



OFFICE OF RAIL REGULATION



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

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

**3 September 2015**

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# Introduction

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In November 2013, the Office of Rail Regulation (**ORR**)<sup>1</sup> opened an investigation pursuant to section 25 of the Competition Act 1998 (the **Act**) into Freightliner Limited and Freightliner Group Limited (together, **Freightliner**) in relation to its 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.

On 9 July 2015, Freightliner proposed commitments which, in ORR's preliminary view, fully address the competition concerns identified by its investigation. It is ORR's preliminary view that the commitments are such that ORR is minded to exercise its discretion to discontinue its investigation by way of a formal decision accepting the commitments.

ORR hereby gives notice (the **Notice**), pursuant to paragraph 2 of Schedule 6A of the Act, that it proposes to accept these commitments. Formal acceptance of the commitments by ORR would result in the discontinuance of the investigation, with no decision made as to whether or not Chapter I/Chapter II of the Act or Articles 101/102 of the Treaty on the Functioning of the European Union (**TFEU**) have been infringed.

Freightliner disagrees with ORR's assessment of its competition concerns.<sup>2</sup> Nevertheless Freightliner has offered commitments to meet the competition concerns expressed to it by ORR.

The proposed commitments are set out at **Annex 1** to this document. ORR invites interested third parties to make representations on the proposed commitments, which it will carefully consider before making any final decision whether to accept the commitments. In order to assist third parties in responding to this consultation, this Notice provides information on:

- The parties and market context;
- ORR's investigation;
- ORR's competition concerns;
- The commitments offered by Freightliner; and

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<sup>1</sup> Pursuant to the Infrastructure Act 2015 new functions were conferred on ORR in respect of monitoring how a strategic highways company exercises its functions in relation to the strategic road network in England. To reflect these new functions, from 1 April 2015 ORR started to use the name „Office of Rail and Road“. This name change will be confirmed by legislation expected to come into force in October 2015. However, until this name change is confirmed by legislation, ORR continues to use „Office of Rail Regulation“ in all documents, decisions and matters having legal effects or consequences

<sup>2</sup> Set out at chapter 4 (below)

- Why ORR is of the preliminary view that the proposed commitments fully address its competition concerns.

Details of how to respond to this Notice are provided at the end of this document. The closing date for comment is 24 September 2015.

# 1. The Parties

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## A. Freightliner Limited

- 1.1 Freightliner Limited is a private limited company incorporated in England and Wales on 20 October 1995. Its reported revenue for the year ended 31 March 2014 was £184 million.
- 1.2 Freightliner Limited is a rail freight operator whose primary activity is the provision of DSC rail transport services in Great Britain between deep sea DSC ports and inland rail terminals. Freightliner Limited also provides road haulage services via its fleet of lorries (Freightliner Road Services) and ancillary services (e.g. terminal storage). Freightliner Limited operates around 100 daily services across Great Britain.
- 1.3 ORR's investigation to date has concerned only the provision of inland DSC rail transport services on certain identified markets<sup>3</sup> in Great Britain. For the avoidance of doubt the investigation does not relate to Freightliner Limited's road or ancillary services.

## B. Freightliner Group Limited

- 1.4 Freightliner Limited is a subsidiary of Freightliner Group Limited, a private limited company incorporated in England and Wales on 14 December 2004. Freightliner Group Limited is the non-trading holding company for the Freightliner group of companies. The Freightliner group of companies provide international freight rail services in Great Britain, Poland, Germany, the Netherlands and Australia.
- 1.5 Freightliner Group Limited's fleet includes approximately 250 standard gauge locomotives (mostly diesel-electric) as well as 5,500 wagons. Freightliner employs over 2,500 people.
- 1.6 On 25 March 2015, Genesee & Wyoming Inc. (a public company listed on the New York Stock Exchange) acquired the majority of the shares in Freightliner Group Limited.

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<sup>3</sup> It is ORR's preliminary view that particular markets may be identified for DSC rail transport services within Great Britain, see paragraphs 4.3 to 4.27 (below)

## 2. Background

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2.1 This chapter sets out ORR's preliminary view of the key characteristics of the DSC transport sector in Great Britain in order to provide context for subsequent discussion of the complaint, ORR's investigation and its competition concerns.

### A. DSCs

2.2 DSCs are intermodal containers that adhere to the ISO<sup>4</sup> standards for containers across the world. DSCs have specific technical characteristics which allow them to be stacked on several levels on sea-borne vessels.<sup>5</sup> DSCs typically measure 20 or 40 feet in length.

2.3 DSCs are capable of holding a wide range of freight, including but not limited to: white goods; consumer electronics; and perishables, with some DSCs having special adaptations, such as refrigeration, to enable them to perform this function. As the term „intermodal“ suggests, DSCs are designed to be easily transferable between transport modes, allowing for efficient transfer between the sea and inland legs of overall journeys.

2.4 The focus of this Notice is on DSCs which are transported to and from inland destinations within Great Britain from origin points outside Northern Europe. Such DSCs arrive in Great Britain on large container ships operated by international shipping lines.

#### i. Usage of DSCs

2.5 Shipping lines utilise their DSCs for the purposes of importing and exporting goods on behalf of their downstream customers.<sup>6</sup>

2.6 ORR's preliminary view is that the nature of competition in the DSC transport sector in Great Britain is driven by imports. The principal use of DSCs is to import goods from overseas manufacturers to businesses in Great Britain. These businesses are often retailers wishing to import internationally manufactured or produced goods for the ultimate purpose of onward sale to downstream „end“ customers.

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<sup>4</sup> International Organization for Standardisation

<sup>5</sup> DSCs have been the subject of European Commission decisions, such as the decision appealed in Case IV/33.941 *HOV SVZ/MCN 94/210/EC* <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:31994D0210> in which DSCs were described as „sea-borne containers“

<sup>6</sup> DSCs are typically owned by shipping lines

2.7 Great Britain's exports in DSCs consist primarily of low value materials such as scrap metal and paper. It is ORR's preliminary view that the business case for export largely rests on the availability of containers which would otherwise be returned to overseas destinations empty.<sup>7</sup>

## ii. Receiving ports

2.8 Only certain ports are large enough to accommodate large container ships. The ports in Great Britain that currently accommodate large container ships are: Felixstowe; Southampton; London Gateway; Tilbury; Thamesport; and, Liverpool.

2.9 The vast majority of DSCs arriving at and departing from Great Britain are routed through the key southern ports of Felixstowe, Southampton and Tilbury (hereinafter the „**Southern Ports**“).<sup>8</sup> Container ships typically make only a single call in Great Britain to load or offload all of their DSCs bound for inland destinations.<sup>9</sup> This creates a need for the onward transport of DSCs to inland destinations from ports and vice versa.

## iii. Models of contracting

2.10 Once a DSC arrives at a port, the onward transport leg typically follows two models, known as line haul and merchant haul. The model which is followed depends on the commercial preferences of the retailer importing the goods inside the DSCs.

### Merchant haul

2.11 The merchant haul model involves the businesses who are importing goods collecting the DSC(s) from the port and arranging their own transport solution to their premises so the goods inside the DSC(s) can be unloaded for their subsequent use.

2.12 Importers utilising merchant haul are almost universally under strict contractual obligations to return the DSCs (which remain under the ownership of the shipping line) either to the origin port or to a designated DSC collection centre thus enabling the shipping line to re-deploy its DSCs. Importers using merchant haul may also be charged for the services of lifting the DSCs containing their goods from the container

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<sup>7</sup> In 2013 the value of non-EU imports arriving through Felixstowe was £33.8 billion in contrast to only £11.2 billion of exports. 52% of export tonnage consisted of pulp/waste paper and scrap metal

<sup>8</sup> Southern Ports accounted for approximately 70% of the total tonnage of DSCs entering the UK in 2013, [www.gov.uk/government/statistics/port-freight-statistics-2013-final-figures](http://www.gov.uk/government/statistics/port-freight-statistics-2013-final-figures). ORR notes that London Gateway is now operational. ORR has not had access to data to verify volumes currently routed through that port. London Gateway opened in late 2013, towards the end of the period which formed the focus of ORR's investigation. More information on London Gateway and how ORR are taking into consideration the impact it may have on this matter is set out at paragraphs 6.49 to 6.53, below

<sup>9</sup> Further details as to why this is the case are set out in the section on market definition at paragraphs 4.7 to 4.9, below

ship onto the onward transport vehicle and for any time taken (including penalties for delays) both to transport the DSCs to the delivery point and return them either to the origin port or the agreed collection point.

- 2.13 Due to the logistics involved in returning DSCs to ports, the merchant haul model is generally preferred by customers where the distance between the deep sea port and the final destination is relatively short.

### **Line haul**

- 2.14 The line haul model involves shipping lines arranging the onward transport leg of journeys on behalf of importers. Essentially this model offers retailers a „door-to-door“ transport solution whereby the shipping line organises the entire international journey of the DSCs from the premises of the overseas manufacturer/producer to the forecourt of the importer’s depot.
- 2.15 Under the line haul model, shipping lines typically deal directly with domestic transport providers with a view to obtaining onward transport solutions for the movement of significant volumes of DSCs between ports and the inland destinations where their customers (importers based in Great Britain) are based.
- 2.16 It is the ORR’s preliminary view that line haul is typically the preferred model where the distances between the DSC port and the inland destinations are longer and the volumes of DSCs being transported are higher.

