House of Commons
Transport Committee

The Rail Regulator's Last Consultations

Thirteenth Report of Session 2003-04

Report, together with formal minutes

Ordered by The House of Commons
to be printed 30 June 2004
The Transport Committee

The Transport Committee is appointed by the House of Commons to examine the expenditure, administration, and policy of the Department of Transport and its associated public bodies.

Current membership

Mrs Gwyneth Dunwoody MP (Labour, Crewe) (Chairman)
Mr Jeffrey M Donaldson MP (Democratic Unionist, Lagan Valley)
Mr Brian H. Donohoe MP (Labour, Cunninghame South)
Clive Efford MP (Labour, Eltham)
Mrs Louise Ellman MP (Labour/Co-operative, Liverpool Riverside)
Mr Ian Lucas MP (Labour, Wrexham)
Miss Anne McIntosh MP (Conservative, Vale of York)
Mr Paul Marsden MP (Liberal Democrat, Shrewsbury and Atcham)
Mr John Randall MP (Conservative, Uxbridge)
Mr George Stevenson MP (Labour, Stoke-on-Trent South)
Mr Graham Stringer MP (Labour, Manchester Blackley)

Powers

The committee is one of the departmental select committees, the powers of which are set out in House of Commons Standing Orders, principally in SO No 152. These are available on the Internet via www.parliament.uk.

Publications

The Reports and evidence of the Committee are published by The Stationery Office by Order of the House. All publications of the Committee (including press notices) are on the Internet at www.parliament.uk/parliamentary_committees/transport.cfm. A list of Reports of the Committee in the present Parliament is at the back of this volume.

Committee staff

The current staff of the Committee are Eve Samson (Clerk), David Bates (Second Clerk), Clare Maltby (Committee Specialist), Philippa Carling (Inquiry Manager), Miss Frances Allingham (Committee Assistant), Diane Sutherland (Secretary), and Henry Ayi-Hyde (Senior Office Clerk)

All correspondence should be addressed to the Clerk of the Transport Committee, House of Commons, 7 Millbank, London SW1P 3JA. The telephone number for general enquiries is 020 7219 6263; the Committee’s email address is transcom@parliament.uk
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The Rail Regulator’s last consultations

1. On 3 June 2004 the Rail Regulator issued emerging conclusions on proposals for reform of the network code. He invited comments on Phase 1 of changes to the code, which were “mainly of a clarificatory and procedural nature, to make the machinery easier to understand and work better.” The closing date for receipt of responses was 24 June 2004, and the Regulator announced that “subject to the views received, I expect to publish later this month the notice incorporating the proposals for change into the network code, with them taking effect from January 2005.”

2. On 7 June 2004, the Regulator issued proposals for reform of the rail industry dispute resolution regime. The deadline for comments was 25 June. Once again, he indicated that it was his intention to publish the notice modifying the rules by the end of the month.

3. The Government’s Code of Practice on Consultations states that 12 weeks should normally be allowed for consultations. We wrote to the Regulator on 14 June asking why he had departed from the standard, and why the proposals could not be left to the Office of Rail Regulation to take forward when it assumes the Regulator’s functions on 5 July 2004. The correspondence is printed with this report. His response, dated 22 June, was that the changes to the Network Code had been widely discussed and the proposals for reform of the Access Disputes Resolution Procedure were justified by the assertion that the industry itself had not brought forward its own proposals for reform in 15 months since he had first expressed concern.

4. The Regulator’s reason for pressing ahead at such unusual speed with these reforms now rather than leaving the Office of Rail Regulation to implement them is extraordinary:

   Finally, you ask what is to prevent the new ORR taking these proposals … forward. The answer is not that there is an impediment, but there is no certainty that it will. The policy objectives of the new ORR may be completely different. It may have quite separate priorities and care little for these reforms. They may be allowed to drop or they could be proceeded with, with vigour. I simply do not know what is likely to happen. One effect – indeed, in my view, the principal purpose – of the creation of a regulatory board to take the place of the single-regulator model is to alter fundamentally the dynamics of decision-making in the regulator authority. I cannot predict how that altered dynamic will affect these reforms, reforms which I believe to be important and necessary to the proper and efficient functioning of the railway industry.

