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

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ANNEX C

SUPPLEMENTARY REPORT ON THE COMPLAINT OF ADTRANZ AND ALSTOM

A. Introduction

1. I am asked to reconsider the findings and recommendations of my Report dated 10 August 2000 in the light of subsequent events.

2. I consider:

   (1) The factual and legal changes that have occurred since the date of my Report;

   (2) The points at issue between the parties, and in particular the challenges to my findings in the Report;

   (3) My revised findings in the light of (1) and (2);

   (4) Railtrack's various proposals for addressing the Regulator's concerns;

   (5) Possible remedies.

B. Factual and legal changes since 10 August 2000

3. The most important developments since 10 August are:

   (1) The letter of the Regulator to the parties dated 23 August 2000, in which he indicated his preliminary view that Railtrack was in breach of its licence and sought appropriate undertakings from Railtrack.

   (2) The response of Adtranz and Alstom dated 10 November 2000.

   (3) The response of the Safety and Standards Directorate of Railtrack ("Railtrack SSD") dated 17 November 2000.

   (4) The response of Railtrack PLC ("Railtrack Line") dated 24 November 2000.

(5) A final further brief response from Adtranz and Alstom dated 26 January 2001.

(6) The revised RGS documents replacing RGS 2149 and 5204 with effect from August 2000, RGS 2149, Issue 2, and RGS 8029.

(7) A number of independent initiatives by the Regulator in respect of Railtrack's licence, in particular the Consultation on Proposed Modifications to Railtrack's Network Licence dated September 2000 and the letter inviting comments dated 15 September 2000.[1]

(8) The Consultation Document issued by the Regulator on 22 March 2001, in parallel to his conclusions in respect of this complaint, entitled "Vehicle and Route Acceptance Procedures".

4. In addition, Condition 6, formerly Condition 3, of Railtrack's Network Licence, which is of primary relevance to the issues that I am asked to consider, has been amended with effect from 1 January 2001 (and renumbered on 1 February). The revised Condition 6:

(1) restructures the way in which Railtrack is required to carry out its safety functions, by the creation of a new wholly owned subsidiary referred to in the Condition as Independent Railway Safety Activity ("IRSA"), taking over the activities of Railtrack SSD; and

(2) makes significant amendments to the purpose of the Railway Group Standards Code.

5. Finally, the Transport Act 2000 has made a number of significant amendments to the Railways Act 1993. Among those changes, the most relevant for present purposes are the amendments to section 55.

6. Adtranz and Alstom's view was that my Report was substantially correct and that an enforcement order should now be made without delay because of Railtrack's

[1] I have also been provided with the Model Clauses for Track Access Agreements: Provisional Conclusions document dated July 2000.

failure to remedy the defects found in my Report. In their 26 January 2001 letter, they emphasised the need to take enforcement action to ensure that Railtrack would deliver on the various promised improvements set out in response to the Regulator's letter of 23 August 2000 and my earlier Report.

7. By contrast, Railtrack SSD and Line each maintained that my Report was defective in its analysis and that no enforcement order should be made. Even on the assumption that the analysis is correct, and Railtrack is in breach of one or more RGS's, no order should be made because of the steps currently under way to remedy the situation. Railtrack SSD and Line therefore submitted that the situation was covered by section 55(5)(b) rather than section 55(1). That issue now needs to be reconsidered against (i) the amended obligations of IRSA and Railtrack Line under Condition 6 and (ii) the amended wording of section 55, in particular the new sub-section 55(5B).

C. The points at issue

8. The points that I am required to reconsider arise primarily from the following facts and submissions.

Safety and practical criteria under the revised licence Condition 6

9. Railtrack SSD complained that I had misunderstood the way in which it was required to exercise its functions under the RGS Code, failing to give due weight to the need for it to be free from commercial pressure in maintaining the safety of the Network. In this respect, the revised wording of what is now paragraph 8 of Condition 6 of the licence is of obvious relevance to the equivalent obligations of IRSA.

The replacement of RGS 2149[2] and 5204.

[2] For clarity, I will refer to the two versions of 2149 as 2149(1) and 2149(2) in the remainder of this Supplementary Report. I have abbreviated the titles of the relevant Railway Group Standards to "RGS 2149" etc.

10. This development significantly alters the subordinate legal regime against which I am asked to consider Railtrack Line's performance under Railtrack's network licence for the purposes of paragraph 15 of Condition 6.

11. Although this strictly affects my findings in relation to only those two RGS's, my conclusions in relation to RGS 3270 were closely linked to my findings under RGS 2149(1) and 5204: see paragraphs 73 ff. of my Report. I reasoned that it would be wholly unsatisfactory for a train to be designed and manufactured without detailed knowledge of the gauge against which the train was to be judged at the stage of vehicle and route acceptance. It therefore seemed to me appropriate to read the obligation imposed by RGS 3270 broadly both in terms of information and in terms of the time at which the information was required to be provided.

12. However, it would in principle be a logical structure for the RGS regime to impose distinct obligations on Railtrack in respect of (i) the provision of information at stages prior to vehicle and route acceptance and (ii) different and possibly additional information that was required at the stage of vehicle and route acceptance, to ensure that those procedures could be carried out satisfactorily. Provided that the information was sufficient at each stage for the relevant steps to be carried out efficiently, there could be no objection to such a structure.

13. Railtrack SSD maintained that this was indeed the way in which the RGS scheme was structured, but denied that there was any general obligation, imposed by RGS's on Railtrack, to provide information prior to vehicle and route acceptance procedures. The revised RGS regime, and in particular section 13 of RGS 8029, was said to provide for the supply of specific gauging information by Railtrack prior to vehicle and route acceptance, effectively for the first time. I have therefore reconsidered the temporal scope of RGS 3270 in the light of the amended RGS regime and Railtrack SSD's submissions on the point.

14. More straightforwardly, the replacement of RGS 2149(1) and 5204 was relied on by Railtrack SSD in respect of my "fitness for purpose" concerns: paragraph 118 of my Report. I consider this in some detail below, particularly in relation to the transitional provisions contained in the new RGS's.

The RAR, IDI and NGP projects

15. Although Railtrack Line denied any breaches of RGS 2149(1), 5204 or 3270, it did provide detailed information as to the timetable for completion of the RAR, IDI and NGP projects: see paragraph 14 of the letter from Mr Middleton of 24 November 2000, and paragraphs 1.8-1.12 of, and Annexes 2 to 4 to, the detailed response, also dated 24 November, attached to Mr Middleton's letter ("the Line Response"). It relied on those projects to show that no order should be made in this case because of the terms of section 55(5)(b) of the 1993 Act, even if the Regulator was satisfied that Railtrack was currently in breach of its licence.

