking adapted measures to a whole series of issues of concern that are actually in the process of being resolved through implementation of the First Railway Package.

2. SPECIFIC ISSUES OF CONCERN

(a) *separation of infrastructure management and train operation*

Separation of infrastructure management and train operation is already foreseen in the First Railway Package. These provisions must be fully implemented throughout the EU to produce their foreseen effects. There is currently no evidence that the different company structures currently put into place and complying with the EC requirements prevent the development of competition on the market. In particular, full legal separation of infrastructure management and rail operations has not proven to be more advantageous than integration when a strong regulatory body is in place.

(b) *staffing and independence of regulators*

Staffing and independence of Regulatory Bodies is foreseen in the railway packages. CER understands that this issue is under scrutiny in the infringement procedures launched by the European Commission. Once the railway packages will have produced their effect, all stakeholders will then be in a more appropriate position to evaluate whether and to what extent further legislation is necessary.

Beyond these aspects, CER would nevertheless like to stress that it is important that Regulatory Bodies are composed of adequately qualified personnel, having a good and knowledgeable understanding of the rail market. Without such knowledge and understanding, Regulatory Bodies are not likely to facilitate the creation of a real European railway area.

(c) *safety certification*

The procedure for railway licenses, safety certificates and homologation of rolling stock is foreseen in the various railway packages and in very recently adopted legislation (Technical Specifications for Interoperability) that has not yet entered into force. Any difficulties in obtaining certificates, etc. appear therefore to be primarily an implementation problem.

(d) *infrastructure charges*

Principles and procedures relating to track access and charging schemes are quite complex and have important ramifications.

The current requirements for setting infrastructure charges are not crystal clear and the sector would welcome some sort of Guidelines from the European Commission. In practice, the degree of public support for infrastructure will have a direct impact on the level of track access charges.

For the rail sector to be able to compete with road, track access charges must remain flexible throughout Europe in order to reflect the differences between Member States in the market. In the new Member States, for example, public authorities appear not to make sufficient efforts when financing rail infrastructure,

therefore IMs are obliged to apply very high charges (see the RailCalc study). The question of insufficient harmonization of principles and procedures will therefore relate to these specific situations that drastically affect the level of track access charges. The question of a unified method of calculation does not appear therefore to be the solution to this problem. Moreover, it appears highly unrealistic in the present situation. The Commission should however concentrate on securing that Member States apply EU law by financing appropriately infrastructure.

(e) *allocation of capacity both on tracks and at terminals*

Non-discriminatory rules for the allocation of capacity both on track and at terminals are clearly stated in the First Railway Package. No further legislation is necessary at this stage. With regard to access to rail related services (RRS) in particular, CER understands the European Commission is envisaging revising the list of services and remedies for which full non-discriminatory access is to be granted.

CER believes that revising list needs further thought and experience: too hasty legislation could harm the market rather than foster its development.

The overall issue of rail related services can only be properly tackled when the railway packages will have fully produced their effects (in particular the two first packages). Freight market opening will trigger demand from operators for access to rail related services (RRS). When there is no viable alternative, access will have to be provided on a non-discriminatory basis. However, experience from countries that have opened their market earlier (ie: the Netherlands) has shown that market players responded spontaneously to demand by creating new forms of business. In other words, demand for RRS fostered entrepreneurship. This is why CER pleads for waiting until the Railway Packages have produced their effects, and therefore for entrepreneurship to grab market opportunities before the European institutions start legislating again on RRS. If the European institutions act in a too hasty manner, they take the risk of creating a straight jacket situation that could prevent the development of entrepreneurship.

In addition, CER considers that non-discriminatory access to services should be limited to those services that are effectively necessary to allow the provision of transport services and which can not (or not reasonably) be duplicated. If the European Commission tries to enlarge this list to other services, it further takes the risk of preventing the development of market initiatives.

Finally, a centralised approach to RRS does not seem appropriate. The detailed list of services and remedies will necessarily vary from country to country, depending upon the physical nature and degree of openness of the market. Responsible authorities in each Member States are then best placed to determine the list of rail related services and possible remedies to secure full and effective market opening. Flexibility must therefore prevail when interpreting Directive 2001/14.

(f) *how the recast would relate to freight transport*

Many believe that the full implementation of the First Railway Package will necessarily lead to increases in market shares. While CER considers that the implementation of the First Railway Package is likely to contribute to market share increases, this objective cannot be attained without other crucial political actions on the financial environment of the transport market, such as:

- *Proper financing of infrastructure*, which is foreseen in Article 6(1) of Directive 91/440
- *Alleviation of the historical debt* from railway undertakings, as stated in Article 9 of Directive 91/440
- *Proper compensation of public service contracts*, required both in the “old” and “new” public service Regulations (see Article 6(2) of Regulation 1191/69 and Article 1(1) and point 5—third indent of the Annex of Regulation 1370/2007). It should be noted that in the new EU Member States in particular, the lack of proper compensation of public service obligations obliges railway undertakings to “cross finance” freight revenues onto passenger traffic to compensate public financing shortcomings. This obviously produces a negative impact on the freight market.
- *Setting a competitive level playing field between transport modes* (see discussions on the so-called Eurovignette Directive, ie the issue relating to the internalisation of external costs in particular)

In this regard, Britain offers a particularly good example of a comprehensive approach to rail revitalisation. While many voices, including governmental ones, seem to attribute rail revitalisation solely to the development of intramodal competition, it is still too much ignored that public financial support to the British rail system has been very intensive since 2001, especially when compared to the levels of public financing in other large countries in the EU. With 9.4 euro cent spent for each transport unit in 2006, the intensity of the

United Kingdom's support to its rail system has been more than double than the one observed in Germany (with only 4.3 euro cent per transport unit).

Such an exemplary support to the rail system is to be put mainly to the credit of the legislator itself, who should not undersell its own contribution to the revitalization of rail in Britain. Public support to the rail system has hence allowed volumes to grow and, to some extent, provided the conditions which have made the rail market become more attractive to new entrants. As a result, one could say that market opening did not boost growth as much as efficient public support fostered both growth and competition. In fact, as far as freight is concerned, the proportion of business acquired by "real" new entrants (other than the two former conventional and intermodal branches of British Rail, EWS-DB-Schenker and Freightliner) is still far below 10% of the whole freight volumes in Britain.

Against this background, CER regrets that the European Commission has not included in the infringement procedures launched last June questions relating to the absence of implementation of all of the provisions mentioned above (including adequate support to rail infrastructure). Once again, CER stresses the crucial importance of these financial issues to allow market share increases (and the development of intramodal competition) in the rail sector.

CER hopes that the European Commission will recognise the full role which the British legislator has played in revitalising its rail market (notably as far as financial support is concerned) and will use the British case as an example to be reproduced in other EU countries.

5 February 2009

Examination of Witnesses

Witnesses: MR LIBOR LOCHMAN, Deputy Executive Director, Ms DELPHINE BRINCKMAN-SALZEDO, Senior Policy Advisor, Legal Affairs, and MR JEREMY DREW, Senior Policy Advisor, Economics, Community of European Railway and Infrastructure Companies (CER), examined.

Q306 Chairman: Thank you very much for coming. We are members of Sub-Committee B of the European Union Select Committee of the House of Lords and we deal with the internal market, energy and transport. We have regular inquiries and this one is into the recast of the First Railway Package. We will send you a transcript of what is said and you can correct it or make any changes you feel necessary, and in due course we will send you our report which will probably come out at the beginning of June. Could each of you for the record please state your names and your principal roles?

Mr Lochman: I am Libor Lochman, Deputy Executive Director of the Community of European Railway and Infrastructure Companies. I would like to thank you for inviting us to such an important meeting because we feel that this is an item that really needs to be discussed and understood by all the parties.

Ms Brinckman-Salzedo: I am Delphine Brinckman-Salzedo, CER Senior Policy Advisor for legal affairs, and I have been following the recast since this word appeared in the European Commission. I had to look it up in the dictionary. I am French so I need the dictionary.

Mr Drew: I am Jeremy Drew. I am Senior Policy Advisor, Economics, at CER.

Q307 Chairman: Thank you very much, and thank you also for your written evidence which, of course, we have all studied and found interesting. What in your eyes are the main failures of the First Railway

Package and why has implementation been such a big problem?

Mr Lochman: First of all, we believe that we should not focus only on the First Railway Package because we need to talk about all the packages that are important for the rail system. You know that there are elements of all the packages that are distributed, such as for opening the freight market, for opening the passenger market or the issues related to the interoperability of licensing of the railway. It is not a single matter of one package, the First Railway Package. What we believe should really be seen as three significant failures are related to not responding clearly and sufficiently to the Commission White Paper, because the Commission White Paper provides a basis in the case of 'three pillars'. The first 'pillar' relates to intermodal competition, or the opening day of the possibilities in a balanced market for all transport modes but we see that not everything that is happening today concerns a balance in the conditions for all transport modes. The second element which belongs to this, in compliance, so to speak, with the Commission White Paper, is the investment in infrastructure. Here we can see that there is a very big backlog as concerns the investments in rail infrastructure, and, of course, we see the consequences of that. Thirdly, we have to say that probably the most successful 'pillar' is the intramodal competition because here we see the market opening within the rail system, especially for freight. This is really the 'pillar' which exists in the First Railway Package and which is being accomplished. On the other hand, if we see that this has been

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achieved, at least partly on the intra-modal competition, not so much the central infrastructure investment and the intermodal competition, we also have to look at what has been done on the Member States' side, so how far the enforcement works here. Here I would like to come back to what I have already said. We see insufficient finances that are available for infrastructure, so the Member States, in fact, are not complying with their obligations completely. There is an under-financing which concerns the public service obligation and there are some difficulties with the recent financing of the historical debt of the companies. On the one side we see that, yes, the railway companies have started to behave as commercial players in the market; but on the other side we see still the difficulties of the understanding on the Member States' side and difficulties that the Member States are simply not fulfilling the obligations that they have in accordance with the First Railway Package. Those would be what we see as the main failures.

Q308 Chairman: I understand your point about financing and we have not really looked particularly at that. You say the market is opening up for freight, yet the impression we have had from other evidence we have taken is that this is still relatively speaking quite a closed area. When we look round other areas of European Union policy and markets, let us take mobile telephones or the energy market, there is genuine opening up going on and yet in the railway sector it is probably the slowest of all, and I wonder why you think that should be the case.

Ms Brinckman-Salzedo: It is the last one they started tackling. They tackled the other markets much earlier and this is where you have the three packages going one into the other. The Commission is looking only at the implementation of the First Railway Package now. They have been looking into the Second Railway Package but at the end of the day the full market, if you take passenger into account, is going to be open in 2010 and later, so as long as you do not have all the different elements throughout the packages fitted together and implemented properly on the market you will not be able to have a clear picture.

Q309 Chairman: I see that, but on the other hand why do the Commission need to take enforcement action? Why have the Member States not responded more vigorously and more promptly to the original directive? It is not just for the Commission. The Commission have come in with enforcement simply because Member States have failed.

Mr Lochman: This is in part true and that is why we have mentioned it. We believe that there still needs to be a lot of action on the Member States' side, absolutely; we are in full agreement with that. If we

come back to the question why we do not see more new entrants to the freight business on the railways, this again comes back to what they can provide, what kind of services they can deliver to the market. From the business point of view can they be successful if they start to provide services on the railway? What do they need? They need an infrastructure that they can operate on. They feel that in many situations they cannot do it because there are bottlenecks and there is insufficient quality of infrastructure; that is one element. The second element is that they have to pay track access charges at such a high level that they are not comparable to what we see on the road, so they have, of course, to calculate what benefit it will bring to them to provide services on rail. That is really not very easy to calculate. It is of less importance, the legislation itself, unfortunately. It is mostly the business aspect that decides.

Mr Drew: As Delphine says, it all started quite late but now it has started it is beginning to show results just in terms of the market share that is held by the new operators. Germany took a very long time to build up because it was the only country in the centre of Europe that was doing it and there was some resistance from the incumbent operator, Deutsche Bahn, to opening up for competition. If you look at France, however, they are already up to over ten per cent of the market being held by new entrants. There is a sort of momentum building up and it obviously takes time for buyers of these infrastructure services to articulate what they want, to develop relationships with the infrastructure manager in order to find out what is available and come to some sort of commercial deal. The infrastructure charges themselves are usually set by government or a regulator but all the other aspects of access to infrastructure have to be discussed and a mutual understanding has to be reached.

Q310 Chairman: I did notice that a word that recurs in your paper, and certainly the sentiment, is "waiting"—"Let us wait, let us give it time", and so on, and yet the Commission seem to have reached the view that it has been going on a bit too long. You say here that most of the issues of concern are in the process of being resolved through implementation of the First Railway Package.

Ms Brinckman-Salzedo: Exactly.

Q311 Chairman: But the perception of the Commission seems to be that they are not being resolved, which is why they are moving to enforcement action.

Ms Brinckman-Salzedo: Yes, they are moving to enforcement, of course, to get the content of the First Railway Package implemented, and this is what we are seeking too. For example, until you have regulatory bodies that are set up with the required

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powers and independence, you cannot get a new entrant to complain. Where does he complain? You need the structures to be there to give all the elements to all the operators on the track in order to move forward. The picture is not fully there on the ground. You can adopt more and more legislation but it is not going to change anything if you are building a house without the foundations. You have to put the foundations in first.

Q312 Chairman: We have just been hearing the very good Belgian regulator who said that although he gets a number of informal complaints he does not get any formal complaints. Secondly, surely there must be areas in the First Railway Package that can be recast independent of the other two packages. You do not have to link them to the Second and Third Packages.

Ms Brinckman-Salzedo: It is very difficult to evaluate. I am just going to be repeating myself, unfortunately, on this. The elements of the First Railway Package take their dimension from the Second Package and sometimes the Third Package. How can you judge? Let us take the wonderful subject of rail-related services where I know many complain that they are not open. By the way, we have new entrants in our membership and when we were discussing this subject the new entrants were saying, "I don't have access to this, I don't have access to that". A month later at another meeting they were saying, "Oh, yes, now I have access because I complained and I went into discussions and negotiations". These are business procedures. You have to get a business mentality into these railways. They started discussing and they got what they wanted, "But now I don't have access to this and I don't have access to that". The open market has to build up to a certain extent. We are not saying that all this is perfect, far from it. I am certain we will need some new measures to make sure that whatever is not working is tackled, but it is very difficult today to be able to judge this when you have not implemented the basic elements properly. You have some questions on regulatory bodies. Let us discuss this in one or two years when all the regulatory bodies are set up in a coherent way when they will have powers. They already have co-operation powers and so on. If they are extremely weak in the ministries and they have no independence, how do you expect them to work properly? This is already foreseen in the current legislation. Give them that. Implement it properly and then, when you see there is still a problem, yes, we will address it and we will be the first one pushing it.

Q313 Chairman: Taking a historical perspective, is it not the case that liberalisation started in 1991 with Directive 91/440?

Ms Brinckman-Salzedo: Yes.

Q314 Chairman: Why was that one so slow to take effect? Here we are 18 years later.

Ms Brinckman-Salzedo: Take Article 9 of 1991/440.

Q315 Chairman: With which you are probably more familiar than I am.

Ms Brinckman-Salzedo: It deals with railway debt. Member States are supposed to do something about it. In most Member States they have not done anything, so we have the incumbent companies on the starting block with the new entrants and one has a big weight attached to its feet, so how do you expect them to be able to compete properly? Take the public service regulation. This one dates back to 1969. In 1969 it was written in the text, "Member States have to compensate". The new text, 1370/2007, also has this written in. Nevertheless, if you take Article 4 and the annex, paragraph 5 or 6 of the annex, there it says clearly that you have to compensate for the costs. Most Member States, if not all, and certainly the new Member States do not compensate properly. These companies have public service obligations. They pay these public service obligations through the revenues they are getting but they get very little compensation, so again, what is happening? They are cross-financing it through freight activities. How do you want to compete?

Chairman: We follow your train of thought and it is probably time for me to pass on the questioning to Lord Bradshaw.

Q316 Lord Bradshaw: Let us go at it another way. The freight market is determined by basically what road hauliers charge and, where there are waterways, what the price is to send it by boat. It does seem as if there is a gap in reality between us saying the railways need to charge this much above the market because of the historical obligations and because they are not compensated for the public service obligations and the fact that at that price they are never meeting the market, so rail freight will not expand. Is it the policy of the European Union, as you understand it, to get more freight traffic on the railway for the sake of the environment or for the sake of rail safety, and, if so, should you not realise that unless the two are brought together you are never going to expand the role of the railway?

Mr Lochman: We are perfectly aware of that problem, as we have just mentioned. Yes, track access charges are the real problem and they are high in some countries because some countries are simply not compensating the losses of the infrastructure managers. They are not investing in the infrastructure and they are not investing in maintenance appropriately. You may have seen this chart which shows the situation on the track access

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charging schemes around Europe. You can see a big difference in the countries having low track access charges where the rail traffic grows compared to the other countries where the rail freight companies have to cover, as you can see also, significant parts of the infrastructure investment, especially in the new Member States where there is under-investment in the existing tracks. That is why rail freight growth is not directly linked to the opening up of the market. We do not have such evidence. We do have evidence that rail traffic growth is much more related to the investments into the infrastructure and the track access charging schemes. Here the correlation is much higher than the correlation between opening the market and rail freight growth.

Q317 Lord Bradshaw: This chart shows that 50 per cent of the infrastructure costs in the UK are covered by track access charges. In fact, the track access charges for freight only cover the short-run marginal costs plus a mark-up for the use of freight-only lines. That does not cover anything like 50 per cent because the rest of the money is borne by the passenger business in some way, so I quarrel a bit with that chart.

Mr Lochman: I have another chart for you and I should perhaps have started with this one because here you see the evidence of what is the price per train kilometre in various countries. We start with less than one euro in some countries and go up to eight euros per train kilometre in others. Besides that you see the comparison between the train/kilometre for freight and for a passenger train. As I mentioned, in the new Member States especially you can see this kind of cross-subsidisation of the passenger traffic from freight because freight pays a lot more, even, in some cases, multipliers of the passenger track access charges. It is a very difficult situation and as a consequence of that we see, at least in the new Member States, that the market share of rail freight is still going down; it is decreasing. Of course, it is not just an effect of the high track access charges but also an effect of building new motorways, of opening the barriers.

Q318 Lord Bradshaw: I understand that, but this is a graph which is attributed to the Directorate General for Transport and Energy in April 2006, which probably means the information was gathered at least a year before and since then the rail regulator in the UK has introduced a system of charging for freight which is much lower than is shown here. This is very out of date so far as the UK is concerned. The evidence we have heard from Belgium this afternoon would indicate that freight in Belgium is paying rather lower than is written here. He said that the freight charges were very low in Belgium. I do not know what the position is in all countries and I know

that the new access countries have got problems because the infrastructure was very run down. If I put it to you another way, the road industry seems to get its act together; it gets investment in new roads, whereas the railway industry does not get its act together and does not get investment in new railways.
Mr Drew: But this is a matter of government policy.

Q319 Lord Bradshaw: Government policy is determined by several things, but particularly by the quality of the representations which are made to government, the economic strength of those representations and the system by which those representations are converted into benefits, and that is quite important. Are you quite certain that all the railways in Europe are presenting to their governments the best possible case for rail or are they not?

Mr Drew: I think it is unlikely that many of them are. In particular some of the newer Member States have not got very sophisticated approaches to the analysis of projects and there are some fundamental problems with the economics of rail in those countries given the massive growth in car ownership and the large investments that are being made in motorways, which makes it very difficult for railways to compete, and it makes it difficult to find good investment projects, but I am sure there is a lot more that railways could do to develop good projects and put their case to Member States.

Q320 Lord Bradshaw: I think that is very important because I think the railways are short-selling themselves considerably. I am not suggesting they should get involved in the extremely complex investment criteria which are used in Britain, for example, but there must be more simple criteria which highlight such things as climate change and accidents. I have looked at the accident statistics in some of those new Member States and they are awful.

Mr Drew: I do not think one can lay the blame for this entirely on the railways because the approach to cost/benefit analysis of projects largely comes, even in Britain, from the Government. The Government sets out what it considers will be acceptable for investment in different types of project. This emanates from the Treasury's Green Book and this is exactly what you would expect to happen in other countries. It has happened well in countries like Germany and France. It has happened probably rather less well in some of the newer Member States.

Q321 Lord Bradshaw: Do you think that the Green Book is a very solid economic foundation on which to build or are you just taking it as read?

Mr Drew: I think it is a pretty solid foundation. I think it is probably much too complicated to apply in a lot of Member States though.

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Q322 Lord James of Blackheath: How far do you believe that there is a clear relationship between market opening and the growth of rail freight? Is there any evidence to support this view?

Mr Lochman: We have already responded to that question.

Mr Drew: Perhaps I could amplify a little on what Libor said. We think there is some evidence. Clearly, countries like the UK and Germany that have liberalised early and well have experienced quite major growth, although it did take a long time in Germany, but on the other hand Sweden, where the market was liberalised very early, has experienced little growth.

Q323 Lord James of Blackheath: Are there any special local conditions in Sweden?

Mr Drew: There may be but I am not aware of them.

Q324 Lord Bradshaw: They allow 60-tonne lorries, which makes a big difference.

Mr Drew: But I do not know whether the timing of that was necessarily linked to it.

Q325 Lord Bradshaw: Yes, it was.

Mr Drew: Just to build on that point, our argument is that there is not a direct relationship between countries where liberalisation was well done and done early and growth in competition, but there were some countries where there was a lot of growth in competition and growth in the market.

Q326 Lord James of Blackheath: Surely the confidence that you can place in the basic idea will have a huge effect on the accuracy of future forecasts, will it not, or the confidence in them? If we are not going to be able to see that the opening up of the market will produce growth in freight how can we have the confidence for feeding that into forecasts?

Mr Drew: Forecasting is a very difficult area anyway, even without considering factors like the opening up of competition. There are lots of other factors which determine growth rates. By far the biggest factor is growth in GDP and that generally overwhelms any other factor in terms of making forecasts.

Q327 Lord James of Blackheath: Or not, at the present time.

Mr Drew: Well, exactly. We have had something like a 35 per cent drop in both western and central Europe January-to-January in rail freight, so it is a very serious situation at the moment.

Q328 Chairman: Could we go on with areas where existing legislation is probably not quite adequate? Some of our witnesses have told us that existing legislation is inadequate regarding the allocation of capacity on tracks and access to facilities such as

freight terminals, marshalling yards and depots. Would you agree with that view and, if so, what do you believe should be done about it?

Ms Brinckman-Salzedo: That is the point I explained a bit earlier with rail-related services. Yes, there are problems and we are not going to deny them. We have the annex of 2001/14, which has all the principles of free access and so on. This is a perfect example of 'wait and see' and look at how the market is working. If you have a proper regulator, if you apply 40 years of competition law properly, you should solve most problems. When all this is being applied and when all these people who are complaining informally do not table their formal complaints, until they do table their formal complaints we will not see anything evolving, but maybe they are not tabling their complaints simply because they know very well that the market is changing—it is taking some time, it is taking some political pressure, it is taking some economic/business related pressure, it is taking discussions. Nevertheless, between you and me, I do believe that once all this is properly implemented we will see some problems emerging here and there which cannot be resolved with the existing legislation, but to tackle those properly we must be able to identify them. This is the reason why we are saying let us analyse the market, let the operators fight together, put pressure on each other, use competition law, regulatory bodies and so on, to open up the markets. We have seen this in France, as Jeremy said. In very little time markets have opened even though new entrants have been complaining that it was not moving forward. Then we will be able to identify the problems and see what the best solution is. Is it a market-driven solution or do we need legislation because the market will not be able by itself to respond to the need? Our biggest fear at CER is that the Commission Services will tend to want to over-regulate everything. You need to regulate to open up a market. It was really necessary in the transport sector, but now give it some time to rest and make sure everything is properly implemented, starting with the obligations of the Member States. If the Member States do not take on their obligations the market cannot develop properly because the financial conditions are not set properly. The discrepancy in competition right now is created by the Member States who are not tackling the financing of infrastructure, debt issues, public service transport. All these are their obligations but, of course, it is money coming out of their pockets and that is why they are reluctant.

Q329 Chairman: But do you think in this context that the Commission ought to make more use of its existing competition powers?

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Ms Brinckman-Salzedo: Yes.

Q330 Chairman: We see them every day fining chemical companies and other companies for monopoly situations and breaches of market opening. Should they be using those laws in relation to the railway situation?

Ms Brinckman-Salzedo: Yes. Why not? The law is there. Apply it. Why do you want to create more laws?

Q331 Chairman: I agree, but why are they not doing it?

Ms Brinckman-Salzedo: Because the first people they have to go against are Member States and they do not dare. I have to say I understand. It is so difficult. This is a highly political issue. Certainly they cannot force Member States to pay and the legislation is drafted in a bit of an archaic manner, saying, "You have to pay . . .", but they should put political pressure on the Member States to face up to their obligations because they know they have a lame duck.

Q332 Chairman: Presumably this is why they have decided to recast the First Railway Package. You may well be right that they should not be recasting it; they should just be implementing it, but their motivation must be that they see performance at present as unsatisfactory.

Ms Brinckman-Salzedo: Yes, but they do not want to face reality. Add legislation as much as you want, saying, "We are going to burden the railway undertakings and the infrastructure managers even more", but if you do not give them the money they are supposed to have to be able to develop that, what a waste of time!

Mr Drew: In a way, and it may be cruel to say it, they are probably quite good at doing legislation but not quite so good at enforcement.

Ms Brinckman-Salzedo: That is a diplomatic way of saying it. I am so undiplomatic.

Q333 Chairman: But across the board I would not necessarily say that was entirely fair. Look what they did to Microsoft, for instance. There have been areas where they have taken on very large institutions which have been abusing these powers.

Ms Brinckman-Salzedo: But not public companies.

Q334 Chairman: Not so much for governments and public companies, although they have done it a bit with energy, have they not?

Mr Drew: Yes.

Q335 Chairman: They forced the unbundling of the energy sector by using their competition powers.

Mr Drew: The difference here is that predominantly we are doing it with state-owned entities which are controlled by the state.

Q336 Lord Bradshaw: I have one small question which arose out of what you said. If what you say is true, and if the charges for freight are at a level anywhere near that graph, then the outcome of that will be the collapse of the railway in a good part of eastern Europe, will it not?

Ms Brinckman-Salzedo: Yes.

Mr Lochman: That is the potential risk.

Q337 Lord Bradshaw: That is a real risk, is it not?

Mr Lochman: Yes.

Q338 Lord Bradshaw: If the infrastructure is as poor as it is and is not being funded, and if Member States will not accept the burdens of past debts and pension obligations and so on, there will not be a railway and then the Member States will have to do it, will they not?

Mr Lochman: They should. That is a good point, and we can see in Europe growing evidence of operators who are simply taking another path, in other words, not crossing a territory where there is poor quality infrastructure and services and on top of that high track access charges. Instead of that they are simply bypassing those countries.

Q339 Lord Bradshaw: Could you give us one example of that?

Mr Lochman: I can do that easily. If you look at that graph that I have provided with a chart, have a look at the Slovakian track access charges and compare them with the Austrian ones. If you go from the Czech Republic to Hungary you have two options. Either you cross the Slovakian territory, which is a kind of shortcut, or you bypass through Austria, which is about twice as long but it is cheaper. We have more and more trains which, instead of crossing through Bratislava and taking the shortest way to Hungary are going via Austria because it is cheaper, the quality is higher and the punctuality is better there.

Mr Drew: Can I just add something on the consequences of this because I think we are on to something really important here? The situation before the economic crisis in central Europe was very bad in terms of not just enough investment but also not enough maintenance, and that is a much more serious problem. Combining these things with the track access charges that you see in front of you, there has been a major decline in rail freight market share. In the White Paper in 2001 the Commission set a target of 35 per cent for rail's share of the freight market. They were starting at just over 40 per cent, so they were saying, "Okay, we do not want it to go

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below 35 per cent by 2010". It is already at 30. The way things are going it is going to be down to close to 25 by 2010, and maybe with the economic crisis even below that. It is going to be at west European levels before long if things continue as they are. In some countries it is a lot worse than in others—where you have got the railway market collapsing. The consequences could be really serious.

Q340 Lord Bradshaw: I had not thought of that. In other countries like Spain, where I go, the railway is improving considerably. Maybe now they have got some economic shocks in the system—

Mr Drew: As far as Spain is concerned, they put a lot of money into high-speed rail.

