**NOTICE OF MODIFICATION TO**

**CONDITION 3 OF**

**RAILTRACK'S NETWORK LICENCE**

Published by the Office of the Rail Regulator

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# *Contents*

# 1. Purpose

1.1 This document is published in accordance with sections 12 (2) and 12 (3) of the Railways Act 1993 proposing modification of Condition 3 of Railtrack's network licence. Railtrack has agreed to the proposed modification. Annex A contains the statutory notice relating to the proposed modification. Annex B contains the full text of the proposed licence condition. The remainder of this document sets out the Regulator's reasons for the proposed modification, explaining its effects and inviting representations in respect of the proposed modification.

1.2 The Regulator has already consulted on his proposals[1] and has received the views of Railtrack PLC, Association of Train Operating Companies (ATOC), passenger and freight train operating companies, rolling stock manufacturers, leasing companies, suppliers to the industry, the rail unions, other rail industry stakeholders and Collins Solicitors on behalf of some of the families of victims and survivors of the Ladbroke Grove and Southall disasters. In making formal proposals for licence modifications the Rail Regulator has considered all these representations. Representatives of the Office of the Rail Regulator, the Health and Safety Executive (HSE) and Railtrack PLC entered into discussions following the initial consultation and the proposed modification also reflects the outcome of those discussions. A list of those who responded to the earlier consultation is given at Annex C.

1.3 The reasons for the Regulator's proposed modification are set out in Chapter 3, together with the reasons for the changes to the earlier proposals.

### Next steps

1.4 Any representations or objections to the proposed modification to Railtrack's network licence should be made in writing **before 5.00 pm on 28 November 2000**. Please address responses to:

[1] *Proposed modifications to Condition 3 of Railtrack's network licence and to other operator licences: a consultation document*, Office of the Rail Regulator, London, June 2000.

Rebecca Phillipson
Executive, Network Regulation Policy
Office of the Rail Regulator
1 Waterhouse Square
138-142 Holborn
London
EC1N 2TQ

1.5 It is expected that copies of all submissions will be published on the ORR website and placed in the ORR Library. In addition, the Regulator may quote from or publish extracts from the submissions.

1.6 If respondents wish to make submissions in confidence, these will be accepted but should be marked clearly as such. Where a submission is made in confidence, it should be accompanied by a statement showing that a confidential submission has been made and the reasons for making such a submission. The statement should also include a summary of the submission, excluding the confidential information. This statement may be published on the ORR website and placed in the ORR Library and the Regulator may quote or publish extracts from it. If respondents do not wish their names to be published, this should be stated in the response.

1.7 Following the close of the consultation period, the Regulator will consider any representations and objections received. If no material objections are made, the Regulator intends to modify Railtrack's network licence following the end of the consultation period.

1.8 Copies of this and other ORR documents referred to in this document can be seen on ORR's website (www.rail-reg.gov.uk) and in the ORR Library.

**Modification of passenger, non-passenger, station and light maintenance depot licences**

1.9 The Regulator made proposals in his earlier consultation document to amend licences to clarify the relevant jurisdictions of ORR and the HSE in respect of enforcement of Railway Group Standards. These proposals were made following a recommendation of the Rail Safety Policy Review and involved the modification of the licences of Railtrack and operators where compliance with Railway Group Standards was an obligation. The general principle was intended to be that the Regulator would not enforce substantive safety obligations, but only provisions concerning matters appropriate to the economic regulator.

1.10 The Regulator has concluded that it is not appropriate to proceed with the modification of operators' licences at present. The reasons for this decision are set out in Chapter 4.

# 2. Background

2.1 Following the tragic events at Ladbroke Grove on 5 October 1999, an inquiry by Lord Cullen was established to consider the causes of the accident and the wider questions of safety management and the appropriateness of the current safety regulatory regime. At the same time as the Cullen inquiry was set up, a working group was established by the Department of the Environment, Transport and the Regions (DETR) to consider the functions of Railtrack's Safety and Standards Directorate (SSD) and whether there were any improvements which should be made pending the conclusions of the Cullen inquiry.

2.2 The Rail Safety Policy Review (RSPR) reported in February 2000[2]. In summary, its recommendations involved the transfer of the functions of SSD to a new Railtrack subsidiary company in order to increase its independence and separation from the commercial interests of Railtrack, and to provide a number of safeguards for that independence.

2.3 The implementation of the RSPR recommendations requires changes to the Railways (Safety Case) Regulations 1994 and changes to Condition 3 of Railtrack's network licence, which concerns the role and functions of SSD. The Health and Safety Commission (HSC) consulted on proposed changes to the Railways (Safety Case) Regulations 1994 earlier this year[3]. The new Railways (Safety Case) Regulations 2000, which revoke the 1994 Regulations, were laid before Parliament on 2 October 2000 and will come into effect on 31 December 2000.

2.4 This document contains proposals to modify Condition 3 of Railtrack's network licence, having regard to those aspects of the RSPR recommendations that the Regulator considers appropriate to be implemented by way of licence modification. The Regulator was represented on the RSPR Working Group along with the HSE, the Shadow Strategic Rail Authority, DETR, the Civil Aviation Authority and an independent member. The Regulator considers that, for the reasons outlined in

[2] *Railtrack's Safety and Standards Directorate, Review of main functions and their location,* Department of the Environment, Transport and the Regions, London, February 2000.

[3] *Proposals for the Railways (Safety Case) Regulations, CD160,* Health and Safety Commission, London, May 2000.

Chapter 3, the changes to the network licence to reflect the recommendations of RSPR are consistent with his public interest duties.

2.5 The RSPR considered improvements which could be delivered quickly and which addressed the concerns identified by the working group, but which would not restrict the options of the Cullen Inquiry nor pre-empt implementation of its recommendations in due course. Some respondents to the Regulator's earlier consultation were not in favour of change now, prior to implementation of the recommendations of the inquiry. The reasons for the Regulator's decision to proceed with licence modification against this background are set out in Chapter 3.