## **iv. Modal choice**

- 2.17 As stated above, DSCs are designed to be readily transferable between transport modes, meaning there are a range of alternative methods by which a DSC may reach its final destination.
- 2.18 Once a DSC arrives at a deep sea port, regardless of whether merchant haul or line haul is utilised, the choice of onward transport is typically between road, rail, feeder ship (by way of „short-sea“ shipping) or a combination of these modes. The choice of mode depends on a number of factors; however, as outlined further in the section on market definition (below) it is ORR’s preliminary view that the principal drivers of modal choice are price and service quality.
- 2.19 Transport by road is carried out on Heavy Goods Vehicles (**HGVs**) which are designed to facilitate the efficient loading and detachment of DSCs. HGVs are able to collect DSCs directly from the port and transport them directly to their final inland destination. HGVs are also used to complete shorter journeys to transport DSCs between inland rail terminals/feeder ports and their final destinations.
- 2.20 Feeder ships are significantly smaller than the large container ships used by shipping lines to transport DSCs to Great Britain from outside Northern Europe. Feeder ships

are used to transport DSCs from the deep sea ports to smaller regional feeder ports (which it would be uneconomical and/or impossible for large container ships to call at). Feeder shipping can take place from the Southern Ports or from alternative ports in Northern Europe. Once DSCs are deposited at the regional feeder port they are transferred to rail, or more commonly road for their onward journeys to their final destinations.

## **B. Suppliers of DSC rail transport services**

2.21 One option for transporting DSC containers for part of the onward leg of their overall journey is by rail. By rail DSCs are transported on flatbed wagons which are hauled by locomotives. These wagons are specifically designed for loading, unloading and carriage of DSCs. DSCs carried by rail are transported to inland rail terminals before being transferred to HGVs for the final stage of their journey to their intended destination.

2.22 ORR takes the preliminary view that rail tends to become more economical for journeys covering longer distances and where there is a sufficient critical mass of demand such that frequent rail services can be justified.

### **i. Providers of DSC rail transport services**

2.23 Providers of DSC rail transport services are known as Freight Operating Companies (**FOCs**).

2.24 The number of FOCs currently providing DSC rail transport services in Great Britain is relatively limited, with only three operators moving a significant amount of DSCs on a regular basis.<sup>10</sup>

### **ii. Requirements to operate as a FOC**

2.25 In order to provide DSC rail transport services, an operator requires:

- A licence to operate railway assets (for example, the train);
- The appropriate level of insurance;
- A safety certificate and to have the relevant safety management systems in place;<sup>11</sup>

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<sup>10</sup> FOCs transport a wide range of other commodities which are not the focus of this investigation

<sup>11</sup> Any FOC wishing to develop or maintain infrastructure, such as an inland rail terminal, also requires a safety authorisation. The requirements for certification and authorisation are set out in the Railway and Other Guided Transport Systems (Safety) Regulations 2006

- A track access contract with Network Rail for operation on the mainline infrastructure; and
- Agreement to enter the network at ports and terminals at either end of the journey and any other contracts for access to railway facilities which they or their customers do not own and are necessary for the operation of trains.

2.26 Full guidance and information on the necessary steps to commence and/or expand an operation to provide freight transport services by rail is available on ORR's website:

<http://orr.gov.uk/what-and-how-we-regulate/track-access/track-access-process/how-to-apply-for-track-access/access-for-freight-operators>

## **C. Customers of DSC rail transport services**

2.27 The customer base of FOCs serving the DSC rail transport services sector is somewhat concentrated with the vast majority of DSC rail transport services being provided to shipping lines under the „line haul“ model.

2.28 FOCs also sell DSC rail transportation services to freight forwarders and in some cases, under the merchant haul model, directly to large importers, though to a much lesser extent than to major shipping lines.

## 3. ORR's investigation

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### A. The investigation

#### i. The complaint

- 3.1 On 17 June 2013, ORR received a complaint about Freightliner's arrangements with its customers for the provision of DSC rail transport services.

#### Relevant markets and dominance

- 3.2 The complaint identified a number of markets for DSC transport within Great Britain in which, it argued, rail operated with only minimal competitive constraints from other possible modes of DSC transport (notably road and feeder). These routes were (in summary) between the two largest ports in Great Britain, Felixstowe and Southampton, and three separate key inland destinations: the Midlands, the North West and South Yorkshire.
- 3.3 The complaint asserted that principally for reasons of price efficiencies, DSC transport services in these markets were „rail only“ or „rail captive“. The complaint alleged that in each of these „rail only“ markets Freightliner was and remains in a dominant position. The complaint asserted that Freightliner enjoyed and continues to enjoy significant market power both in terms of shares of customer demand and in having significantly superior levels of access to the infrastructure necessary in order to viably operate a DSC rail transport service, by virtue of being the incumbent operator.

#### Allegedly anti-competitive arrangements

- 3.4 The complaint alleged that Freightliner's arrangements with its customers for DSC rail transport services on the identified routes were exclusionary in nature and operated to foreclose FOC competitors from competing for customers' demand. The complaint alleged that these arrangements therefore amounted to an infringement of the Chapter I and II prohibitions in the Act and/or Articles 101 and 102 TFEU. The complaint further suggested that Freightliner may have been extending its allegedly exclusionary practices to routes to and from the new London Gateway port.

#### ii. Evidence and information gathering

##### Concurrency

- 3.5 On 14 August 2013, in accordance with Regulation 4(1) of the Competition Act (Concurrency) Regulations 2004 (the **Regulations**), ORR informed the Office of Fair

Trading (**OFT**)<sup>12</sup> that it was proposing to investigate the allegations made by the complainant. On 15 August 2013, the OFT agreed that, pursuant to Regulation 4(2) of the Regulations, ORR was best placed to exercise prescribed functions and take the investigation forward.

## Investigation

- 3.6 On 7 November 2013, having carefully considered the complaint and gathered further intelligence, ORR launched a formal investigation under section 25 of the Act and undertook an unannounced inspection of Freightliner's premises on the same day. The investigation was launched on the basis that ORR had reasonable grounds to suspect that there were one or more markets within the DSC intermodal transport sector which might be captive to rail and that:
- Freightliner had entered into agreements and/or concerted practices which had as their object or effect the prevention, restriction, or distortion of competition contrary to the Chapter I prohibition and/or Article 101 TFEU; and/or
  - Freightliner held a dominant position within one or more relevant markets and had abused (and continued to abuse) such dominant position(s) by engaging in exclusionary conduct through one or more of its agreements with customers contrary to the Chapter II prohibition and/or Article 102 TFEU.
- 3.7 In March 2014, ORR determined that the strand of the investigation into suspected infringement of the Chapter I prohibition/Article 101 TFEU should be deprioritised. The strand of the investigation into whether Freightliner had engaged/continued to engage in conduct which amounted to an abuse of a dominant position continued.
- 3.8 The investigation into Freightliner's conduct continued between November 2013 and January 2015. In addition to analysing the material obtained at the unannounced inspection, ORR sent formal notices under section 26 of the Act to:
- Freightliner;
  - The complainant;
  - Customers of DSC rail transport services (principally shipping lines); and
  - A number of organisations involved in the wider DSC transport sector.
- 3.9 In addition to utilising its formal investigatory powers, ORR also held a series of face-to-face meetings with customers and relevant organisations. During the course of the

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<sup>12</sup> The OFT was abolished on 31 March 2014. The competition enforcement functions relevant to this Notice were transferred to the newly established Competition and Markets Authority (the **CMA**) on 1 April 2014

investigation ORR provided Freightliner with regular updates as to progress through holding scheduled State of Play meetings.

## B. Commitments discussions

- 3.10 At a scheduled State of Play meeting on 30 January 2015, Freightliner expressed an interest in opening discussions with a view to making an offer of formal commitments.
- 3.11 In accordance with „Guidance on the CMA’s investigation procedures in Competition Act 1998 cases“ (**CMA8**)<sup>13</sup> and „Competition Act Guideline: Application to Services Relating to Railways“ (**OFT430**)<sup>14</sup> following Freightliner’s initial contact and prior to entering into commitments discussions, ORR carefully considered whether commitments would be appropriate in this case.
- 3.12 Having considered all of the circumstances and the applicable policy, ORR considered that commitments could be an appropriate outcome to the case, such that it was appropriate to engage with Freightliner in commitments discussions. Specific reasons as to why commitments are considered appropriate in this case are set out at paragraphs 6.1 to 6.8 below.
- 3.13 A factor in this determination was consideration of whether ORR had gathered sufficient information and evidence to provide Freightliner with a summary of its competition concerns<sup>15</sup> at that point in the investigation. ORR determined that it could, on the basis of evidence already collected, appropriately and reasonably articulate a summary of its competition concerns to Freightliner.
- 3.14 ORR provided a summary of competition concerns to Freightliner on 27 March 2015. Commitments discussions took place between 27 March 2015 and 9 July 2015.
- 3.15 On 9 July Freightliner proposed commitments which, for the reasons set out in the remainder of this Notice, in ORR’s preliminary view, fully address its competition concerns. ORR is of the preliminary view that the proposed commitments are such that it is minded to exercise its discretion to discontinue its investigation by way of a formal decision accepting the commitments.
- 3.16 Any final decision as to whether to make a formal decision to accept these commitments is contingent on the outcome of this market testing exercise.<sup>16</sup>

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<sup>13</sup> [www.gov.uk/government/publications/guidance-on-the-cmas-investigation-procedures-in-competition-act-1998-cases](http://www.gov.uk/government/publications/guidance-on-the-cmas-investigation-procedures-in-competition-act-1998-cases)

<sup>14</sup> [www.gov.uk/government/publications/railways-sector-legislation-application-and-enforcement](http://www.gov.uk/government/publications/railways-sector-legislation-application-and-enforcement)

<sup>15</sup> In accordance with paragraph 10.19 of CMA8

<sup>16</sup> In accordance with paragraph 3.49 of CMA10 Regulated Industries: Guidance on Concurrent Application of Competition Law to Regulated Industries (**CMA10**) March 2014, [www.gov.uk/government/publications/guidance-on-concurrent-application-of-competition-law-to-regulated-](http://www.gov.uk/government/publications/guidance-on-concurrent-application-of-competition-law-to-regulated-)

## 4. ORR's competition concerns

### A. Introduction

- 4.1 This chapter sets out ORR's competition concerns regarding Freightliner's arrangements with its customers. ORR first sets out its preliminary view on market definition and Freightliner's position in the relevant markets, followed by its concerns about Freightliner's conduct in these markets.
- 4.2 It should be noted that the conduct set out in this chapter refers to both historical and current agreements and/or arrangements. ORR considers it necessary to refer to past conduct in this Notice as, whilst it might no longer be taking place, it is ORR's preliminary view that this conduct may have taken place within the period of time which formed the focus of ORR's investigation<sup>17</sup> and for the purposes of clarity and transparency ORR considers it appropriate to outline the full extent of the concerns it has identified.