Mr Lochman: That is the difference between the passenger rail system in Spain and the freight system. Rail freight in Spain is not so well developed as we would like it to be there. Passenger and high-speed are totally different segments.

Q341 Lord Bradshaw: It is partly the gauge problem, but you do recognise it is important. I think we have covered this question about the wide variation in infrastructure. There is provision in the existing directive for multi-annual contracts. What is your view on multi-annual contracts? What is your view on the way in Britain we have these control periods which last a number of years where things remain fixed?

Mr Lochman: I will answer in general and then I will pass over to Delphine or Jeremy who know much more about this. We do not want to see legislation where it is really not necessary. In the case of multi-annual contracts we would be inclining towards hard legislation but good legislation, so not having it, let us say, stopping halfway. Today we have the guidelines which are not too bad. They do not fulfil all the expectations and especially the enforcement of those guidelines in the new Member States is very poor. It is not respected there. On the other hand we know that the current economic crisis will probably block that as we see with the Eurovignette. It is a similar situation. It has been blocked, so why should we be optimistic and say, "Okay, the railway will win". Probably not. Perhaps Jeremy could say more on that.

Mr Drew: You have pretty well said it all. The key thing is that in principle we think it is the right way to go. It is really a question of timing and we do not think this is the right time.

Q342 Lord Bradshaw: I will ask one more question and that is on the question of international freight corridors. Do you believe that the creation of international freight corridors will boost rail market share? If so, what do you need to do to achieve it and are there other ways of achieving it?

Mr Lochman: Certainly we are in favour of corridors and especially of freight corridors. CER was one of the initiators of this idea many years ago, so we have been promoting the corridors. We are still promoting the concept of corridors because it is here where we can really see the market grow in favour of the rail system if we remove the bottlenecks, if we improve the quality of infrastructure and if we have the management of the corridors done in a joint way. This is where we see the opportunity for such corridor management as we can see today for the corridor from Rotterdam to Genoa or from the other corridors that have been originally grouped in a so-called ERTMS corridors but in an extended version covering much more. We talk about 30-35 per cent of rail freight concentrated in those corridors, so yes, we believe absolutely in the idea of those corridors.

Q343 Lord Bradshaw: But these are corridors which are not exclusive to rail freight. It is just ones on which provision has been made for rail freight; is that right?

Mr Lochman: Most of those corridors are the corridors with mixed traffic, that is true, so it is passenger and freight traffic on the same line or even the same track. However, on all the newly-built tracks, or even the renovated tracks, you see that there is a kind of intention not to fully separate that but to prioritise it. Wherever you have a quadruple track then, of course, you can part-dedicate two tracks to freight and another two tracks for the intercity passenger services. This is what we can see. The alternative to that, of course, is that you do not always have the room to put four tracks in one direction, so you use the branches of the corridor. This is the concept that we want to develop more and more. Not all our members believe in the concept of priority rules, but in the case of corridors, yes, we are in favour of setting such rules on a corridor basis where we will see the opportunity for rail freight to have some priority on the lines that can be used for that so that there will not be interference between freight and passenger traffic. Yes, I agree, on most of the lines there is mixed traffic but there is a tendency more and more to separate wherever possible and use part of those tracks for freight and part for passenger.

Q344 Lord James of Blackheath: In your evidence you suggest that the funding availability in the United Kingdom has been a significant factor in the increase in rail freight. How should the Commission ensure that the British example is replicated across Europe?

Mr Drew: I think it is back to the multi-annual contracts and the financing, essentially. What happened in the UK in the 1990s was that there was not a lot of money for infrastructure but a lot of money went into rolling stock, but there was a sort of

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bottleneck hit around the year 2000 when it was realised that some more money needed to be spent on infrastructure, and that has allowed that growth to continue. What has happened in central Europe is that the capacity of the infrastructure has not been developed in the right places and the quality of the service that has been provided has not been adequate and this has led to this decline. The situation in central Europe is quite different from that in the UK so the lessons cannot be applied completely, but the idea is that when you start running into a bottleneck and you find that the capacity of the system is not able to cope with demand then you need to start investing for capacity and you need to start investing for quality.

Q345 Lord James of Blackheath: You are buying your way through the bottleneck?

Mr Drew: Yes.

Q346 Lord James of Blackheath: And that is feasible in certain cases?

Mr Drew: Yes.

Lord James of Blackheath: That is the answer then. Thank you.

Q347 Chairman: Can we move on to questions about the regulator? You made the very valid point at the beginning that there are all sorts of different qualities, levels, competences, independence of regulators at the moment, yet at the same time we all want to see greater free movement in Europe for the rail freight area. What impact do you think regulators can have on this? At the moment they are just national regulators. Should there be some sort of informal co-operation of regulators, should there be a college of European rail regulators, or should the extreme be a European rail regulator? I must say the last one is not something anyone has proposed to us in our evidence sessions so far. They have all said it is either impractical or undesirable, but a level of co-operation does seem to be fairly sensible. Do you think it is adequate at the moment? Should it be improved?

Ms Brinckman-Salzedo: It is already foreseen in the legislation. It is written in black and white in Articles 30 and subsequent of Directive 2001/14, I believe. It is already there, implemented, and certain regulators are co-operating but not all. They should. Again, it is about implementation. You are going to hate me for this; I am going to be called Mrs Implementation, but, yes, at the end of the day you cannot move forward if whatever has been adopted is not properly put down.

Q348 Chairman: But does the First Railway Package provide for a formal level of co-operation between European rail regulators?

Ms Brinckman-Salzedo: Yes, it does. If I can look in the text—

Q349 Chairman: I do not doubt you. I just do not know myself. I was asking from the point of view of information.

Ms Brinckman-Salzedo: I know it is Article 31. It is foreseen and they do meet regularly, but it is again the same thing. When you have a strong regulator meeting another strong regulator they have good discussions. When you have a weak regulator who is not independent meeting a strong one, “Hello, what are you doing? Good, fine. I will go back home and ask my minister”. That does not make any sense.

Q350 Chairman: What is your judgment about the pace at which regulators are likely to develop? We believe in the UK we have a pretty efficient regulator, and from what we were hearing just now we thought the Belgian regulator with newly acquired powers seemed to be a great step forward, but there are other areas where some countries seem to be a long way behind, particularly in independence.

Ms Brinckman-Salzedo: Yes.

Q351 Chairman: Do you think that is going to move quickly or do you think it is going to require the Commission to enforce it?

Ms Brinckman-Salzedo: This is part of the infringement procedures which the Commission has launched. Let them do their work and hit on the table and CER is behind them to say to them, “Go ahead, do it”. For me to be credible in saying, “Wait for the recast”, I need to have something on the table to say, “Look: it is working”, and if it is not working it does not make any sense.

Q352 Chairman: How truly independent do you regard, for instance, the German regulators now? There have been changes there. Would you accept that they are fully independent?

Ms Brinckman-Salzedo: From what I am hearing DB is being looked at very closely. There are complaints which are being dealt with constantly. The pile of complaints is pretty high. From what I see and hear—I speak English; I do not speak any German so I am afraid I cannot get close enough to them—they are doing their job quite well, and they are I would not say feared but the operators know that they are dealing with someone who is strong.

Q353 Chairman: We took evidence from them recently. We were quite impressed by them. On the other hand, we understand the French regulator is confined to one person.

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Mr Drew: It has only just been established though.
Ms Brinckman-Salzedo: It is exactly that. Look at the Germans, how many there are, and they are really standing up, whereas the French are still in the process of being set up.
Chairman: Your views on that are certainly very clear.

Q354 Lord Bradshaw: We have talked a little bit about the internalisation of external costs across all modes of freight transport. Do you think there is anything more that needs to be done or is likely to be done by the Commission in that respect?

Mr Lochman: We would certainly wish to see more, especially when talking about the Eurovignette. However, here we would not blame the Commission because the Commission has started with a relatively good proposal that we appreciated. It is rather the reaction to these proposals of the Member States especially, not so much the Parliament, although there are some parts that they are interested in more or less on this problem, and especially again we have to see the link with the current economic crisis. We can see a good start to that, that road transport will be charged adequately what concerns the external costs, as rail partially already is, and, of course, will be more and more because we see what the impact of the new regulation will be on diesel emissions and what the impact will be of noise related track access charges. That is what everybody sees and everybody wants to see it imposed on rail as soon as possible, but it needs to be reflected on the other side as well. Yes, of course, we see this potential to have that balance between modes.

Mr Drew: May I just add one or two things to that? The Commission's proposal was a very modest one, reflecting political realities. It was then watered down. The Parliament was quite in favour, but if it had gone through, and it has not succeeded in this session of Parliament, its effect would be to increase road costs by three per cent, a fraction of the external costs, so this is a very long road before we get full internalisation.

Q355 Lord Bradshaw: It is a long road. I thought it may be. Lastly, you are the Community of European Railway and Infrastructure Companies. How do you rank yourself against the people in Brussels who are advocating more expenditure on roads?

Mr Lochman: They obviously see CER as the player which is defending the interests of the rail sector in Brussels, the most important one. This has developed historically, of course. It is not recent. The CER is the association that has probably the most important voice concerning the rail sector in Brussels. You can see that they also feel that on the road side, if that was the question.

Q356 Lord Bradshaw: Well, no. I was reading on the train on the way over the magazine of the Freight Transport Association, where there was a page and a half of diatribe about the Eurovignette which they could not possibly afford in current economic circumstances and they were looking for reductions rather than any imposition. I just wonder: in Brussels or in the European Community is the voice of road transport heard much more strongly than that of rail transport?

Mr Drew: We are probably outnumbered, given the fact that there are lots of them. There are quite a few in rail but there is a sort of confluence of interests in the road sector—it is the manufacturers, it is the International Road Union (IRU), and so on, and, of course, it is a bigger sector. I would say that it is quite difficult for rail to keep its voice heard. You need a very strong body like CER to do it because otherwise you could just disappear. I think we do.

Q357 Chairman: You deal with the Commission a great deal, obviously. What is your estimate of whether they are likely to come forward with a recast of the First Railway Package? We seem to be entering a bit of a hiatus in Europe at the moment with the parliamentary elections and so on. Would you expect to see this before the second half of 2010?

Ms Brinckman-Salzedo: We are hearing everything. It is springtime. Everything flows in the air.

Q358 Chairman: What do you think though? My question was, what is your judgment if you were asked by your members to give a judgment of when you are likely to be confronted with a recast Railway Package? What would you instinctively tell them?

Ms Brinckman-Salzedo: Honestly, it is a very difficult question because it depends on so many political elements, first of all, the new Commission and potential new commissioner. The Commission Services are very adamant on this dossier, but I am not certain the current commissioner is following that very closely. It all depends how everything evolves.

Q359 Chairman: So you feel you are getting some resonance at the top level for your arguments?

Ms Brinckman-Salzedo: Yes.

Q360 Lord Bradshaw: Can I ask you a very technical question? ERTMS, which I believe you know, the European Rail Transport Management System, has been around virtually throughout my railway career, certainly for a long time. How soon is it really going to have any effect on the main trunk routes in Europe?

Mr Lochman: If you ask me my personal opinion, because I am involved in ERTMS, of course, it would only have an effect if you could see a reduction in

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number of onboard equipment as well as trackside equipment. Otherwise there is clearly no benefit. You can run easily on the current ATP system, and, if I may exaggerate a little, you can simply change a locomotive at the border and continue with the freight train, so it will only bring benefits if you can make savings onboard and at trackside, which means that you really start building the corridors which will be continuously equipped by the ERTMS. The first target for that, I mean a realistic one, is 2020. Although you see the ERTMS European deployment plans saying that a significant part of the corridor should be equipped by 2015, it will be difficult because by 2015 we will still just be starting with the new version of ERTMS that will be satisfactory for several companies, and it will take another five years to equip the corridors over a complete length. It will be 2020 for the corridor-oriented services when we

see savings that will have an impact on the business life of the companies. I have here another chart concerning the relationship between the opening of the market and the number of new entrants on one side and rail freight growth on the other, because this is in evidence. Although I admit that it is again based on the figures up to 2004 (we do not have newer ones), it shows that there is not a correlation between opening the market and rail freight growth. Then, because all the time we talk about the need to stabilise the financial architecture, we have some copies of the document that we would like to leave here for you.

Chairman: Thank you, all three, very much indeed for your very full, frank and occasionally passionate evidence. It is very rare that this subject becomes exciting but it has been this afternoon and we are truly grateful to you for coming along and answering our questions.

MONDAY 6 APRIL 2009

Present Bradshaw, L. Powell of Bayswater, L. (Chairman)
James of Blackheath, L.

Memorandum by Arriva

INTRODUCTION

1. Arriva plc is one of Europe's largest transport services organisations, employing more than 40,000 people to provide bus and train services in 12 Member States of the European Union. Although the major part of the transport services provided by Arriva are for bus and rail passengers, the German company Osthannoversche Eisenbahnen AG (OHE), a subsidiary of Arriva Deutschland, operates freight services in Germany and, with partners, runs cross-border services to Austria, the Czech Republic, the Netherlands and Poland. In addition to the operation of freight services, OHE is the infrastructure provider for approximately 300 km of railway with a direct link to the Port of Hamburg.
2. Arriva is an active member of the European Rail Freight Association; we work with national and European institutions on the development of transport policy, including the review of the First Railway Package. We support the further opening of the rail freight market across Europe and believe that this will be of benefit to our customers.
3. At an operational level, there are significant problems in cross-border operations, ranging from excessive waiting times at border stations, limited (or non-existent) access to rail-related service facilities, poor train paths and last-minute changes to the paths provided, excessive energy-supply costs and concerns about the security of commercial data provided to infrastructure managers.
4. Arriva is pleased to respond to the specific questions raised by the Committee. We will be happy to clarify or expand on any point of interest to the Committee.

Whether the provisions on the separation of infrastructure management and train operations are sufficient; whether they should be amended or whether they should be replaced with a requirement for full ownership unbundling

5. Although some incumbent operators argue that the separation of rail operations and infrastructure management does not have any influence on traffic growth or the degree of market opening (measured by the quantity of new entrants on a given network competing against the "national" operator), and with some others arguing that being in charge of the infrastructure is a competitive disadvantage when compared with those who do not have to manage a network, the motivation to retain the infrastructure is primarily an instrument to maintain control over a monopoly asset and the operators using it.
6. OHE is both a rail operator and an infrastructure manager. The OHE infrastructure enables us to offer an alternative way for any operator into the port of Hamburg (within the capacity of the infrastructure). In order to expand that capacity, OHE has applied for public funding under similar schemes that support the incumbent infrastructure manager, DB Netz. OHE has not received any funding comparable to that provided to DB Netz.
7. The infrastructure and servicing facilities that are essential for intermodal or single wagon traffic are generally not open to new entrants or only at excessive prices. In several countries, there are entire regions that are dominated by the national operator, to the exclusion of new operators (either directly or through a pricing mechanism).
8. A frequent problem is access to and pricing for the use of diesel fuelling stations or traction energy supply. Furthermore, freight operators that are part of a larger state-owned rail operator can obtain access to infrastructure or low energy prices because of the company structure, providing them with a considerable competitive advantage over external competitors. An ownership model for freight based on a national holding company structure is not sufficient to prevent the abuse of a dominant position by the national operator. Such abuse can only be prevented by full ownership separation (eg the UK model).

Whether the current provisions are adequate regarding the staffing and independence of regulators and whether statutory independence from government is desirable

9. We believe that legislation at an EU level should be clarified so that the regulation of access, charging and unbundling should be the responsibility of a regulatory body with the autonomy to act independently of operators or regional ownership structures.

10. By way of example, the regulation of access to rail infrastructure and infrastructure charging in Germany is undertaken by the rail regulator, Bundesnetzagentur (BNETZA); the responsibility for unbundling is with the railway authority (EBA).

11. The effectiveness of the arrangements suffers from the high level of communication needed between the different parties. The Ministry of Transport is responsible for EBA; the Ministry of Economic Affairs for BNETZA. In addition, the Ministry of Transport is responsible for Deutsche Bahn and its subsidiaries (including DB Netz) and the regulatory activities of EBA. From the point of view of OHE, we would prefer that the responsibilities for the competitive framework, for non-discriminatory access and for unbundling were with BNETZA.

12. In many EU countries there are examples of:

- Insufficient powers and resources for the Regulatory Body to monitor competition in the rail service market.
- Insufficient supervision by the Regulatory Body over negotiations between new operators and the Infrastructure Manager on the level of charges.

13. An effective Regulatory Body would meet these criteria:

(a) General

- Visible and easily contacted (through its website, publications, etc).
- Independent, in accordance with Article 30.1 of EU Regulation 2001/14.
- It should have proper rules on corporate governance (management, processes, outputs, etc).
- Good communication both formal and informal with operators active in the market.
- Active co-operation at an EU level so as to benefit from the exchange of best practice and experience.

(b) In relation to areas of responsibilities and competencies

- The role and competencies clearly defined and made public. They should be common throughout the EU.
- Independence from political structures and state-owned operators so as to avoid any potential conflict of interests.
- The monitoring of market development and competition in rail service facilities (eg supply, energy, etc) and all issues for which it is responsible, in particular those under Regulation 2001/14 Article 30 (network statement and its criteria, capacity allocation, charging, safety certificates, enforcement and monitoring of safety standards and rules).
- The power to enforce relevant EU law. This requires that the Regulatory Body should have legal powers and that decisions have immediate effect.
- Employees who are trained and experienced in the legal, technical and practical understanding of rail and the development of the rail market.
- Responsibility, with neighbouring countries, for cross-border activity.
- The responsibility for enforcing compliance with EU rules and obligations.

(c) Procedures and decisions

- The working procedures clearly defined and published.
- Formal processes for consultation and appeal.
- Decisions to be timely and published.
- The scope, procedures and follow-up of complaints and sanctions are clear to all those active in the relevant market.

(d) Publications

- The maintenance of an up-to-date public register (licences, certificates, rules for access and for charging, agreements, exemptions, enforcements, penalties, administrative issues).
- The production of an Annual Report.

Whether there remain barriers to entry due to factors such as safety certification requirements, and if so how these should be addressed

14. Some barriers do exist. For example, the current framework in Germany requires the appointment by operators of a senior technical expert, Eisenbahnbetriebsleiter, who has knowledge of the whole range of rail-related processes and procedures, even where such processes are not required or are not relevant to the operations in question. The system is expensive and inefficient and presents a barrier to new operators, as they need to appoint specialists with knowledge and experience that is far beyond that which is necessary to ensure proper levels of operational safety.

15. The aim should be to have, as a standard, a system that requires the appointment of accredited safety managers with the necessary specialised knowledge and experience, tailored to the needs of the specific operations being undertaken. Such safety experts would then ensure that the managerial responsibilities of those operators were properly carried out.

16. The possession of a safety certificate is a prerequisite for operating rail freight services in the EU and for obtaining a licence. In most Member States the body in charge of allocating safety certificates (often the Regulatory Body) is responsible to the Ministry of Transport. The most frequently encountered barriers to safety certification are:

- The available resources and competences of the Ministry of Transport, the National Safety Authority and the Regulatory Body are not sufficient to produce legally stable processes and competent decisions.
- Information is often available in the national language only and may be very complex. In some countries, an applicant has to consult over 150 legislative texts and regulations. A single package with all relevant texts should be made available to all applicants.
- All information from the rail operator has to be translated into the relevant national language; including elements which are already certified in another EU Member State (eg part A of the safety certificate). English should be a fully recognised second language.
- The financial conditions for obtaining a licence or a certificate are often not clear.
- The timeframe for certification processes in Member States can be between four months and eighteen months. Comparable processes with clear milestones and deliverables throughout the EU would improve the efficient introduction of cross-border services.
- As the safety certification encompasses three elements (technical, personnel and rolling stock approvals), different bodies are involved in this process (National Safety Authority, Regulatory Body, Ministry of Transport, etc) delaying and complicating the process.
- There is no appeal body to prevent the abuse of safety procedures for anti-competitive purposes. Consideration should be given to extending the competence of the European Rail Agency (ERA) as a way of resolving this problem.
- Operators wishing to operate cross-border traffic often have problems with the certification of their rolling stock. Safety rules are still on a national basis and cross-acceptance or harmonised certification procedures at an EU level do not yet exist. Furthermore, Member States may impose national rules which are not in line with EU norms, which may hinder cross-border operation. The competence of ERA in speeding up and harmonising EU-wide cross-acceptance and homologation procedures for rolling stock is crucial.
- Cross-border agreements between state-owned carriers for accepting their relevant locomotives should be abolished or made accessible to all operators. Some cross-border services are operated by the relevant state-owned carriers only. Resolving this involves extending the scope of the Regulatory Body to deal with cross-border issues.

Whether the current requirements regarding the setting of infrastructure charges are adequate, and if not how they should be amended

17. For the pricing of infrastructure charges, the provisions of Articles 7 and 8 of Directive 2001/14 apply. The charges are to be collected by a body that is independent in its legal form, organisation and decision-making from any operator. They may include:

- Track access charges covering directly-incurred costs.
- Scarcity costs during congested periods.
- Compensation schemes for environmental, accident and infrastructure costs.

- The recovery of costs for specific investment projects.
- Performance schemes.
- Charges for train paths that have been reserved (even if they are not used).

18. We believe that the existing provisions in 2001/14 on infrastructure charges need to be revised with specific regard to the following points:

- The existing provisions need to be more specific and should define a framework for infrastructure charging.
- Conditions for non-discriminatory access and pricing of power and fuel supply should be improved and more clearly defined.

19. The main problems with infrastructure charges are:

- National charging systems are sometimes too complex, and prevent an operator from calculating the price for a route. In such cases, the infrastructure manager should provide appropriate software tools.
- Infrastructure charges are calculated in many different ways. They are complex and may consist of a basic fee, plus individual fees (speed, density of infrastructure usage, wear and tear), plus reservation fees, “malus” fees, other fees, etc. We must work towards the harmonisation of the structure of infrastructure charges through initiatives such as the recast of the First Railway Package, arrangements where operators have contracts over a number of years for a specific quality of infrastructure and the EC proposal for a regulation concerning a European rail freight network.
- The EU Directive allows for discounts, provided they are available to all users of the infrastructure, for specified traffic flows or specified sections of infrastructure. In some Member States (especially those where there is a state-owned operator and infrastructure manager), quantity discounts are allocated to the state-owned operator only. In some cases, it is not clear whether the state company pays any infrastructure charges.
- Specific mark-ups for shunting or terminal access have increased and exceed the level of what the market can bear.
- Performance schemes for infrastructure managers are highly desirable and should precede performance schemes for operators. At present, such schemes apply in few Member State and very complex.

20. Regulatory Bodies have an important role to play to ensure fair, user-friendly and understandable access pricing.

Whether the existing provisions regarding allocation of capacity both on tracks and at terminals are adequate and if not how they should be amended

21. Article 14 of Directive 2001/14 says that the allocation of capacity should be on a fair and non-discriminatory basis. Access to and usage of all infrastructure-related facilities exceeding the minimum access package is subject to certain conditions, eg the existence of viable alternatives or the willingness of the infrastructure manager to supply these services.

22. The Directive also requires infrastructure managers to co-operate to enable the efficient creation and allocation of infrastructure capacity across networks (art 15). *Ad hoc* requests for individual train paths should be dealt with as quickly as possible, and within five working days. If the infrastructure has been declared congested, the manager may employ priority rules, especially for international freight services (art 22).

23. At present, new entrants experience a variety of problems with capacity allocation, both on tracks and at terminals (infrastructure facilities) as a result of legal, technical and operational issues:

- Access to and usage of infrastructure related facilities exceeding the minimum access path proves to be excessively difficult: in some cases, the concept in the Directive of a “viable alternative” is not applied or correctly interpreted; in others, the facility may be declared “full” even when this is not the case. The access to and the usage of these facilities may be artificially reduced by excessive pricing or very limited opening hours. Market segments requiring a high degree of access to these facilities (eg for shunting) to offer single wagon traffic are therefore dominated by the national operator, as they are the only ones having access to all the facilities.
- This problem can only be solved by extending the current minimum access package to all rail-related service facilities. Furthermore, the introduction of an obligation to use the facility or, if not, to lease it by leasing or selling to potential applicant would be very helpful. This concept should go further in obliging the relevant operator to sell or lease out these facilities to a third party (under the

supervision of the Regulatory Body). Where facilities receive public funding, this funding needs to be maintained to new operators.

- Changes in the capacity (due to track works or incidents) are not communicated or only at a very late stage. This sometimes involves a longer route (increasing time and costs for the user). Performance criteria for infrastructure managers are essential.
- *Ad hoc* requests are often dealt with only within the permitted five-day time-frame.
- Priority rules are not applied in a consistent manner, especially for international traffic. International rail freight priority rules will, however, be introduced with the proposal for a regulation concerning a European rail network.
- EU rules do not provide sufficient rules and procedures to solve infrastructure usage conflicts.

How a recast First Railway Package should relate to other EU freight transport policies

24. The first railway package should be dealt with as a high priority. It is key for infrastructure access in the EU. If the existing framework remains unchanged, other policies on rail and rail market liberalisation will be affected. The aims should be:

- a clear separation of operator and infrastructure manager where this does not currently exist;
- fair and non-discriminatory access with a clear understanding of the legal framework and the technical and other criteria;
- open access to all service facilities; and
- clear separation of the tasks of the rail regulator and the rail authority;

25. The development of a vibrant, commercial rail freight business across the European Union requires greater access to rail facilities in a way that is transparent and non-discriminatory. We welcome progress in this direction.

10 February 2009

Examination of Witness

Witness: MR JAN MOELLMANN, European Affairs Executive, Arriva, examined.

Q361 Chairman: We are members of Sub-Committee B of the European Union Select Committee of the House of Lords and we deal with the internal market, energy and transport. We are conducting an inquiry into the recast of the First Railway Package. We will have a formal record made of our discussion which we will send to you in draft form and you can make any comments on or amendments to the transcript you wish. Can we ask you to say formally for the record who you are and what you do?

Mr Moellmann: My name is Jan Moellmann. I work for Arriva. I am half German, half Dutch, so English is not my native language. If there is some trouble I apologise for that. I have been working for four years now for Arriva, for the past two years in Brussels as the EU Affairs Executive. At the same time in Brussels I wear a second hat. As well as representing Arriva I manage a small organisation representing the five British PLCs—First Group, Stagecoach, Go-Ahead, National Express and Arriva, the three big French private groups, a Dutch operator and a Portuguese operator, so when discussing the topic of the First Railway Package or answering the questions, you may sometimes see me switching my hat and saying, “Sorry, there are different positions on this”. I have been invited for Arriva but sometimes

I might be able to give another view from a different part of the industry.

Q362 Chairman: Thank you very much; that is very helpful. As you say we have seen your written evidence, for which thank you very much. If later you wish to send us any further material we shall be happy to have it. Can you tell us what are the main barriers to market entry faced by a new rail operator in Europe and how should they be addressed?

Mr Moellmann: I am putting on my hat as the person who has replied to you on behalf of Arriva and its subsidiary, Osthannoversche Eisenbahnen, which is a freight operator with a seat in Germany. It was acquired two years ago by Arriva, mainly for the passenger service but freight also plays a role. Arriva operates in several countries—Austria, the Czech Republic, The Netherlands and Poland. We looked at our business and found four issues very interesting. One was that the requirements on safety management, which we experience together with partners in other countries, differ quite a lot. The second is the question of cross-acceptance of rolling stock, which can be bothersome. The same problem has occurred with passenger services since Arriva has started to operate services from Munich to Prague, but I will tell you about that later. The third point is

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Mr Jan Moellmann

the whole question of path allocation. The main market for Arriva Oshannoversche Eisenbahnen is Germany. At the beginning there were some problems with the integrated railway and infrastructure provider and we had the impression that competition was distorted and the level of information given to the operator was different, but it has not proved to be so. Nonetheless, in some places we still have the feeling that things could be better than they are now. Connected to this is the question of the rail regulator. Looking to the German market, we have a rail regulator who is very keen on looking at the market and using the powers he has been given by the national legislation, and he is aware of that. I think you may also have received a contribution from the German side, so you may be aware of the fact that not all tasks are allocated to the German rail regulator. There is still a railway office and a railway authority that have some responsibilities for the unbundling task, which makes things difficult. For us safety management, cross-acceptance, path allocation and the rail regulator, who should have a more specified role, are key points. In the new accession countries we have the feeling that the independence of the infrastructure provider and also of the railway authorities still has to develop. Obviously, this is a process that other countries have gone through but we are still unhappy with one rail authority not accepting rolling stock in another country. Poland is one example. I am not sure whether you are taking this to protocol or not; otherwise I will not mention names. It is just that in some countries we have no problems but in other countries we have the feeling that the former system is still in the minds of the people and we need clearer regulation and a clearer development of the legal framework or more specified requirements defining the task of the regulator.