2.6 The RSPR report also noted that the current licences held by train, station and depot operators and Railtrack, enforced by the Regulator, require compliance with Railway Group Standards, where relevant to the licensed activity. To the extent that Railway Group Standards are purely about safety, this overlaps with the HSE's jurisdiction. RSPR noted that this overlap may cause confusion. The Regulator and the HSE have considered whether this could be resolved by modifying the relevant licences to clarify the relevant jurisdictions. Chapter 4 of this document explains why, on balance, the Regulator has concluded that it would be inappropriate to modify licences to this effect at the present time.

# 3. Reasons for proposed modification to Condition 3 of Railtrack's network licence, and response to consultation

3.1 In the earlier consultation document[4] the Regulator asked for views from consultees on the appropriateness of his objectives in modifying Condition 3 of Railtrack's network licence, his proposed approach to meet these objectives and some specific arrangements proposed in the modified licence condition. This chapter sets out consultees' responses to these questions, the conclusions the Regulator has reached in light of these views, and the consequent changes to the proposed licence modification. These changes are now reflected in the proposed licence modification that has been agreed by Railtrack.

**Objectives and approach**

3.2 Following the report of the RSPR the Regulator concluded that Railtrack's network licence should be modified to require the establishment of an Independent Railway Safety Activity as a new subsidiary company of Railtrack Group PLC in order to meet the following objectives:

- in parallel with the HSE's proposed modifications to the Railways (Safety Case) Regulations 2000, to strengthen the arrangements which ensure that the commercial interests of Railtrack do not impinge on the safety responsibilities currently discharged by SSD;
- to ensure that, having primary regard to safety requirements, the SSD treats all industry parties in a fair and even-handed way; and
- to make much clearer the arrangements for separation of the SSD from the functions of Railtrack PLC and Railtrack Group PLC.

3.3 The Regulator recognised that alternative proposals might be developed as a result of the Cullen inquiry.

[4] See footnote 1

3.4 He considered that the objectives set out above were consistent with the duties imposed on him by section 4 of the Railways Act 1993, and in particular the duties:

- to take into account the need to protect all persons from dangers arising from the operation of railways, taking into account, in particular, advice from the HSE;
- to protect the interests of users of railway services; and
- to promote the use of the railway network in Great Britain for the carriage of passengers and goods, and the development of that railway network.

*Consultees' views*

3.5 There was broad support from consultees for the objectives set out in paragraph 3.2.

3.6 However, concern was expressed by a number of consultees about the timing of the proposed modification, in view of the further significant structural changes which would be likely to be required as a result of the Cullen inquiry and the prospective EC directive on railway safety. The Association of Train Operating Companies (ATOC), supported by separate submissions by a number of train operators, while recognising that the changes were intended to be interim measures, expressed concern about the risks brought about by multiple organisational changes in a short space of time. Railtrack emphasised that it was vital that the proposed changes were implemented with the minimum of disruption and within a realistic timescale.

*Regulator's conclusions*

3.7 The Regulator welcomes the broad support for his objectives. He made clear in the previous consultation document that he saw the changes as interim steps pending the outcome of the Cullen inquiry.

3.8 He considers that the changes resulting from the proposed modification are the minimum necessary to achieve his objectives, and in particular that of making clearer the arrangements for separation of SSD functions from other Railtrack functions. He does not consider it appropriate, in the light of the analysis in the RSPR report, to leave the present situation unchanged. He understands that Railtrack is content with the timescale under which the arrangements will be implemented by 31 December

2000, and considers that concerns caused by consultees about the effect of organisational change can be dealt with by effective change management processes.

3.9 Furthermore, the Regulator understands from the HSE that the licence modification is necessary in order for the Railways (Safety Case) Regulations 2000 to be effective. These regulations transfer responsibility for acceptance of train operator safety cases from Railtrack to HSE, and require Railtrack PLC as an infrastructure controller, to procure an assessment of safety cases and a 12 monthly audit of its operation from an "assessment body". That "assessment body" must, *inter alia*, be sufficiently independent of Railtrack PLC to ensure that such assessment or audit is objective. The new Independent Railway Safety Activity company (IRSA) is the means by which this is proposed to be achieved, and thus the licence modification is appropriate to facilitate the implementation of the regulations which the HSE and the Health and Safety Commission (HSC) have approved and which have now been made. In the light of his duty in respect of safety (section 4 (3) (a) of the Railways Act 1993), the Regulator therefore considers that the licence modification is appropriate.

**Location of the new Independent Railway Safety Activity**

3.10 In his June consultation document, the Regulator considered three alternatives for the location of the new IRSA subsidiary:

- outside Railtrack Group;
- a subsidiary of Railtrack Group PLC; or
- a subsidiary of Railtrack PLC.

3.11 In line with the RSPR recommendations, he considers that it is not appropriate for the company to be outside Railtrack Group. Such a radical change would be likely to require primary legislation and this is a matter for the Cullen inquiry to consider.

3.12 If the new company were a Railtrack PLC subsidiary, this would enable the Regulator to enforce obligations directly on the IRSA's parent company and this gives an enforcement route for the Regulator. However, it would mean that, in order to secure compliance, Railtrack PLC would be obliged to use its shareholding in IRSA to control IRSA's activities. The effect would be that Railtrack PLC's relationship with IRSA would be more intrusive, thus reducing the degree of independence in practice.

3.13 If, on the other hand, IRSA were established as a Railtrack Group subsidiary, there would be greater separation from Railtrack PLC, the operating subsidiary, since there would not be the direct ownership relationship. It would, however, require there to be arrangements between Railtrack PLC and Railtrack Group covering the setting up of the subsidiary, and arrangements to enable Railtrack PLC, in order to comply with its licence obligations, to require IRSA to take action, since the Regulator would only be able to take action directly against Railtrack PLC, the licence holder. IRSA could not itself hold a licence under current legislation since it is not an operator of railway assets.

3.14 The draft licence condition was based on the assumption that IRSA was a Railtrack Group PLC subsidiary, rather than a Railtrack PLC subsidiary. It specified obligations to be met by IRSA, and a requirement on Railtrack PLC to enter into a contract with Railtrack Group PLC and IRSA to perform these obligations and to enforce that contract when required by Railtrack Group and the Regulator.

