



## **Provision of Deep Sea Container rail transport services between ports and key inland destinations in Great Britain**

**Notice of intention to accept  
modified commitments offered  
by Freightliner Limited and  
Freightliner Group Limited and  
invitation to comment**

19 November 2015

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**Annex A** - Notice of intention to accept binding commitments offered by Freightliner Limited and Freightliner Group Limited and invitation to comment

**Annex B** – Modified Commitments

**Annex C** – Quarterly reporting pro-forma

# 1. Introduction

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- 1.1 This Notice (the **Notice**) sets out the Office of Rail and Road's (**ORR's**) proposal to accept modified commitments (the **Modified Commitments**) offered by Freightliner Limited and Freightliner Group Limited (together **Freightliner**) in relation to its investigation into Freightliner's arrangements with its customers for the provision of deep sea container (**DSC**) rail transport services between certain ports and key inland destinations in Great Britain.
- 1.2 This Notice should be read in conjunction with ORR's first notice<sup>1</sup> (the **Initial Notice**), which describes ORR's investigation and ORR's preliminary views on: the DSC transport sector; ORR's competition concerns; the initial commitments offered (the **Initial Commitments**); and ORR's assessment of the Initial Commitments.
- 1.3 On 3 September 2015, the Office of Rail Regulation, now formally re-named the Office of Rail and Road,<sup>2</sup> gave notice that it proposed to accept the Initial Commitments offered by Freightliner in Case 11/2013 and invited representations from interested third parties on this course of action.
- 1.4 ORR's competition concerns, which were set out in chapter 4 of the Initial Notice, remain unchanged.<sup>3</sup> In summary, ORR's preliminary view is that certain arrangements Freightliner has with its customers may, by their scope, duration, and nature tend to restrict competition or are capable of having that effect by foreclosing access to customers by actual or potential rail freight operating company (**FOC**) competitors.<sup>4</sup> ORR's competition concerns apply in the '**Relevant Markets**' as defined in paragraph 4.3 of the Initial Notice.
- 1.5 The Initial Commitments offered by Freightliner were set out in chapter 5 of the Initial Notice. The Initial Commitments provided that, among other things, Freightliner would (in relation to the Relevant Markets):

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<sup>1</sup> 'Notice of intention to accept binding commitments offered by Freightliner Limited and Freightliner Group Limited and invitation to comment', published on 3 September 2015 (attached at **Annex A**)

<sup>2</sup> ORR's name change was formalised by The Office of Rail Regulation (Change of Name) Regulations 2015 on 16 October 2015

<sup>3</sup> One respondent requested clarification on ORR's position in relation to its investigation into alleged restrictions on resale in Freightliner's arrangements with its customers. Whilst ORR deprioritised its investigation into exclusive arrangements under Chapter I of the Competition Act 1998 (the **Act**) and/or Article 101 of the Treaty on the Functioning of the European Union (**TFEU**), ORR subsequently identified reselling restrictions which were potentially infringements of Chapter I of the Act and/or Article 101 TFEU. A new strand of investigation was therefore opened into alleged resale restrictions for the purposes of commitments discussions

<sup>4</sup> Contrary to the prohibitions in Chapter II of the Act and/or Article 102 TFEU

- Not enter into any contracts for a duration of more than five years;
- Remove all clauses in its contracts which provide for automatic rollover;
- Not enter into any contracts which require customers to purchase exclusively or any given proportion of their total demand from Freightliner, or place any restrictions or conditions on customers reselling unused contract capacity;<sup>5</sup>
- In contracts with a duration of more than three years, provide a unilateral right for customers to reduce wagon commitments by 10% on the third and fourth anniversaries; and
- Not enter into specified potentially anticompetitive discounting/rebate arrangements.

1.6 ORR's consultation on the Initial Notice ran from 3 September 2015 to 1 October 2015. Responses were received from a combination of: customers of DSC rail transport services, competitors, trade associations and individuals. ORR also received comments from the Competition and Markets Authority (**CMA**)<sup>6</sup> and the European Commission (**EC**). Having carefully considered representations to the Initial Notice, ORR has put to Freightliner certain matters which it identified as possible issues, both in writing and through discussions. Freightliner has subsequently proposed to make certain modifications to the Initial Commitments. The Modified Commitments, containing the proposed modifications, are attached at **Annex B**.

1.7 Having considered the Modified Commitments, ORR is of the preliminary view that their acceptance will fully address its competition concerns. It is ORR's view that the Modified Commitments are such that ORR is minded to exercise its discretion to make a decision accepting the commitments.

1.8 ORR therefore gives notice to interested third parties pursuant to paragraph 3 of Schedule 6A of the Act that it proposes to accept the Modified Commitments in accordance with section 31A(2) of the Act. Formal acceptance of commitments by ORR would result in the discontinuation of its investigation, with no decision made on whether or not the Act, or the TFEU, has been infringed by Freightliner. Acceptance of the Modified Commitments would not prevent ORR from taking any action in relation to competition concerns which are not addressed by the Modified Commitments. Acceptance of commitments also does not prevent ORR from continuing its investigation, making a decision or giving a direction where it has reasonable grounds for:

<sup>5</sup> Restrictions on resale are prohibited in all of Freightliner's contracts within Great Britain

<sup>6</sup> The working arrangements between ORR and CMA are set out in the CMA/ORR Memorandum of Understanding <https://www.gov.uk/government/publications/cma-and-the-orr-memorandum-of-understanding>

- Believing that there has been a material change of circumstances since the commitments were accepted;
- Suspecting that a person has failed to adhere to one or more of the terms of the commitments; or
- Suspecting that information which led it to accept the commitments was incomplete, false or misleading in a material particular.<sup>7</sup>

1.9 ORR invites interested third parties to make representations on the Modified Commitments. ORR will take representations into account before a final decision is made on whether to accept the Modified Commitments. Details of how to comment are provided in Chapter 5 of this Notice. The deadline for comments is 17.00hrs on **27 November 2015**.