### B. The Relevant Markets

- 4.3 ORR has reached the preliminary view that there are six relevant markets; namely, the separate markets for the provision of DSC rail transport services *between* each of the following ports and terminals in inland regions (hereinafter collectively referred to as the **Relevant Markets**):

Between „Southern Ports“ and „inland terminals in the North West“		
The port of Felixstowe	↔	Inland terminals in the North West
The port of Southampton	↔	Inland terminals in the North West
The port of Tilbury	↔	Inland terminals in the North West
Between „Southern Ports“ and „inland terminals in Yorkshire“		
The port of Felixstowe	↔	Inland terminals in Yorkshire
The port of Southampton	↔	Inland terminals in Yorkshire
The port of Tilbury	↔	Inland terminals in Yorkshire

[industries](#), ORR has shared a draft of this Notice with the CMA. ORR has considered comments and guidance provided by the CMA prior to the publication of the Notice and will continue to have regard to any comments or guidance in reaching any final decision as to whether or not to accept the proposed commitments

<sup>17</sup> ORR's investigation focussed on the time period from the start of 2011 onwards, that being the time when a number of the key agreements/arrangements which form part of ORR's competition concerns, were concluded

## i. Approach to market definition<sup>18</sup>

- 4.4 It is ORR's preliminary view, consistent with the European Commission's decisional practice,<sup>19</sup> that not all modes of transport are generally substitutable for each other in view of the geographic situation of the customer as well as the specific characteristics of the goods to be transported. In the context of DSC rail transport services in Great Britain, in each geographic frame of reference there are usually three alternative modes of DSC transport services available; namely, road, rail and feeder (or a combination of these options).
- 4.5 Journey distance is a key factor in determining the mode of DSC transportation. ORR's view is that the traditional economics of haulage (of all commodities) dictates that, other things being equal, rail is relatively strong (i.e. cost effective) over longer distances and relatively weak over shorter ones. This is because transportation by rail involves relatively high „fixed“ costs that do not vary with distance, including the costs of lifting at both ends of a journey, intermodal shift, and inland terminal access charges. ORR's investigation sought to establish whether there were any particular sub-national markets which were captive to rail given the key role played by distance.

## ii. Relevant geographic markets

- 4.6 The nature of DSC transport services is inherently geographic; to serve end customers (principally retailers) DSCs need to be transported from point-to-point to facilitate economic delivery to the end customer.
- 4.7 ORR is of the preliminary view that it is appropriate for each of the Southern Ports, (Felixstowe, Southampton and Tilbury) to constitute separate „ends“<sup>20</sup> of the relevant geographic markets. In any event, even if the Southern Ports were to a certain degree interchangeable, ORR considers that this would not impact the overall analysis of its competition concerns, since the conditions of demand and supply, including operators' shares, do not differ greatly by port of origin.
- 4.8 It is ORR's preliminary view that onward DSC transport services considerations are unlikely to have a material impact on decisions of shipping lines to switch between ports. This preliminary view is consistent with observations that there is minimal switching between ports by shipping lines; shipping lines have a tendency to follow existing deep sea shipping networks which call at particular ports and customers often have long-term arrangements with individual ports. Only certain ports have the

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<sup>18</sup> For information on ORR's approach to market definition; see „Market Definition“ (OFT403), December 2004 <https://www.gov.uk/government/publications/market-definition>. This guidance was originally published by the OFT and has been adopted by the CMA

<sup>19</sup> See, for example, Case No COMP/M.5480 *Deutsche Bahn/PCC Logistics*, [http://ec.europa.eu/competition/mergers/cases/decisions/m5480\\_20090612\\_20310\\_en.pdf](http://ec.europa.eu/competition/mergers/cases/decisions/m5480_20090612_20310_en.pdf)

<sup>20</sup> The origin point for imports and the destination point for exports

capability to handle the necessary DSC volumes required by shipping lines. Container ships typically make a single call in Great Britain to load or offload all of their DSCs bound for British inland destinations in order to avoid the costs associated with multiple stops.

- 4.9 ORR takes the preliminary view for these reasons that there is also limited interchangeability between the Southern Ports (which are calling points on existing networks) and alternative Northern European ports (such as Antwerp, Le Havre or Rotterdam).<sup>21</sup>
- 4.10 It is ORR's preliminary view that it is appropriate to group together inland terminals within regions. The relevant regions in this case are the North West, Yorkshire and the Midlands. ORR has considered whether it would be appropriate to consider a broader geographic market than groups of inland terminals within specific regions. It is ORR's preliminary view that a broader frame of reference would not be appropriate. Road distances between the nearest terminals in neighbouring regions are significant and much larger than distances between terminals within regions. Analysis undertaken by ORR suggests that inland terminals are primarily utilised to serve downstream customers within the hinterland region in which they are situated. The ORR's preliminary view is that when considering onward DSC transport services customers view the market on a „port-to-region“ (and vice versa) basis.

### **iii. Relevant product markets**

- 4.11 There are a number of advantages and disadvantages to DSC transport services by each of road, rail and feeder. These advantages/disadvantages vary in their degree when applied to different routes within Great Britain.
- 4.12 In seeking to define relevant product markets, ORR has carefully considered how the relative advantages and disadvantages of each mode apply on particular routes.

#### **Modal choice (general)**

- 4.13 ORR's preliminary view, based on the evidence gathered during its investigation, is that modal choice by shipping lines (and other customers where relevant) on each particular route or routes is principally dictated by price and service quality (primarily speed and flexibility) considerations.
- 4.14 Compared to rail, road offers greater service quality in some important respects (for example „on-demand“ flexibility). Rail has counterbalancing advantages in other areas, in particular reliability. ORR has not found any evidence to date to support a view that environmental factors play a key role in modal choice for shipping lines,

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<sup>21</sup> An exception to this being DSCs bound for inland destinations in Scotland (see paragraph 4.20, below)

though some shipping lines do choose to highlight their environmental credentials in advertising to their customers.

- 4.15 In undertaking its market definition exercise, ORR has had regard to the impact of the government's Mode Shift Revenue Support (**MSRS**) scheme. The MSRS scheme provides subsidies for journeys where rail has been estimated to face a disadvantage vis-à-vis road haulage and where the environmental benefits of rail are highest. Of the regions referenced below, MSRS support is most significant for transport between the Southern Ports and the Midlands.
- 4.16 ORR's preliminary view based on its analysis is that the relative proximity of the Southern Ports to London and the South East means that DSCs being transported to these areas are moved almost exclusively by road. Road offers „on-demand“ flexibility to customers based in these regions. The short distances involved between the Southern Ports and the South East and London are insufficient for the efficiencies of rail to offset the high fixed costs associated with the use of that mode.
- 4.17 The attitude of shipping lines and other customers to feeder shipping appears to vary. In ORR's preliminary view, though some customers view feeder as a cost effective alternative to rail and/or road, most customers who expressed a view to ORR expressed at least some degree of reluctance to use feeder services on a wide scale, citing disadvantages such as: considerably increased transit time; increased cost; reduced service frequency; and lower levels of reliability.
- 4.18 Feeder services emanating from the Southern Ports are particularly advantageous when serving parts of the country that are relatively close to a regional „hinterland“ feeder port. For example importers based in the North East of England often utilise DSC feeder transport services calling at the feeder port of Teesport.
- 4.19 Importers and shipping lines also have the option to tranship DSCs to hinterland feeder ports from alternative Northern European ports such as Antwerp, Le Havre or Rotterdam. However, as noted above, it is ORR's preliminary view that shipping lines have firm tendencies to follow existing shipping patterns and to deposit DSCs ultimately bound for British inland destinations most commonly at a Southern Port.
- 4.20 An exception to this general pattern are DSCs bound for Scotland where, in ORR's preliminary view, the especially long distances between the Southern Ports and the Scottish inland destinations, and the availability of Scottish ports such as Grangemouth, mean that the economic case for transhipment from an alternative Northern European port is much more viable. This option is much more widely utilised by shipping lines and importers in this particular geographic situation. Feeder ships also serve other regional destinations to some extent, with the North West being partly served by feeder ships from Rotterdam, Antwerp and Le Havre to Liverpool.

4.21 ORR considers that these considerations explain the focus of the complaint on the transport of DSCs by rail between the Southern Ports and the key inland destinations of the Midlands, the North West, and Yorkshire. The distances involved in these journeys are referred to by the complainant as the “golden triangle” in which the distances and economies of scale involved make rail sufficiently efficient, both in terms of price and service quality, that it is not readily interchangeable with other modes of transport. ORR has carefully considered this assertion.

### **Routes between the Southern Ports and inland terminals in the Midlands**

4.22 ORR is of the preliminary view that road acts as a sufficient competitive constraint on rail in markets between each of the Southern Ports and inland terminals in the Midlands for the relevant frame of reference for inland DSC transport services on these routes to include transport by road as well as rail.

4.23 Road and rail offer similar prices on these routes. The relative advantages and disadvantages as between road and rail on these routes are finely balanced. Further, switching analysis undertaken by ORR suggests, in ORR’s preliminary view road and rail are to a significant degree interchangeable services/modes on these routes.

### **Routes between the Southern Ports and inland terminals in the North West**

4.24 In ORR’s preliminary view, neither road nor feeder constitutes a significant competitive constraint to rail on routes between each of the Southern Ports and inland terminals in the North West. These routes are of sufficiently long distance such that the efficiencies of rail (along with other factors) mean that in ORR’s preliminary view DSC rail transport services are not readily substitutable with other modes of DSC transport.