Q363 Chairman: Could I ask you three supplementaries to those answers you have given? You say these are the three principal issues in your mind. First, are they basically common to freight and passenger services? Secondly, are they all matters you would like to see dealt with in the recast of the First Railway Package, and, third, do you think they could be equally well dealt with using the Commission's competition powers more generally?

Mr Moellmann: On the first question, as to whether these experiences would be valid for passenger and freight services, Arriva is one of a few non-incumbent operators running services from Germany to Denmark, from Germany to Poland, from Germany to the Czech Republic. We operate together with a partner from Germany to Switzerland and we have two railway lines running from Germany to The Netherlands. Apart from the line which goes to Prague, all the other services are regional rail services,

which means the line will end 20 or 30 kilometres before the border, so it is not a classic international rail service, but, of course, we face similar challenges with regard to path allocation, cross-acceptance and the question of who has to deal with the problems we face in another country. Arriva is the owner of a fleet of coaches in Germany which originally came from one of the big incumbent railways. It is good rolling stock, 200-kilometre intercity stuff which has been refurbished and which in the old railway system was listed in the so-called RIC agreement. However, we still have a struggle to get them acknowledged in other countries because it is not DB which is the owner of the rolling stock in the list any more; it is another owner. We say that this is exactly the same rolling stock, it is well maintained, it is safe, we have all the certificates from the national side, we can prove everything, it has been operating into those countries many years, and then we are told, "No. We need the signature of Deutsche Bahn, the former owner, for this rolling stock". We know that one EU Member State is making trouble. In another Member State there is an agreement. They say, "We are fine with it. We don't have a written agreement but we are fine. You can operate. The supervision is fine. We see it has been well maintained. You are welcome". This is for us one of the points which, of course, is also a cross-acceptance issue, and when you look at freight rolling stock and the plans that Arriva have (and I am sure many other companies also have), this is very important.

Q364 Chairman: Have you complained to the regulator of the country concerned about this?

Mr Moellmann: The answer is yes, and their answer was, "Please, we need a signature". (There followed a discussion off the record)

Q365 Lord Bradshaw: How many formal complaints have Arriva made to a rail regulator in writing?

Mr Moellmann: For this case?

Q366 Lord Bradshaw: No, generally.

Mr Moellmann: In this specific case we have raised the issue. In other cases we have always found a way of speaking to the rail regulator or the authorities, reminding them of the rail work and trying to do it in a co-operative way, which in many cases has gone well, by convincing them that we are private but we are safe, we maintain the stock well, we can be trusted, we have all the certificates and we know the law. There is only one case where a new Member State has entered this and we are not able to convince them, and we are just at the point now of thinking about what legal steps can be taken to make sure that this issue can be solved sooner rather than later.

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Mr Jan Moellmann

Q367 Lord Bradshaw: One regulator to whom we have spoken has said that he has not had formal complaints and if he had formal complaints he could take action.

Mr Moellmann: I was talking about the cross-acceptance issue.

Q368 Lord Bradshaw: Yes, I understand that.

Mr Moellmann: In Germany we are asking questions of the German rail regulator and raising issues, and there we do it in a very co-operative way, and also in The Netherlands, where we operate in the north, we have no problems. Of course, The Netherlands is a very well established example in the experience of myself and my colleagues. In Germany we have somebody who is looking at this incumbent company which owns not only the fuelling services but also the sidings for freight services and even for passenger trains, which is always an issue and over which we have no influence, so, of course, there we complain and letters are written, and also on the infrastructure charging systems and the systematics. First we have to complain to the infrastructure provider, then copy it to the railway regulator, and it has been our experience that if you are seen as a reliable stakeholder most of the regulators will try to understand and will act. In the case of Germany, although the infrastructure framework has developed over the past year, we still find some things a problem. Fuel service charges is one of the problems, or the use of certain facilities on the platforms—are they included in the pricing or not? There are also problems with access to information systems on the platform for passenger services and entering certain marshalling yards for freight services and cross-border services. If you have one or two slots a day as an operator to pass the line and if your train, for whatever reason, is late and it is not your fault, it is just the traffic on the lines, then your train will wait for a long time, whereas you can see that other operators, which have 20 or 30 slots over the border, will be able to be more flexible and sometimes use their slots or sometimes not. We say, “This is impossible. Why are our customers waiting for such a long time whereas other operators”—usually the incumbent operator—“can cross the border?”, and usually we have a bottleneck around the borders of 10, 20, 50 kilometres at the collecting points or the points where the trains can wait.

Q369 Chairman: It is extremely interesting. It is going into perhaps a little more detail than our report can cope with.

Mr Moellmann: I am sorry.

Q370 Chairman: No, no, it is very interesting. Just to come back to the point, you were also going to talk about the issues you have raised. Would they be

helped by a recast of the First Railway Package or do you think they are better dealt with outside that?

Mr Moellmann: When it comes to infrastructure, path allocation procedures and, of course, the position and rights of rail regulators, I think the First Railway Package will be very helpful. As for cross-acceptance, this is a sort of side point. We understand it is connected to the First Railway Package, although there is work to be done on other levels but, yes, the First Railway Package is the next scheduled change at European level.

Q371 Chairman: The recast?

Mr Moellmann: Yes, and we think that those issues should be tackled. Looking at the questions which were sent, the different infrastructure charging regimes are, of course, also one of the points to be raised.

Q372 Chairman: We have just heard from CER that the last thing they want is a recast. They say it is just a question of implementation of the First Package. Is that a realistic point of view?

Mr Moellmann: We have had several discussions in Brussels on this issue and we definitely share another point of view—(a), if the existing framework was sufficient why are there so many complaints, and, (b), we have had the infringement procedures. Some Member States were very quick in changing their regimes and opening up and other Member States were not and will not change if there is no pressure from another side; the past few years have proved that, and so that is why we believe that European action needs to be taken. Of course, and I guess you will come back to this later, it must be done in a balanced way so that Member States know on the one hand what they have to do and on the other hand that Europe will not take over everything. It is just a question of what the European Union should be doing and proposing and what should be done at the national level and there we may have mixed views.

Q373 Lord James of Blackheath: What is your experience of dealing with infrastructure managers that are still part of the same group as major train operators? Is there a problem here and how should the recast of the First Railway Package address this?

Mr Moellmann: First of all I must mention that Arriva in Germany is also an integrated infrastructure provider and rail operator, on a very small scale but Arriva operates 300 kilometres of railway in a European corridor which link up directly to the harbour of Hamburg, so it is not a very small line; it is something which is also in the political discussion as one of the main lines. In theory it is also an incumbent railway operator with an integrated infrastructure system. We operate the infrastructure in an open and non-discriminatory way. The

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infrastructure came with the company which was acquired. It is not a dedicated aim to become an infrastructure provider throughout Europe. It is just that it is there and we are dealing with that, but, of course, we have Deutsche Bahn operating on our railway line and we operate on their railway line. Our infrastructure is open and we have an open and transparent regime, as we believe it should be. Having said that, we can also see that in Germany the big infrastructure provider has done a lot in the past few years.

Q374 Lord James of Blackheath: Can I try and tweak the question a bit then, because if you see it from the point of view of being an integrated provider yourself what notable differences do you see in other integrated providers and where would you be critical of how they deal with the issues which you have been able to handle?

Mr Moellmann: On the one hand, when it comes to capacity planning or slot allocation on the infrastructure, we have a clear separation of this and all our information is available to the railway operators which want to operate on these lines.

Q375 Lord James of Blackheath: Are you saying you have got a better software system? Is that it?

Mr Moellmann: In our experience over the years, although the German rail regulator looks very hard into every request and every letter or every question we raise on the charging system, we have had a higher charging system for the ad hoc train path which for us, as one of the small operators with a certain market model, as have all other private operators, has been a problem. Fortunately, the high administrative court made DB stop this and imposed a certain mark-up on the charging system. It will not happen with us. Also, all our information is open, clear and transparent, on the DB network or other networks is not entirely a given. In The Netherlands with ProRail we have clearer rules and processes in getting to an agreement. The communication is much more open and much better for the operators on the lines, even on technical details, than you would find it with a big German network, whereas, to answer your question again, the system the small railway line infrastructure is given follows not only the legal requirements but also the recommendations of the German transport association dealing with the railway. It is common standards, you can get all the information you need, but the difference between our operations and the DB operations is that we are not on the trans-European network and information about technical requirements and construction work on the railway line and so on, which is necessary for informing your customers when the train is going to arrive, is always very difficult with the infrastructure provider. Infrastructure is regarded in Germany as

one of the key services of general interest, so Deutsche Bahn receives investment and a lot of money for maintenance from the federal state, which, if you have a comparable infrastructure with a comparable function, the other providers of infrastructure will not receive. At the moment, in terms of management of the infrastructure, counting the money for 2007 and part of 2008, DB will get 70 times more funding for the same length of comparable infrastructure to cover technical requirements. This has been addressed in Germany by Arriva saying that this is impossible, this is against European law, this is against German law, and even the federal German parliament and the scientific service of the parliament have agreed and have made a report about this but the government still states, "No, there are still two ways of financing. DB gets this sum and the private infrastructure providers get the other sum, even if the infrastructure serves the same purpose". This is one issue we have to deal with from day to day just to keep the infrastructure safe and workable. Another point for us is the capacity planning of the line for both passenger and freight by the integrated infrastructure manager, for example DB but there may be others, but here it is about the decision as to whether the siding will be cut off or taken out of service.

Q376 Lord James of Blackheath: Just to get the final bit of the answer to the original question, what would you want the recast to say in this regard?

Mr Moellmann: A very good thing to have for the investment and planning side would be incentives to reduce inefficiencies and costs. I pointed out at the beginning that ad hoc requests are a problem. They should be addressed more quickly. We have now a five-day time frame for ad hoc requests for train paths. If it could be speeded it up it would be better. Of course, there is an issue, which was also mentioned before, when you look to international transport and other transport, and that is the priority rules. Who is going over the border when and what is the waiting time? This is an area where we feel the big integrated companies still try to play another card in order to have an advantage.

Q377 Lord Bradshaw: You are critical of the integrated company. You have said that they get a lot more money to maintain their infrastructure than you do. How much of that extra that the incumbents get relates to historic debt and pension contributions rather than all the other things?

Mr Moellmann: In Germany, with the start of the railway reform the historic burdens, such as pensions, were taken over by a special federal office and this federal office leases out the stuff at market price. Any historic debt is with the state.

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Q378 Lord Bradshaw: And all historic debt is with the state?

Mr Moellmann: Yes.

Q379 Lord Bradshaw: So you are talking about comparing the costs of your maintaining the infrastructure with the costs of DB?

Mr Moellmann: And also with the investment side.

Q380 Lord Bradshaw: Investment in maintenance?

Mr Moellmann: Yes.

Q381 Lord Bradshaw: But what pressure is brought on DB? Who is responsible for seeing that their infrastructure charges are efficient?

Mr Moellmann: For Germany, from what I see, this is not clear enough. The rail regulator will look very closely at this question but from the reactions you get obviously the efficiency has not been reached.

Q382 Lord Bradshaw: In the control period just started the British rail regulator has cut the budget of the infrastructure manager by 25 or 30 per cent, I think. It says they are not efficient so it just cut the budget, so they will not have that money. Nobody is inquiring into how efficient DB is?

Mr Moellmann: No.

Q383 Chairman: We have heard from quite a lot of witnesses that the existing regulatory arrangements are inadequate in many Member States. What would you like to see in the recast First Railway Package about regulatory bodies?

Mr Moellmann: We have been discussing this intensively and we know the different situations in different European countries. The first thing is that regulators should have quite extensive powers to review capacity allocation and they should clearly be stated. We have compared this and seen that the German regulator, for instance, has a specific framework which is sometimes very helpful in terms of the question when can a rail regulator act and on what basis, which is a slightly *ex ante* and *ex post* discussion. This is a very helpful element in a market where, in freight, if you are not serving the market, the customer will go to somebody else, so you need quick decisions and you should not have to go through the whole legal process which will take two or three years and until then the business cannot exist. It is the whole question of when should a rail regulator have the right to act and should he act on his own by reviewing the legal framework or should he only start his work when he receives a complaint. In this case a framework would be helpful where rail regulators have the right to look into the rules on their own if they believe there is something wrong, and they should have the right to act *ex post* or *ex ante*. It is helpful if you have a rail regulator who can

do that. It is like the *ex officio* investigations are for us when you have complained or you have seen that a system comes up and you can make somebody act by having also a formal complaint because the legal framework has not been finally established. This is helpful. There is also the question of should the rail regulator's decision have immediate effect or should it be put into effect only at the point where the incumbent or other companies have made their claim and lost it? From our point of view this would have an immediate effect and avoid a suspensory effect by the courts. It is very helpful especially for the freight business. In the passenger business the conditions are different. You usually have two years to establish everything after the passenger service tender. In freight services it is different. You have a customer coming to you asking whether you are able to offer your services within a period of sometimes a month, sometimes less, or sometimes two or three months.

Q384 Lord Bradshaw: When we were talking to one regulator we taxed him about this question of international train paths. We asked him whether he had any expertise at all in questions on timetables and he said no, he had no expertise, so the regulator, in the situations you describe, if he does not have that expertise, has to go back to the incumbent to ask the questions.

Mr Moellmann: It depends. Some rail regulators will use external advice and in some markets you have access to the systems. This is also, of course, a question of staffing and qualifications, and, of course, budgeting, because such advice will cost but it is helpful in many cases if the regulator has got the backing, if he is able to check on the information coming from the incumbent or the company.

Q385 Lord Bradshaw: To check independently without going to the incumbent to ask?

Mr Moellmann: Of course, the incumbent will submit his own views and his own diagrams or rosters, whatever he has, but somebody must be able to check this.

Lord Bradshaw: I agree with you.

Q386 Chairman: You have some very good points in your paper about what you would like to see the regulator to do and I do not think we would dispute those. What about the international level though? Do you think there should be more active co-operation between the national regulators and will that help when it comes to making it easy to run international freight traffic across borders?

Mr Moellmann: Yes. This question has been discussed in Brussels during the past month. There is another question: whether there should be a European regulator.

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Q387 Chairman: That is right; that comes in our next question.

Mr Moellmann: In our experience it is good if the rail regulators co-operate closely and have some working contact and find a way of having a very close discussion on things. We know from different contacts with different rail regulators that an informal group has been established, and from our point of view this is a good starting point but it must be developed so that there is a good way of exchanging experience and also that the people know each other so that when there is a conflict it can be solved easily.

Q388 Chairman: But you would not favour a single European regulator?

Mr Moellmann: From the point of view of an operator it is too far away. You still have certain specific cases in national law and the rail regulators we know, apart from the one I mentioned before, are very close to the market and very close to the operators and other stakeholders, and this is very important if you have complaints. If you have a rail regulator far away in Lille or in Brussels, or wherever this might be established, it will need travel time and knowledge about the local situation, which at the national level is a given.

Q389 Chairman: But in some other sectors of the economy the Commission have proposed a European regulator although I do not think it has been accepted anywhere. Do you think they will propose it in the recast or do you think they are wise enough not to?

Mr Moellmann: What will be proposed I am not too sure about. I am not saying we should not have any regulation at European level but there should be a national rail regulator for staffing reasons, for budgeting reasons or for the reason of this interim phase between one legislation and the next or the legislation to be developed. There should be an appeal possibility at European level to look into things, avoiding the idea of a supra-regulator at European level, but this can only work if the national bodies have clearly defined rights and can intervene at local level and if they are not lame ducks or just some formal regulator who has no power to act at all or is too close to the former incumbent.

Q390 Chairman: Do you sense that things are moving in the right direction with regulation, that it may be too slow but is it going the right way, or do you think there is really entrenched opposition in some countries to having a genuinely independent regulator?

Mr Moellmann: Yes, there is. I would say that in some European countries there is resistance to a fully empowered regulator and so at the European level there should be in the recast of the First Railway

Package a list of requirements—what should a rail regulator be entitled to, should it be developed and it should be ensured that the rights are enforceable?

Q391 Lord Bradshaw: Can we talk for a moment about international rail freight because you are obviously in that market? You have talked about the problems at borders. Do you think it gets any priority at all, and I am talking about open access operators, or are you very much at the bottom of the queue?

Mr Moellmann: Do I understand correctly that you are referring to the question of international rail freight?

Q392 Lord Bradshaw: Yes. It may not be what Arriva is in, but if you want to move traffic, say, from Antwerp to Genoa, is that given any form of priority, or do you get stuck at every crossing place?

Mr Moellmann: We have more the experience that there is a risk of getting stuck. You need a lot of clever people who can try to sort it out at the operational level but this is only possible if your operational people know the other people and can put pressure on keeping the contracts. The priority is not given as it could be given. We see that especially at the border. As I mentioned before, we have the feeling that there is different treatment of the big incumbent international freight operators and the non-incumbent freight operators when it comes to waiting times at the border or the possibility of getting direct through-slots without waiting four, five, six hours in some places. It is difficult.

Q393 Lord Bradshaw: Do you go through Switzerland, just as a matter of interest?

Mr Moellmann: We had services going through Switzerland. At the moment this is not the case.

Q394 Lord Bradshaw: Did you get problems at the border there or are they more efficient?

Mr Moellmann: I know from my colleagues that for Switzerland there were capacity constraints but other problems have not occurred.

Q395 Lord Bradshaw: It is possible if the will is there to deal with some of these problems. What I am leading you on to is that it is the lack of will rather than the incumbent which is causing the problem.

Mr Moellmann: Yes.

Q396 Lord James of Blackheath: What about the existing investment in rail infrastructure? Is it adequate in Europe as a whole? Are the existing provisions of Directive 2001/14 enough? What needs to be done?

Mr Moellmann: This was before the economic crisis took place. At the moment capacities may or may not be a problem, but if everything carries on again

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capacity problems which should have been solved have not been solved, and so the answer to this question, if I understand it correctly, is, no, the existing investment has not been adequate because otherwise capacities should have been adapted on certain lines and, as I mentioned before, with this small infrastructure business the answers also are clear—no, because the funding which is granted to the private rail infrastructure provider is hardly sufficient. If it were to come to equal terms and fair allocation of the investment funding or other funding, then the answer would be yes, we can do a lot more with the development of our infrastructure, but your question is more to the general and there the answer is that the investment has not been adequate. Otherwise the bottlenecks which have been known for the last ten years would have been worked on.

Q397 Lord James of Blackheath: To a very large extent probably the answer to this question goes back to the earlier issue of the European regulator. It would only be possible to cure it if it were centrally controlled and directed but that would effectively impose cost penalties on countries having to find the finance to do the job at the direction of a central regulator.

Mr Moellmann: Or regulators working very closely together and having the right to decide about this.

Q398 Lord James of Blackheath: Yes, but that raises the issue as to whether there is going to be enough power in a local regulator working within the structure of his own government as opposed to an international regulator who can seek to impose, through the structure of Europe, a different authority.

Mr Moellmann: And that is why from our point of view we stress that the rights and the role and the equipment of the rail regulator should be upgraded, should be clearly developed and promoted and why the idea of more independence is important.

Q399 Chairman: The independence means the independence to, say, spend more money which might be very difficult within a local community.

Mr Moellmann: It might prove difficult but, when it comes to a performance regime and capacity constraints, they will come up again. As far as I understand it, many freight trains are not operating so at the moment you might be able to get the slots you want, but half a year ago it was hard.

Q400 Chairman: Perhaps we can turn back to a question which Lord Bradshaw was asking. He was asking to what extent did freight suffer because of the priority demands of passenger services. What about the other way round? Is there a risk from your experience that increased rail freight is going to impact on passenger services to their disadvantage?

Mr Moellmann: Indeed, we see a danger that the discussion on the promotion of international prioritised rail freightways can impact on passenger services. As we operate passenger and freight services in several countries, as we have been discussing, yes, there is a risk, but on the other hand at the moment (this is only from the operators' side) the average travel time for those trains which we operate and the international fast freight trains should be similar, so there should be not too many problems. I am sorry to get technical and detailed again, but, if you look at what the planners do with their diagramming, freight trains and regional express trains may be able to cope with each other if you have a similar profile. If you have a high-speed line, the high-speed line will eat up capacity, it will go through the whole planning range, and for high-speed passenger services there is a conflict. For the other passenger services, if you have reasonably good planning and reasonable co-operation between those who have scheduled passenger services every hour at the same time, which is important for transport authorities and important for the passenger on the train, and if this is not endangered, it should be possible to cope. If it is the political aim in the Member States to move passengers from road to rail with modal shift, as you can see in Switzerland, as you can see in some parts of Germany, as you can see in The Netherlands, if these systems are endangered there is a big risk that there will be a clash of interests between freight and passenger, but as long as you are not discussing high-speed services, which are the real threat to capacities on railway lines because if you have a high-speed line all the trains must have their spare tracks where they can wait for the process of overtaking, then it should be possible.

Q401 Lord Bradshaw: My next question relates to the market in which you operate. Is it your opinion that the price you can get in the market is almost entirely determined by what price is charged by road freight or water-borne freight?

Mr Moellmann: With regard to our business, we have specialised in certain customers where you can only transport by rail, so this question is less relevant and therefore what I can say is hypothetical. I do not know whether this helps your findings. In this case, of course, the road price is a determining factor. Secondly, if you look at the infrastructure charging regimes and the infrastructure price, and if you then have long-term scheduled trains with a short-term path request, the price in many cases is even higher. Then you must specialise in special goods where you can have another price, where you offer certain reliabilities, where you have to guarantee certain qualities or special wagons, and this will work, but if you are just one-to-one competing with road it is, I think, for many freight operators very hard.

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Q402 Lord Bradshaw: Does the fact that different countries in Europe have different schemes and infrastructure charging have a big impact on what you have just said?

Mr Moellmann: It would have an impact because you do not know the charging. It is so different and it is so difficult to understand. Sometimes even for Germany certain things are not clear in one regime, and if you have that across border services, for instance, if you have a short-term path request in one country it is at a higher price and in the other country it is not, it is almost impossible to immediately work out a price quote which will help you to give a safe and reliable price to the customer.

Q403 Lord Bradshaw: Is there anything at all the Commission can do to help that problem or is it a matter for regulators, or who is it a matter for?

Mr Moellmann: Concerning the patterns of charging regimes, advice would be helpful.

Q404 Chairman: There was a point we picked up in your written evidence where you suggest that some state operators are receiving discounts or not even paying infrastructure charges at all. Do you have clear evidence of this?

Mr Moellmann: This is again a point where, if we had clear evidence, written evidence, which could be taken to court, we would have found a way to get this to court, either as a company or via an association. We have oral evidence, we believe we have reliable sources, but if we were able to prove this it would be a case for making a claim.

Q405 Chairman: You do not have any fingerprints or DNA?

Mr Moellmann: No.

Q406 Chairman: One last question from me, in two parts. When do you expect the Commission to come forward with the recast of the First Railway Package and, secondly, do you think they are going to have the political guts to really take it to the Member States and force them to do what they are supposed to do?

Mr Moellmann: The original timing was quoted as September/October 2009 or even earlier. I do not believe this will be dealt with in 2009. We will be happy if it is dealt with as early as possible. I do not know whether this fits into your scheme but I have been discussing it in Brussels with many stakeholders. If you connect the issues related to the requirements from the field of passenger services and those from the field of freight services, it will be a big package. It will take a lot of time, as the discussion on the priorities for freightways has proved. It will be a

discussion over years. If we could achieve a two-step approach, first, to take all the biggest problems, which are definitely in the freight sector, and address the freight-related issues, that would be one step for the recast of the First Railway Package, and we could then go (in parallel but I think this will be a longer process) to the passenger services, because the opening up of the markets will be in eight months for international passenger railway services, and collect experiences in the passenger field, and I guess those experiences will also have to be addressed. I know there are forces who will want to join all the issues in one big package but if this happens we will not have a recast of the First Railway Package in 2010 or even 2011.

Q407 Chairman: What about the political strength of the Commission? Do you think they are really going to be prepared to do what they have done in some other areas, to their credit, to bear down heavily and directly on powerful Member States?

Mr Moellmann: There are two or three big European Member States which might be putting their foot on the brake but we have a good example. I do not know whether you agree, but having seen the big development in the country you come from—the financing and the relations between the different stakeholders, most of the problems have been solved. The one point on which the UK received the infringement letter was very minor.

Q408 Lord Bradshaw: It has been done, I think.

Mr Moellmann: It has been done. It was a very minor thing.

Q409 Lord James of Blackheath: It is nice to know that from the outside looking in it looks as though we have solved everything. I am not so sure it looks the same from the inside looking out.

Mr Moellmann: It is perhaps very unfriendly to say, but some years ago I had a very particular view about the UK business, and I was following this even before I joined Arriva, but all the issues have been addressed in a transparent way and, having learned the lesson, I hope the UK will, with your help, be ready to push things forward.

Chairman: Thank you. We are very unused to being praised in Brussels. It is almost embarrassing! Mr Moellmann, thank you very much indeed. You have answered our questions very fully and given us a lot of material. We will send you the transcript and do make any changes you feel necessary. If you have any other material subsequently you want to send us, please send it to our Clerk.

TUESDAY 7 APRIL 2009

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| Present | Bradshaw, L. Freeman, L. (Chairman) | James of Blackheath, L. |
|---------|--|-------------------------|

Memorandum by Mr Brian Simpson MEP

1. The recast of the First Rail Package is something I and those within the European Parliament Transport committee believe is very much needed to improve technical specifications and to enable free movement of rail freight throughout the European Union. This remains as important today as ever before as we place reviving rail transport as a key objective of EU transport policy.
2. Firstly, as part of this evidence I would like to give a brief summary of the main priorities from the Commission's 2006 green paper which set the ground for this recast and then a brief outline of what the European Parliament called for in response to this. Secondly, I would like to address and give my opinion on the specific points that the "call of evidence" asks me to focus on.

COMMISSION GREEN PAPER AND LAST EUROPEAN PARLIAMENT OPINION

3. It was clearly highlighted in the Commission's green paper of 2006 and the European Parliament's subsequent report on "the implementation of the first rail package" that Member States across the EU had fallen short in implementing legislation and that more measures were needed to provide a better and more interoperable rail network.
4. I think the Commission were right to highlight:
 - Track access charging, and introducing more incentives for Infrastructure Managers to reduce costs and charges.
 - Separating infrastructure managers from railway operators.
 - Making sure Member States set up independent regulatory bodies with real powers.
5. However, Parliament in its response to the green paper stated that the Commission and Member States must also focus on:
 - Further interoperability to allow cross border working and access to infrastructure.
 - Modernising and developing intermodal infrastructures particularly at ports where we find a real lack of flexible rail infrastructure.
 - The rapid installation of ERTMS (European Rail Traffic Management System) on the six corridors which the EU has reached agreement on with railway undertakings and Member States.
 - Initiating legal proceedings without delay against Member States which have not implemented the first or second railway packages.
6. Are the Provisions on the separation of infrastructure management and train operations sufficient?
7. They are only sufficient if the infrastructure manager is a separate entity from the national railway operator and completely independent of the railway companies.
8. In some instances the infrastructure operator is merely another arm of Government with very close links to the state owned railway company. This in my view can compromise impartiality and stifle cross border services.
9. Are the current provisions adequate in regards to staffing and independence of regulators?
10. Independence from Government is essential but so too is independence from railway operators and, train companies. What is required is the regulator to regulate impartially for the benefit of the railway not to show favour to one company or another or one country or another. Regulators need to regulate more vigorously and be accountable to Government or the EU for their actions.
11. The problem we have in the UK is that our regulator hasn't got a clue what is going on in Europe and most, if not all of their thinking is focused on the UK, on what appears to be a day by day basis. Most of their focus also seems to be centred entirely on the high speed passenger and London commuter with little consideration of freight and international services.
12. Are there barriers to entry due to factors such as safety certification requirements?