5. Mr Winsor clearly believes that his assessment of the needs of the industry should be acted on without delay to avoid the possibility that his successors will not share his views.

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2 Office of the Rail Regulator, Press Release: Next steps in reform of the rail industry network code, 03 June 2004, ORR/18/04
3 Office of the Rail Regulator, Press Release, Rail Regulator publishes proposals to improve railway industry dispute resolution …, 07 June 2004, ORR/19/04
The Regulator has been eager to classify any challenge to his role as “unconstitutional”. The Office of Rail Regulation was established by Act of Parliament to assume the functions of the Regulator. The new ORR has a right to construct its own policy. In similar cases when regulatory powers have passed from one regulator to another, it has been left for the successor body to take forward any unfinished business. If there is significant opposition to the reforms the ORR should be left to decide on the correct course of action. It may well be that the proposed reforms to the Network Code have the support of the rail industry; in that case, we would not wish to hinder them. However, the Regulator should base his decision on whether or not the reforms are necessary on the views expressed by the industry, not on his single personal view of what would be appropriate.

6. In the time available it was obviously impossible for us to look at the proposals in any detail. However, we were struck by the provision in the proposals for reform of the rail industry dispute resolution regime that tribunals deciding on access risk disputes should defer to Counsel to the Access Dispute Resolution Committee. Under the Regulator’s proposals, Rule A5.11.2 of the Rules would read:

On any issue identified by Counsel to the Committee as a legal issue, the tribunal in reaching its determination shall seek and abide by the opinion of Counsel to the Committee. [italics added]

We sought legal advice, and we have been advised that such a power is unprecedented. We appreciate that the Regulator is concerned that previous cases may have been decided without proper regard for the law, but we consider that the appropriate remedy for this would be a requirement that the Tribunal have regard to its legal advice. There may well be cases in which Counsel to the Committee has a different opinion from that of the parties making a case before the Tribunal, who may also have been advised by Counsel; we see no reason why the Tribunal’s discretion should be fettered completely, as long as there is an adequate appeals process. We have written to the Regulator on this matter, but, given the truncated period for consultation, have not yet received any reply. We consider that when, as in this case, proposals appear to hand unprecedented power to an employee of the Access Disputes Resolution Committee there is need for a proper consultation, however widely the Regulator’s views have been made known beforehand.

7. In our recent Report on “The Future of the Railway” we cited the Interim Review of track access charges as “not only an example of the highhanded manner in which the Regulator approaches his role; it is an example of the deep failure in the structure of rail governance which has allowed the Regulator to act as a “Rail Czar”, something that was never intended and which must be corrected.” We trust that the new regulatory board will carry out its functions in a less highhanded manner, and will allow a proper period for consultation on any proposals that it makes.

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4 See, for example, the Sir Robert Reid Memorial Lecture, 10 February 2004; the Report of the Rail Regulator, 2003-04, Introduction, para 12.
5 See Appendix C
APPENDIX A

Letter from the Chairman of the Committee to Tom Winsor Esq, Rail Regulator

In the past fortnight you have published two consultation documents, one on reform of the network code, and another on reform of the rail industry dispute resolution regime. The normal practice for government consultations is to allow a 12 week period for responses; these papers have deadlines of 24th and 25th of June.

I would be extremely grateful if you could explain why the consultation period has been so truncated, and what, if anything, would prevent the Office of Rail Regulation carrying forward your work in a less hurried fashion when it comes into being.

I am copying this letter to the Secretary of State.

Hon Gwyneth Dunwoody MP
Chairman

14 June 2004
APPENDIX B

Letter from the Rail Regulator to the Chairman of the Committee

Consultations


2. The present consultations on the reform of the network code and certain aspects of the railway industry’s dispute resolution arrangements are the final phases of a much longer process of examination and analysis of the industry’s problems in these two respects and the discussion of what should be done to put things right. These are processes in which, over many months, the railway industry has been extensively engaged.

Network code reform

3. As you will know from the consultation document, the reform of the network code is taking place in two phases. The first phase deals mainly with definitional, clarificatory, procedural and information improvements. It follows the recent reforms to Parts L (local accountability) and J (changes to access rights), which were substantive and material changes. The second phase of reform - to be led by the railway industry and not the regulatory authority - will deal with the economic architecture of the code. That could lead to major changes to the balance of risks and obligations of train operators and Network Rail. It is a phase which begins on 5 July 2004.

