
**REPORT ON BEHALF OF THE RAIL REGULATOR ON
THE COMPLAINT OF ADTRANZ AND ALSTOM**

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A. Introduction

1. This Report concerns the letter from the Chief Executive Officer of Adtranz and the Managing Director of Alstom Transport dated 13 October 1999. This letter, and its two substantial annexes, set out a series of complaints about difficulties alleged to have arisen in obtaining safety clearance for new trains. These problems are said to have been caused by defects in the relevant Railway Group Standards and Railtrack's procedures for vehicle and route acceptance, which are alleged to constitute breaches of Railtrack's network licence.
2. The 13 October 1999 letter followed various correspondence in July 1999. On 5 July 1999, Adtranz and Alstom had written to the Regulator, Sir Alastair Morton and Mr Michael Grant, complaining of the situation in respect of new trains:

“A number of train operating companies have entered into contracts with us for new trains that they want to use on Railtrack's network. Specifications for these contracts were based on gauging requirements declared by Railtrack, through Group Standards, data and comparator vehicles. Both companies have designed and developed new trains based upon these references laid down by Railtrack. However, Railtrack has gone beyond these requirements in the actual introduction of trains to Zones and have therefore moved away from the basis (supplied by Railtrack) on which new trains were designed. This has revealed what appear to be serious inadequacies in Railtrack's data and knowledge of its own network. It has also meant that new trains cannot be introduced into service without physical work to infrastructure (such as e.g. platforms), responsibility for which, as we understand it, Railtrack has not accepted vis a vis the train operating companies. These are serious impediments to the entry of new trains into service on time, to specification and within budget.

These difficulties give rise to short and long term problems. In the short term, the public may not receive the benefit in service when expected of new trains already ordered. In the longer term, the whole market is likely to ascribe significantly higher risk to dealing with Railtrack in relation to these matters than is necessary, and so increase the long-term price of procuring new trains for the industry. Both of these matters will have a direct and adverse impact on the Franchising Director's budget and for the time within which current and future train orders can be expected to be implemented.”

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3. Mr Grant wrote to Adtranz and Alstom on 22 July 1999, indicating his concern that the matter should require regulatory involvement but expressing his and Sir Alastair Morton's view that this was a matter for the Regulator rather than the Shadow Strategic Rail Authority ("sSRA") or the Franchising Director. HM Chief Inspector of Railways wrote to the Regulator on 28 July 1999 emphasising the need for Railtrack to carry out thorough safety acceptance procedures despite the commercial pressure to process applications quickly.
4. The Regulator wrote to Adtranz and Alstom on 6 August 1999 setting out his areas of concern and asking a series of detailed questions as to the precise nature of their difficulties.
5. The letter of 13 October 1999 and its attachments were sent in response to those detailed questions, paragraphs 8-11 of the Regulator's letter of 6 August.
6. The Regulator wrote to the Chief Executive of Railtrack plc ("Railtrack") on 8 December 1999 inviting Railtrack to comment on the complaints detailed in the 13 October letter, setting out a number of broad areas of concern to him.
7. The Director of Railtrack's Safety and Standards Directorate ("SSD"), Rod Muttram, wrote to the Regulator on 13 January 2000 in respect of the "'fitness for purpose' of Railway Group Standards, and the management of Railway Group Standards processes".
8. A detailed response was also received from the Director of Operations at Railtrack, Chris Leah, under cover of a letter dated 7 February 2000.
9. This Report assesses the merits of the complaints and Railtrack's responses, based on the above correspondence and attachments and on discussions with officers within the Office of the Rail Regulator ("ORR"), in particular Michael Beswick and Michael Woods. I have also been given access to the relevant

Standards, in particular GO/RT 3270 (issues 1 and 2), GM/RT 2149 and GC/RT 5204, and to the Railway Group Standards Code.¹

10. In order to give both the complainants and Railtrack a full opportunity to put their case to the ORR, a full day's hearing was held on 9 May 2000 at which a range of interested parties were invited to attend. The transcript of the hearing has been made available to the parties for the purposes of information and correction.
11. Immediately prior to the hearing, a letter dated 8 May 2000 was received from another manufacturer of trains, Siemens, commenting on the issues raised by the complaint in a manner generally favourable to Railtrack:

“Siemens ... have no objection to either the Railway Acceptance Group Standard or the Railtrack implementation of the Route Acceptance Process.

In order to present a balanced view, we have in the past experienced difficulty in obtaining Infrastructure Data and gaining testing paths. However, we believe that Railtrack and the industry as a whole are now addressing these issues.”

12. Railtrack also presented further documentary materials at the hearing and three short letters were subsequently received from the parties dealing with various issues raised at the hearing: a letter dated 12 May 2000 from Mr Muttram of the SSD, a letter from Railtrack's solicitors dated 22 May 2000 and a letter dated 31 May 2000 from Adtranz and Alstom. The 22 May 2000 letter from Railtrack's solicitors attached a short further submission dated 19 May 2000, addressing three central issues that had been discussed in detail at the hearing.
13. At the hearing, both parties made reference to:

¹ I have also seen the letter dated 7 July 2000 from Michael Beswick to John Smith, Head of Regulatory Regulation at Railtrack, enclosing a draft amendment to Railtrack's licence relating to the establishment of a comprehensive asset register in accordance with guidelines to be issued by the Regulator.

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- 13.1. a report prepared by the firm of Arthur D Little dated 3 March 2000 on behalf of Porterbrook, in which various recommendations and findings were made in relation to the rolling stock acceptance process; and
- 13.2. a document entitled “Supplementary Information Supplied by Railtrack plc” dated 13 April 2000; the document forms “Part 7 – Railtrack Infrastructure Information” of the “Invitation to Tender for Replacement of Mark I Rolling Stock” issued by the shadow Strategic Rail Authority.

These two documents have also been taken into account in preparing this Report.

14. The Report is structured as follows:
 - the relevant rules;
 - the principal areas of complaint;
 - gauging;
 - electromagnetic compatibility;
 - infrastructure costs;
 - conclusions and possible remedies.

The findings of the Booz Allen & Hamilton report

15. This Report also takes account of the conclusions of the Booz Allen and Hamilton report “Railtrack’s Performance in the Control Period 1995-2001: Final Report” March 1999. As the Regulator pointed out at point 7 of his letter of 8 December 1999, the substance of the complaints is closely related to the issues raised by and addressed by the Regulator in his First Response to that report dated 25 November 1999, § 1.8(b)(i) and (iii) and Chapter 3.

16. At § 120 of the Booz Allen report, in the section relating to Railtrack's stewardship and development of the network, the authors state:

“One of the fundamental building blocks for a long term asset management strategy is the assembly of comprehensive information on asset condition. When Railtrack was formed, the condition of its assets was poorly documented. At the end of the control period, that situation still exists and the achievement of a database of reliable information must become a high priority. Without such a database, there will continue to be problems in setting priorities for the long term and in the short-term delivery of renewal investments. By its appointment of a new Director, Asset Management in early 1999, Railtrack has recognised that insufficient priority had been given in the past to the development of maintenance management plans for its long lived assets.”

17. Similarly, in the section of their Conclusions headed “What would a reasonably efficient comparator have done?”, the authors find at § 137:

“It should be recognised that Railtrack has delivered significant improvements in operational and management processes. However, one area of concern – and one on which utility comparators have demonstrated great focus – is in the development of asset information systems and asset management plans. The quality of inherited data concerning asset condition was poor but improving data quality has not received great focus in the control period to date. This is especially concerning given the changes in Railtrack's maintenance and renewals philosophy in the period and the need to satisfy regulatory requirements on the appropriateness of long term renewal expenditure. Greater priority should have been given to this area (this has been recognised by Railtrack through its appointment of a Director, Asset Management in early 1999).”

18. In his Response to the Booz Allen report, the Regulator found that Railtrack:

“should be required, through a modification of its network licence, to establish a register of the nature and condition of key asset categories, and to populate the register with data” (§1.8(b)(i));

and

“should develop reliable data on the capability of the network, including the gauging of specific routes, both to inform its own plans for the development of the network and to provide customers with accurate and timely advice on the ability of the network to meet their

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requirements and to cope with both redeployment of existing stock and new rolling stock” (1.8(b)(iii)).

B. The relevant rules

The Railways Act 1993

19. The powers and duties of the Regulator relevant to this complaint are set out in section 55 of the Railways Act 1993. Where the Regulator is satisfied that a licence holder such as Railtrack “is contravening, or is likely to contravene” any relevant condition of its licence, section 55(1) imposes a duty to make a “final order” for the purpose of securing compliance with that condition.
20. Section 55(1) is subject to section 55(2) to (5) and section 56. Of these provisions, the most relevant is section 55(5), which provides:
 - “The appropriate officer shall not make a final order ... in relation to a relevant operator if he is satisfied –
 - (a) that the duties imposed on him by section 4 ... above preclude the making ... of the order;
 - (b) that the relevant operator has agreed to take, and is taking, all such steps as it appears to the appropriate officer for the time being to be appropriate for the relevant operator to take for the purpose of securing or facilitating compliance with the condition ... in question;
or
 - (c) that the contraventions were, or the apprehended contraventions are, of a trivial nature.”
21. In relation to section 55(5)(a), section 4 of the 1993 Act sets out the general duties of the Regulator, of which the most relevant are those set out in paragraph (1) (which requires the Regulator to take account of a range of economic considerations in the interests of consumers and users of railway services), and paragraph (3)(a) (which specifically requires the Regulator to take account of “the need to protect all persons from dangers arising from the operations of railways” and in particular “any advice given to him by the Health and Safety Executive”).

