**Report of the Joint Economic Committee to the Channel Tunnel Intergovernmental Commission**

**Date: 19 September 2013**

**On an appeal by**

**Eurostar International Limited (Appellant)**

**v**

**France Manche S.A**

**The Channel Tunnel Group Limited (Respondents)**

## I. Introduction

1. This is a report by the Joint Economic Committee ("JEC") to the Intergovernmental Commission ("IGC") containing the JEC's recommendations as to the disposal of an appeal ("the Appeal") by Eurostar International Limited ("EIL") lodged on 20 March 2013 pursuant to Article 12.2 of the Bi-national Regulation on the use of the Channel Tunnel ("the Regulation").

2. In accordance with Article 10(7) of the Treaty of Canterbury ("the Treaty"), Article 12.2 of the Regulation, and Article 9.2 of the Intergovernmental Commission Rules of Procedure for the consideration of appeals brought under Article 12 of the Regulation ("the RoP"), on 10 April 2013 the JEC was appointed to assist the IGC in its consideration of the Appeal. This report has been prepared with that task in mind.

3. Before addressing the substance of the appeal, the JEC deals with two preliminary issues:

   (a) identification of the Parties; and

   (b) a summary of the principal definitions, abbreviations and reference documents used in this report.

***Identification of the Parties.***

4. The appellant is Eurostar International Limited ("Eurostar" or "EIL").

5. The addressee of the appeal is stated to be "Eurotunnel", whose identity is specified as follows:

> "*Groupe Eurotunnel SA »* …
>
> *Concessionnaires –*
>
> *France Manche SA* …
>
> *The Channel Tunnel Group Limited* …"

6. It is clear that "Eurotunnel" rightly identifies the Concessionaires as the infrastructure managers of the Channel Tunnel. The Concessionaires are therefore validly specified as defendant parties to the present appeal.

7. By contrast, as the Concessionaires themselves point out, "*The Eurotunnel Group is not the infrastructure manager*" (cf. letter dated 19 August 2013). It is therefore not validly identified as a defendant party. It is however referred to several times by EIL and the Chairman and Chief Executive of Groupe Eurotunnel SA has intervened in the procedure by writing various letters to the IGC, EIL and to the French and UK authorities. In addition, the Network Statement is published on the website of Groupe Eurotunnel SA, which is the 100% shareholder of the Concessionaires. The Glossary of Terms in the Network Statement states that "Eurotunnel" is the infrastructure manager of the Channel Tunnel. The JEC therefore considers that it is appropriate to treat Groupe Eurotunnel SA as an interested party within the meaning of Article 12 of the Rules of Procedure.

8. In the light of this preliminary remark, the following should be regarded as defendants to the present appeal:

   (a) France Manche SA

   (b) The Channel Tunnel Group Limited.

9. In their capacity as concessionaires and infrastructure managers of the Channel Tunnel, they are referred to in this report as “Eurotunnel” and are represented by Quinn Emanuel Urquhart & Sullivan (“Quinn Emanuel”).

10. The following should be regarded as “interested parties” in the present appeal:

    (a) SNCF

    (b) BRB

    (c) The Department of Transport

    (d) The French ministry in charge of transport (Direction générale des Infrastructures, des Transports et de la Mer

    on the basis that they are identified as interested parties by one or other of the defendants and, as such, have been invited by the IGC to provide their observations on Eurostar’s appeal.

    (e) DB Schenker Rail (UK) Ltd

    (f) Groupe Eurotunnel SA

    (on the basis that they are aware of Eurostar’s appeal and have submitted representations on their own volition).