13. Barriers still exist because national Governments or National Regulators don't want to give up competence to the EU.
14. The railway industry is not the most dynamic when it comes to innovative thinking or problem solving and when they are backed by regulators or national authorities' intent on protecting their own empires, progress becomes painfully slow.
15. ERTMS is a classic example of this, particularly in the UK as is through freight transit in France for countries like Spain. Sadly the railway industry throughout Europe will always give you nine reasons why something can't be done instead of one reason why it can.
16. Are the current requirements regarding the setting of infrastructure charges adequate?
17. The problem with infrastructure charging is that there are 27 different systems. What is needed is one system that can be adapted to national needs not 27 separate ones.
18. The charging system for use of the Channel Tunnel is different to what the UK and the French have. How can this be sensible? Three different charging regimes to run a freight train from Britain to France.
19. We also need better rail access to our ports, often I feel they are left out in regards to Government investment due to them being privately owned. However if we are serious about getting more freight on rail it is essential our ports are well connected to the rail network.
20. Are existing provisions regarding the allocation of capacity both on tracks and at terminals adequate?
21. Allocating capacity is bias against the freight train and what is required is a level playing field with freight getting a fairer allocation of train paths. This along with a lack of interoperability of both infrastructure and rolling stock is the major reason why rail freight numbers are still low.
22. Organising a freight train from Wembley to Europe is a nightmare. Different charging regimes, lack of pathways, lack of rolling stock interoperability, working with a number of infrastructure providers; all put a brake on a fast efficient freight network.
23. How should a recast of the First Rail Package relate to other EU freight transport policies?
24. It needs to be at the centre of it both in transport and environmental terms. We need to get the railways (particularly in the UK) to think international and have in place the framework that could give us fast rail freight services to the heart of Europe that are at an affordable price and not faced with technical and bureaucratic obstacles imposed from above.
25. However, Member States must also play their part by recognising the role the EU must play in all of this and do away with protectionist barriers. Rail freight needs to be a priority, especially in regards to track access charges, and a fairer deal in regards to pathways.

22 January 2009

Examination of Witness

Witness: MR BRIAN SIMPSON, MEP (Labour), examined.

Q410 Chairman: First of all may I thank you very much indeed for coming to assist the inquiry of the House of Lords Select Committee Sub-Committee B on the European Union into the recast of the First Railway Package. May I ask you to talk a little bit about your own background and experiences, which will be very helpful to us, and perhaps make any opening remarks you wish and then we will divide the questions up among the three of us.

Mr Simpson: My Lord Chairman, I am Brian Simpson. I have been a Member of the European Parliament since 1989 although I had a little two-year sabbatical from 2004 to 2006. Democracy can be cruel sometimes, as you know, my Lord Chairman, but I came back in 2006. Most of the time I have been the spokesman on transport and tourism for the Socialist Group, which includes the UK Labour Party and all our sister parties, and in that role I have been very active since about 1990. Originally I was

the Parliament's rapporteur for the 1991/440 Regulation, the first real regulation looking at the liberalising of the railway market. Railways are an interest and love of mine as well as clearly being important in the political work we do. I come from Wigan, which is now in Greater Manchester, although many of us still say it is in Lancashire, and I used to train spot on the West Coast Main Line at Golborne. That is where my love of railways came from, and for my sins I am the Vice President of the Heritage Railways Association in the United Kingdom and I try to help them whenever possible when people over here in the EU have great difficulty in understanding that in order to make a steam locomotive work one has to set it afire first. That is my background. My main area of work in the Parliament is transport and tourism although I do agriculture and rural affairs as well, because, as you probably are aware, we have two committees that we

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tend to concentrate on. That is a little bit about myself and I will do my best to answer your questions.

Q411 Chairman: In your CV it says you were PPS to the Deputy Prime Minister.

Mr Simpson: I was the first European PPS to the Deputy Prime Minister, John Prescott, which was an idea he had prior to the 1997 general election. I think he found it quite useful, in the sense of having somebody over in the European Parliament who could advise him on European issues and what other sister parties and other governments were saying, as part of his role which you may recall was that very big department at the outset, including transport and environment. I was given that role, which I kept right up to 2004.

Q412 Chairman: Just for the record, I was the Minister responsible for the rail legislation and, of course, John Prescott was leading for the Opposition. It was a fascinating experience to work with him and he has been a lifelong friend ever since. I have great admiration for his enthusiasm, not only for the railways but for his roots. If I may ask the first question, what are the main failures of the First Railway Package in outline, and are they really proving to be very serious, almost mortal, in terms of the development of a competitive rail freight industry?

Mr Simpson: The honest answer is yes, in some respects. I think it is important to remember that the First Railway Package represents a first step. It was a first step on the ladder to creating an integrated rail network that covers the whole of the EU and I think many of its perceived failures are down to that particular fact. The real problem for me is a lack of harmonised implementation from Member States. In some states we have opened markets, in other states we have seen little progress, if any, and in some instances even obstructive measures to stop that liberalisation. I think this leads to confusion and lack of co-ordination. The points made by the Commission in their 2006 Communication are still valid. The package has not in my view, my Lord Chairman, addressed some of the important issues that need to be addressed if we are to create a fully functioning and competitive rail freight market. I will pick on three—the lack of independence of infrastructure managers from railway operators, the lack of independent regulatory bodies and the lack of a uniform charging system, particularly for rail freight. I appreciate that within the UK in a lot of those areas we have put into position a system that brings that about, but in many of the European Union Member State countries that has not happened, and I particularly refer to the divorcing of the infrastructure manager from the railway.

Q413 Lord Bradshaw: I too in one of my previous jobs was on the railway. I remember Wigan and was in charge of it and I used to look out of the window to see the notice on the end of the house, “Uncle Joe’s Mint Balls Keep Us All Aglow”.

Mr Simpson: Lord Bradshaw, if I had known I would have fetched some with me.

Q414 Lord Bradshaw: I think largely we agree with what you have just said, or, rather, the evidence we have heard from several people leads us to the fact that these weaknesses exist. Do you think the way in which these are to be addressed, through a recast, will effectively tackle these problems?

Mr Simpson: Yes. I am always conscious of the fact that when it comes to railways I seem to be dogged by the philosophy that people will always give you nine reasons why you cannot do something rather than one reason why you can. My favourite phrase I always use with Network Rail is that when you come up a suggestion there is that sharp intake of breath through the teeth and you feel you have come up with some great radical idea and all you really want is to put a signal here or a platform there. There is a need for flexibility and I think there is a need in any EU legislation to recognise national foibles, if you like, and the way national railway undertakings work, but I do believe that sometimes that is used as an excuse to stop progress. I often remember the famous quote from one of our commissioners who said, for example, with France, “Unfortunately, when the good Lord created the earth in railway terms he put France where he did”. There is this difficulty of getting over nationalistic boundaries and nationalistic problems. I think we have to have flexibility. If you look, for example, Lord Bradshaw, at the point I raised in my written evidence about the charging systems, if you want to run a freight train from Wembley to Lille there are three different charging systems. If you want to run a lorry from Wembley to Lille you do not have that problem, and you are interoperable and away you go. Until the railways really start to address that in my view there is always going to be this problem, so I would very much say that the recast needs to look at the whole issue but make sure it is not so rigid that it cannot work. It is that flexibility but working together which I think is missing at this moment in time.

Q415 Lord Bradshaw: You have referred to all the different charging systems. We have a system in Britain where rail freight pays marginal costs plus a bit for freight-only lines. Do you see any hope of attaining an easier, better system for international rail freight?

Mr Simpson: I am ever the optimist, yes. We have tried recently. We have just been discussing in the Parliament the whole idea of rail freight corridors

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and, straightaway, as soon as the idea of rail freight corridors came out, who were the ones complaining about this and doing their damndest to stop it? The German national railway. “You cannot be this rigid”, was their view, “because we need passengers getting the priority”. I fully understand that you cannot put freight trains on TGV lines and I fully understand that there has to be passenger priority, but what I and some of my colleagues have been calling for is that we need to move on from freight just getting the crumbs off the master’s table or, in my own area, Freightliner getting the crumbs off the table of Virgin West Coast. We have to have a better system that would ensure within the UK that freight gets the adequate pathways that it needs, then, transposing that into European operations, makes sure that we can take up that challenge that the lorry can start at Wigan and be in Paris the following day and rail freight has to compete on that basis. We have to take the freight train from Wigan to Paris. It does not even have to be the same day. People will use it if it is competitive and reliable and economic. It is just these frustrations of the railway industry itself—let us do something about freight, let us do something to encourage freight. Who are the first ones who object? ATOC, German railways and so on.

Q416 Lord Bradshaw: I must say I agree with you. We asked a question of the people we saw before, which really turned on the fact that almost any railway timetable is capable of being improved.

Mr Simpson: Yes, except through Manchester Piccadilly 13 and 14. I just thought I would mention that, my Lord Chairman, for the record.

Q417 Lord Bradshaw: But most railway timetables are sub-optimal and, in fact, given any railway timetable, I guess within an hour or two you can find ways of getting things through it. I believe in Europe a lot of the capacity in timetables is eaten up by trains that do not run or run seasonally or are being safeguarded for something or other but they do not actually have trains in them. We asked somebody whom we saw yesterday, one of the regulators, whether they had any expertise in this area and his answer was no. How do you see that being resolved because what I call the professional railway operator does not appear to get into this awful mess of regulation caused by rigidity?

Mr Simpson: I think there has to be a better system of co-operation and co-ordination between infrastructure managers across the whole of Europe. For us in the UK it would be the Channel Tunnel, being an island, but when you talk to freight operators about where the problems are, the problems are invariably at national boundaries or in those pinch-point areas in and around the larger cities. I think what we need to do and what we have

tried to call for in the freight corridor report is better co-operation and co-ordination between the national infrastructure managers so that they can sit down with the train operators and freight operators and sort the problem out. It does not happen at this moment in time.

Q418 Lord Bradshaw: But will the recast address this issue at all?

Mr Simpson: I think the Parliament will home in on that. My answer would be yes, but probably via Parliament. That is the kind of view that certainly Parliament is pushing, along with the interoperability and so on.

Q419 Lord Bradshaw: Could I turn to a totally different question? We have heard evidence that people are pursuing a technical agenda which consists of things like interoperability and rapid installation of ERTMS. I worked on the railway for 50 years and I believe ERTMS was in somebody’s mind very soon afterwards, and it is still there but it is not happening. How long do you think it is going to take to install ERTMS along a significant European corridor?

Mr Simpson: How long is a piece of string? I think there is a move towards that now. We have a particular group looking at ERTMS under the Commission. The Commission’s co-ordinator is looking at ERTMS, and there is certainly a push from Parliament that we need to develop ERTMS. The problem is that every time you start to develop ERTMS it depends which particular system you are looking at. I have to say I am disappointed with the UK attitude towards ERTMS, which is, “This could be expensive. Let somebody else pile at it and then, when it works, we will probably have it but let us take it away and try it on the Cambrian coastline”, that very overworked railway line in Wales. I have been trying desperately to get the UK Government to be a little bit more forward in getting on board with ERTMS. To answer your question directly, I think it is still eight to ten years away on a major route.

Q420 Lord Bradshaw: Do you believe that waiting for ERTMS is important in terms of improving the access, or could a lot of improvement be made without it?

Mr Simpson: I think it could be quicker. I think we need to get it right, but I think it could go at a quicker pace than it is going at this moment in time.

Q421 Lord Bradshaw: Yes, but is there any reason why we should not prosecute our desire to see the corridors used while we are waiting for ERTMS?

Mr Simpson: No, none whatsoever.

Q422 Lord Bradshaw: That is what I wanted to

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know. In your evidence you have said that the UK regulator has not got a clue what is going on in Europe and that he focuses on high-speed passenger rail. I think the recent statements on the East Coast Main Line are really rather different from that and we are bending their mind to the fact of turning the Midlands Main Line into a proper freight route to the north. On the other hand, the British case is an example which holds up a lot of lessons for Europe. Are you really still as critical of the regulator in Britain in terms of not having a clue?

Mr Simpson: Yes. I would qualify it on a couple of points. In all my time here and ever since the Office of the Rail Regulator has been in operation, I can count on one hand the amount of times the rail regulator has approached either myself or my colleagues in regard to EU legislation going through on railways. I would have thought that with regulations going through there would have been a lot more dialogue between us. I also sincerely believe that the UK rail industry—and that includes the regulator—is so nationally focused (maybe it is the island mentality) that we have not broadened out and looked at the whole issue of links to Europe, and it is only when we have a problem, ie, freight charges through the Channel Tunnel or a fire at the tunnel or something, that we look at the European angle. My criticism is of the industry as a whole, which includes the regulator. The second point I would make about the regulator is that I would like the regulator to regulate. I would like the regulator to ensure that the regulations and the Government's policy decisions are implemented. I do not want the regulator running the railway. It is for the professional railway people to run the railway within the guidelines set down. I sometimes think that with our regulator he gets too involved in running the railway and I would even extend that criticism to the Department for Transport. It should not be for the Department for Transport to decide which class of locomotive should be running on this, that or the other. That should be a matter for the railway operator. I think we have got into this in the UK, trying to run the railway instead of trying to regulate the railway.

Q423 Lord Bradshaw: I would lump ATOC in with the same thing.

Mr Simpson: Indeed. I think it is only fairly recently that ATOC has had a person over here in Europe working on their behalf. That is my criticism of the rail regulator. It comes at both the national level at the way they are working, but also I just want them to open up a bit more.

Q424 Lord Bradshaw: I will convey your messages to Bill Emery when I have lunch with him.

Mr Simpson: I have lots of letters from Bill Emery, me saying, "What's going on with ABC?", and he replies, but it would be nice for the rail regulator to come to us and say, "This is a concern in the regulation".

Q425 Lord James of Blackheath: How are we going to get the regulators to work together to achieve better international freight operations across border?

Mr Simpson: Again, I think we have actually started that in regard to the attempt on the freight corridors. I would make the point that the First Railway Package is a first step. What you have seen since that has been the kind of development where the Commission are looking at how we work that, because that has been highlighted as one of the significant problems, along with the technical and physical interoperability—locomotives, signals and so on. The barrier of national rail regulators and infrastructure managers is perceived as the second one. I am not advocating that we have a kind of EU rail regulator. What I am advocating is that we should set into motion a strong structure that allows the rail regulators to get together and look at where the problems are, and again it is invariably the cross-border issues, and sorts them out. I think we need the regulators singing off the same hymn sheet and we need the infrastructure managers singing off the same hymn sheet.

Q426 Lord James of Blackheath: To get this to happen do you think we need an EU level regulatory body to oversee the whole of this cross-border dialogue?

Mr Simpson: No, I do not. I think what we need is the Commission to take on its responsibility via the regulatory process that we have at the moment within the EU and ensure that whatever is agreed and passed between Council and Parliament is then enforced by the Commission. It is very difficult to have an EU regulator in regard to railways because the railways are so diverse and so different. You have TGV, Thalys, Pendolinos on the one hand and you get to Bulgaria and you are lucky to get something that stays on the track on the other. Every time anybody moans about the railways in Britain I would love to transport them all out to the Black Sea coast and ask them to take a ride to Romania and I am sure they would come back thinking we have a wonderful railway system. I do not see an EU regulator as the issue because the railways are run differently, they are separate. We have even got separate gauges and so on. What we do need is this co-ordination of the rail regulators, perhaps a European federation of rail regulators and infrastructure managers. I am sure we can think of an acronym that would be appropriate.

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Q427 Lord James of Blackheath: Thank you for that very strongly held view as a start point. How do you feel about what we should be doing with the recast with regard to the regulation of competitive freight and how far that should be reflected in the package?

Mr Simpson: I am a great believer in strengthening the freight aspect of all the railway regulation, and again I refer back to the rail freight corridors attempt by the Commission to prioritise rail freight. I think everything is still on the table. We need to get the framework in position to liberalise the rail industry all the way through. We have started. We have said rail freight has to be liberalised. We are waiting for passengers to be liberalised in the next couple of years. Then we need to look at how we then prioritise the rail freight package within that.

Q428 Lord James of Blackheath: Given the strength of the answer you gave to my first question, I would not expect you to be very enthusiastic at the idea of having a separate regulation for a European freight network.

Mr Simpson: I think that is a separate issue. I think a European rail regulator is a completely different issue from saying let us have a European transport policy that includes freight corridors and prioritises freight.

Q429 Lord James of Blackheath: Even though that might cut across the national interests?

Mr Simpson: It will do; it has to. The point I am making is that that is why you need a structure in place that says, "Okay, but we need to sit down and co-ordinate this and we need to co-operate with each other". We still have difficulty in the railways in Europe in co-operating with each other. There is a great suspicion going on—"What are the French up to now?", a kind of "Beware of Greeks bearing gifts".

Q430 Lord James of Blackheath: It is sometimes fully justified.

Mr Simpson: Sometimes very justified. Of course, we come out in the UK from a market that has been opened up and, as you will be aware, in France there is great negativity towards opening anything up, be it energy, be it the utilities. I have often said that you can take down the French Tricolour from outside the Parliament, you can set it afire and jump all over it and a French Member will not bat an eyelid, but you attack SNCF and Air France and the whole balloon goes up. They are so inter-focused into them as national assets.

Q431 Lord James of Blackheath: Given your very decided views on that, what do you feel about the recast addressing the question of the improvement of access to marshalling yards, ports and terminals? This is going from the macro to the micro view.

Mr Simpson: I very much support that.

Q432 Lord James of Blackheath: Is that because you are critical of the access at the moment?

Mr Simpson: I am critical on a couple of things. I am critical on the UK Government position that says, for example, that we cannot help the Port of Liverpool have a rail access into its container port because it is privately owned, it is private land, but that outside the yard we might put some railway tracks. It is stupidity like that, frankly, that I find difficult to grasp when everybody else in Europe will say, "Let us help to put the railways into the ports".

Q433 Lord James of Blackheath: This is one instance where we are the villains, is it?

Mr Simpson: It is an area where we are the villains, yes.

Q434 Lord Bradshaw: Over-zealous.

Mr Simpson: One could argue that we are a victim of privatising the ports, I do not know.

Q435 Lord James of Blackheath: I am not a railway man but would not the British line that we are taking at the moment open up huge potential for interference by terrorist interests? We have the famous case, for example, of al-Qaeda claiming (whilst not doing so) to have put a nuclear device into an unidentified container in New York harbour. It virtually closed down trade into America for about six months while they decided whether there was anything there. Is not any unsupervised external place like that going to open up a bigger security risk?

Mr Simpson: No, I do not think so at all. One could then say that we will never do anything because it is a security risk. One would not cross the road. It might be a security risk because the car might be carrying an al-Qaeda bomb. Clearly security is an issue and the security in our ports and our airports is there. I would be bold enough to say that if a terrorist wants to attack the railway I could show him 200-odd mileposts up and down the length and breadth of the country where he could cause far more disruption.

Q436 Lord James of Blackheath: My concern is the threat which is not a real threat but a threat by inference and innuendo, such as they did in New York.

Mr Simpson: You are always going to get that. I went over to America and very strongly argued with Kip Hawley about the proposals where they wanted to screen every container going into American territorial waters and tried to point out the nonsense of that.

Q437 Lord James of Blackheath: Was that before or after the al-Qaeda incident?

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Mr Simpson: This was before. I am not a security expert, Lord James, but most people tell you that the thing that stops terrorism more than anything is good intelligence. That is what we need to work on. I do not think that saying we will help a particular UK port to develop its rail hub within its boundaries is a threat to security. In fact, one could argue that it strengthens security because you can bring the train in and fence it and secure it and what-have-you.

Q438 Lord James of Blackheath: Can I go back to the question that I was asking about this question of promoting better access to marshalling yards? You say is really a British problem?

Mr Simpson: It is not just a British problem. What I have used there is a specific UK problem.

Q439 Lord James of Blackheath: If it is a specific UK problem would it not be better to deal with it not by imposing a generality upon Europe but by giving a specific directive to Britain?

Mr Simpson: That would be one way through it, an EU regulation that says you should do this, but then one has to persuade the UK Government that that is also a way forward and they would have to agree it in Council. I find in my dealings with Council that more often than not it is cost that is the issue. It is absolutely nothing to do with security; it is cost. The UK Government does not want to be spending money on what it sees as privately owned ports. Of course, that is fine, except that in other European countries they are quite happy to throw grants and loans at their people to develop their port infrastructure. If the UK are serious we need to do a number of things as far as ports are concerned. We need to link them to the railway network effectively. Southampton is the classic example of being a poor connection out of Southampton. We need to link it, but also we need to develop as a ports policy a short sea shipping policy. It never ceases to amaze me that containers arrive at Felixstowe and then are transported by road to Liverpool. Whilst I appreciate that there may not be enough containers to fill a big ship, the issue of short sea shipping should be looked at, which we have never done in the UK, in particular the issue of rail freight, but in order to do that you have to get into the ports.

Q440 Lord James of Blackheath: I need to ask my Chairman something. My Lord Chairman, I have just thought of something which is not here but which just occurs to me, from the style of Mr Simpson, might be a very considerable problem that we ought to reflect in any report we make, and that is, what is going to be the consequence for Britain's role in the European integrated freight network in the event that the consequence of the recent adjustment to the rating arrangements for ports which was carried

through bankrupts 150 of our ports and terminals and takes out a significant part of the operability of our receiving network for our part of the international European network?

Mr Simpson: That is a bonny question. If I may, my Lord Chairman—

Q441 Chairman: Please.

Mr Simpson: The Government has got a very good ports policy document. It has come up with, in the main, a very good railway policy document. It has got a highways policy document, but nobody except John Prescott has looked at how we integrate them so you still have these different sections.

Q442 Lord James of Blackheath: We have now got Baroness Andrews ripping the whole thing apart by insisting upon this new rating arrangement. I think it is an issue for us to think about.

Mr Simpson: I have never been an expert on ratings, I have to say. One of the things I would ask you to look at seriously is the issue of public investment in our major ports and this kind of blockage that there is at the moment with the UK Government's position being, "It is privately owned."—it is Peel Holdings, for example—"They should pay for it".

Q443 Lord Bradshaw: Just to be very clear about that, the Port of Liverpool has made this application for money to be spent and you are saying the money has to be spent outside the dock gates?

Mr Simpson: Yes. What the Government is saying is that they see their role outside the dock gates, "Yes, we will build the line, but inside, that is your responsibility".

Q444 Lord Bradshaw: Are the Port of Liverpool not able to apply for a rail freight grant to construct the stuff inside the port?

Mr Simpson: As I understand it, they have applied for a loan, not even a grant, and have been turned down.

Lord James of Blackheath: Can I establish the major concern? There are 152 terminals and ports which are identified now as being balance sheet insolvent but which are continuing to trade as a result of this. They cannot do so indefinitely and that is what my concern is, as to whether we have adequately reflected the impact that is going to have on our role in time.

Q445 Chairman: It is useful to have the point on the record, but I wonder if I could ask you, Mr Simpson, just to stand back and imagine that you are the new Commissioner for Transport, not transport and energy, and try and give us some guidance on navigating through some conflicting evidence. We have had a lot of evidence that infringement really is what should be done as a top priority and then everything may or may not be all right, but

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infringement is something that should be pressed. It will take years, it has to go to the European Court of Justice, et cetera. On the other hand, we have got evidence which says that it is not just clarification, tidying up the original Directive, and indeed some of the Regulations, but what is needed is a proper recast because you are not going to be able to get proper implementation of reform unless the wording is correct, and we have learned the lessons of the last eight years since the original Directive. One appreciates that there are a number of issues, frankly, in the longer term. TENs is one, rail passenger competition is probably another, but there are some urgent issues like unbundling and financial transparency that the Committee may feel, when it drafts the report very shortly, are matters of urgency. Commissioner, if you will, in that position, what would you be doing in terms of key issues to focus on the timetable, how you deal with Parliament, what you believe to be realistic in terms of delivery?

Mr Simpson: I would use my biggest ally in all of this for a radical reform of the railway industry, and my biggest ally is the European Parliament. The European Parliament is keen to see a real change in the railway industries because it knows that that is needed. I think we need something as radical as 1991/440 was in its time, and that is to completely recast what we have got and let us have a proper strategic plan for our railways covering all aspects of the railways, but in particular covering the interoperability of the rail network and also particularly looking at the co-modality use the railway can offer us, and link that in with ports and airports. I would have my ports people and my airports people in, because you have got passengers in and out of the airports, to work on a coherent new strategy. The second point I would make, my Lord Chairman, is that I would then make sure that when it was drafted and working with the Parliament and the Council (and that is where the seas can get a little choppy, working with the Council), we would then ensure that what was there was implemented. That is the real issue at the moment. We have a patchwork quilt of regulations and people know that, so okay, they do not implement it, and when it comes to the time when the Commission goes to court, okay, they move a little further and so on, and that needs to be put a stop to. As a commissioner looking at the railways, I would start --- I nearly said "with a clean sheet of paper" but that would not be true. I would take what we have got and let us get a coherent railway policy for the whole of the European Union.

Q446 Chairman: That is a bold, comprehensive, clearly logical way forward, presumably including the Second and Third Packages.

Mr Simpson: Yes, and, if I might say, my Lord Chairman, the freight corridor idea. I do not know why we keep having these bits, "Let's do a freight corridor one now", and then, "Let's do a something else one". Let us get a good one together as a full railway package, like they have done with the maritime package.

Q447 Chairman: A true internal market?

Mr Simpson: Indeed.

Q448 Chairman: But I think the implication is, is it not, that that is going to take some time? Are you prepared to sacrifice a couple of years, a new Parliament, perhaps a new Commission?

Mr Simpson: I think Parliament would, yes. It is difficult to speak for Parliament because I do not know what the new Parliament will be made up of. I think it would, my Lord Chairman, provided we could see the light at the end of the tunnel and we knew where we were going. Where Parliament gets very frustrated is where it does not see the light at the end of the tunnel, so people say, "We cannot do it until 2026", or whatever, and you say, "Why?", and nobody gives you an adequate reason why. Parliament is very good at saying, "We are even happy to say let us do it in XXX". An example of that which I could give you is probably the Postal Services Directive where there was opposition to liberalisation on the one hand, and there was, "Let's do it tomorrow" on the other, so Parliament said, "Let us bring it in in stages". It is quite happy to do that provided it can see the end of the line or the light at the end of the tunnel, whatever railway analogy you want to use.

Q449 Chairman: A rail map?

Mr Simpson: Indeed, yes, a rail map would be a good idea, the ERTMS bit on the Cambrian coast highlighted in red or whatever.

Chairman: That has been very helpful.

Q450 Lord Bradshaw: It has been very helpful because it is a clear, fresh look, and there seems to be a big gap between what this First Railway Package will achieve and what actually needs to be done. We have heard what I would call, for want of a better phrase, bureaucratic obstacles to doing it, and they are many, but this is an old industry with many people blending technical practices, labour practices, and defending them on a national basis while, as it were, Rome burns because the traffic is leaving all the time.

Mr Simpson: I am on record in the Parliament as saying that as far as rail freight is concerned I firmly believe that unless we do something radical and prioritise rail freight and look at the whole system of charging and so on rail freight is not far from drinking in the last chance saloon.

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Lord Bradshaw: Certainly in much of Europe I would believe that to be the case.

Chairman: And specifically as between the United Kingdom and the rest of the Europe, principally France, Germany and The Netherlands—

Q451 *Lord Bradshaw:* In talking about international rail freight we are, because the amount of international rail freight from Britain is pathetic.

Mr Simpson: It is very low.

Q452 *Lord James of Blackheath:* My Lord Chairman, may I come in on that because it is an extraordinary remark? It is the first time anybody has said anything to us as emphatic as that, about the last chance saloon. If that is a view which is sustainable from the perspective that you have here in Brussels, is it not then correct to say that the issue is being undervalued and under-addressed by the European Commission as a whole and that they should be taking much more fundamental action than we have heard from anybody?

Mr Simpson: I would not disagree with that, Lord James. “Courageous” is a word I would use. What is needed now is a bit more courage from the Commission coming forward with its proposals. It faces a problem and you can name the Member States that will give it the problem.

Q453 *Lord James of Blackheath:* Everything would be wrong with the collapse of the European freight rail system because it would be anti-green, it would be anti-pollution correction, it would be everything we do not want.

Mr Simpson: That is an interesting point. You can ask my colleague coming in later because, bizarrely, one of the groups which voted against the proposals for priority on a rail freight corridor was the Greens.

Q454 *Lord James of Blackheath:* Ever consistent.