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22. Section 55(5)(a) and (b) are considered further below. Section 55(5)(c) is not relevant to the central elements in the complaints, which raise substantial issues if they are well founded.

Railtrack's licence and the Railway Group Standards Code

23. The principal relevant licence conditions are as follows:

- Condition 3(2):

“The licence holder shall:

- (b) ...² comply with the provisions of the Railway Group Standards Code; and
- (c) comply with any Railway Group Standards authorised under the Code so far as applicable to licensed activities”.

- Condition 3(3):

“The Railway Group Standards Code shall be a code prepared by the Directorate whose purpose is to ensure the safe operation of the licence holder’s network and railway assets used or to be used on or in connection with the licence holder’s network (“the Purpose”) having due regard to the need:

- (a) to promote the use and development of the licence holder’s network;
- (b) to promote efficiency and economy on the part of the licence holder and other persons providing railway services on or in connection with the licence holder’s network;
- (c) to promote competition in the provision of such railway services;
- (d) to impose on the licence holder and other persons providing such services the minimum restrictions which are consistent with the Purpose; and

² This condition is subject to derogation with the consent of the Regulator (Condition 3(8)). That possibility is not apparently relevant to any issue in this Report.

(e) to enable the licence holder and such other persons to plan the future of their businesses with a reasonable degree of assurance”.

- Condition 3(4)(c):

“The Railway Standards Code shall ... require the Directorate, where it has reasonable grounds for considering that any revision of a Railway Group Standard is required, to propose such a revision and pursue it in accordance with the procedure referred to in sub-paragraph (b).”

- Condition 3(7):

“The licence holder shall procure that the Directorate shall establish, maintain and operate such procedures as shall be sufficient to ensure that any participating railway operator which has applied to the Directorate for the purposes of this paragraph shall be provided with such information, advice and assistance (excluding training) as may reasonably be required to determine the application of any Railway Group Standard to that operator or to railway assets of which it is or proposes to be the operator. The licence holder may charge a fee for any such information, advice or assistance. Any such fee shall not exceed an amount which is, in the opinion of the Regulator, reasonable.”

- Condition 3(9):

“Railway Group Standards” means:

- (i) technical standards with which railway assets or equipment used on or as part of railway assets must conform; and
- (ii) operating procedures with which operators of railway assets must comply”.

- Condition 7(1) and (2):

“7(1) The purpose is to secure:

- the maintenance of the network;
- the renewal and replacement of the network; and
- the improvement, enhancement and development of the network;

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in each case in accordance with best practice and in a timely, economic and efficient manner so as to satisfy the reasonable requirements of persons providing services for the carriage of passengers or goods by railway and funders in respect of the quality and capability of the network.”

“7(2) The licence holder shall carry out its licensed activities to achieve the purpose to the greatest extent reasonably practicable having regard to all relevant circumstances including the ability of the licence holder to finance its licensed activities.”

24. §§ 6.2-4 and 7.2-3 of the RGS Code provide:

“6.2 Railtrack’s duty, exercised by the Directorate, to establish and maintain Railway Group Standards requires the Directorate to make decisions in matters both of detail and principle, ways that could significantly influence the safety responsibilities, the methods of operation and the costs to other railway industry parties. To avoid any suggestion that this discretion might be exercised in a partial manner, Code decisions are subject to the tests set out within the Code Decision Criteria.

“6.3 The Code Decision Criteria consist of two related factors: the Safety Criterion and the Practical Criteria. The Safety Criterion will take precedence, but where more than one option is able to satisfy compliance with the Safety Criterion, the Practical Criteria will be used to assist with decision making. None of the Practical Criteria has priority over any other but all may require some consideration as to their relative importance in any specific case.

“6.3.1 There is an overriding **Safety Criterion** which requires the outcome of all decisions demonstrably to contribute to levels of risk that are “As Low As Reasonably Practicable”. In order to comply with safety legislation the safety of employees, passengers and members of the public should be ensured, so far as is reasonably practicable, by all activities undertaken by railway industry parties. Railtrack’s Railway Safety Case sets out the methodology for assessment of risks and the means by which the test of reasonable practicality is applied. Railway Group Standards should only ever be created when there is a need to secure system safety or safe interworking by the imposition of technical or operating standards or management procedures which control or reduce the level of risk.

“6.3.2 The overall effect of Railway Group Standards must be consistent with the conditions set out in Condition 3 of Railtrack’s Network Licence ... To this end the purpose of the Code as defined by the Licence requires Railtrack to take into account the following **Practical Criteria** in the decisions it takes. These address the potential

economic implications of standards as set. None of these will necessarily have priority over any other. These practical factors are:

- (a) avoiding imposing undue or unreasonable burden of costs on any particular railway industry party/parties;
- (b) ensuring as far as is practicable that railway industry parties are able to meet existing or future contractual obligations;
- (c) avoiding unreasonable increases in costs to railway industry parties, of operations, maintenance and capital assets;
- (d) avoiding unnecessary changes in working practices;
- (e) avoiding unnecessary requirement to develop new railway industry practices;
- (f) avoiding unnecessary barriers to innovation and new services;
- (g) avoiding, as far as practicable, frequent changes in Railway Group Standards;
- (h) where practicable, developing changes to related Railway Group Standards concurrently;
- (i) providing railway industry parties reasonable time to make consequential changes within their business for compliance with the changed Railway Group Standard;
- (j) ensuring Railway Group Standards are sufficiently clear, adequate information is provided and requirements of those affected are clearly defined; and
- (k) providing railway industry parties the maximum reasonable flexibility in deciding how they best achieve compliance

Note: The list of factors set out in this Paragraph 6.3.2 does not preclude the consideration of other factors where appropriate.

“6.4 In any case where there is a dispute between railway industry parties, or with the Directorate, as to the appropriateness of a Railway Group Standard, or as to the need for new or revised standards, the Code Decision Criteria provide all affected with a set of benchmarks, against which they can assess, and/or contest, the merits of individual standards or decisions. Decisions as to the content or scope of any

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safety cost-benefit analysis will also be informed by the Code Decision Criteria.

...

“7.2. Where, having regard to the Code Decision Criteria, the Directorate has reasonable grounds for considering that any review of a Railway Group Standard is required it will pursue it in accordance with Railway Group Standard GA/RT 6001.

“7.3. The following events and processes may lead to a review of the relevant Railway Group Standards by the Directorate:

...

“7.3.4 Customer Feedback: The Directorate actively seeks feedback from customers. In addition, customer complaints may result in review of Railway Group Standards.

...

Note: This is not an exhaustive list of the events and processes which may lead to a review of the relevant Railway Group Standards.”

25. The relevant obligations imposed on Railtrack under the Licence Conditions and the RGS Code are thus in summary:
 - 25.1. to prepare an RGS Code and maintain individual RGS's in accordance with the Safety Criterion and Practical Criteria (Condition 3(3) and 3(4));
 - 25.2. to comply with the RGS Code (Condition 3(2)(b));
 - 25.3. to comply with individual RGS's (Condition 3(2)(c) and RGS Code 6.3);
and
 - 25.4. to monitor the continuing adequacy of individual RGS's (Condition 3(4)(c) and RGS Code § 7.2).
26. As Mr Muttram's letter correctly indicates, the first of these obligations is primarily if not exclusively for SSD itself to consider. Mr Muttram takes exception to the procedure adopted by Alstom and Adtranz in writing to the

Regulator directly rather than to himself. However, the Regulator is plainly entitled to monitor the discharge by the SSD itself under the Conditions, the SSD forming part of Railtrack with specified duties under Condition 3(4)(c) (and Condition 3(2)(b) and 3(3) imposing a general obligation in relation to the RGS Code). In any event, it would be appropriate for the SSD to take account of the views expressed during this procedure pursuant to its general duties imposed by paragraphs 7.3 and 7.4 of the Code.

27. Condition 3(7) is of only limited relevance, in that it essentially imposes an advisory duty on SSD to assist interested parties in the interpretation of the RGS's. There is no real complaint about SSD's discharge of this function.
28. Similarly, Condition 7, §§(1) and (2), are essentially concerned with the development of Railtrack's physical infrastructure. Although in one sense many of the difficulties that underlie these complaints derive ultimately from the lack of uniformity of the British rail network, this Report concentrates on the extent to which these difficulties could be better addressed in the actual state of the network rather than the hypothetical question of how they would ideally be addressed if the network were more uniform. The extent to which greater uniformity can be achieved in the short to medium term raises substantial funding issues that go beyond the issues central to these complaints.

Individual Group Standards

29. The primary relevant provisions of the individual Group Standards are:

- Group Standard 2149, §§ 4.1 and 4.5:

“4.1 Vehicles shall be designed and maintained so that they do not infringe the minimum clearances required between vehicles and track infrastructure and between vehicles passing each other on adjacent tracks. Required clearances shall be maintained under all normal track and operating conditions on those routes where the vehicles are permitted to operate. ...

...

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4.5 A vehicle shall satisfy at least one of the following requirements to be accepted for operation on a specified route. In each case, formal acceptance and clearance to operate must be obtained from the appropriate Infrastructure Manager.

(a) the swept gauge of the vehicle shall not be greater than that prescribed in Section 5.

(b) the swept envelope of the vehicle shall not be greater than that prescribed in Section 6.

(c) for vehicles which fail to meet the requirements of both (a) and (b), special arrangements for kinematic gauging clearance shall be agreed and implemented.

It should be noted that compliance with (a) may result in vehicles that are smaller than necessary. Compliance with (c) may require extensive investigations and costly modifications to the track infrastructure, and the imposition of additional operating restrictions.”