***Summary of principal definitions, abbreviations and reference documents used for the purposes of this report:***

Intergovernmental Commission, hereafter referred to as the “IGC”, appointed by the Channel Tunnel Act 1987 to supervise all matters concerning the construction and operation of the Channel Tunnel Fixed Link and décret n°86-342 du 11 mars 1986 relatif à la constitution de la commission intergouvernementale chargée de suivre l’ensemble des questions liées à la construction et à l’exploitation de la liaison fixe transmanche

Joint Economic Committee, hereafter referred to as the “JEC”, established on 2 February 2010 and appointed by the IGC on 10 April 2013 to assist it in this appeal

Eurostar International Limited hereafter referred to as “EIL” or “Eurostar”, railway undertaking, applicant;

France Manche SA (Concessionaire), infrastructure manager of the Fixed Link, hereafter referred to as “Eurotunnel” or "ET", defendant;

The Channel Tunnel Group Limited (Concessionaire) infrastructure manager of the Fixed Link, hereafter referred to as “Eurotunnel” or "ET", respondent;

Groupe Eurotunnel SA, interested party as per Article 12.3 of the Binational Regulation, hereafter referred to as “Eurotunnel”;

DB Schenker Rail (UK) LTD, interested party as per Article 12.3 of the Binational Regulation, hereafter referred to as “DB Schenker”;

The British Railways Board, interested party as per Article 12.3 of the Binational Regulation, hereafter referred to as “BRB”;

*La Société Nationale des Chemins de Fer Français*, interested party as per Article 12.3 of the Binational Regulation, hereafter referred to as “SNCF”;

Department for Transport (DfT), interested party as per Article 12.3 of the Binational Regulation, hereafter referred to as “DfT”;

*Direction générale des Infrastructures, des Transports et de la Mer* (Department for Infrastructure, Transport and the Sea) French Ministry in charge of Transport, interested party as per Article 12.3 of the Regulation, hereafter referred to as “DGITM”.

Treaty between the United Kingdom of Great Britain and Northern Ireland and the French Republic concerning the Construction and Operation by Private Concessionaires of a Channel Fixed Link, Canterbury, 12 February 1986, hereafter referred to as “the Treaty”;

Directive 2001/14/EC of the European Parliament and of the Council of 26 February 2001 on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification, hereafter referred to as the “Directive”;

The Channel Tunnel (International Arrangements) Order 2005, Statutory Instrument, numbered SI 2005 No 3207, as amended, hereafter referred to as “the 2005 Order”;

Décret n°86-342 du 11 mars 1986 relatif à la constitution de la Commission intergouvernementale chargée de suivre l’ensemble des questions liées à la construction et à l’exploitation de la liaison fixe transmanche et du Comité de sécurité

Concession Agreement of 14 March 1986 between the French and British States

and the France Manche SA and Channel Tunnel Group Limited companies, hereafter referred to as “the Concession Agreement”;

Regulation of the Intergovernmental Commission on the use of the Channel Tunnel of 23 July 2009, hereafter referred to as “the Regulation” or “the Bi-national Regulation”;

Rules of Procedure of the Intergovernmental Commission for the consideration of appeals brought under Article 12 of the Regulation on the use of the Channel Tunnel, hereafter referred to as “the ROP";

The 2014 version of Eurotunnel’s network statement, hereafter referred to as “the Network Statement” or “NS”, containing all information relating to access rights to the infrastructure, particularly from a technical, operational and charging viewpoint;

Usage contract concluded on 29 July 1987, and valid until 2052, between Eurotunnel, (BRB) and SNCF, on the principles and conditions of using the infrastructure, hereafter referred to as “the Railway Usage Contract” or “the RUC”;

Back to Back agreement relating to the Rail Usage Contract concluded on 10 May 1994 between BRB and European Passenger Services Limited (EPS) (replaced by EIL), Railtrack PLC and the Secretary of State for Transport, with the aim of BRB delegating to EPS operational execution of its obligations with regard to passenger transport under the RUC, hereafter referred to as “the Back to Back agreement";

“Best practice guide for Railway Network Statements”, published by the European Commission on 4 February 2010;

European Court of Human Rights (“ECtHR”)

European Convention on Human Rights (“ECHR”)

Court of Justice of the European Union (“CJEU”)

European Commission (“the Commission”)

Secretary of State for Transport (“SOS”)