Mr Simpson: Nobody knows why, except that we feel that the German railways got at them, but it is a valid question to ask them. We see that we need to develop rail freight, and, as Lord Bradshaw said, we are coming from a low base here. We are literally at the bottom of the sea and there is not much further to go. The point I raised in my very first answer was indeed the issue of interoperability. That is why I see interoperability as being absolutely crucial in order to give rail freight a chance. There are other issues there that need to be addressed—efficiency, costings and so on, but that is for the industry to address. You could have the best rail freight operation in the world and it would grind to a halt before it went through the Channel Tunnel or the other side of it or when it hit a border. We have got to get over this particular problem and that is why I talk about getting the infrastructure managers together, getting the

pathways sorted, but having the flexibility to ensure, of course, that people do not hold on to paths when they are not going to use them. It is done in aviation. We call it “use it or lose it” in the slots. Okay, there is a big hoo-hah at the moment because the airlines want to abandon that because of the economic situation, but at congested airports if you do not use 80 per cent of your slots you lose them. Why can we not say that to train operators on paths in congested areas? I just throw that in.

Q455 *Lord James of Blackheath:* As an ex-airline operator, I like that. That works.

Mr Simpson: Yes.

Q456 *Lord Bradshaw:* Can I finish this session with one anecdote? A rolling stock manufacturer in the UK has built a wagon which will convey containers through areas which have low loading gauges because they have built it with small wheels and a very low platform.

Mr Simpson: A kind of drop bed?

Q457 *Lord Bradshaw:* No, it is—

Mr Simpson: It is just a flat wagon?

Q458 *Lord Bradshaw:* With small wheels, but it has been constructed and it has gone for tests in the Czech Republic, I think. It has to go there because they are the only people who have got the test bed. One of the reasons the wagon has failed so far is that it has not got spark guards fitted to it. Bearing in mind it has composite brakes and a steel floor, you cannot ignite a fire but the regulations insist that there should be spark guards and that is only a small example. Everybody finds some reason why you cannot use something or do something.

Mr Simpson: It is the nine reasons why you cannot do something. I have another one in the sense that our battle at the moment is that the Environment Commission has come forward because it wants to do something about reducing rail freight noise. You just start to try and develop the rail freight and somebody comes along and says, “Ah, but these wagons are too noisy”. One of the problems we had then, as I am sure you appreciate, Lord Bradshaw, was that, of course, in Britain we tend to know where all our rail wagons are and they tend to be our rail wagons. The Italian railways had not got a clue where all their railway wagons were and they had to retrofit them to be quiet and so on. They were all over the place. They found them in Bulgaria, in Greece and goodness knows where. There is a practicality in my view as to what you need to have with the railways. I have used the term “flexibility” quite a bit. It is an old industry. It is like in Britain when we passed the disabled access laws. There was a reason why the railways got a little bit longer to do it—I think we gave the railways too

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long, actually, but that is a personal view—because, of course, we have got Victorian infrastructure.

Q459 Lord Bradshaw: And Victorian—well, not Victorian trains, but nearly. You have probably got some.

Mr Simpson: The anecdote I would finish on is that in a rail freight conference I said, “One of the problems we have got with the rail freight industry is that, as the rest of us have just entered the 21st century, I am

pleased to announce that the railway freight industry have just entered the 20th century”.

Q460 Chairman: I think on that note we can bring the meeting to a close. It has been a very invigorating session. We are extremely grateful to you and I am sure that the transcript will read even better. Thank you very much.

Mr Simpson: And I thank you for coming because my criticism of the House of Commons Transport Select Committee is that they never look at European legislation.

TUESDAY 7 APRIL 2009

Present Bradshaw, L. James of Blackheath, L.
Freeman, L. (Chairman)

Examination of Witness

Witness: MR MICHAEL CRAMER, MEP (Greens/European Free Alliance), examined.

Q461 Chairman: Thank you very much for coming, Mr Cramer. Would you kindly introduce yourself and your background for the transcript?

Mr Cramer: My name is Michael Cramer and I have been in the European Parliament since 2004. Before I was in the city state parliament of Berlin. I began my work in the Berlin parliament in 1989 and those 20 months we were in power, because there was a Green coalition in the Bundesland, the second one in Germany, people say was one of the most successful governments because at the same time the soccer club moved up to the first division (Bundesliga) and the wall came down. However, after the wall came down we had to work out in terms of transport how the two halves of the city would come together because the public transport systems in the east and the west were totally different. In the west it was based on underground and bus with no trams and very few urban railways, and in the eastern part it was just the opposite. Of course, I worked in transport to help the city come together and now I do almost the same in Europe because Europe also was divided—it is a different horizon—but it is the same work I want to do because, of course, I am a Green and now after the reunification of Europe Germany is in the middle of the continent and is a transit country, and so we are very interested in ensuring that the increase in transport is done in an environmentally friendly manner. Rail is the most important mode of transport which is environmentally friendly but the situation in Europe is different. We support and subsidise those modes of transport which are very harmful to the climate and we punish and make more and more expensive the environmentally friendly mode of transport, which is railway. We want to change that. We had a discussion about Eurovignette, but you all know that we have a mandatory toll on the railway system for each locomotive on each kilometre and the amount is almost infinite, but on the road it is not mandatory; it is the free will of a Member State to decide if they have a toll on the road and then it is normally only on highways and only for trucks with more than 12 tons. With this competition, which is not a competition; it is an unfair competition, railways have no chance and we have to change it, but we are looking also at the railway sector and there the Commission is looking to see if competition is possible but at the moment there is unfair competition between the railways and

the roads—and the same situation we have between aviation and railways.

Chairman: That is a very interesting point and I am sure our questions will in part seek to tease out some of the issues there, as you say, in terms of the unfair competition, the imbalance between road and rail in terms of the environment.

Q462 Lord James of Blackheath: Mr Cramer, I think what you have effectively said is that you have three principal views. You have a pan-European responsibility as a Member of the European Parliament, you have a national concern from the perspective of Germany as a major transportation centre, and you have a specifically ethical interest as a Green. We have been having lots of questions with a lot of people over the last day and a half. Not surprisingly, we are tending to recycle the questions mostly over and over again, so when, with those three separate views, you see that there are different answers that you could give from the point of view of any one of those interest groups it would be very helpful to know whether your answer is from a national German, pan-European or ethical Green interest point of view.

Mr Cramer: When you say a national vision, Germany is in the middle of Europe but it is not a national vision.

Q463 Lord James of Blackheath: No, but there will be national interests, no?

Mr Cramer: No. If the air in Germany is bad and we have the wind from the east the air in France is bad. If the air in Poland is bad and the wind comes from the east then it is bad in Germany. It is our interest to have clean air, to have good conditions in the environment, for all Europe, not just for Germany.

Q464 Lord James of Blackheath: All I am asking is that where any question has potentially a different perspective according to each of the areas it would be helpful to have that highlighted. The first question is, with a potential recast of the First Railway Package should the Commission focus on the implementation of the existing provisions or should they effectively take a clean slate to it and start again?

Mr Cramer: It is the law in Europe that there must be a division between the network and the train

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companies, and the Commission has to look at the law and if it is broken it has to intervene. If it is not courageous enough that is a problem and those who do not feel it is just should go to court.

Q465 Lord James of Blackheath: So what should the Commission focus on in the recast of the First Railway Package and why? What should be the priorities?

Mr Cramer: In Great Britain you have had good and bad experiences because you privatised not only the railway companies; you also privatised the network, and even though the network was in a bad condition after ten years they were making money and the state took it back. That was a disaster but you have repaired this mistake because now the network is in public ownership. We want to have that as well but we want competition on the network. That is necessary and if there is one company which is in charge of the network and the rail company that is not good. We have an example in France. There is an artificial division between RFF and SNCF, but RFF said to SNCF, "Okay, you can do everything with slots", and so SNCF made reservations for lots of slots which they did not use. The reservation was not to get the slots but so that their competitors could not get the slots, and RFF did not do anything about it and that is a disaster. In Germany it is the same. The head of the German company is now a new man, but it was Hartmut Mehdorn for ten years, and he controls both and that is not good for competition.

Q466 Lord James of Blackheath: You have already spoken in favour of the current legislative powers, but do you think the current legislation goes far enough in the degree of separation it requires between infrastructure and operations, and should the recast go much further in requiring full ownership unbundling?

Mr Cramer: That is a problem because at the beginning of the reform of the railways in Europe there should be a strict separation, but Germany did not do it. We had the discussions. We should have had the discussions before the decision of the Commission, but afterwards they did not do the reform and the Commission has agreed that if there is a body which looks carefully after fairness in giving slots to everybody they will accept it, and they have accepted it. That is not good, I think. In France we would be very glad if we had the situation we have in Germany because in the last year the German network has given 40,000 slots to 300 different companies in freight transport and only six or seven could not be accepted, and they have been controlled by the body and they have said, "That is okay", so there is no complaint now.

Q467 Lord James of Blackheath: There is an ambiguity in the way you have just put that. Only six or seven what? 6,000 or 7,000?

Mr Cramer: Six or seven slots out of 40,000.

Q468 Lord James of Blackheath: I was not sure if you meant 6,000 or 7,000.

Mr Cramer: You are astonished. Therefore, I asked the Commission, when they came with the new report on the priority for freight transport, "Where is the problem?", because in Germany there is a big problem because on the same lines we have freight transport, passenger transport and so on, because in France they have lost in the last six years nearly 30% of their freight transport on the railways, and the regional passenger transport, is not in a very good condition, so they have lots of slots free. I asked them, "Where is the problem?", and they could not give me an answer.

Q469 Lord James of Blackheath: But if that is effectively therefore France weakening the overall structure of freight performance within Europe should there be some positive discrimination in favour of France in any recast to try and encourage them to fill the gap?

Mr Cramer: You know that there is every time positive discrimination for big countries. That is not only France or Germany. I know another country as well.

Q470 Lord James of Blackheath: My final question is, we have obviously had a lot to ask people about the role of regulators and how they see that. Do you think the existing legislation requires sufficient independence and powers for national regulators and, if not, what powers should Member States be required to grant to regulators under any new arrangements?

Mr Cramer: I think because we have now had the discussion we have the opening of the network for freight transport since the 1. January 2007, for example, from Rotterdam to Genoa, and if you have got three free slots and one of the countries says, "No, we have not", that is not good. I can imagine in the future that there should be a European regulator.

Q471 Lord James of Blackheath: Mr Cramer, you have answered my questions with great precision but I am going to add a small and quick extra one. From the point of view of the Greens what do you most want to see from a recast?

Mr Cramer: That there is a strict separation between the network and the rail operators and that to the network belongs the power over the electricity, the marshalling yards. That should be in a strict division because then the network has the task of making money out of it and not seeing that a competitor does

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not get entry to the network. That must be clear, and then we will have European-wide competition, not only for France but also for Great Britain.

Q472 Chairman: Just before we turn to Lord Bradshaw, can we clarify the very clear answer to the very helpful question that Lord James put about a European regulator? A European regulator replacing national regulators or having control over national regulators?

Mr Cramer: No, to oversee the decisions, for example, on the corridor Rotterdam-Genoa. In Germany for the slots there are three bodies involved, one in Duisburg, one in Frankfurt/Main and one in Karlsruhe, and although the German railway is a very centralised body and is always looking for centralisation they know it is not possible to centralise those decisions, but if there is a company which wants to have trains from Rotterdam to Genoa which run through four countries, there must be a body which oversees that, or, if the Germans say no, then they should ask them why, and they should have prove why it is no, because it is in the European interest.

Q473 Lord James of Blackheath: You want a pan-European referee?

Mr Cramer: Of course. You agree?

Q474 Lord James of Blackheath: It sounds sensible, the way you put it.

Mr Cramer: I am interested in your answer.

Q475 Lord James of Blackheath: I do not think I am expert enough to know but I think that your answer is interesting enough to stimulate a debate.

Mr Cramer: Okay.

Chairman: But that is a real point for rail freight crossing a number of different countries, and the whole of the Trans-European Network corridor for freight could not operate unless all the regulators co-operated. We will come back to that.

Q476 Lord Bradshaw: Can I go back to an answer you gave to Lord James? This was the question on the allocation of the slots on the track, and you said that Germany had 40,000 slots and all but six or seven of them had been taken up. First of all, does Germany have any other obstacles to the use of these tracks by rail freight? Are there regulations or are you pressing for regulations which make it difficult to run rail freight trains?

Mr Cramer: Of course, we have priority for passenger transport, and, of course, it is a nice dream to have a separated freight rail network in Germany or in Europe, but—

Q477 Lord Bradshaw: No, that is impossible.

Mr Cramer:— in 100 years we will not have it. There must be a combination of intelligent infrastructure. For example, if you know that a freight train, which is one or two kilometres long, has to stop in 50 kilometres because there is a problem, but then you know after ten minutes that the problem is gone, you can reduce the speed and then the train does not need to stop because that is time and energy. That is one thing, but on the other hand the German railway in the last ten years has concentrated on going to the bourse and making money, and we all know that the railways, if they reduce their passengers, for example, by 25%, can make more money. The public transport system is the same. If you concentrate on those lines which are very good you can make more money, but as politicians we need different things. We need people in the country also to have access to the network, and not only for money. In this time they have given up some lines. They have rebuilt sidings, and, for example, if a train was late they could not replace it because they have given up all those things. Therefore, the infrastructure, especially in the bottlenecks, is not in good condition and therefore we have to look at where the bottlenecks are and put investment there first, and not, for example, €5 billion between Cologne and Frankfurt for the high-speed line. That is a nice thing but for two or three trains an hour it is a big investment.

Q478 Lord Bradshaw: I understand that, but let us go back to DB and rail freight, because that is really why we are here. I accept what you say about the high-speed line, but do DB charge new entrants more money to use their tracks than they charge themselves?

Mr Cramer: In the beginning they did not put it this way; they are clever. They said, “Okay, we have the same price for everybody, but, of course, big customers will get a reduction”, and there was only one big customer, DB, the German railway. That was in the beginning but they do not do it now.

Q479 Lord Bradshaw: Are you telling us then that they charge the new entrants the same as they charge themselves?

Mr Cramer: Yes, they told me, and that has been proved by the regulatory body. If you have different information please let me know.

Q480 Lord Bradshaw: But you said something different from that which we were told by somebody else. You have also talked about the allocation of slots.

Mr Cramer: Wait a minute. There is a difference between the modes of train. For example, DB AG makes money with the tolls for the tracks and the tolls in the stations. For example, the new railway station

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in Berlin is paid for by the urban railway system S-Bahn, because 84% of all the tolls in the stations is taken by the Bundesländer or by the regional trains and that is a big problem, but the German railway is capable of setting the price. They could do it, but it is not controlled and therefore we need the separation. They set the prices in a way that gives them an advantage, but that is not so where there is an urban railway train. DB AG has to pay two euros and the other one has to pay three euros. Such a difference I do not know, but if you know such an example, please let me know.

Q481 Lord Bradshaw: It was suggested by another witness that the difference was a lot more than that which you have suggested. That was all I was trying to say. You regard running rail freight as important and you regard it as important that more freight should use the railway?

Mr Cramer: Of course. We want a modal shift from road to rail, but with this framework I mentioned before, that is a framework for a modal shift—but from rail to road, and that is, I am sorry for that, reality.

Q482 Lord Bradshaw: That is quite serious, or you would suggest it is quite serious.

Mr Cramer: That is a catastrophe. I know that the German railway went to court because of unfair competition, for example, kerosene tax. Aircraft have not to pay kerosene tax but if there is a diesel locomotive the German railway has to pay mineral tax. The railway is involved in the emissions trading system because they have to buy electricity and for aircraft it is not necessary. I supported the same conditions for everybody, I want fair competition. I mentioned that they went to the court but it is a catastrophe that the court did reject it, and also for the Commissioner of Competition, that that is accepted.

Q483 Lord Bradshaw: Yes, I understand that. I am not a supporter of the emissions trading scheme. I think there should be other ways of doing it.

Mr Cramer: Which one? A kerosene tax? I agree.

Q484 Lord Bradshaw: I do not like the emissions trading scheme.

Mr Cramer: Do you like kerosene tax?

Q485 Lord Bradshaw: I believe the fact that aircraft do not pay for aircraft fuel, when other forms of transport do, is wrong, yes.

Mr Cramer: But it is €14 billion every year in the European Union.

Q486 Lord Bradshaw: I accept that. You have made it clear that there is an argument in your view for a European regulator. It has been suggested to us by other people that bringing the individual rail regulators together on a regular basis would improve matters. Is that the case?

Mr Cramer: Yes, but because we have a European Railway Agency and they look after technical things and cross-acceptance. That is a very big step forward, that they have now got cross-acceptance, because if—before this possibility of cross acceptance—you want to have a locomotive which you can use in Germany and you go to France you need three years and €10 million to get a licence for it and if then you do it in Great Britain or in Spain that is crazy. You will need a lot of money and a lot of time, and we need a European railway network because railways are the very last national bodies and so you cannot produce locomotives, for example, in large numbers because you need 20 locomotives for Germany and 20 for France and so on but if you get 100 for Europe the price will go down.

Q487 Lord Bradshaw: I understand that, but how far has that technical harmonisation of safety acceptance, safety certificates, progressed?

Mr Cramer: It has very much progressed in fantasy with ERTMS, the European Rail Transport Management System. That is one of the most efficient systems in the world and the Swiss have totally transformed their railway system with ERTMS. They are not a member of the European Union.

Q488 Lord Bradshaw: I do not agree with you. The Swiss have installed a working section on one main line which works, at enormous expense, but can you tell me anywhere else where it works?

Mr Cramer: Of course. It is installed in Berlin between Berlin and Leipzig. The level two is installed in Italy between Roma and Napoli. During the night it is used by freight transport and during the day it is used by high-speed railways.

Q489 Lord Bradshaw: But do you think we have to wait for the installation of that to free up the railway freight system in Europe?

Mr Cramer: Yes. We have the six corridors and we want to install it. It is co-financed by the European Union up to 50%, not only the sections at the border but totally, because—I was the rapporteur for ERTMS—it was declared as a trans-border system also if it is in Leipzig or in Berlin or in Köln or not near the border. It is a problem for those countries which have modernised their signalling system in the last few years, which is the case for Germany, for example. But it is very easy and successful for Hungary or Poland, for example, which have yet to modernise their system if they do it because they will

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have three advantages. The first one is that they will save a lot of money on the installation and also on the maintenance because you do not have signals. The second is that perhaps you can save one new line because the capacity can be improved on the old lines and that is good, and then there is a European one. For example, the Thalys has six systems and that is very expensive.

Q490 Lord Bradshaw: I know.

Mr Cramer: Who is paying for that? So we need it. I know that Great Britain is out of ERTMS. They do not like it, they do not use it.

Q491 Lord Bradshaw: A system is being installed.

Mr Cramer: Yes, because you have splendid isolation on your island.

Q492 Lord Bradshaw: No, it is not that. I do not agree with you. I think that you can use lines more intensively with the use of proper timetabling and conventional signalling systems. I believe it is possible to do that.

Mr Cramer: Yes, but not in Europe.

Q493 Lord Bradshaw: Sorry, but I am a bit sceptical. We have heard what I would call the sales talk from the technical side and the manufacturers. It is not what my experience of running a railway would teach me.

Mr Cramer: Yes, but the advantage is in the United States. This highwayland par excellence has 40% transport on railways, and in Europe we have only 17%. One of the reasons is that we have 20 different signalling systems in Europe, we have six different power systems and we have four different gauges, because in Ireland there is a different width gauge than in Spain and the other one in the Baltic States. That is a big problem and we have to harmonise it because it is so different.

Q494 Chairman: I think it would be helpful to seek your advice as to where this whole matter of the recast of the First Railway Package is likely to go in 2009 in Brussels. We have two schools of thought. The first one is that we need a new Directive which consolidates the first three packages, consolidates new regulations but perhaps not regulations to do with passenger traffic at the moment, one which looks at freight rate charging, in other words, gives priority to freight on the railways, as we have in the United Kingdom by short-run marginal costing used as the basis for charging, so a brand new initiative to create a true internal market and improve the opportunity for more freight to be carried on rail and roads. The other view is a much more cautious one, which is that it is all a matter of infringement and countries should be taken to task and then ultimately taken to the

European Court of Justice, that we need a step-by-step approach, that it is all too difficult. We cannot enforce unbundling, as we all but have with electricity recently in Germany. We do need to clarify the powers of the regulator, but what you do not need and cannot deliver is a major new initiative to help international rail freight as well as domestic rail freight in Europe. I suspect you are in the former camp rather than the latter. What advice can you give to this Committee as to the likelihood of changes coming from the Commission and then also the Parliament, given the fact that there are elections in the Parliament, we might have a new Transport and Energy Commissioner or a new Transport Commissioner, and that inevitably the whole process of reform, which we have heard about and taken evidence about over the last four months, will all grind to a halt? Are you an optimist or a pessimist?

Mr Cramer: If I were a pessimist I would not be sitting here.

Q495 Chairman: Sorry—are you an optimist or a realist?

Mr Cramer: Both. I know the reality and I am optimistic that I can change the reality, and that is necessary. Look, I make environmental policy since more than 30 years. For a Green it was not a surprise when Nicholas Stern made his big speech about the environmental problems, and then he said what I did know, that it is in 30 years, but he gives figures and it was the first time that a World Bank manager said this because in former times that was said only by the Greens and people said that the Green were not in reality, they were crazy, they had nothing to do with business and so on, but now Nicholas Stern has mentioned it. For me and for the Greens it was great. So, for 30 years it was necessary to be an optimist and from one day to the other I was more than a realist, and that was a title given by Nicholas Stern and others. Then for two years in Europe we talked about it and now, climate change—forget it. Now we have the financial and economic crisis, but both belong together because our way of living is wrong for the future. We perhaps can continue with our way of living until our death but for our children and our children's children it is a problem.

Q496 Chairman: There is one practical problem for rail freight and that is the basis of charging. You can improve interoperability, you can improve regulation, open access, competition, but what about charging? In the United Kingdom our regulator has the power to impose the basis of charging which gives freight an advantage. That is not the case in other European countries. It would be a green thing to do to require by regulation a marginal cost charging basis by all railway infrastructure owners on rail freight. Do you agree and is that practical?

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Mr Cramer: Yes, but we need an interoperable coordinator and regulator.

Q497 Chairman: Of course.

Mr Cramer: What I mentioned before, that is our problem. The United Kingdom exports every year five million tonnes of pork meat and if you look at the import quota the figure is exactly the same, five million tons. We could avoid five million tons of pork meat going between the United Kingdom and Europe or other countries. That is crazy. Why is it so? Because transport is very cheap. Only the environmental mode of transport is expensive and it is the political will that that is reality, and although that is reality I am optimistic about changing it and it is necessary to change it. I will give you an example with the prawns which are caught in Scandinavia. They are transported via road and ship to Morocco in cooling trucks where they are pooled and they are

transported back to serve up in the restaurants of Copenhagen, Oslo or London. That is crazy. For this crazy transport we should build roads or railways with taxpayers' money? No. First, avoid the nonsense, and the modes to do it for the economy we have in Europe that is the price. If you look at Switzerland the toll on road is five times higher than in Germany, and in Germany it is very high, but after the installation of the tolls the transport in Switzerland for the customers has increased only by 0.5%.

Q498 Chairman: You have ended on a visionary note, if I might say so.

Mr Cramer: You did begin by asking if I am an optimist or a pessimist.

Chairman: Yes, but it is important that one raises, to use an English expression, eyes to the horizon and not get bogged down in detail, mixing my metaphors. Thank you very much indeed for coming.

MONDAY 20 APRIL 2009

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|---------|--|-----------------------------|
| Present | Bradshaw, L Dykes, L Freeman, L (Chairman) James of Blackheath, L Powell of Bayswater, L | Rowe-Beddoe, L Whitty, L |
| | | Eccles of Moulton, B |

Memorandum by the Department for Transport

INTRODUCTION

The Government is grateful to the Committee for giving it the opportunity to submit evidence to their inquiry into the proposed recast of the First Railway Package. The Government fully supports the Commission's efforts to make international rail freight more attractive and competitive and to ensure that all operators have fair and equal access to rail infrastructure and ancillary services in Member States.

The Commission's objective of encouraging the development of a sustainable, efficient, well-integrated rail freight system is broadly similar to Government policy, and there are clear gains from increasing rail freight. The rail freight market in Great Britain is the most liberalised in the EU, and our rail freight volumes have grown by over 60% in the last 10 years.

GENERAL ISSUES

The Government supports the Commission view that the First Railway Package has not achieved its declared objective of market opening. There is anecdotal evidence that the separation of infrastructure management and train operations, as transposed and practised by a number of Member States in everyday operational situations, has not achieved the desired intention of ensuring transparent, equitable and non-discriminatory access to rail infrastructure for non-incumbent, independent operators.

On 26 June 2008, the Commission wrote to all but one of the Member States with a rail system (24), alleging varying degrees of failure to transpose the First Railway Package adequately into national law.

Furthermore, the Government fully support the Commission in their efforts to recast the First Railway Package with the overall aim of clarifying and strengthening the regulatory framework for rail market access. In particular, we support the Commission in ensuring the separation of accounts and essential tasks such as the allocation of capacity and charging. We also endorse the need to ensure adequately resourced and properly independent regulatory bodies in order to facilitate market entry and competition as well as to develop rail service markets, including those linked to the provision of rail freight transport services.

RESPONSE TO SPECIFIC ISSUES

(a) *Whether the provisions on the separation of infrastructure management and train operations are sufficient; whether they should be amended or whether they should be replaced with a requirement for full ownership unbundling?*

A major feature of the First Railway Package is the clear separation between the rail infrastructure manager, which in many Member States is owned by the State, and of rail transport operators. There appears to be anecdotal evidence that the separation of infrastructure management and train operations, as transposed and practised by a number of Member States in everyday operational situations, has not achieved the desired intention of ensuring transparent, equitable and non-discriminatory access to rail infrastructure for non-incumbent, independent operators.

In its Communication COM(2006)189 final (published 3 May 2006) on the implementation of the first railway package, the Commission concluded that Member States had formally transposed the rail access Directives in national law, while a number of important provisions had not been implemented effectively and correctly. The Commission report COM(2007) 609 (published 18 October 2007), on monitoring rail market developments, found that although competition had increased, a genuine European rail transport market had not yet been created and that a number of entry barriers and other inefficiencies remained.

The fact that operators are faced with a lack of uniform implementation by Member States leads to legal uncertainty and increased legal and administrative compliance costs, which for some operators (particularly the smaller ones) represent insurmountable barriers to market entry.

The Commission published on 11 December 2008 a proposal for a draft Regulation concerning a European rail network for competitive freight. This proposal follows the Commission's Communication of October 2007 entitled "Towards a rail network giving priority to freight" in which the Commission noted the steady increase in the efficiency of road transport and the consequent need for rail transport to become more competitive. It explained that action was necessary at EU level to create a strong European rail freight network which would offer a better quality of service in freight transport in terms of journey times, reliability and capacity, which would have a positive impact on all segments of the freight market.

(b) Whether the current provisions are adequate regarding the staffing and independence of regulators and whether statutory independence from government is desirable

We consider that many European rail regulators lack the competences, the resources and the necessary independence from government to be effective local enforcers of the spirit and the letter of European rail legislation.

A 2006 IBM report on Rail Regulation across the EU 25 concluded that Member States which have made good progress in opening up their rail transport services markets are those which have independent and better organised and resourced regulatory bodies. The report identified three types of regulatory bodies:

- those integrated within a ministry, ie the Ministry regulatory model. Regulatory bodies under this model do not have decision making powers or proper organisation. This is the situation in 11 Member States.
- those included in a railway authority, ie the Railway Authority regulatory model. In this case, decision making and accountability are provided under a single organisation. Regulatory duties consist primarily of safety and other railway-specific administrative tasks and the issuing of licences. Six Member States have followed this model.
- those set up as an independent authority, ie Special regulatory model. These regulatory bodies have extensive decision making powers and are specialised in regulatory matters. Six Member States were included in this category (including the UK).

The report highlighted that the following requirements for a best practice regulatory body are:

- (i) independence with a standing organisational structure;
- (ii) free from any political or other influence;
- (iii) staff qualified in regulatory matters and rail specific issues;
- (iv) sufficient decision-making powers and accountability for its decisions;
- (v) procedures and decisions to be transparent, consistent and publicly accessible; and
- (vi) customer orientated.