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<sup>7</sup> Section 31B(4) of the Act

## 2. Summary responses to the consultation on the Initial Commitments and ORR's responses

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- 2.1 ORR received representations from seven interested parties in response to the Initial Notice. Responses were received from competitor FOCs, trade associations, customers and individuals. The representations which ORR received are summarised in the remainder of this Chapter, together with ORR's response to those representations.
- 2.2 In the course of considering representations received in response to the Initial Notice, ORR met with certain key respondents in order to clarify and gain further understanding of the concerns which they raised. ORR has also gathered further relevant information from a number of sources, and considered in detail the operation of the regime for access to rail freight infrastructure.<sup>8</sup>

### A. Seriousness

#### i. Representations

- 2.3 A number of respondents raised the concern that this case was not appropriate for resolution by commitments. Respondents highlighted that the relevant ORR policy on commitments<sup>9</sup> states that ORR will not accept commitments in cases where not continuing its investigation would undermine deterrence and/or in cases involving a *serious* abuse of a dominant position.<sup>10</sup>
- 2.4 Respondents cited guidance issued by the CMA on commitments which states:
- "The CMA is very unlikely to accept commitments in cases involving secret cartels between competitors or a serious abuse of a dominant position."*<sup>11</sup>
- 2.5 The key arguments made by respondents were that:
- Particular elements of the conduct identified in ORR's competition concerns (which in ORR's preliminary view, included exclusive purchasing obligations

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<sup>8</sup> See, in particular, paragraphs 2.25 to 2.33, below

<sup>9</sup> *Application of Services Relating to Railways (OFT430)*, October 2005, paragraphs 4.32 - 4.34

<sup>10</sup> OFT430 paragraph 4.32 states that ORR will not deviate from the general principles adopted by the OFT (which is as stated above) unless it is persuaded that the circumstances are sufficiently distinguishable, that the public interest is so served and the circumstances in which the commitments are accepted do not establish an undesirable precedent going forward

<sup>11</sup> *Competition Act 1998: Guidance on the CMA's investigation procedures in Competition Act 1998 cases (CMA8)*, March 2014, paragraph 10.17

and retroactive rebate practices) are *per se* unlawful and/or “*blatantly anti-competitive*” and as such constitute *serious* abuses of a dominant position;

- The market structure, in particular Freightliner’s high market shares and status as the post-privatisation incumbent, suggests that this case is not appropriate for resolution by commitments;
- For ORR to accept any commitments in this case would mean it had failed to properly have regard to relevant policy considerations;<sup>12</sup> and
- If ORR were to accept commitments, it may have failed to discharge its duties under section 4 of the Railways Act 1993.

2.6 ORR discussed the representations it received in relation to seriousness with key respondents in face to face meetings. Respondents emphasised views that the Initial Commitments may not have a sufficient impact, rather than stressing that an infringement decision should be made regardless of the commitments offered. Discussions therefore focused on issues relating to access to infrastructure, rather than on whether commitments should not be adopted at all.

## ii. ORR’s response

2.7 ORR is required to have regard to the guidance for the time being in force when exercising its discretion as to whether or not to accept commitments.<sup>13</sup>

2.8 ORR set out its preliminary assessment of the appropriateness of this case for commitments at paragraphs 6.1 to 6.8 of the Initial Notice.

2.9 ORR has carefully revisited its application of the relevant policy on commitments in relation to the facts of this case. In particular, ORR has considered whether the alleged conduct represents a ‘serious’ abuse within the meaning of OFT430 paragraph 4.34. In making this assessment ORR has considered all the circumstances of the case including: the nature/category of the conduct; the nature of the relevant service; the structure of the market; the market shares of the undertakings involved; the entry conditions and the effect on competitors and third parties; and the direct or indirect impact on consumers.

2.10 ORR notes that the alleged conduct that it identified did not include predatory pricing, which is generally considered to be a ‘serious’ abuse of a dominant position.<sup>14</sup> ORR notes that, whilst it did express concerns in relation to Freightliner’s inclusion of

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<sup>12</sup> For a list of factors to be included in the consideration of whether a matter constitutes a serious abuse see OFT430 paragraph 4.34 and *Enforcement (OFT407)*, December 2004, paragraph 4.4, footnote 16

<sup>13</sup> Section 31D(8) of the Act

<sup>14</sup> OFT430 paragraph 4.34, footnote 77, specifically cites that “*predation would generally be regarded as a serious abuse*”

potentially distortive provisions concerning loyalty-inducing rebates, the majority of the potential foreclosure in the current case is, in ORR's preliminary view, brought about by minimum contracted volume commitments (**MVCs**). Whilst ORR took the preliminary view that this conduct potentially constituted an abuse in the particular circumstances of this case, MVCs in particular are recognised as standard practice in the rail freight sector. Where MVCs do not lead to market foreclosure, they are considered to be a legitimate commercial practice.<sup>15</sup> ORR also notes, and has had regard to the fact, that the CMA and the EC have accepted commitments in cases involving alleged exclusionary conduct.<sup>16</sup>

2.11 In the context of the current case ORR notes, in relation to market shares and the market structure<sup>17</sup>, that in its preliminary view Freightliner does have significant market shares in the Relevant Markets and does benefit from incumbency advantages, particularly in relation to access to infrastructure. Set against these considerations, however, are the following factors:

- Whilst Freightliner does have certain incumbency advantages in relation to access to infrastructure, this is subject to a direct regulatory regime giving competitors a presumption of a right to access and a right of appeal to ORR; and
- The levels of market foreclosure, whilst potentially abusive, have allowed competitors to compete for, and win, some demand from customers. ORR notes that some market entry has been possible in the Relevant Markets, particularly in relation to routes between the '**Southern Ports**'<sup>18</sup> and Yorkshire.

2.12 ORR notes that the Modified Commitments will require Freightliner to make positive changes to the way it does business with its customers. ORR also considers that the changes Freightliner will be required to make will operate to send strong signals as to the appropriateness, or otherwise, of certain practices, thus adding to the deterrent effect of competition law.

