



Select Committee on the European Union

Internal Market Sub-Committee

Corrected oral evidence: Future UK-EU transport arrangements

Thursday 11 October 2018

10.45 am

Watch the meeting

Members present: Lord Whitty (Chairman); Lord Aberdare; Baroness Donaghy; Lord German; Lord Lansley; Lord Liddle; Baroness Randerson; Lord Rees of Ludlow; Lord Robathan; Lord Wigley.

Evidence Session No. 2

Heard in Public

Questions 9 - 20

Witnesses

I: Mr Damian Testa, Senior Policy Manager, Rail Industry Association; Mr Chris Jackson, Head of Transport Group, Burges Salmon; Mr John Thomas, Director of Policy, Rail Delivery Group.

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Examination of witnesses

Mr Damian Testa, Mr Chris Jackson and Mr John Thomas.

Q9 **The Chairman:** Welcome and good morning. As you know, we are conducting an inquiry into the possible implications of Brexit for various outcomes on transport. We have done a brief report on aviation. We are concentrating on surface transport in this study, and today we are looking at rail.

I remind you that this is a public session broadcast on the parliamentary website. A record will be taken. You will have a chance to correct that record, but you should recognise that this is a public session. Before we start the questions, could you introduce yourselves briefly?

Mr Damian Testa: I am the Senior Policy Manager at the Railway Industry Association, and I hold the policy lead on Brexit.

Mr John Thomas: I am Director of Policy for the Rail Delivery Group.

Mr Chris Jackson: I am head of the transport sector at the law firm Burges Salmon. We have been involved in rail for the past 30 years or so.

Q10 **The Chairman:** Thank you very much. I will open with a general question to all of you. You do not all have to answer every question, but you will probably all wish to answer this one. It is about the relationship from your perspective between the rail industry and the Department for Transport in discussing preparations for Brexit and various outcomes, including currently the exercise on no deal. How well do you think the department has engaged? How well has it listened? Are you now clear as to what is likely to happen as far as the rail sector is concerned? It is really about relations with the DfT.

Mr John Thomas: Through the Rail Delivery Group, we have had extensive engagement with the Department for Transport in particular, and to some extent with DExEU, at both working level and more senior level. Over the last two years, we have been working with the DfT team, providing it with information and advice on the issues we expect to arise, and the risks that need to be mitigated as a result of Brexit.

We have had very strong engagement with the team at DfT; it has been very receptive and has wanted to listen to the industry and get information from it. We have been very pleased with that. For example, we provided it with options for bilateral agreements, looking in particular at the Swiss Land Transport Agreement and what we might be able to take from it for the bilateral agreements. We have been advising on issues around not just the passenger services that go through the tunnel but freight and some of the potential risks in relation to freight. The team has been very receptive to a whole series of issues.

Because of the sensitive nature of the Brexit negotiations, we are not clear about how far the DfT has got in negotiations with France, the Netherlands and Belgium, for example, on the bilateral agreements. Although we provided advice about the legislation that we think needs to

be covered by the statutory instruments, we have not yet seen drafts of them. We think it would be beneficial to the department if we did, because we could provide an overview and a review of the draft statutory instruments before they are published.

In summary, we would like the department to be a bit more open about where it is in relation to negotiations and the development of the statutory instruments, but overall we are very encouraged by the fact that it has wanted to engage with us throughout the process.

Mr Damian Testa: At RIA, we have had strong engagement with the department as well. It has a number of talented people and they value our input. I echo what John said. For my members, it is really about the lack of specificity of detail in how they would go about planning for managing Brexit. Clearly, it is a very complex area. I think the DfT would find it easier if it had more resource and capacity, because of the sheer volume of legislation. In addition, parts of the decisions that affect transport are cross-government, particularly around trade and standards, and that is some of the detail we are missing.

The complication for my members is that transport is part of the discussion on the future relationship rather than purely the withdrawal deal. A business might have more detail in some areas, particularly around goods, given the Chequers proposal. There is still a degree of uncertainty about services, but we continue to engage with the DfT and it continues to welcome our views. We are now not far from the date when the UK is due to leave, and we need more detail for our businesses to be able to plan for that. We have given the DfT a lot of information on supply chain impacts, what we would like to see around the trade regime and the importance for rail to have access to what we call an appropriately skilled workforce. Our workforce is at all skill levels; it is not at one end or the other, which seems to be the direction of travel certainly of the Migration Advisory Committee recommendations.

To give a bit more detail, in the rail sector nationally, 20% of the workforce comes from the wider EU, but if you draw a line at Derby, south of that line almost half of the rail supply industry workforce is from the wider EU. No one is suggesting that overnight we will lose that many workers, but, as projects or programmes conclude, we anticipate that a number of those workers will return home. In our sector, most of those workers are at lower-skill levels, levels 2 and 3, so there is concern about recruitment, the perception of the UK as a good place to come and work, and how welcome wider EU workers will be.

Mr Chris Jackson: I defer largely to these gentlemen on the specific question. We work with a number of clients who are very directly affected by these issues, and they tend to have the direct discussions with the department. My understanding from that is really in line with what the gentlemen to my left have just said.

The Chairman: There are one or two things I will come back to, but before I do that Lord Wigley will ask a question.

Lord Wigley: The question was asked in the context of your relationships with the Department for Transport. Of course, rail transport is partly devolved in Wales and Scotland. Northern Ireland has its own dimensions. To what extent have you been engaged with the devolved authorities in Wales, Scotland and Northern Ireland?

Mr Damian Testa: At RIA, we represent the whole of the UK. We represent the views of all members. We are looking not just at distinct geographic areas but at the broader business impacts. We have had a number of regional engagement events in Scotland and around the country, and shortly we will be doing one in Wales, so we are collecting a very broad range of views on the impact across the country.

Lord Wigley: I take that on board, but have you had any interface with the transport departments of the Welsh or Scottish Governments?

Mr Damian Testa: We have had some interface with both the Welsh and Scottish Governments, but our main interface continues to be the Department for Transport, as you would understand.