*Consultees' views*

3.15 The views of consultees about the proposed arrangements split into two groups, on the basis of the new company being outside Railtrack Group PLC, or being a subsidiary of Railtrack Group PLC.

3.16 Those who considered that the new company should be outside Railtrack Group PLC argued that the proposed function of IRSA should be exercised by a body operating completely separately and independently from Railtrack. These respondents include ATOC, some passenger train operators, Collins Solicitors on behalf of some of the families of victims and survivors of the Ladbroke Grove and Southall disasters and ADtranz. In particular, the concern was that under the Regulator's proposals, little would change from present arrangements where Railtrack is both regulated (as infrastructure operator) and regulator (as infrastructure controller), and this leaves Railtrack with too dominant a position. One respondent (ADtranz) commented that, based on its experience to date and knowledge of the operation of commercial companies, the Regulator's objectives (set out at paragraph 3.2 above) can only be met if the IRSA is outside Railtrack Group PLC.

3.17 However, ATOC and passenger train operators acknowledge that the Regulator's proposals are interim measures, pending the outcome of the Cullen inquiry.

3.18 Other respondents supported the Regulator's proposed approach that the new company should be a subsidiary of Railtrack Group PLC. One consultee, Freightliner, considered that IRSA's obligations should be directed through regulation and not by contract with Railtrack Group PLC. Another, ASLEF, was doubtful that the mere creation of SSD as a subsidiary company would remove all possibility of safety being compromised by commercial considerations.

*Regulator's conclusions*

3.19 The Regulator has concluded that his original proposal to establish IRSA as a Railtrack Group PLC subsidiary is appropriate at the present time. For the same reasons as those outlined in paragraph 3.8 above, he considers that it is appropriate to proceed with the changes now. He recognises the strength of view that the new company should be entirely independent of Railtrack. He notes, however, the RSPR view that such a degree of independence would be likely to require primary legislation. This emphasises that the change is interim, and does not constrain the findings of the Cullen inquiry. He considers that the proposal is consistent with creating the minimum necessary change in advance of Lord Cullen's recommendations.

3.20 The Regulator has considered whether it would be possible to impose licence obligations directly on IRSA, but since the company will not hold a licence, he considers this is not possible, and that the proposed arrangement achieves the necessary regulation of IRSA's activities and its relationship with other Railtrack Group companies and other industry parties. In recognition of the concerns about Railtrack's continuing role, he will be developing, in discussion with HSE, a compliance-monitoring regime for IRSA, so as to ensure that safety considerations come before commercial interests.

**Arrangements for appointment of directors**

3.21 The Regulator proposed that he and industry stakeholders be consulted before a person is appointed to be a director of IRSA. There should be a maximum of nine directors, of whom a majority should be non-executive. The non-executive directors should be persons with experience of the business of train operators and others involved in the rail industry. The chairman should be independent but have appropriate safety-related knowledge or experience, and not have been the employee of a railway industry company within the previous two years of appointment. The chief executive should have extensive relevant experience and knowledge, and not be a director of Railtrack PLC or Railtrack Group PLC.

*Consultees' views*

3.22 A variety of views were expressed in response to these proposals. Some, such as GNER, were supportive of the proposals, others were supportive with caveats. Merseyrail Electrics pointed out that the proposals would secure a form of independence, but that the Cullen inquiry may make recommendations on whether it is the *necessary* independence.

3.23 Railtrack indicated that it would need 11 rather than 9 directors, the majority of whom would be non-executive, in order to obtain the requisite range of expertise. It supported the requirement for non-executive directors collectively to have experience relevant to functions of IRSA but commented that it would be beneficial to include on the board directors who had a wider range of experience. It identified a need to cover circumstances where a chairman could not otherwise be found and proposed that the requirements could be waived with prior consent of the HSE and the Regulator. In respect of stakeholder consultation, Railtrack expressed concern that the inclusion of all stakeholders was too wide and thus impractical, and proposed a representative sample instead. This was also the view of the Railway Industry Association.

3.24 ATOC and some train operating companies expressed the opinion that the proposed safeguards were minimal, in particular those on the chief executive. One consultee, Central Trains, observed that meaningful consultation with the full range of stakeholders would help deal with this concern. ADtranz observed that the proposals would mean that the chairman and chief executive of IRSA would have access to the boards of Railtrack Group PLC and Railtrack PLC This arrangement does not apply to other railway operators and hence a level playing field would not exist.

3.25 In respect of the pool of candidates who would be eligible for membership of the IRSA board, Balfour Beatty and Collins Solicitors questioned why IRSA directors should be limited to those with experience of the rail industry, and not extended to those with safety knowledge of other industries. Collins Solicitors noted the lack of provision for inclusion of persons specifically representing the interests of passengers.

*Regulator’s conclusions*

3.26 Having considered these representations and following further discussions with Railtrack, the Regulator has concluded that some changes to his original proposals for the appointment of directors are appropriate.

3.27 The proposed licence modification as agreed with Railtrack allows up to 11 directors of IRSA at any one time. Eight shall be non-executive directors, of whom no more than one may have been an employee of the Railtrack Group within two years of the date of appointment to the IRSA Board. Those who are appointed to the non-executive directorships shall collectively have appropriate practical experience in relation to the functions of IRSA, and also have extensive current experience of the management of safety. The chairman and four other non-executive directors must not be employees or recent employees of the railway industry; the remaining three non-executive directors are expected to be representatives of the railway industry.

3.28 The chief executive must have extensive current experience of the management of safety and current knowledge of railway operations, and may not be a director of Railtrack PLC or Railtrack Group PLC.

3.29 The Regulator considers that these arrangements will provide an appropriate degree of independence, industry representation and specific expertise and address the concerns raised in consultation. The five non-executive directors (including the chairman) without recent railway industry experience will be able to provide a perspective from outside the industry. The three non-executive directors from the railway industry should provide an appropriate balance of industry representation. He believes this will need to be supplemented by an industry advisory group. He also considers that it is important that IRSA has arrangements in place to obtain the views of passenger representatives via the Rail Passengers Council and the Rail Passengers Committee network.

3.30 The Regulator has asked Railtrack to prepare a proposed list of stakeholder bodies to be consulted on director appointments, and he expects Railtrack to consult these bodies on the proposed appointments shortly.

