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VEHICLE AND ROUTE ACCEPTANCE: COMPLAINT BY ADTRANZ AND ALSTOM

1. This letter sets out my conclusions on the complaint I received from ADtranz and Alstom on 13 October 1999 in respect of Railtrack's procedures for vehicle and route acceptance, and the action I am proposing to take as a result of this complaint pursuant to Condition 6 of Railtrack's network licence. This letter takes account of my publication of the consultation document on vehicle and route acceptance issues on 22 March 2001[1].

[1] *Vehicle and route acceptance procedures: A consultation document*, Office of the Rail Regulator, London, March 2001

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2. I emphasize that nothing in this letter affects Railtrack's responsibilities for the safety of the network in its role as infrastructure controller.

3. I recognise that a great deal of work has been done by Railtrack and other industry parties on vehicle and route acceptance, and that current difficulties with the introduction of new rolling stock are not all about the acceptance procedures.

Background

4. On 13 October 1999 ADtranz and Alstom wrote to me setting out a number of matters on which they considered Railtrack was in breach of its network licence. Following representations from the parties, a hearing on 9 May 2000 and further representations, I wrote to Railtrack, ADtranz and Alstom on 23 August 2000 (Annex A) with my provisional conclusions. ADtranz and Alstom responded on 10 November 2000, supporting these conclusions. Railtrack sent two responses, one from the Safety and Standards Directorate dated 17 November 2000 and one from Railtrack PLC dated 24 November 2000. ADtranz and Alstom commented on the Railtrack response on 26 January 2001.

5. In considering this complaint, I have been advised by Mr Rhodri Thompson, barrister. Mr Thompson produced a report dated 10 August 2000 (Annex B), which was circulated to the parties together with my letter of 23 August 2000. Following the responses from the parties Mr Thompson has produced a second report (Annex C).

Changes to the legal regime

6. Since Mr Thompson's first report, the following relevant changes have been made to the applicable legal regime:

(a) Railtrack's network licence was amended with effect from 1 January 2001 to introduce an amended Condition 3 concerning safety and standards. Subsequently, as a result of a transfer scheme made under the Transport Act 2000, Condition 3 was renumbered as Condition 6;

(b) in accordance with what is now paragraph 6 of Condition 6 of Railtrack's network licence, Railtrack PLC, Railtrack Group PLC and the newly formed Railway Safety entered into a tri-partite agreement dated 20 December 2000; and

(c) section 55 of the Railways Act 1993 (the 'Act') has been significantly amended with effect from 1 February 2001.

7. The effects of these changes are considered in Mr Thompson's supplementary report. In particular, the amendments to Railtrack's network licence materially affect the basis on which this complaint falls to be considered. I agree with Mr Thompson's analysis to the effect that I must now address these complaints under the current terms of section 55 and Railtrack's network licence, rather than the historical wording of the Act and the licence.

8. Paragraph 6(d) of Condition 6 now provides that I may direct Railtrack to require Railway Safety to perform its obligations under the tri-partite agreement, including to ensure that Railway Group Standards conform to the Code provided for in paragraph 8 of Condition 6 of Railtrack's amended network licence. This power is relevant to the extent that I may find that existing Railway Group Standards do not conform to the purpose of the Code set out in paragraph 8 of Condition 6, in particular sub-paragraphs (a) to (e) thereof.

9. Paragraph 6(d) of Condition 6 does not set out any particular procedure to be adopted, or any specific conditions that must be satisfied, where I give a direction to Railtrack to enforce the obligations of Railway Safety under the tri-partite agreement, other than that such a direction should be given by notice.