4.25 It is ORR’s preliminary view that rail has price advantages over road on these routes<sup>22</sup> and that insufficient switching to other modes would occur so as to incur a critical loss in the event of a small but significant non-transitory increase in price (**SSNIP**).<sup>23</sup>

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<sup>22</sup>ORR notes that the extent of these price advantages may fluctuate in response to changes in global oil prices, with advantages being more pronounced when global oil prices are relatively high (given the greater impact of this factor on road transport prices)

<sup>23</sup>The SSNIP test determines whether a given increase in product prices would be profitable for a hypothetical monopolist in a candidate market

## Routes between the Southern Ports and inland terminals in Yorkshire

- 4.26 In ORR's preliminary view, neither road nor feeder constitutes a significant competitive constraint to rail on routes between each of the Southern Ports and inland terminals in Yorkshire. These routes are of sufficiently long distance such that the efficiencies of rail (along with other factors) mean that, in ORR's preliminary view, DSC rail transport services are not readily substitutable with other modes of DSC transport.
- 4.27 It is ORR's preliminary view that rail has price advantages over road on these routes and that insufficient switching to other modes would occur so as to incur a critical loss in the event of a SSNIP.

## C. Freightliner's position on the Relevant Markets

- 4.28 ORR is of the preliminary view that Freightliner holds a dominant position in markets for the provision of DSC rail transport services between each of the Southern Ports and inland terminals in the North West and markets for DSC rail transport services between each of the Southern Ports and inland terminals in Yorkshire. It is ORR's preliminary view that as DSC road transport services are included in the markets between the Southern Ports and inland terminals in the Midlands, Freightliner does not hold a dominant position in those markets.

### i. Market power

- 4.29 Since privatisation Freightliner, as the incumbent intermodal FOC, has maintained a consistently high share of the total UK intermodal rail sector. Freightliner's share of DSC rail transport services<sup>24</sup> on routes between the Southern Ports and inland terminals in Yorkshire is approximately 60% and on rail routes between the Southern Ports and inland terminals in the North West is approximately 90%.<sup>25</sup>
- 4.30 ORR notes that during the period of the investigation Freightliner has held 22 out of a total of 30 daily paths out of the port of Felixstowe<sup>26</sup> and operates 15 to 16 of the approximately 20 daily trains running from the port of Southampton. Furthermore, during the same period Freightliner owned and controlled access to a number of key terminal facilities at ports and inland destinations. ORR is of the preliminary view that

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<sup>24</sup> Based on weight of DSCs transported

<sup>25</sup> ORR has not considered it necessary to further delineate Freightliner's shares for each of the markets which have been separately identified on a preliminary basis. ORR is of the preliminary view however that in each such market Freightliner has a sufficient market share so as to be presumed to be dominant; namely, more than 50%

<sup>26</sup> These figures represent approximations for 2013 based on information currently available

this gave Freightliner significant advantages in terms of winning and retaining business in the Relevant Markets.

- 4.31 Freightliner has had long-term relationships with key customers in the intermodal sector which date back to pre-privatisation; competitor FOCs have not had the benefit of such relationships.

### **Barriers to entry and expansion**

- 4.32 ORR is of the preliminary view that the DSC rail transport services sector and the Relevant Markets in particular, are characterised by high barriers to entry and expansion for actual or potential competitor FOCs.
- 4.33 Despite industry and regulatory mechanisms which are designed to support competing applications for capacity, the unpredictability of outcomes in such situations where capacity is constrained and where there may be equally compelling business need by applicants, means that decisions on entry or expansion bear an element of risk. Success in any application for access to such infrastructure is uncertain and requires a willingness on the part of competitor FOCs to take a degree of risk. Previous decisions on access are not numerous or frequent enough to provide a strong indication of the likely success of an application on a particular route.
- 4.34 In ORR's preliminary view, significant investment is required to enter or expand in the Relevant Markets. ORR notes the need to acquire or otherwise obtain access to sufficient locomotives and flat-bed wagons which are compatible with the UK rail network to operate a DSC rail transport service. Obtaining necessary management expertise and sufficiently experienced staff may also constitute a barrier to entry.
- 4.35 It is the ORR's preliminary view that in order to viably enter or expand in the Relevant Markets an actual or potential competitor is likely to need to secure a certain minimum volume of business from customers in order to achieve necessary economies of scale and scope and to effectively service the demand of customers. In ORR's preliminary view actual or potential competitors must secure a certain volume of „base“ demand from customers in order to viably compete for additional flexible/„spot“ demand and to have a sufficient platform on which to support a successful application for access to the necessary infrastructure.
- 4.36 As set out below, it is ORR's preliminary view that the arrangements between Freightliner and its customers impose further artificial barriers to entry and expansion by actual or potential competitor FOCs, limiting opportunities for competition to occur on the merits.

## Countervailing buyer power

- 4.37 It is ORR's preliminary view that customers do not possess buyer power sufficient to diminish Freightliner's strong market position on the Relevant Markets. Any attempt to exert countervailing buyer power is likely to be constrained by the lack of alternative capacity in the Relevant Markets. ORR notes its preliminary views on barriers to entry in this regard.
- 4.38 As stated above, in ORR's preliminary view DSC rail transport services are not readily substitutable with other forms of DSC transport in the Relevant Markets. Capacity on necessary infrastructure in the Relevant Markets is constrained and largely controlled by Freightliner. As such, notwithstanding the fact that many customers are international shipping lines, in ORR's preliminary view they are unable to exert countervailing buyer power on Freightliner or other FOCs when seeking to obtain DSC rail transport services in the Relevant Markets.

## D. Conduct raising concerns

### i. ORR's competition concerns regarding Freightliner's conduct

- 4.39 ORR's preliminary view is that certain arrangements Freightliner<sup>27</sup> 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 FOC competitors. These concerns apply in each of the Relevant Markets.
- 4.40 ORR is also concerned about the reselling restrictions in Freightliner's arrangements with its customers which go beyond safety or technical considerations. The reselling restrictions identified were, in the preliminary view of ORR, potentially infringements of Chapter I of the Act and/or Article 101 TFEU. Whilst ORR's investigation into Chapter I of the Act/Article 101 TFEU was de-prioritised, ORR considers that relevant reselling restrictions must also be appropriately addressed in any binding commitments accepted by ORR. ORR is of the preliminary view that such restrictions may limit potential resellers of DSC rail transport services, thereby reinforcing the position of Freightliner as the principal distributor of such services. ORR is of the preliminary view that, where they exist, such reselling restrictions are a competition concern across all of Freightliner's agreements with its customers, that is, within and beyond the scope of the Relevant Markets.

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<sup>27</sup> For convenience, reference is made to Freightliner but, for the avoidance of doubt, the conduct which gave rise to ORR's competition concerns relates solely to the intermodal business of Freightliner Limited in Great Britain

## Exclusionary conduct

- 4.41 ORR considers that where a supplier has a dominant position, arrangements which require customers to purchase all or most of their demand from a single supplier may be capable of foreclosing competition.<sup>28</sup>
- 4.42 ORR is of the preliminary view that Freightliner entered into arrangements with a number of its customers which may have an exclusionary effect. These arrangements are bespoke, vary in form and may be categorised into different types of exclusionary restrictions.
- 4.43 ORR is of the preliminary view that both (in certain cases) individually and cumulatively these exclusionary arrangements may tend to restrict competition or are capable of having that effect by foreclosing or making more difficult access to customers by actual or potential competitors.<sup>29</sup>
- 4.44 In reaching this position, ORR notes the relatively high shares Freightliner holds in the Relevant Markets and the relative lack of competitive entry or expansion by FOC competitors, particularly in relation to the markets between the Southern Ports and inland terminals in the North West. Given Freightliner's market position in the Relevant Markets, ORR is of the preliminary view that Freightliner was (and remains) an unavoidable trading partner for a substantial part of the demand of many customers seeking services in the Relevant Markets.

## Arrangements of individual concern

- 4.45 It is ORR's preliminary view that a number of arrangements Freightliner has or had with its customers may individually be of concern; these are arrangements which:
- May constitute outright exclusive purchasing obligations, or have been interpreted or applied as such;
  - May involve minimum volume commitments (**MVCs**) which constitute all or most of a particular customer's demand;<sup>30</sup> and
  - May constitute loyalty-enhancing or exclusivity-inducing rebate arrangements where payments applied retrospectively to all volumes, or, prospectively (in a ratcheted manner) to future volumes and where (a) the targets for triggering such rebates were set individually based on a particular customer's demand

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<sup>28</sup> Case 85/76, *Hoffmann-La Roche v Commission* [1979] ECR 461, paragraph 89

<sup>29</sup> Case T-155/06 *Tomra Systems ASA v Commission* [2010] ECR II-4361, paragraph 289

<sup>30</sup> Such MVC obligations typically contain „take or pay“ clauses/arrangements whereby customers must pay for the minimum capacity regardless of whether or not they use it. Customers are therefore incentivised to utilise all of their MVCs under the contract before considering placing any demand with an alternative supplier, or otherwise seeking to satisfy such demand on the flexible „spot“ market

and (b) payments did not relate to the passing on of any objectively identifiable efficiency savings.