## Controls on staff commercial and financial interests

3.31 The Regulator stated in his consultation document that he did not consider it appropriate for any element of the remuneration of IRSA staff to be related to the commercial, financial or stock market performance of a railway company. The proposed licence condition therefore prohibited shareholding in railway companies other than with the Regulator's approval. The Regulator recognised that it was vital for the effective operation of IRSA that it must be able to attract staff of sufficient calibre and expertise, and offer attractive remuneration arrangements to achieve this, which should be linked to safety performance not commercial performance. He also noted however that current tax legislation might not permit a ban on participating in employee share schemes.

*Consultees' views*

3.32 Consultees supported the principle underpinning the proposals and recognised the necessity of attracting staff of sufficient calibre and expertise. Views differed as to how to achieve the balance between attracting such staff and placing an appropriate element of distance between those persons and the commercial performance of Railway Group companies in which they might have an interest. ATOC and some train operating companies stated that it was not appropriate for proposed IRSA staff to have any commercial or other interest in the railway industry. They recognised that this was probably unrealistic, however, and proposed that employees should only hold a 'disqualifying interest' recorded in a register and with the approval of ORR. Merseytravel proposed that staff should be required to hold in trust any shareholdings in a railway company for the duration of employment or secondment to IRSA. Railtrack proposed that employees of IRSA should be allowed a *de minimis* threshold of 10,000 shares as, unless this level was allowed, it would be unable to attract suitable staff whether as employees or on secondment

*Regulator's conclusions*

3.33 The Regulator remains committed to the principle that decisions by IRSA staff should not be influenced by commercial interests. He recognises, however, that given the interim nature of the IRSA arrangements and the need to ensure the availability of personnel of the appropriate expertise, experience and competence that there will be a need for IRSA to be largely or wholly resourced by staff seconded from the industry. He considered that Railtrack's proposal of a threshold of 10,000 shares was wholly inappropriate as it would allow staff to hold in the region of £100,000 worth of Railtrack shares. In view of the real need to attract suitable staff the Regulator proposed that those in positions of significant influence or decision-taking should not have financial, commercial or stock market interests in railway industry companies. Railtrack agreed with this and therefore the agreed licence modification contains restrictions on the interests of staff with decisive authority (which are those at director and controller level). The Regulator considers this can be achieved by disposal of interests of staff (and their spouses, partners and dependent children) or, with the approval of the Regulator in appropriate cases, placing the relevant shares in a blind trust, the trustees of which would be required to hold a significant proportion of the investment in non-railway industry shares.

3.34 In view of the tax law difficulties in applying the restriction to shares held under an Inland Revenue approved share-saving scheme, such shares will be excluded from the prohibition.

3.35 The Regulator emphasises the importance he attaches to the development of incentives for IRSA staff focused on industry safety performance.

3.36 In the case of non-executive directors the prohibition would apply. However, the Regulator recognises the importance of being able to attract senior industry personnel with current involvement in the industry and would consider on a case-by-case basis whether shareholdings by non-executive directors should be permitted, having regard to that principle.

**Funding of Independent Railway Safety Activity**

3.37 The proposed licence modification placed an obligation on Railtrack PLC to ensure that at all times IRSA had funds which are sufficient for the proper carrying out of its functions. The functions of IRSA would be wider than those of SSD and would include the promotion of research into matters of railway safety. The implication was that Railtrack PLC would be funded under access charges to finance the activities of IRSA. The Regulator would expect to make provision for this as part of the periodic review of the access charging regime currently under way.

*Consultees' views*

3.38 The Regulator's proposals broadly received support from consultees, with express concern from Collins Solicitors, that the costs of ISRA should not be paid by the travelling public through the fare box. Railtrack noted that whilst the proposed arrangements will provide a framework for funding IRSA, in the longer term a review of funding arrangements would be appropriate to consider the possibility of other stakeholders (who do not have track access agreements) contributing to the cost of delivering a safe railway.

*Regulator's conclusions*

3.39 The Regulator has concluded that his original proposals remain appropriate and the licence modification will proceed on that basis. Provision for the funding of IRSA has been made as part of the periodic review of access charges.

**Relationship with the Railways (Safety Case) Regulations and Railway Group Safety Plan**

3.40 Under the new Railways (Safety Case) Regulations 2000, changes have been made to the existing regulations which will require all safety cases, both of infrastructure controllers and of train and station operators, and material changes to safety cases, to be approved by the HSE. In addition, Railtrack PLC will have a specific obligation to procure, from an independent body, advice on Railtrack PLC's own Railway Safety Case (RSC) and any material revisions to this RSC. It also will have an obligation to procure independent advice on the safety case, and any material revisions to the safety case, of each train and station operator carrying out activities on its network. Railtrack PLC must also procure an independent body to carry out annual audits of its operations as Infrastructure Controller and those of the train operating companies and station operators operating on its infrastructure. The Regulator sought views on whether any of the obligations proposed in the draft licence condition would be more appropriately included in the regulations.

3.41 Under existing arrangements, SSD prepares a safety plan for Railtrack and holders of safety cases for operation on Railtrack's network (the Railway Group Safety Plan). Although not an express requirement of the Railways (Safety Case) Regulations 1994 or 2000, Railtrack at present undertakes such an obligation in its safety case, with the work of preparation being carried out by SSD. The Regulator's proposals did not include an obligation in this respect, and he sought views as to whether the production of the safety plan should become an obligation of IRSA, and, if so, whether it should be included in the regulations or the licence condition.

*Consultees' views*

3.42 Views were divided in terms of whether any of the obligations proposed in the draft licence condition would be more appropriately included in the regulations, and whether the production of the safety plan should become an obligation of IRSA, through the regulations or the licence. Those who stated that they were in favour of inclusion in the regulations did so on the basis there should be an obligation enforced by a single regulatory body. Those who were in favour of licence obligations supported no change prior to the Cullen inquiry recommendations, some commenting that present arrangements worked well and there was no need to change them.