- Group Standard 5204, §§ 4.1.1, 4.2, 4.3, 5.1.2, 5.1.3, 5.3.1, 5.4.1, 6.1.1, 6.1.2, 6.3.1 and 6.3.2 provide:

“4.1 New Construction

“4.1.1 Railtrack shall apply the Standard Structure Gauge (App. C and D) as a minimum standard for all new construction.

...

“4.2 Existing Structures

“Railtrack shall ensure that clearances between existing track and structures less than Standard Structure Gauge are not worsened and wherever reasonably practicable are improved. Clearances more than Standard shall not be worsened to the extent that they become less than Standard.

“4.3 New Vehicles on Existing Routes

“4.3.1 Clearances less than the Standard Structure Gauge³ shall not normally be created or perpetuated when new vehicles (including any vehicles new to the route(s) concerned) are under consideration.

...

“5.1.2 Railtrack shall ensure the safe passage of existing traffic in relation to existing clearances by means of:

...

(b) monitoring of existing clearances (para. 5.3);

(c) maintenance of records (para. 5.4)

“5.1.3 In addition, for vehicles new to a route Railtrack shall operate a gauging clearance procedure (section 6).

...

“5.4 Maintenance of Records

“5.4.1 Railtrack shall keep details of the relative positions of its tracks and structures which are less than the Standard Structure Gauge.

...

“6.1 General Requirements

“6.1.1 Railtrack shall operate a procedure to ensure the safe passage of proposed new or modified vehicle types and loads on wagons (e.g. containers) in the context of existing clearances.

“6.1.2 The procedure shall require the determination of the Kinematic and Swept Envelopes of the proposed vehicle and the assessment of the compatibility of these with existing structural and passing clearances over the proposed route(s).

...

³ “Standard Structure Gauge” is defined in § 3 to mean “the recommended minimum structure gauge referred to in the HSE/HMRI publication Railway Construction and Operation Requirements and as shown in Appendix C”. Appendix C comprises a technical diagram illustrating “minimum lateral and overhead clearances”, supplemented by a number of detailed explanatory notes.

“6.3 Granting of Route Clearance

“6.3.1 If the swept envelope of the proposed vehicle (including pantograph where appropriate) is greater than that of vehicles already cleared for the route, a full clearance exercise involving assessment of both structural and passing clearances shall be performed for the route (or uncleared parts of a route). If acceptable clearances (i.e. exceeding 200mm) are available the proposed vehicle shall be considered clear of gauge for that route.

“6.3.2 If the swept envelope is equal to or within that of vehicles already cleared for the route, no further assessment of clearances is required. However, before route clearance can be given it will be necessary for any HSE/HMRI dispensation granted for existing vehicles to be obtained for the proposed vehicle. It shall be Railtrack’s responsibility to seek this additional dispensation.”

- Group Standard 3270 (issue 1), § 6:

“Railtrack must have processes:

(a) to provide information to Train Operators and Vehicle Owners, to permit compatibility between their vehicles and Railtrack’s controlled infrastructure and safe interworking between their vehicles and others operating on that infrastructure to be determined”

- Group Standard 3270 (issue 2), §§ 6 and 10:

“6.1 Exchange of Information

There shall be an exchange of information between the Train Operator and Railtrack in the case of vehicle proposals ... In each case, the exchange shall identify such aspects as the likely consequences on safety, potential mitigation measures and additional information requirements.

“6.2 Identification of risks

The Train Operator(s) and Railtrack shall cooperate in the identification of the risks associated with the proposals. There shall then be an analysis to identify which risks are satisfactorily addressed by compliance with Railway Group Standards and which are not. In the latter case, the parties shall agree on a strategy for reducing risks falling within the scope of this Standard to a level which is as low as reasonably practicable (ALARP).

“6.3 Acceptance criteria

Following agreement on the strategy for mitigation of risk, Railtrack shall indicate the nature and scope of the evidence which it requires to be presented in support of an application for a Certificate of Authority to Operate. Railtrack shall give a clear indication of the criteria by which it will judge the information which is presented, both in respect of what constitutes acceptable performance and in respect of the integrity of the process by which that performance has been assessed.

...

“6.5 Acceptability of the Proposals

Railtrack shall indicate clearly to the Train Operator whether the evidence presented in support of the application for a Certificate of Authority to Operate represents an acceptable demonstration that the risk has been controlled to a level which is as low as reasonably practicable. If it is not acceptable, Railtrack shall give a clear statement of the reasons why, and shall indicate what further steps need to be taken by the Train Operator to provide such a demonstration” (RGS 3270, § 6.5);

...

“10. Responsibilities of Railtrack

10.1 Organisation and competence

Railtrack shall have processes and resources to fulfil its obligations under the requirements of this Standard in a timely manner. In particular, Railtrack shall:

- have clearly defined arrangements for interfacing with Train Operators for the purposes of Route Acceptance;
- operate within a defined framework which ensures that all safety aspects of vehicle acceptance are dealt with in a systematic and controlled manner;
- ensure that the appropriate competences are made available to fulfil its obligations under this Standard;
- ensure that sufficient information is provided regarding the physical characteristics and behaviour of the infrastructure which it supplies for use in the processes required by this Standard;

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- have processes in place to control the configuration of infrastructure such that, unless the processes described in this Standard have been invoked, no changes are made which may affect the compatibility with vehicles authorised to operate over it, or for which a Certificate of Technical Acceptance has been granted;
- ensure that those responsible for the planning and implementation of infrastructure modifications and renewals are aware of the potential implications on safe operation of vehicles and have available sufficient information to allow them to judge whether a proposed change requires Route Acceptance to be invoked or whether it is necessary to consult with Train Operators in order to decide whether it needs to be invoked.”

30. Section 18 of the Competition Act 1998 provides (in part):

“(1) ... any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in a market is prohibited if it may affect trade within the United Kingdom.

- (a) (2) Conduct may, in particular, constitute such an abuse if it consists in-directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- (b) ...
- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of the contracts.”

31. Section 18 of the 1998 Act falls to be construed in the light of Article 82 (ex 86) of the EC Treaty (see in particular section 60 of the 1998 Act). It is well established that a statutory licensing authority is likely to be regarded as a dominant undertaking in the market where it exercises its authority, particularly where it is also a market participant in that market or a closely related market: *Case 26/75 General Motors* [1975] ECR 1367; *Case C-18/88 RTT v. GB-INNO-BM* [1991] ECR I5941. Railtrack is therefore almost certainly dominant in the market for the supply of new trains on its network and in the supply of infrastructure compatible with those new trains, given its monopoly over safety

clearance of such trains and indeed more generally over access to the network (albeit subject to regulation).

32. As a result, Railtrack falls under two general obligations of potential relevance to the matters complained of:

32.1. it must not discriminate between its customers without objective justification: see, e.g. Bellamy and Child, 4th edn., § 9-077; and

32.2. it must not make the supply of the goods or services in which it enjoys a monopoly conditional on acquisition of other goods or services, again otherwise than on objective grounds: see, e.g., Bellamy and Child at §§ 9-070-074.

C. The main complaints

The written complaints

33. The two complaints documents filed by Alstom and Adtranz, forming respectively principal attachments A and B to the letter of 13 October 1999, raise a large number of specific issues. This Report concentrates on the main issues raised, following the approach of the Regulator in his letter of 8 December 1999, which in turn forms the basis for the response of Railtrack.⁴

34. The main complaints are as follows:

34.1. Railtrack is alleged to have failed to provide satisfactory data for the purposes of Alstom and Adtranz' preparation of applications for vehicle and route acceptance in accordance with Railway Group Standards, and in particular has failed to comply with its obligations under § 10 of RGS 3270:

- the data held by Railtrack is materially inadequate in itself, i.e. it is insufficiently complete, detailed and accurate; this has led to delays caused by the need to operate on the basis of comparative rather than absolute gauging, with the consequential need to make late modifications to stock or to infrastructure when more accurate data is generated at the safety acceptance stage; it has also led to additional costs for manufacturers in obtaining more accurate or complete data for themselves;
- such data as Railtrack holds is held in a form that makes it difficult to access; much of it is held in paper form that requires physical

⁴ This Report does not attempt to deal with every detailed issue raised. In the original written complaints, there were four individual cases where Alstom and Adtranz raised specific concerns: Coradia, Juniper and Virgin's ATT (Alstom); and Electrostar (Adtranz). Railtrack submitted comments on each case. However, although these individual complaints were the primary focus of the original written submissions, it does not appear necessary to set out detailed conclusions on the merits of individual cases. The 9 May 2000 hearing helpfully focussed on the issues of principle raised by the complaints and that is the approach adopted in this Report, although the individual cases have been considered on their merits and inform the general conclusions set out in this Report.

inspection to be carried out rather than inspection by electronic means, such as over the Internet; this has required the manufacturers to incur the cost and inconvenience of carrying out, or paying others to carry out, manual inspection of documentary records;

- Railtrack refuses to warrant the adequacy or accuracy of its existing database, including for the purposes of preparation of applications for vehicle and route acceptance, leading Alstom and Adtranz to incur delays and expense in seeking to confirm the data independently for such purposes.

34.2. Railtrack's assessment procedures are allegedly inadequate and therefore fail to comply with § 6 of RGS 3270:

- Railtrack's criteria for assessment are said to be unclear in themselves, in particular in respect of electromagnetic interference, where no RGS currently exists and where Railtrack maintains that it is impossible to lay down binding criteria;
- this lack of clarity is said to be compounded by the two stage clearance procedure, whereby applications for vehicle and route acceptance are assessed by Independent Safety Advisors ("ISAs") before being finally assessed by the Safety Review Panel ("SRP"), with no clear criteria laid down at either stage;
- Railtrack refuses to warrant that safety assessments will be carried out on the basis of the data supplied to manufacturers by Railtrack, with the consequences already referred to in respect of defective data; the manufacturers maintain that Railtrack should be prepared to guarantee that it has complete and accurate information as to the physical condition of its network, so that manufacture and safety assessment can proceed on the basis of a consistent set of information known in advance;

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- Railtrack fails to give adequate reasons where the safety assessment is negative;
- although this is not the primary focus of the complaints, RGS 3270 is said to be defective both in the level of particularity with which it is drafted and in failing to provide for any enforcement mechanism that would effectively require Railtrack to comply with the requirements of §§ 6 and 10.