16. This point now falls for consideration under section 55, paragraphs (1) and (5B).

Replacement of RGS 1914

17. Although SSD denied any breach of licence condition in failing to produce a replacement RGS for the discredited (though not apparently withdrawn) RGS 1914, it accepts as "undoubtedly correct" that "the existing GS/ES 1914 requires revision" and recognised that Section E of my Report "raises a number of very important points which S&SD will take into consideration as it prepares a new RGS on this issue": see section 4 of the SSD Response, paragraphs 4.3 and 4.5.

18. This is a matter to be considered under paragraphs (6)(d) and (7) ff. of Condition 6.

Enforcement of Railtrack's obligations under existing Group Standards

19. Compliance by Railtrack with RGS's is directly enforceable by the Regulator pursuant to paragraph 15 of Condition 6 of Railtrack's licence and section 55 of the Railways Act. The current complaint is based on this procedure.

20. The enforcement regime under the RGS's themselves, i.e. without the intervention of the Regulator, is very weak if not non-existent[3] (this comment does not apply to the enforcement of safety standards, which falls within the jurisdiction of the

[3] Neither judicial review nor the section 55(1) procedure is likely to provide effective mechanisms for day-to-day enforcement of the regime, nor to provide compensation if losses are suffered as a result of infringements of individual standards.

Health and Safety Executive and is not the subject matter of this report). In my earlier report, I raised the possibility of alternative enforcement either by regulatory intervention or by contractual means. In the longer term, Railtrack and the Regulator appear to agree that a contractual solution offers advantages over further regulatory involvement.

21. Although Railtrack Line and SSD both denied any obligation to provide manufacturers with information at the design stage, Railtrack Line in particular recognised that there was a "gap" in the provision of information to manufacturers and proposed to enter into contracts directly with manufacturers in order to address that problem, albeit outside the scope of the RGS regime: see paragraph 12 of Mr Middleton's letter and paragraphs 1.6, 1.13-1.16 and 1.20 of the Line Response. A draft Heads of Terms and Commentary is at Annex 5 to the Line Response.

22. This issue is addressed in the Consultation Document published on 22 March 2001. The Regulator expresses the provisional view that a contractual solution is preferable "because it would enable private enforcement and a more effective liability regime": see part 4 of the Document generally and consultation question 6.4

23. I do not understand the complainants to dissent from this approach as a matter of principle, although they emphasised the practical difficulties they had encountered to date in achieving a workable contract with Railtrack at the 9 May 2000 hearing: see paragraphs 122-125 of my first report. The Consultation Document is intended to address these concerns: see paragraphs 4.8ff.

Fitness for purpose of the RGS regime

24. The position in relation to fitness for purpose of RGS's themselves is now more complex. The amendments to Condition 6 of Railtrack's licence, intended to increase the independence of IRSA, have complicated the enforcement regime. Whereas at the time of my earlier Report, SSD was part of Railtrack, so that a complaint that a particular RGS was unfit for purpose was a matter falling directly within the scope of Railtrack's licence and therefore section 55 of the Railways Act 1993, that is no longer the position.

25. Under Condition 6(6)(d) of its licence, Railtrack is required to enforce the obligations of IRSA under a legally binding agreement to be entered into between Railtrack, Railtrack Group PLC and IRSA with the approval of the Regulator, "whenever required, or whenever so directed by the Regulator by notice, and in accordance with the terms of the direction". IRSA's obligations in respect of the RGS Code include (Condition 6(7)(c)) to "comply with the provisions of that code as revised from time to time with the approval of the Regulator".

26. The consequence is that where the Regulator forms the view that IRSA is failing to perform its obligations to formulate and review RGS's in accordance with the RGS Code, the enforcement procedure requires him to direct Railtrack to enforce IRSA's obligations pursuant to the agreement between Railtrack, Railtrack Group PLC and IRSA.

Disputes between the parties

27. In Mr Middleton's letter of 24 November 2000, in particular paragraphs 2 to 7 and 17 to 21, Railtrack Line made a series of serious allegations against Adtranz and Alstom, in relation to:

    (1) unreasonable pressure that Railtrack alleged was exerted by the manufacturers to compromise safety clearance procedures to advance their commercial interests; and

    (2) unrealistic and inefficient approaches to manufacture for the particularly complicated and difficult UK network.

28. These allegations were vigorously denied by the manufacturers and I have seen a number of documents from both sides of this debate relating to a complaint by Railtrack to the HSE. Although I have read these documents, I do not think that it is necessary or appropriate for me to make any findings on that issue.

D. Revised findings as to changes of circumstances

29. My conclusions in the light of these important changes of circumstances are as follows.

Safety under paragraph 8 of Condition 6 of the revised licence

30. I do not think that Railtrack SSD's references to its overriding safety obligations, its lack of commercial functions and the primary function of the RGS Code to ensure safety (paragraphs 2.1 to 2.14 of the SSD Response), all of which I accept without any query, undermine the approach in my earlier report. This was explored with Mr Muttram at the oral hearing on 9 May (in particular at pages 110D-116B).

31. I remain of the view that the effect of the Safety and Practical Criteria in combination is that the Practical Criteria are to be taken into account by Railtrack wherever that can be done in a manner that does not undermine the achievement of the Safety Criterion. In other words, although the Safety Criterion will take precedence under the Code, where more than one option is available that would satisfy the Purpose of the RGS Code, as now defined in paragraph 8 of Condition 6, then the practical considerations set out at sub-paragraphs 8(a) to (e) of Condition 6 of Railtrack's licence are to be taken into consideration in the formulation of RGS's (see paragraph 6.3 of the Code for the approach to be adopted).

32. In its written response, SSD refers to what is now paragraph 4(a) of Condition 6 of Railtrack's licence, where IRSA is required to have "no commercial functions or responsibilities except to the extent that they are necessary for the performance of any activity specified in paragraph 1 or have been approved by the Regulator" (see paragraph 2.2 of the SSD Response). I note that paragraph 1(b) of Condition 6 refers to "the activities in relation to Railway Group Standards Code specified in this Condition", so that SSD's reasoning is essentially circular: if the RGS Code contains "commercial" elements, then IRSA is permitted and required to carry them out.