4. These reforms of the network code have been discussed at great length and over a long time. They were subject to extensive consultation with the industry before the present - final stage of consultation on Phase 1 began. Over the last six months we have established and worked with industry working groups of interested parties and experts, to develop the present proposals. This has been a very valuable and constructive process. What is being done now has, so far, also achieved a very large measure of industry support. The industry is, to a considerable extent, keen to bank the first phase of changes, to establish important improvements now and build up a momentum of real engagement, ideas and constructive debate for the major reforms of Phase 2. It is taking ownership of a code which, for too long, was neglected and disregarded. It is now realising and is determined to put to good use the code’s power and value as the central commercial instrument for the railway industry in matters of timetable and access rights development, changes to the network itself and the means whereby new rolling stock is brought onto the network, the flow of information in both directions (between infrastructure provider and infrastructure user), and the proper and robust handling of operational disruption. After five years of encouraging the railway industry to take the code seriously, I am glad that this is now happening.
5. And so I do not believe that the consultation in this respect is unduly short. It is the last part of a much longer, significantly engaged process with the railway industry.

**ADRR reform**

6. In relation to the issue of the reform of the Access Dispute Resolution Committee, this too is far from a new subject to the industry. I explained in detail what is wrong with the competence and operation of the Committee in certain material respects in Network Rail Infrastructure Limited -v- Eurostar (UK) Limited [2003] RR 1. The decision was published on 6 March 2003. Extracts from that decision are contained in paragraphs 4.29 - 4.31 and 4.45 of the present consultation document. Despite these quite severe criticisms, in the 15 months since that decision was published the industry has not proposed any reforms to the Access Dispute Resolution Rules to address them. In the light of that fact, I am entitled to conclude that it will not do so unless ORR takes the lead, which is what is now happening.

7. I discussed my criticisms and the need for reforms with ADRC members when it was contemplating the appointment of a replacement for the chairman of the Committee, Mr Bryan Driver, over two years ago. At that time, aware of my criticisms, ADRC members asked me what qualities the new chairman of the ADRC should have and I said that as a minimum he or she should be legally qualified. I explained to them then that was because of the poor quality of legal reasoning when legal issues, usually questions of the interpretation of contracts, was concerned, or the absence of any reasoning.

8. Subsequently, I discussed my criticisms in this respect with George Renwick (RTDR chairman) and Sir Anthony Holland (by then appointed ADRC chairman), and told them of my view that there was a need for reform to make good this defect in the ADRC’s competence. In addition, over many months I have frequently raised my criticisms and the need for reform at G6, on which all relevant industry participants are represented, both in the context of the legal competence of ADRC and (latterly) the reform of appeals to the new regulatory board. I have also discussed my criticisms on at least two or three occasions with the Railway Industry Association.

9. As is apparent from the above, the issues have been repeatedly publicly stated over a long time. What is now being discussed is how to tackle the problems.

10. One consequence of starting this process - under Condition C8 of the network code - is that the industry now has to address the issues raised. That is welcome, although (as I have explained above) long overdue. It is also inevitably true that these proposed reforms are not perfect. Doubtless they can be improved. But if they are not proceeded with now, in view of its record in this respect in the past there is, in my view, a material risk that the industry will let the matter drop after 4 July 2004 - or not proceed with the necessary vigour, whereupon the momentum will peter out - and so deny itself and the public interest the benefits which reform will bring about. Subject to
the results of the present consultation, I believe we must press on with reform now. However, I have discussed with Network Rail, ATOC and the Chairman of the ADRC a modification of these proposals, or rather the commencement arrangements for them. My proposed modification may allay the concerns of those who, even now, after ten years of inactivity in this respect, want more time.

11. Under Condition C8 of the network code, a regulatory modification of the Access Dispute Resolution Rules - the constitution of the ADRC - cannot have effect earlier than 180 days after the Regulator’s modification notice. So, these reforms, if I proceed with them, could not come into effect before January 2005. I have now proposed to the industry a pre-emptive provision for the industry to come up with a better set of reforms. It would provide that the June 2004 reforms - if I make them - will come into force in January 2005 unless, before then, the industry has enacted better reforms. It gives the industry the ability to put in place improved reforms, as long as it gets on with the job. It is of course also the case that the Access Dispute Resolution Rules, after reform (whether by ORR or the industry), are not set in stone for ever. They can be revised and improved over time, and they should be. But it appears now to be accepted by very many industry players that the stasis and neglect of the industry’s common arrangements - whether in the network code or in this areas of dispute resolution - should be brought to an end.