Mr Chris Jackson: As a firm we do, but on different things. My partner Brioney Thomas, who was originally going to give evidence, is doing a large transaction for the Welsh Government today and sends her apologies. Clearly, Scotland and Wales do not have a land border, so the immediate impacts are wrapped up with the approach to what the legislative settlement will be on the wider market on standards and so on. The Ireland-Northern Ireland border is clearly distinct, and a lot of thinking about that is going on. I am slightly constrained by how much detail we can go into, but there is a lot of thinking going into that; maybe we can return to it in later questions. The degree to which one needs to engage is different depending on whether or not there is a land border.

Lord Wigley: In Holyhead, in particular, the interface between the port and the railway facility is a relevant one.

Mr John Thomas: Yes. Similarly, at RDG, as you would expect, we engage with the devolved authorities on a whole range of different issues, but our central point of contact has been primarily with the DfT.

The Chairman: The point I want to return to is about the extraordinary figure of 50% of your personnel south of Derby. In the NHS, we have heard about people leaving and applications for new posts being down. Has the rail industry suffered anything similar, or is it all fine at the moment?

Mr Damian Testa: As I mentioned earlier, we are not expecting an exodus overnight come the day the UK leaves. As an industry, we have some time to plan for and manage that situation. There is more investment in skills and apprenticeships. We are working very closely with the National Skills Academy for Rail, which is generating new apprenticeship courses to fill that gap.

We will still need access to a wider workforce. My members have certainly expressed concern about losing staff. If they are key staff, it will be difficult to replace them. It is supply and demand; when there is less supply, the chances are that we will see wage inflation, which hits our competitiveness.

The Chairman: As with certain other industries, the fact that you have to employ that level of workers suggests a lack of investment in skills in the UK workforce over the years in an industry that historically used to be a big provider of skilled labour. I would guess that you will have to adjust your training and development programmes.

Mr John Thomas: There is now significant investment in upskilling the workforce. I mentioned the new recruits that we need in the industry. We are projecting 20,000 new apprenticeships over the next few years, for example, so that will help to fill the gap, but there will be a gap for a period of time when we will still need access to a skilled workforce from overseas.

Mr Chris Jackson: There has been a surge in the level of infrastructure investment. It is not a legal issue, but my understanding from the industry is that, as the supply has been increasing and the skills have been building up, equally the scale of projects and the level of resource needed has been increasing at the same time.

Q11 **Lord Robathan:** There is a somewhat confused situation regarding Brexit. I think we can all agree about that. There is the distinct possibility of no deal, but let us leave that to one side. However, it would have obvious implications for you. The Government say that they are already seeking to negotiate bilateral agreements with our neighbours in France, Belgium, Ireland and the Netherlands, and that we will continue to co-operate with our European partners as it is everyone's interests that we do so. Eurostar, which is pretty involved, said that it believes that in all the respective Governments there is a collective will to conclude discussions. It seems to me to come down to will to a certain extent. What are the key implications for your members of no deal in the rail sector, and how are they preparing for the possibility of no deal?

Mr Chris Jackson: In this case, for us they are clients rather than members.

Lord Robathan: Fair enough, but you know what I mean.

Mr Chris Jackson: I can probably break it up into a number of different categories. Domestic freight will be affected primarily by the impacts on the economy because it will be about volumes. International rail bodies will obviously require some form of cross-border bilateral agreement. There is a mechanism for that to occur. Article 14 of directive 2012/34 contemplates that and is specifically designed for that purpose. There is a slight discussion as to the boundaries, but there is a mechanism if the will is there.

For Eurostar, there is some form of recognition. The will is there, as you have said, so it is just a question of finding the mechanism. We start with systems with convergent and consistent standards, so it is not a normal bilateral situation, such as Russian entry where there are completely different standards. We start from a position where they are the same. The will is believed to be there, and the mechanisms are there, so it is a question of working through the detail and the regulatory intent.

Translink has the common travel area, which predates all the European rail legislation and is wider than, and not synonymous with, the rail issues, but gives a basis to work with. Again, it is a question of will, and, if you want, you can put in place the bilateral.

If there is no deal, domestically one could, as a matter of principle, diverge from standards afterwards. We will come to what the implications of that might be and where it might or might not be sensible to diverge, but in principle one could. As for the specifics, this is probably the point at which I should hand over to my colleagues.

Mr John Thomas: The key is the bilateral agreement, even in the event of no deal. As I said earlier, we provided the DfT with heads of terms, or the sorts of things that a bilateral agreement would need to cover—for example, continuing adherence to TSIs, allowing for smooth cross-border traffic, and cross-acceptance of operator licences, safety certificates, driver licences, rolling stock and those sorts of things. I think there is the will to get an agreement to make sure that those services continue to run on day one after Brexit. We just need to make sure that we have addressed all the issues that need to be addressed in order to do that. For example, such things as validity of insurance would need to be addressed.

A freight-related issue that is not clear to us at the moment is that, even if there is a bilateral agreement that covers driver licensing, cross-acceptance of rolling stock, et cetera, what happens when those freight services go beyond France and Belgium and into Germany and Spain, for example? What happens to the certification of wagons that presumably have been certified in the UK? We are not clear on that specific issue. We are satisfied on driver licensing and suchlike; freight operators change drivers and locos in France anyway, and they would therefore be certified to go beyond France, Belgium and Holland. It is about the wagons. We are working through that at the moment with the department.

Mr Damian Testa: RIA has related but separate issues. First, in a no-deal scenario, clearly UK-EU trade will be impacted if we enter a regime where we have both border checks and tariffs that did not apply before. Our members are multinationals and SMEs. A multinational with an office in the EU and in the UK clearly has more resource with which to manage that situation. For SMEs, it will be very hard to get to grips with a new administrative system to import and export when hitherto they have never had to do that, so there is concern about that.

There is concern about the impact of tariffs on competitiveness. We still have insufficient detail about what the regime is going to be. Everyone is working on the assumption that it will be the WTO most favoured nation tariffs. That is an issue. We have the immediate issue of standards. On 29 March next year, as a member state, we will work to European technical standards for interoperability. Come 30 March, the EU will not recognise the standards in the UK because they will not be called TSIs.