34.3. It is alleged that Railtrack requires manufacturers (or the relevant operating company) to pay for infrastructure changes where:

- inadequacy of absolute data requires manufacturers to operate by reference to characteristics of existing stock in preparing applications for vehicle and route acceptance;
- new stock falls within the kinematic envelope of existing stock;
- Railtrack subsequently imposes additional requirements in respect of the safety assessment of new stock, i.e. requirements which are not applied to trains that are already operating on the route in question and that have been used as the reference models for the manufacture of new trains, leading to a requirement of infrastructure change.

34.4. A number of detailed allegations of a procedural nature are made about scheduling and attendance at meetings etc. These complaints are not clearly distinct from the complaints about the inadequacy of data and or acceptance procedures at points 34.1 and 34.2 above.⁵

The 9 May hearing

⁵ It is possible that section 55(5)(b) or (c) may apply to these complaints: it appeared to be common ground at the hearing on 9 May 2000 that significant progress had been made in this respect, partly as a result of mediation undertaken by the sSRA: pages 22 (Mr Muttram of SSD, Mr Humphrey of sSRA), 70 (Mr Trayner of Adtranz) and 127 (Mr Leah of Railtrack) of the Transcript.

35. The hearing held on 9 May 2000 explored the positions of the parties in relation to information provision and criteria in considerable detail, on the basis of which it is possible to refine the central issues, which relate primarily to information and criteria for the physical gauging and electromagnetic compatibility of new trains on individual routes.
36. The complainants maintain that Railtrack should be able to provide detailed safety criteria in these key respects, based on precise and detailed knowledge of the physical characteristics of its network, both in general and specific terms, against which new trains could be designed in the knowledge that these criteria would not change during the process. Their ideal solution would be a set of binding criteria contained in RGS's against which trains could be designed in the knowledge that they would then be compatible with Railtrack's network. However, they appear to accept that the current state of the network renders that impossible, so that their fallback position is that they must be provided with comprehensive information as to the relevant physical characteristics of the routes for which their trains are to be designed and built.⁶ The manufacturers maintain that anything short of this necessarily leads to unacceptable delays and an unacceptable transfer of risk from Railtrack to the manufacturers. In particular, the procedural proposals made in the AD Little report were considered to be inadequate in themselves to address the underlying problems faced by manufacturers.⁷
37. The manufacturers also allege that the current procedures involve a significant degree of subjective assessment by Railtrack, which in turn leads to an "ALARP spiral": higher and higher safety criteria are imposed on new trains to compensate for the lack of certainty in the assessment criteria and the information on which those criteria are based; and risks that arise from defects in the network infrastructure are in effect transferred from Railtrack to the safety assessment of the trains that are intended to run on that network.⁸

⁶ See pages 119-120 of the Transcript.

⁷ See pages 72-3 of the Transcript.

⁸ See pages 7-8, 65-66 of the Transcript.

Railtrack's response at the hearing

38. Railtrack's position on this issue emerged clearly at the hearing and is stated in forceful terms in the subsequent memorandum dated 19 May 2000:

"1. Provision of Information to Manufacturers at the Design Stage

During the course of the hearing the manufacturers sought to argue that point 4 of section 10.1 of Group Standard 3270 obliged Railtrack to provide 100% absolute data on 100% of its infrastructure at the tender or design stage.

Railtrack's view is that Group Standard 3270 obliges Railtrack to supply to the TOC or its agent sufficient information to enable the route acceptance process to be completed. It does not require Railtrack to provide 100% absolute infrastructure data to allow manufacturers to optimise train design."

39. In support of this position, Railtrack noted two cases where it had entered into commitments that were, as Railtrack alleged, inconsistent with such obligations being contained in RGS 3270 (in particular, it had entered into contractual commitments with West Coast Trains that would have been redundant if comprehensive data had to be provided in any event under RGS 3270).
40. However, Railtrack accepts that in practice it provides "standard data and ... information on whether a specific kinematic envelope supplied by the manufacturer can pass over a route" and that it is in the process of compiling a data base of "all structural dimensions affecting vehicle gauging" to be provided free to manufacturers.
41. It thus appears that there is only limited practical difference in view between the parties in relation to physical gauging, in that Railtrack now appears to accept that it must substantially improve its data collection and management systems. However, Railtrack does not accept that RGS 3270 imposes an obligation in this respect; and therefore does not appear to accept that it should be always have been in a position to provide absolute gauging data for use by manufacturers. This issue is considered in more detail in part D of this Report.

42. The more intractable difference of view relates to electromagnetic compatibility. Railtrack's stance, articulated in detail at the hearing, is that the composition of the UK network, and advances in technology over time, make it impossible to provide any simple and unqualified criteria for clearance that could be used by manufacturers as a blueprint for their designs. By contrast, the manufacturers consider that Railtrack is exaggerating the difficulties and that international experience supports their belief that much more specific information should be available at a much earlier stage. This is discussed in Part E below.

Other issues

43. There are a number of other issues that were raised by the complaints:
- 43.1. the "Yellow Book" of technical requirements (i) is unduly complex (although a revised version apparently has been very recently agreed, including by Alstom and Adtranz) and (ii) is not in fact treated as providing binding criteria in any event;
 - 43.2. further uncertainty arises in respect of platform stepping distances (Alstom complaint, exhibit 9(a)11);
 - 43.3. the involvement of ISAs introduces an additional layer of uncertainty and subjective assessment, without clear criteria being followed at this preliminary stage of assessment;
 - 43.4. the obligation to state reasons laid down by § 6.5 of RGS 3270 is not adequately complied with by Railtrack.
44. The undue complexity of the Yellow Book may have been partly admitted, but addressed, by the fact that a new version has very recently been prepared. However, the other aspect of this complaint is that the Yellow Book is not treated as supplying binding criteria by the SRP, so that it does not provide binding criteria on which the manufacturers can rely in preparing their applications for vehicle and route acceptance. Railtrack does not appear to deny that this is the case in its written response and the matter was not discussed at

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the oral hearing. If that is in fact the position, then that represents a further breach of § 6 of RGS 3270, subject to the points discussed in parts D and E below in relation to the interpretation of RGS 3270. The status of the Yellow Book, as against the detailed rules laid down by the RGSs in this area, requires clarification in any event.

45. The issue of platform stepping distances is alleged to arise because of inconsistencies of approach between Railtrack and HMRI but also because of the fact that actual platform heights do not in general conform to those provided for in the relevant standards. This is an area where the nature of the network inherited by Railtrack causes particular problems and where significant investment by Railtrack will be needed if a long-term solution is to be found. In the interim, the issue raises the same problems of inadequate data referred to above. It is clearly essential that both the manufacturer and Railtrack should know what platform heights and clearances are actually present on a particular route. A number of difficulties are recorded in the complaints where new trains have had difficulty in complying with the range of heights and clearances present on a route or routes where the train is intended to operate. At the hearing, Railtrack gave evidence that it was proposing a major programme of investment to improve the physical infrastructure in this respect.⁹

46. The third and fourth points are relatively minor and difficult to assess in general terms:

46.1. It is plainly desirable that the ISAs and SRP should operate to common standards and that reasons should be given where an application for vehicle and route acceptance is refused, in sufficiently clear terms that a manufacturer can take appropriate steps to put the matter right. Railtrack asserts that reasons have been given and have produced documents in support of that assertion. However, Adtranz and Alstom maintained in their original complaints that those reasons are insufficient in practice.

- 46.2. There are a number of detailed procedural allegations and counter-allegations between the parties as to failure to nominate personnel and delays in providing information etc. These are relatively minor aspects of the complaints by comparison to the issues raised in respect of information and criteria for applications for vehicle and route acceptance. The allegations made by the manufacturers are not clearly established by the written complaints as distinct issues from those considered above. Although they could in principle constitute further breaches of RGS 3270, they were not pursued at the oral hearing and there is no sufficient evidence in the papers to reach a final adjudication on this matter.
47. If these issues remain a matter of serious concern to the manufacturers, and they wish the matter to be addressed by the Regulator, then they need to provide much more detailed evidence of the problem on the basis of which he can act. In addition, the oral evidence at the 9 May hearing suggested that the sSRA and the principal parties were now actively seeking ways to adopt a constructive and cooperative attitude. If that is so, then it may not be necessary for the Regulator to intervene.

⁹ Page 91 of the Transcript. I have also seen part of Railtrack's May 2000 cost submissions (§ 2.110) which link this issue to the current revision of RGSs 2149 and 5204 to require compliance to Standard Structure Gauge below 1100mm above rail level "by 2007 or within 18 months of application by train operators".

D. Gauging

48. The first substantial issue raised by the complaints is the difficulties that have arisen for Adtranz and Alstom in developing new trains that will physically fit on the routes for which they are designed. In summary, Railtrack is said to produce too little information too late in the process for the manufacturing and clearance process to operate efficiently. Although this a simple issue to state, it is clear that there are substantial practical difficulties involved in introducing trains that seek to go beyond the standard shape and size of trains that have been used on the British network for many years.
49. In the complaints as lodged and in the oral hearing, attention was concentrated on RGS 3270. However, as Mr Muttram insisted at the hearing, RGS 3270 is not the only relevant RGS in this respect. It is in fact more logical to start with RGS 2149 and 5204 which form an interlocking regulatory scheme for physical clearance of new trains.
50. The relevant text from these two RGS's is set out above.