We believe that the strong statutory independence from government of rail regulation in Great Britain has ensured the correct application of European rail legislation, with transparent, equitable and non-discriminatory access to rail infrastructure for all operators. As a result, in conjunction with a fully liberalised market, we have seen rail freight traffic growth by over 60% in the last 10 years.

We believe that in a number of Member States rail regulators lack the resources and independence to be effective enforcers of rail legislation, and therefore are not in a position to facilitate market entry and competition. We consider that to be effective, it is necessary for a regulatory body to be fully independent from government and to be adequately staffed and resourced.

(c) Whether there remain barriers to entry due to factors such as safety certification requirements, and if so how these should be addressed

While railway safety is an imperative, it must not become a barrier to a fully open and liberalised rail market. We continue to engage with the Commission and the European Railway Agency (ERA) in seeking to improve the competitive position of the railway.

Safety Certificates

The Railway Safety Directive (2004/49/EC) was introduced to help to break down barriers to the establishment of international transport operations through the development of harmonised railway safety regulatory structures across Europe. It included measures to standardise and facilitate the mutual recognition of safety certificates across the Community. The prescribed common format for safety certificates is divided into two parts. Part A covers a railway undertaking's general safety management arrangements and is mutually recognised by Member States. Part B covers the specific operations of a railway undertaking within each Member State. Operators must obtain a Part B certificate from the safety authority of every Member State within which they wish to operate. 2004/49/EC includes a requirement for Member State safety authorities to determine applications for safety certificates within a period of four months. 2004/49/EC was implemented in Great Britain by the Railways and Other Guided Transport System (Safety) Regulations 2006 (known universally as "ROGS").

The Office of Rail Regulation (ie the GB National Safety Authority) is participating in an ERA led exercise to peer review Member State safety certification processes. The main objectives of the peer review exercise are to facilitate the harmonisation of decision-making criteria and improve knowledge among Member States of the control and governance processes used by the different National Safety Authorities to assess applications.

European freight licences

In principle, railway undertakings holding a European freight licence issued in accordance with Council Directive 95/18/EC (as amended) are permitted to operate prescribed freight services in any EEA state. Although in practice, many EEA states (including UK) may require European licence holders to obtain a supplement to satisfy certain additional national regulatory requirements. The current licensing requirements for rail freight operators in Great Britain are prescribed in the Railway (Licensing of Railway Undertakings) Regulations 2005.

Amendments to Railway Safety and Interoperability Directives and the European Railway Agency (ERA) Regulation

The recent changes to the European Railway Safety and Interoperability Directives were aimed at improving the arrangements for the approval and cross acceptance of rolling stock, which should facilitate the operation of international rail freight services. This includes the introduction of the mandatory certification of entities in charge of maintenance (ECM) of freight wagons. The amended ERA Regulation provides for ERA to play a more central role in the development of recommendations for cross-acceptance, certification and mutual recognition of rolling stock.

(d) Whether the current requirements regarding the setting of infrastructure charges are adequate, and if not how they should be amended?

We consider that the current requirements regarding the setting of infrastructure charges are adequate as transposed in the UK. We consider it important to retain the flexibility available in the way that charges based on "costs directly incurred" are calculated. However, it would be helpful in a future recast to have some clarity that the definition does not include full cost recovery. On the UK's national rail network, we calculate the costs directly incurred on the basis of short run marginal costs estimated on the basis of the variable costs of operating the infrastructure for the traffic. We understand that in some other European countries additional categories of costs (including some elements of fixed costs) may be taken into account in the calculations.

The existing European legislation covers circumstances when higher infrastructure charges can be levied. In practice, there is a lack of clarity concerning a suitable charging mechanism for government to recover capital investment costs. Article 8 paragraph 2 of Directive 2001/14/EC, we consider, needs to be made more flexible to ensure that the legislation does not act as a disincentive to rail freight investment.

We believe there to be anecdotal evidence that, in other Member States, the setting of infrastructure charges lacks transparency which is likely to have the effect of hindering the development of competition in the European rail freight market.

On 26 June 2008, the Commission wrote to all but one of the Member States with a rail system (24), alleging varying degrees of failure to transpose the First Railway Package adequately into national law. In the case of 14 Member States the infraction proceedings relate to the setting of infrastructure charges and associated issues.

(e) *Whether the existing provisions regarding allocation of capacity both on tracks and at terminals are adequate and if not how they should be amended?*

We believe that the existing provisions regarding allocation of capacity on tracks are adequate in Great Britain. For terminals within Great Britain we consider that the measures introduced through the First Railway Package as transposed in GB legislation have extended the opportunities for freight users to seek access to other operators' terminals and in particular those facilities previously exempt from regulatory intervention, although it has, on occasion, proved difficult to reconcile the legitimate commercial interests of access applicants and facility owners—particularly where capacity is constrained.

However in some other Member States there is anecdotal evidence that access to tracks, terminals, ports and services remains a problem for non-incumbent, independent operators and, in particular, that operators are having difficulty obtaining evidence that the charges which are quoted for access to tracks, facilities and supply of services reflect the cost of providing the service, calculated on the basis of actual use.

On 26 June 2008, the Commission wrote to all but one of the Member States with a rail system (24), alleging varying degrees of failure to transpose the First Railway Package adequately into national law. In the case of six Member States the infraction proceedings also related to allocation of capacity and associated issues.

(f) *How a recast First Railway Package should relate to other EU freight transport policies?*

The Commission's 2001 Transport White Paper and more specifically its 2006 mid term review of the White Paper set out the challenges faced by the EU as a result of the predicted 50% growth in freight traffic in the EU in the period 2000 to 2020 due to economic growth and the enlargement of the Union.

Europe's priority is to ensure continued economic growth but in order to do this, freight transport in the EU must be both efficient and sustainable. This is consistent with Government aims.

To achieve this, the Commission is promoting the idea of "co-modality". This is a term used to describe the effective use of more than one mode to carry freight, rather than promote a simplistic modal shift from road. This reflects the UK's approach. For example, our Sustainable Distribution Fund supports both modal shift and the promotion of more efficient road freight operations.

The Freight Transport Agenda draws together five initiatives in relation to freight, some of which have been established for some time while others are new proposals. These are:

- The Freight Transport Logistics Action Plan Communication (FLAP).
- Draft Regulation concerning a European rail network for competitive freight.
- The EU Ports Policy Communication.
- European Maritime Transport Space without Borders.
- The Motorways of the Sea initiative.

These initiatives share common approaches. There is a focus on transport corridors; promoting innovative technologies and practices in infrastructure, transport and freight management; the simplification and facilitation of freight transport chains and related administrative procedures; and the reinforcement of quality.

The Commission is considering both legislative and non-legislative measures in developing detailed proposals in their Communications under the Freight Transport Agenda. In general, the Government supports the use of non-legislative measures where practicable to enhance overall logistics efficiency.

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Examination of Witnesses

Witnesses: LORD ADONIS, a Member of the House of Lords, Minister of State, Department for Transport, MS SUSIE NORTHFIELD, Head of Rail Freight, Department for Transport, and MR HEINZ KESSEL, Head of International Rail, Department for Transport, examined.

Q499 Chairman: Lord Adonis, thank you very much indeed for coming. I will just make one or two introductory remarks and then ask you very kindly for the record to introduce yourself and your two colleagues. We intend to finish at five, and I can assure you we will. I am sure you know everyone around the table, but if you do not can you read their nameplates?

Lord Adonis: I certainly can.

Chairman: I understand you would like to make some introductory remarks. We are very grateful to you for coming. Our timetable is to seek to publish on June 2—subject to the Select Committee agreeing the report—and we hope to not only have a function here in the House some time after publication, inviting all those who have given evidence to come and listen to an explanation of some of the key conclusions and indeed participate in questions and discussions—this is a new initiative with the EU Select Committee—but also as a matter of courtesy to go back to the Commission in Brussels at some time. We know that they will be in the middle of elections for the European Parliament so the exact date of that is to be decided. We have got a representative here in terms of one of the former members of our Committee—perhaps, Lady Eccles, you would briefly explain for the record when the previous report was published.

Baroness Eccles of Moulton: It was one of the first reports of the session after I joined the Sub-Committee B, so it was a very interesting one to be involved in early on. The title was *Liberalising Rail Freight Movement in the EU* and we were quite concerned with the first package, which did not look as if it was going to get very far at that stage. That was 2004/05 and now we are in 2008/09 and not a great deal on that front seems to have happened, but I am sure I will learn more.

Q500 Chairman: To ensure their Lordships do not impair their collective memory we thought we would return to the same subject, and you are most welcome.

Lord Adonis: Thank you very much, my Lord Chairman. Can I first of all introduce my two colleagues from the Department, Susie Northfield to my left who is the Head of Rail Freight and Heinz Kessel to my right who is the Head of the International Rail Team. If it is convenient to you, my Lord Chairman, I would be happy to make a brief opening statement as well. Rail freight volumes in Great Britain have grown by more than 59 per cent since privatisation. We believe that one of the underlying reasons for this growth is the fact that we

have one of the most liberalised market structures for rail freight in the European Union. The Commission's aim of encouraging the establishment of an efficient, well-integrated and sustainable rail freight market is broadly similar to Government policy. The legislation contained in the First Railway Package was intended to lay the foundation for the opening of the European rail markets. In the Department's written evidence we supported the Commission's view that in reality the package may have started this process but to date has not fully achieved its declared objective of market opening. In 2006 the Commission published a report which concluded that whilst Member States had formally transposed the rail access directives in national law a number of important provisions had not been implemented effectively and correctly. A further Commission report from 2007 found that although competition had increased a genuine European rail transport market had not yet been created and that a number of entry barriers and other inefficiencies remained. There is anecdotal evidence that in a number of key areas the package has failed to accomplish on the ground at Member State level what it set out to do. For example, it appears that the separation of infrastructure management from train operations, as transposed and practised by a number of Member States in everyday operational situations, has not achieved the desired intention of ensuring transparent, equitable and non-discriminatory access to rail infrastructure for non-incumbent, independent operators. We believe that the strong statutory independence from government of rail regulation in Great Britain has ensured the correct application of European rail legislation, with transparent, equitable and non-discriminatory access to rail infrastructure for all operators. However, in many European Member States rail regulators seem to lack the competencies, the resources and the necessary independence from government to be effective local enforcers of the spirit and letter of European rail legislation. There also appears to be evidence that in some Member States the setting of infrastructure charges lacks transparency, which is likely to have the effect of hindering the development of competition in the European rail freight market. On 26 June last year the Commission wrote to all but one of the Member States with a rail system alleging varying degrees of failure to transpose the First Railway Package adequately into national law. In the case of 14 Member States—not including Britain—the infraction proceedings relate to the setting of infrastructure charges and associated issues. For the

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record I should note that the British Government was cited for one alleged infraction—for there being no regulatory body obliged to take action for infringements within two months of a complaint, but I am glad to say that this arose from a misunderstanding of the regulatory regime in the UK: the Office of Rail Regulation does in fact respond within two months and we have made this clear to the Commission. In the case of six Member States the letters of formal notice issued by the Commission related to allocation of capacity and associated issues. Access to tracks, terminals, ports and services remains a problem for non-incumbent independent operators and, in particular, operators are having difficulty obtaining evidence that the charges which are quoted for access to tracks, facilities and supply of services reflect the cost of providing the service calculated on the basis of actual use. The Government therefore fully support the Commission in their efforts to make the international rail freight market more attractive and more competitive. We also endorse the Commission's dual track strategy of achieving this objective by ensuring proper and comprehensive transposition by Member States of existing legislation and also by reviewing the First Railway Package with the overall aim of clarifying and strengthening the regulatory framework.

Chairman: Thank you. Lord Bradshaw.

Q501 Lord Bradshaw: Thank you very much for that statement which more or less covers what we have set down in our first question. What I want to ask you is do you see the British Government taking the initiative in the Council of Ministers in pressing the case for this recast to be carried through and the case for the freight-orientated network in Europe. I am really asking you what are you going to do and are you going to, as it were, get your kicking boots on in the Council of Ministers.

Lord Adonis: The short answer to that is yes. We are at the forefront, it is fair to say, of the measures to strengthen the liberalisation of the European markets. We have been arguing strongly for this at European level and of course we are still waiting for the Commission's proposals in respect of the recast of the First Railway Package—my understanding is that we expect those in the early part of next year and we will then engage intensively to see that any proposals that the Commission wishes to make, which will strengthen the process of achieving liberalisation of the European freight markets, are carried into being. We have, as I say, an excellent record ourselves. I have here, which might interest the Committee, in tabular form the summary of alleged infractions against the First Railway Package by Member State which makes very interesting reading, and I would be happy to elaborate on it in due course,

my Lord Chairman, and cite one or two examples of countries which have got large numbers of alleged infractions. I am glad to say Britain is not one of them, we have an excellent record, and of course since privatisation we have trebled the number of freight operators with reasonable market share in Britain, so we are practising what we preach here in Britain. I say this from a position of no complacency, because if you look at the historic figures on freight carriage in Britain we still have a long, long way to get back into the position of 30 years ago, and so the process of encouraging liberalisation so that we actually see that more freight is carried by rail still has a long way to go, but we will definitely be arguing for this strongly once the Commission has produced its proposals for recasting of the First Railway Package.

Q502 Lord Bradshaw: What part do you see a revitalised flow of freight through the Channel Tunnel having in this campaign if you will to see more rail freight? Do you think that the Government and the other players in the Channel Tunnel are really going to get their act together in seeing a reasonable proportion of freight between Europe and Britain travelling by rail?

Lord Adonis: We see that as having an important part to play because of course this is crucial to developing a genuinely international corridor for Britain—both the Channel Tunnel which you mentioned and also, of course, getting access to freight on High Speed One where, I am glad to say, it looks as if we are making real progress after some difficulty over recent years; so we do see this as having an important part to play. It is fair to say—because I know that Lord Bradshaw has a long memory in these matters—that we have not realised the projections which were made for the potential of freight, both through the Channel Tunnel and on High Speed One, so I should immediately say that we have a long way to go but if we can get some serious freight onto High Speed One—which looks to be possible in the near future, although of course the entire freight market has taken a downturn of late—then I hope that that will be a platform for developing a true international freight corridor through High Speed One and the Channel Tunnel.

Q503 Chairman: Just before turning to Lord Dykes, Lord Adonis are you volunteering that helpful table on alleged infractions as evidence to the Committee or is that going to be too embarrassing?

Lord Adonis: Having mentioned it, my Lord Chairman, I have to provide it to the Committee; I now feel under an obligation to do so and I will happily do so. The point that it makes though, which I know is of great concern to the Committee, is that we still have a long way to go to make a reality of the First Railway Package and it is fair to say that some of the major countries in Europe, crucial to the

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development of access on a European-wide basis to the rail freight market, still have a good deal further to go to deliver on the full package.

Q504 Lord Dykes: Just following up on Lord Bradshaw's question to you, Minister, because you did sound somewhat more optimistic in a way about the opening up of freight on High Speed One, would you care to give any putative indications of the number of potential increases in freight trading units going through the Tunnel in the near and medium term future, because the number is very small still, as you know.

Lord Adonis: At the present time Network Rail advise that there are approximately eight freight trains per day in each direction running through the Channel Tunnel, though I am told this varies according to the day of the week, that is an average. While we know that not all rail freight paths through the Tunnel are used—the precise utilisation figure is a matter for Eurotunnel—on the UK side, however, 35 paths per day are reserved for international freight on the UK classic rail routes from the Channel Tunnel to London, which are protected under the terms of the Channel Tunnel usage contract which gives an idea of the scope for increasing freight through the Channel Tunnel and onto both the conventional network and, in due course, High Speed One.

Q505 Lord Dykes: Do you think that will happen though in the near future?

Lord Adonis: After the failure to meet projections in the past on rail freight through the Channel Tunnel it would be a brave minister who made a firm prediction. What might be more helpful is if I quote the industry's own freight route utilisation strategy which in 2005 forecast a 200 per cent increase in Channel Tunnel rail freight tonnage to 2014/15 "if access and pricing issues are resolved". I believe we have a gone a long way now to resolving access and pricing issues—indeed, I believe that DB Schenker, the largest rail freight carrier in Britain—has now agreed heads of terms with High Speed One on access. If that leads to rail freight actually developing on High Speed One then of course I would hope that those industry forecasts could be realised.

Q506 Lord Powell of Bayswater: Minister, you spoke about Government support for the recast; surely the problem is not really with the First Railway Package itself, it is with the failure to implement it, so should not the priority be to get the Commission to take its responsibilities and enforce it, and will a recast not actually just distract from that process by tying everyone up in the Council for a year or two debating various changes? Should the Government really be jumping on the Commission and saying "use your powers, go to the courts and get this enforced"?

Lord Adonis: We are of course doing that too. When I provide the list—if I take a particular example, France—of infractions against the First Railway Package at the moment—

Q507 Lord Powell of Bayswater: Pure coincidence I am sure.

Lord Adonis: There is a whole list of alleged infractions which have been identified by the Commission: essential functions still performed by incumbent railway undertaking; infrastructure manager does not determine infrastructure charges; insufficient legal provisions to ensure the infrastructure manager balances revenues and costs; insufficient incentive for the infrastructure manager to reduce infrastructure costs and access charges; charges set above marginal cost or similar; insufficient regulatory powers for the regulator to control charges—and so it goes on. We would wish to see the Commission take a robust line.

Q508 Lord Powell of Bayswater: If they did that would it really still be necessary to have a recast because if people actually did what they were supposed to do maybe the recast would not serve a useful purpose.

Lord Adonis: If we could get action sufficiently quickly on those issues that may well be right. My expectation is that it will not happen.

Q509 Lord Powell of Bayswater: Why would they be more likely to implement a recast than they are to implement the original package?

Lord Adonis: Because any room for hiding behind ambiguity would be lessened one hopes by a recast, but I do of course accept your basic point, Lord Powell, which is that if there had been sufficiently rigorous implementation of the First Railway Package then the recast might be not so necessary.

Q510 Lord Powell of Bayswater: Just on a related point one of the best things about Europe are the competition laws; they are very powerful and the Commission makes great use of them. Why do you think they do not use them in this case and should we not be encouraging them to do so?

Lord Adonis: Our view is that the competition laws will be the appropriate tool if economic operators are breaching either of the prohibitions under Article 81 or Article 82 of the Treaty, Article 81 prohibiting agreements between undertakings which have as their object to effect the prevention, restriction or distortion of competition with the EU and Article 82 preventing the abuse of conduct by dominant firms. These prohibitions can be applied by designated national competition authorities and national courts as well as the European Commission and we think it may be appropriate to use these tools.

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Q511 Lord Powell of Bayswater: “May be” sounds a little tentative; why are you not encouraging the Commission or our own courts to use them?

Lord Adonis: It is difficult for me to make a judgment on the application of those provisions by the Commission in respect of the regime in other countries, but we certainly would not wish to dissuade the Commission from using the full range of tools at its disposal.

Q512 Lord Powell of Bayswater: The First Railway Package is implemented through Directives; is there a case for this time having a Regulation, directly enforceable?

Lord Adonis: Our view is that whatever works best we should take full advantage of, so I do not think we are close-minded about the potential for regulations but we have chosen to go down the directive route so far. There is of course a concern which we have at large about unnecessarily detailed interference by Brussels in domestic arrangements so it is getting the balance right.

Mr Kessel: If I may just go beyond this and say the Commission are in fact potentially thinking about making the recast a regulation. It is just a matter of the reality of negotiations around two sets of 27 negotiating parties around the table. Individual Member States will scrutinise a regulation even more than they would any directive because they know what is at stake, and hence any content of a regulation is extremely difficult to negotiate without it being diluted to a significant extent.

Q513 Lord Powell of Bayswater: Which leads us back to enforcement. Just one last question—I am sorry for going on so long—assuming we get the recast what are the two principal objectives that you will go for to ensure they are covered in the recast?

Lord Adonis: Am I allowed to answer that by saying there are four rather than two? Our clear concerns are to make progress on the four key planks of the original First Railway Package, which is unbundling—which is a clear functional and structural separation of infrastructure management and train operations—a transparent regime for capacity allocation and charging; well-resourced, independent regulators; and access to ancillary facilities—terminals, marshalling yards, ports, services and so on as well as track access. Our view is that we still have significant progress to make in much of Europe on all four of those key areas.

Q514 Lord Powell of Bayswater: Even though they are in the existing First Railway Package.

Lord Adonis: Indeed.

Q515 Lord Dykes: Coming back to what Lord Powell was saying and just as a general point, it is a matter of concern to us when we get the impression visiting Brussels that the Commission actually does, in a very strong sense, agree with the aspects of the British Government policy that you have already outlined in your original statement. I know the Commission has to hesitate when it is a matter of complex negotiations between Member States and getting the dossiers right for everybody, but have they not been a little bit too limp? In the Annual Legislative and Work Programme they refer to clarifying certain key aspects of the recast package but should they not be really changing it fundamentally to make sure it comes back to the original objective?

Lord Adonis: They would argue that that is clarification, so one can get into a debate about the meaning of words. However, the British Government lay great store by the action the Commission took on 26 June last year in writing to all but one of the Member States with details of alleged failures to transpose the First Railway Package. That was an important step because that put in respect of each Member State a set of specific issues on the table which the Commission then intended to pursue in detail with Member States. As I say, in our case this led to us having a detailed discussion with them on our one alleged failure to implement the package and we believe that this is leading to full and frank conversations between the Commission and our fellow Member States on, in many cases, quite a long list of such failures.

Q516 Lord Dykes: Should the British Government not have been stronger on the idea of having an overall European-wide regulatory framework matrix even if the national regulators operated within that, rather than appearing to be very hesitant about that because we were thinking that we were in the best position, showing a model example of how the regulator was working already. Was that not a mistake with the other Member States?

Lord Adonis: Our view on this is that this is an area where subsidiarity ought to be able to work effectively; it ought to be possible if effective regulators are put in place—and we have an effective regulator in the Office of Rail Regulation—country by country for individual Member States—and of course their governments have a massive interest in seeing more rail freight—and putting in place robust arrangements. The steps which would be required to put in place a European regulator would be at such a level of difficulty and controversy that it would be unlikely to deliver in any reasonable timescale the gains that we were seeking. That was the view that we took, but of course I do follow that up by saying we still have got some way to seeing that many Member

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States do indeed have well-resourced independent regulators, and that is something that we will continue to push hard for.

Q517 Lord Dykes: Do you think that a College of Rail Regulators in Europe could quickly get into some kind of very similar European-type thinking for everybody, including particularly on transparency of access charges and freight charges for kilometre tonnages?

Lord Adonis: I would hope so. I would hope we would see increasingly effective co-operation between regulators at the European level. I do not know whether Mr Kessel has got anything to add on that.

Mr Kessel: A European-wide regulator Member States would have real difficulty with. At the moment Member States, other than the UK, have serious problems with the idea of a fully independent regulator—independent from government as well—and that is one of the major difficulties with the existing transposition of the First Railway Package. Member States would absolutely balk at the proposed introduction of a European regulator.

Q518 Lord Dykes: Can a College be a strong co-ordinating body?

Mr Kessel: Our perspective is that if all European regulators were as independent, as strongly resourced and had the powers of the Office of Rail Regulation then that would solve the problem of the lack of regulation across Europe. Individual national regulators could become at national level the enforcers of the European legislation, and we would as a result also see increased co-operation between those stronger and more independent national regulators.

Q519 Lord Rowe-Beattie: Can I come back to regulatory issues, Minister? In the Government evidence you kindly provide the IBM analysis of the three distinct forms of regulatory bodies in Europe, and they clearly are so very different that it boggles the mind really as to how they possibly could work together in common; but that is neither here nor there I suppose. How can the Commission, with the bodies that we currently have here and the three distinct models of regulation, encourage may lead them to co-operate on all cross-border issues?

Lord Adonis: The steps that the Commission is taking to highlight failures to implement the First Railway Package—which as I say is now taking the form of highlighting very specific failures country by country—will concentrate the minds of governments on the need for stronger independent regulation, and therefore I would expect that to lead, country by country, to a big step in the direction of setting up the independent and well-resourced regulator that we want to see, albeit that the actual model varies

country by country. I take the view on this matter that the more specific the issues which countries have to address are the greater the pressure there will be on them to take effective regulatory action.

Q520 Lord Rowe-Beattie: You referred—not quite your words—to the smokescreen of ambiguity that obviously exists in the implementation of this package and that is why we are sitting here today I guess. Do you think—although you have referred to it as something that would be very difficult to achieve—that it would be appropriate for government to push for some form of EU overriding body in regulation?

Lord Adonis: We think it would only be appropriate to take that step if the alternative of co-ordination between national regulators had manifestly failed, and we have not reached that stage in our judgment, but we believe that if other states set up independent, well-resourced regulatory bodies on the model of our Office of Rail Regulation then it would not be necessary to take such a step, so we certainly do not contemplate the establishment of a single European regulator, we would need to be convinced that the alternative of co-ordination between national regulators was simply failing to achieve. But it is not an unmixed picture at the moment. In preparing for coming before the Committee I looked at the statistics on what has in fact happened on European rail freight and there is a very interesting report by the Commission—its last report published in September 2007—on monitoring developments in the rail market which shows that after a long period of time in European rail freight volumes have started to rise since 2003—modestly, I accept, but nonetheless they have started to rise. The other crucial finding from the point of view of the British Government as we argue the case for liberalisation at a European level is that between 2000 and 2005 the EU witnessed a significant increase in rail freight performance in Member States where non-incumbent railway undertakings took the highest market share, which is a significant boost to the whole argument behind the First Railway Package and the position the Government has been adopting. As the importance of getting freight off the roads and onto railways becomes much, much more urgent for Member States because of congestion on the roads and because of carbon reduction targets, governments will, I believe, place much greater emphasis on effective practical steps including strong independent regulators to see that freight does go onto rail, and I believe that there will be less captured by incumbent operators who of course have sought to dilute the impact of such measures. I have in recent months been seeking to familiarise myself with the major high speed networks in Europe so I visited most of the major European countries which have been developing high

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speed networks—which are most of the major West European countries—and discussing in detail their plans for the development of the next generation of rail technology and, in particular, a key issue that comes up is the role that new rail networks might play in developing freight traffic. With the exception of France, it is fair to say, which hitherto has not allowed freight onto its high speed network—and that is an important exception—every other European country I have been speaking to about the development of rail freight sees new networks as a crucial instrument for significant modal shift of freight onto new networks, so they are very, very alive to the potential of rail to carry much larger rail freight volumes and they accept that that simply will not happen unless we take effective steps to liberalise. Of course, in some ways it is easier to liberalise the new lines than existing lines because you do not have so great an effect on incumbency.

Chairman: We will stay on this subject. Lord Dykes.

Q521 Lord Dykes: Coming on to the question again of the idea that was put forward recently of the Regulation to deal with the European-wide freight network corridors—which does seem to have been well received in many quarters—there was one specific element in that draft Regulation context that there would be created by the Commission legislation clusters of “governance bodies” of officials who were very expert in rail infrastructure operations and control, from all the different countries, making sure that there was proper linkage and a policy decision-making operation effect on all the parts of the European-wide corridors that were going through more than one, two, three or four Member States. Do you feel that is a good idea? Should that be pursued and will the UK Government be pursuing that particular notion?

Lord Adonis: We are not keen on governance bodies which make joint investment and funding decisions.

Q522 Lord Dykes: I am sorry, I have not explained myself properly, Minister. This would be with independent legal status so that they could make sure that the infrastructure decisions are implemented properly by the operators.

Lord Adonis: Our view is that providing such bodies operate on the basis of co-operation and mutual consent and are subject to the national law applicable in Member States then the answer is yes, but what we are not keen on are governance bodies which sit above Member States.

Q523 Lord Dykes: Subject to that important qualification that you have just enunciated would that be a good thing that the British Government supported strongly?

Lord Adonis: Yes, we do support it but, as I say, we are not keen on such governance bodies having executive powers over Member States; we think that this will lead to confusion and also an abdication of responsibility on the part of domestic bodies if they think that powers are in fact passing up to governance bodies above national level.

Q524 Lord Dykes: What would be the impact also of this specific kind of regulation on passenger transport; would there be any direct impact on that?

Lord Adonis: There ought not to be if there is effective planning but of course where you have lines which are at or near congestion then the simple fact of there being more rail freight, which is part of the objective of the First Railway Package, is an issue with passenger operators.