10. Section 55 of the Act as amended sets out a number of possibilities for addressing a complaint of this kind, if I consider that Railtrack is contravening, or is likely to contravene, its network licence:

(a) section 55(1) of the Act requires me to make a final or provisional order requisite to secure compliance but is made subject to section 55(5), 55(5A), 55(5B);

(b) section 55(5) provides that I should not make an order if I am satisfied that the duties imposed on me by section 4 of the Act preclude the making of an order;

(c) section 55(5A) provides that I should not make an order if I consider that it is appropriate to take action under the Competition Act 1998;

(d) section 55(5B) requires that if I am satisfied that:

    (i) Railtrack has agreed to take, and is taking, all such steps as it appears to me for the time being to be appropriate for it to take for the purpose of securing or facilitating compliance with the relevant Condition; or

    (ii) the contravention will not adversely affect the interests of users of railway services or lead to any increase in public expenditure,

then I should only make an order if I consider it appropriate to do so.

11. Paragraph 15 of Condition 6 requires Railtrack to comply with applicable Railway Group Standards.

12. I have therefore considered the facts of the complaint, in so far as they relate to the fitness for purpose of Railway Group Standards, against the revised wording of Condition 6. Whereas paragraph 15 of Condition 6 requires Railtrack to comply with existing Group Standards, so that the section 55 mechanism is appropriate where Railtrack fails to do so, fitness for purpose concerns are now to be addressed by directions given to Railtrack under paragraph 6(d) of Condition 6 and enforcement by Railtrack of Railway Safety's obligations under the tri-partite agreement.

The 23 August 2000 letter

13. In my letter of 23 August 2000, I stated that in the light of Mr Thompson's advice and consideration of the relevant papers by my Office, I had provisionally concluded that Railtrack was in breach of its network licence in the following respects:

(a) it was in breach of express or implied obligations contained in Railway Group Standards GM/RT2149, Issue 1, GC/RT5204 and GO/RT3270, Issue 2, in respect of provision of information and criteria for the vehicle and route acceptance process; thus, Railtrack was in breach of paragraph 2(c) of Condition 3 of its network licence;

(b) to the extent that Railtrack's narrow construction of the information requirement in Railway Group Standard GO/RT3270 could be accepted (i.e. that it does not apply to the design stage and does not require detailed information or criteria needed for the design of new trains to be provided at any stage), the Railway Group Standard had not been reviewed for fitness for purpose under the requirements of the Railway Group Standards Code (paragraph 7.2); thus, Railtrack was in breach of paragraph 2(b) of Condition 3 of its network licence; and

(c) likewise, if no such obligations were implicit in Railway Group Standards GM/RT2149 or GC/RT5204, contrary to Mr Thompson's view, they were not fit for purpose and Railtrack was in further breach of paragraph 2(b) of Condition 3.

14. I also stated that:

(a) introduction of new vehicles onto the network was important to passengers, train operators and the Franchising Director (now the Strategic Rail Authority), and the failings identified appeared, at least in part, to have contributed to significant delays in their introduction;

(b) I did not consider that any of the duties in section 4 of the Act precluded me from making an order; and

(c) it was possible that Railtrack was prepared to take, and was taking, appropriate steps to secure or facilitate compliance with its network licence obligations; if, and to the extent that, I were to be satisfied that this was the case, I would have been precluded from making a final or provisional order.

15. I invited representations on these points. In addition, I considered that the following points were of particular relevance to this case, and to wider questions of vehicle and route acceptance:

(a) the adequacy of the steps Railtrack was taking to improve the information available for the acceptance process and the nature of Railtrack's commitment to doing this;

(b) the need to improve the means by which respective obligations in the process are defined and enforced, and the definition and quantification of the liabilities which may arise; and

(c) Railtrack's policies on harmonisation of the railway infrastructure.