RGS 2149

51. In summary, RGS 2149, § 4.5, lays down three possible ways in which a new vehicle may be cleared: (i) by reference to a "Reference Swept Gauge to which vehicles have been previously built and are known to have acceptable clearances on the proposed route or routes of operation" (§§ 4.5(a) and 5.1); (ii) by reference to a "Reference Swept Envelope which ... is known to provide acceptable clearances" (§§ 4.5(b) and 6.1); or (iii) by "special arrangements for kinematic gauging clearance" (§ 4.5(c)).
52. Of these three possibilities, the first is said to be liable to result in "vehicles that are smaller than necessary", whereas the third is said to be liable to require "extensive investigations and costly modifications to the track infrastructure, and the imposition of additional operating restrictions" (§ 4.5, concluding paragraph). The second possibility, clearance by reference to a "Reference Swept Gauge", is

not stated to suffer from either of these disadvantages and thus appears as the most practical method of clearance where it is available.

53. At the 9 May hearing, detailed evidence was given in relation to the “Supplementary Information Supplied by Railtrack plc” in the sSRA “Invitation to Tender for Replacement of Mark I Rolling Stock”. That evidence casts light on how RGS 2149 is operating in practice. In the document itself, Railtrack states that:

- the passenger gauge specified in RGS 2149, C1/C1a, “MUST NOT be used for vehicle design purposes without reference to Railtrack”;
- “Unless a new vehicle complies fully with a standard vehicle gauge, gauging authority must be progressed on a route by route basis”;
- “On the South East England DC network, absolute dimensional data is available for approximately 75% of the network.

However most of the network has been gauge cleared, with works where necessary, for modern vehicle designs, leaving only a small number of routes where a comparative gauging approach will not be possible.”

54. In oral evidence, Railtrack executives apparently accepted the position to be that for the 25% of the South Eastern DC network, where absolute dimensional data were not available (or at least were not comprehensively available), manufacturers were in effect obliged either to design their trains to conform to the size and shape of existing trains (and that modern suspension might mean that they would in practice be obliged to build smaller trains in order to come within an existing kinetic envelope) or to obtain individual clearance of the train in question, i.e. the third of the options provided for in RGS 2149.

55. It thus appears to be common ground that, on this part of the network at least, neither of the first two possibilities envisaged by RGS 2149 is in practice available to manufacturers, subject only to the possibility that they limit new trains to a very small kinetic envelope to conform to, at the maximum, the profile of an existing cleared train.

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56. Likewise, in applying the possibility laid down by § 4.5(c), Railtrack is in practice obliged to use comparative methods of assessment in combination with a piecemeal absolute clearance process, because it is currently unable to provide a comprehensive “Reference Swept Envelope” for the purposes of § 4.5(b) or comprehensive absolute gauging data for the purposes of § 4.5(c).

57. This analysis seems to be confirmed by Railtrack’s own document entitled “Guidance Note for Zone Gauging Engineers - Acceptance of Vehicles”, exhibited as document 9(d)1 to the Alstom complaint, which states that:

“The preferred method of vehicle acceptance is by using absolute proven data but it is recognised that data quality and availability may preclude this, requiring comparative methods to be used. ...

“The technique of using comparative gauging must only be undertaken when complete absolute proven data has not been made available. Where this data is available comparative gauging must not be used.”

58. It thus appears that Railtrack is currently unable satisfactorily to operate gauging clearance in any of the ways provided for in RGS 2149, § 4.5, because of the lack of absolute data on which such an approach could be based.

59. It is important to note, given Railtrack’s stance in relation to RGS 3270, that § 4.5 of RGS 2149 clearly applies at the *design* stage (“Vehicles shall be designed and maintained so that they do not infringe the minimum clearances ...”). It would make little sense to impose such obligations on designers of new vehicles if Railtrack was under no obligation to provide accurate and detailed gauging information at the design stage.

RGS 5204

60. RGS 5204 is primarily concerned with the creation and maintenance of a “standard structure gauge” (“SSG”) complying with the recommendations of HSE/HMRI. However, given the current state of the network, which is to a substantial extent non-compliant with the SSG, detailed rules are laid down for dealing with sub-standard clearances, and for the transition to standard clearances

and the SSG where new trains are introduced and/or where the infrastructure is replaced or repaired.

61. RGS 5204 defines a procedure for determining what substandard clearances may be permitted in relation to new trains. RGS 5204 is therefore relevant to the issue of infrastructure costs considered in part F of this Report. However, it is also material in relation to gauging, in that §§ 5.1.2(b) and(c) and 5.3 and 5.4 impose specific obligations on Railtrack to monitor substandard clearances and to “keep details of the relative positions of its tracks and structures which are less than the Standard Structure Gauge”.
62. Although Railtrack maintained at the hearing that these obligations were performed on Railtrack’s behalf by its maintenance contractors,¹⁰ it seems obvious that such obligations cannot be satisfactorily performed unless Railtrack has comprehensive data readily available as to the physical structure of its network and that such information is not currently available in a comprehensive form. It appeared from the evidence that a very substantial proportion of the network does not conform to the SSG and therefore falls within the terms of § 5.3.
63. Likewise, § 6 of RGS 5204 lays down procedures for the grant of Route Clearance, similar to those provided for in RGS 2149, in terms that cannot be efficiently carried out without comprehensive data held by Railtrack. § 6.3.1 requires “a full clearance exercise involving assessment of both structural and passing clearances” to be performed on routes where a proposed vehicle has a swept envelope “greater than that of vehicles already cleared for the route”.
64. Although Railtrack sought to argue that such an obligation could be performed on an ad hoc basis where Railtrack did not hold the relevant data for its own purposes, such an exercise would be conducted significantly more efficiently by reference to comprehensive absolute data. If such data is not available, there is an inevitable risk of substantial delays while the required information is

¹⁰ Page 80 of the Transcript.

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assembled and/or judgment is exercised as to whether a comparator vehicle can be used to provide assurance that the new vehicle can be cleared in this respect.

§§ 6 and 10 of RGS 3270

65. §§ 6 and 10 of RGS 3270 impose a number of specific obligations on Railtrack to lay down clear criteria for safety assessment and to provide information to parties such as Alstom and Adtranz, and to give detailed reasons where those criteria are not satisfied.
66. The allegations made by Alstom and Adtranz are to the effect that there have been serious and repeated breaches of these obligations by Railtrack and that Railtrack will effectively remain in continuing breach of those obligations unless and until it is able to provide accurate, accessible and complete data and clear criteria for assessment of applications for vehicle and route acceptance. In particular, it is alleged that Railtrack has failed to devote adequate resources for it to be able to satisfy the information requirements of the third and fourth indents of § 10.1, and there are also allegations of breaches of the procedural requirements of §§ 6.3 and 6.5.
67. The cumulative evidence contained in the written and oral complaints of the manufacturers, much of which was effectively accepted by Railtrack, strongly supports these allegations, which are essentially the same as the passages from the Booz Allen report cited above. In addition, the various projects referred to below appear to be tacit acceptance that Railtrack needs to make substantial investment in data collection and data access systems if it is to manage its network efficiently, in particular in relation to vehicle and route acceptance. Those projects are still far from complete although it appears that substantial progress is now being made.¹¹
68. In addition to referring in detail to the efforts now being made to remedy the lack of comprehensive and accessible data, Railtrack advances three points of

¹¹ See paragraphs 84 and 85 below for the evidence presented by Railtrack in this respect.

construction of RGS 3270, designed to show that there has been no breach of RGS's, and in particular of RGS 3270, the RGS on which the complainants primarily rely:

- 68.1. As a technical matter, the individual cases on which the complaints were based fell to be considered under the simpler provisions of RGS 3270, issue 1, in that they were applications made before issue 2 entered into effect.
 - 68.2. The requirement to provide "sufficient information", laid down in point 4 of § 10.1 of RGS 3270, issue 2, is not to be judged by absolute standards, laid down to suit a manufacturer wishing to design a new train, but rather by reference to the information that Railtrack itself requires for the purposes of its own business.
 - 68.3. The requirement to provide "sufficient information" is to be applied at the safety assessment stage, not at the stage of initial design and manufacture.
69. The first point, the application of RGS 3270, issue 1, would be of considerable relevance if the statutory regime were historical and punitive in its structure. But that is not so. Under section 55, the Regulator is required to consider current or likely future breaches of Railtrack's licence conditions and to take account of any undertakings to remedy such breaches. In making such an assessment, it is appropriate to consider not only the precise regime under which particular cases have been operating but also to look more generally at Railtrack's current obligations and the extent to which they are being discharged by Railtrack's current practices.
70. On the other two points, Railtrack's characterisation of the complainants' position as requiring Railtrack "to provide 100% absolute data on 100% of its infrastructure at the tender or design stage" polarises the debate in an unrealistic way. The Regulator is required in respect of RGS 3270, § 10.1, to consider whether "sufficient information is provided regarding the physical characteristics and behaviour of the infrastructure, in order for the processes required by this Standard to be satisfactorily completed". He must also consider whether

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Railtrack has “processes and resources to fulfil its obligations under the requirements of this Standard in a timely manner”.

71. The allegations made by the manufacturers raise serious questions as to whether the requirements of RGS 3270 can be completed “satisfactorily” or “in a timely manner” unless Railtrack has a greater detailed awareness of the “characteristics and behaviour” of its network than is currently the case. A finding that the current level of information is not “sufficient” in this sense would not imply that Railtrack must comply with unrealistically absolute requirements.
72. The timing issue is more substantial and merits separate treatment.