*Regulator's conclusions*

3.43 The Regulator has concluded, in consultation with the HSE that, pending the outcome of the Cullen inquiry, the balance between obligations imposed by licence and by regulation should be as originally proposed. He considers that further change would go beyond the minimum necessary to achieve the objectives.

3.44 As far as the Railway Group Safety Plan is concerned, the Regulator has concluded that it is not necessary for this to be an obligation on the face of the licence, but both he and the HSE consider that coordination and production of the plan by IRSA is important, and he will, if necessary to clarify the position in respect of IRSA's vires, issue a notice under paragraph 1 of the revised licence condition to this effect. The HSE has emphasised that Railtrack's own role in producing a plan for its own infrastructure should not be diminished. The Regulator understands there may be a similar need for a notice in respect of following up the audit recommendations.

**Appeals to the Regulator under the Railways Group Standards Code**

3.45 The Regulator proposed to include a provision in the modified licence condition to allow appeals by stakeholders who are materially aggrieved by a decision on new or amended Railway Group Standards. This was a change from the existing licence condition, which allows appeals from participating railway operators (essentially licence holders and applicants for licences) only. The proposed stakeholder definition covered three categories:

- any person having a safety case for operation on or in connection with the Railtrack network;
- any funder (as defined in Condition 7 of Railtrack's network licence)[5]; and
- any person whose business activities or goods which he manufactures must comply with Railway Group Standards.

*Consultees' views*

3.46 The proposals were generally supported. There was some concern as to whether the Regulator would remain the appropriate appeal body for matters purely covering safety and whether instead these should transfer to the HSE, with the Regulator dealing solely with the economic element of Group Standards.

3.47 Railtrack queried the need for an appeal mechanism, on the basis that once the Group Standards change process had transferred to an independent IRSA, IRSA would probably be considered a public body for the purposes of the Human Rights Act and would therefore be open to challenge if it did not operate a fair procedure. If any appeal mechanism was required, the IRSA board should be the first point of appeal, and not the Regulator.

3.48 Whilst supporting the wider definition of stakeholders, Railtrack was concerned that the new right of appeal went too wide and might place a burden and delay on IRSA, particularly since the new stakeholders would not contribute to costs.

*Regulator's conclusions*

3.49 The Regulator has concluded that it is appropriate to proceed with the modification because he considers it important that funders and suppliers have the direct right of appeal since they can be materially affected by changes on Railway Group Standards.

[5] Condition 7 of Railtrack's network licence defines 'funder' as the Franchising Director, each Passenger Transport Executive and any local, national or supra-national authority or agency (whether of the United Kingdom or the European Union) or other person who provides money by way of grant or loan with the primary purpose of securing the provision of railway services.

He considers it appropriate that, pending the outcome of the Cullen inquiry, he as economic regulator should remain the appeal body. The licence condition makes it clear that the Regulator would consult the HSE in the event of an appeal.

## Other changes

*Railtrack PLC*

3.50 Railtrack PLC indicated that it might be appropriate for IRSA, with the permission of the Regulator, to undertake activities other than those specified in the proposed licence modification.

3.51 The Regulator recognises that there may be benefits in providing for this, for instance providing safety advice to the Channel Tunnel Rail Link and London Underground Limited. In doing so, there must be no limitation on the resources available to IRSA to perform the activities required by the proposed licence condition.

3.52 Accordingly the Regulator will consider specifying by notice under the proposed licence modification that such activities may be carried out by IRSA provided he can be satisfied that this will not detract from IRSA's performance of its primary functions.

3.53 Railtrack PLC stated that, on its own, the Railway Group Standards Code could not *ensure* safety although it did make a significant contribution to the safety on the railway. It recognised the paramount importance of safety at all times and in all circumstances.

3.54 The Regulator has made changes to the proposed licence modification to make clear that the Railway Group Standards Code should contribute significantly to the achievement of safety, but that by itself it cannot ensure safety.

3.55 Railtrack commented that the purpose of the Railway Group Standards Code should be limited to "the safe interworking" of railway assets "in so far as such matters fall within the license holder's responsibilities as infrastructure controller".

3.56 The Regulator does not agree with this proposal and believes the purpose of the code should extend to "operation" of railway assets. The HSE has confirmed that this is necessary. Nor is it appropriate to limit it to matters falling within the responsibilities of the infrastructure controller. In some instances the operation of an asset will impact on other users of the infrastructure and therefore this operation needs to be covered by the code.

**Other consultation issues**

3.57 Some consultees raised issues in their responses that are not covered elsewhere in this document. These points are covered below.

3.58 Maintrain sought confirmation of its understanding that light maintenance depot (LMD) operators do not require an approved safety case before the Regulator issues a licence.

3.59 The Railways (Safety Case) Regulations 1994 and 2000 require safety cases for train or station operators and for infrastructure controllers. An LMD operator would not require a safety case and by virtue of that fact the granting of a licence by the Regulator is not linked to the possession of a safety case. Procedures and requirements for all potential licensees are set out in the Regulator's licensing guidance.[6]

*Confederation of Passenger Transport (CPT)*

3.60 CPT is concerned that the Regulator's earlier consultation document refers to "the industry" whereas the proposals apply to "the Railway Group". Light railway and tramways are part of the railway industry They are subject to inspection by HMRI, but are not part of the Railway Group, nor are they licensed by the Regulator, nor do they operate under the Railways Group Standards procedures.[7] CPT notes that the different nature of light railways is recognised in the Railways (Safety Case) Regulations 2000, and requests that the Regulator's proposed licence modification does so too, and clarifies that they apply to the Railway Group whose members are licensed under the Railways Act 1993.

[6] *Application for a licence to operate railway assets*, Office of the Rail Regulator, London, September 1995

[7] The exception is Tyne and Wear Metro, which will be a member of the Railway Group to reflect its use of Railtrack's infrastructure for the Sunderland metro extension, and will conform to special Group Standards for light rail vehicles.

3.61 CPT makes a valid point, in respect of clear terminology. However, the proposed licence modification concerns Railtrack PLC and not other infrastructure controllers, and therefore the Regulator does not consider that any change is necessary.