#### 4.46 Examples of individual arrangements about which ORR has competition concerns include:

- An arrangement between Freightliner and a customer which may constitute an outright exclusive purchasing obligation. ORR is of the preliminary view that the contractual provisions between the customer and Freightliner amounted to an understanding that the customer would exclusively purchase its requirements in the Relevant Markets from Freightliner. In the ORR's preliminary view the contract was of significant duration.
- Contracts with customers containing MVCs which in the ORR's preliminary view, both through the contractual provisions and through observation of volumes carried in practice, are/were effectively calibrated so as to capture all or most of a particular customer's total demand in the Relevant Markets. In the ORR's preliminary view, some contracts containing MVCs are/were contained within contracts of significant duration which are often not made subject to open tender by customers when they come to be renewed. Certain contracts contain mechanisms to vary MVCs together with termination provisions; however ORR takes the preliminary view that there is minimal incentive to utilise such provisions and limited scope to use them for the purpose of switching demand to a competitor.<sup>31</sup>
- One contract which, in ORR's preliminary view contains a revenue target rebate arrangement, applied on top of MVCs, where the targets for payments of the rebate were set by reference to the customer's demand rather than objectively identifiable efficiencies. This arrangement may have exacerbated the overall potentially exclusionary nature of Freightliner's arrangement with that customer.
- An arrangement between Freightliner and a customer which may have constituted a loyalty-enhancing rebate scheme. ORR is of the preliminary view that:
  - The rebates were not designed to pass on objectively justifiable efficiency savings to the customer;
  - The target volumes at which rebates were triggered were set individually by reference to the customer's actual demand; and

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<sup>31</sup> ORR is of the preliminary view that these provisions have never in practice been considered or utilised for the purpose of switching demand. ORR also notes the judgment of the General Court relating to the existence of termination clauses in Case T-286/09 *Intel Corp v Commission*, at paragraph 112 (citing Case T-65/89 *BPB Industries and British Gypsum v Commission* [1993] ECR II-389, paragraph 73) :

*“As regards the argument based on the possibility of terminating contracts at short notice, the Court would point out that the right to terminate a contract in no way prevents its actual application, until such time as the right to terminate it has been exercised.”*

- The rebates were not paid only in respect of incremental volumes, but rather in respect of future volumes which created a ratcheted loyalty-inducing effect.
- An arrangement between Freightliner and a customer, which in ORR's preliminary view may have constituted an exclusivity-inducing retrospective rebate arrangement. ORR is of the preliminary view that:
  - This arrangement may have involved Freightliner setting a „business target“ which constituted all or most of the customer's demand for DSC rail transport services in exchange for a 10% rebate across all volumes if this target was met; and
  - The rebate payments were not calibrated so as to reflect the „passing on“ of efficiency savings.

4.47 ORR considers that the potential for exclusionary arrangements to have an anti-competitive foreclosure effect is increased when they are contained within agreements of significant duration and/or within contracts with evergreen or rollover provisions. Some of the potentially exclusionary arrangements that Freightliner entered into with its customers were in some instances contained in agreements which, in the ORR's preliminary view, were of significant duration and/or, within contracts with evergreen/rollover clauses.

4.48 In certain cases contracts with major customers containing arrangements of concern to ORR were not made subject to open tender by customers for significant periods of time.

### **Cumulative foreclosure effects**

4.49 ORR is of the preliminary view that, when taken together, the potentially exclusive purchasing obligations and loyalty-enhancing rebate arrangements may tend to or are capable of foreclosing a potentially significant part of the Relevant Markets to competition.

4.50 ORR estimates, on the basis of data currently available, that the cumulative effect of the exclusionary arrangements is that 30-40% of the total demand for DSC rail transport services on routes between each of the Southern Ports and inland terminals in Yorkshire is potentially foreclosed. In relation to routes between each of the Southern Ports and inland terminals in the North West, ORR estimates that 50-60% of the total demand is potentially foreclosed.<sup>32</sup>

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<sup>32</sup> ORR has not considered it necessary for the purposes of this Notice to further break down this analysis as between the six separate routes identified above as it is ORR's preliminary view that the proposed commitments address its competition concerns in the Relevant Markets regardless of the levels of foreclosure on specific routes

4.51 ORR is of the preliminary view that a significant proportion of total demand is therefore capable of being foreclosed in each of the Relevant Markets by the network of exclusionary arrangements Freightliner has entered into with its customers. ORR is concerned that these exclusionary arrangements may have artificially raised barriers to entry by making it more difficult for actual or potential competitors to compete for demand in the Relevant Markets. This cumulative foreclosure effect is in ORR's preliminary view exacerbated by the fact that a number of the exclusionary arrangements formed part of:

- Contracts of long-term/significant duration;
- Contracts with regularly utilised evergreen/rollover clauses;
- Contracts with absolute restrictions on the resale of excess capacity; and
- Contracts which were not regularly (or in some cases ever) made subject to competition.

4.52 As stated above, Freightliner holds long-term relationships with many of the major customers for DSC rail transport services. ORR is concerned that a significant number of contracts concluded with these major customers contain (or, in the period to which this investigation relates, contained) long duration clauses and/or that they were routinely allowed to rollover. This, and the fact that a number of contracts are regularly concluded by customers without recourse to open tender or communication with alternative FOCs, means opportunities for alternative FOCs to regularly compete for customers' demand on an open competitive basis may have been considerably limited.

### **Limiting potential resellers of DSC rail transport services**

4.53 ORR is of the preliminary view that Freightliner entered into certain arrangements with customers that prohibited or otherwise restricted the ability of customers to resell capacity of DSC rail transport services. Such arrangements included:

- Restrictions on offsetting MVCs through resale to third parties;
- Outright prohibitions on resale, either absolutely or to Freightliner's customers; and
- Resale Price Maintenance (**RPM**), restricting customers from selling capacity to third parties at less than Freightliner's spot price.

4.54 ORR's preliminary view is that such clauses give rise to competition concerns as they may restrict competition „by object“ separately from any anti-competitive effects related to exclusivity considerations.<sup>33</sup> ORR is concerned that such restrictions may

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<sup>33</sup> As such, notwithstanding that ORR's investigation into potential restrictions of Chapter I/Article 101 is currently deprioritised, it is considered appropriate that such clauses form part of ORR's competition concerns

have had an adverse effect on competition by limiting potential resellers of DSC rail transport services capacity and therefore artificially reinforcing the position of Freightliner as the principal provider of such services. ORR is concerned that this reinforcement may soften competition in downstream markets for the resale and trading of DSC rail transport services.

4.55 ORR's preliminary view is that such restrictions go beyond what is objectively necessary, for example to satisfy safety or technical concerns.

4.56 An example of a reselling restriction about which ORR has competition concerns is an agreement between Freightliner and one of its customers, in which the customer was restricted from:

- Selling wagon space in competition with Freightliner;
- Selling more than 10% of the available wagon capacity on a train;
- Selling to regular customers of Freightliner; and
- Selling space at no less than the published Freightliner spot tariff applicable for the relevant route and for the relevant container size and weight.

4.57 ORR is of the preliminary view that such resale restrictions may constitute infringements of the Chapter I prohibition and/or Article 101(1) TFEU by „object“. As such, ORR's competition concerns in this regard are not limited to conduct within the Relevant Markets but extend to all agreements between Freightliner and its customers which contain/contained reselling restrictions.

## Effect on Trade

4.58 In ORR's preliminary view, where a dominant company's behaviour makes it more difficult for competitors from other member states to gain access to, or expand in significant markets within Great Britain, trade between EU member states may be affected.<sup>34</sup>

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<sup>34</sup> See Commission Notice (2004/C101/07) Guidelines on the effect on trade concept contained in Articles 81 [now 101] and 82 [now 102] of the Treaty, paragraphs 97 to 99

## 5. The Commitments

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### A. Introduction

- 5.1 In order to address ORR's competition concerns, Freightliner has offered formal commitments to ORR.

### B. The proposed commitments

- 5.2 The paragraphs below summarise the commitments proposed by Freightliner. The commitments relate solely to the DSC rail transport business of Freightliner within their specified geographic scope of application set out at paragraphs 5.16 to 5.18, below. The commitments will be binding on Freightliner and any other group companies involved in the provision of DSC rail transport services in Great Britain.
- 5.3 The proposed commitments will remain in force for a period of three years from the date on which the commitments are formally accepted by ORR. Freightliner also commits to use all reasonable endeavours to ensure that any contractual modifications or other actions required are completed within six weeks of the date on which the commitments are accepted by ORR.

#### Duration of contracts

- 5.4 Freightliner commits not to enter into any contracts on routes with customers for a duration of more than five years.
- 5.5 In order to address ORR's competition concerns in respect of Freightliner's existing long term contracts with customers, for any existing contracts with a duration of more than five years, Freightliner commits to provide the customer with a unilateral right to terminate the contract on the fifth anniversary by providing at least 6 months' notice in writing to Freightliner.
- 5.6 Freightliner commits to removing all clauses in its contracts which provide for automatic rollover. Freightliner also commits not to include such automatic rollover clauses in any new contracts with customers.

#### Exclusivity

- 5.7 In order to address ORR's competition concerns on exclusivity, Freightliner commits not to enter into any contracts which:
- Require customers to purchase exclusively from Freightliner;

- Require customers to purchase any given proportion of their total demand from Freightliner; or
- Place any restrictions or conditions on customers reselling unused contract capacity to third parties, save only where such restrictions or conditions are justified by safety concerns.

5.8 To the extent that the ORR is of the preliminary view that any of Freightliner's existing contracts with its customers contain any of the exclusivity provisions specified above, Freightliner commits to write to the relevant customer and confirm that they are in fact not under such an obligation.

### **Contractual volume commitments**

5.9 Freightliner commits to providing all customers that enter into contracts with a duration of more than three years (including current contracts) with a unilateral and unconditional right to reduce their contracted wagon commitment by:

- 10% on the third anniversary of the contract; and
- An additional 10% on the fourth anniversary of the contract

On the routes in the Relevant Markets which fall within the geographic scope of the commitments.

5.10 However, by way of derogation from the commitment detailed at paragraph 5.9 above, where Freightliner enters into a contract with a customer following an open, non-discriminatory, advertised tender for the business, or provides evidence to ORR that the customer has approached at least one alternative FOC in writing, the commitment on contractual volume release will not apply.

