10 August 2012

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Dear Joe

Re: Consultation on the variable usage charge and freight specific charge

Thank you for the opportunity to comment on the ORR's proposals on the variable usage and freight specific charges. The British Ports Association (BPA) represents a wide range of 90 port authority members located throughout UK and we are well placed to give a balanced national response to the consultation. We understand that several ports will also make their own individual representations to you directly. The UK's ports are vital economic gateways for freight to/from continental Europe and other global sources. In 2011 UK ports collectively handled over 520 million tonnes of freight, which represents more than 95 per cent of the UK's international trade. As an island the UK has an unrivalled number of commercial ports, which operate in competitive and sensitive markets.

In relation to the ORR's consultation we understand the reasons behind the proposals and the legal framework as set out in the Access and Management Regulations 2005. We are also not in a position to make judgements on the assessment of what the ORR and Network Rail have defined as network maintenance or 'freight avoidable costs'. We are however very interested in what the impact of the proposals will be upon the UK ports industry and in particular any possible changes in freight traffic flows and routes. With this in mind we have not attempted to answer all of the consultation questions, but have instead limited our response to cover some of the questions posed in Chapter 6.

For context it is worth highlighting that UK ports operate independently in the private sector, receiving no systematic financial support from the Government. It should be noted that this is commonly not the case in other parts of the EU. One of the main roles of the UK Government in relation to ports is to safeguard a fair and level playing field so that competitive port markets are not distorted. This policy was recently reaffirmed in the Department for Transport's National Policy Statement for Ports earlier this year (designated in February 2012). We had expected that when reviewing track access charges the ORR was mindful that decisions can have adverse impacts upon commercial port operators and traffic flows. We are disappointed that the proposals, in respect to cargoes such as ESI Coal, appear not to have recognised this fundamental point. We have outlined this later in our response (below) but would urge the ORR to liaise with their ports colleagues at the Department for Transport urgently.

The recently announced rail investment plans in the 'High Level Output Specification' programme for 2014-19 demonstrate that funding is available for the investment in the rail network. We would hope that it is feasible that increased investment could trickle-down to ensure that annual network maintenance costs are reduced, which in turn could help ensure that track access charge increases on certain freight, such as for ESI Coal, are not driven up disproportionately or dramatically. More generally in an increasingly competitive market the ORR should be mindful of not unduly disadvantaging industries involved in the UK logistics chain or to make the UK less attractive to foreign businesses/investment.

In response to question *'**7.27 - Do you have comments on our write-up, interpretation and application of the studies carried out by MDST and NERA? Is there any further evidence that you believe should be considered?**'*, our view is that we are extremely concerned that the studies do not take into consideration the impact on wider shipping and transport routes. As identified in the Stage 1 and Stage 2 impact studies by MDS Transmodal a significant increase in the transportation costs for certain cargoes is a real possibility. We would warn that this would invariably lead to distortion of exiting freight routes (see our response to **question 7.29** for details). The studies do not take into consideration what the wider impact on the freight and maritime sector might be following the increased gate price of cargoes such as ESI Coal. The ORR has failed to recognise that sensitive shipping markets and freight routes could be severely altered and certain ports unfairly disadvantaged by an ORR policy. The studies do not have the remit to examine these possible outcomes directly. Other than reducing the proposed ESI Coal cap further we would urge the ORR to commission further work to examine the wider commercial and economic impact of the proposals on ports, the transport sector, regional economies and even the mining industry. More evidence is needed to understand what the likely altered freight traffic flows would mean for ports and regional economies. We are also aware that no approach was made by either the ORR or those conducting the studies to many of the ports that are likely to be affected. At the moment therefore our view is that the studies are incomplete.

Furthermore at the two recent industry seminars at the ORR's offices in London, the presentation of these studies focussed on the preservation of secure levels of income for Network Rail and not the potential wider economic and freight impacts. While we recognise the need for Network Rail to adequately resource and maintain its infrastructure there is a feeling that the Government has taken a one dimensional view and underestimated the potential impacts that the proposals might have on UK industry. The BPA would urge a fundamental rethink and change in perspective. Notwithstanding these points we have found the distinct lack of clarity on what the exact variable usage charge caps problematic. This vague approach has given us a real problem in estimating the likely impacts upon our sector. Through not want to be too prescriptive and failing to provide more precise estimates the ORR has created an atmosphere of concern and uncertainty in the freight and transport industry.

Other options need also to be explored. A flat-rate/single track access charge has been completely dismissed however there is some value in examining if some kind of compromise charge, which does not overly favour/disadvantage the varying journey distances, can be agreed.

In regard to question '***7.29 - Do you agree with our proposal to levy the proposed charge on ESI coal traffic***', the ORR has taken the rather narrow view that the power and electricity generating industry could bear the cost of increased charges on cargoes such as ESI Coal, however as suggested above this does not take into consideration the wider impact on the freight and maritime sector. In the case of cargoes like ESI Coal, ports which are located some distance away from power stations will be unfairly disadvantaged against those in closer proximity as charges penalise the routes with the greatest distance. The BPA would suggest that the ORR has taken the view that the charges can be increased because the viability of modal shift on the road is impossible. The policy however has not been thought through. Ports compete in sensitive markets and the forecast change in gate prices identified by MDS Transmodal for ESI Coal is alarming indeed. The results of such distortion would not only negatively impact upon some ports but could also have further economic repercussions on regional business and employment. Given their nature, unlike many businesses, ports cannot move and relocate closer to key markets. The commercial port activities on the Tyne and the Clyde are under direct threat from these proposals and there are likely to be other negative impacts across the UK ports sector.

Also on this point, under EU law the implementing legislation in the UK, 'The Railways Infrastructure (Access and Management) Regulations 2005', allows for increases in charges to reflect the avoidable costs of freight only if 'the market segment can bear the increase'. We would suggest that while the wider energy industry might (according to the Government) be able to bear the proposed costs on ESI Coal, a number of ports would not.

Finally on the question '***7.32 Do you agree that we should revisit our policy on levying a charge for the biomass market segment to coincide with the recalculation of its credit (subsidy) regime (from 2017 for England and Wales)?***', we would urge the ORR not to introduce such a charge for biomass so as not to limit growth in the sector. Given the sector's infancy it would be more sensible to suspend this completely or at the very least move this in line with the Government's 2020 ROC targets as announced in the recently published draft Energy Bill. We hope you give this serious consideration.

We would be pleased to discuss the proposals with the ORR/Network Rail further in the future and look forward to learning more about the likely course of action in due course.

Yours sincerely

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