Q525 Lord Dykes: One last brief question if I may. Inevitably there is a slowing-down effect that incorporates the new East European Member States with their plans—you can look at the infrastructure and operating systems in East European countries and see that they are behind what has been done perhaps on the western side of the EU membership zone, but not in any critical way because they have only just recently joined—do you feel that that should be allowed for in a new recast legislation, or should they just try and catch up as fast as possible with everybody else? Rail freight is significant and very important in percentage terms in these East European countries.

Mr Kessel: Funding is an issue for East European Member States and the recast of the First Railway Package could address some of those funding issues. Funding is particularly important in a sector where operating margins are very slim and operators can be literally taken off the market from one day to the other by the national infrastructure manager increasing its charges. Very often this is another example of the vagaries of national governments’ annual budgeting process which may all of a sudden cut the subsidy to the national infrastructure and in order to balance costs and income he has then to increase his infrastructure charges. It is important perhaps that the First Railway Package recast looks at putting funding on a more sustainable basis providing continuity for infrastructure managers.

Q526 Lord Bradshaw: The inevitable outcome of what you have just described is the infrastructure charge goes up and the traffic disappears from the railway, so the infrastructure manager is no better off anyway.

Mr Kessel: Yes.

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Q527 Lord Whitty: Still in this territory really, on the funding of the infrastructure do you think the multiplicity of different forms of funding is an issue? You have just said that you think the ability of the Member States to intervene on almost an annual basis on the infrastructure charging can be hugely disruptive to the operator, so would you wish to see the Directive specifically cover the requirement that Member States do go for a multi-annual contract arrangement or any other more specific form of funding so that the kind of problems you have outlined in response to Lord Dykes do not actually arise?

Lord Adonis: In the UK we have a system of five-year periodic reviews which we believe does create the right balance of continuity and stability. We would wish to encourage other Member States to go down the same routes.

Q528 Lord Whitty: You are talking about encouraging rather than prescribing through the directive.

Lord Adonis: We certainly would want to encourage them strongly but how far we see this as a matter for prescription I am not sure.

Mr Kessel: There is already a provision in 2001/14 that encourages Member States to go down that route and it even proposes a timeframe of three years. We would want to have that encouragement expressed in slightly stronger terms.

Q529 Lord Whitty: What I am pressing for is whether encouragement in slightly stronger terms amounts to a requirement.

Mr Kessel: If you were to press me I think it should become a requirement but it depends on what is negotiable at the negotiating table.

Q530 Lord Powell of Bayswater: Minister, you spoke proudly of Britain's record of liberalising and the increasing amount of rail freight, and that is obviously right. On the other hand other markets in Europe which are not liberalised, or at least not to our degree, have also seen an increase in rail freight so obviously liberalisation alone is not doing it, the other things are economic growth, congestion on the roads. How much do you think is actually attributable really to liberalisation as such?

Lord Adonis: May I say it is very hard to tell because of course separating out policies is a difficult process. What we know is that there has been a 59 per cent increase in rail freight volumes since 1995—over the last 14 years—and this has gone hand in hand with liberalisation. Our view is that it has been a factor but it has also gone hand in hand with the increase in the number of rail freight operators which we believe is part of the reason why we have been able to increase volumes. There are other factors too like coal being

carried a longer distance, which is a big factor in the increase in rail freight in Britain. As I say, the findings of the Commission itself do relate growth in rail freight to countries that have the largest number of non-incumbent operators and that is a finding which applies across the EU and appears to be borne out by our experience here in the UK.

Lord Powell of Bayswater: It certainly cannot be bad; the only question is how good it is.

Q531 Lord James of Blackheath: Are the UK freight operators getting on and getting the access that they need both to the rail services and the off-network infrastructure?

Lord Adonis: In Europe?

Q532 Lord James of Blackheath: Yes. At our meetings in Brussels two weeks ago when we discussed a lot of these aspects there seemed to be some fairly gloomy responses on that, so how is the UK finding it?

Lord Adonis: We have anecdotal evidence, I am told, as I said in my opening remarks, that they are having difficulty in obtaining evidence that the charges which are quoted for access to tracks, facilities and supply of services reflect the cost of providing the service, calculated on the basis of actual use. That is anecdotal but in terms of the actual success of UK-based non-incumbent operators in getting into Europe I do not actually have the figures to hand. Do we have those?

Mr Kessel: One indication might be that the table that Lord Adonis referred to earlier on with regards to alleged infringements by Member States quotes this as one of the areas which is missing, and there are a number of Member States who clearly do not on the one hand give equitable access to these facilities but even if they do then once inside those facilities it is often very difficult for operators to gain access to services within these facilities.

Q533 Lord James of Blackheath: Are there any initiatives that you could see that could be taken from the top down to try to improve this situation?

Lord Adonis: The robust action by the Commission in seeing that failures to implement the First Railway Package are dealt with I think is the single biggest initiative that could be taken. The issue is how they are getting on though.

Q534 Lord James of Blackheath: If they apply what is in the first package it will be enough, you do not see any need for amendments in the recast to make it better.

Lord Adonis: This relates to my earlier exchange with Lord Powell, that if all the objectives of the first package were met then this would meet most of the

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case, but how those objectives are met and the extent to which that requires a new or amended package—

Q535 Lord James of Blackheath: You have no special wish list for new additions to it.

Lord Adonis: The four key objectives that we have remain. When you ask how they are getting on though, in my briefing summary—which inevitably I cannot lay my hands on now—there are somewhere some statistics on how UK-based operators are in fact developing markets in Europe and I will write to the Committee with the data on that which would answer your specific question.

Q536 Lord James of Blackheath: Do you think that the British rail freight operators are actively missing any opportunities that are there that they could take but which they are falling short on picking up on?

Lord Adonis: I am not sufficiently familiar with the market to be able to answer that question myself. I do not know whether my colleagues, who are much closer to the market than I am, could offer any observations on that point.

Ms Northfield: Again there is a lot of anecdotal evidence that some of the UK operators are getting a lot of contracts, particularly Euro Cargo who are an offshoot of DB Schenker operating in France. Some of them are doing very well but we hear anecdotal evidence—I know that one of the people representing the Freightliners operation in Poland gave evidence to the Committee and said that they were having some problems, but certainly they seem to be doing very well as far as we can see at the moment.

Q537 Lord Powell of Bayswater: Minister, you have referred several times to anecdotal evidence which is a very interesting point, because we raised this when we were in Brussels, talking both to a national regulator and to the Commission, and said “We keep hearing anecdotal evidence” and they said “So do we.” When we asked why they said the reason is nobody makes a complaint. We said “Why do they not complain?” and they implied very strongly that there was a certain amount of intimidation that was practised and that large men swinging bicycle chains from the national regulatory railway authorities were intimidating the operating companies from actually pursuing complaints. Do we have any evidence that British companies feel intimidated in Europe?

Lord Adonis: Do we have any anecdotal evidence of intimidation?

Ms Northfield: I do not think they are easily intimidated.

Q538 Lord Bradshaw: That is contrary to what we were told. We were told quite clearly that the people who are entering markets are, shall we say, unwilling

to complain because they feel in so doing there will be further obstacles placed in their way.

Lord Adonis: Let me make further anecdotal enquiries of UK-based freight operators and if I have anything more I can add to my remarks on that I would be glad to do so.

Q539 Lord Powell of Bayswater: It would be quite useful surely from the Government’s point of view if there was such evidence to raise it with the Commission, to encourage them in their recast.

Q540 Lord Rowe-Beattie: Minister, to what extent do you believe that the diversity of charging schemes and their level is a problem for cross-border rail freight?

Mr Kessel: It is significant. I think what we have seen with the transposition of the First Railway Package is that we have a massive diversity of different ways of transposing this legislation, and not just in so many different ways but also as the Commission would allege in so many different incorrect ways or incomplete ways. This does not just create legal uncertainty but it also creates a diversity of regimes that operators find very difficult to operate in, especially if you imagine an operator wanting to take paths that lead into two, three or more Member States so the diversity of transposition, the different legal regimes, the different ways of charging, the alleged lack of transparency in infrastructure managers arriving at their track charges makes it extremely difficult for operators to find their way through this jungle, and this administrative effort that they need to undertake is a business cost which some operators cannot afford.

Q541 Lord Rowe-Beattie: How then should the Commission address this in your opinion? You have identified the problems but how should this be addressed in the meantime?

Mr Kessel: What the Commission could do, clearly, is to clarify the principles of charging as currently laid down in Article 7 of Directive 2001/14 and clearly lay down what elements of costs can be included in marginal cost or incurred cost calculations, and which ones must not be. It could also then take the next step and clarify exactly the situations under which exceptions to these principles are possible and when they are not possible. In that way it would probably arise as a less diverse and more homogeneous charging system across Europe, which in itself reduces business cost and makes the administrative effort for railway undertakings operating across Europe smaller.

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Q542 Lord Rowe-Beddoe: In your evidence, however, you do actually suggest that there should be more flexibility in charging, so I wonder would you like to comment on that.

Lord Adonis: The flexibility which we had in mind was with the calculation of infrastructure charges for freight operators within Article 8, paragraph 2 of Directive 2001/14 which deals with the setting of charges in the context of specific investment projects, the issue being whether or not the need to develop the specific investment projects is contingent upon additional charges that are going to be levied on the operators, an issue that arose in respect of the opening of a line in Scotland, the line from Stirling to Alloa—I am told that this was an issue there. However, our view is that whilst it is right that that flexibility should be there—because it may be vital for encouraging additional investments—it should not be retroactively applied, it is very important that freight operators should have a clear and transparent understanding of the charging regime that they will face and that they should not face charges which are levied for specific investment projects, about which they were not aware when those investment projects were being planned. That is the flexibility we are talking about, but we see it as having a limited scope.

Q543 Lord Whitty: You were talking in terms of charging in relation to trans-border journeys; does the Trans-European Transport Network approach help here at all and what is the Government's view of the latest Green Paper on the Trans-European Transport Network? Could that be a means of establishing interoperable and commercially viable corridors across borders?

Mr Kessel: In terms of interoperability we have already very strong and coherent interoperability legislation that is in place, although I am speaking perhaps a little bit prematurely here because the Interoperability Directive was only recently revised so the transposition will take a little bit of time and we will have to wait to see what effect it will have on the ground. The Trans-European Transport Network in itself is a funding mechanism but the more important issue concerns legislation that governs

principles of track access and charging and other matters. It is more important to get transposition at national level right at the level of existing legislation, and then of course to build on that by looking at where existing legislation, even after proper implementation, still has systemic gaps and holes in it, to plug those and amend it.

Q544 Chairman: The last question is from me and that is on the timing of all this. Minister, you indicated in your opening statement that possibly there might be some proposals coming from the Commission towards the end of this year or the early part of next year, but we are looking at the Commission possibly running out of its mandate and European elections to the Parliament. Do you see, optimistically perhaps, all this coming to a conclusion with a recast within the next six to twelve months?

Lord Adonis: Nearer twelve than six is the advice I am getting as to the likely timescale.

Q545 Chairman: Perhaps this is slightly off script so forgive me asking the question but from your experience as a minister what contribution can this House of Lords Select Committee make to this great debate?

Lord Adonis: As ever bringing to bear the weight of your great wisdom on our colleagues in the Commission because it is quite clear from our discussions this afternoon that effective and timely action by the Commission will be critical to making a reality of European rail freight liberalisation, and as one of the most expert Parliamentary committees in the EU that looks at these matters, your words will I am sure have a great deal of weight, if you choose to express them with your typical directness, on the importance of pressing ahead robustly with liberalisation and the many steps that could get us there. We have talked about a number of them today, the dealing effectively with the failures to implement the First Railway Package and all the follow-up steps which could follow in the proposed recast next year.

Chairman: Minister, we will take those words to heart; we shall not disappoint you. Thank you very much for your evidence.

Supplementary letter from the Department for Transport

At my evidence session to the Committee on 20 April, I agreed to provide the enclosed table on infractions so that it may be entered into evidence. (See Figure 3 in Volume 1 of the report.)

During the session, Lord James of Blackheath asked what difficulties UK companies were encountering in Europe. As I said in my opening speech, there is anecdotal evidence that in a number of key areas, the First Railway Package has failed to accomplish on the ground, at Member State level, what it set out to do. For example, it appears that the separation of infrastructure management from train operations, as transposed and practised by a number of Member States in everyday operational situations, has not achieved the desired intention of ensuring transparent, equitable and non-discriminatory access to rail infrastructure for non-incumbent, independent operators. We believe that the strong statutory independence from government of rail

regulation in Great Britain has ensured the correct application of European rail legislation, with transparent, equitable and non-discriminatory access to rail infrastructure for all operators. However, in many European Member States rail regulators seem to lack the competences, the resources and the necessary independence from government to be effective local enforcers of the spirit and the letter of European rail legislation.

There also appears to be evidence that, in some Member States, the setting of infrastructure charges lacks transparency which is likely to have the effect of hindering the development of competition in the European rail freight market. On 26 June 2008, the Commission wrote to all but one of the Member States with a rail system (24), alleging varying degrees of failure to transpose the First Railway Package adequately into national law. In the case of 14 Member States the infraction proceedings relate to the setting of infrastructure charges and associated issues.

In the case of six Member States, the letters of formal notice issued by the Commission related to allocation of capacity and associated issues. Access to tracks, terminals, ports and services remains a problem for non-incumbent, independent operators. and, in particular, operators are having difficulty obtaining evidence that the charges which are quoted for access to tracks, facilities and supply of services reflect the cost of providing the service, calculated on the basis of actual use.

Finally—and in response to Lord Rowe-Beddoe's question on the subject of intimidation. I confirm that, whilst we have heard anecdotal evidence from a number of parties including Freightliner operating in Poland and the Rail Freight Group, that UK operators have encountered significant problems in setting up services in European countries, in our opinion none of these has led to the operators concerned feeling intimidated.

27 April 2009

Written Evidence

Memorandum by Cargo Rail Europe

(a) *Whether the provisions on the separation of infrastructure management and train operations are sufficient; whether they should be amended or whether they should be replaced with a requirement for full ownership unbundling*

The separation of infrastructure management and train operations is most important. The existent solution is not sufficient. Integrated management of infrastructure and train operating by holding structures has a negative impact on the access rights/competition.

(b) *Whether the current provisions are adequate regarding the staffing and independence of regulators and whether statutory independence from government is desirable*

Current provisions are not adequate. The statutory independence from government, infrastructure managers and railway undertakings is desirable.

(c) *Whether there remain barriers to entry due to factors such as safety certification requirements, and if so how these should be addressed*

Cross acceptance of certificates, admissions etc.

Access to private sidings, terminals, last mile services etc.

(d) *Whether the current requirements regarding the setting of infrastructure charges are adequate, and if not how they should be amended*

They are not adequate. Freight trains have to pay too high charges. The priority of passenger trains and the high standards of infrastructure needed by passenger trains have to be charged in an equivalent way.

(e) *Whether the existing provisions regarding allocation of capacity both on tracks and at terminals are adequate and if not how they should be amended*

(f) *How a recast First Railway Package should relate to other EU freight transport policies*

EU freight transport policies have to treat combined transports and conventional rail freight transports in an equal way. Programmes such as Marco Polo have to be opened to the conventional rail freight transport.

9 February 2009

Memorandum by Deutsche Bahn AG

GENERAL COMMENTS

The Commission initiative for a recast of the first railway package is premature and should be rejected. The current legal framework for the railway sector has just been completed with the publication of the third railway package. There is a close interrelation of the measures embodied by the three railway packages. The effects of the new regulatory provisions and further market opening have to be monitored and evaluated over a longer period of time before drawing conclusions and proposing new measures. Experience in Germany has shown that liberalisation did not cause significant impact until several years after the railway reforms. Existing obstacles that obstruct access to the European railway markets can be tackled by means of a thorough application of the existing law. Instead of proposing new legal texts the Commission should concentrate on the proper implementation of the existing provisions in all Member States. There is currently still a considerable lack of effective implementation of European regulatory law in several Member States. The only new legislative initiative which should be launched at present is the completion of the liberalisation of rail passenger transport, ie the opening-up of national rail passenger markets in Europe.

COMMENTS ON SPECIFIC ISSUES RAISED BY THE HOUSE OF LORDS

Whether the provisions on the separation of infrastructure management and train operations are sufficient; whether they should be amended or whether they should be replaced with a requirement for full ownership unbundling?

The existing unbundling provisions already structurally guarantee non-discriminatory access to the railway network and are therefore sufficient. Article 6 par 1 Directive 91/440/EEC calls for accounting separation and bans cross subsidies. Article 6 par 2 Directive 91/440/EEC requires organizational unbundling. Independent decision making regarding essential functions is laid down in Article 6 par 3 Directive 91/440/EEC and Article 4 par 2, Article 14 par 2 Directive 2001/14/EC. The development of railway markets in Europe does not give any evidence that full ownership unbundling is required to provide for effective market opening. In the Rail Liberalisation Index 2007 countries with full ownership separation such as Great Britain and Sweden as well as countries with holding structures such as Germany and Austria reach high scores.¹

Whether the current provisions are adequate regarding the staffing and independence of regulators and whether statutory independence from government is desirable?

Article 30 Directive 2001/14/EC requires the establishment of a regulatory body which must be independent in its organisation, funding decisions, legal structure and decision-making from any infrastructure manager, charging body, allocation body or applicant. Article 30 par 2—5 Directive 2001/14/EC lay down the field of activity and powers of the regulatory body. At first, the existing legislation has to be implemented properly in all Member States which is currently not the case. Urgent need for more effective regulation exists for example in France. According to the “effet utile”—principle Member States have to provide for effective implementation of the provisions and therefore have to establish effective as well as sufficiently staffed and equipped regulatory bodies. The independence of regulatory bodies is another important prerequisite for effective regulation.

Whether there remain barriers to entry due to factors such as safety certification requirements, and if so how these should be addressed?

The Rail Liberalisation Index 2007 shows that irrespective of legal market opening substantial practical barriers to entry remain in several Member States. The EU has adopted legislation regarding important issues such as cross acceptance of rolling stock, certification of train drivers and safety certificates. The European Commission should closely monitor the respective implementation in the Member States. A thorough analysis of the effects of the new pieces of legislation is necessary before proposing new measures. Apart from access conditions in the railway market it is important to keep in mind that legislation still lacks behind in creating a fair level playing field for rail in intermodal competition. Unlike other modes of transport rail is—as electricity consumer—affected by the emission trading scheme. To provide for fair intermodal competition other modes of transport have to be included as well. Moreover, by not establishing full and mandatory internalisation of external costs for all transport infrastructure users, the European transport legislation deprives the rail mode of the opportunity to benefit from its advantages in term of environmental friendliness and safety. In this respect the current proposal for the revision of the Eurovignette Directive is a step in the right direction.

Whether the current requirements regarding the setting of infrastructure charges are adequate, and if not how they should be amended?

The current provisions are adequate and should not be amended. EU law regarding the setting of infrastructure charges provides for the necessary flexibility to adjust to national specificities in the Member States. This applies in particular to the exceptions mentioned in Article 8 Directive 2001/14/EC. Article 8 par 1 Directive 2001/14/EC refers to mark-ups which the market can bear. This provision is crucial to provide for the competitiveness of rail in intermodal competition.

¹ Rail Liberalisation Index 2007, IBM/Kirchner 2007 (available at http://www.deutschebahn.com/site/bahn/en/db_group/press/information__material/rail_liberalisation_index2007.html).

Whether the existing provisions regarding allocation of capacity both on tracks and at terminals are adequate and if not how they should be amended?

The existing provisions are adequate and should not be amended. Here again it is important that EU law leaves sufficient flexibility to Member States to adjust to their national specificities. Regarding access to service facilities such as terminals regulatory intervention is not necessary and even detrimental if viable alternatives under market conditions exist. This basic precondition is accurately laid down in Article 5 par 1 Directive 2001/14/EC and should not be amended.

How a recast First Railway Package should relate to other EU freight transport policies?

A recast of the first railway package is premature. Deutsche Bahn also rejects timing, method and design of the current Commission proposal "A European rail network for competitive freight". Growing traffic volumes call for sufficient investments in rail infrastructure by the Member States. Schematic and inflexible provisions for the utilisation of the freight networks across Europe as contained in the Commission proposal do not reflect the distinct operation logic in different Member States (as for example in Germany the highly polycentric structure and the organisation as a mixed operations network) and cause the loss of urgently required capacities. Furthermore, instead of setting up new organisational structures the work of the existing corridor organisations should be analysed first. Before the relevant demand has not been identified, it is vital to avoid premature Europe-wide specifications and legislative measures by the Commission owing to insufficient experience in practical application.

30 January 2009

**Letter from the European Association for Forwarding Transport, Logistic and Customs Services
(CLECAT)**

CLECAT represents European freight forwarders, logistics service providers and Customs agents. Neutral towards transport modes, logistics service providers are large users of rail freight services and, hence, important customers of railway undertakings. Aware of the fact that rail could and should play a more substantial role in the supply chain, CLECAT has been promoting a liberalised European rail freight market where full and fair competition takes place throughout the European territory.

We thank you for giving us the opportunity to share with you our views on the recast of the first railway package and are pleased to provide you with some input regarding the following questions you raised.

(a) Whether the provisions on the separation of infrastructure management and train operations are sufficient; whether they should be amended or whether they should be replaced with a requirement for full ownership unbundling

CLECAT believes that the provisions on the separation of infrastructure management and train operations are unfortunately not sufficient. In particular, some major obstacles to the opening of the European rail freight market include the failure of some member states to separate fully the ownership of infrastructure managers from railway undertakings, often entailing dominant positions and difficulty in gaining access to the rail for new entrants. Regulatory bodies sometimes (and in different geographical areas) appear insufficiently successful in their steering role.

(b) Whether the current provisions are adequate regarding the staffing and independence of regulators and whether statutory independence from government is desirable

CLECAT believes that the current provisions are not completely adequate regarding the independence of regulators. Even if the strengthening of the role of regulatory bodies is certainly welcomed by CLECAT as it should increase competition and transparency, a condition *sine qua non* is that these Regulatory Bodies must act in the full interests of competition and are kept immune from national politics, mere ideology or incumbents' influence. For that reason, CLECAT would like to stress the importance of enhancing first the independence of the regulatory bodies and also to ensure a permanent exchange of information and general communication between regulatory bodies. We also take the view that customers and authorised applicants should have a voice in the regulatory bodies and customers' requirements should simply be at the tops of the list of the policy action.

This being said, CLECAT believes that the lack of competence on cross-border cooperation of regulatory bodies related to international rail services is an obstacle to the opening of the rail market.

Some possible measures that would contribute to solve this issue:

- Ability for the regulators to carry out audits or to initiate external audits with the railway undertakings and infrastructure managers to verify the compliance with accounting separation provisions;
- Introduction of a legal base for reinforcing the structures for cooperation of regulatory bodies (eg setting up formal joint working groups and a secretariat, agreeing on common principles and procedures of decision making), possibly in a corridor approach;
- Obligation for regulatory bodies to take a joint decision in case of a problem related to access or pricing (complaint based or *ex-officio* action) in case of international services (eg related to a facility in a border-crossing station), especially with regards to international corridors;
- Permanent cooperation between Regulatory Bodies and terminals managements as well as direct contacts with biggest railway users/forwarders, which could contribute to deal with congestion and traffic disruption problems at border-crossing points;
- Enhancement of the current tasks and competencies of the European Railway Agency, which are enough to fully contribute to the development of an integrated European Railway Area. Notably as regards freight, the Agency may be invested with new tasks, such as setting the EU rules for a priority network for freight at continental level and enabling Authorised Applicants to benefit from a commercial access to infrastructure.

Some of the above points are contained in the proposal of a regulation for priority freight corridors which is now on the tables of the EP. CLECAT and a number other interest representatives have voiced their concern both with the limitations of the proposal, on the grounds that it could have been more courageous, and with the risk of losing it because of the pressure that was put on some MEP's.

(c) *Whether there remain barriers to entry due to factors such as safety certification requirements, and if so how these should be addressed*

The cross acceptance of certificates, admissions etc is certainly an important barrier to the opening of the rail market. On that matter, CLECAT encourages, for instance, mutual recognition of brake tests and inspection so that wagons do not undergo the same checks at each border crossing. Moreover, we support the assignment of the rules of cooperation and coordination for carriage of dangerous goods in international corridors, in order to enhance traffic security. We take the view that the full mutual recognition of rolling stock in all EU MS's is an element that is vital for the full implementation of an EU-wide rail market.

(d) *Whether the current requirements regarding the setting of infrastructure charges are adequate, and if not how they should be amended*

CLECAT believes that the setting of infrastructure charges is not adequate everywhere in the EU, as there is a tremendous divergence of rates for infrastructure charges from one country to another and, sometimes, even differences between different operators in the same country. In order to move toward fairer and more transparent charges, we suggest that the possibility that Railway Undertakings can collect rail infrastructure charges should be abolished. Instead of it and in order to ensure fair competition, Infrastructure Managers could should responsible for collecting the track access charge to avoid possible unwanted conflicts of interests.

(e) *Whether the existing provisions regarding allocation of capacity both on tracks and at terminals are adequate and if not how they should be amended*

CLECAT believes that discrimination in access to rail related services (eg in terminals, shunting yards, rolling stock maintenance, etc) and insufficient harmonisation of principles and procedures are major obstacles to the opening of rail market. It is therefore crucial to have rules that ensure a fair and transparent distribution of paths. Access to terminals and shunting yards should be guaranteed to all operators on the same footing.

To achieve this goal, it is important to increase the availability of facilities in the market. One of the solutions would be to support the introduction of "Use-it-or-loose-it" provisions for the management of rail related service facilities. Indeed, if a service facility is not in use, or is insufficiently used, it should be made available by its owner (on a rent, lease base) to another interested party. If this does not happen out of business interest, the procedure should be regulated by means of legislation.

CLECAT also believes that Infrastructure Managers should be allowed in all Member States to enlarge their choice of customers and to assign slots to different kinds of “authorised applicant”, such as a freight forwarders, shippers and other transport operators that may have an interest in qualifying (large truck owners, airlines or shipping lines) and not just to traditional rail freight operators. This would add competition in the relationship between IM’s and their customers, which would benefit the EU rail freight market in general. For this reason, CLECAT strongly support the mandatory implementation of the “authorised applicants” concept in all Member States.

(f) *How a recast First Railway Package should relate to other EU freight transport policies*

CLECAT has welcomed the recent Commission proposal for a regulation concerning a European rail network for competitive freight. With this proposal, the Commission aims to increase the proportion of goods transported by rail by encouraging the creation of corridors with which rail operators would be able to offer an efficient, high-quality service and be more competitive on the goods transport market. The proposal seeks to bring together the infrastructure managers, to work closely and coordinate the management of the lines designated as international rail freight corridors. However, despite the good intention of the proposal, CLECAT argued for more direct involvement of rail freight users and customers in the establishment, management and strategic development of the corridors and we hope that in the future, the recast of the first railway package will also go toward that direction.

In addition, CLECAT would like to stress that setting a clear and reasonably close period for the obsolescence materials and equipment would be an advantage for improving the international rail freight market and also contribute to facilitate the opening of the rail market. Indeed, this could work in stimulating innovation and improvement for both rolling stock and infrastructure and could also partly contribute to making the access to the infrastructure easier for new entrants. Moreover, in order to improve the strategy for the development and maintenance of rail transport, specific measures should also be created to facilitate the availability of unused equipment, such as wagons, and upgrade/restore into service obsolete or abandoned tracks and stations (quite abundant all over Europe), if these are then devoted exclusively or predominantly to rail freight. On that matter, CLECAT suggests that efforts should be made to identify obsolete tracks, devote them to freight entirely and mandate their sale by public auction to interested third parties for private operation. It is clear that rail transport need some fresh air: using or changing the user for spaces and materials that are often left rotting in our landscape seems a very good idea.