2.13 In light of these factors and in all the circumstances of the case, ORR remains of the overall view that the acceptance of commitments is appropriate and that due regard has been given to the policy for the time being in force. ORR also considers that,

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<sup>15</sup> Respondents confirmed with ORR in face to face meetings, that MVCs were a recognised standard practice in the rail freight sector

<sup>16</sup> See, for example: CE/9496-11 *Supply of service, maintenance and repair platforms: Decision to accept commitments offered by epyx Limited and FleetCor Technologies, Inc.*, decision of 9 September 2014; MP-SIP/0034 *Western Isles Road Fuels Decision to accept binding commitments from Certas Energy UK Limited and DCC plc*, decision of 24 June 2014; Case COMP/B-1/37966 *Distrigaz*, decision of 11 October 2007; Case COMP/39.386 *Long-term Contracts in France* (EdF), decision of 17 March 2010

<sup>17</sup> These factors are specified as matters which should be taken into account in OFT430, paragraph 4.34

<sup>18</sup> The term 'Southern Ports' is defined at paragraph 2.9 of the Initial Notice as (separately) the ports at Felixstowe, Southampton, and Tilbury



having had regard to the relevant policy, it has appropriately discharged its duties under section 4 of the Railways Act 1993 to the extent it is required to do so.<sup>19</sup> ORR has therefore not considered it appropriate or necessary to make amendments, or indeed withdraw from the commitments process in response to representations received on the subject of seriousness.

## B. Access to infrastructure

### i. Representations

2.14 A number of respondents to the Initial Notice made representations that whilst the Initial Commitments might operate to release demand from Freightliner's arrangements with its customers, they would not resolve structural issues in the Relevant Markets (and the wider intermodal sector) relating to access to the network and key facility infrastructure.

2.15 Respondents cited particular issues in the Relevant Markets in securing access rights to paths on the Felixstowe branch line (the **Felixstowe Branch Line**) and securing access to the Maritime terminal at the port of Southampton (**Southampton Maritime**) which is controlled by Freightliner. The particular issues arising with regards to these parts of rail infrastructure, which are governed by different regulatory regimes, are discussed below.<sup>20</sup>

2.16 Respondents suggested that ORR could not be fully satisfied that its competition concerns were fully addressed unless issues relating to access were resolved. Respondents made representations that the measures to release customer demand would be ineffective unless Freightliner were, in turn, required to divest access rights to the rail network it currently holds, and to grant access to key facility infrastructure which it controls.

2.17 Representations made in relation to access to infrastructure generally were that:

- Freightliner's competitors cannot quote for business without first securing access to necessary infrastructure, yet cannot secure access to infrastructure without securing business (a '*chicken and egg*' problem);
- Freightliner's strong position in terms of access rights to the national rail network and control of key terminal infrastructure necessary for operating DSC rail transport services might in itself constitute an abuse of a dominant position;

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<sup>19</sup> Pursuant to section 4(7A) and (7B) of the Railways Act 1993, when exercising its concurrent powers under the Act, ORR may only have regard to the duties imposed on it by section 4 of the Railways Act 1993 if it is a matter that the CMA could have regard to when exercising that function. ORR also notes that no particular representations were made as to why ORR had failed to comply with its duties under section 4 of the Railways Act 1993

<sup>20</sup> At paragraphs 2.18 to 2.24

- The current access issues are a result of Freightliner’s contractual practices, which have entrenched its incumbency advantages, and as such should be addressed as part of the current investigation;
- The commitments should include additional obligations for Freightliner to allow access to terminal infrastructure it holds and to divest access rights to paths on the national rail network to its competitors;
- The wider policy concerns relating to access have not been addressed in ORR’s investigation and should be referred to the CMA;<sup>21</sup> and
- The direct regulatory access regimes are not fit for purpose and fail to achieve the objective of facilitating competition between railway undertakings.

### *The Felixstowe Branch Line*

2.18 The Felixstowe Branch Line is a single track connecting the port of Felixstowe to the national rail network. Access to the branch line is controlled, in the first instance, by Network Rail who grants rights to access through track access contracts. These contracts are subject to approval by ORR.<sup>22</sup> Mechanisms for transferring access rights between FOCs within the duration of access contracts (where there is no alternative space<sup>23</sup> on the network) are provided for in the Network Code (the **Network Code**).<sup>24</sup> Applications to transfer access rights are made in the first instance to Network Rail. There are provisions for decisions on access under the Network Code to be appealed to ORR.

2.19 One respondent suggested that the access regime within the port of Felixstowe was working well (in contrast to the port of Southampton)<sup>25</sup> due to the implementation by the port operator<sup>26</sup> of an open and transparent tendering process for access rights to

<sup>21</sup> Such a measure would likely have to be taken under ORR’s concurrent powers to refer markets to the CMA under Part 4 of the Enterprise Act 2002

<sup>22</sup> ORR’s functions in relation to the approval of track access contracts are set out at sections 17 to 22C of the Railways Act 1993. In exercising these functions ORR is bound by its duties under section 4 of the Railways Act 1993, one of which (to be balanced against other duties) is “*to promote competition in the provision of railway services for the benefit of users of railway services*”

<sup>23</sup> Commonly referred to as ‘white space’, referring to gaps in the timetable where services can run

<sup>24</sup> The Network Code is a common set of rules that apply to all parties who have a contract for rights of access to the track owned and operated by Network Rail. The Network Code is incorporated into, and therefore forms part of, each such bilateral contract. The mechanisms relating to the allocation of timetabling are set out in Part D, for the transfer of access in Part J, and for making an appeal to ORR in Part M. For more information about the Network Code see <http://orr.gov.uk/what-and-how-we-regulate/track-access/the-network-code>

<sup>25</sup> See paragraphs 2.22 to 2.24

<sup>26</sup> Hutchinson Port Holdings <https://www.portoffelixstowe.co.uk/>

the port infrastructure. The respondent suggested that the fair regime at the port was having the knock-on effect that corresponding access to the Felixstowe Branch Line was also being granted fairly. However, a number of representations were received suggesting that obtaining the necessary access to the mainline network via the congested Felixstowe Branch Line was problematical. Some representations noted that there were unlikely to be additional paths available to competitors to operate DSC rail transport services to and from the port of Felixstowe even if they did manage to secure some customer demand as a result of commitments. This would result in a need to rely on existing mechanisms designed to facilitate the transfer of access rights in the Network Code. Some representations received suggested that these mechanisms did not work well for DSC traffic where the transfer of business was less than a full train load.