33. In any event, I do not agree that it is "only a commercial imperative" (paragraph 3.4 of the SSD Response) for manufacturers to be given appropriate information to enable them to design new trains for the UK rail network, without being bound simply to follow existing swept envelopes or standard gauges. It does not seem to me to be satisfactory in the light of the Safety and Practical Criteria for vehicle and route acceptance ultimately to depend on ad hoc information gathering at a late

stage in the clearance process, the manufacturer having had to base the original design of the train on partial information and a necessarily imperfect comparison to an existing train.

34. I am not aware of any suggestion that the provision of complete and accurate information at an earlier stage might have adverse safety consequences and I cannot currently see how that could be the case. On the other hand, there is a clear risk that lack of information will lead to a situation where designs are based on excessively cautious assumptions in the absence of detailed knowledge. That in turn threatens to stifle innovation, most obviously by making new trains unnecessarily small, contrary to the Practical Criteria. There is also a risk of delay and unnecessary additional costs if problems that could in principle have been identified and avoided, on the basis of full information provided at the stage of design and manufacture, are only identified at the stage of vehicle and route acceptance.

35. These issues require further consideration against the new wording of paragraph 8 of Condition 6 of Railtrack's licence, which defines the RGS Code in this way:

> "a code whose purpose is to establish standards (and the procedures for modifying those standards) compliance with which will contribute significantly to the safe operation of the licence holder's network and the safe operation and interworking of 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 services relating to railways on or in connection with the licence holder's network;
>
> (c) to promote competition in the provision of such services for the benefit of users of railway services;
>
> (d) to impose on the licence holder and other persons providing such persons restrictions which are proportionate to the achievement of the Purpose; and
>
> (e) to enable the licence holder and other persons to plan the future of the their businesses with a reasonable degree of assurance."

36. Although this wording reinforces the emphasis on safety, and modifies the wording of point (d) to introduce the concept of proportionality in respect of restrictions contributing to the Purpose as defined, it seems to me that such wording remains apt to cover standards requiring detailed information to be provided to manufacturers of new trains before the stage of vehicle and route acceptance. The provision of such information will indeed "contribute significantly … to the safe operation and interworking of railway assets … to be used" on Railtrack's network.

37. The "safe operation and interworking" of new trains to be used on Railtrack's network are necessarily and significantly enhanced if the person responsible for designing and building those new trains is given full information as to the physical characteristics and behaviour of the network. It is not an answer to this view that any incompatibility between the new train and the network can be sorted out later, at the vehicle and route acceptance stage. The possibility of altering the physical characteristics of a train at the stage of vehicle and route acceptance is a means of *remedying* defects in design and manufacture that may arise from lack of information at an earlier stage. A process that made such remedial work unnecessary or less extensive would in my view fall within the scope of the Purpose as defined in paragraph 8 of Condition 6. A broad analogy might be that a healthy diet and exercise "contribute significantly" to an individual's health even if it is possible to treat many medical conditions with drugs.

38. The five practical considerations set out in sub-paragraphs 8(a) to (e) of Condition 6 confirm the good sense of that conclusion. In this respect, it is important to note that the wording of paragraph 8 of Condition 6 now includes sub-paragraphs (a) to (e) as part of the purpose of the Code (which is "to establish standards [etc.] having regard to …"). Even though sub-paragraphs (a) to (e) are not part of the "Purpose" as defined, they do form part of the wider purpose of the Code itself.

39. In any event, the information provision now provided for expressly in RGS 8029 and 3270 does not seem to me to differ in kind from the information that would be provided more generally to manufacturers wishing to design new trains that will fit on the network (RGS 8029 indeed requires the provision of information to such persons, as SSD themselves emphasise at paragraph 3.10 of the SSD Response).

Mr Muttram did not seek to argue that such provision of information falls technically outside the remit of the RGS Code, as "only a commercial imperative".

40. But the logic of Railtrack's position in respect of information at the design stage would seem to apply equally here: if the reasoning were correct, it could be said that it is merely a "commercial imperative" that manufacturers and train operating companies who are designing new trains wish to do so on the basis of full information, rather than by assembling information on a piecemeal basis or by ensuring that their trains are no bigger than existing rolling stock. The obligations now incorporated into RGS 8029 would not be justified on a narrow reading of the Purpose laid down in paragraph 8 of Condition 6 of Railtrack's amended Licence.

41. Sub-paragraph 8(d) of Condition 6 is also of relevance to this point. As I have just indicated, Railtrack SSD's suggestion that information supplied prior to vehicle and route acceptance is outside the scope of the RGS regime is inconsistent with the terms of RGS 8029 in particular. One way of assessing IRSA/SSD's approach is to consider whether the transitional arrangements contained in RGS 8029 are restrictions on Railtrack's conduct that are "proportionate" to achievement of the Purpose. Taking such an approach, IRSA/SSD could accept that fuller information provided at the stage of design and manufacture does indeed contribute to the safe interworking of new trains and the network, but would then have to maintain that the provision of such information does not have sufficient priority for a short deadline to be imposed on Railtrack to obtain and provide such information. IRSA's current position seems to be that it does not even have to address this question. In my view that is wrong.

The interpretation of RGS 2149(1) and 5204

42. I am not persuaded by Railtrack's arguments as to the meaning of RGS 2149(1) and 5204: see paragraphs 2.14 and 2.16 of the Line Response. Although I accept that the implication of terms is not to be undertaken without sufficient justification, I remain of the view that it made no sense to require train manufacturers to design trains "so that they do not infringe the minimum clearances" if there was no equivalent obligation on Railtrack to provide manufacturers with the information necessary for them to fulfil that obligation. If that was really the position, then there was a serious "fitness for purpose" issue,

which is vividly illustrated by the "gap" recognised by Railtrack Line: see paragraph 21 above.

43. Given that (i) RGS 2149(2) and 8029 replaced RGS 2149(1) and 5204 and (ii) section 55(1) of the 1993 Act is forward-looking rather than historical in its approach, it might be thought that the interpretation of those earlier RGS's is no longer of any significance. However, the transitional arrangements in place under RGS 2149(2) and 8029 mean that the earlier regime may remain relevant: see below.

The interpretation of RGS 3270

44. In relation to the findings made in my earlier report in relation to RGS 3270, there are two points:

(1) sufficiency of information; and

(2) the purpose for which (and therefore the time at which) such information is to be provided.

