

30 September 2011

Freight Industry Colleagues
- by email

Dear colleagues,

Access to rail freight sites market study

As you may know, between September 2010 and February 2011 we carried out a public market study into access to rail freight sites in Great Britain (GB). This resulted in a stakeholder consultation on our findings, which ran from May to July 2011.

The full consultation responses are published on our website¹, with confidential material redacted as requested by respondents. The note attached is designed to provide an overview and to stimulate the discussions necessary in the development of remedies which will form the next stage of this review.

We would like to thank the sixteen organisations which responded. A full list of respondents is available at Annex B.

As our initial findings document² suggested, many of the issues identified in the market will require solutions, particularly those around the transfer of leases and access to freight sites. We are proposing that these solutions be industry-led.

We would encourage all rail freight stakeholders to play their full part in designing a framework that enables both the suppliers and buyers of railway services to plan their business with a reasonable degree of assurance that there are no unnecessary barriers to competition, and to work together to develop and agree measures necessary to resolve the issues identified.

In particular, we are asking the rail freight industry to develop and agree a Code of Practice to improve transparency around capacity and charges for freight sites as well as interpretation of alienation and termination clauses in leases, using a consultative and collaborative approach.

Based on further discussions with industry stakeholders, we intend to consult on an industry action plan in December 2011, which will set out what actions will be taken to

¹ <http://www.rail-reg.gov.uk/server/show/ConWebDoc.10391>

² Also available on our website



improve the functioning of this market, including the owner of each action and appropriate timescales.

If you have further comments or queries, or any additional suggestions or proposals for improving the functioning of this market, please contact Anna Pollard (anna.pollard@orr.gsi.gov.uk).

Yours sincerely

A handwritten signature in blue ink, which appears to read 'Annette M. Egginton', is positioned below the 'Yours sincerely' text.

Annette Egginton

ANNEX A: SUMMARY OF CONSULTATION RESPONSES

Overview

1. In general, respondents told us that our report provided a fair reflection of how this market currently works. There was general agreement that existing mechanisms designed to facilitate the transfer of site use between rail freight operators were not working effectively and in such a way as to enable rail freight operators to compete for and win business with a reasonable assurance that facility access would inevitably follow. With the exception of GB Railfreight, respondents agreed that a reference to the Competition Commission (CC) would be a disproportionate response at this stage.

2. GB Railfreight argued that the structure of ownership and regulation of essential rail facilities is the most significant impediment to the future growth of the rail freight market, stating that this issue is most acute in relation to facilities owned by a vertically-integrated rail freight operator that are critical to the supply of a downstream market. It proposed two options to improve this structure:

“a disposal of key terminals so as to remove vertical integration and create facility owners who are profit-maximising entities in their own right”, or

“regulation of those facilities should treat the freight operator as a monopoly service provider [...] under an obligation to operate as an independent terminal owner, operating at arms-length to the freight operator”.

3. Network Rail and the Freight Transport Association also both raised concerns about the contestability of this market which they thought could lead to growth being constrained.

4. Transport Scotland stressed the importance of rail freight for contributing to environmental and economic growth. It supported initiatives to remove any real or perceived barriers to modal shift.

Responses to each question

Q1. Do our findings represent a fair reflection of how this market(s) works in practice?

5. In general, respondents told us that our findings report provided a fair reflection of how this market currently works, and that it is not working as effectively as it was intended to at the time of privatisation.

6. However, Network Rail felt that although the report did address the key issues, it did not go far enough, arguing that facility access is more difficult for existing and new operators, and the issues identified have a greater impact on the industry, than the report suggests. DB Schenker thought it to be a broadly fair reflection though drew attention to a small number of what it considered to be misconceptions within the report. It provides its contrary view and further clarification in relation to some of the examples which we used in our findings.

7. Although GB Railfreight acknowledged that the availability of land was outside the review, it thought that the lack of transparency around existing capacity was an issue which needed to be addressed. It also told us that the statement that ransom strip income earned by freight operators is less than 1% of industry revenue, understated the significance of the issue, arguing that variability, uncertainty and lack of transparency of facility access charges can be material even if such charges in total, averaged across the industry, have to date represented a small value.

Q2. Is there more material impact on competition between rail freight hauliers and customer choice than summarised within our findings?

8. Most respondents agreed that our findings provided a broadly accurate reflection of the impact of the issues on rail freight hauliers and customer choice.

9. However, GB Railfreight argued that our findings ignore the opportunity cost resulting from the failure of the market to innovate and grow, and the reduced investment and choice for customers resulting from the current pattern of ownership of railway properties. It thought that there may be additional public disbenefits such as slower growth in certain markets, with a consequential impact on the road network and continuing grant subsidy requirements for incumbents.

10. Freightliner broadly agreed with our findings here but considered that it was worth emphasising the impact that the difficulties associated with using existing mechanisms had on behaviour, in particular the inclination to explore all other means of resolution rather than to use the lease or regulatory mechanisms and, in extremis, to withdraw from the process entirely if resolution is taking too long.