2.20 Respondents stated that the mechanisms in the Network Code, namely the ‘use it or lose it provision’ (requiring a failure to use a path for 90 days), and, the ‘primary purpose provision’ (requiring at least 50% of the demand carried on a path to switch) did not work well for intermodal traffic, where trains typically carry the demand of a number of customers. Respondents stated that this meant that DSCs hauled on behalf of any particular customer, aside from a very small number of the largest ones, would account for less than 50% of the boxes hauled on a particular service. Respondents stated that it was difficult for competitors to identify the ‘primary purpose’ of any particular path in order to effectively apply for access rights to switch.

2.21 Two respondents highlighted an example of a recent dispute between two FOCs regarding a switch of intermodal traffic, where, in the respondents’ view, there had been issues with the application of the Network Code. Further representations in relation to access to the Felixstowe Branch Line were that:

- Freightliner should be required to give up light engine paths to generate more capacity for DSC rail transport services,<sup>27</sup> and
- Freightliner should be required to divest paths on the Felixstowe Branch Line.

### *Southampton Maritime*

2.22 Southampton Maritime is not part of the national rail network. As such, it is not subject to the Network Code. Instead, access to the terminal infrastructure is governed by the Access and Management Regulations 2005 (the **Access Regulations**). The Access Regulations are the domestic implementation of a number of European Union directives<sup>28</sup> introduced with the key objectives of: (i) opening up

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<sup>27</sup> Light-engine paths denotes network capacity that is used by ‘light engines’, i.e. by locomotives travelling on their own without any wagons attached.

<sup>28</sup> Council Directive 91/440/EEC of 29 July 1991 on the development of the Community’s railways (OJ L237, 24.08.1991, p.25), as amended by Directive 2001/12/EC of 26 February 2001 (OJ L75, 15.3.2001, p.1) and Directive 2004/51/EC of 29 April 2004 (OJ L164, 30.4.2004, p.64), both of the European Parliament

the rail transport market to competition; (ii) improving the interoperability and safety of national networks, and; (iii) developing rail transport infrastructure.<sup>29</sup>

2.23 A number of respondents made representations about access to the Southampton Maritime terminal. Respondents highlighted that Southampton Maritime is controlled by Freightliner, as such, access to the terminal is determined by the same entity which also operates a downstream DSC rail transport service (this is commonly referred to as ‘vertical integration’). A number of respondents represented that the Access Regulations were inadequate in dealing with issues caused by vertical integration at Southampton Maritime. Respondents suggested that Freightliner, as the owner of the terminal, was in a position to reject all requests for access to the terminal on the basis of assertions that it was full. Two respondents made representations that Freightliner was not using its terminal efficiently. Representations were received that suggested that the commitments should require Freightliner to offer access to Southampton Maritime.

2.24 Other representations made in relation to access to Southampton Maritime included that:

- Southampton Maritime should be declared ‘congested’ and Freightliner should be required to invest in the terminal in order to increase capacity;<sup>30</sup> and
- Freightliner’s refusal to grant access may constitute an additional exclusionary abuse, as it may amount to a refusal to supply access to an essential facility.

## ii. ORR’s response

2.25 ORR has carefully considered the particular issues raised in relation to the Felixstowe Branch Line and Southampton Maritime and in relation to access generally. In doing so ORR has drawn upon its experience of the operation of the access regime including the Network Code and hearing appeals under the Access Regulations.

2.26 In order to operate a DSC rail transport service, FOCs require access to necessary infrastructure.<sup>31</sup> ORR considers that the respective access regimes, namely the

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and of the Council, and Council Directive 2001/14/EC of 26 February 2001 on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification (OJ L75, 15.3.2001, p.29), as amended by Directive 2004/49/EC of 29 April 2004 on safety on the Community’s railways (OJ L220, 21.6.2004, p.16), both of the European Parliament and of the Council

<sup>29</sup> See [http://ec.europa.eu/transport/modes/rail/index\\_en.htm](http://ec.europa.eu/transport/modes/rail/index_en.htm)

<sup>30</sup> When Network Rail receives more requests for trains to run on part of the network than can be accommodated, the sections of line concerned must in certain circumstances be declared as Congested Infrastructure under regulation 23 of the Railways Infrastructure (Access & Management) Regulations 2005. If Network Rail declares infrastructure to be congested, ORR will undertake and publish a capacity analysis within 6 months under regulation 24. Then Network Rail will develop a capacity enhancement plan and publish that within a further six months under regulation 25

Network Code<sup>32</sup> and the Access Regulations (collectively the ‘**Access Regimes**’) are designed and operate to deal with the fair, transparent and non-discriminatory distribution of access between FOCs. The Access Regimes provide an established framework for the resolution of disputes between competing FOCs and a route to independent regulatory scrutiny of the complex commercial and technical issues (e.g. timetabling and the efficient use of infrastructure) which can arise in the context of access disputes.

- 2.27 When determining access appeals, ORR has significant information gathering powers which it may utilise, where appropriate, to determine disputes.
- 2.28 Importantly, ORR notes that the Access Regimes are currently subject to incremental changes which are intended better to address issues such as the coordination of winning business and obtaining corresponding rail paths on the national rail infrastructure in the context of intermodal traffic. In this context, ORR notes the establishment of an industry working group to deal with issues with the application of Part J of the Network Code to intermodal traffic. Furthermore the imminent transposition of Directive 2012/34/EU<sup>33</sup> into UK law has the objective of improving rights of access to infrastructure (including terminal infrastructure) by modifying the provisions of the current Access Regulations.<sup>34</sup>
- 2.29 ORR notes that the current investigation has focused on Freightliner’s arrangements with its customers for the provision of DSC rail transport services, rather than wider structural issues with access to infrastructure in the rail freight sector. ORR’s competition concerns reflect this focus.
- 2.30 The objective of the commitments is to ensure that demand is released from Freightliner’s contracts and is regularly made available for competition by alternative FOCs, which in ORR’s preliminary view is not currently occurring sufficiently in the Relevant Markets. ORR considers that where demand is released, and won by competitors, there will be greater incentives for the frequent utilisation of the Access Regimes which, as noted above, are in the process of change both to strengthen the grounds for making an application and to better suit the intermodal sector.
- 2.31 ORR considers that even if the investigation were to proceed to an infringement decision based on ORR’s competition concerns as expressed in the Initial Notice, it would be unlikely to be possible for it to impose directions on Freightliner requiring it to surrender its existing access rights or to impose structural remedies in relation to

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<sup>31</sup> See paragraph 4.33 of the Initial Notice

<sup>32</sup> For infrastructure which is part of the national railway network as defined by the Railways Act 1993

<sup>33</sup> Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area (recast) (OJ L343, 14.12.2012, p.32)

<sup>34</sup> See paragraphs 4.8 to 4.11 for further discussion of the transposition of Directive 2012/34/EU into UK law

its vertical integration at Southampton Maritime. ORR therefore considers that it may not be proportionate to refuse to accept commitments on the basis that the commitments do not require Freightliner to divest its existing access rights or to require it to grant access to competitors at Southampton Maritime in the context of this case.