45. On the first point, sufficiency of information, I remain of the view that the evidence supports my finding that the current level of information available to Railtrack Line does not enable it to carry out safety clearance satisfactorily or in a timely manner. Put most simply, the lack of a readily accessible and comprehensive database inevitably causes delays in the process.

46. Although this is disputed by Railtrack (see paragraphs 37 to 41 of Annex 1 to the Line Response), I remain of the view that the efforts Railtrack is currently making to remedy the situation are indicative that the current position is unsatisfactory. I do not think that the amount of work now being done on this issue is consistent with the suggestion that the current situation is "satisfactory".

47. This issue again depends on the correct construction of the RGS Code. SSD appears to take the view that "satisfactorily" refers only to the Safety Criterion and the Purpose as defined in paragraph 8 of Condition 6. If that were right then I agree that I would have no basis on which I could find that the current procedure is unsatisfactory. My view that Railtrack is in continuing breach of § 10 of RGS

3270 is based on the fact that paragraph 8 of Condition 6 requires SSD/IRSA, in establishing RGS's under the RGS Code, to have regard not only to the Purpose but also to the additional criteria set out at sub-paragraphs 8(a) to (e). It must follow that sub-paragraphs 8(a) to (e) must equally be taken into account in interpreting the scope and meaning of existing RGS's and therefore also in judging whether Railtrack is performing "satisfactorily" under such RGS's. It would require a clear restriction on the meaning of general words of this kind if they were to be interpreted without reference to sub-paragraphs 8(a) to (e) of Condition 6. There is no justification for implying such a restrictive interpretation in the absence of clear words.

48. It is true to say that § 10 is expressed in general terms. In the light of the analysis set out below in respect of the supply of information *prior* to the stage of vehicle and route acceptance, the Regulator may wish to consider whether Railtrack's obligations under RGS 3270 should be made more explicit even at the stage of vehicle and route acceptance.

49. However, even in respect of the current wording, I remain of the view that Railtrack is in breach of the substantive obligation imposed by § 10 of RGS 3270. § 10 imposes a broad positive obligation on Railtrack to have in its possession information that is sufficiently complete, accurate and accessible for the purpose of efficient conduct of the vehicle and route acceptance procedure. I do not think that the responses of Railtrack and SSD/IRSA sufficiently recognise the broad nature of this obligation, construed in the light of paragraph 8 of Condition 6.

50. On the other hand, I have reconsidered *the purpose for which* RGS 3270 requires information to be acquired by Railtrack and provided to interested parties. In relation to gauging, my finding that Railtrack was in breach of the RGS's in relation to the provision of information at stages prior to vehicle and route acceptance were essentially based on the terms of RGS 2149(1) and 5024.[4] My specific findings in relation to RGS 3270 primarily concerned the nature of the information

[4] In relation to electromagnetic compatibility, there is the more fundamental problem that the criteria contained in RGS 1914 are now agreed to be in need of replacement.

that must be available to Railtrack rather than the purpose for which or the time at which such information must be made available to manufacturers.

51. Given the revisions to the applicable RGS's, now RGS 2149(2) and 8029, I am inclined to accept that:

(1) the most coherent interpretation of the RGS regime now in force is that RGS 2149(2), 8029 and 3270 form an interlocking but not overlapping set of provisions;

(2) although RGS 3270 imposes substantial obligations in relation to the acquisition of information (and that information acquired pursuant to RGS 3270 is obviously available to Railtrack for all purposes), the purpose for which such information is to be acquired and provided is for performance of vehicle and route acceptance procedures rather than more broadly for supply to manufacturers and others at the stage of design and manufacture; and therefore

(3) RGS 3270 does not impose obligations on Railtrack in relation to acquisition and supply of gauging information at stages prior to vehicle and route acceptance; and

(4) there is no reason to construe RGS 3270 more broadly in respect of *other, non-gauging*, information.

52. If these points are correct, then the focus of enquiry in respect of *gauging* information to be provided prior to vehicle and route acceptance shifts to the revised RGS 2149(2) and the new RGS 8029, and the transition from the old regime to the new. In assessing the substance of the complaints against the regulatory regime that now prevails in respect of gauging, the Regulator will have to determine whether the new RGS's are fit for purpose and whether Railtrack is complying with their terms. In making this assessment, the transitional issue is particularly important, given that one key aspect of the manufacturers' complaints has always been the slow pace at which Railtrack has made improvements in its ability to provide complete and accurate information to interested parties.

53. In respect of *non-gauging* information, in particular concerning electromagnetic compatibility, it is clear that there are no effective, binding criteria, and no obligations on Railtrack to provide information, contained in current RGS's, apart from the obligations imposed by RGS 3270.

RGS 2149(2) and 8029 and gauging information prior to vehicle and route acceptance

54. Subject to the transitional arrangements now in place, unless and until the revised RGS regime is found unfit for purpose, Railtrack Line's performance of its licence conditions under the RGS regime (now contained in paragraph 15 of Condition 6) in respect of gauging information should in principle be reconsidered against the different standards prescribed by these new RGS's introduced in August 2000.

55. Those RGS's are considerably more sophisticated than their predecessors and the preference for absolute gauging methods apparent from the evidence on which my Report was based and in RGS 2149(1), paragraph 4, is less marked in the revised RGS's. Where information is to be obtained or provided by Railtrack, it is more carefully defined: see paragraphs 12.1 and 12.9 of RGS 2149(2) and section 13 of RGS 8029.

56. Given that these revised RGS's do not enter into force until 1 April 2001 or later, I necessarily concentrate on the issue of fitness for purpose.

57. On that issue, Railtrack SSD emphasises that the current versions of RGS 2149(2) and 8029 have been prepared after detailed consultation with interested parties, including the manufacturers. As I understand it, these amendments have been made in accordance with the procedures laid down in the RGS Code and there has been no challenge to their terms: see in particular paragraph 3.8 of the SSD Response.

58. In addition, if the complainants are not satisfied with the terms of these new RGS's, it has been open to them to object to their terms or subsequently to make further submissions on this point, pursuant to the procedures set out in the RGS Code. In this respect, SSD's original submission, made in Mr Muttram's letter to the Regulator of 13 January 2000, was that the complainants should follow the procedures laid down in the RGS Code itself rather than pursuing the present complaint.

