

8 May 2015

Dear freight industry colleagues,

ORR conclusions on our study into access to Rail Freight sites

1. ORR carried out a public market study between September 2010 and February 2011 into access to rail freight sites in Great Britain. This resulted in a stakeholder consultation from May to July 2011, in which we described a number of potential issues affecting this sector, with a particular focus on the effectiveness of the various provisions that were put in place at privatisation to prevent the control of sites by rail freight operating companies (FOCs) acting as a barrier to competition. These mechanisms did not appear to be working entirely effectively and we concluded that overall this market should not be given a clean bill of health.
2. At this time, we did not feel that it was necessary to refer the market to the Competition Commission (now the Competition and Markets Authority (CMA)). However, we felt that the issues were sufficiently serious to require resolution and took the view that industry-led solutions would provide the most effective approach.
3. The industry agreed to take this forward and signed up to an action plan at the end of 2011.
4. We wrote to the industry on 27 October 2014 recording progress to date and to seek stakeholders' views on the materiality of the un-discharged actions on the plan and the extent to which they were still of concern and, with further evidence, should be pursued. In particular:
 - I. **A Code of Practice on Leases.** To strengthen the mechanisms put in place at privatisation to ensure that Network Rail owned sites held on long lease by freight operators were effectively transferred between operators along with the business that serviced them.
 - II. **Publication of key information on FOC owned terminals** (such as opening hours; existence of equipment; length of sidings etc.). This was a FOC owned action.
 - III. **Publication of key information on Network Rail owned sites** (including, for example, the condition of each site and the existence of shared structures). This was a Network Rail action.

5. In seeking views we said that we were mindful of the following developments which, over the longer term, could have the potential to support competition in this market namely:

- I. The delivery of 'Mountfield 13' where sites at key nodal points on the network would transfer back to Network Rail rather than, as now, on long term lease to incumbent FOCs.
- II. Forthcoming requirements arising from Directive 2012/34/EU of 21 November 2012, otherwise known as the recast¹, due to be implemented in the UK in June 2015.

Responses to the consultation

6. We received five responses to our consultation from: DB Schenker, GB Railfreight, Network Rail, Rail Freight Group (RfG) and WH Malcolm².

7. DB Schenker was supportive of closing the review. It was of the view that considerable progress had been made on the plan including the establishment of the Code of Practice on Access. It considered Project Mountfield to be relevant and referred to the handing back of a significant number of its sites into Network Rail direct ownership thereby changing the freight property arrangements for these sites. It also submitted the view that the publication of information about its sites was complex in practice and would be, in any case, addressed by European legislation. Network Rail referred also to the difference that Project Mountfield would deliver in terms of greater transparency about the freight estate and confirmed that it remained its intention to discharge the action assigned to it and will introduce a live map of available freight sites, with searchable criteria, shortly.

8. WH Malcolm and RFG thought that we should revisit this area in 2015 to allow time for European developments and Project Mountfield to take effect.

9. GB Railfreight, however, considered there to be a continuing need to take some of the actions forward, citing in particular, publication of information on FOC owned sites and the need for a Code of Practice on Leases.

Our assessment

10. We are pleased to learn from stakeholders that the discharged remedies, for example the Code of Practice on Access, have been helpful in setting out the obligations and expectations of both parties when submitting or receiving applications for access.

11. We support GB Railfreight's view that it is important that every FOC remains aware of the contents of the Access Code and their obligations under it and ensures that all staff (including those at a working level within terminals) are briefed on these published rules of engagement. GB Railfreight points to the obligation, for example, to provide reasons for the refusal of a request for access and the obligation on all parties to work constructively together to achieve a mutually acceptable outcome. A further point raised by GB Railfreight is that for a short notice ad-hoc request a response, including details of

¹ Directive 2012/34/EU of 21 November 2012 establishing a single European area

² The letters can be found on our website [here](#).

applicable charges, is ideally required within two working days. This gives the FOC making the request some sort of certainty that it can plan its trains into another FOC's facility. We support these concerns.