There is a further complication. The current approach of the Department for Transport is to transpose those standards into UK law, but it will have to name them differently. For argument's sake, let us call them UK technical standards. Although the content would mirror the EU standard, there will not be mutual recognition between the standards on day one. There will be legal and regulatory implications for EU-based businesses in the UK. There will be export-import implications around the standards. There is a lot of uncertainty about what the immediate impact will be.

On the plus side for the DfT, as part of the Government's overall approach, it is issuing no-deal technical notices to help businesses prepare. We understand that the rail notices are to be published imminently. Although they will provide a level of detail, it remains to be seen whether that will enable us to plan how it is going to happen. On 29 March, everything would appear to be okay, but on 30 March, the additional complication, which will affect members of the Rail Delivery Group, is that in the current system we have approved notification bodies in the UK that certify products for approval for sale on the EU market. In a no-deal scenario on 30 March, those certifications will no longer be valid.

Lord Robathan: Mr Testa, what you are saying is that this is all about freight and tariffs, essentially.

Mr Damian Testa: I am not saying it is all about freight. I am talking about components, subcomponents, rolling stock and other equipment.

Lord Robathan: Are you saying that on 29 March rolling stock will be waved through because it has the standards—the TSIs you talked about—of the European Union, but on 30 March they will say it is not up to scratch?

Mr Damian Testa: We do not have the level of detail to know that.

Lord Robathan: This is a question of good will, is it not? For instance, take Eurostar. Is Eurostar French owned?

Mr Chris Jackson: It is majority French owned.

Lord Robathan: Are the French going to say, "Sorry, you can't come through", because the standard of the rolling stock is exactly the same the day afterwards?

Mr Damian Testa: With due respect, as the supply chain we are not so close to that.

Lord Robathan: You are talking about freight.

Mr Chris Jackson: I do not want to cut across Mr Testa, but my understanding is that there are two different situations. One is the actual trains flowing, which requires a bilateral in relation to recognition. It is not about things that are already manufactured. A UK exporter of rolling stock components, with an integrated supply chain, has a harmonised certification system at the moment. For that to continue after 30 March will require mutual recognition of certification in the UK. Although you are still doing exactly the same thing with the same piece of kit to the same standards, the actual thing that joins that mutual certification together is different. Can you then put whatever the particular component is into a unified thing with parts that are coming from France, Germany or wherever it happens to be? There are two different things to be distinguished.

Mr Damian Testa: Without mutual recognition, a UK supplier would need to get that notification from an approved body based in the EU 27. There will be challenges to the supply chain as a result.

Baroness Randerson: Mr Testa, you have been explaining in excellent detail the issues connected with the manufacturing side of the industry. It is not just the issue of rolling stock going from one country to another, but the value of the manufacturing side of the industry to our economy. The aerospace sector has the same issues that you have been discussing. It has been very public about them and they have been discussed on numerous occasions. Do you make common cause with the aerospace sector, because it is exactly the same issue of certification as far as I understand? Am I right in that understanding?

You mentioned earlier that the Government had not yet published their no-deal technical note. Are you surprised by that? I was led to believe that it would be published in the last batch and then it did not appear. Is that a sign that there are issues and problems, or do you think that the schedule of publication is what the Government always intended it to be?

Mr Damian Testa: It is difficult for me to comment on that because the Government decide when they will publish those notices. We know that the department has been working on them. They are published when they are published. We have regular engagement with the DfT, so when they are published we do not expect any surprises as such.

Thank you for your excellent question on aviation. The government White Paper says explicitly that the Government are looking to have an ongoing relationship with only three European Union agencies post Brexit. As you rightly say, one is aviation; the others are chemicals and medicine. Our view at RIA is that the UK needs to continue to have a relationship with the European Union Agency for Railways. That is our prime position. That is because, as we currently align with or implement the technical standards for interoperability, we see many benefits for the UK industry in that respect. Because all those products are compatible within the EU,

we can export our products without modification, and that supports efficiencies of scale and competitiveness.

In the White Paper, there is variance in the treatment being proposed for modes of transport. Aviation probably will not see a huge amount of change from the current situation. For rail, the critical things we would like to see but which are not there at the moment are a relationship with the European Union Agency for Railways and reciprocal market access. Even roads have reciprocal market access, and it is not entirely clear why rail is different from those other modes.

The Chairman: No doubt we will come back to some of these things.

Q12 **Lord Lansley:** We have just been talking about circumstances in which there is no deal, but let us move on and say that there is a deal and a withdrawal agreement is in place. As I understand it, and no doubt you will be right across all of this, under the withdrawal agreement, in so far as there is an implementation or transition period, it is sometimes regarded as the status quo continuing for a period of time, but that is not the case; it is a period during which there is transition from full membership of the EU to whatever the future relationship looks like.

In your context, the Department for Transport said in its evidence to us: "Given that the UK's railway is largely domestic, we will not be seeking a future relationship with the EU on rail". Certain qualifications and issues arise from that, but in that context the implication is that transition is not a cliff edge, but it is definitely a sliding slope, and some of the things you are describing, even under a withdrawal agreement, would continue to apply; for example, certification by a notified body might be withdrawn on day one anyway, regardless of whether there is a deal or no deal. How do you collectively feel about the future relationship? Do you think there should be such a future relationship, and what do you think is necessary for that?

Mr Damian Testa: Our understanding of the transition period is that existing EU legislation will continue to operate throughout that period. It is being badged as no change during that period, so in essence it would provide time to negotiate the future relationship. As to how that comes out, none of us has a crystal ball.

Lord Lansley: In so far as there are, for example, notified bodies in the United Kingdom, and let us say the transition period runs to the end of 2020, your expectation is that the EU 27 would continue to accept certifications from within the United Kingdom throughout that period.

Mr Damian Testa: That is the expectation, because EU legislation would continue to apply.

Lord Lansley: I am not sure that is necessarily people's expectation in other sectors, but perhaps we will pursue that with the department.

