

## **Access to rail freight sites - scope of our market study and provisional timetable**

**10 September 2010**

### **Summary**

1. The Office of Rail Regulation (ORR) is today starting a public study into access to rail freight sites in Great Britain.
2. In this terms of reference (ToR) document we explain why we are doing this, the key issues that we expect our study to consider, what the potential outcomes are, and our provisional timetable and process, including how third parties can register an interest in this study with us. Our deadline for registering interest is Friday 24 September 2010 although in the new year stakeholders will have an opportunity to respond to a written consultation.

### **Background**

3. Rail freight sites are key to the movement of goods by rail. Their uses include the loading or unloading of rail freight, the transshipment of freight between rail and other modes, storage, marshalling, and stabling.
4. Our decision to open a public study follows a research study that we undertook from mid-April to mid-July 2010, involving the scrutiny of information and intelligence that we held internally and preliminary interviews with industry stakeholders.
5. Our 2010-11 business plan commitment to carry out a review of access to rail freight sites was driven by a number of policy imperatives including:
  - our focus on the freight customer and our duty to promote competition in the provision of railway services for the benefit of users; and
  - our focused and effective regulatory approach and our commitment to only intervene where market mechanisms do not work or are unlikely to work.
6. Our research study set out to:
  - review the mechanisms that exist within the current legal framework to facilitate competition between freight operators. This included a review of the current leasing arrangements of rail freight sites and a consideration of how these mechanisms had worked in practice;

- review the existing regulatory framework to consider how it applied to rail freight sites and to identify any issues that have arisen during the course of exercising our regulatory functions and in our regular exchanges with the industry; and
- identify any incumbency advantages that accrue from legacy arrangements including any foreclosure effects and/or any other factors potentially distorting competition in downstream haulage markets.

7. Our research study formed one part of our freight regulatory programme. We have also undertaken:

- a survey of freight customers; and
- a short, again primarily desk-based study, to complement work others had done in this area, on the potential for rail freight, particularly around barriers to growth.

8. All of this work has contributed to our decision to now undertake a public study to enable us to fully explore, with the industry and its customers, the issues around access to sites suitable for rail freight business.

9. In parallel to this study we plan to hold a freight workshop towards the end of this calendar year. This workshop will have a broader agenda than just rail freight sites, being an extension of our research on the potential for rail freight and our freight customer survey. We expect, however, also to use this forum to discuss the issues around access to freight facilities and as such this workshop will provide a valuable additional means by which to debate some of the issues that we are already aware of.

### **Scope of this study**

10. Our research to date has raised issues around the control of key rail freight sites by freight operators. These include, in particular:

- the extent to which the long-term site leases transferred to incumbent operators around the time of privatisation may have distorted competitive outcomes to the detriment of customers of rail freight services; and
- the efficacy at promoting competition between operators of the processes and procedures attaching to the strategic freight sites list managed by Network Rail.

11. We will, as a result of this public study, gain a fuller understanding of how current arrangements work in practice; the effectiveness and ease of use of existing contractual and regulatory arrangements around facilities in facilitating the transfer of traffic between competing operators; and what impact current arrangements have had on the development of a competitive rail freight industry.

## Potential outcomes

12. It is, of course, possible that this public study may lead to a finding that the existing arrangements are working well and that the mechanisms put in place at privatisation remain fit for purpose and/or the issues are so limited so as not to merit further scrutiny or regulatory action at this time.

13. Other potential outcomes that we will explore during the course of the study include whether there may be a case to:

- change the regulatory framework, including how we assess future applications for access exemptions. Our findings will feed into our access exemptions policy work;
- change how we assess appeals relating to access to freight facilities made to us under the Access and Management Regulations<sup>1</sup>, to ensure that our approach and processes are as facilitative as they can be in promoting competitive downstream haulage markets;
- change model access contracts to ensure that they enable the existing leasing mechanisms to work effectively and as intended; and/or
- strengthen the incentives on Network Rail to take a more proactive approach to the management of leases.