New ORR

12. Finally, you ask what is to prevent the new ORR. taking these proposals - both in relation to the network code and the ADRR - forward. The answer is not that there is an impediment, but that there is no certainty that it will. The policy objectives of the new ORR may be completely different. It may have quite separate priorities and care little for these reforms. They may be allowed to drop, or they could be proceeded with, with vigour. I simply do not know what is likely to happen. One effect - indeed, in my view, the principal purpose - of the creation of a regulatory board to take the place of the single-regulator model is to alter fundamentally the dynamics of decision-making in the regulatory authority. I cannot predict how that altered dynamic will affect these reforms, reforms which I believe to be important and necessary for the proper and efficient functioning of the railway industry.

13. If you would like to discuss any aspect of these matters, I shall of course be happy to do so at any time.

Tom Winsor
Rail Regulator

22 June 2004
APPENDIX C

Note on Reform of the Rail Industry Dispute Resolution Regime

The Scrutiny Unit was asked to examine a number of specific points raised in relation to the Consultation Document, Reform of the Rail Industry Resolution Regime (June 2004)

Does the Tribunals and Inquiries Act 1992 apply to the Access Dispute Resolution Committee (ADRC)?

The Tribunals and Inquiries Act 1992 provides the statutory basis for a Council of Tribunals. Its functions are specified in section 1(1) of the Act and include:

- to keep under review the constitution and working of tribunals specified in Schedule 1 to the Act, and from time to time, to report on their constitution and working;
- to consider and report on such particular matters as may be referred to it under the Act with respect to tribunals, other than courts of law, whether or not specified in Schedule 1;
- to consider and report on such matters as may be referred to the Council under the Act, or as it may determine to be of special importance, with respect to administrative procedures involving, or which may involve, the holding by or on behalf of a Minister of a statutory inquiry, or any such procedure.

The ADRC is not specified in Schedule 1 and, accordingly, the Council of Tribunals is not required to review or report on the Committee unless a specific referral to do so has been made. In relation to England and Wales, such a reference must be made by the Lord Chancellor.

Analysis of the role of Counsel to the Access Dispute Resolution Committee

Under the current Access Dispute Resolution Rules (ADRR), which form an annex to the network code, the ADRC is stated to consist of a Chairman, the Committee Secretary and eight elected members. The Chairman is not a member of the ADRC, although he chairs its meetings; he is appointed and removed by unanimous decision of the ADRC.

The Chairman of the ADRC is entitled to appoint a clerk who may, but need not be, a lawyer. The consultation document, Reform of the Rail Industry Dispute Resolution Regime provides:

7 See para 4.4 of the Consultation document
'Although the ADRR are silent on the role to be filled by such a clerk, at the time of establishment of the ADRC and the ADRR in 1994, it was envisaged that the clerk would be a lawyer who would attend ADRC (and sub-committee) hearings and guide the tribunal on matters of law and procedure, in very much the same way as the legally qualified clerk to a lay magistrate.'

Concern was expressed by the Rail regulator that:

'the ADRC Chairman has over the years made insufficient use of the his entitlement…. to obtain legal advice. The ADRC has acknowledged that on occasion it has acted beyond jurisdiction and that it should have the benefit of clear guidance on points of law.'

The proposals for reform include the creation of a new office of Counsel to the Committee (legal officer). He/she will be appointed by the ADRC and be independent of all industry parties. The responsibilities designated to Counsel of the Committee will be to:

(a) work with parties to a dispute in advance of any hearing to settle any disputes as to jurisdiction and identify the issues of fact and law which the tribunal will need to consider;
(b) direct the Clerk of the Committee in the administration of cases;
(c) attend any hearing held by a tribunal;
(d) be entitled to put questions to the parties and, if oral evidence is taken, examine and cross-examine witnesses;
(e) advise the tribunal on points of law; and
(f) draft the written record of the tribunal’s determination on the basis of the tribunal’s deliberations, which must be approved by the tribunal before being issued to the parties.