### **Rebates**

5.11 With a view to removing ORR's competition concerns on potentially loyalty-inducing/exclusivity rebates, Freightliner has offered two commitments:

- Not to enter into any discount or rebate arrangements which relate retrospectively to volumes already purchased or which require customers to purchase exclusively, or a given proportion of, their wagon requirements from Freightliner; and
- Not to enter into any discount or rebate arrangements by which the price, rebate or discount in one period depends upon the volume purchased from Freightliner in an earlier period.

## Reporting requirements

- 5.12 Within the first two months of the date on which the ORR formally accepts the commitments, Freightliner will submit to ORR an implementation report. As explained above, Freightliner commits to use all reasonable endeavours to ensure that any contractual modifications or other actions required are completed within six weeks of the date on which the commitments are accepted by ORR. This report will enable ORR to monitor the extent to which the commitments have been implemented.
- 5.13 Freightliner will also submit, on a quarterly basis, a report which will provide data on the volumes of containers carried by Freightliner in that quarter under contracts with a duration of more than one year. The format for the quarterly reports is provided at Annex 2 to this Notice. The data will be provided both in absolute terms as well as relative to the total volume of containers carried by Freightliner. This quarterly report will enable ORR to monitor effectively the wider impact of the commitments and the proportions of Freightliner's total volumes that are carried under contracts of more than one year's duration. This commitment will expire following delivery of the quarterly report relating to the last full quarter for which the commitments were in force.
- 5.14 In addition, Freightliner will deliver an annual compliance statement to the ORR, for each period of 12 consecutive months during the term of the commitments. The annual compliance statement will be submitted to ORR within three months after the end of the year to which the report relates. This obligation will expire following delivery of the annual compliance statement relating to the last 12 month period for which the commitments were in force.
- 5.15 The above reporting requirements will enable ORR to monitor compliance and the impact of the commitments on the Relevant Markets. ORR will consider any material changes of circumstances which may lead either to the release of the commitments or the reopening of the investigation.<sup>35</sup>

## Geographic application

- 5.16 The commitments which prevent Freightliner from placing any restrictions, including any resale price conditions, on customers reselling unused contractual capacity to third parties apply across all of Freightliner's contracts relating to routes in Great Britain and not just those contracts on routes within the Relevant Markets.
- 5.17 The remainder of the commitments apply to all contractual arrangements entered into between Freightliner and its customers which contain an obligation to provide or take a number of wagons on routes between:

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<sup>35</sup> Pursuant to either section 31A(4)(b) or section 31B(4)(a) of the Act, as appropriate

- The port of Felixstowe and inland rail terminals in the North West;
- The port of Southampton and inland rail terminals in the North West;
- The port of Tilbury and inland rail terminals in the North West;
- The port of Felixstowe and Freightliner's inland rail terminals in Leeds;<sup>36</sup>
- The port of Southampton and Freightliner's inland rail terminals in Leeds; and
- The port of Tilbury and Freightliner's inland rail terminals in Leeds.

5.18 The term „inland rail terminals in the North West“ refers to Freightliner's rail inland terminals in Manchester (Trafford Park) and Liverpool, and the inland rail terminal owned by Eddie Stobart at Ditton.

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<sup>36</sup> Further discussion of the fact that the Commitments relate only to the inland terminal at Leeds, as opposed to inland terminals throughout Yorkshire is set out at paragraphs 6.41 to 6.46, below

## 6. ORR's assessment of the Commitments

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### A. ORR's assessment of the appropriateness of this case for commitments

#### i. The applicable guidance

- 6.1 In accordance with the ORR's Guideline<sup>37</sup>, *Competition law application and enforcement (OFT407)*<sup>38</sup> and CMA8,<sup>39</sup> ORR is likely to consider it appropriate to accept binding commitments only in cases where (a) the competition concerns are readily identifiable; (b) the competition concerns are fully addressed by the commitments offered; and (c) the proposed commitments are capable of being implemented effectively and, if necessary, within a short period of time.<sup>40</sup>
- 6.2 ORR will not accept commitments where compliance with such commitments and their effectiveness would be difficult to discern, and/or where ORR considers that not completing its investigation and making a decision would undermine deterrence.<sup>41</sup>
- 6.3 As a concurrent competition authority, the decision to accept commitments is at ORR's discretion.<sup>42</sup>

#### ii. ORR's assessment of this case

- 6.4 ORR considers that this is an appropriate case for commitments for the following reasons:

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<sup>37</sup> See footnote 14, above

<sup>38</sup> OFT407 Enforcement, December 2004, [www.gov.uk/government/publications/competition-law-application-and-enforcement](http://www.gov.uk/government/publications/competition-law-application-and-enforcement)

<sup>39</sup> See footnote 13, above

<sup>40</sup> Paragraph 4.33 of OFT430; paragraph 4.3 of OFT407; and paragraph 10.16 of CMA8

<sup>41</sup> Paragraph 4.33 of OFT430; and paragraph 4.5 of OFT407

<sup>42</sup> It should be noted that ORR is required pursuant to Regulation 9(c) of the Competition Act 1998 (Concurrency) Regulations 2014, which replaced the Regulations as of 1 April 2014, to share a draft of any commitments which ORR proposes to accept under section 31A of the Act with all competition authorities who have concurrent jurisdiction in the relevant case before those commitments are accepted. As stated above, in this case in accordance with paragraph 3.49 of CMA10, ORR has shared a draft of this notice with the CMA and provided 10 working days for the CMA to provide comments and guidance to ORR. ORR will also share any draft decision to accept commitments with the CMA (should ORR determine that taking such a decision would be appropriate in light of representations received in response to this Notice) prior to accepting commitments. ORR has taken into account comments and guidance from the CMA prior to the publication of this Notice and will continue to have regard to any comments or guidance both in the course of considering representations made in response to this Notice and in the course of reaching a final decision as to whether or not to accept the proposed commitments

- **The competition concerns are readily identifiable:** Although the arrangements between Freightliner and its customers are varied and bespoke, it is the ORR's preliminary view that common themes and practices, as summarised above, can be identified. As set out above, ORR is concerned that Freightliner's conduct was capable of foreclosing competition in the Relevant Markets.
- **ORR has reached the preliminary view that the commitments offered by the parties fully address its competition concerns:** The commitments will ensure that Freightliner's arrangements with its customers will not operate to foreclose access to customers by actual or potential FOC competitors in any of the Relevant Markets, e.g. by removing and prohibiting outright exclusivity, limiting contracts to a maximum duration of five years, including options to release capacity at the third and fourth anniversaries of contracts containing MVCs, prohibiting loyalty-inducing rebate practices, and prohibiting restrictions on resale of capacity. An explanation of why these commitments are capable of fully addressing ORR's concerns is set out in paragraphs 6.9 to 6.67, below.
- **The commitments offered are capable of being implemented effectively and within a short period of time:** The commitments will come into force from the date that ORR makes a decision accepting them. Freightliner has committed to use all reasonable endeavours to ensure that any contractual alterations or other actions required under the commitments are completed within six weeks of the date on which ORR formally accepts the commitments.<sup>43</sup> ORR therefore considers that the commitments will be implemented within six weeks or as soon as possible afterwards, with customers being notified in writing of changes being made to their contracts and/or their arrangements with Freightliner.

6.5 The commitments require Freightliner to change the way that it does business with its customers and to comply with regular reporting requirements. ORR considers that the changes Freightliner will have to make to its arrangements with its customers will send strong signals as to the appropriateness or otherwise of certain practices, thus adding to the deterrent effect of competition law.

6.6 ORR notes that Freightliner has cooperated throughout the course of the investigation, giving ORR an indication early in the process that it wished to offer commitments with a view to resolving ORR's competition concerns. ORR also notes that Freightliner has adjusted its conduct on the Relevant Markets since the commencement of the investigation, for example by: removing many of its potentially

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<sup>43</sup> ORR notes in this regard that the contract alterations require no more than Freightliner to grant unilateral rights to its customers: customers would not be burdened with additional duties of their own or otherwise disadvantaged by virtue of the commitments

anti-competitive rebate practices; reducing volumes under long-term contracts; and removing clauses which require specified proportions of demand to be purchased in on-going negotiations with a particular customer. As such, ORR's investigation has already brought about changes even before any commitments have been accepted. In the circumstances, ORR considers that accepting commitments would not undermine the deterrent effect of competition enforcement.

- 6.7 ORR considers that accepting commitments is appropriate in this case as such action would result in market changes more quickly than if ORR were to continue with its investigation.
- 6.8 The proposed commitments do not preclude ORR from taking further enforcement action in relation to other conduct in these and/or related markets which raise competition concerns.

## **B. ORR's assessment of why the commitments fully address its competition concerns**

- 6.9 ORR has carefully considered Freightliner's proposed commitments and takes the preliminary view that they fully address its competition concerns as outlined in chapter 4.
- 6.10 ORR takes the preliminary view that whilst natural barriers to entry to the Relevant Markets may remain high, the commitments will operate to ensure that Freightliner's arrangements with its customers do not impose further potential artificial barriers to entry for actual or potential competitor FOCs.
- 6.11 As stated above, Freightliner's arrangements with its customers are bespoke and vary in form. Notwithstanding this, the range of arrangements can readily be categorised into discrete concerns. For the reasons set out below, ORR is of the preliminary view that its competition concerns are fully addressed by the proposed commitments when the combined effect of the proposed commitments is considered.
- 6.12 ORR has also had regard to actual and possible future developments in the DSC transport sector and the Relevant Markets in reaching its preliminary view that the proposed commitments fully address its competition concerns. In particular ORR has had regard to:
- The impact of London Gateway on the Relevant Markets (see paragraphs 6.52 to 6.55);
  - The imminent launch of Liverpool II (see paragraph 6.52 to 6.55); and

- Freightliner's representations as to the reductions in volumes of DSCs carried under contracts of over 12 months duration (which are to be monitored on a quarterly basis through the reporting provisions).