59. Those facts could ordinarily be relied on to demonstrate that the new RGS 2149(2) and 8029 reflect an appropriate balance between the various competing interests (and are therefore "proportionate" for the purposes of paragraph 8(d) of Condition 6 of Railtrack's licence).

60. If this were a matter that turned exclusively on evidence as to the reasonableness of requiring Railtrack to deliver particular information by particular dates, it would be very difficult if not impossible for me to go behind this apparently agreed position. For example, the new provisions impose much more extensive obligations on Railtrack in relation to the "structure gauge" below 1100mm above the plain of the rails, both in terms of information and in terms of uniformity of structure. I am not in a position to judge why this approach was chosen, whether it is reasonable or the extent to which there might be room to expand the scope of Railtrack's obligations. Given that I disagree with SSD/IRSA's general interpretation of the Practical Criteria and paragraph 8 of Condition 6 of its licence, it is possible that SSD has taken an unduly conservative view of Railtrack's obligations but that is not a matter on which I can make a finding without specific evidence. Similarly, I do not have sufficient evidence or expert knowledge to make a finding that the timetable set out in RGS 8029, for imposition of additional obligations on Railtrack, is unduly lenient.

61. It seems to me that the Regulator is not in a fundamentally different position on the evidence, despite the expertise available to him within his Office. If the Regulator were to make specific findings on what obligations could or should have been included in these new RGS's, it would require at least a further round of evidence to determine why the terms of RGS 2149(2) and 8029 are as they are and what additional specific obligations could reasonably be imposed on Railtrack in these respects (see in particular section 13 of RGS 8029).

62. I do not think that this is a task on which either I am or the Regulator is required to embark under section 55 of the Railways Act or in accordance with the RGS Code or Condition 6 of Railtrack's licence. To do so would tend to involve the Regulator in particular in carrying out the functions that are specifically delegated to IRSA/SSD under Condition 6.

63. In my view, my role (and the Regulator's role) is more limited, but requires consideration of whether the scope of the new RGS's as described conforms to the requirements of the RGS Code and paragraph 8 of Condition 6 of Railtrack's licence.

64. In this respect, I do not think that the considerations set out above can be decisive, for a number of interrelated reasons:

(1) As I discuss in more detail below, the underlying "fitness for purpose" issue, referred to at paragraph 42 above, remains unresolved by the new RGS regime. Neither RGS 2149(2) nor 8029 clearly imposes any *general* obligation on Railtrack to provide information to interested parties at stages prior to vehicle and route acceptance, parallel to the general obligations imposed by § 10 of RGS 3270.

(2) SSD, and now presumably IRSA, continue to maintain that it would be beyond the proper scope of the RGS Code for such a general obligation to be imposed, notwithstanding the obligations gradually to be imposed on Railtrack by RGS 8029 in this respect.

(3) The "gap" recognised by Railtrack to exist and to persist under RGS 8029 appears to be condoned by the replacement RGS regime, because of SSD/IRSA's interpretation of the scope of the Code, which I have already found to give inadequate weight to sub-paragraphs 8(a) to (e) of Condition 6 of Railtrack's licence and the Practical Criteria contained in the RGS Code.

65. In those circumstances, it seems to me to be strongly arguable that this approach is inadequate in principle and that RGS 8029, or some other part of the RGS regime, should impose a general obligation to provide information to interested parties in advance of the vehicle and route acceptance procedure.[5] What such an obligation

[5] I discuss below the possibility that section 13 of RGS 8029 imposes a general obligation to provide gauging information *in Railtrack's possession*, at least from 1 October 2001. In respect of electromagnetic compatibility, where the current position under the RGS regime is entirely unsatisfactory, it would be necessary either to create a general RGS covering information provision at all stages prior to vehicle and route acceptance (i.e. both gauging and electromagnetic compatibility) or else to include a specific obligation in whatever eventually emerges to replace RGS 1914.

should mean in particular cases would obviously depend on the purpose for which the information was required and a realistic appreciation on all sides of what was practically feasible and reasonably necessary; but those qualifications do not seem to me to undermine the value of such a broad obligation.

66. Even viewed simply as a matter of fact, some of the specific obligations to be imposed on Railtrack by RGS 8029 will not actually be imposed until 2005, notwithstanding the fact that Railtrack Line's three initiatives to obtain adequate information are due to be completed in April 2001 (IDI, RAR) or 2003 (NGP). It is hard to see any justification for an additional delay of at least two years after the measures that Railtrack relies on to demonstrate its entitlement to rely on section 55(5)(b) (now section 55(5B)(a)) of the 1993 Act.

Transition from RGS 2149(1) and 5204 to 2149(2) and 8029

67. The transitional regime is far from clear, particularly in the current period August 2000 to April 2001. Both RGS 2149(2) and 8029 were issued in August 2000 but Part A of each RGS requires compliance only with effect from 1 April 2001. On the natural reading of the new RGS's, RGS 2149(1) and 5204 were withdrawn in August 2000. It that is right, there has been an unacceptable 8-month gap in the RGS regime in this area.

68. In addition, the specific information obligations imposed on Railtrack by RGS 8029 enter into force only gradually from 1 April 2001 onwards (1 October 2001 for paragraphs 13.1 and 3-5; 1 April 2005 for paragraphs 13.6-7).

69. These extended transitional arrangements in RGS 8029, and the terms of RGS 2149(2), give rise to a further significant difficulty in the light of my interpretation of RGS's 2149(1) and 5204. Railtrack SSD asserts in respect of RGS 2149(2) that "The purpose of this new standard is more limited than Issue One": paragraph 2.18 of the SSD Response, referring to the revised terms of Part B, paragraph 1, of RGS 2149(2).

70. On my interpretation of RGS's 2149(1) and 5204, the effect is that Railtrack is moving from a regime under which it is subject to a broad but ill-defined and implied obligation to provide information at the design stage to a narrower and more precisely defined obligation. It would be entirely unsatisfactory for Railtrack

to be released from the general obligation before, and in some cases several years before, it came under the more specific obligation. It is also hard to see any justification for any *reduction* in Railtrack's general obligations either during the transitional period or thereafter.

71. I understand from the ORR that IRSA is currently of the view that the requirements of RGS 5204 at least remain in force during the transitional periods laid down under RGS 8029. Presumably, IRSA would take the same view of RGS 2149(1) and (2). However, the natural reading of these RGS's is that there is an unacceptable gap in the RGS regime that renders it to that extent clearly unfit for purpose. Even on a more charitable reading, it would presumably remain the case that any general obligations contained in the earlier RGS's would lapse once the more specific obligations contained in RGS 8029 entered into force, which would remain unsatisfactory on my analysis.