Changes in circumstances

16. In addition to changes in the legal regime, outlined in paragraphs 6 – 12 above, the most important changes that have taken place since Mr Thompson's first report and my letter of 23 August 2000 are that:

(a) a new Railway Group Standard GE/RT8029 (Management of Gauging and Clearances) and a revised Railway Group Standard GM/RT2149 (Requirements for Defining and Maintaining the Size of Railway Vehicles) were issued in August 2000; the effect of these new Railway Group Standards and the unsatisfactory transitional arrangements currently in place are considered in detail in Mr Thompson's second report; and

(b) Railtrack has continued work on three substantial projects, the RAR, IDI and NGP initiatives described in its responses. In its response, Railtrack said that in respect of vehicle and route

acceptance information two of these (IDI and RAR) were scheduled to be completed by April 2001, though in the case of IDI this was conditional on inputs from other parties. Substantial parts of NGP should also be completed by April 2001.

17. In respect of gauging information, Mr Thompson's view is that the current transitional regime imposes no information obligations at all, for stages prior to vehicle and route acceptance, until 1 October 2001, notwithstanding the fact that Railtrack recognises the 'gap' that results and that it has already done a great deal of work on the RAR, IDI and NGP initiatives.

18. The initiatives described in paragraph 16 above should already enable Railtrack to provide significantly improved information to interested parties for the purposes of designing and building new trains. However, even after April 2003, when, according to Railtrack's present plans, the NGP is scheduled to be completed, there are still significant transitional periods before the obligations contained in Railway Group Standard GE/RT8029 enter into effect.

19. In respect of non-gauging information prior to the stage of vehicle and route acceptance, the continuing delays and difficulties encountered in the replacement of Railway Group Standard GS/ES1914, Issue 1, mean that there will be no effective obligations imposed on Railtrack for the foreseeable future.

20. The other major change of circumstance is the publication of my consultation document on vehicle and route acceptance issues on 22 March 2001. In this I state that it is important that manufacturers and owners, as well as operators, have an effective locus in the processes of vehicle and route acceptance, including at the specification and design stage. I suggest that this will be best achieved by the introduction of contractual arrangements on the model of the vehicle and route acceptance contracts between Railtrack and West Coast Trains Limited and Railtrack and Cross Country Trains Limited. Furthermore, since contracts between Railtrack and persons who require permission to use the network (for example to test trains), including ones between rolling stock manufacturers or owners and Railtrack, are access agreements, subject to the provisions of sections 17 to 22 of the Act, adequate means exist (namely under section 17) to obtain such contracts even if Railtrack unreasonably refuses or demands unreasonable terms. The document also addresses questions of harmonisation of the railway infrastructure.

Up-dated findings

21. Following consideration of the responses of the parties, and Mr Thompson's further report, I have concluded the following in respect of the obligations entered into by Railway Safety pursuant to the tri-partite agreement dated 20 December 2000 and paragraphs 7 and 8 of Condition 6:

(a) the current Railway Group Standards regime is unfit for purpose in that it does not impose on Railtrack any clear general obligation, either in respect of gauging or in respect of other relevant matters, to obtain and provide information needed by designers and manufacturers of new trains at any stage prior to vehicle and route acceptance;

(b) even in respect of vehicle and route acceptance, where paragraph 10 of Railway Group Standard GO/RT3270, second issue, does impose such obligations, the scope and extent of such obligations are not specified in any detail, with the inevitable consequence that there have been disputes as to the scope of these obligations;

(c) the specific obligations imposed by Railway Group Standard GE/RT8029 are too narrow in scope and are subject to an excessively long lead-in period to meet this general concern; in any event, Railway Group Standard GE/RT8029 does not cover information in respect of matters other than gauging; and

(d) Railway Group Standard GS/ES1914, Issue 1, is still not fit for purpose.

Thus Railway Safety has not performed the obligations set out at paragraph 7 of Condition 6 and of the Railway Group Standards Code, read in the light of the tri-partite agreement.

22. In respect of the obligations imposed by Railway Group Standards at the stage of vehicle and route acceptance, I have concluded that Railtrack still does not have adequate information available to it to perform its obligations under Railway Group Standard GO/RT3270, paragraph 10, properly interpreted in the light of paragraphs 8(a) to (e) of Condition 6. I have therefore concluded that Railtrack is in breach of paragraph 15 of Condition 6 of its network licence in this respect. However, the precise extent of this obligation is poorly defined in the present Group Standard, as I have indicated at paragraph 21(b) above.