# 4. Enforcement of Railway Group Standards

4.1 The Regulator proposed in his earlier consultation document that all licences which require compliance with Railway Group Standards be modified to require the licence holder to comply with such Railway Group Standards or parts of such standards as may be specified in a notice issued by the Regulator to the licence holder, after consulting the licence holder and the HSE. The general principle would be that he would not expect to enforce substantive safety obligations, but provisions concerning matters appropriate for the economic regulator. He intended to consult on which elements of Railway Group Standards should be specified for enforcement by him.

*Consultees' views*

4.2 A number of consultees stated that there was insufficient clarity in what was proposed.

*Regulator's conclusions*

4.3 The Regulator remains of the view that the current position where he and HSE have, in effect, overlapping jurisdiction in respect of enforcement of Railway Group Standards, is undesirable. To the extent that Railway Group Standards concern purely safety matters he considers that enforcement by the safety regulator is appropriate. However, under current legislation, purely economic matters need to be enforced by the economic regulator.

4.4 In view of the fact that this is likely to be an issue addressed by the Cullen inquiry, and the lack of consensus on what should be done for the present, the Regulator has concluded that he should not pursue these proposed modifications at this time. This is reflected in the proposed modification to Railtrack's network licence; he will not be proceeding with modifications to other licences.

# *Annex A: Notice under section 12 (2) of the Railways Act 1993*

The text of the statutory notice published today is as follows:

The Rail Regulator ("the Regulator"), pursuant to section 12(2) of the Railways Act 1993 (c.43) ("the Act") hereby gives notice as follows:

(1) he proposes to modify Condition 3: Railway Group Standards of the network licence granted to Railtrack PLC ("the network licence") under section 8 of the Act;

(2) the modifications to the network licence require Railtrack PLC to:

(a) procure, by 31 December 2000, the establishment of a wholly owned subsidiary (Independent Railway Safety Activity, or IRSA) of Railtrack Group PLC for the purpose of carrying on activities relating to safety currently carried on by the Safety & Standards Directorate of Railtrack PLC, and other related functions;

(b) ensure that IRSA has no commercial functions or responsibilities except those necessary for that purpose or those that have been approved by the Regulator;

(c) ensure that persons with decision making responsibilities within IRSA (including directors) do not have, except with approval of the Regulator, interests in railway companies;

(d) ensure that the directors of IRSA have the requisite experience, including an appropriate balance between railway and non-railway experience;

(e) enter into an agreement with IRSA and Railtrack Group PLC which requires IRSA to take over and maintain responsibility for the Railway Group Standards Code and to authorise the Railway Group Standards (including authorisation of amendments thereto, subject to a right of appeal to the Regulator in respect of any decision by IRSA in respect of such authorisation); and

(f) ensure that IRSA complies with other related specified requirements;

(3) the reasons why the Regulator proposes to make modifications are to:

(a) strengthen, in parallel with the Railways (Safety Case) Regulations 2000, the arrangements which ensure that the commercial interests of Railtrack do not impinge on its safety responsibilities as infrastructure controller;

(b) ensure that, having primary regard to safety requirements, all industry parties are treated in a fair and even-handed way; and

(c) make much clearer the arrangements for separation of safety responsibilities from other functions of Railtrack PLC and Railtrack Group PLC;

(4) a copy of the draft proposed modifications and a notice containing full reasons can be obtained (free of charge) from the address below or by telephone (020 7282 2001); fax (020 7282 2045); e-mail: legal.orr@gnet.gov.uk; website: www.rail-reg.gov.uk; and

(5) any representations or objections to the proposed modifications may be made in writing on or before **28 November 2000** to the Regulator at the Office of the Rail Regulator, 1 Waterhouse Square, 138-142 Holborn, London EC1N 2TQ, ref. R Phillipson.

**Michael Beswick**
***Director, Network Regulation***
***Duly authorised by the Rail Regulator***

# *Annex B: Text of proposed modification to Condition 3 of Railtrack's network licence*

Condition 3: Safety and Standards

**The Safety Activity**

1. For the purposes of this Condition, Independent Railway Safety Activity means:

   (a) the provision of advice to the Health and Safety Executive, the Regulator, the licence holder and stakeholders in respect of matters relating to safety of the operation and use of the licence holder's network;

   (b) the activities in relation to the Railway Group Standards Code specified in this Condition;

   (c) the discharge of any statutory obligation in relation to safety imposed on or in respect of any person carrying on the Independent Railway Safety Activity by or under the relevant statutory provisions or any Community obligation;

   (d) the maintenance of any records (including databases) previously maintained by the Safety and Standards Directorate of the licence holder in respect of safety information relevant to the operation and use of the licence holder's network; and

   (e) the promotion of research and development, of training and of the provision of information in each case in relation to all aspects of safety relevant to the provision of railway services on or relating to the licence holder's network,

and such other safety related activities as the Regulator may, after consulting the licence holder, IRSA (as hereinafter defined) and the Health and Safety Executive, specify by notice.

**IRSA**

2. The licence holder shall procure that:

(a) Railtrack Group PLC ('the holding company') shall prior to the effective date establish and maintain a wholly owned subsidiary limited by guarantee (such subsidiary being referred to in this condition as 'IRSA') for the purpose of carrying on the Independent Railway Safety Activity;

(b) IRSA shall at all times comply with the requirements of paragraphs 4 and 5;

(c) the licence holder can ensure that the holding company complies with the provisions of sub-paragraphs (a) and (b) and with the relevant provisions of paragraphs 4 and 5.

3. The licence holder shall:

(a) on the effective date transfer or make available to IRSA all assets previously held or used by the licence holder's Safety and Standards Directorate which are necessary or expedient to enable IRSA to perform the Independent Railway Safety Activity from that date; and

(b) at all times ensure that IRSA shall have funds which are sufficient for the proper carrying out of its functions.