2.32 ORR further considers that it is not necessary to refuse commitments on the basis that the commitments do not address access issues where there are existing and established regulatory alternatives that have been designed to address the issues raised by respondents. ORR is therefore of the view that its competition concerns can be fully addressed by the acceptance of commitments, which solely and fully address issues regarding Freightliner's arrangements with its customers and facilitate the regular release of customer demand for competition. ORR is also of the view that access issues can be addressed by the exercise of regulatory powers designed for that purpose.

2.33 ORR does consider that there may be merit in representations it received about the duration proposed in the Initial Commitments given improvements in the Access Regimes which are currently in the process of being made. Such considerations are set out in the section on duration, below.<sup>35</sup>

## C. Reporting requirements

### i. Representations

2.34 A number of representations were made in relation to the adequacy of the reporting requirements in the Initial Commitments, namely:

- In order to address the risk that Freightliner's strategy may shift from exclusionary practices to predatory pricing, ORR should insist upon price-based reporting for the duration of the commitments; and
- Compliance with the commitments will be difficult to discern because: the reporting requirements are too infrequent; and, there is no requirement for compliance to be independently audited or for any assurance from Freightliner's senior management as to the accuracy of responses to reporting requirements.

### ii. ORR's response

2.35 ORR considers that to accept commitments containing reporting requirements designed to mitigate the general risk of future predatory pricing would not relate to the abuse identified, would be speculative, and would potentially impose a disproportionate burden on Freightliner.

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<sup>35</sup> See paragraphs 2.42 to 2.47

2.36 ORR considers that independent auditing would be disproportionate and impose significant unnecessary resource burdens on Freightliner particularly as ORR is in a position to adequately monitor the data provided by Freightliner and to carefully monitor the on-going efficacy of the commitments. ORR considers that quarterly reports detailing volumes of containers in contracts and annual compliance reports will be sufficient for ORR to adequately monitor compliance. In addition to the reporting requirements placed on Freightliner, ORR considers that members of the DSC rail transport industry and customers will be in a position, and have a strong commercial interest, to inform ORR if they are affected or otherwise suspect a breach of any commitments. ORR has attached a copy of the quarterly reporting pro-forma at **Annex C**.

2.37 ORR considers that representations it received about requiring senior personnel within Freightliner to confirm the accuracy of reports sent to ORR raised important issues; this issue was put to Freightliner. Freightliner has proposed modifications to the Initial Commitments to address this issue. The proposed modifications are described in Chapter 3 of this Notice. ORR's provisional assessment of the proposed modifications is set out in Chapter 4 of this Notice.

## D. Geographic scope

### i. Representations

2.38 Respondents made a number of representations about the geographic scope of the commitments. Representations raised concerns that:

- The limited geographic coverage of the Initial Commitments would allow Freightliner to leverage its dominant position in the Relevant Markets into markets not covered by the commitments. In particular representations suggested that the commitments should apply to:
  - London Gateway in addition to the Southern Ports; and
  - Inland terminals in the Midlands and the North East of England.
- The limited coverage could allow Freightliner to circumvent the commitments by using alternative inland terminals within the Relevant Markets but not specified within the Initial Commitments given that there is available alternative inland capacity. Representations were made that the commitments should apply to all inland terminals within the Relevant Markets.

### ii. ORR's response

2.39 ORR notes that London Gateway is not within the focus of ORR's investigation and ORR expressed no preliminary views as to Freightliner's conduct in relation to routes

to and from London Gateway in the Initial Notice. Similarly ORR's competition concerns did not extend outside of the Relevant Markets, e.g. to the Midlands or the North East of England.<sup>36</sup> ORR considers it unlikely that Freightliner will face commercial incentives to circumvent the commitments by switching to inland terminals in these other regions given the desirability for minimising the onward road distance between inland terminals and final destinations of DSCs. ORR also notes that DSC rail transport customers do use different transport modes and providers for different routes; as such ORR considers that potential for Freightliner to leverage market power between regions is limited. Furthermore, ORR considers that applying restrictions on Freightliner's contractual freedom on routes in which it has not, in ORR's preliminary view, been found to be dominant or engaging in allegedly abusive conduct may be disproportionate. ORR therefore does not consider it necessary for the commitments to be amended so as to extend their scope outside of the Relevant Markets.

2.40 ORR remains of the view that it is not necessary for the commitments to include the terminal at Doncaster (in South Yorkshire), given the ORR's preliminary views about the strength of competitive pressure from road haulage between that particular terminal and the Southern Ports weakening the competitive advantage enjoyed by rail FOCs.<sup>37</sup>

2.41 ORR considers, however, that representations it received in relation to coverage of terminals within the Relevant Markets (with the exception of the terminal at Doncaster) do raise issues with the Initial Commitments, particularly in relation to the potential for circumvention. These issues were raised with Freightliner. Freightliner has proposed modifications to the Initial Commitments to address this issue. The proposed modifications are detailed in Chapter 3 of this Notice. ORR's provisional assessment of these modifications is set out in Chapter 4 of this Notice.

## E. Duration

### i. Representations

2.42 Two respondents made representations suggesting that the duration of the Initial Commitments was too short. One respondent suggested that commitments should straddle two price control periods<sup>38</sup>, namely control period 5 (**CP5**) and control period 6 (**CP6**) so that commitments would still be in place following any changes affecting FOCs (particularly in relation to charging). Two respondents made representations

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<sup>36</sup> Other than in relation to resale restrictions, which are prohibited across Great Britain by the commitments

<sup>37</sup> In contrast to terminals situated further away from the Southern Ports where rail gains increasing advantages over road, see paragraph 4.5 of the Initial Notice

<sup>38</sup> A control period is a period of time for which ORR sets the outputs required of Network Rail and the associated access charges. CP5 is scheduled to run between 1 April 2014 and 31 March 2019. The duration of CP6 has not yet been determined



that the commitments would not allow sufficient time to obtain access to locomotives, wagons, drivers and other resources necessary to enter and expand in the Relevant Markets.