Remedies

Railtrack's proposals

23. I have reconsidered the question of what action I should take in the light of the changed legal and factual circumstances that now prevail, and in particular whether it is necessary or appropriate to take such action in addition to the measures that are now the subject of consultation.

24. Railtrack's responses to my letter of 23 August 2000 contain a number of positive proposals for addressing my concerns:

(a) the revised and replaced Group Standards GM/RT2149 and GE/RT8029;

(b) the IDI, NGP and RAR initiatives;

(c) continuing work to replace RGS GS/ES1914 in the context of IDI;

(d) proposed heads of terms as the basis for contractual commitments to the provision of information where manufacturers have binding contracts for the delivery of new trains; and

(e) other possible contractual arrangements for interested third parties, including manufacturers.

25. My office has considered these matters and I have also taken account of Mr Thompson's analysis in his second report. I have a number of concerns about these proposals, particularly in the light of the long history of problems in this area.

26. In particular, I am concerned that:

(a) the transitional periods provided for in the new and revised Group Standards are too long, extending in some cases to 2005; also the interim position is far from clear and seems on its face to be highly unsatisfactory due to the difficulty in ascertaining which, if any, Railway Group Standards regime applies;

(b) the data gathering initiatives currently being undertaken by Railtrack do not provide sufficient guarantees that the legitimate concerns underlying the manufacturers' long-standing complaints will be addressed in practice, that is to say that they will deliver the improved efficiency in the procedures for delivery of new trains that is required;

(c) none of the proposed initiatives has been completed as yet, although the RAR and IDI initiatives should be completed shortly, and Railtrack asserts that the NGP, which will provide Railtrack with greatly improved gauging information, cannot be completed for more than two years; and

(d) I do not accept that the 'gap' that Railtrack admits exists in the provision of information to manufacturers prior to vehicle and route acceptance cannot be addressed through amendments to Group Standards: the terms of RGS GE/RT8029 itself are inconsistent with this suggestion.

27. The heads of terms proposed by Railtrack do not, in my view, offer sufficient guarantees that persons in the position of the complainants will have an effective enforcement mechanism if Railtrack fails to meet the standards that I consider appropriate and necessary for a solution to these long-standing problems.

28. The issue of such enforcement is a matter that is properly addressed through the consultation procedure that I initiated on 22 March 2001. However, I am also concerned to ensure that Railtrack is subject to appropriate obligations, and is performing such obligations as already exist, to obtain and provide information to those with a legitimate interest in obtaining such information. That regulatory background is critically important if the enforcement mechanisms considered in the consultation document are to operate effectively in practice.

Direction under paragraph 6(d) of Condition 6

29. As appears from paragraphs 21 and 22 above, my primary concern is that the current Railway Group Standards regime is incomplete and unsatisfactory. It contains no general obligations on Railtrack to obtain or provide information prior to vehicle and route acceptance and the obligations imposed at that stage are insufficiently clear and precise.

30. This incompleteness and lack of clarity necessarily mean that Railtrack's obligations under paragraph 15 of Condition 6 are equally unclear or non-existent. Railtrack admits that this leaves a 'gap' in the regulatory regime.

31. I have considered Safety and Standards Division's representations as to the scope of Railway Group Standards, the meaning of the Safety Criterion and the Practical Criteria, and the suggestion that it would go beyond the scope of the Railway Group Standards Code to place a general information obligation on Railtrack at stages prior to vehicle and route acceptance. I have also considered Mr Thompson's discussion of this matter in his two reports.