Mr John Thomas: RDG members have been clear that continuing the formal relationship with the Agency would be very important in any

event. We start from the strong presumption that, even when we are outside the EU, we will continue to comply with the Technical Specifications for Interoperability. That is not just important for cross-channel services; it is important for the supply chain, for economies of scale and for cost-efficiency in the industry.

Our position as an industry is that there would have to be a very strong business case—a whole system and whole life business case—to move away from Technical Specifications for Interoperability. That being the case, if we then have virtually no influence in the development of future TSIs, we do not think that is advantageous. Having a strong formal relationship with the Agency on that issue alone would be very advantageous for us as a country and an industry. The Government have been clear that there will be limited continuation of membership of agencies, and the European Union Agency for Railways will not be one of them, so we will need to find other ways of influencing indirectly TSIs and other issues that it deals with.

Mr Chris Jackson: Interoperability obviously has two different purposes. One is the physical running, and the second, as Mr Thomas was saying, is the effectiveness of the market and the competitiveness of businesses of whatever nationality operating in the market. The extent to which one can diverge from those standards has to be looked at very carefully because, other than at a very localised level where there might be a solution that will neither affect the physical operation of services nor have wider economic effects, there will still need to be a grouping with one of the recognised global blocks of standards, of which realistically TSIs are the dominant ones.

Relationships vary from the very loose to the very integrated, so you can calibrate them according to policy. That is a policy decision rather than a legal one. Under the agreement with Switzerland, it was anticipated that it would continue to participate, even though it is not a member state. That has hit a bit of a hiatus because of the Swiss referendum, but it was certainly contemplated within their own multilateral agreement that the Swiss would be part of that for the reasons we have just been discussing. I think they are having a policy review on that. Norway obviously is an active member and pays to do that, but it does not get a vote. You are in the situation Mr Thomas was talking about, where standards emerge through an iterative process, and you would be in those standards, but ultimately you would not have a vote or control over the impacts.

Lord Lansley: If I read the Department for Transport's evidence to us correctly, it implies that it does not think a future relationship in relation to the rail industry is necessary, and it appears to think that is the case because the EU Commission has accepted that it will backfill what is required through international agreements, which we will talk about in the context of COTIF, and through the operation of bilateral agreements with France, Belgium, the Netherlands and the Republic of Ireland.

Do you think the department is right about that? Can it backfill what is required, and does the Swiss agreement, or the Russian agreement with

Poland or Finland, give us sufficient confidence to feel that those bilateral agreements and the international context for standards is enough to meet the need?

Mr Damian Testa: There are other issues that build on what my colleagues have said about exports, because increasingly global trade is underpinned by European technical standards for interoperability. If the UK does not follow those in the future, there will be a potential impact on UK global trade at a time when the UK is seeking an independent trade policy and to negotiate free trade agreements in key markets around the world.

There are other standards bodies with which we can have a relationship, but naturally having a seat at the table at the European Union Agency for Railways is the best way to do that. On divergence, if we do not have a relationship with the EU rail agency and there comes a point when we decide to take a slightly different approach from one of the EU standards, there is a risk that, if the UK creates something bespoke, a two-tier market will start to emerge, so that products are solely for the UK rather than having wider applicability. That could have a number of implications for businesses in the UK looking to supply the EU.

A further point is that the UK is currently implementing a 20-year programme to roll out European standard digital in-cab signalling. It is called digital railway. Much of the equipment will be built in the UK, and if we do not continue to use those standards or if we diverge from them, there is a risk that those products will be built elsewhere.

Lord Lansley: Clearly, for the Swiss, rail interoperability is even more important than it will be for us. Does it present a good parallel for us?

Mr Chris Jackson: In that it sets a precedent that there can be bilateral and multilateral agreements, it is useful. With all of these, it is important to separate two different things. One is the physical operation of the services, which bilateral agreements and article 14 would cover, so that people and trains can move from one place to another. That is, effectively, the first part of the purposes of interoperability. Separately, you move from the technical pillar to the market pillar, which is what sorts of efficiencies within the market you are trying to create. That is a separate issue, and I do not profess to know the details of the second—or indeed the first—under the Swiss model.

The Swiss model establishes the precedent. It is different in that it is an agreement with the EU rather than bilateral agreements between individual member states, which is the mechanism that article 14 contemplates. It is different on that level, but physically they are different because the Swiss sit at the heart of a number of different interactive bits of the network, so their physical operation requirements are different.

The second part, which is the operation of the market—the market pillar—is policy driven. To echo what Mr Testa was saying, there may be opportunities to diverge on standards if they are very localised and do

not create a wider economic imbalance. If you can put in a lighter bridge, for example, at lower cost that serves the same purpose and, therefore, you can put in more access to take out level crossings, but it does not have a wider market or operational impact, hypothetically that might be an opportunity, but one needs to be aware of unintended effects.

After the rail inquiries of the early 2000s, in which we were involved, there was a system called the Train Protection and Warning System (TPWS), which you are probably familiar with. That has been a very good and robust system, but because of the urgency for it to be fitted, rather than using what is called a Eurobalise as a building block that could then be upgraded to the digital railway, it was put in as a bespoke system. There were good reasons for putting it in as a bespoke system, but it is not migratable, so we created a UK-bespoke system that works very well but would create both operational and economic impacts if we took it further. It is always important to distinguish day-to-day operations from longer-term economic market impacts.

Mr John Thomas: Our concern would be if there was an assumption that there are huge benefits and cost savings to be had from diverging from European standards. We simply do not think that will be the case. There will be some specific isolated instances where we might be able to save cost without diminishing safety, but we believe there has to be a strong presumption that we continue to comply with the TSIs. There needs to be a strong process, which we are discussing with the industry and the Rail Safety and Standards Board, about the analysis we would need to do and the evidence we would need to generate from a whole industry perspective in order to move away from TSIs.