- 2.43 Respondents reiterated representations made in relation to the operation of the Access Regimes that apply to access to infrastructure. Such points were particularly made in the context of the Felixstowe Branch Line and the Southampton Maritime terminal. It was argued that access issues would not be resolved, and therefore customer demand could not be captured, within the three year duration of the Initial Commitments. Respondents highlighted that industry was taking forward discussions to reform Part J of the Network Code, but stated that this process would take time, reducing the efficacy of the commitments given their limited timescale.
- 2.44 Respondents stated that opportunities to compete for demand released by the commitments within the initial three year duration would be limited by the lack of transparency of when customer contracts were ending. Representations were made that competitor FOCs would be unable properly to target their sales activities given this lack of transparency.

## **ii. ORR's response**

- 2.45 ORR notes that any changes brought about by CP6 would apply equally to all FOCs; ORR therefore cannot see a material link between the matters which are the subject of this investigation and any changes which might be brought about upon the expiry of the current control period.
- 2.46 ORR discussed the availability of resources, such as locomotives and wagons, in meetings with respondents and experts within ORR. In light of these discussions ORR considers that the need to obtain such resources would not undermine competitor FOCs' ability to win business within the duration of the Initial Commitments.
- 2.47 ORR does however consider that representations it received about the operation of the relevant Access Regimes and the resultant ability of competitor FOCs to win business within the duration of the commitments do raise issues with the Initial Commitments. ORR also considers that representations it received about the lack of transparency about the end of customers' contracts with Freightliner may raise issues with the Initial Commitments.
- 2.48 The issues regarding duration and transparency have been raised with Freightliner. Freightliner has proposed modifications to the Initial Commitments to address these issues. The proposed modifications are detailed in Chapter 3 of this Notice. ORR's provisional assessment of these modifications is set out in Chapter 4 of this Notice.

## **F. Implementation**

### **i. Representations**

2.49 One representation suggested that the conditions for the implementation of the commitments within six weeks were too vague and could be difficult to enforce. The representations also stated that the requirements for implementation should be in the body of the commitments and not the recitals.

### **ii. ORR's response**

2.50 ORR considers that the wording of the commitment in the Initial Commitments requiring Freightliner to use all reasonable endeavours is proportionate in terms of placing a positive obligation on Freightliner to ensure that the commitments are implemented quickly and effectively. ORR will be able to assess whether Freightliner has complied with this commitment through consideration of Freightliner's implementation report and, if necessary, by liaising with third parties.

2.51 ORR considers the representation that the implementation obligation should be contained in the main body of the commitments, rather than the recitals, raised issues with the Initial Commitments, and put this issue to Freightliner. Freightliner has proposed modifications to address ORR's concerns. The proposed modifications are detailed in Chapter 3 of this Notice. ORR's provisional assessment of the modifications is set out in Chapter 4 of this Notice.

## **G. Minimum volume commitments**

### **i. Representations**

2.52 One representation stated that the 10% volume release at the ends of years three and four of the contracts is minimal. The representation suggested that this level of volume release would have little impact in terms of releasing customer demand for competition.

### **ii. ORR's response**

2.53 ORR considers that this provision is sufficient as part of the overall package of commitments. ORR notes that the release of 10% of volumes from contracts of over three years' duration acts together with restrictions on, for example, rebates, exclusivity and roll-over clauses to ensure that, in ORR's preliminary view, at least 50% of volumes currently carried by Freightliner will be out of contract by the end of year one of the commitments and open to competition, and by the end of the second year this percentage will rise to 100%.

2.54 ORR therefore does not consider it necessary for modifications to be made to address representations made in relation to the 10% volume release.

## 3. The proposed modifications to the Initial Commitments

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3.1 Freightliner has proposed a number of modifications to the Initial Commitments. Freightliner's Modified Commitments offer was made on [12 November 2015. This Chapter describes each of the proposed modifications. Further explanation of the impact of the proposed modifications, and ORR's provisional assessment of them, is set out in Chapter 4.

### A. Duration (recital 5 and paragraph 12)

#### i. Initial commitment

- 3.2 Freightliner originally proposed, in the Initial Commitments, that the duration of the commitments should be three years from the date on which ORR formally accepts the commitments.
- 3.3 In the Initial Commitments there was no provision for the removal of clauses which could operate to prevent customers informing competitor FOCs of the dates on which their contracts with Freightliner were to end.

#### ii. Proposed modification

- 3.4 Freightliner has proposed that the duration of the commitments be extended so that they are in force until 31 March 2019.
- 3.5 Freightliner has also proposed a new commitment which will operate to remove any clauses in contracts between Freightliner and its customers which prohibit customers from informing alternative FOCs of the end dates of their contracts with Freightliner.

### B. Implementation (paragraph 19)

#### i. Initial commitment

- 3.6 In the Initial Commitments Freightliner proposed (in the recitals) to use all reasonable endeavours to ensure that the commitments were implemented within six weeks.

#### ii. Proposed modification

- 3.7 Freightliner has proposed that the provision be moved to the body of the commitments.

## C. Geographic coverage (paragraphs 6, 7 and 8)

### i. Initial commitment

3.8 In the Initial Commitments Freightliner proposed that the commitments should apply to contracts between (i) the Southern Ports and inland rail terminals in the Northwest; and, (ii) the Southern Ports and Freightliner's inland rail terminal in Leeds. 'Inland rail terminals in the Northwest' was defined as including Freightliner's terminals in Manchester (Trafford Park) and Liverpool and the terminal owned by Eddie Stobart in Ditton.