32. I agree with Mr Thompson that this analysis is too restrictive and that it is part of the purpose laid down by paragraph 8 of Condition 6 of Railtrack's network licence that Railway Group Standards should be established having regard to the matters set out at sub-paragraphs 8(a) to (e) of Condition 6. Taking that approach, and also taking account of the additional obligations now being imposed by Railway Group Standards GO/RT3270 and GE/RT8029, I do not accept that such a general obligation is outside the scope of the Railway Group Standards Code or of paragraph 8 of Condition 6.

33. In those circumstances, I have concluded that this is an appropriate case for exercise of the power conferred by paragraph 6(d) of Condition 6 of Railtrack's network licence. I therefore propose to direct Railtrack to exercise its contractual rights under the tri-partite agreement to require Railway Safety to perform its obligations under paragraph 7(c) of Condition 6 and the tri-partite agreement. A copy of the proposed direction is at Annex D to this letter.

34. I have also considered the appropriate terms of the direction. I have concluded that the measure that is appropriate and necessary to ensure compliance with paragraph 8 of Condition 6 in this area is to impose an "information obligation" on Railtrack efficiently and in a timely manner to obtain and provide complete and accurate information as to the characteristics and behaviour of the infrastructure which is reasonably required for the purpose of the efficient and timely design, build, commissioning, testing and acceptance of new or modified rolling stock so as to enable it to be brought into safe and reliable service.

35. I consider that the information obligation, linked to the legitimate purposes for which interested parties require such information, is a reasonable and proportionate obligation on Railtrack that will significantly improve the situation for persons such as the complainants, while reflecting an appropriate balance between the parties. The information 'gap' recognised by Railtrack needs to be filled without further delay. Therefore the proposed direction requires the revised Railway Group Standards to require Railtrack to perform the information obligation from 1 October 2001, subject only to the possibility that Railtrack satisfies me on a case by case basis that it would not be reasonably practicable for it to comply with the information obligation by that date. However, in considering any such limitation of the scope of the information obligation, I would take into account the fact that Railtrack is already contractually committed to provide such information for a large part of the network, under the vehicle and route acceptance contracts which it entered into with West Coast Trains Limited and CrossCountry Trains Limited in May 1998.

36. I have also considered whether it is necessary to make a direction in relation to the replacement of Railway Group Standard GS/ES1914. In relation to the need for binding criteria, that is clearly an urgent necessity, but I accept Railway Safety's assurances that this is a matter that is being pursued as a high priority through the procedures set out in the Railway Group Standards Code and that it raises difficult technical issues. I have therefore decided that it is neither necessary nor appropriate to issue a direction in this respect now, although the information obligation to be imposed on Railtrack will include all matters relevant to compliance with vehicle and route acceptance procedures, and will thus include information in respect of electromagnetic compatibility.

Section 55 of the Act

37. As stated in paragraph 22 above, I have concluded that Railtrack remains in breach of Railway Group Standard GO/RT3270, paragraph 10. I am thus satisfied, subject to what follows below, that section 55(1) applies. The legal consequence is that I am required to make a final order in respect of vehicle and route acceptance unless one of the qualifications contained in section 55 applies to preclude the making of an order or to relieve me from the duty imposed by section 55(1).

38. I have therefore considered whether sub-section 55(5), (5A) or (5B) precludes or renders inappropriate the making of an order on the particular facts of this case. I do not think that either section 55(5A) or (5B) applies on the present facts. But I have concluded that section 55(5) does apply and that I am therefore precluded from making an order.

39. In respect of section 55(5A), I do not consider that it would be appropriate to take steps under the Competition Act 1998 in the present circumstances. Railtrack is a dominant undertaking and it is a potential abuse of such dominance to refuse to supply dependent customers or to discriminate in such supply. In the current circumstances, however, I have decided that the priority is to establish a satisfactory and operational regulatory and contractual structure and that it is more appropriate to proceed under the Railways Act 1993. Once that structure is in place, the Competition Act 1998 will of course be an important consideration in assessing Railtrack's conduct under that structure and I will give careful consideration to any credible suggestion or evidence that Railtrack is acting in a way falling within the scope of that Act.