4. The requirements of this paragraph are that:

(a) IRSA shall have no commercial functions or responsibilities except to the extent that they are necessary for the performance of any activity specified in paragraph 1 or have been approved by the Regulator;

(b) IRSA shall be provided with, or have made available to it, sufficient suitably qualified and experienced personnel to enable it to perform its functions;

(c) except with the written approval of the Regulator and in accordance with the conditions of that approval, no relevant employee shall have a disqualifying interest;

(d) the chairman and chief executive of IRSA shall be timeously provided with copies of relevant papers provided to the board of directors of the licence holder and of the holding company which are relevant to the functions of IRSA save that the entitlement shall not extend to such documents or parts of documents which the licence holder and the holding company could not be compelled to produce or give in evidence in civil proceedings in any court;

(e) the chairman and chief executive of IRSA or (in either case) a duly appointed nominee shall be given due notice of and have the right to attend and speak at any meeting of the board of directors of the licence holder or of the holding company which considers any safety matter, within the Independent Railway Safety Activity (save in relation to matters within paragraph 6(d)); and

(f) IRSA shall maintain a list (approved by the Regulator) of stakeholders and bodies which are representative of stakeholders, with such list indicating which of the persons on the list shall be consulted as required under paragraphs 5(a), 7(d) and 9(b)(i).

**Directors of IRSA**

5. The requirements of this paragraph are that:

(a) before any person is appointed to be a director of IRSA, the Regulator and bodies which are representative of stakeholders are consulted and, in relation to the directors on the effective date, have been consulted prior to the effective date in relation to their appointment;

(b) there shall be not more than eleven directors at any time of IRSA of whom eight shall be non-executive directors and not more than one non-executive director shall be a person who has at any time within two years prior to the date of appointment as a director been an employee of any member of Railtrack Group provided that, during any period in, or at any meeting at, which there shall not be such a majority of non-executive directors, there shall be allocated to the chairman additional votes as shall be necessary to enable the aggregate of the votes of the non-executive directors to constitute a majority;

(c) persons who are appointed to be non-executive directors of IRSA shall be so far as is reasonably practicable persons who collectively have appropriate practical experience in relation to the functions of IRSA including experience of the business of any one or more of passenger train operation, freight train operation, rolling stock leasing, rolling stock manufacturing, infrastructure maintenance and repair and other relevant railway activities of stakeholders and persons having extensive current experience of the management of safety;

(d) the person appointed to be chairman of IRSA and four other non-executive directors shall have extensive current knowledge or experience of the management of safety and, unless otherwise agreed by the Regulator after consultation with the Health and Safety Executive, shall not have within two years prior to the date of appointment as chairman or non-executive director, as the case may be, been an employee of any member of Railtrack Group, holder of a licence granted under section 8 of the Act, franchisee or franchise operator (as those terms are defined in section 23 of the Act), rolling stock leasing company, rolling stock manufacturer or railway infrastructure maintenance or repair company carrying on business in Great Britain or providing goods for use on the licence holder's network;

(e) the person appointed to be chief executive of IRSA shall have extensive current experience of the management of safety and current knowledge of the operation of railways and shall not, for such period as he shall be chief executive, be a director of the licence holder or of the holding company;

(f) each non-executive director shall be appointed as director for a fixed term not exceeding 3 years but shall be capable of being reappointed and three of the non-executive directors shall be representative of the railway industry; and

(g) the arrangements for the taking of decisions at the board of IRSA shall be such as to avoid or neutralise conflicts, or potential conflicts, of interests.

**Agreement with IRSA**

6. The licence holder shall:

(a) procure that before IRSA starts to carry out any functions, IRSA and the holding company enter into a legally binding agreement ("the agreement"), approved by the Regulator, with the licence holder, respectively to comply and secure compliance by IRSA with paragraphs 7-13 of this Condition;

(b) promptly notify the Regulator of any breach of any obligation under the agreement;

(c) not waive any right of the licence holder under the agreement without and in accordance with any conditions contained in the prior written consent of the Regulator; and

(d) enforce the obligations of IRSA and the holding company under the agreement whenever required, or whenever so directed by the Regulator by notice, and in accordance with the terms of the direction.

**Railway Group Standards Code**

7. IRSA shall :

(a) exercise the rights and perform the functions which were, before the effective date, exercised and performed by the Safety and Standards Directorate under the Railway Group Standards Code so far as comprising the Independent Railway Safety Activity;

(b) cause the Railway Group Standards Code to be amended to reflect the effect of sub-paragraph (a);

(c) comply with the provisions of that code as revised from time to time with the approval of the Regulator; and

(d) from time to time or when so directed by the Regulator and in consultation with bodies which are representative of stakeholders review the provisions of that code and its implementation and propose for the approval of the Regulator any revision thereto which may be necessary or appropriate having regard to the provisions of paragraph 8.

**Purposes**

8. The Railway Group Standards Code shall be a code whose purpose is to establish standards (and the procedures for modifying those standards) compliance with which will contribute significantly to the safe operation of the licence holder's network and the safe operation and interworking of railway assets used or to be used on or in connection with the licence holder's network ("the Purpose") having due regard to the need:

(a) to promote the use and development of the licence holder's network;

(b) to promote efficiency and economy on the part of the licence holder and other persons providing services relating to railways on or in connection with the licence holder's network;

(c) to promote competition in the provision of such services for the benefit of users of railway services;

(d) to impose on the licence holder and other persons providing such services restrictions which are proportionate to the achievement of the Purpose; and

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

**Contents**

9. The Railway Group Standards Code shall be a code approved by the Regulator which shall:

(a) authorise the Railway Group Standards in force from time to time;

(b) establish a set of procedures for the grant or refusal of relevant authorisations which:

(i) provide for a fair and balanced representation and participation in such procedures by experienced and competent persons from all classes of stakeholders likely to be materially affected;

(ii) provide for proposals for relevant authorisations to be fully and fairly considered (other than any which are trivial or vexatious), and for full and proper consultation with the Health and Safety Executive;

(iii) provide an accelerated procedure for the grant of relevant authorisations in specified circumstances;

(iv) provide for the recovery of a fair proportion of the costs of any determination whether or not to grant a relevant authorisation from any stakeholder which has proposed such authorisation, whether or not the proposal in question shall have been successful; and

(v) provide for any stakeholder aggrieved in any material respect by a decision of IRSA to have the matter reconsidered by the board of directors of IRSA and thereafter, if dissatisfied with the results of such reconsideration, to have the matter referred to the Regulator for determination after consultation with the Health and Safety Executive;

(c) require IRSA, where there are reasonable grounds for considering that a relevant authorisation is necessary or expedient, to propose such action and pursue it in accordance with the procedures referred to in sub-paragraph (b); and

(d) provide that the Railway Group Standards Code issued by the licence holder and in force prior to the modification of this Condition shall have effect for the purpose of this Condition until approved (whether or not after amendment) by the Regulator.