Proposal 26 of the reforms provides:

'A5.11.2 Tribunal to defer to Counsel to the Committee on points of law

On any issue identified by Counsel to the Committee as a legal issue, the tribunal in reaching its determination shall seek and abide by the opinion of Counsel to the Committee.'
The duty on Counsel to the Committee duty to advise on points of law is analogous to the role of the justices’ clerk. The functions of a justices’ clerk are provided in section 2811 of the Courts Act 2003 and include:

(4) ..... giving advice to any or all of the justices of the peace to whom he is clerk about matters of law (including procedure and practice) on questions arising in connection with the discharge of their functions, including questions arising when the clerk is not personally attending on them.

(5) .... at any time when he thinks he should do so, bringing to the attention of any or all of the justices of the peace to whom he is clerk any point of law (including procedure and practice) that is or may be involved in any question so arising.

Unlike the Rail Regulator’s proposals for the ADRC, there does not appear to be an obligation on the justices to abide by the opinion of the justices’ clerk on a question of law. However, a failure by a bench of lay magistrates to follow the correct advice of a legally qualified justices’ clerk on a matter of law would provide grounds for appeal by way of case stated. After the hearing and decision of a case by magistrates, a party may require a case to be stated for the opinion of the High Court on the ground that it is wrong in law or in excess of jurisdiction [s 111(1), Magistrates’ Courts Act 1980]

The Human Rights Act 1998 does not prescribe the form a trial or hearing should take, but article 6 does provide that proceedings as a whole should be fair and that the tribunal should be independent and impartial. The imposition of a duty on a decision-making tribunal, such as the ADRC, to follow legal advice would raise serious questions as to the independence of that tribunal. Imposing an obligation on the ADRC to have regard to legal advice would be a sensible compromise between, on the one hand, the present system of having the option to seek legal advice and on the other, the proposals to be bound by any such advice. Such an approach would ensure that the ADRC had access to guidance on questions of law and would promote the independent determination of disputes.

**Appeal structure from a decision of the ADRC.**

Under the current structure of the Railways Act 1993, the Rail Regulator hears appeals for certain classes of disputes from decisions of the ADRC and its sub-committees. Appeals

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11 This section is not yet in force

12 After the hearing and decision of a case by magistrates, a party may require a case to be stated for the opinion of the High Court on the ground that it is wrong in law or in excess of jurisdiction [s 111(1), Magistrates’ Courts Act 1980]
may raise issues of regulatory policy or questions of law and are heard on the merits of the matter in dispute. A decision of the Regulator is subject to judicial review by the High Court. Under the Railways and Transport Safety Act 2003, upon abolition of the role of Rail Regulator, his functions will be transferred to the Office of Rail Regulation (ORR).\textsuperscript{13}

Under the 2003 Act the ORR will have statutory authority to establish committees and to delegate functions to such committees. An Appellate Committee will hear appeals from the relevant ADRC tribunals which are currently heard by the regulator. The Appellate Committee will have the right to appoint a legal officer to act as an adviser when hearing appeals.

Manjit Gheera
Scrutiny Unit

21 June 2004

\textsuperscript{13} s 16, Rail and Transport Services Act 2003
APPENDIX D

Letter from the Chairman of the Committee to Tom Winsor Esq, Rail Regulator

REFORM OF THE RAIL INDUSTRY DISPUTE RESOLUTION REGIME

In the limited time available to respond to your proposals for reform, the Transport Committee’s attention was drawn to Proposal 26:

‘A5.11.2 Tribunal to defer to Counsel to the Committee on points of law

On any issue identified by Counsel to the Committee as a legal issue, the tribunal in reaching its determination shall seek and abide by the opinion of Counsel to the Committee’.

