



HOUSE OF LORDS

European Union Committee

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10th Report of Session 2008–09

# **Recast of the First Rail Freight Package**

## **Volume I: Report**

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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

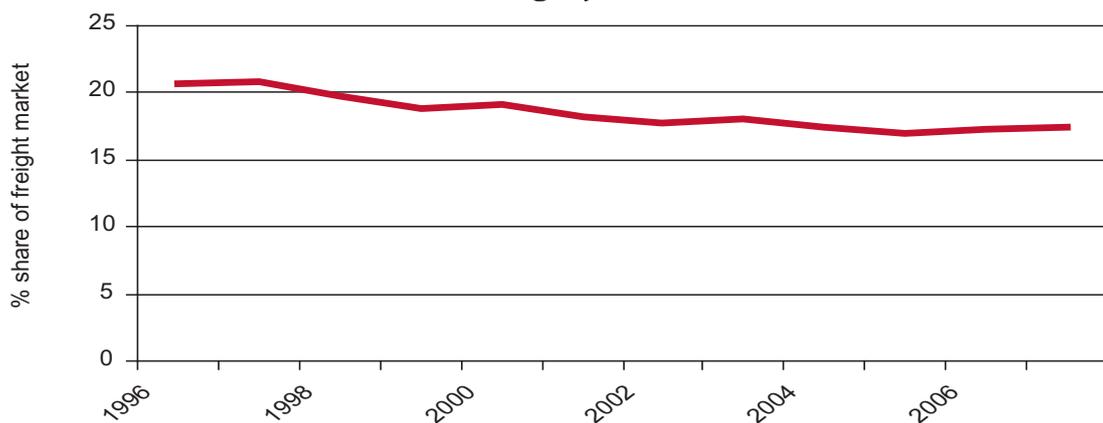
## CHAPTER 1: INTRODUCTION

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1. The European Commission published a white paper entitled “European transport policy for 2010: time to decide”<sup>1</sup> 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).

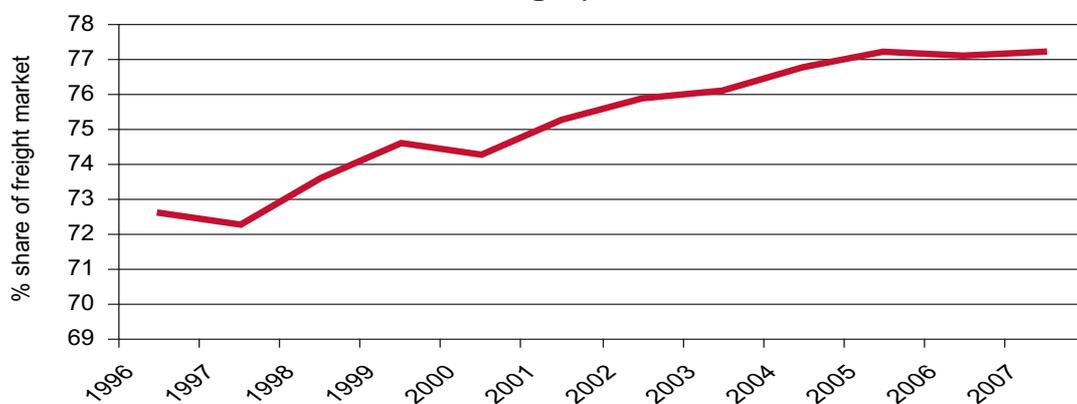
**FIGURE 1**

**Rail freight, EU-25<sup>2</sup>**



**FIGURE 2**

**Road freight, EU-25<sup>3</sup>**



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<sup>1</sup> COM(2008)370 final

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

<sup>3</sup> *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 report<sup>4</sup> 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 UK<sup>5</sup>. In its 2008 and 2009 Legislative and Work Programmes (LWP)<sup>6</sup>, the Commission committed itself to proposing a recast<sup>7</sup> 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”<sup>8</sup> 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*<sup>9</sup>.
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/EC<sup>10</sup>. We do not discuss passenger rail legislation.
7. We thank our Specialist Adviser, Professor Christopher Nash of the University of Leeds<sup>11</sup>, 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.**

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<sup>4</sup> COM(2006)189 final

<sup>5</sup> 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.

<sup>6</sup> COM(2007) 604 final and COM(2008) 712 final

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

<sup>8</sup> *Op cit*

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

<sup>10</sup> OJ L75 (15 March 2001) pp 29–46

<sup>11</sup> Professor Nash's declared interests are listed in Appendix 4.