9 April 2009

Memorandum by Mr Henry Holbrook

(a) *Provision on the separation of infrastructure management and train operations are sufficient; whether they should be replaced with a requirement for full ownership unbundling*

Having a look at what is going on in France now four main new railway undertakers are acting on this rail freight market all of them are on the train load market:

- European Cargo Rail (ECR) subsidiary of DB Schenker (former EWS, English Welsh and Scottish Railway) this latest being the German Historical Railway Undertaker DB Schenker with subsidiaries all over Europe: integrating 1 January 2009 EWS, Transfesa in Spain and Railion (Railion being formed of Railion Scandinavia, Railion Deutschland, Railion Italia, Railion Nederland and Railion Schweiz).
- Veolia Cargo France, which is a subsidiary of Veolia Group an International French Group which also own Veolia Cargo Deutschland and Veolia Cargo Nederland and is acting also in France with local short lines subsidiary CFTA and SOCORAIL dealing with rail handling and rail operations at industrial facilities.
- Colas Rail subsidiary of Colas group which main core business is rail tracks maintenance and construction and also assume rail transportation of aggregates;
- VFLI is a subsidiary of SNCF group, acting as a private company without the burden of the one that apply to the State own main SNCF, and is a member of European Bulls Rail freight Alliance (COMSA Rail Transport in Spain, Rail4Chem in Germany, Fer Polska in Poland, NordCargo in Italy and Viamont in Czech Republic).

- New operators may arrive shortly like Crossrail (North-South Intermodal Rail Company) Neighbour historical companies have a certificate like B Cargo, CFL Cargo...

The SNCF as the Historical Railway Undertaker is the main Freight operator (90% of traffic) and the only one proposing a full wagon load service. It is in charge of providing the essential rail facilities to the other new undertakers like maintenance facilities for engine and wagons or transport to a workshop. This company has taken over a full control of Geodis Group so to be in a position to act in the same way of DB Schenker and become a major Freight International Company.

The separation of infrastructure management in France with Réseau Ferré de France (RFF) which is a Public State Fund Company (EPIC) has created a separate infrastructure management and is so conducting an independent policy giving the same rights and access to all Rail Freight Operators. Being under the full control of French MoT we have noticed that priority on investments is not given to Freight.

RFF is in charge of the investment policy but do not give any priority and funding to resolve bottle neck which exist at Lille, Paris and Lyon and are blocking the development of European Railfreight from and to the United Kingdom and North-South main railway lines. These investments are a priority for European rail development

New operators gave assessments that train operations is fully assumed by SNCF only and does not give the same treatment to them all over the country pending of the will of the individuals that in charge of day to day operations. Further, staff in charge has been trained to give priority to the passenger business.

The SNCF Trade Unions are major actors of the French State owned Company refuse to accept European Policy and act to slow the development of European Policy wishing to maintain the former monopoly. They will try to block any step toward this direction.

These facts demonstrate that train operations should be made under a European regulation and under control of an independent structure (private or state owned) with independent staffing and managed independently of all Railway Companies whether they are historical or new.

The mere separation of infrastructure and train operations is not sufficient and should given only a limited period of time to adapt.

(b) Whether the current provisions are adequate regarding the staffing and independence of regulators and whether statutory independence from government is desirable

Independent Regulators does not exist in France today. An independent staffed regulator body will be created this year 2009. So it is as far as now difficult to determine is future efficiency. The non existence of a real Regulator Body may explain the difficulties which was exposed before.

We have to take into account the power of the SNCF Trade Unions in France as upper mentioned and their ability to block the country and so enforcing the transport policy of French Government to obey to their wishes. We so believe that the regulator body should be made as independent as possible from government to be able to act under the European Rail Legislation.

We remember the lack of decision of French government when immigrants to UK blocked trains in Calais causing disruption of the complete cross channel rail traffic and bringing to a halt any development of Rail Freight through the Tunnel for many years.

(c) Whether there remain barriers to entry due to factor such as safety certification requirements, and if so how they should be addressed

In the Maintenance Department where I work we are practising daily maintenance work and conduct safety examinations to wagon whatsoever is the owner or train operators. We have noticed personally that it exist a lack of knowledge of safety and maintenance rules within the main actors of the business. Such a certification policy should be continued developed and accelerated as far as possible. Far from being a barrier safety certification must provide a basis to safety to all actors of the market. We are lacking the non existence yet of certification for wagon owners and workshops. This step will add to a fair competition between rail undertakers, wagon owners and workshops without putting at risk rail safety.

Main wagon fleet owner companies are waiting for the implementation and will act to cut the delays through the memorandum of understanding of the Entity in Charge of Maintenance on a voluntary basis as it will improve safety, the knowledge of maintenance, liability and define the documents that should be applied to maintenance.

Applying the same minimal rules will protect users and help to promote competition.

The uncertainties that still exist are a barrier to entry on the business of newcomers.

Wagon owners use different maintenance scheme, either their own like VTG or ERMEWA or one originated by the historical undertakers. To be able to conduct the works, workshops must be agreed to the maintenance scheme that apply to the wagon and that is the one that has been declared to the governmental safety agency by the owner and vice versa an owner must check that works are conducted by the workshop obey the maintenance scheme.

Main workshops must have audit taken place under different scheme to be agreed and so be able to work on wagons under different maintenance scheme like the German VPI (mainly DB source) or the French SNCF one. This is a source of discrepancies as the resources a workshop must allocate to treat wagons differ under different maintenance scheme. Further the result will bring discrepancy on the cost when someone is using a maintenance scheme which is not the one of the majority like it is within the computers world between Microsoft and the others. These differences that are cost consuming and inefficient for both wagon owners and workshops. A European certification of these two major actors that are wagon owners and workshop will help solve some uncertainties and some complication that exist.

An European certification should be based on the ability to do what is required with the right knowledge to insure the required level of safety;

Certification will avoid that one major historical Railfreight undertaker imposed all over Europe only one way and that fair trade are at risk.

Rail Undertaker will be able to use wagons maintained by a certified body with full confidence. Wagon owners will be able to address labelled workshop just adding their own criteria's and specifications due to their maintenance policy.

Safety certification must not be a barrier providing it is clear and applied to everyone. The industry is suffering from the complexity of legislations, of sources of document that apply TSI, UIC, national rules like DIN, COTIF 99, GCU.

SNCF wagon maintenance scheme has difficulties to be recognised and treated in fair competition in Germany or Eastern countries even with an appliance to over 100 000 wagons to which it is the best scheme for the type of bogie in uses with this fleet. The German VPI is a guide but not a maintenance scheme.

(d) Whether the current requirements regarding the setting of infrastructure charge are adequate and if not how they should be amended

We think that the same common will, or as similar as possible, should apply all over Europe for Rail Freight. The level of charge should not be very different.

New European traffic taking out shipment from the road should be given help if needed on the basis covering the cost discrepancies that may exist between road and rail as it is in UK.

Development of local policies participating in part of the infrastructure charge should be developed.

(e) how a recast First Railway Package should relate to other EU freight transport policies

It seems that it will be inefficient to conduct a recast without relating to the other freight transport policies. Even if such a work is not as urgent as the item developed before. Priority of funding, of pushing one mode development. The recast should be created taking into account the other modes peculiarly when intermodal is at stake.

February 2009

Letter from the International Union of Private Wagons (UIP)

In answer to your letter of January 12 2009 we are pleased to submit to you some evidence regarding your Inquiry into the Recast of the First Railway Package.

UIP, the International Union of Private Wagons, has existed for over 50 years and comprises 16 European associations from 16 European countries. It represents owners, shippers, users and other parties interested in about 180,000 private rail freight wagons running in Europe.

Private freight wagons are developed, built and managed by private operators. They finance and maintain by their own means a very large wagon fleet and free railways and finally governments from substantial investment and maintenance costs. Without these customized wagons the large scale bulk transport of chemical products, petroleum products or foodstuff is inconceivable.

The economic importance of the private wagon fleet is a combined result of specialization and use of efficient logistic processes in such a way that 30% of the total European wagon fleet represented by private wagons generates nearly 45% of all tonne-kilometres carried.

It is this independent freight wagon fleet which guarantees the survival of private Railway Undertakings (RUs) and makes competition between traditional RUs and the new entrants possible.

The UIP considers it as main task to fill the gap created by the end of State railways' predominance with the responsibility of private wagon keepers and to help to balance the new cooperation between national/European control and the rail freight actors.

The UIP has succeeded in a long years' tough struggle with the State railways to create a contractual framework, the General Contract of Use (GCU), which adapts the circulation of the European rail freight fleet to the changed legal environment and allows its free circulation across Europe.

The European Commission has recognized the importance of this work for liberalization by recently introducing the "wagon keeper" into the EU legislation as third actor besides the RU and the Infrastructure Manager.

The UIP has constantly and actively supported all the EU efforts to liberalize the railway market. The reduction of technical and organizational barriers in the European market is vital for its member companies.

Findings of the EU Commission show that practically no Member State has fully implemented the EU measures of the First Railway Package. The UIP therefore supports the European Commission's intention to simplify and further improve (= recast) the Directives of the first railway package.

The initiative of the House of Lords seems to be a valuable contribution in reaching this objective.

SPECIFIC ISSUES

Whether the provisions on the separation of infrastructure management and train operations are sufficient; whether they should be amended or whether they should be replaced with a requirement for full ownership unbundling

The UIP considers that an integrated model requires an efficient and powerful national regulatory body (with *ex ante* powers) to guarantee fair play between incumbents and new entrants. With the absence of such qualification the existing control bodies do not seem capable of avoiding or satisfactorily sanctioning abuses by delegated infrastructure managers (ie state railways).

In the framework of the "House of Rail" conference on "sidings and last miles" (HoR members: UIP, ERFA, F&L, IBS) last November it became evident that the conditions of access and use regarding the last miles were far from being satisfactory. The availability and non-discriminatory access to the "last mile" infrastructure have to be considered as vital for the future of rail freight.

Whether there remain barriers to entry due to factors such as safety certification requirements, and if so how these should be addressed.

Regarding the authorisation of placing wagons into service an important improvement will enter into force on 1 July 2009 with the introduction of cross-authorisation valid for wagons corresponding to Annex JJ Part 2 of the TSI Wagon, which closes many identified "open points" of the TSI. This means in principle that one authorisation delivered by a Member State will be valid in all other Member States. Nevertheless this cross authorisation does not cover the whole UIP fleet of wagons. In case of placing into service of non TSI conform wagons only cross acceptance of national rules can offer a solution but the works of the European Railway will not be achieved before the end of 2010.

Two main obstacles can still be noted for wagon keepers:

The procedure for the putting into service of new and renewed/upgraded wagons presents a source of problems for wagon keepers.

The approval of new wagons according to TSI is time consuming and costly. Even if a TSI contains imperfections (therefore the TSI are permanently revised) a national authority has to consider its rules as binding.

It is strongly therefore recommended to take technical details out of the TSI and refer to EN standards. If an error or mistake is discovered in a standard authorities can (as happens in Germany, for instance) carry out a “comparison of equal safety”. This possibility does not exist in case of a binding TSI.

The scope of application of TSI also applies to renewed/upgraded wagons. Contrary to a new wagon the procedure for renewed or upgraded wagons is not clear at all. Wagon keepers who modify wagons in order to adapt them to market demand find themselves almost systematically faced with a dossier to be filed with a risk of the wagon to be brought into compliance with the TSI, whatever the work to be carried out. Therefore the border should be determined between work requiring a new authorisation and not.

The retrofitting of the existing European rail freight wagon fleet with noise reducing composite brake blocks has to be carried out in the next five years according to the commitment of the EU Commission. The replacement of the noisy cast iron blocks by the so-called composite “K blocks” demands an extensive renewal of the brake system. Some national authorities therefore require a new authorization of placing into service which will increase the already considerable financial burden of retrofitting for wagon owners.

The introduction of the “Entity in Charge of Maintenance” (ECM) in the newly amended EU safety directive (2008/110/EC) denies the direct link between the wagon keeper and wagon maintenance responsibility.

The “wagon keeper” emerges in the context of the above mentioned General Contract of Use, which covers the exchange of all freight wagons in Europe, reaching even beyond the EU borders, as new key actor with responsibility for the maintenance of his wagons in comparison with the responsibility of the RU for the safety of train operations. The EU Commission insisted nevertheless on introducing a further “entity in charge of maintenance”. No convincing reason has ever been offered why the professional and articulated opinion of the sector (the contracting parties of the GCU: UIC, UIP, ERFA) to confirm the responsibility of the wagon keeper for the maintenance of his wagons (corresponding in addition to the text of the COTIF/RUV 1999) in the EU legislation has not been taken into account.

A further problem exists as the mandatory certification of the ECM provided for in the amended safety directive will only apply with the entrance into force of the directive expected in 2012.

To bridge this period a draft Memorandum of Understanding providing for an interim voluntary certification system was developed by the sector, adopted by the Commission and presented to Member States representatives (RISC Group) in November 2008.

Unfortunately some member States, among them the UK, were not prepared to sign this agreement. As a consequence it might be feared that national safety authorities will impose new administrative burdens on wagon keepers and/or RUs in absence of clear proof that the necessary safety requirements regarding maintenance are met.

Whether the current requirements regarding the setting of infrastructure charges are adequate, and if not how they should be amended

The UIP congress in Cannes 2007 (“Relaunch Rail Freight”) showed that too variable rates for infrastructure charges exist from one country to another. The principle demanded by European texts is that such charges have to be “transparent and non discriminatory” and privilege the marginal cost, but the infrastructure managers are authorised to recover 100% of their costs, if the market can bear that.

Sometimes (in the Baltic countries) the costs are thus 100% covered by the infrastructure charges, sometimes less than 10% according to State subsidies and what the market can bear.

A remedy for the different infrastructure rates could be to put in place harmonised charges on each main European corridor, those the EU considers its priorities and which are called upon to pay a very important role for freight transport.

A possibility could be as well that the charges include a notion of quality of service to the shipper. Especially the RUs which are still faced with the sometime poor quality and reliability of their service are putting more and more emphasis on the shortcomings of the infrastructure, partly because they want to discharge themselves but partly because there is a real problem as well.

In the meantime, rail freight continues to pay for each kilometre run on rails (infrastructure charges represent 30% of rail freight transport costs) and it seems normal to impose infrastructure charges for the use of the rail network. On the other side most of the European road network is free and the cost is covered in member States’ general budgets.

Cross subsidization of passenger transport still exists in some EU countries. For instance in Slovakia, a corridor invoiced at two Euros per km for a passenger train as against eight euro per km for freight.

This situation has in particular its roots in the economic weakness of the countries which joined the EU in 2005–07. They are not able to finance the public service obligation they impose on their railways. It seems that the European funds (cohesion, FEDER etc) could contribute but these countries cannot offer a sufficient number of valuable rail projects. The UIP had this experience in Poland in case of an information project for rail freight having a European importance.

CONCLUSION

The recast of the First Railway Package can make an important contribution in eliminating technical, administrative and organisational barriers. It is a vital step for the creation of a single EU transport market.

The practical experience of the sector confronted daily with the imperfections and needs of rail freight should be considered in this framework as indispensable.

9 February 2009

Memorandum by the Ministry of Transport, Slovakia

1. We believe that it is not enough to recast only the First Railway Package. Directive 91/440/EEC should also be amended.
2. We believe that the recast Package should not apply to bodies which are both railway undertakings and infrastructure managers where their operations do not include passenger services or cross-border infrastructure.
3. The provisions of the First Railway Package should only apply to infrastructure managers and railway undertakings that are owned by the state or other public authority or who operate due to public service obligation contracts with the state or other public authority.
4. We disagree with Article 5 of Directive 2001/14. We do not believe that Member States should be required to agree multi-annual contracts with their infrastructure managers. We believe governments or other public authorities must be free to decide how long contracts with infrastructure managers are.
5. The Third Railway Package must be implemented immediately so that passenger services are not limited or restricted.
6. We believe that the recast of the First Railway Package must include provisions to ensure competition in the leasing of wagons and in other rail-related services. We believe that this is crucial to driving the market forward.

27 March 2009

Memorandum by Mr J H Rees

I am a retired official of the European Commission. During my career at the Commission I held various posts including head of division for land transport policy, head of the railway policy unit. My evidence is submitted in a personal capacity.

Taking the questions in the order listed in the call.

(a) Whether the provisions on the separation of infrastructure management and train operations are sufficient; whether they should be amended or whether they should be replaced with a requirement for full ownership unbundling?

The provisions need to be reviewed as they do not provide a sufficient basis to ensure the efficient entry of new operators. Given that European railways are fundamentally passenger railways, unlike in the USA, I cannot see a realistic economic case for freight operators controlling “their” infrastructure. Furthermore, the economics of passenger operation do not allow for a fully commercial operation of railway infrastructure (perhaps with the exception of certain high speed routes). In this situation the ownership of railway infrastructure by the State concerned is inevitable. Currently many State railways effectively control the operation of the national rail infrastructure. This leads almost inevitably to problems with new entrants and path allocation. Even accepting that there can be problems with creating a separate state entity for rail infrastructure I favour complete ownership unbundling. However, such a process should ensure that the infrastructure body is made clearly responsible to its users and does not become too focussed on internal issues.

(b) *Whether the current provisions are adequate regarding the staffing and independence of regulators and whether statutory independence from government is desirable?*

Statutory independence appears essential if the regulators are to be effective. It should be possible for the Commission to monitor the staffing etc of regulators and develop “indicators” relating their “resources” to rail activity and progress.

(c) *Whether there remain barriers to entry due to factors such as safety certification requirements, and if so how these should be addressed?*

There have been well documented examples of problems in certification etc. This is perhaps not surprising considering the traditional isolation of railways companies and indeed differences exist in other similar areas eg electrical power transmission. However, the Railway Agency appears to be making good progress in these areas and the results of its efforts could be awaited before deciding whether further legislative action is needed.

(d) *Whether the current requirements regarding the setting of infrastructure charges are adequate, and if not how they should be amended?*

The principle of marginal cost pricing for freight seems justified on the basis that much of the European rail system is operated for passenger traffic which determines safety standards etc. However, the Directive 2001/14 does allow the Member States considerable discretion and this has resulted in wide variations in access charges. There is a provision in the directive for charges to include external costs but this is not to be applied as long as road transport infrastructure charges do not include external costs. There is a proposed revision of the so called “Eurovignette” directive² currently under discussion which would for the first time levy external costs on road freight transport. The proposed revision of the “Eurovignette” directive includes maximum charges (or “caps”) such an approach could also be applied to the railways to ensure that there is more uniformity between national charges.

(e) *Whether the existing provisions regarding allocation of capacity both on tracks and at terminals are adequate and if not how they should be amended?*

The provisions seem to be broadly satisfactory although there may be a need for more independence for the allocation bodies. The real problem is the shortage of capacity in general which are due to under-investment in the rail system and the growth of regional passenger services. There appears a question mark regarding the most efficient use of infrastructure capacity and the Commissions recent proposal regarding the creation of European rail freight network should help in this respect.³

(f) *How a recast First Railway Package should relate to other ED freight transport policies?*

The overall objective for ED policy should be the creation of a sustainable European freight system that meets its full internal and external costs. As a broad generalisation the railways freight activities are generally considered to meet their external costs but to involve considerable direct costs (in France the SNCF accounts show losses on freight traffic of up to 400 million €). By contrast road haulage is profitable but does not meet its external costs. From this standpoint it could be concluded that freight transport is too cheap. It is difficult to answer the question what is the “right” level of rail freight. However, it is clear that if rail freight services are operated efficiently they can compete with road haulage on long distances and for heavy traffic flows. However, it is likely that much of the long distance bulk freight suitable for rail is already carried by rail. The challenge is how to attract freight to the railways that does not justify complete trains. In the UK little domestic non-bulk freight is now carried by rail: containers are carried from ports but there are only a small number of domestic non-bulk movements. In Europe it is estimated that 50% of rail freight is less than train load. There is a question mark if these flows can be retained let alone increased if all freight is to cover its costs. The entry of new operators could even complicate the situation and alone is not a simple elixir. To date very few new entrants have shown any interest in the less than train load market. It does not seem economic to transfer the

² COM 2008 436 final: on the charging of heavy goods vehicles for the use of certain infrastructure.

³ COM 2008 0852 final: Proposal for a Regulation of the EP and the Council for a European rail network for competitive freight.

substantial remaining “wagon load” movements to containers. This question needs to be addressed in relation to the objective of increasing rail freight. The railways can be competitive even over middle distance (200–300kms) if freight can be moved in long heavy trains that link a small number of strategic locations. The question is how a number of operators could cooperate to provide a comprehensive network of services? There are examples of international corridors⁴ which show that operators can work together (although they are all national operators) If a viable European network for less than train load movement cannot be created it may be difficult for the railways to maintain even their current freight traffic levels.

23 January 2009

Memorandum by Swiss Rail Traffic

Swiss Rail Traffic AG is a rail operator in Switzerland. We answer this inquiry based on our experience in Switzerland.

We first developed own issues (Nb 1–3), than address the questions asked (Nb a–f).

1. HARMONIZE AND SIMPLIFY HOMOLOGATION

We are currently developing a new small electric locomotive made to operate under 15 and 25 kV. The locomotive is based on components already in service in many European countries.

For a few units, the price of a locomotive is close to 2 M€, including expensive Swiss signaling system and first homologation in Switzerland. We got following information for homologation in the neighbor countries, knowing that Switzerland signed a cross-acceptance agreement with them.

- In Germany, plan roughly 1 M€ and 1 year.
- Don’t dream of homologation in Austria, because of fire requirement.
- We didn’t get any clue about France.

Thus we strongly urge to harmonize and simplify homologation.

Harmonization without simplification might simply kill the rail industry: than nobody would dare to make any new development, the cost of homologation turning it uncompetitive.

It is always possible to increase safety requirement, but this might kill the system. We pledge to not increase safety requirement on railways so long the same level is not achieved on the road.

2. HARMONIZE AND SIMPLIFY OPERATING RULES

Each country has his own operating rules, sometimes based on an other philosophy. Employees has to be trained on different systems. Operating international rail services is thus complicated and expensive.

The language is also a barrier. We suggest to introduce an easy to start with common language in parallel to local languages, like English.

Thus we strongly urge to harmonize and simplify operating rules. We suggest to declare English as the official common language for railway operations, in parallel to local languages.

3. ACCESS FEE FOR LIGHT TRAINS

One reason for rail is not competitive on short distances is the too low productivity of railcars, usually around one load every second or third day. One way to address this issue is to operate dedicated, short, quick trains.

The fee to access infrastructure is in some countries the same till about 1,000 tons. This limits short distance shipment to commodities like sand or iron ore, but excludes light consumer goods.

⁴ An example is—Sibelit, the corridor from Antwerp to Switzerland, which started on 1 April 2006 and is a co-operation of B-Cargo (Belgium) with SNCF (France) and CFL (Luxemburg).

On the passenger business at short to medium distances, frequent small trains were the edge to gain market share. Why should a similar trend be excluded on freight railways?

Thus we pledge that infrastructure access fee do not penalize light freight trains.

(a) *Separation of infrastructure*

We consider that SBB, BLS and SOB infrastructures show enough independence of their rail operating parent companies. We did not experience any kind of obstruction.

We experienced delay by DB-Infra for granting us access to the short sections it is managing on Swiss territory.

We notice that in some situations SBB Cargo enjoy advantages because it belongs to the same parent company that SBB-Infra.

If we want a fair marketplace, a total separation between infrastructure and rail operation is a prerequisite.

On the other hand, railroading under one single system might be more efficient, because of fewer interfaces, especially by independent short lines.

Thus a rule with exception might be adequate in this particular situation:

- Total separation of rail operation and infrastructure management.
- Independent short lines might obtain a waiver. This waiver has a limited time value (as example five years), but can be renewed.

Independent means for example that no rail operator owns directly or indirectly more than 10% of the stocks on the infrastructure manager, nor is member of the board.

Short means less than 100 km (one may argue for short lines till 500 km).

(b) *Regulator*

We experienced goodwill at Swiss Department of Transportation.

(c) *Safety certificate*

Safety certificate for Switzerland is not a burden.

(d) *Access fee*

Usually freight train's slots are the leftovers of passenger services, but too often fees do not reflect this situation.

(e) *Allocation of capacity*

Even the Swiss network is intensively used, we hadn't to complain because of lack of capacity.

(f) *Recast rail package*

The regulations surrounding railways should help rail services to be competitive through suppression of bureaucratic burden, harmonization of regulations, simplifying requirements and reducing costs.

6 February 2009

Memorandum by Mr Andrew Woodcock

A. *Whether the provisions on the separation of infrastructure management and train operations are sufficient; whether they should be amended or whether they should be replaced with a requirement for full ownership unbundling*

A1. Member states have each adopted slightly different models to implement the directives, reflecting the different railway, economic and political organisation in each state. The industry is capable of continuing to develop with this situation, subject to there being appropriate independent regulatory arrangements in place to prevent discrimination in favour of incumbent operators.

B. Whether the current provisions are adequate regarding the staffing and independence of regulators and whether statutory independence from government is desirable

B1. The demands of the freight sector are for speedy decisions; the staffing of regulatory offices relates to the turn round times for submissions, which will depend on the workload and complexity of the issues the regulator has been asked to consider. The EU may wish to ensure that regulatory bodies work in a matter which is conducive to support the commercial activities of the rail freight sector.

B2. The EU may wish to be satisfied that the regulatory bodies which have been established in member states are working in an effective manner to ensure fair and appropriate regulation.

C. Whether there remains barriers to entry due to factors such as safety certification requirements and if so how should these be addressed

C1. Safety Certification *per se* is not in itself a barrier, the progress over the last five years in clarifying the regulatory and approvals process, has given clarity to any potential new operators. The requirement to list and publish National Notified Standards has opened up to all potential railway undertakings a previously limited area of information.

C2. It is anticipated that this will become progressively simpler as more and more of the European rail network becomes interoperable, however this will take a considerable time before the whole network is interoperable.

C3. There remain economic barriers to entry, in that the start up cost of a freight operation tends to favour larger enterprises. This may mean that the market cannot reach its full potential as smaller operators are unable to raise the necessary funding to obtain the equipment in terms of locomotives, wagons, personnel and obtaining all the necessary approvals to operate.

C4. However the increase in the number of railway undertakings being granted operating licences since the start of the liberalisation process is evidence that the current arrangements have allowed new entrants to develop and compete in the European rail freight market.

D. Whether the current requirements regarding the setting of infrastructure charges are adequate, and if not how should they be amended

D1. The current legislation is adequate to allow levels of charges for using infrastructure to be established to be set, however each member state uses a different methodology which results in very different charging regimes being established.

D2. For operators of international trains or for operators active in more than one country, having a different method of calculating the charges and then verifying that the actual fees charged for the trains which have operated, adds a level of unnecessary complexity to the business process.

D3. In this particular context the UK has adopted a complex methodology based on wagon type and commodity carried but this method does have the advantage of ensuring that rolling stock which cause less wear on the infrastructure is charged less.

D4. The EU may wish to satisfy itself that the track access charging regimes operated by infrastructure managers only reflect the direct cost of operating freight trains and that any possible loopholes have been closed.

E. Whether the provisions regarding allocation of capacity both on tracks and at terminals are adequate and if not how they should be amended

E1. The process for allocation of capacity along the lines covered by the EU directives in most member states appears to be adequate for the current levels of traffic. If the levels of traffic grow in line with the EU projections, this will bring increased pressure on certain key routes resulting in a limitation on the number of freight trains which can be run.

E2. Each of the member states has various sections of line with recognised capacity constraints; the EU needs to ensure that the requirements for allocating capacity where there is restricted capacity available are aligned with the criteria set by the EU and not following local/national requirements.

E3. In addition member states need to have processes in place to anticipate future infrastructure requirements to meet the anticipated traffic growth on a route specific basis. On lines where demand is likely to exceed capacity, the Government's of the member states need to have a process in place to direct the infrastructure manager to develop plans to increase capacity.

E4. There remains a concern in some member states that significant sections of railway infrastructure used for freight services are owned and operated by organisations other than the national infrastructure manager. These secondary routes/lines do not necessarily benefit from the same legislative protection that the main lines do, yet they are equally as important to freight customers, providing a link between the loading point and the main line.

E5. A review of the First Railway Package may wish to consider whether users of these sections of line have sufficient protection to safeguard access or whether it needs to be supplemented by an extension of the regulations applicable to main line infrastructure.

E6. Open access terminals need to have the benefit of a regulatory regime to ensure that the terminal operator operates the terminal in a fair and non-discriminatory manner.

F. How a recast First Railway Package should relate to other EU freight transport policies

F1. The railways are only part of the overall transport package available for the movement of goods and people both internally within the EU and externally to and from neighbouring countries. The Railway Packages need to dovetail into the overall transport policy, such that rail as a mode is placed on the same economic footing as other modes.

F2. Initiatives by the EU to refocus the TEN-T routes may mean that management of freight on these routes needs a greater coordination than has been possible with a national system of capacity allocation.

8 February 2009