40. In respect of section 55(5B), after careful consideration of the terms of Railtrack's responses, I have concluded that the steps currently under way do not fall to be considered under section 55(5B)(a), because of my concern that they may not in practice achieve the improvements that I consider necessary in this area. Railtrack has set out a number of things it is doing, including the NGP, RAR and IDI. But I am concerned:

(a) about the timescales proposed; and

(b) whether they will deliver the quality of information necessary.

41. Likewise, I consider, for the purposes of section 55(5B)(b), that there is a significant risk that Railtrack's failure to provide adequate information for the purposes of vehicle and route acceptance might adversely affect the interests of users of railway services and lead to an increase in public expenditure. One of the original grounds for the complaint in 1999 was that costs were being increased as a result of perceived risks of delays in the vehicle and route acceptance process.

42. In respect of section 55(5) (and section 4) of the Act, I have considered whether the proposals contained in the consultation document, when combined with the various other initiatives currently under way, preclude me from making an order. I have considered in particular whether, given the proposals in the consultation document published on 22 March 2001 and terms of the direction that I propose to make, it would impose an undue restriction on Railtrack (and thus be contrary to section 4(1)(f) of the Act) also to make an order at this stage.

43. I have concluded that, in the present circumstances, where (i) I have found that the relevant obligation, paragraph 10 of Railway Group Standard 3270, is insufficiently precise, and (ii) I am actively pursuing at least two other regulatory initiatives with essentially the same objective, it would be contrary to section 4(1)(f) also to make an order. I therefore conclude that I am precluded from doing so by section 55(5) of the Act.

44. I stress that this conclusion is based on the current circumstances described in this letter and in the consultation document published. I will continue to monitor the situation closely and would be prepared to reconsider my determination in the light of any material change of circumstances, and, in particular, any evidence that Railtrack is not addressing the information deficiencies sufficiently quickly.

Timing

45. In summary, my conclusions are that:

(a) I should use my power under paragraph 6(d) of Condition 6 to make a direction in the terms set out in the attached proposed direction; and

(b) I should not make a section 55(1) order in this case limited to the breach of RGS GO/RT3270, although I will keep the matter under careful review in the light of changing circumstances.

46. There is no timetable for consultation set out in Condition 6 but I consider that it is appropriate to provide an opportunity for interested parties to comment on my proposed direction.

47. Given the fact that I have just opened consultation on proposals that I consider will make a substantial contribution finally to resolving these issues, and that there is a strong common purpose between the making of a direction in this case and the bringing into effect of those proposals, I have decided to give notice of the direction on the basis that the timetable for consultation and for any representations or objections with respect to the direction under Condition 6(6), should be the same. That will enable interested parties to comment on all relevant issues at the same time, and thus to provide me with suitable information on which I can finally determine whether the terms of the proposed direction are appropriate. Any representations or objections with respect to the direction should be made therefore by no later than 5.00 p.m. on Thursday 17 May 2001.

48. In the interim, given the history of this matter, both prior to and during the examination of this complaint, and the information that Railtrack already has at its disposal, I expect that Railtrack will take steps to comply immediately with its projected new obligations under paragraph 15 of Condition 6, i.e. to perform its new information obligations in respect of information already in its possession with immediate effect. If it does not do so then I would consider an order under section 55(1) as a matter of urgency once the relevant Railway Group Standards were in place.

49. I emphasise that my primary objective is to ensure that information, in the terms of the information obligation, is available quickly and that the matters in paragraphs 21-22 above are addressed. I would be prepared to consider alternative means provided I could be satisfied that this would be achieved and that mechanisms were available to me to ensure that it was achieved.

50. I am publishing this letter and the proposed direction. Copies of the letter and its annexes, and the previous correspondence to which I refer in this letter, will be placed on the ORR website.

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