Lord Liddle: I hope I am not shunting us into a siding. I was very struck by the statement, "Given that the UK's railways are largely domestic, we will not be seeking a future relationship with the EU". That is a very absolutist statement and suggests a ministerial hand rather than that of a cautious and nuanced official. I wondered whether it was about Mr Grayling's present thoughts as to where to take the structure of the rail industry, with the desire to end the separation of track and operating companies and merge them. Do you think that in the ministerial mind EU framework directives are seen as an obstacle to moving in that direction?

Mr John Thomas: I cannot answer for Mr Grayling's thinking. I do not think he said specifically that he wants to bring track and train physically back together. He clearly, quite rightly, wants the railway industry to work much better as a system, and we need to collaborate much more effectively.

Lord Liddle: But do you think that part of the objection to the EU framework is the legal structure, which is what the British under Conservative and Labour Governments argued for, and that this separation is problematic in some way?

Mr Chris Jackson: I will take it on the legal level rather than the policy level. The main legal prohibition on amalgamating train and track is in

primary UK legislation that predates the relevant implementation of the UK package. It is in the Railways Act 1993, which is a British domestic statute. If there was to be a policy change, you would need to change primary legislation, which does not derive from the EU. You obviously have different things within the various packages—we are now up to the fourth railway package—and it is important to separate them.

Open access and the ability to access infrastructure are predicated on the philosophy that national monopoly providers are an obstacle to market liberalisation; that is the EU policy that underpins the separation. There are, however, a whole number of variants in the way it is operated. The original Commission vision was for a much more vertically separated structure, but that has been amended down in the fourth package. You quite often see infrastructure managers that are separated in governance terms but not necessarily in ownership terms from the big national providers. Within the boundaries of EU law, if you look at the French and German models and some others, you see things that are quite close together and are still compliant with EU law.

One can have a view on how far you need to go between national monopoly in the British Rail sense at one end and a fully disaggregated railway at the other. That is a policy decision, but it is not an absolute separation in the EU. It is currently an absolute separation in British domestic legislation, and that is different from interoperability.

The Chairman: We may come back to some of these issues.

Q13 Baroness Donaghy: Lord Lansley provided a useful trailer about COTIF. Several pieces of written evidence to our inquiry suggest that the International Convention concerning Carriage by Rail could be used to support post-Brexit UK-EU travel. How useful do you think COTIF would be in supporting future travel arrangements, and what limitations, if any, do you think it has?

Mr Chris Jackson: I would not pretend to be an expert on COTIF, because, by definition, close knowledge of its fairly involved schedules has not needed to be an area of expertise. Having looked at it a lot more closely over recent months, I think the underlying point is that it is useful and it facilitates access because it provides for convergence between railway standards not only within the EU but more widely. What it does not give is a right to operate. That is dealt with through bilaterals. Once you have a right to operate, it can facilitate the way you operate and convergence of standards, which is generally helpful. It is not of itself a silver bullet, but its content is very useful.

Mr John Thomas: It would not cover mutual recognition of train driver licences, for example. We would still have to go through a process of agreeing those sorts of things anyway, but there may be some things in COTIF that could backfill some of the gaps. I mentioned earlier the use of wagons in third countries. There may be things in COTIF on contracts for use of vehicles. We do not yet have the level of expertise we need, because we have not had to rely on it, but we are in discussion with OTIF

about the framework and, given the situation we will be in, where it sees things in the COTIF arrangements that would be helpful to us in filling some of the gaps that might exist.

Mr Damian Testa: We do not have expertise in this area, either; we see it as primarily an operator issue.

Q14 **Baroness Randerson:** A few moments ago, you touched on the EU rules on the shape of the railways, if I can put it that way. There has been a very active debate in Britain about the level of foreign ownership of franchises, and the foreign supply of rolling stock from the EU. Do you think that will be a significant issue in future, once we leave the EU? Do you anticipate that situation changing at all, as a result of leaving the EU? To what extent are UK companies already bidding and present in EU markets, and will that be affected?

Mr John Thomas: We have welcomed the introduction of foreign companies in our market of. They enhance competition, and if we have more competition it brings greater innovation and suchlike. They also bring some of their expertise. For example, at c2c, Trenitalia has brought a huge amount of expertise in digital signalling. We should welcome that. Furthermore, the opportunities for market openings in the EU have allowed British companies to access those markets. For example, National Express and Go-Ahead in particular are operating franchise-type agreements in Germany. Equally, although rolling stock is supplied from EU companies to the UK, there are opportunities for UK companies to export to those other markets. It is a win-win situation.

We have heard nothing to make us believe that access to the UK market will be restricted for those companies—on bidding for franchises, for example. Of course, we hope that that is reciprocated in other markets. It is possible that some companies operating in some markets might have to set up subsidiary companies in those countries, but we are not absolutely clear on that yet. My colleagues might be able to say a bit more about that.

Mr Damian Testa: RIA has rolling stock members that are EU multinationals, which have manufacturing sites in the UK. That is good news for us, because a large part of the work goes down to the UK-based supply chain. We want that relationship sustained. Fundamentally, as with any market in rolling stock, if it is sufficiently buoyant you will get competition. In the same way, Hitachi provides rolling stock to the UK, and has a UK base here. We have heard nothing to suggest that any of those sites will not be there in future. Largely, that will depend on the shape of the market.

The Chairman: Is there an implication under EU procurement rules?

Mr Damian Testa: That is a very good point. We do not know yet what the future UK procurement regime will be. As a third country, under existing agreements, we would not be allowed any more than 50% of domestic content to bid into the EU. We do not know whether the UK will

apply the same requirement to the EU. We just do not know. As I mentioned earlier, as far as I am aware, that is part of the future relationship discussions. There is not enough certainty or detail to know how that will operate in future.

Mr Chris Jackson: I absolutely agree. It is a question about the procurement regime, rather than a rail-specific question. I absolutely agree with Mr Testa that it depends on the future relationship. The starting point under general procurement law would be the rollover of the existing regime and how the UK has implemented it. The TFEU principles apply to equality of treatment between entities within European member states, but in the UK we have applied those same principles more widely. If you are an entity from Hong Kong, Japan or Malaysia, you have the same equality of treatment. Whether that is the same in each member state depends on how it has been domestically implemented by each member state.