11. The Freight Transport Association reported that its own discussions with shippers and logistic companies indicated that access to and ownership of terminals is an area where there is scope for improvement. It accepted that concerns are generally presented in broad terms but felt there might be merit in ORR working with those affected to work up some more detailed and specific examples.

Q3. Do consultees agree that a Competition Commission (CC) reference would be a disproportionate response to the issues found?

12. As set out in the 'overview', all but GB Railfreight agreed that the issues identified in the findings document could be resolved without referral to the CC and that a reference at this time would be disproportionate. Some felt that the existing mechanisms have not always been strictly enforced and that this should take priority.

13. Some respondents, including Network Rail, referred to the work ongoing at European level to 'recast' the First Railway Package, which may result in changes to those provisions dealing with access to locations providing railway services.

Q4. Do consultees agree that statutory undertakings would not be appropriate here and at this stage?

14. GB Railfreight thought that statutory undertakings could potentially be appropriate though gave no further detail on what such undertakings would look like. Other respondents thought that statutory undertakings would not be appropriate here and at this stage.

Q5. Do consultees agree that there would be limited value in extending the study into a third stage?

15. Most respondents felt that there was no compelling case to extend the study into a third stage, unless significant new evidence of detriment was presented. In fact, the general consensus was that a work programme should be developed with industry to help address the issues identified, with ORR monitoring the market going forwards.

16. Network Rail supported the continuation of the study into a third stage, arguing that there was a need for more detailed investigation and understanding of the market. GB Railfreight wanted a further period of time to focus in particular on reviewing the Access & Management Regulations to ensure that they are fit for purpose, particularly with regards to access to intermodal rail terminals. In particular and in response to another question it expressed the strong opinion that a well regulated market is one characterised by a clear regulatory framework that offers a credible threat of effective action and potential penalty. It felt that this would engender better behaviour than the existence of an appeal route. It considered that ORR may have overestimated the ability of appeal routes to provide the speed and certainty of outcomes needed within this sector where change of haulier sometimes occurs with very little notice.

Q6. Do consultees consider that the evidence supports further consideration of the case for licence modification now and if so why and what would such a licence obligation should be seeking to deliver?

17. In general, respondents felt that licence modification could be considered at a later date if progress was not made in addressing the issues raised by other means. There was some interest, however, in conducting a review of licences given that some of the conditions had been in place since privatisation.

18. GB Railfreight suggested that Network Rail could be obligated to perform to specified service standards in relation to management of leases and Strategic Freight Sites.

Q7. Do consultees agree that the ten percent club should be extended to all licensed rail freight hauliers and any party which can provide a *bona fide* interest in the sites as a potential haulier of rail freight?

19. The majority of respondents supported a review of the membership of the ten percent club, with many, including Colas Rail, Freightliner, DB Schenker, GB Railfreight, and Vici Railfreight, agreeing that extending membership should be considered. The general view was that all licensed freight operators should have the option of membership.

20. However, some supporters suggested that further thought would be needed on issues such as voting arrangements. There were mixed views about extending membership to potential hauliers, with concerns about the group becoming unwieldy.

21. Some respondents also suggested that the remit could be widened, including GB Railfreight, Vici Railfreight, and DB Schenker who proposed that Network Rail could consult the group when it wishes to sell or develop Strategic Freight Sites.

22. Network Rail considered that there may potentially be value in reviewing the effectiveness of the regime through which the Strategic Freight Sites are governed.

Q8. We invite consultees to comment on and to advance proposals as to how the package of measures outlined around the management and operation of leases and in particular the alienation and termination provisions can be put into effect.

23. Respondents expressed a range of views and presented several options as to how the management and operation of leases can be improved.

Management of leases

24. Several parties suggested that Network Rail could be more proactive in managing its leases. Network Rail pointed out that the development of the rail freight market has resulted in a greater interest in the competitive use of existing sites than was foreseen at the time of privatisation and the drafting shortfalls in the leases have been highlighted.

25. Victa Railfreight felt that the 'use it, or lose it' provisions of the leases offered by Network Rail to freight operators should be more rigorously enforced. It suggested that the leases on locations that are no longer regularly used for services should be 'reclaimed' by Network Rail and offered to other freight operators. Colas Rail and Transport Scotland put forward similar views about the release of sites not in use. DB Schenker felt that generally the termination provisions in leases work well.

Alienation provisions

26. DB Schenker considered that the alienation provisions are satisfactory and fit for purpose. GB Railfreight agreed that the alienation process works reasonably well if both parties are in agreement but *"issues such as the poor drafting of the lease terms can give rise to the opportunity for delay and uncertainty"* where the incumbent has a commercial reason to frustrate the process.

'Nominated Location'

27. Network Rail said that a key priority is the resolution of the issue of the definition of 'Nominated Location' and its link between the track access agreement and the lease. This view was supported by DB Schenker and Freightliner.

Definition of 'use'

28. Victa Railfreight argued that the definition of 'use' should not be satisfied by occasional 'spot' use, nor by long- or short- term stabling of rolling stock. This view was also expressed by other respondents including Colas Rail and Freightliner. Freightliner proposed that the test of whether rolling stock is fulfilling an active commercial and business purpose should be both robustly challenged and proved.