Timing and design clearance

73. In relation to timing, it would clearly be highly unsatisfactory if Railtrack’s construction of RGS 3270 were correct. The result would be that Railtrack’s position in relation to innovation in rolling stock was essentially passive. It would not have any obligations to provide detailed information to train operating companies (or others seeking route acceptance) until they had produced a detailed design of a new train.
74. If this analysis is correct for RGS 3270 then it must apply equally to RGS 2149 and 5204. It would be pointless and illogical to read those RGS’s significantly more broadly than RGS 3270 in relation to the clearance of new trains. However, it is clear from RGS 2149, § 4.5 that the obligations contained in that RGS are indeed intended to apply at the design stage.
75. There are thus two possibilities:
 - 75.1. the narrow construction adopted by Railtrack in respect of § 10 of RGS 3270 is wrong; or
 - 75.2. the current RGS’s, 3270 and 5204, are defective and incoherent, in that they do not impose any obligations on Railtrack to provide detailed information of precisely the kind that is needed for a manufacturer to

engage in detailed preparatory work for the purposes of designing new trains that will prove to be compatible with the British network, despite the fact that RGS 2149 imposes the equivalent obligation in respect of gauging on those manufacturers at the design stage.

76. As was put to Mr Muttram at the hearing (pp. 43-4), it would not be acceptable for a manufacturer to build a train on the basis of inadequate information provided by Railtrack as to the “physical characteristics and behaviour of the infrastructure” and then to find only at the safety clearance stage that the train does not fit on the route in question. If Railtrack is technically correct that this situation falls outside the scope of current RGS’s, then this is a matter that requires urgent review by the SSD in the performance of its duties under Condition 3(4)(c).
77. In this respect, Condition 3(3) of Railtrack’s licence is relevant, together with the description of the Safety Criterion and the Practical Criteria in the RGS Code. The provision of detailed information at the design stage is not something that would be required on a narrow view of the Safety Criterion, in that the issues of safety only arise directly when an actual train is presented for safety clearance. However, a number of the objectives identified by the Practical Criteria would be advanced if full information were available at the design stage.
78. In particular, the RGS Code is required by Condition 3(3) to include the purpose of ensuring “the safe operation of ... railway assets ... *to be used* on or in connection with the licence holder’s network” (emphasis added) and to have due regard to the need, inter alia: “to promote efficiency and economy on the part of ... other persons providing railway services on or in connection with the licence holder’s network and “to enable ... other persons [providing services on Railtrack’s network] to plan the future of their businesses”.
79. Given the current scope of the RGS Code, Railtrack, and SSD in particular, appear to take the view that these obligations do not include (i) any obligations to facilitate the design stage of new trains or (ii) to provide detailed information and

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criteria to manufacturers or designers of new trains in advance of the clearance procedure.

80. That interpretation does not take proper account of the Practical Criteria and the factors identified at Condition 3(3)(a) to (e) set out above. It would certainly be consistent with those Criteria for a wider obligation to be imposed by extending the scope of current RGS's or by the introduction of a new RGS dealing expressly with the supply of information to manufacturers at the design stage. In addition, the wording of RGS 2149, § 4.5, indicates that the RGS Code can impose obligations *on train operating companies and manufacturers* at the design stage. It is highly unattractive, as well as arbitrary, to suggest that complementary obligations were not and could not have been imposed on Railtrack by Condition 3(3) and the RGS Code.

Future steps

81. Although Railtrack would not apparently accept the above analysis in relation to the provision of information at the design stage, it has recently begun a systematic attempt to provide the gauging information that has been demanded by manufacturers.
82. The historical deficiencies in Railtrack's performance, and in particular its failure to honour commitments entered into in 1997, are clearly recognised in a Railtrack paper dated 18 May 1999 (exhibit 9(a)6 to Alstom's submission):

"Infrastructure Asset Data

"In 1997 Railtrack promised Train Operating Companies and train builders free and ready access to Railtrack infrastructure asset data. This has not proved possible *due to the lack of Asset Management Systems* and has therefore required manual data gathering at Zone record offices. This exercise has also been undertaken by Alstom/Adtranz employees *due to lack of Railtrack resource*. With immediate effect, it is proposed to use a small Railtrack HQ Task Force to undertake this and obtain the necessary validation from Zones. *Prior to the implementation of RAR, this will ensure Railtrack in part meets its 1997 commitments.*" (emphasis added).

83. This passage recognises the validity of two aspects of the complaints: (i) the failure to provide ready access to the data held by Railtrack; and (ii) the need for the establishment of an asset register to deliver on data supply commitments made in 1997.
84. Annexes C and D to Railtrack's original written response set out the position in respect of two other such initiatives, the "Industry Data Initiative" and "National Gauging Project" as at 12 and 31 January 2000 respectively.
- at that time, the IDI project was intended to be finalised by August 2000 in terms of "Data Packages" to be submitted to the Safety Review Panel "for endorsement of their technical content", whereas the completion of a database was to be completed by April 2001;
 - the NGP project was less well advanced but was then intended to be completed by the end of 2002, with priority being given to routes in accordance with currently perceived commercial necessities (set out in Appendix B to Annex D).
85. Additional written information was produced at the hearing and further evidence was given orally by employees of Railtrack with responsibility for the various tasks.¹² The NGP is primarily relevant to the gauging issue, whereas the IDI and RAR projects are particularly relevant to the issue of electromagnetic compatibility discussed below.
86. In summary, the NGP is intended to produce absolute data in a readily accessible form for the great majority of the Railtrack network. It appears that this undertaking, if implemented in the manner described by Railtrack at the oral hearing,¹³ will satisfy the most pressing aspect of the complaints in relation to gauging, Railtrack's historic and continuing lack of such detailed knowledge of

¹² Pages 38ff and 48ff of the Transcript.

¹³ See pages 38-9 of the Transcript: "for the areas covered by this project, whatever shape of train the manufacturer comes up with, you will be able to press a button on the computer and it will be able to tell you whether it will fit or not? Yes, that is right."

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the physical characteristics of the network. Although the manufacturers would clearly prefer to design trains to a single gauge for the entire British network, their primary objective is to obtain early guidance either by way of binding criteria or detailed information where no simple criteria can be laid down. The NGP is intended to produce the second of these.

87. Another point is relevant here. As discussed above, RGS 5204 currently requires that Railtrack should conform to SSG when it replaces its infrastructure (§ 4.1.1), that it should improve compliance with the SSG “wherever reasonably practicable” (§ 4.2) and that it should normally remove sub-standard clearances when new vehicles are introduced on a route (§ 4.3.1). Railtrack presented evidence at the hearing that RGS 5204 (and 2149) were in the process of replacement, and that Railtrack was to be placed under additional obligations to make substantial alterations to the infrastructure. The effect should be that, over the next few years, there will be significant improvements in the consistency of the gauge.
88. However, Railtrack does not accept that it is obliged by its licence or by any RGS to provide detailed infrastructure information for the purposes of facilitating the design of new trains (or that there is any such obligation in relation to manufacturers directly, as against through the train operating companies). As discussed above in the context of timing, that is either an unduly restrictive analysis of Railtrack’s obligations under the current RGS regime or else SSD should consider the introduction of additional obligations, pursuant to the Practical Criteria, requiring Railtrack to provide such information at an early stage, including to manufacturers at the design stage. The complaints make it clear that the current situation is unacceptable and the efforts that Railtrack is now devoting to the NGP (which mirror the findings of the Booz Allen report) effectively confirm that this is so.

E. Electromagnetic compatibility

89. The situation in relation to electromagnetic compatibility is legally more straightforward, although the technical and practical difficulties facing the parties in progressing the issue appear to be serious and genuine.
90. Legally, it is clear that there is at least a technical breach of Railtrack's licence. A previous BRB RGS, GS/ES 1914 (which laid down detailed criteria for electromagnetic compatibility), has been withdrawn without being replaced. Electromagnetic compatibility is a very important issue, for both safety and practical reasons, which requires detailed criteria to be laid down or detailed information to be provided if it is to be dealt with effectively. It is a breach of the RGS Code, both on safety and on practical grounds, for there to be no current RGS on this issue.
91. However, Railtrack has expressed the firm view on a number of occasions that the previous RGS was seriously inadequate and that it is impossible to provide binding criteria that would enable the industry to move forward in the design of new trains across the network (unless an extremely restrictive approach were taken, in which case most new trains would have to be rejected as unsafe).¹⁴ Railtrack maintains that the British network is particularly complex in this respect, given the range of track circuits currently to be found on the network and the somewhat haphazard way in which they were replaced or introduced.
92. On this point, it is necessary to distinguish two issues:
 - 92.1. the accumulation of detailed information about the location and layout of the relevant Railtrack infrastructure; and
 - 92.2. the issues of technical analysis and judgment that arise in assessing how particular traction packages on new trains will interact with the current infrastructure (and other trains on the network).

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93. Although it is easy to see that the second issue is technically complex, the first issue appears to be similar, and possibly simpler, than the accumulation of accurate gauging data. Although it is no doubt a very time-consuming task to assemble the information in a comprehensive and accessible form, it does not appear to be technically particularly difficult to locate and identify the relevant Railtrack assets.
94. As mentioned above, both aspects are currently being pursued by Railtrack, in addition to the NGP, although it is clear that these efforts are far from complete.
95. On the first point, Railtrack is in the course of producing the RAR, which Railtrack claims will provide comprehensive information as to the location of individual assets, including those relevant to the electromagnetic compatibility issue.
96. In parallel, Railtrack has embarked on the IDI, which is said to be designed to give much more detailed guidance to the industry, including to manufacturers, as to the technical characteristics of the current network, both where it conforms to SSG and where it does not (as is currently the case to a very large extent). Railtrack remains adamant that it is technically impossible to present this information in a simple, binding form, but the evidence suggested that a considerable investment of time and resources is now being made by all parties to take the matter forward on a constructive and cooperative basis.
97. In respect of the RAR, similar issues arise under RGS 3270 as in respect of gauging. If Railtrack is correct, and RGS 3270 only applies after a train has been presented for safety clearance, then the SSD should give active consideration to extending the current RGS regime by imposing an obligation to provide detailed information at a much earlier stage. If RGS 3270 already has that effect, then the failure to assemble information along the lines of the proposed RAR represents a continuing breach of RGS 3270, both in relation to the provision of information

¹⁴ Pages 53-55 and 62-64 of the Transcript.