## CHAPTER 2: LEGISLATIVE CONTEXT

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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)<sup>12</sup> 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)<sup>13</sup> and infrastructure capacity allocation and the charging of infrastructure fees (95/19/EC)<sup>14</sup>. 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/EC<sup>15</sup>, 2001/13/EC<sup>16</sup> and 2001/14/EC<sup>17</sup>. 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

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<sup>12</sup> OJ L237 (24 August 1991) pp 25–28

<sup>13</sup> OJ L143 (27 June 1995) pp 70–74

<sup>14</sup> OJ L143 (27 June 1995) pp 75–78

<sup>15</sup> OJ L75 (15 March 2001) pp 1–25

<sup>16</sup> OJ L75 (15 March 2001) pp 26–28

<sup>17</sup> *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 Package<sup>18</sup> 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 Package<sup>19</sup> 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 railways<sup>20</sup> (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 trains<sup>21</sup> (see Box 1). Also in 2008, the Commission adopted a “Greening Transport” package<sup>22</sup>. 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.

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<sup>18</sup> 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).

<sup>19</sup> 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).

<sup>20</sup> Malta and Cyprus do not have significant rail networks.

<sup>21</sup> COM(2008) 852 final

<sup>22</sup> 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

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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 manager<sup>23</sup>. 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

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<sup>23</sup> See RFF’s website: [http://www.rff.fr/pages/connaitre/sncf\\_rff.asp?lg=en](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 2007<sup>24</sup>, 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

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<sup>24</sup> *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

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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 Package<sup>25</sup>. This “curate’s egg”<sup>26</sup> (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*<sup>27</sup>, 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)<sup>28</sup>. 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

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<sup>25</sup> *Op cit*

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

<sup>27</sup> *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

<sup>28</sup> 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 freight<sup>29</sup> (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.

<sup>29</sup> 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

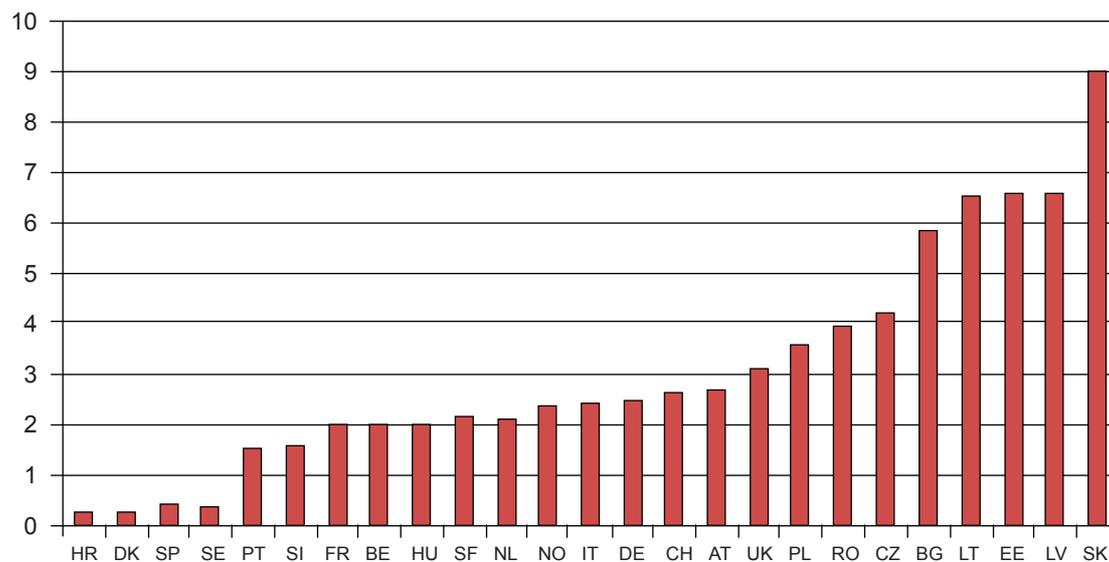
53. Most witnesses not only discussed the regulatory system and the relationships between infrastructure managers and railway undertakings, but also highlighted a number of barriers to new entrants and distortions in the market.

### 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”<sup>30</sup>. 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)<sup>31</sup>



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

<sup>30</sup> *Op Cit*

<sup>31</sup> 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”<sup>32</sup>.

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

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<sup>32</sup> 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 Directives<sup>33</sup> were aimed at

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<sup>33</sup> 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?

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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**

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### **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)**

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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

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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

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1. In its 2009 Legislative and Work Programme<sup>34</sup>, 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 freight<sup>35</sup>. 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.

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<sup>34</sup> COM(2008) 712 final

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

## **APPENDIX 4: SPECIALIST ADVISER'S INTERESTS**

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### **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**

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**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

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### 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)