Conversion of Yard and Sidings leases to Let Sidings leases

29. GB Railfreight supported the conversion of Yard and Sidings leases to Let Sidings leases where there has been a substantive change of use. However, DB Schenker did not see any need for such a mechanism.

Q9. We invite consultees to comment on our proposals to introduce a Code of Practice governing leasing and access arrangements to sites and to advance views as to what such a Code should include.

30. There was widespread support from respondents for the introduction of a Code of Practice. Network Rail also supported increased guidance notes to encourage transparency.

31. Suggestions for content of a Code of Practice included explanation of how the existing leasing and access arrangements can and should work, including information requirements and timescales, as well as the reasonable behaviours that could be expected from all parties.

32. GB Railfreight did not believe that a Code of Practice would have sufficient teeth to address some of the behavioural problems that it had encountered. As noted above, it would prefer the establishment of a regulatory regime that held parties to account for failure to engage and for denying access, with appropriate deterrent by way of a financial penalty.

Q10. Consultees are invited to provide ideas as to what information facility owners should make transparent and how.

33. There was widespread support for greater transparency of information by facility owners and operators, although a mix of views on what information should be made available, especially with regards to capacity and charging arrangements.

34. Network Rail suggested that it may be useful if the market had access to a comprehensive list of terminals/sites detailing their capabilities. There was support for a list of sites and their ownership from DB Schenker and Mendip Rail.

35. Many respondents, including Transport Scotland, DB Schenker, Freightliner and GB Railfreight, supported publication of an indicative list of the access tariffs for sites, although there were differing views about the level of detail which should be made available.

36. There was also some support for publication of capacity information, including from Transport Scotland and GB Railfreight. Network Rail suggested that it may be appropriate to consider introducing an obligation requiring adjacent facility owners to provide the rationale for a refusal of a request for access, supported by a terminal occupation plan and capacity statement.

37. Freightliner proposed that a web-based system could be used to make this information accessible.

38. GB Railfreight also suggested that where a site could be subject to alienation, information including head lease terms and sub lease terms should be made available.

39. The Freight Transport Association and HITRANS supported making the charging regime for the maintenance of sites more accessible.

40. Transport Scotland expressed particularly strong views about the continuing existence of ransom strips which it considered should be abolished as an outcome of the review. Transport Scotland expressed the view that ransom strips have adverse commercial and operational effects without necessarily creating any efficiencies. It thought that information should be published for 'ransom strips' as well as freight sites, including the terms of business in relation to use of these sections of track and the 'network capability'.

Q11. Consultees are asked how our guidance could be improved and how we can ensure that the information we provide is readily accessible to those who need it.

41. There were mixed views on whether our guidance could be improved and information made more accessible. Some respondents were generally satisfied with our guidance, including DB Schenker and GB Railfreight.

42. However, some suggestions for improvements were made by Rail Freight Group, Network Rail, GB Railfreight and Freightliner, which included using plainer English and providing greater detail on how appeals might be considered, as well as incorporating experience gained from appeals to date.

Q12. Do consultees consider there to be continued value in ORR continuing to pre-approve contracts using its powers under the Railways Act 1993 (RA93) or is it appropriate for the ORR to withdraw from pre-approval and rely entirely on an appeals based regime, for example that provided under the Access and Management Regulations?

43. There was a mixed response from respondents to this question. Network Rail supported pre-approval where appropriate, but there was some support for pre-approval to be withdrawn, including from DB Schenker, Freightliner and GB Railfreight. DB Schenker pointed out that withdrawing freight site access from the purview of RA93 would bring all freight sites onto the same footing, as some are already exempt.

44. As noted in response to other questions, some parties, including GB Railfreight, Victra Railfreight and Mendip Rail, however, expressed concern that the appeal mechanism must be made more dynamic to reflect the needs of business.

45. Victra Railfreight suggested that our ability to intervene is important where access is restricted by incumbent operators, on the grounds of capacity, or otherwise, to ensure that the constraint is genuine. It also proposed that facility owners should indicate how capacity is to be enhanced to cater for demand, where access has been constrained.

Q13. Do consultees consider there to be circumstances where pre-approval should be maintained, for example (given the issues identified within our study) where a FOC operates a facility and competes in the downstream market?

46. There was a mixed response on maintaining pre-approval in the circumstances described. Some respondents, including Network Rail, agreed that there is scope for pre-approval where appropriate.

47. However, others, including DB Schenker and Freightliner, felt that an appeals-based regime under the Access & Management Regulations was the best approach. DB Schenker also expressed caution about having a split regime for access approval, and pointed out that not all sites where vertical integration exists are within the ambit of RA93.

ANNEX B: LIST OF CONSULTATION RESPONDENTS

Aberdeen Harbour

Colas Rail

Department for Transport

Derbyshire County Council

DB Schenker

Freightliner Group

Freight Transport Association

GB Railfreight

Hitrans (Highlands and Islands Transport Partnership in Scotland)

Mendip Rail

Network Rail

Rail Freight Group

SEStran (South East of Scotland Transport Partnership)

Transport for London

Transport Scotland

Victa Railfreight