(§ 10) and as a necessary element in the laying down of criteria for safety clearance (§ 6).

98. Finally, it is noteworthy that Railtrack seems to adopt a different approach in relation to electrical equipment as against the physical infrastructure; pursuant to RGS 5204, Railtrack is required to conform to SSG in building new infrastructure. However, there does not appear to be any equivalent obligation requiring Railtrack to adopt a standardised consistent approach to the installation of electrical equipment. There was at least one incident raised in the complaints, not apparently denied by Railtrack, where particular track circuits were removed from one part of the network because of concerns at their possible incompatibility with a proposed new train, only to be reintroduced elsewhere on the network.¹⁵
99. Whether as a matter of practice or as an amendment to RGS, it would clearly be desirable for Railtrack to adopt a consistent approach to replacement of electrical equipment across the network, so that the network could gradually but consistently move towards greater uniformity and interoperability of new trains.

¹⁵ The issue is discussed at pages 93-95 of the Transcript.

F. Infrastructure costs

100. The complaints in respect of infrastructure costs can be summarised as follows:

- 100.1. much of the network currently fails to comply with the SSG;
- 100.2. Railtrack has imperfect knowledge of the physical characteristics of the network, contrary to the requirements of RGS 5204;
- 100.3. Railtrack has therefore been obliged in practice to operate a comparative gauging procedure, whereby manufacturers have been advised to design new trains to conform to a specified comparator (or a composite of such comparators) known to operate safely on the route in question;
- 100.4. in practice, this process leads to difficulties where the new train is found to generate substandard clearances;
- 100.5. under RGS 5204, such substandard clearances generally need to be remedied in relation to new trains;¹⁶ and therefore
- 100.6. Railtrack seeks to recover the costs of such infrastructure changes from the relevant train operating company (who may directly or indirectly seek to recover the costs from the manufacturer), relying on the terms of Part F of the Track Access Conditions.

101. In response, Railtrack's position is that the manufacturers have oversimplified the situation in a number of respects:¹⁷

¹⁶ § 4.3; § 4.2 requires Railtrack to ensure that "clearances between existing track and structures less than Standard Structure Gauge are not worsened and are wherever reasonably practicable improved". What is "reasonably practicable" cannot be divorced from the approach to funding of improvements of this kind and it appears that Railtrack takes a conservative view of its obligations as a matter of general maintenance of the network: see §§ 3.3-4 of Railtrack's paper of 22 May 2000. The phrase "reasonably practicable" also appears in Condition 7(2) in relation to Railtrack's obligation to fulfil the stewardship obligations imposed by Condition 7 of Railtrack's licence. In Condition 7(2), there is an express reference to Railtrack's "ability to finance its licensed activities".

¹⁷ Railtrack set out a summary of its position in its supplementary paper dated 22 May 2000, part 3.

- 101.1. in relation to the comparative approach to gauging, Railtrack maintains that it has been made clear to manufacturers that this approach cannot bind Railtrack and that the new vehicles have generally gone outside the kinetic envelope of the comparator vehicle;
- 101.2. RGS 5204 itself imposes more stringent requirements in relation to substandard clearances for new trains than for existing trains and Railtrack is obliged to comply with those rules;¹⁸
- 101.3. that approach is well-established as industry practice;¹⁹
- 101.4. the practical effect is that where Railtrack becomes aware of a substandard clearance (which would require attention even if no new train was at issue) during the safety clearance of a new train, it will remedy the situation at its own cost; however, Railtrack will rely on Part F where the need for infrastructure change arises only because of the introduction of the new train;²⁰
- 101.5. in addition, Railtrack would accept responsibility for rectifying its infrastructure if a new train had been built in reliance on misleading information from Railtrack; but it would seek to recover the costs of such changes where Railtrack had been unaware of the difficulty until the procedure for clearance of that new train (for example, in the case of the 25% of the SE network where Railtrack lacks complete data for the purposes of the current tendering round, Railtrack would not accept responsibility for infrastructure changes that emerged as necessary during the clearance process on that part of the route, except in the circumstances identified in § 101.4 above).²¹

¹⁸ Compare § 4.2 and § 4.3 of RGS 5204.

¹⁹ See, e.g., § 9 of Part 1 of “Railway Safety Principles and Guidance”, HSE Books 1996.

²⁰ See pages 102-103 of the Transcript and § 3.6 of Railtrack’s paper of 22 May 2000.

²¹ See pages 103-104 of the Transcript.

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102. As the provisions of RGS 5204 indicate, a number of issues of judgment arise where a proposed new train would generate sub-standard clearances (and more generally, as to when it is “reasonably practicable” for Railtrack to improve clearances independently of route acceptance for new trains). The matters of which the manufacturers complain appear to be caused by:
- 102.1. the difficulties in respect of information and criteria discussed in Parts D and E above;
 - 102.2. the lack of uniformity of the network, a matter falling largely outside the scope of these complaints;
 - 102.3. the principles underlying RGS 5204 in particular, whereby Railtrack only comes under a general obligation to eliminate substandard clearances when new trains are introduced (§ 4.3.1) and is only obliged to build to SSG in respect of “new construction” (§ 4.1.1), although it is required to improve substandard clearances “wherever reasonably practicable” (§ 4.2); and
 - 102.4. the terms of Part F of the Track Access Conditions.
103. Of these points, point 102.1 concerns the information and criteria issues already discussed. Points 102.2 and 102.3 raise fundamental funding issues. The lack of uniformity of the network could not be eliminated immediately, regardless of the resources available; and it would be extremely expensive to impose a general obligation to move to a uniform network that conformed to SSG at all points. As stated above, the desirability and practicality of such a transition falls outside the scope of this complaint. Railtrack explained at the 9 May 2000 hearing that the proposed changes to RGS 5204 will impose additional obligations on Railtrack to achieve greater uniformity in the structure of its network, but Railtrack’s current

cost submission to the periodic review does not include a more general undertaking to accelerate the move to SSG.²²

104. That leaves the contractual situation under the Track Access Conditions. There seem to be two ways in which the complaints could be interpreted against the background of these contractual terms: either that there is a breach of RGS 5204 and thus of Condition 3(2)(c) of Railtrack's licence; or, conceivably, that Railtrack's conduct in seeking recovery of the costs of infrastructure changes represents an abuse of dominant position by Railtrack, contrary to § 18 of the Competition Act 1998 (see §§ 30-32 above).²³
105. Under the licence conditions, RGS 5204 does not currently state who is to bear the costs of any transition to SSG occasioned by the clearance of a new train under §4.3 of the RGS. It would be an artificial reading, both of §§ 4.2 and 4.3.1 of RGS 5204 and of Part F, to find that it was always "reasonably practicable" for Railtrack to reduce or eliminate substandard clearances at its own cost whenever a new train was proposed for clearance, so that no such costs ever fell on a train operating company under Part F.
106. Similarly in respect of § 18 of the Competition Act 1998, as described above, Railtrack's current practice is to charge operators for changes to the infrastructure occasioned by the requirements of RGS 5204 for new rolling stock. It could be argued that this practice (i) treats operators wishing to introduce new trains less well than operators of existing stock (who are not required to contribute to upgrading of the infrastructure required to comply with RGS 5204), and (ii) is made possible by Railtrack's monopoly of safety clearance on the network. However, the current terms of RGS 5204 and Part F, and the basis on which Railtrack is currently funded, themselves reflect such an approach, so that the

²² See pages 98, 108-109 of the Transcript. As explained by Railtrack, there will be an obligation, under the replacement for RGS 5204, to conform to SSG up to 1100mm above rail level, subject to a transitional regime ending in 2007 and with the possibility of acceleration in individual cases.

²³ Although conformity with a licence condition or the terms of the Track Access Conditions will normally fall outside Chapter 1 of Part I of the Competition Act 1998 (restrictive agreements), there is no such general exemption for conduct falling within the scope of § 18, unless it is *required* by or under UK legislation: Schedule 3, § 5.

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point turns essentially on the same issues of interpretation that have already been discussed above.²⁴

107. If a train operator is dissatisfied as to the way in which Part F currently operates in practice, and contends that Railtrack's interpretation is incorrect, Condition F5 sets out a procedure for referring such issues to the Network and Vehicle Change Committee for determination and for a further right of appeal to the Regulator. One issue that might arise in such a context is whether Railtrack is currently discharging its obligation under § 4.2 of RGS 5204 in individual cases, i.e. whether it has acted or is acting in a particular case to improve substandard clearances "wherever reasonably practicable". I understand that the Regulator has not as yet been asked to consider what is "reasonably practicable" in this context, given Railtrack's commitments and resources, although I am informed that there is currently a case before the Committee where this issue is raised.
108. In relation to the future, the Regulator is giving active consideration to amendments to the Track Access Conditions. He has also drawn attention to the existence of the Vehicle and Route Acceptance Contracts already agreed between West Coast Trains and Railtrack, and Cross Country Trains and Railtrack, which set out detailed obligations on Railtrack in the supply of information and which are, at least in principle, available to other train operators. It is thus possible that there will be a material change in the contractual situation in the near future. This is discussed further below.