### ii. Proposed modification

3.9 Freightliner has proposed to extend the geographic scope of the commitments in terms of the coverage of inland terminals. In relation to the Northwest, Freightliner has proposed that routes between the Southern Ports and all terminals within Zone 11 of the Department for Transport's (the **Department's**) Intermodal Zone Map for calculating Modal Shift Revenue Support<sup>39</sup> should be covered by the commitments including but not limited to: Freightliner's terminals at Manchester (Trafford Park) and Liverpool; the Eddie Stobart terminal at Ditton; the Trafford Park terminal owned by DB Schenker; Barton Dock Road terminal; and the terminal at the port of Salford.

3.10 In relation to Yorkshire, Freightliner has proposed that all terminals within the ceremonial county boundaries of North and West Yorkshire should be included within the scope of the commitments, including but not limited to the terminals at: Wakefield; Selby; and Leeds.

## D. Reporting requirements (paragraph 23)

### i. Initial commitment

3.11 In the Initial Commitments, there was no description of the personnel within Freightliner who would be responsible for signing off the content of responses to the reporting requirements.

### ii. Proposed modification

3.12 Freightliner has proposed that a senior executive of Freightliner Limited will act as signatory for each of the reporting documents; namely the implementation report, the annual compliance statements and the quarterly reports. This individual will have delegated authority from Freightliner's Board, which will have oversight of each reporting document sent to ORR.

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<sup>39</sup> <https://www.gov.uk/government/publications/mode-shift-revenue-support-msrs-scheme-2015-to-2020>

## 4. ORR's provisional assessment of the proposed modifications

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4.1 This Chapter sets out ORR's provisional assessment of the proposed modifications. Whilst each of the proposed modifications is dealt with individually, ORR has considered the Modified Commitments as a package. ORR's preliminary views on the overall effect of the proposed commitments are set out at the end of this Chapter.

### A. Duration of commitments

4.2 ORR set out its preliminary views on the initial duration of three years at paragraphs 6.45 to 6.48 of the Initial Notice.

4.3 In light of the representations received in response to the Initial Notice, ORR carefully reviewed its original assessment regarding the sufficiency of the duration of the commitments. In particular ORR noted representations regarding:

- Congestion at key points of infrastructure required for entering or expanding in the Relevant Markets;
- The operation of the Access Regimes following transfers of customers' demand in the intermodal rail transport sector; and
- The lack of transparency as to dates on which customers' contracts with Freightliner were to end.

4.4 ORR remains of the preliminary view that the capacity created by London Gateway and the opening of the Liverpool II port are likely to have a significant impact on the competitive situation in the Relevant Markets within the proposed term of the Initial Commitments; indeed, this preliminary view was corroborated by respondents to the Initial Notice.

4.5 However, in light of the representations received on the subject of access ORR considered that it was necessary to raise the issue of duration in discussions with Freightliner. These discussions were held in the context of ensuring that the commitments would be fully optimised in terms of competitor FOCs being able to take full advantage of the release of demand from Freightliner's contracts given the current developments in the respective Access Regimes.

4.6 The proposed modification for the commitments to remain in force until 31 March 2019 represents an extension to the duration of the commitments. The proposed extension of the commitments have regard to the current timescales for the planned

improvements to the Access Regimes<sup>40</sup>, and, therefore, provide for those improvements to be implemented and take effect at the start of the extended period. In ORR's preliminary view, this means that competitors will be able to take full advantage of the release of the demand by the commitments which, in ORR's continued preliminary view, can be achieved within ORR's initial assessment of three years.<sup>41</sup>

- 4.7 Freightliner has also proposed a commitment to remove any clauses which would operate to prevent customers discussing the end dates of their contracts.

## i. Transposition of Directive 2012/34/EU

4.8 A key argument made by respondents was about issues with the operation of the Access Regulations in allowing competitors to secure access to congested terminal infrastructure. ORR notes in this regard the forthcoming transposition of Directive 2012/34/EU<sup>42</sup> (the **Directive**); which, when implemented, will result in changes to the Access Regulations. The overall objective of the Directive is to strengthen further the governance of railway infrastructure, thereby enhancing the competitiveness of the rail sector vis-à-vis other modes.<sup>43</sup>

4.9 The implementation of the Directive was consulted upon by the Department between 24 March 2015 and 18 May 2015.<sup>44</sup> A copy of the draft implementing regulations was published alongside the Department's consultation.<sup>45</sup> The Department noted in its Impact Assessment<sup>46</sup> that certain provisions in the Directive were new and could bring about additional benefits in terms of increasing competition and opening access to certain rail service facilities.

4.10 ORR is of the preliminary view that implementation of the Directive will improve the operation of the Access Regulations. In particular, the new regulation will give ORR powers to monitor the competitive situation in rail services markets and control

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<sup>40</sup> See paragraphs 4.8 to 4.13, below

<sup>41</sup> See paragraphs 6.45 to 6.48 of the Initial Notice

<sup>42</sup> See footnote 33 (above)

<sup>43</sup> In particular the Directive seeks to address the 'equal access challenge', namely, conflicts of interest which arise in vertically integrated railway holdings which naturally lead to protectionist practices which may impair competition in the rail sector. In particular the Directive seeks to apply appropriate safeguard measures preventing such conflicts of interest and distortions of competition arising in the context of all of the essential functions of infrastructure managers  
[http://ec.europa.eu/transport/modes/rail/packages/2013\\_en.htm](http://ec.europa.eu/transport/modes/rail/packages/2013_en.htm)

<sup>44</sup> <https://www.gov.uk/government/consultations/recast-first-railway-package>

<sup>45</sup> The draft Railways Infrastructure (Access and Management) and Railway (Licensing of Railway Undertakings) (Amendment) Regulations 2015 (**Draft Regulations**)  
[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/416363/consultation-paper-recast.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/416363/consultation-paper-recast.pdf)

<sup>46</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/416368/annex-w-ia-recast-1st-rail-package.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/416368/annex-w-ia-recast-1st-rail-package.pdf)

arrangements for access to railway infrastructure (including rail terminals) and services with a view to preventing discrimination against applicants (amongst other matters).<sup>47</sup> This power may be exercised on ORR's own initiative. A number of other requirements will be included in the implementing regulations including requirements placed upon certain rail infrastructure managers to maintain separate accounts and retain independence in decision making on access to the relevant infrastructure.

4.11 ORR considers it likely that the Directive will be transposed into UK law in the near future. ORR considers that the extension of the duration of the commitments will ensure that competitors are able to optimise the competitive benefits of the commitments as they will have a greater period of time in which to compete for customer demand which is released by the commitments under the jurisdiction of the improved regime.