**Publication**

10. IRSA shall:

(a) publish the Railway Group Standards Code and any modifications thereto in such form or manner and with such frequency as the Regulator may require;

(b) provide a copy of the Railway Group Standards Code and any modification thereto to every licence holder, the Franchising Director, the Health and Safety Executive and the Regulator;

(c) publish a catalogue of current Railway Group Standards; and

(d) provide a copy of the Railway Group Standards Code and any Railway Group Standard or proposed Railway Group Standard and of the catalogue referred to in sub-paragraph (c) to any person requesting a copy. IRSA may charge for the provision of copies under this sub-paragraph provided that such charge shall not exceed an amount which in the opinion of the Regulator is reasonable.

**Assistance for stakeholders**

11. IRSA shall establish, maintain and operate such procedures as shall be sufficient to ensure that any stakeholder which has applied to IRSA for the purposes of this paragraph shall be provided with such information, advice and assistance (excluding training) as may reasonably be required to determine the application of any Railway Group Standard to that stakeholder or to railway assets of which it is or proposes to be the operator or which it provides or proposes to provide for use on or in connection with the licence holder's network. IRSA may charge a fee for any such information, advice or assistance. Any such fee shall not exceed an amount which, in the opinion of the Regulator, is reasonable.

**Annual report**

12. IRSA shall, as soon as practicable after the end of each period of 12 months ending on 31 March, make to the Regulator and the Health and Safety Executive and publish a report on its activities in respect of the Independent Railway Safety Activity during that period, including a general survey of developments during that period in relation to safety on and in connection with the operation of the licence holder's network and the stations and depots served by that network.

**Information**

13. IRSA shall provide to the Regulator such information relating to its activities in respect of the Independent Railway Safety Activity as the Regulator may reasonably require for the purpose of carrying out any of his functions under Part 1 of the Act other than any information:

    (a) for any purpose referred to in section 58 of the Act which it could not be compelled to provide under that section; or

    (b) which it could not be compelled to produce or to give in evidence in civil proceedings in any court.

**Records of compliance**

14. The licence holder shall maintain such records concerning compliance with its obligations under this Condition as the Regulator may require.

**Railway Group Standards**

15. The licence holder shall comply with such Railway Group Standards or parts of such standards which are applicable to licensed activities.

**Interpretation**

16. In this Condition:

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| all employee share scheme | means any Inland Revenue approved employee share scheme established by a company under which it is a condition of such approval that participation is offered generally to all employees of the company and its participating subsidiaries or to all such employees fulfilling conditions as to length of service; |
| benefit | includes any payment, profit, gain or advantage however expressed, established, given or made; |
| disqualifying interest | means an interest in any benefit which concerns or is determined by reference to the commercial activities or affairs of any person engaged in or likely to be engaged in the provision of services relating to railways but shall not include an entitlement to participate in an all employee share scheme established by any such person; |
| effective date | means 1 January 2001, or such other date as agreed with the Regulator; |

| | |
|---|---|
| interest | in relation to a benefit, includes the possession, receipt or expectation of or entitlement to an interest; |
| member of the Railtrack Group | has the meaning given in Condition 11; |
| Railway Group Standards | means:<br><br>(i) technical standards with which railway assets or equipment used on or as part of railway assets must conform; and<br><br>(ii) operating procedures with which the operators of railway assets must comply; |
| relevant authorisation | means authorisation of a new Railway Group Standard or the modification or abolition of an existing Railway Group Standard; |
| relevant employee | in relation to IRSA means:<br><br>(a) every director of the company and every other person who has decisive authority in respect of any aspect of IRSA's activities (whether or not an employee of IRSA); and<br><br>(b) the spouse, partner and dependent children of any such person; |
| relevant infrastructure controller | has the meaning given by the Railways (Safety Case) Regulations 2000; |
| relevant statutory provisions | has the meaning given by Part I of the Health and Safety at Work etc Act 1974; |

| | |
|---|---|
| safety case | has the meaning given by the Railways (Safety Case) Regulations 2000; |
| services relating to railways | has the meaning given by clause 241 of the Transport Bill as amended in Committee (on re-commitment) in the House of Lords; |
| stakeholder | means:<br>(i) any person having a safety case in respect of which the licence holder is the relevant infrastructure controller;<br>(ii) any funder (having the meaning given in Condition 7 of this licence); and<br>(iii) any person whose business activities or any goods which he manufactures must comply with Railway Group Standards; and |
| subsidiary | has the meaning given to it in section 736 of the Companies Act 1985. |

# Annex C: Responses to consultation

Responses to *Proposed Modifications to Condition 3 of Railtrack's Network Licence and to Other Operator Licences: A Consultation Document*, Office of the Rail Regulator, London, June 2000. These have been placed in the on the ORR website[8] and in the ORR Library.

Railtrack

*Passenger train operators, their owners and representatives*

Association of Train Operating Companies
Central Trains
Connex
FirstGroup
Gatwick Express
GNER
Merseyrail Electrics
Midland Mainline
Northern Spirit
Thameslink (on behalf of Thameslink & Thames Trains)
Virgin Trains
WAGN

*Freight operators*

Freightliner

*Passenger Transport Executives*

Merseytravel
SPT

*Depot operators*

Maintrain

[8] Some respondents sent the Regulator a copy of their Statement of Case to the Ladbroke Grove Rail Inquiry. These submissions have been placed in the ORR Library only, and not on the ORR website.

*Rolling stock manufacturers, leasing companies and rail industry suppliers*

ADtranz
Balfour Beatty
Railway Industry Association

*Rail Unions*

ASLEF (on behalf of ASLEF, RMT & TSSA)

*Other parties*

Collins Solicitors
Confederation of Passenger Transport UK
London Underground Ltd
Lloyds Register
RITC Ltd