The Committee were sufficiently concerned by this particular proposal to seek the advice of our lawyers, who concluded that the imposition of a legal duty on a decision-maker to follow legal advice was unprecedented. An analogy was drawn between the role of Counsel to the Committee and that of a justices’ clerk. Both positions are responsible for advising their respective tribunals on matters of law arising in connection with the discharge of their functions. However, the lay justices are not bound by the opinion of the legally qualified justices’ clerk. Under Proposal 26 of the Rail Regulator’s reforms, the tribunal would be obliged to apply the legal advice given to it, with the result that Counsel to the Committee would effectively be determining the dispute. Such a method of dispute resolution would raise serious questions as to the independence of the tribunal. Furthermore, Proposal 26 fails to foresee cases where one or both of the parties’ legal representatives do not concur with the advice of Counsel. Accordingly, the proposals do not provide any guidance as to the approach to be taken in such a situation.

The legal advice obtained by the Transport Committee raises serious concerns about the Rail Regulator’s proposals. We would be grateful if you would explain the policy reasons behind the proposals to provide Counsel to the Committee with such extensive and unprecedented powers.

Hon Mrs Gwyneth Dunwoody MP
Chairman

23 June 2004
The following Declarations of Interest were made:

Mrs Gwyneth Dunwoody: Member of the Associated Society of Locomotive Engineers and Fireman

Mr Brian H. Donohoe, Mrs Louise Ellman and Mr George Stevenson: Members of Transport and General Workers’ Union

Miss Anne McIntosh: Holder of shares in First Group and Eurotunnel

Wednesday 30 June 2004

Members present:
Mrs Gwyneth Dunwoody, in the Chair
Mr Brian H Donohoe
Mrs Louise Ellman
Miss Anne McIntosh
Mr George Stevenson

The Committee deliberated.

Draft Report (The Rail Regulator’s Last Consultations), proposed by the Chairman, brought up and read.

Ordered, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 7 read and agreed to.

Resolved, That the Report be the Thirteenth Report of the Committee to the House.

Ordered, That the Chairman do make the Report to the House.

Ordered That the provisions of Standing Order No. 134 (Select committees (reports)) be applied to the Report.

Ordered, That the following papers be appended to the Report.—(The Chairman.)

A. Letter from the Chairman to the Rail Regulator, dated 14 June
B. Letter from the Rail Regulator to the Chairman, dated 22 June
C. Paper by the Committee Office Scrutiny Unit, dated 21 June
D. Letter from the Chairman to the Rail Regulator, dated 23 June

Adjourned till Monday 5 July at 3.00pm
Reports from the Transport Committee since 2002

**Session 2003–04**

| First Report                  | Traffic Management Bill | HC 144 |
| Second Report                | The Departmental Annual Report | HC 249 |
| Third Report                 | The Regulation of Taxis and Private Hire Vehicle Services in the UK | HC 215-I |
| Fourth Report                | Transport Committee Annual Report 2002-03 | HC 317 |
| Fifth Report                 | The Office of Fair Trading’s Response to the Third Report of the Committee: The Regulation of Taxis and Private Hire Vehicle Services in the UK | HC 418 |
| Sixth Report                 | Disabled People’s Access to Transport | HC 439 |
| Seventh Report               | The Future of the Railway | HC 145-I |
| Eighth Report                | School Transport | HC 318-I |
| Ninth Report                 | Navigational Hazards and the Energy Bill | HC 555 |
| Tenth Report                 | The Vehicle Operating Services Agency and The Vehicle Certification Agency | HC 250 |
| Eleventh Report              | National Rail Enquiry Service | HC 580 |
| Twelfth Report               | British Transport Police | HC 488 |
| Thirteenth Report            | The Rail Regulator’s Last Consultations | HC 805 |

**Session 2002–03**

| First Report                  | Urban Charging Schemes | HC 390-I |
| Third Report                 | Jam Tomorrow?: The Multi Modal Study Investment Plans | HC 38-I |
| Fourth Report                | Railways in the North of England | HC 782-I |
| Fifth Report                 | Local Roads and Pathways | HC 407-I |
| Sixth Report: Aviation       | Aviation | HC 454-I |
| Seventh Report               | Overcrowding on Public Transport | HC 201-I |
| Eighth Report                | The Work of the Highways Agency | HC 453 |
| Ninth Report                 | Ports | HC 783-I |
| Second Special Report        | Government Response to the Committee’s Fourth Report, Railways in the North of England | HC 1212 |

**Session 2001-02**

| First Special Report         | The Attendance of a Minister from HM Treasury before the Transport, Local Government and The Regions Committee | HC 771 |