12. We are also pleased at the progress made by Network Rail in providing greater detail about the freight estate on its website and understand that Network Rail's industry-wide consultation on its longer term management and development of its freight estate under Project Mountfield will deliver significant clarity around sites now under its control.

13. GB Railfreight, for example, has stated that *"since 2011, the work that been carried out and the information contained on the "Freight Sites Opportunities" has been excellent."* We support, however, GB Railfreight's views for further work in this area in particular:

- To deliver more comprehensive detail in relation to strategic freight sites to enable a prospective user a far clearer picture of the issues that any draw-down of site may bring to them and the scale of their liabilities; and
- To ensure that information is kept up to date, for example, by having a nominated Network Rail Freight Team member who can ensure that the strategic freight sites and connections guide information are kept up to date.

14. We continue to be of the view that the recast has the potential to address a number of the residual problems associated with FOC ownership of facilities. In particular it requires:

- those providing facility services to be independent in organisational and decision making terms from any dominant undertaking in national rail service transport markets and thus ensuring non-discriminatory access to service facilities;
- operators of service facilities to publish information on access conditions and on charges for gaining access to the facility and for the provision of services; and
- an operator of a facility to offer up for lease part of or the whole of a facility that has not been in use for at least two consecutive years.

15. Further we believe that the existing regulatory mechanism for making an appeal for access to a facility under the **Access and Management Regulations**, if used more frequently, could be an effective tool in delivering more transparency by way of our scrutiny and challenge and the publication of decisions.

16. We are, however, mindful of the fact that:

- Project Mountfield only accounts for a proportion of FOC managed sites;
- the implementing act on the recast is unlikely to be adopted until November 2015 and its impact will take some time to be felt; and
- The access appeal route under the existing Access and Management Regulations is relatively untested and may not be a speedy enough route to resolution for those seeking access to facilities in order to support tendering for customer contracts.

Conclusions and next steps

17. Given the above, we think it remains important for the industry to continue its focus on delivering a more transparent framework which demonstrates that the ownership of freight

facilities by FOCs is not a barrier to competition in the movement of freight by rail. To this end we will be asking the Rail Delivery Group to take responsibility for ensuring that the industry is moving swiftly toward compliance with the forthcoming directive and implementing regulations. In the short term that means taking ownership of delivery of a lease Code of Practice and reaching an agreement on what information should be published about FOC owned sites to facilitate requests by those seeking access.

18. We do not consider there to be merit in deferring the review until later in 2015 as proposed by WH Malcolm and the RfG, given that even by the end of the year the provisions will unlikely to have been tested or have taken full effect.

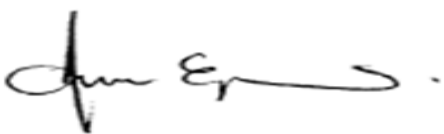
19. On balance, therefore, we consider that we should close the review, as the formal process of collecting evidence and reaching conclusions has been completed. However, we will continue to monitor for concerns that lead us to believe that there has not been sufficient progress in implementing the remaining actions or in addressing the underlying issues that our work has highlighted. Further, stakeholders continue to be able to raise issues with the ORR, in particular where there is evidence:

- of conduct that needs immediate action i.e. something that needs remedy prior to the new European framework taking effect;
- of conduct that is unable to be resolved by the new enhanced framework (obligations arising out of the Recast, plus our existing appeal role under the Access and Management Regulations); or
- that shows, in the light of experience, that the new enhanced framework is not working effectively to address competition concerns in the freight market.

20. Action could include use of our competition powers.

21. More broadly, we also continue to retain focus on the Railfreight market, as reflected in the ORR's strategic objectives. There are also a variety of ways that we gain insight through continuing engagement with train operating companies and customers in both our economic and safety role, including through the recently established freight panel.

Yours sincerely



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