Section 13 of RGS 8029

72. Section 13 of RGS 8029 enters into force gradually from 1 October 2001. On the above analysis, any information obligations on Railtrack implicit in RGS's 2149(1) and 5204 ceased to have effect in August 2000. There is therefore a gap of over a year before such obligations are replaced by the specific requirements of RGS 8029.

73. Even ignoring the transitional problem, it is not clear whether RGS 8029 contains any general obligation on Railtrack to provide gauging information to interested parties, even of the information that is already in its possession or control. The wording of section 13 is cryptic, but it is possible to read the opening words of paragraph 13.1, which enters into force on 1 October 2001, to impose such a general obligation:

> "This section contains details of the information that the Infrastructure Controller shall keep and make available to Railway Group members and their suppliers when required for the execution of their legitimate business."

74. Neither this provision nor any other provision in RGS 8029 *clearly* imposes an obligation on Railtrack to provide the information in its possession generally to interested parties of the kind identified in paragraph 13.1. The provision cited

above seems to be descriptive of section 13 rather than imposing any general obligation on Railtrack, and the remainder of paragraph 13.1 merely requires Railtrack to publish "the processes by which it will provide the information required by this section".

75. However, it seems to me that it must be implicit in section 13 as a whole, and the cited wording is the nearest to an express indication of such an obligation, that Railtrack is in fact required by section 13 to provide the persons identified in the above citation with at least the information specified in section 13 *as and when it is obtained*. But if that is right, as I think it must be, then it would be an absurd limitation for Railtrack to be obliged to provide information to interested parties, *of a kind available to Railtrack and required for the execution of an interested party's legitimate business*, only if Railtrack had been obliged to *obtain* that information pursuant to an obligation imposed by section 13. It would lead to a pointless exercise of distinguishing between different items of information on the basis of how or why they had been obtained.

76. But if this reasoning is right then there does not seem to be any rational explanation of why paragraph 13.1 should not be read to include an obligation on Railtrack to provide *all* the gauging information in its possession, *including information obtained for the purposes of vehicle and route acceptance procedures in accordance with § 10 of RGS 3270 or for Railtrack's own purposes*, to "Railway Group members and their suppliers when required for the execution of their legitimate business", *whether or not that information had been obtained under an obligation imposed by section 13 of RGS 8029*.

77. If, contrary to the above analysis, IRSA were to maintain that section 13 does not include such a general obligation to provide all gauging information in Railtrack's possession to interested parties for the purposes of their legitimate business, then I consider that the RGS regime would be clearly unfit for purpose in that respect. In any event, failure by Railtrack to grant access to information in its possession, on equal terms to all parties with a legitimate interest in such information, might also

be in contravention of Condition 10 of its licence, prohibiting undue discrimination.[6]

Applicability of section 55(1) in respect of gauging

78. This leaves the investigation under section 55(1) in a very unsatisfactory state. On my reading of RGS 8029, no gauging information obligations are currently in place prior to the stage of vehicle and route acceptance, notwithstanding:

(1) Railtrack's acceptance of the appropriateness of such obligations (see paragraphs 21 and 42 above);

(2) my finding that such obligations fall within the scope of the purpose laid down by paragraph 8 of Condition 6, properly construed;

(3) my finding that RGS's 2149(1) and 5204 contained implicit obligations to that effect; and

(4) my finding that section 13, properly construed, ought to be read as incorporating such an obligation with effect from 1 October 2001, at least in relation to all gauging information in Railtrack's possession or control.

Conclusion as to continuing breaches

79. I therefore conclude as follows in relation to continuing breaches of Condition 6.

80. In relation to *information provision for the purposes of vehicle and route acceptance*, Railtrack Line has not demonstrated that it has sufficient information available to it in an accessible form to discharge its obligations under RGS 3270, § 10, i.e. to have and to provide sufficient information for the satisfactory and timely performance of vehicle and route acceptance procedures. It is therefore in breach of paragraph 15 of Condition 6 in this respect, although § 10 itself could be much more clearly expressed.

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[6] As I have already found, to conform to paragraph 8 of Condition 6, the information obligation in RGS 8029 should also include an obligation to *obtain* gauging information reasonably required for legitimate business purposes. RGS 8029 clearly does not include any such general obligation at present.

81. In relation to *criteria for electromagnetic compatibility*, there is a continuing breach of the RGS Code in SSD/IRSA's failure to replace RGS 1914. SSD/IRSA is bound to accept that RGS 1914 is not fit for purpose since it does not dispute that it requires very substantial revision. It is such an important issue that it cannot be satisfactory to have no binding and satisfactory RGS available for an extended period of time. IRSA is therefore in at least technical breach of the obligations set out at paragraph 7ff. of Condition 6, enforceable by Railtrack in accordance with paragraph 6 of Condition 6.

82. In relation to *information provision at stages prior to vehicle and route acceptance*, the position is more complicated, but can be summarised in this way:

(1) Railtrack remained in breach of the implied obligations implicit in RGS's 2149(1) and 5204 in respect of gauging information, at least until those RGS's were withdrawn in August 2000.

(2) Because of the absence of any effective RGS in respect of electromagnetic compatibility, Railtrack was not subject to any clear or effective information obligation at any date relevant to my investigation, rendering the RGS regime additionally unfit for purpose in that specific respect.

(3) Since August 2000, it is not clear what information obligations, if any, are imposed on Railtrack in respect of gauging, given the unsatisfactory transitional provisions in RGS 2149(2) and 8029. On the assumption that no such obligations are currently in force, there is another serious fitness for purpose issue.

(4) Even when RGS 8029 enters into force, it is not clear what if any general obligations are to be imposed on Railtrack in relation to the supply of information.

(5) On the assumption that such obligations are to be imposed in respect of gauging information in Railtrack's possession with effect from 1 October 2001, the obligations are limited to the information in Railtrack's possession or under its control, and may even be limited to the information that it is required to obtain pursuant to section 13 itself.

83. These complicated difficulties in respect of information provision at stages prior to vehicle and route acceptance could be addressed quite simply by an amendment or addition to the RGS regime introducing a general information obligation equivalent to that currently contained in RGS 3270 in respect of vehicle and route acceptance (the RGS 3270 obligation at the stage of vehicle and route acceptance could also be made considerably more precise, to the benefit of all concerned).