14. Where existing regulatory mechanisms (even when modified) are unlikely to be sufficient to remedy problems identified we could potentially refer one or more markets to the Competition Commission (CC) as a market investigation reference using our powers under the Enterprise Act 2002 (EA02)<sup>2</sup> or accept undertakings in lieu of making a reference<sup>3</sup>. See *ORR's approach to reviewing markets*<sup>4</sup> for a fuller explanation of, among other things, this and other potential outcomes.

15. We may also decide that at the end of our timetabled period the scope needs to be widened and we need more time to consider the issues arising during the study in more depth. We will publish a further timetable and renewed scope should this prove to be the case.

## Our provisional timetable and process

16. We intend to adopt an open and transparent process. We have set out a provisional timetable below in order to inform key stakeholders when they can

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<sup>1</sup> The Railways Infrastructure (Access and Management) Regulations 2005 SI 2005/3049.

<sup>2</sup> By virtue of section 67 of the Railways Act 1993 (as amended) and section 131 of EA02.

<sup>3</sup> See section 154 of the EA02.

<sup>4</sup> <http://www.rail-reg.gov.uk/upload/pdf/282.pdf>

expect us to engage with them and when they should expect us to reach a conclusion.

17. Our provisional timetable is as follows:

- **September 2010**
  - Terms of Reference published 10 September.
  - Written information requests sent to key stakeholders.
  - Deadline for Third Parties to register interest, 24 September.
- **October 2010**
  - Meetings with key stakeholders.
  - Likely deadline for written responses to information requests sent out in September.
- **November 2010**
  - Further stakeholder dialogue.
- **January/February 2011**
  - Published consultation on provisional findings.

18. The meetings scheduled for this October will primarily be to assist parties in responding in writing to our written information requests and will represent an opportunity for parties to seek clarity on what is being asked of them. Parties may also wish to use meetings to indicate whether there is any additional evidence or information which they consider would be material to our study. It is entirely possible, therefore, that we will send out further individual information requests following a meeting, and indeed potentially ask for further face to face dialogue.

19. We may want to disclose in our written conclusions information that has been provided to us. It will therefore be important that any material of a commercially sensitive nature that is provided to us be clearly identified and marked as such along with reasons explaining why the information should be treated so. A blanket claim of confidentiality on information submissions will not be sufficient.

20. Part 9 of the EA02 restricts the disclosure of information that comes to us in connection with our functions under Part 4 of the EA02, such as this study. However the EA02 also provides for a number of 'gateways' through which we may disclose information, in particular where we consider that the disclosure of information would facilitate the exercise of our statutory functions, including the conduct of a study such as this. Any such disclosure is subject to certain considerations set out in section 244 of the EA02.

21. We intend to consult on our findings in early 2011. We hope that this consultation will be in the form of a set of preliminary conclusions but our consultation could also indicate that the scope of the study needs to be

broadened and/or that we need more information in order to come to firm conclusions.

### **Registering interest in this study**

22. We will be contacting key stakeholders such as the main rail freight operators, some rail freight customers, and Network Rail directly. However, any other stakeholders who have an interest in the outcome of this study and who view themselves as being likely to be able to contribute also have an opportunity to register interest. Registering interest with us means that you may be asked for information during the information gathering phase and that we may ask you for your views/opinions at various key stages.

23. We encourage, therefore, interested parties to register at the address below.

The Competition & Consumer Policy Team  
Office of Rail Regulation  
One Kemble Street  
London WC2B 4AN

24. You can also email [competition@orr.gsi.gov.uk](mailto:competition@orr.gsi.gov.uk).

25. When registering as an interested party, you should clearly indicate the following:

- Your name, or that of your company and, in the case of companies, your job title and any relevant parent/subsidiary corporate structure;
- A brief summary of your relevant activities or those of your company;
- Your or your company's interest in the study (for example, you may be a customer of a freight operator); and
- How you or your company can contribute to the study.

26. Upon receipt of the details above, we will decide whether to accept your registration as an interested third party.

27. Please note that our deadline for registering as an interested third party is **Friday 24 September 2010**.