## **ii. Network Code modifications**

4.12 ORR is aware of industry discussions to improve the Network Code (especially Part J) so as to make it operate more efficiently in relation to the intermodal sector. ORR considers that industry, having identified issues with the application of Part J of the Network Code to intermodal, should be sufficiently incentivised to deliver improvements in a relatively short period of time. If no industry agreement can be reached, ORR has the power to intervene to propose modifications to the Network Code.

4.13 ORR considers that the extension of the duration of the commitments will ensure that competitors are able to optimise the competitive benefits of the commitments as they will have a greater period of time in which to compete for customer demand which is released by the commitments with the benefit of incremental improvements to the Network Code.

## **iii. End dates of contracts**

4.14 ORR considers that removing contractual restrictions on the disclosure of end dates of contracts will improve transparency in the Relevant Markets. ORR considers this will enable competitor FOCs to target their sales activities in order to target the volume released as a result of the commitments whilst they remain in operation, maximising their ability to capture customer demand.

## **iv. Overall impact**

4.15 ORR considers that, in light of the above, the extension of the duration of the commitments and the removal of clauses preventing customers from disclosing the

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<sup>47</sup> See in particular Regulation 35(2) of the Draft Regulations and Article 56(2) of the Directive



end dates of their contracts will ensure that the commitments are effective within the term of their operation.

4.16 ORR is of the preliminary view that its reasoning expressed in the Initial Notice remains valid. In particular, ORR remains of the preliminary view that effective competition in the Relevant Markets is not reliant on new entry; rather, there are a number of active FOCs in the Relevant Markets who are potentially capable of capturing further customer demand and operating alternative DSC rail transport services in the Relevant Markets. ORR remains conscious of the need to ensure that commitments are proportionate, and considers that the extension of the commitments to 31 March 2019, which has regard to the current timescales for the planned improvements to the Access Regimes, will give competitors sufficient time to expand into the Relevant Markets to provide a competitive alternative to Freightliner.

## **B. Implementation**

4.17 ORR is of the preliminary view that the proposed modifications regarding implementation will ensure that Freightliner's obligations to implement the commitments within six weeks becomes an enforceable requirement. ORR can monitor compliance with this commitment through the requirement for Freightliner to provide an implementation report within two months of the start of the commitments.

## **C. Geographic coverage**

4.18 ORR notes that the geographic coverage of the commitments within the Relevant Markets has been greatly increased in the Modified Commitments.

4.19 ORR notes that all other terminals within the Relevant Markets, other than those in South Yorkshire, are within the scope of the Modified Commitments. This extension of geographic coverage will, in ORR's preliminary view, maximise the efficacy of the commitments within the Relevant Markets, and ensure that Freightliner cannot circumvent the commitments by switching its operations to alternative inland terminals.

## **D. Reporting requirements**

4.20 ORR considers that the proposed modifications to the reporting requirements, requiring all data and compliance statements returned to ORR to be authorised by a senior executive of Freightliner Limited (authorised on each occasion by the full Board of Freightliner Group Limited), will ensure that there are appropriate levels of accountability in relation to the accuracy of returns issued by Freightliner.

## **E. Overall effect of the proposed modifications**

4.21 In light of the reasons set out above, ORR is of the preliminary view that the Modified Commitments will address issues raised about the Initial Commitments by representations made in accordance with the Initial Notice. ORR considers, having had regard to the relevant policy, that it is appropriate for it to exercise its discretion to accept the Modified Commitments in this case.

4.22 For the same reasons as expressed at paragraphs 6.59 to 6.65 of the Initial Notice, and given the proposed modifications contained in the Modified Commitments, ORR is of the preliminary view that the effect of the Modified Commitments would be that actual or potential competitor FOCs would have the opportunity to access customer demand in order to enter or expand in the Relevant Markets and would not therefore, in ORR's preliminary view, be anti-competitively foreclosed as a result of Freightliner's conduct.

## 5. ORR's intentions and invitation to comment

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### A. ORR's intentions

- 5.1 In light of the above, ORR is of the preliminary view that the Modified Commitments offered by Freightliner and set out in Annex B of this Notice are sufficient to fully address its competition concerns in this case. ORR is also of the preliminary view that the Modified Commitments are sufficient such that ORR is minded to exercise its discretion to discontinue its investigation by way of a decision accepting the Modified Commitments in accordance with section 31A(2) of the Act.
- 5.2 As required by paragraph 3(1) of Schedule 6A of the Act, ORR must not accept the Modified Commitments unless it gives notice of the proposed modifications and considers any representations made in accordance with this Notice and not withdrawn. As such, ORR now invites interested third parties to make representations on the Modified Commitments. ORR will take representations on the Modified Commitments into account before making a final decision on whether to accept the Modified Commitments.
- 5.3 ORR is particularly interested to hear from customers of DSC rail transport services, Freightliner's actual and potential FOC competitors in the Relevant Markets and participants in the wider DSC transport services sector.
- 5.4 ORR has not reached a final view and invites all interested parties to submit representations and evidence in order to assist ORR in its final assessment of the Modified Commitments offered by Freightliner.

### B. Invitation to comment

- 5.1 Any person wishing to comment on the Modified Commitments should submit written representations to the postal or email address given below, by 17.00hrs on 27 November 2015.
- 5.2 Please quote the case reference Case no. 11/2013 in all correspondence related to this matter.

Ricardo Araujo  
Office of Rail and Road  
One Kemble Street  
London  
WC2B 4AN

Email: [DSCrailtransport@orr.gsi.gov.uk](mailto:DSCrailtransport@orr.gsi.gov.uk)

## C. Confidentiality

- 5.3 ORR does not intend to publish the responses to the consultation with any commitments decision or notice to provisionally accept further modified commitments. However, the information contained in the responses may be used or summarised on an anonymous basis in these documents.
- 5.4 In the event that the Modified Commitments are not accepted and ORR is considering disclosing the information (such as in or with a statement of objections), it will revert to the provider of that information to obtain representations on confidentiality. ORR will then consider those representations before deciding whether the information should be disclosed under Part 9 of the Enterprise Act 2002.



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