## **i. Outright exclusivity**

- 6.13 Through the operation of the proposed commitments, customers will be clear that they are under no obligation to purchase their entire demand or even a specified proportion of their demand for DSC rail transport services on the routes within the geographic scope of the commitments.<sup>44</sup>
- 6.14 The absolute prohibition on the use of both outright exclusivity restrictions and restrictions requiring the purchase of specific proportions of demand is applicable regardless of the duration of contracts. As such, even very short term contracts will allow scope for customers to consider using alternative FOCs even if they take the view that Freightliner is an essential trading partner for at least some of their demand. The commitments also make clear that contractual arrangements suggesting that prioritisation should be given to Freightliner for additional or future volumes have no force in practice.
- 6.15 ORR is of the preliminary view that this will achieve significant transparency gains in the Relevant Markets where uncertainty as to the extent to which the arrangements between customers and Freightliner may be interpreted as exclusive may have led to reluctance on the part of customers to place volume with alternative suppliers, with, in ORR's preliminary view, the consequence of weakening the intensity of competition within the Relevant Markets. The proposed commitments will make clear that Freightliner will not be able to act or treat customers on the basis that their arrangements amount to outright exclusive supply agreements.

## **ii. Minimum volume commitments**

- 6.16 ORR recognises that even in the absence of outright exclusivity or requirements to purchase specified proportions of demand, competitors may nonetheless still be foreclosed from the Relevant Markets if customers are subject to agreements containing MVCs, particularly where they are underpinned by take or pay arrangements which are so high that competitors are unable to compete practically for any of that customer's demand, or only token amounts of that demand.
- 6.17 ORR considers that some degree of MVC is permissible provided that the extent of such MVCs, either in individual contracts or cumulatively, across the Relevant Markets do not operate so as to anti-competitively foreclose actual or potential competitor FOCs from entry or expansion. Indeed ORR recognises that a certain level of MVC is desirable for both customers and suppliers and may lead to

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<sup>44</sup> See paragraphs 5.16 to 5.18 of this Notice

efficiencies; in particular it allows for a reasonable degree of business planning (such as making applications for access to infrastructure and investment in required staff/locomotives) on the part of the service supplier.

- 6.18 As outlined above, ORR is of the preliminary view that the potentially exclusionary effects of the MVCs identified (prior to the implementation of any commitments) are exacerbated by their inclusion in contracts of long duration; containing evergreen clauses; and containing resale restrictions preventing the off-setting of excess demand.
- 6.19 ORR is of the preliminary view that the proposed commitments will operate so as to reduce the potentially exclusionary effects of MVCs to the extent that they will neither individually nor cumulatively be capable of having an anti-competitive foreclosure effect on actual or potential FOC competitors in the Relevant Markets. The proposed commitments achieve this through removing or significantly reducing each of the „exacerbating factors“, namely by (for routes within the geographic scope of the commitments):
- Prohibiting the use of, and immediately removing, evergreen clauses;
  - Limiting the duration of contracts containing MVCs to five years;
  - Allowing for the release of 10% of contracted volumes at the third and fourth anniversaries of contracts of over three years“ duration; and
  - Prohibiting the use of, and immediately removing, any restrictions on the resale of excess demand.<sup>45</sup>

### **Prohibition and removal of evergreen clauses**

- 6.20 The commitments will prevent contracts, regardless of duration, from rolling over. As stated above ORR is concerned that custom and practice in the Relevant Markets may have led to many contracts being allowed by customers to automatically renew without the demand serviced by those contracts being made subject to regular competition.
- 6.21 ORR understands in this regard that, of Freightliner“s total share of demand in the Relevant Markets, 35-45% is currently held in contracts over 12 months' duration. This percentage will be monitored carefully (see below). The remaining percentage of 55-65% supplied under spot arrangements<sup>46</sup> or contracts of a duration of 12 months

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<sup>45</sup> This applies to all of Freightliner“s contracts, i.e. it is not limited to the narrower geographic scope set out at paragraph 5.16 to 5.18, above

<sup>46</sup> Spot arrangements are arrangements made at very short notice with no duration or binding volume commitment. They are often conducted using rate cards, applicable for particular periods of time, which FOCs periodically agree with shipping lines

or less, will, in ORR's preliminary view, either be immediately subject to competition or, at a minimum, available to competition annually. ORR considers that the commitments will increase the frequency and scale of opportunities for competitors to compete for significant proportions of customer demand in the Relevant Markets. ORR is also of the preliminary view that customer would potentially support a competitor with a superior offering in an access application if a deal is offered which sufficiently incentivises them to do so.

- 6.22 ORR takes the preliminary view that customers approaching the end of their contracts will have a greater incentive to consider using alternative FOCs for all or some of their demand rather than simply relying on existing agreements automatically continuing for many years.

### **Limitations on the duration of contracts and volume release**

- 6.23 The commitments operate to limit Freightliner's contracts to a maximum duration of five years.
- 6.24 For contracts of over three years' duration which contain MVCs, the commitments require an option to release capacity at the third and fourth anniversaries of the contract. This option for customers to switch up to 10% of committed volumes at the third and fourth anniversaries will be written into contracts meaning it is likely to be applicable beyond the end of the term of the commitments.
- 6.25 ORR understands that all of the volumes within Freightliner's long-term contracts will fall to be renewed or be available to be switched away from Freightliner within the three year duration of the commitments. Given the cumulative effect of the commitments regarding the removal of evergreen clauses, resale restrictions and rebates (see further below), ORR is of the preliminary view that a significant amount of volume currently carried by Freightliner will become available for competitive bidding during the term of the commitments. Indeed ORR understands, due to the dates on which Freightliner's contracts will (under the proposed commitments) expire, that by the end of year one of the commitments at least 50% of volumes currently carried by Freightliner will have been out of contract and by the end of the second year, 100% will have been out of contract.
- 6.26 Further contractual volumes will become available to competition even after the three year term of the commitments has expired, due to the mandated 10% volume release requirements being included within all of Freightliner's relevant contracts with its customers concluded within the commitment period.
- 6.27 In ORR's preliminary view the commitments will operate to allow customers to consider alternative FOCs and create more opportunities for actual and potential competitors to compete for volumes of demand sufficient to viably enter or expand in

the Relevant Markets. ORR's preliminary view is that this is likely to create an appropriate environment for competition to occur on the merits.

### **Open tender carve out**

- 6.28 The commitments to release volume at the third and fourth anniversaries of contracts including MVCs do not apply to contracts that are secured following an open tender or following a customer approaching at least one competitor FOC in writing.
- 6.29 ORR considers the scope of this carve out to be relatively limited – it applies only to the volume release commitment and not to the remainder of the commitments package. For example, arrangements concluded by Freightliner following open tender or contact with an alternative FOC may not contain outright exclusivity requirements or loyalty-inducing rebates.
- 6.30 ORR considers that provided the contract is exposed to legitimate competition on the merits, any reduction in competition caused by the loss of the volume release requirements is sufficiently mitigated. ORR considers that the use of open tenders, or at least the approach of contacting rival FOCs prior to concluding contracts, is a useful way to achieve open and transparent competition between rival FOCs. ORR considers that any additional incentive created by the commitments and the carve out in particular, either to engage in open tender or approach alternative FOCs, will be consistent with the objective of creating an environment for competition to take place on the merits.
- 6.31 ORR has considered the potential for there to be differing interpretations of what is or is not an open tender. ORR has also considered whether any such differences in interpretation could lead to circumvention of the volume release commitment. In ORR's preliminary view the risk of circumvention is sufficiently mitigated by the requirements placed on Freightliner to provide evidence to ORR that the requirements of the carve out and its objectives are met (i.e. to preserve the rights of customers to contract according to their own preferences), before being discharged from the volume release commitment.<sup>47</sup>

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<sup>47</sup> For the avoidance of doubt, the requirement to provide evidence does not constitute authorisation or approval for the exchange of commercially sensitive information between Freightliner, its customers and competitors. Any evidence that the carve out has been engaged should be provided to ORR without any risk of engaging in such information sharing. Ideally evidence that the carve out is applicable should be provided directly to ORR by the relevant customer (albeit likely at the request of Freightliner)

## Prohibition and removal of resale restrictions

6.32 ORR considers that the removal of any resale restrictions<sup>48</sup> that limit potential resellers of DSC rail transport services capacity, will remove any artificial reinforcement of the position of Freightliner as the principal provider of such services.

## Cumulative foreclosure effects

6.33 Based on ORR's understanding of the current volumes in contracts of over 12 months' duration, ORR is satisfied that if the proposed commitments were implemented sufficient volumes of customers' demand remain open for competition either immediately or within 12 months.

6.34 ORR considers that the limitation on duration, the prohibition on the automatic rollover of contracts and the required volume release in contracts of over three years containing MVCs will significantly increase the frequency of volume being released to the market, presenting alternative FOCs with regular opportunities to compete for customers' demand. ORR is of the preliminary view that the proposed commitments will therefore operate to increase customers' ability and incentive to engage with alternative FOCs.

6.35 As stated above, ORR understands that by the end of year one of the commitments at least 50% of demand currently carried by Freightliner will have been out of contract and by the end of the second year, 100% will have been out of contract. The inclusion of the third year allows sufficient time for competitor FOCs to make the necessary arrangements to enter or expand in the Relevant Markets in order to actually start delivering competing services, should they successfully win demand from customers on the merits.

## iii. Rebates

6.36 The proposed commitments, in clear terms, operate to prohibit the use of loyalty-inducing rebate practices. The proposed commitments will operate to prohibit the use of rebates which apply retrospectively to all volumes once a target is hit and those which once achieved are applied to future volumes and which can lead to a ratcheted effect over time (i.e. granting discounts in future periods for hitting targets in earlier periods).

6.37 ORR understands that Freightliner has eliminated the vast majority of such practices during the course of ORR's investigation; although ORR will continue to monitor this through the reporting requirements.

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<sup>48</sup> Across Freightliner's arrangements with customers for all routes in Great Britain and not just routes in the Relevant Markets.