²⁴ Railtrack's analysis is at §§ 3.1-2 and 3.5 of its paper of 22 May 2000; see also §§ 31 and 32 above.

G. Conclusions and remedies

109. Section 55(1) imposes a duty on the Regulator to make an order where he is satisfied that Railtrack is contravening or likely to contravene its licence conditions, subject only to the exceptions laid down in section 55(5)(a)-(c). Given the nature of the central areas of complaint, section 55(5)(b) appears most relevant. There is no apparent inconsistency between the duties imposed on the Regulator by section 4 of the 1993 Act and an order in this case; nor, given the consumer and commercial issues at stake, could these allegations be regarded as trivial. Section 55(5)(b) prevents the making of an order where Railtrack agrees to take and is taking all steps appropriate for it to take “for the purpose of securing or facilitating compliance with the condition or requirement in question”.

Information and criteria

110. The complaint in respect of inadequate data (point 34.1 above) is not seriously disputed. Railtrack is now taking steps to improve the situation, primarily through the NPG, RAR and IDI initiatives, but no real explanation is offered of why this has not been addressed as a major priority since 1994. That was clearly the conclusion of the authors of the Booz Allen report and is being addressed independently by the Regulator as a matter of priority by his proposal for an amendment to Railtrack’s licence.

111. The Alstom and Adtranz documents contain a series of examples where inadequate data has made it difficult for the safety assessment procedure to proceed efficiently. Even if the Regulator were to accept Railtrack’s contention that it is unrealistic to impose an absolute obligation to hold all possible technical details of Railtrack’s network in an immediately accessible form, the written and oral complaints and Railtrack’s response show that Railtrack has fallen well below the standards reasonably to be implied in this respect. The lack of binding criteria follows *a fortiori* and is common ground in respect of electromagnetic

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compatibility. The principal areas of complaint, set out at paragraphs 34.1 and 34.2 above, are thus confirmed by the evidence.

112. It is not relevant to this conclusion that, as Railtrack points out in its written response, there may have been a number of occasions when Adtranz in particular has supplied defective paperwork. Nor is it relevant if Railtrack is correct in its allegations that delays have not in fact been caused by data problems, because of independent difficulties encountered by the two manufacturers in producing trains in accordance with projected timetables. This Report is not concerned to identify the extent or the operative cause of particular delays but only to determine whether Railtrack is in breach of its licence conditions and it would be purely fortuitous from the point of view of Railtrack if delays caused by other difficulties or failings had the effect that no defects in Railtrack's supply of data had ever caused a delay.²⁵ It seems implausible that this is the case in any event.
113. In its response letter of 7 February 2000, Railtrack stresses the facts that the network does not have "standard, simply defined, characteristics" and that although "Railtrack acknowledges the need to improve its ability to provide good quality data ... in general the difficulties are being overcome by co-operation at working level". Neither of those background facts, though no doubt broadly correct, adequately explains or justifies Railtrack's continuing inability to provide detailed information as to the composition of the network for the purposes of safety clearance of new trains.
114. More specifically, although Railtrack claims to have "provided gauge clearance data in accordance with the Railway Group Standards and its 1997 promises to the industry, and responded to comparative gauging requests", Railtrack is also "committed to significant systems improvements in this area, for general industry benefit". Likewise, although it denies that it is "non-compliant with the spirit of GO/RT3270" in respect of the provision of electrical infrastructure data, it

²⁵ In particular, the role of the Regulator is very different from that of an arbitrator in a commercial dispute, such as the dispute involving Virgin and the West Coast Main Line referred to in the papers.

recognises “the need for improvement in the efficiency and timeliness of data provision and technical guidance for safety case preparation”.

115. It is hard to see what purpose would be served by these initiatives if Railtrack maintained that the current situation is satisfactory.
116. Finally, these complaints appear well-founded even if the narrow construction of RGS 3270 for which Railtrack and SSD contend is correct: even if Railtrack’s obligations to provide information and criteria are limited to the safety clearance procedure, the lack of adequate data or data management systems makes it impossible for these procedures to be conducted “satisfactorily” or “in a timely manner”.
117. The minimum appropriate remedy for the current unsatisfactory situation would be for Railtrack to be required to give undertakings as to the timetable to be followed in relation to the NGP, the RAR and the IDI (i.e. to agree to take those steps for the purposes of section 55(5)(b)) and to give binding assurances as to the level of information/criteria that will be provided when those initiatives are completed and milestones against which progress can be monitored.²⁶ It would be for Railtrack to come forward with suggestions for the appropriate form of such assurances as a matter of urgency, to meet the reasonable demands of interested parties for an efficient clearance process based on detailed information and/or criteria. If Railtrack were unable to produce assurances satisfactory to the Regulator, section 55(1) would require him to make an order requiring Railtrack to provide such information/criteria within a specified timetable.
118. In addition, as discussed above, SSD should consider whether current RGS’s impose adequate obligations on Railtrack in relation to the supply of information to assist actual and potential suppliers of new trains to achieve an efficient design and manufacturing process. On the interpretation of RGS's (and RGS 3270 in particular) currently advanced by SSD, the obligations imposed on Railtrack are

²⁶ Given the lack of uniformity of the network, the ideal solution, of binding uniform criteria, will not be forthcoming in the foreseeable future. It is therefore inevitable that the primary focus will be on detailed information provision unless and until Railtrack undertakes the necessary investment in the network.

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not sufficiently robust and fail to oblige Railtrack to provide information that is necessary if trains are to be designed that can operate safely on Railtrack's network, (as § 4.5 of RGS 2149 makes clear in respect of gauging). If SSD maintains this interpretation, and will not give an undertaking to extend the scope of RGS's for the purposes of section 55(5)(b), then the Regulator would be required to act under section 55(1) to clarify Railtrack's obligations in this respect.

119. Both the above remedies would be closely related to the Regulator's parallel proposal for an amendment to Railtrack's licence conditions in respect of the compilation of an asset register. Such an amendment would make explicit obligations that are currently implicit in RGS's 2149, 5304 and 3270, and would clarify the position in respect of electromagnetic information where no specific RGS is currently in place. It would also address directly the findings of the Booz Allen report set out at the start of this Report.

Remedies other than section 55 of the 1993 Act

120. The manufacturers complain that RGS 3270 provides for no procedural or other remedies enforceable against Railtrack where Railtrack fails to comply with its obligations under §§ 6 and 10, other than those that might be ordered by the Regulator himself pursuant to section 55. It is therefore necessary to consider whether this is something that could readily be altered or provided for either within or outside the scope of the RGS Code. One such possibility would be the creation of a contractual scheme to be entered into between Railtrack and other interested parties, probably as part of the Track Access Conditions.
121. If the matter was to be dealt with under the RGS Code, the most obvious amendment would be to enlarge the scope of § 9 of RGS 3270 so that issues of compliance by Railtrack with the requirements of, in particular, §§ 6 and 10 could be made the subject of appeal to the Director of SSD, who would then be responsible for the appointment of independent assessors to determine whether adequate data and adequate criteria had been provided by Railtrack.

122. The alternative would be for a contract to be entered into, between Railtrack and either the manufacturers or the train operating companies, setting out each side's obligations and providing for a mechanism of arbitration and compensation where differences arose.
123. Issues of this kind were debated between Adtranz and Railtrack in the correspondence attached as ADT1-3, in particular the letter from Adtranz dated 11 March 1998 in respect of the draft Agreement at ADT4:
- “...we consider the Agreement would need to include some commitment by Railtrack to the on-going completeness and current accuracy of the database in relation to all data needed by any and every potential supplier of rolling stock, as opposed to any one supplier in isolation”.
124. At the oral hearing, it became obvious that there were considerable difficulties in a contractual solution of this kind. Both Adtranz and Alstom currently hold the view, on the basis of experience, that this would not be a successful way forward (see pages 122-3 of the Transcript). Alstom entered into such a contract but it has never proved effective, whereas Adtranz has never concluded a contract despite having attempted to do so. This is not surprising: as a matter of commercial reality, Railtrack is a monopolist with very considerable market power and with no commercial incentive to bind itself to a set of procedural and other guarantees that are more demanding than those provided for under the licence conditions and RGS Code.
125. It would be possible for the Regulator to investigate the reasons why a contractual solution of this kind has not currently proved effective, either as a matter of the non-discrimination condition contained in Railtrack's licence (Condition 6) or under section 18 of the Competition Act 1998. It appears to me likely that such an investigation would ultimately involve the Regulator in an assessment of the commercial terms on which such obligations should be imposed on Railtrack, for the purpose of: (i) laying down a tariff structure; (ii) facilitating a commercial solution to an individual case; or (iii) a finding of discriminatory or abusive conduct in failing to reach agreement. It thus appears inevitable that if a contractual solution is to be achieved, it will have to be a

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hybrid between a commercial contract and a set of public law obligations imposed either by the Regulator directly or else through the licence conditions and RGS Code.

Further information from manufacturers on other issues

126. As stated above at paragraphs 43-47, there are several issues raised in the complaints where the information is insufficient to justify action under section 55. In particular, it is unclear whether the issues over the Yellow Book, reasons for refusal of applications for vehicle and route acceptance and general procedural difficulties are still of substantial concern to Adtranz and Alstom. If they persist in these complaints (or any other matter that was not pursued by them at the oral hearing and has not been considered in this Report), then they will need to provide much more detailed and up-to-date evidence of the problems that they face. They also need to explain the extent to which the cooperation between the parties described at the 9 May 2000 hearing falls short of their requirements in these respects.

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10 August 2000