Under EU law, it is permissible to discriminate against third countries; that is the point. If you are a Japanese company bidding in some member states, it is perfectly permissible not to be given equality of treatment. It becomes a specific position. As at day one, globally, companies will continue to have equality of treatment in the UK, whether they are EU companies or companies from elsewhere, but there will not be an automatically reciprocal arrangement, which is why it ties into the future relationship.

There is something called the general procurement agreement under WTO rules, which you may have come across. We have been a signatory under EU membership, and there is an assumption that we will become one in our own right, although I believe that there are some complications tied up with the negotiations with the US as to whether we continue, which may affect the procurement position. All roads lead, effectively, to the future relationship discussion, but you could have asymmetry.

The Chairman: Some of that is covered by Bills going through Parliament at the moment.

Lord Lansley: The Government's White Paper says that they will sign up to the procurement agreement under the WTO rules.

Mr Chris Jackson: My understanding is that that is the firm intent, but I understood that there may be some wider discussion as to whether it is possible.

Q15 **Lord German:** I want to try to sum up some of the discussion that we have had already on the European Union Agency for Railways. If I have heard correctly everything that has been said, the UK Government's position is that they do not want a relationship with that Agency. Your view is that, of the three things that the Agency is responsible for, operability is the most crucial one to be dealt with, and that for the UK, following any ongoing change in standards or following the TSI route, it

will not be the same as mutual recognition. If you have a standard and you follow it, that does not mean that it will be recognised, unless there is some process for mutually recognising those standards.

The interoperability issue relates primarily to standards, but it can relate to the operation under the two pillars that Mr Jackson talked about—to wagons and so on. The Government's position seems to be that they want to operate bilateral arrangements for most of that, but you think that that will not be sufficient, because the bilateral relationships need to be extended beyond nearby countries.

If I have understood all that correctly as the position that you and the Government have described, what are the alternatives, or is there an alternative that will work that does not involve being at the table with the European Union Agency for Railways, even if that would mean having a place at the table that we would have to pay for without having a vote? That is the route the Government seem to be saying that they will not follow. What possible alternatives are there that will fit all the issues you have just raised, or is that the only solution?

Mr Damian Testa: For us, fundamentally, the position is that we need a relationship with the Agency. If that is not possible, we need mutual recognition of standards. As I mentioned earlier, on day one if we have the same language mirrored in the UK standard, we need recognition, and it needs to be deemed equivalent, formally, and then it will be much easier to manage the process. The concern would then be about when there is divergence from those standards. As John said, industry needs to play a large part in any discussions around a decision to diverge. There may be isolated cases where that happens.

Lord German: The European Agency will also create standards that change over time, so it will not just be the UK wishing to do things. The European Union will do things.

Mr Damian Testa: You are entirely correct. In those circumstances, as we mentioned earlier, there are other standards bodies that we can seek to influence, which could then represent a view to the Agency. Doubtless we will have relationships with what I would term friendly EU member states, where there might be sharing of minds on particular standards. The issue is whether they relate to and are relevant to the UK market.

The risk for the UK is that future TSIs are not relevant to the UK, which would create a challenge for the UK. As I mentioned earlier, if we start to see the emergence of a bespoke or two-tier market in the UK, it will have business impacts. If production lines move out of the UK or we find it much harder to export our products, there will be an impact on the competitiveness of the UK rail industry.

Mr John Thomas: It is about trying to find ways of indirect influence.

Lord German: What do you mean by indirect influence?

Mr John Thomas: We are a member of a European trade organisation, CER; RIA may also be a member. CER has a close relationship with the

Agency and influences it in the development of common standards, TSIs and suchlike. We will still be a member of that body, so we will have the ability to influence the position that it takes with the Agency.

Lord German: Does CER sit at the table?

Mr John Thomas: It does not sit at the table, but it has a close relationship with the Agency. That is the sort of thing I mean by indirect.

The Chairman: On potential divergence, we will take a question from Lord Rees.

Q16 **Lord Rees of Ludlow:** We have had some discussion of the issue, with Lord Lansley and others, but I would like to ask Mr Thomas about it especially. Your written evidence seemed to downplay the benefits and likelihood of much divergence, whereas you say in your paper that some of your members seem to think differently. We heard from Mr Jackson the example of safety standards for bridges, and so on, where there may be some cost saving and divergence. Can you clarify what you think the situation is going to be on divergence, to add footnotes to what we have heard already?

Mr John Thomas: To reiterate, we believe that there will be instances where divergence makes sense, from an economic cost point of view in particular. However, they will be fairly limited, so we think that there should be a strong presumption of convergence. So that we can assess, as an industry, whether divergence in certain situations will be beneficial from a whole industry perspective, we have been working with the industry and RSSB to develop a process, with the analysis that would need to be done to come to a view as to whether we should diverge. That is still in draft and for discussion, so there is not a huge amount I can say about the detail, but I can assure you that we are developing that process to make it very clear that divergence must be based on a whole system and whole life cost and not on benefits to an individual part of the industry, which could potentially have knock-on effects on the supply chain, for example.

Mr Chris Jackson: Mr Thomas and I come at it from the same point of view. It might be possible to look at it this way. The key word is "system". Both the economics of the system and the whole rail system, the train track and signalling and all the other parts of it, are a dynamic systems. Divergence when there are no wider system impacts, either at the economic or the operational level, may be possible, but it is likely to be highly localised. When a divergence starts to have a system impact, there can be an unintended effect.

I mentioned the TPWS example, and there are a number of other examples around radio systems. In the days before TSIs were introduced, the UK had a reputation for taking a standardised global system and adding a bell here and a whistle there—not literally. We added a twiddle and a tweak: "Wouldn't it be nice if we had this or that?" By the time you got to the final system, it was significantly more expensive and

significantly less functional. That was a concern that we heard through all the various statutory rail inquiries. I cannot comment on whether that was operationally correct, but the effect of something that seemed like a good idea at the time is sometimes not fully predictable in advance. Whether something has a wider system impact or merely has a localised benefit is a good acid test.