## **iv. Resale restrictions**

6.38 ORR takes the preliminary view that the commitments to remove resale restrictions including RPM will prevent Freightliner from building such resale restrictions into any future contracts (not limited to the Relevant Markets) and ensure that these restrictions are immediately dis-applied in existing contracts.

## **v. Geographic scope**

6.39 The commitments which apply to resale restrictions apply across all of Freightliner's contracts relating to routes in Great Britain. ORR is of the preliminary view that this is appropriate to address ORR's competition concerns about such provisions, which may be anti-competitive by object.

6.40 The commitments which address ORR's competition concerns about potentially exclusionary conduct are limited to particular routes on which Freightliner operates in the Relevant Markets as explained further below.

### **Southern Ports to inland terminals in the North West**

6.41 The commitments apply to routes between each of the Southern Ports and each of the inland terminals in the North West in which Freightliner operates. Given this wholesale coverage of terminals in the region, ORR takes the preliminary view that the commitments are sufficient to address its competition concerns in these markets.

### **Southern Ports to inland terminals in Yorkshire**

6.42 The commitments apply only between the Southern Ports and the inland rail terminal at Leeds. There are two other significant terminals in Yorkshire, namely Doncaster and Selby.

6.43 The terminal at Leeds carries a much larger volume of DSCs than the other two terminals in the region. ORR also notes that a competitor FOC has captured a significant amount of demand at, and thus controls a significant amount of the access to, the inland terminal at Selby significantly softening Freightliner's power on routes to and from that terminal.

6.44 ORR therefore takes the preliminary view that the application of the proposed commitments only to routes between the Southern Ports and Leeds will be sufficient to fully address ORR's competition concerns identified in each of the Relevant Markets for routes to and from this region.

## **vi. Duration of commitments**

6.45 ORR takes the preliminary view that three years is a sufficient period to allow competitors the opportunity to capture volume that becomes free of contractual

arrangements with Freightliner during the term of the commitments. The active existence of competitive opportunities within the Relevant Markets has the potential to change the way that business is conducted and encourage greater switching in the future by customers.

- 6.46 As outlined above, there are a number of steps which an organisation must take before it can viably commence providing, or expand its provision of DSC rail transport services. ORR considers that three years is a reasonable and proportionate period of time for an actual or potential competitor, should it successfully win demand from customers on the merits, to take the required steps including obtaining access to infrastructure, and actually start delivering competing DSC rail transport services in the Relevant Markets.
- 6.47 ORR is also conscious of the need to ensure that the commitments are proportionate. ORR considers that the duration of three years is sufficient to allow switching. ORR notes in this regard that the market is not reliant on new entry and has a number of active FOCs who, given the necessary access to infrastructure and terminals, could provide alternative services within the Relevant Markets. These competitors have extensive experience of the commercial and regulatory regimes. The three year duration gives these competitors sufficient time to expand into the Relevant Markets to provide a competitive alternative to Freightliner, where they have a cost or service quality advantage over Freightliner.
- 6.48 ORR also notes the possible impacts of London Gateway and Liverpool II, discussed further below, and considers that three years is a reasonable timeframe to assess what impact the additional capacity that comes on line from these developments has on the Relevant Markets.

## **vii. Developments in markets**

- 6.49 As stated above, ORR, in considering Freightliner's commitments proposal, has had regard to developments in the Relevant Markets and wider DSC transport sector, in particular when considering what a reasonable duration of commitments would be. In this regard the key developments are the opening of the London Gateway and Liverpool II ports.
- 6.50 The first ship called at London Gateway in late 2013.<sup>49</sup> Public statistics on volumes at this port are not yet available but ORR's understanding is that as yet London Gateway is still a relatively small player relative to the ports of Felixstowe and Southampton. Road and rail distances from London Gateway to key population centres such as those in the Relevant Markets are comparable to distances from Felixstowe.

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<sup>49</sup> See, [www.londongateway.com/media-page/press-releases/britains-new-gateway-global-trade-dp-world-london-gateway-port/](http://www.londongateway.com/media-page/press-releases/britains-new-gateway-global-trade-dp-world-london-gateway-port/)

- 6.51 ORR understands that rival FOCs have managed to secure some demand of major customers emanating from London Gateway going to key inland destinations.
- 6.52 Further DSC capacity will come online in late 2015, via the new Liverpool II container terminal,<sup>50</sup> which will be an extension to the existing Seaforth Dock container terminal operated by Peel Ports. This investment has the potential to particularly affect competition on the routes between inland terminals in the North West and the Southern Ports.
- 6.53 The impact of these developments in Great Britain's port infrastructure on the Relevant Markets is unclear. Nonetheless ORR is of the preliminary view that they have the potential to have a significant effect on: the dynamics of the DSC transport sector in Great Britain; the Relevant Markets; and the effects of Freightliner's behaviour within the Relevant Markets. ORR therefore considers it is important to monitor carefully any changes in the Relevant Markets and is of the preliminary view that is reasonable and appropriate to limit the duration of the commitments to three years to account for the fact that the DSC transport sector may be subject to considerable change within this period.

## viii. Reporting requirements

- 6.54 The commitments place significant reporting requirements on Freightliner. The requirement to provide annual compliance statements ensures that ORR is provided with a regular overview of compliance with the terms of the commitments.

### Quarterly data statements

- 6.55 The quarterly data statements allow ORR to carefully monitor volumes in contracts of more than 12 months' duration.
- 6.56 One factor influencing ORR's preliminary view that the commitments fully address its competition concerns is the percentage of overall customer demand serviced by Freightliner that is subject to contracts of more than 12 months duration (c.35-45%). ORR will carefully monitor data provided in relation to this issue. ORR will regularly consider, should the percentage of volumes in contracts of over 12 months' duration materially increase, whether ORR should utilise its power<sup>51</sup> to reopen the investigation.
- 6.57 In considering whether or not to reopen the investigation, ORR would consider all the circumstances behind the increased percentage including the rate of any increase, the reasons for any increase, and impact of the change on the operation of the wider commitments package. For example, if Freightliner's percentage increased only

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<sup>50</sup> See, <http://peelports.com/liverpool2>

<sup>51</sup> Pursuant to section 31B(4)(a) of the Act

because it had lost a significant volume of spot business and volumes from contracts of less than 12 months' duration, this would be less likely to be a concern for ORR as it would show, in fact, that the commitments were working and competitor FOCs were successfully competing for demand.

6.58 Equally, data monitoring could be used by ORR as a basis for releasing Freightliner from the commitments at an earlier date, or, as a basis for varying the commitments if the percentage of volume in contracts of over 12 months' duration materially decreased.<sup>52</sup>

## **ix. Overall effect of proposed commitments**

6.59 ORR is of the preliminary view that the effect of the proposed commitments would be that actual or potential competitor FOCs would have the opportunity to access customers' demand in order to enter or expand in the Relevant Markets and would therefore not be anti-competitively foreclosed.

6.60 The commitments also have the potential to create a pro-competitive dynamic in the Relevant Markets, such as creating a downstream market for the trading of DSC rail transport services capacity.

6.61 ORR takes the preliminary view that the three year duration of the commitments is sufficient for competitors to enter or expand in the Relevant Markets, in light of its analysis of the requirements to operate as a FOC and in particular its analysis of the access regime.

6.62 The commitments provide scope for careful monitoring, which is particularly important given potential developments which may impact the competitive situation in the Relevant Markets.

6.63 ORR therefore is of the preliminary view, for the reasons set out above, that the proposed commitments fully address its competition concerns.

6.64 ORR notes that should competition concerns arise which are not addressed by commitments accepted by it, it will not be prevented from taking any appropriate action in relation to these concerns.

6.65 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:

- Believing that there has been a material change of circumstances since the commitments were accepted (see in particular paragraphs 6.58 to 6.60, above);

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<sup>52</sup> By utilising ORR's powers under section 31A(3) or (4) of the Act

- 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>53</sup>

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<sup>53</sup> Section 31B(4) of the Act

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

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### A. ORR's intentions

- 7.1 In light of the above, ORR is of the preliminary view that the commitments offered by Freightliner fully address its competition concerns in this case. ORR is also of the preliminary view that the commitments are such that ORR is minded to exercise its discretion to discontinue its investigation by way of a formal decision accepting the commitments.
- 7.2 As required by paragraph Schedule 6A paragraph 2 of the Act, ORR now invites interested third parties to make representations on the proposed commitments. ORR will take such representations into account before making a final decision on whether to accept the commitments.
- 7.3 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 commitments offered by Freightliner. 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.
- 7.4 If applicable in due course, ORR will inform the European Commission no later than 30 days before the adoption of a decision accepting commitments.<sup>54</sup>

### B. Invitation to comment

- 7.5 Any person wishing to comment on the commitments should submit written representations to the postal or email address given below, by 24 September 2015. Please quote the case reference Case No. 11/2013 in all correspondence related to this matter.

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<sup>54</sup> In accordance with the requirement under Article 11(4) of Regulation 1/2003 Council Regulation (EC) of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 [now 101] and 82 [now 102] of the Treaty [now TFEU] to inform the European Commission no later than 30 days before the adoption of a decision accepting commitments in all cases which affect trade between Member States, to enable it to submit any comments

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## C. Confidentiality

- 7.6 ORR does not intend to publish the responses to the consultation with any commitments decision or notice to provisionally accept modified commitments. However, the information contained in the responses may be used or summarised on an anonymous basis in these documents.
- 7.7 In the event that the commitments are not accepted and ORR is considering disclosing the information (such as in or with a statement of objections), or ORR is considering disclosing the information for any other reason, 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.



Use of the name, the Office of Rail and Road, reflects the new highways monitor functions conferred on ORR by the Infrastructure Act 2015. Until this name change is confirmed by legislation, the Office of Rail Regulation will continue to be used in all documents, decisions and matters having legal effects or consequences.



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