84. I can see no jurisdictional objection to such a change being made, thereby addressing the "gap" recognised by Railtrack itself and bringing the RGS regime into line with paragraph 8 of Condition 6 of Railtrack's licence in this respect. I consider that the current situation is a further failure by IRSA to perform the role set out at paragraphs 7ff. of Condition 6.

85. In the current confused situation, it is much more difficult to assess whether Railtrack is in breach of paragraph 15 of Condition 6 of its licence in respect of the provision of information prior to vehicle and route acceptance. Because of the transitional situation, there does not appear to be any relevant RGS currently in force (apart from the discredited RGS 1914 in respect of electromagnetic compatibility).

86. With effect from 1 October 2001, Railtrack will come under at least some obligations under RGS 8029, but it would be a broad reading of section 55(1) to find that Railtrack was "likely" to breach a provision of a new RGS that did not enter into force for several months, and whose meaning and scope was obscure, particularly given the steps currently under way to improve Railtrack's provision of information (described in Part E below).

87. The obvious breach in this as in other respects is the obscurity of the obligations, if any, currently imposed by the RGS regime, thus rendering them unfit for purpose and in need of urgent amendment and clarification by IRSA.

E. Railtrack's proposals

88. I have already considered the amendments to the RGS regime in some detail. In addition, Railtrack's responses to my earlier report and to the Regulator's letter of 23 August 2000 set out a number of other positive steps currently being undertaken. These measures relate primarily to two areas: the gathering and

provision of access to information; and the creation of directly enforceable rights for manufacturers and other interested parties.

Supply of information

89. In addition to the new RGS's already discussed, the most important development is that Railtrack has now provided specific dates (and detailed schedules in respect of particular routes) by which the three data gathering initiatives, RAR, IDI and NGP will be completed, subject to various caveats as to the scope of the initiatives.

90. I cannot judge whether the dates that are proposed are reasonable or could be accelerated[7] or whether the initiatives will provide the information and access to the information that the manufacturers have hitherto lacked. Ultimately, the important practical question is not whether particular categories of information are obtained by particular dates, but whether there is a marked improvement in practice in the procedures for the design, manufacture and vehicle and route acceptance of new trains for the network.

91. The essential obligations that I consider are (or should be) imposed on Railtrack by the RGS's are to obtain and provide sufficient information for the efficient achievement of specific purposes, namely the design, manufacture and vehicle and route acceptance of new trains. It is therefore those outcomes that will ultimately demonstrate that (i) the RGS regime conforms to paragraph 8 of Condition 6 and (ii) Railtrack is performing its obligations under that regime in accordance with paragraph 15 of Condition 6.

92. Two possible specific areas of doubt in respect of the current initiatives are:

(1) whether the RAR under construction by Railtrack will be sufficiently rigorous to satisfy the standards of the Regulator, given his independent initiative to impose a licence condition in this area; and

(2) whether the primary explanation given by Railtrack for the delay in completing the NGP project, that there is only one gauging train (see

[7] In relation to RAR and IDI, this point is virtually academic, as the intended completion dates are April 2001.

paragraph 1.12 of Line's Response and paragraphs 24 and 26 of Annex 4 to the Response), is acceptable for a company of Railtrack's size and resources; I do not know how sophisticated or expensive a piece of equipment is involved, but there does not seem to be any reason why in principle a company with the resources of Railtrack should not invest in additional gauging trains to survey the network more rapidly.[8]

93. More generally, the complainants have expressed considerable reservations as to whether Railtrack will in fact deliver on its obligations (two of which should be performed within the next month), and it is obviously an open question whether the completion of the three initiatives will in practice deliver the satisfactory and timely supply of information that the complainants seek.

94. Subject to these reservations, these appear to be genuine and substantial attempts to address Railtrack's historical lack of information about the network and the need to replace RGS 1914 (which is being addressed by cooperation in the context of the IDI initiative).

Enforcement of obligations

95. In relation to enforcement, Railtrack has produced draft Heads of Agreement on the basis of which it would propose to enter into direct relations with individual manufacturers: Annex 5 to the Line Response. The ORR has compared the proposed Heads of Terms with the terms of the existing contracts entered into between Railtrack and West Coast Trains and Railtrack and Cross Country Trains referred to at paragraph 108 of my earlier report.

96. Paragraphs 1.13 to 1.16 of the Line Response usefully analyse the three ways in which interested parties may wish to access Railtrack information:

(1) access to data by "all those with a legitimate interest in the characteristics of the infrastructure";

[8] I understand from discussions with ORR officers that the real problem may be lack of expertise available to interpret the data produced by the gauging train. Again, I cannot judge whether it would be impossible to train additional "interpreters" at the same time as building additional gauging trains. On the face of it, it does not sound convincing that Railtrack could not manage such a task in less than two years.

(2) interpretation of data, in particular during pre-contract discussions regarding new rolling stock; and

(3) contractual arrangements for the supply of data to train manufacturers with contracts to build new rolling stock.

97. The proposed Heads of Terms address only the third of those issues, although Railtrack raises the possibility of entering into "consultancy arrangements with train manufacturers" in respect of the interpretation of data.

98. This issue is addressed in detail in the Consultation Document published on 22 March 2001.

F. Remedies

99. If the Regulator finds that there is a breach of the current RGS regime, then Railtrack is in breach of paragraph 15 of Condition 6 of its network licence and the matter is governed by section 55 of the 1993 Act.

100. If the Regulator finds that the RGS regime itself is defective, then paragraph 6(d) of Condition 6 of Railtrack's licence potentially applies.

101. Section 55(1) imposes a detailed statutory regime requiring the Regulator to make an order to ensure compliance, subject to qualifications contained in section 55(5)-(5B).

102. Condition 6(6)(d) does not contain any detailed procedural provisions, but confers a power on the Regulator to direct Railtrack, by notice, to require IRSA to perform its obligations under the tri-partite agreement between Railtrack, IRSA and Railtrack Group PLC and Condition 6(7)ff. of Railtrack's licence.

103. Given the above findings, the primary focus for remedial action is likely to be Condition 6(6)(d).

104. I have already considered these points as part of the above discussion but I summarise the position on three issues:

(1) the applicability of the amendments to Railtrack's licence and section 55 of the 1993 Act to the complaints;

(2) the possibility of a direction under Condition 6(6)(d); and

(3) an order under section 55 of the 1993 Act.