Mr Damian Testa: We echo John's views. The premise of the technical standard for interoperability is that it is the most effective and lowest cost method of carrying out the work. We hear commentary that standards are adding cost, but, if you scrape under the surface, you find that the TSI has not been implemented properly. It is not the TSI itself that is the issue.

Lord Rees of Ludlow: Do you think that massive European ownership of rail companies will be a constraint on the amount of divergence that some people might want in this country?

Mr Damian Testa: I am not sure that I can really comment on that. I reiterate that there would be a broad industry consultation around the benefit of divergence. Under the approach being proposed at the moment, the Department for Transport would have the final say on whether the UK would diverge or not.

Mr Chris Jackson: Just to circle back to an earlier question, my understanding from discussions with people at the European Agency for Rail is that Network Rail in particular has had very close direct involvement with the development of standards. Participation at the Agency is at a number of different levels. There is direct governmental involvement, which is one level of relationship, and, clearly, it would be a big policy decision to continue that. It is unusual for individual infrastructure managers or operators to participate directly; often it is done collectively. My understanding is that, historically at least, Network Rail has had a big voice in the standards being developed. Mr Thomas would be able to confirm that.

Mr John Thomas: Yes, it has been very influential. There are specific cases recognised in the EU because of our legacy systems—for example, structure gauges and suchlike—where it would simply not be cost-effective for us to comply with certain TSIs. We have the ability, as long as it is agreed at EU level, not to comply with certain TSIs. We have been very successful in arguing the case for those things.

Mr Damian Testa: If we end up in a no-deal scenario, on 30 March our expectation is that they would no longer be recognised, because we would no longer be a member state.

The Chairman: Let us move briefly from the technical to the structural.

Q17 **Lord Aberdare:** Again, this is something you have commented on already. The fourth railway package seems to be moving in a slightly more UK-like direction on separation of tracks and trains and a

competitive bidding system. One of our previous witnesses suggested that removing EU legislation from the UK would enable a return—or at least a trial—to having the same company providing tracks and trains. On the other hand, a research paper for the European Parliament suggested that it seemed unlikely that the UK would decide to remove the current separation. Mr Jackson commented on this earlier, but do you see this as an area where there might be some potential upsides from leaving the EU regime, or do you think that it is likely not to have much effect on the current structure in the UK?

Mr Damian Testa: At a very high level, my understanding is that the existing EU legislation will obviously be transposed come exit day, so that would still be in force. The UK has the most liberalised rail market in the EU, which is held up as an exemplar. This morning, we are expecting publication of the terms of reference for the Williams rail review, and we expect that to be part of the review of the structure of the railways. We anticipate that being looked at, and we will have to see what recommendations come out of the review.

Mr John Thomas: We welcome the Williams review. As an industry, we have been calling for a wide-ranging and independent review. We believe that there are changes that would make the railways deliver better for customers, both passengers and freight operators. As an industry, we are absolutely up for that review. Of course, we will have to see what its conclusions are and whether it would require primary legislation to make changes for them to happen. We do not want to pre-empt the outcome of the review, but we want to be heavily involved, inputting ideas from the industry and wider stakeholders. Let us not pre-empt the outcomes.

The Chairman: Could I raise a different dimension? To put it delicately, in certain circles some people see one of the benefits of Brexit as being that the fourth package would not constrain any move to renationalise British Rail. Is that your interpretation of what the removal of the constraints of the fourth package would allow?

Mr Chris Jackson: As I am occupying the lawyer seat, I am not going to express a policy view. I shall express, if I may, a legal view and will stay away from upsides, or not, or however we might put it.

As we were saying earlier, currently there is in UK domestic legislation an absolute prohibition on the reassembly of a vertically integrated national monopoly. One can have a policy view on whether in rail, aviation or any other utility or industry vertically integrated national monopolies are efficient or not, or have virtues or not, but the primary blocker at the moment is domestic legislation.

Beyond that, yes, absolutely there are constraints in the fourth package, which increased as they went through the first, second and third packages, but the point I sought to make earlier is that it is not a binary model. It is a fairly absolute prohibition in domestic legislation, but different models can be tried under European legislation. You are right: the EU legislation would not permit the creation of a vertically integrated

national monopoly, so something would have to give within that. If one wanted to create something more on the spectrum between a national monopoly at one end and fully liberalised at the other, there is some flexibility to do that in the EU model. What you want to do and what will come out of the franchising review then strays over into policy.

Mr John Thomas: On the policy point, our position is that we should not start from what the ownership structure should be. We should start from the other end, with what should be the arrangements within the industry, how we should work together effectively and what the structures should be to deliver better for customers. Then you can decide what type of ownership structure you want.

Lord Aberdare: There appears to be a fairly strong view among the public and customers that all is not ideal in the current structure, so that needs to be fed in somehow as well.

Mr John Thomas: Absolutely. We need to consult our customers, the workforce and the wider public, and I expect that Keith Williams and his team will do that.

Q18 **Lord Robathan:** Can I ask a brief question, although you may not know the answer? In the Railways Act 1993, we introduced privatisation of rail and the separation of track and rail services. Was that anything to do with an EU suggestion, or was it purely a domestic idea? Do you know? I voted on it, but I do not remember.

Lord Lansley: It was not required by the EU.

Mr John Thomas: We were a trailblazer.

Lord Robathan: The EU seems to have adopted our position. Is that right?

The Chairman: I think that is absolutely right.

Mr Chris Jackson: There was a symbiotic relationship between the two. The very first package rail directive in 1991 was a tentative first step towards liberalisation by vertical separation. All it required at the stage of the [1990¹] 1991 directive were separate accounts and some degree of separation. The 1993 Act effectively took that concept to where the fourth package is really just getting to, and a bit further. There has been a symbiosis between the two, because the UK liberalised faster and has experienced growth and, since the early 2000s, a much better safety record than some others. For example, the Cullen inquiry fed into the railway safety directive, and so on. There has been symbiosis.

Lord Robathan: That was a slight red herring, but I was quite interested. The EU has followed us, rather than vice versa.