The temporal scope of the amendments to section 55 and Condition 6(6)

105. The major change to section 55 since my earlier report is that section 55(5)(b) of the 1993 Act was deleted by section 226(1)(a) of the Transport Act 2000, with effect from 1 February 2001.[9] Section 55(5B)(a) is in similar terms, but the Regulator is no longer precluded from making an order under section 55(1) where he is satisfied that the provision applies, but is required to make an order in such circumstances "only … if [he] considers it appropriate to do so".[10]

106. I have considered whether there is any reason to apply the unamended terms of section 55 to the present situation. In my view, that would not be right: the terms of the amending legislation are clear, and the Regulator has not as yet reached a final view on the matters specified in the section. It therefore seems appropriate for him to apply the new statutory wording when he finally satisfies himself as to the application of section 55 to this case.

107. Likewise, it seems to me to be clear that the Regulator should consider the substance of the complaints against the new wording of Condition 6 of Railtrack's network licence. In particular, any enforcement action in respect of the RGS Code must operate in accordance with paragraph 6 of Condition 6 and the tri-partite agreement rather than directly against Railtrack, as was the situation under the previous version of the licence.

Condition 6(6)(d) direction

108. If the Regulator accepts the findings set out above in respect of fitness for purpose, in respect of electromagnetic compatibility generally and information

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[9] See Regulation 3 of and Schedule 2 to the Transport Act 2000 (Commencement No. 3) Order 2001, SI 2001/57.

[10] Section 55(5B)(b) is materially altered from the old section 55(5)(c): whereas section 55(5)(c) applied where the Regulator found a breach to be "trivial", section 55(5B)(b) applies only where a breach of a licence condition "will not adversely affect the interests of users of railway services or lead to any increase in public expenditure".

provision prior to vehicle and route acceptance, then paragraph 6(d) of Condition 6 confers a power on the Regulator to made a direction by notice requiring Railtrack to enforce IRSA's obligations under, inter alia, the RGS Code. Condition 6 does not lay down any procedure to be adopted in such a case.

109. The terms of such direction are a matter for the Regulator but the essential focus of the concerns set out above should be clear. In my view, IRSA takes an unduly restrictive approach to paragraph 8 of Condition 6, with the result that the current RGS regime does not impose any general obligation on Railtrack to obtain and provide information to interested parties sufficient to meet their legitimate business interests. That seems to me to be at the heart of the current complaint.

Section 55

110. The basic structure of section 55 is that the Regulator is obliged to make an order under section 55(1) in respect of breaches of licence condition, subject to section 55(5)-(5B).

111. The following questions therefore arise:

(1) Given the changed factual and legal situation and the parallel initiatives in progress, in particular the publication of the Consultation Document on 22 March 2001, is the Regulator precluded from making an order by section 55(5)(a), read in the light of section 4?

(2) Is he precluded from such action by section 55(5A) and his duties under the Competition Act 1998?

(3) Is Railtrack doing or undertaking to do enough to satisfy the requirements of section 55(5)(b), now replaced by the terms of section 55(5B)(a), with the result that it is not "appropriate" to make an order?[11]

[11] Given the terms of the complaints, I do not think that section 55(5B)(b) could apply.

Section 55(5)(a) and section 4

112. Turning to the possibility that the Regulator's duties under section 4 of the Railways Act 1993 might "preclude" him from making an order under section 55(1), this is not a matter that I considered in any detail in my original Report. At that time, it was unclear to what extent if at all Railtrack was prepared to countenance any effective mechanism for the supply of information to persons other than TOC's and there was no suggestion that either Railtrack or the Regulator placed any reliance on section 55(5)(a).

113. The position is now very different:

(1) the Consultation Document published on 22 March 2001 is precisely intended to provide enforceable rights to interested parties in respect of vehicle and route acceptance;

(2) Railtrack has indicated a willingness in principle to accept such a contractual mechanism; and

(3) the mechanism provided for by paragraph 6(d) of Condition 6 enables the RGS regime to be amended without the need for an enforcement order under section 55(1).

114. In those circumstances, it would be open to the Regulator to find that it would be contrary to section 4, and in particular section 4(1)(f) (minimum restrictions consistent with the performance of the Regulator's functions), additionally to make an order in respect of the breach of § 10 of RGS 3270.

Section 55(5A)

115. Although I have not considered this matter in any detail, I have seen nothing in the complaints or the facts to suggest that section 55(5A) is applicable here.

Section 55(5B)

116. The application of section 55(5B)(a) is very much a matter for appreciation by the Regulator. I have already identified the continuing breach of RGS 3270, § 10, and the steps that Railtrack is undertaking to improve the situation. It is for the

Regulator to judge whether these initiatives and undertakings satisfy him that Railtrack "has agreed to take, and is taking, *all such steps as it appears to [the Regulator] for the time being to be appropriate for [Railtrack] to take for the purpose of securing or facilitating compliance*" with the requirements of existing RGS's in relation to the supply of information (section 55(5B)(a)).

117. Under the new regime, section 55(5B)(a) of the 1993 Act, as amended, no longer precludes an order even if the Regulator is satisfied that section 55(5B)(a) applies. Given the terms of the Consultation Document and the possibility of a direction under paragraph 6(d) of Condition 6, the Regulator may not consider it "appropriate" to make an order if finds that Railtrack has satisfied the terms of section 55(5B)(a).

G. Conclusion

118. Inevitably, the final decision as to how this complaint should be dealt with depends on a complex exercise of discretion by the Regulator: see section F.

119. In the end, although I have expressed views on these points, it is a matter for the Regulator to decide:

(1) what precise standard of performance under the RGS regime is appropriately to be required of Railtrack in this area, given the terms of paragraph 8 of Condition 6;

(2) how the RGS regime should be amended if he considers that it currently fails to meet that standard;

(3) whether the substantial initiatives proposed by Railtrack are sufficient to satisfy the requirements of § 10 of RGS 3270, in the light of the complaints, in particular the doubts most recently expressed by the complainants;

(4) if he is not satisfied of (3), whether he considers that these initiatives nonetheless satisfy the standard laid down by or section 55(5B)(a) and render it inappropriate to make an order; and

(5) whether his broader duties under section 4 of the 1993 Act preclude the making of an order in the particular circumstances of this case (section 55(5)(a)).

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30 March 2001