¹ Note by witness: The proposals and draft directives were in play in 1990. The actual issued key directive on this point was however Directive 1991/440/EC within the First Rail Package.

Mr Chris Jackson: The UK and the EU were interacting with each other. The concept of vertical separation came from the 1991/440 first package directive, but we turbocharged it.

If we take the Swiss agreement as a precedent, it required that the Swiss signed up to market liberalisation and therefore separation. As regards solutions, the island of Ireland has different gauges and so on. The solution should logically be founded in the market pillar of what we are looking at in the fourth package. It is important to look separately at the technical aspects and the market and ask what the right solution is for the right place. It might not be a one-size-fits-all solution, because different markets have different needs, and what is suitable for Switzerland, with its close integration, might not be suitable for different bits of our market.

Lord Robathan: Sorry, I have taken this discussion off the track, so to speak.

Q19 **Lord Lansley:** Can we focus on the Channel Tunnel for a moment? We have written evidence from HS1, Eurostar and Getlink. If you have a particular view, do you have an understanding of whether there is a risk to the operation through the tunnel arising from a no-deal scenario? A French newspaper report said that some French Ministers were suggesting that there was such a risk. Is everything secure under the Treaty of Canterbury?

Mr Chris Jackson: The Treaty of Canterbury, the concession agreement and the rail usage contracts predate the European issues and provide a good basis. This comes back to earlier comments about the will and the mechanisms that are there. There will need to be some formal arrangement.

We are starting from an aligned position, with the same standards and the will of, seemingly, all involved, including the commercial organisations, that people and trains continue to move. In theory, yes, there is a risk, because you need something else to be in place that is not in place at the moment, but there is a mechanism to achieve that and, seemingly, the will to achieve it. The details will need to encompass driver licensing and so on, but for all that there are a number of mechanisms that could be used. It is probably something that will be resolved, and one hopes that it will be.

Mr John Thomas: I find it difficult to believe that the French would not want a bilateral agreement to ensure that cross-channel services keep running. Essentially, it would just be replicating the arrangements that we already have on driver licensing and cross-acceptance of rolling stock, along with arrangements for access, charging and suchlike. Those things happen already today, so it is just a matter of replicating them in a bilateral agreement. I find it difficult to believe that there would not be the will on both sides to do that.

Lord Lansley: HS1, in evidence to us, spoke positively about the market

opportunity for potential services, referring to London to Bordeaux, and London to Frankfurt and London to Geneva. In that context, HS1 said that it would be very helpful for the Government to broaden their view of the bilateral treaties that should be entered into. Do you have any sense that it is something the Government have taken on board?

Mr John Thomas: Our view is that it would have been beneficial for the agreements to be wider to allow for that sort of growth. The critical agreements that need to be put in place for day one are those to ensure that existing services keep running. That is the position the Government have taken; they will focus on the bilateral agreements with France, the Netherlands and Belgium. I guess there is nothing to stop future bilateral agreements being put in place to facilitate growth and traffic.

Lord Lansley: I have one more quick point, probably for Mr Testa. Getlink referred with approval to what you and your colleagues have been saying about implementing a railway customs area in railway or freight terminals across the country, rather than relying on its being close to Folkestone. Do you want to add anything to what Getlink said positively on that, or on where you stand in relation to it?

Mr Damian Testa: In fairness, that was a piece of work commissioned by my colleague sitting on my right, although we support it.

Lord Lansley: I beg your pardon. It refers to the RDG.

Mr John Thomas: That is right. The idea was to avoid congestion at the tunnel. We commissioned a piece of work on the possibility of having inland customs clearance areas. It is feasible, but we would need new infrastructure, systems, resource and personnel. Basically, we submitted those ideas to the Government, and that is where it sits at the moment. We are waiting for a response from the DfT, because it needs agreement. Even if it is a good idea, who will pay for all those things? Will it be the terminals themselves, and will it need some support from government? We are at that stage at the moment.

Lord Lansley: The project is not even defined, let alone proceeded with.

Mr John Thomas: No, not in detail.

The Chairman: Obviously, we will ask this question of the Secretary of State when he comes to us, but is it your impression that the reality is that at technical and official level we are fairly close to an agreement?

Mr John Thomas: I really do not know.

The Chairman: Okay.

Q20 **Baroness Donaghy:** The final question is on rail passenger rights, although over the last few months thousands of rail passengers would guess that they do not have many rights, given the service they did not enjoy. In general, what are the opportunities and challenges for rail passenger rights in future?

Mr John Thomas: Passenger rights in the UK in some respects go beyond the minimum requirements in EU legislation. An example would be delay repay, whereby operators pay compensation irrespective of the cause of the delay and who is responsible. I do not think that happens in other EU countries, and it is certainly not a requirement of the legislation. In many respects, we have been a bit of a trailblazer on passenger rights and influencing passenger rights legislation in Europe.

Mr Chris Jackson: My understanding is the same as Mr Thomas'. Effectively, the passenger rights regulation sets out a minimum standard, and then member states can go beyond that. I have not seen anything in policy or regulatory intent that would indicate that any pullback would be sought from the UK's current position, which is contractually and operationally some way beyond the minimum standard. It would be a policy decision. Reversing it would swim against the tide of where ORR regulation and government policy have been for a while.

The Chairman: Thank you very much. Is there anything you have not registered with us that you would wish to?

Mr Damian Testa: I reiterate that, fundamentally, my members are seeking more certainty and detail. March is not far away, and we need more information to be able to plan for and manage Brexit. We obviously want to make it a success, but we need granularity of detail. I just reiterate the importance for our industry of a relationship with the European Union Agency for Railways, that we are a sizable and scalable sector economically, and we want to be part of any negotiations around future free trade agreements.

The Chairman: Yes, indeed. Anybody else?

Mr Chris Jackson: There is a practical issue. Your team may already have this, but, if it would be helpful, we have a number of short notes distilling the first, second, third and fourth packages into one side per package.

The Chairman: Yes, that would be helpful. We would welcome that. If you have any further thoughts, we would welcome written submissions. Thank you very much indeed.