Office of Rail Regulation, (“ORR”)

Memorandum of Understanding between DfT and the ORR dated 19 July 2007, (“MoU”)

## II. Summary of EIL’s appeal and relief sought

11. The Appeal relates to the 2014 version of Eurotunnel's Network Statement. Paragraph 3.3 of EIL's notice of appeal ("the Submission") states as follows:

> *"...the Appeal relates to decisions, actions and conduct by Eurotunnel as infrastructure manager of the Fixed Link in respect of:*
>
> - *the Network Statement,*
> - *the criteria contained within the Network Statement,*
> - *the charging scheme in the Network Statement, and*
> - *the structure of infrastructure fees which Eurostar (and other operators) are or may be required by Eurotunnel to pay to Eurotunnel as set out in the Network Statement*
>
> *leading to the unfair treatment of, and/or discrimination against, Eurostar and other railway undertakings operating, or that might otherwise seek to operate, train services through the Fixed Link.*"

12. At paragraph 3.5 it is said that:

> "*Eurostar's appeal complaint is that Eurotunnel has failed to give proper transparency of its costs and to justify the structure of its charges in accordance with Chapter II of Directive 2001/14/EC, as it is required by law to do...*"

13. The relief sought by EIL is set out at paragraph 3.10 of the Submission. EIL seeks a decision and declaration for each of the disputed points a, b and c below, namely:

> *(a) that the charging scheme set out in the NS is not, as a matter of transparency and structure, established in accordance with the Charging Principles and permissible heads of charge for access to infrastructure as required by Article 11.4 of the Regulation and the Directive. [...]*
>
> *(b) that the structure of charges set out in the NS has not been justified by Eurotunnel against the Charging Principles as required by Article 11.4 and Article 11.5 of the Regulation.*
>
> (c) *that Eurotunnel did not conduct compliant and meaningful consultation (taking far account of responses received) in relation to the NS as required by Article 5.3 of the Regulation.*

14. In addition, EIL seeks the following directions from the IGC in respect of Eurotunnel:

*(a) that Eurotunnel shall, in accordance with Article 11.4 and Article 11.5 of the Regulation, justify the structure of charges set out in the NS against the Charging Principles.*

*(b) that, in setting out such justification, Eurotunnel shall provide the information detailed at paragraph 3.11(b) of the Submission.*

*(c) that Eurotunnel shall provide all relevant charging, accounting and funding information and evidence necessary to validate the structure of charges set out in the NS against the Charging Principles, categorising, itemising and identifying such information and evidence by reference to each of the separate permitted heads of charge under the Charging Principles.*

*(d) That Eurotunnel shall produce and publish a revised 2014 network statement that is, as a matter of transparency and structure, established in accordance with the Charging Principles and permissible heads of charge for access to infrastructure as required by Article 11.4 of the Regulation and the Directive.*

**III.Summary of Eurotunnel's response in its Counter-submission**

15. Eurotunnel's response is contained in its counter-memorial dated 10 June 2013 ("the Counter-submission"). In summary, it submits that:

(a) The IGC is not competent to entertain the Appeal. This is because (i) it is both judge and party; (ii) it is functionally dependent on the governments; (iii) it is exercising both regulatory and control functions, which has led to a flawed procedure from the outset; and (iv) it has shown a lack of impartiality towards the parties.

(b) EIL's claim is inadmissible. EIL does not challenge a specific decision of Eurotunnel; it merely alleges abstract discrimination and hypothetical unfair treatment. EIL's claim is also an abuse of process, in that it is seeking to counter its contractual mechanism for accessing the relevant infrastructure and verifying access charges.

(c) In terms of the substance of the appeal, EIL is requesting information to which it has no right and is interfering with the justification works between

the IGC (in its capacity as regulator) and the infrastructure manager. In any event, Eurotunnel's fee system is fully compliant with the requirements of the Directive.

16. Eurotunnel accordingly asks the IGC:

(a) To declare that it does not have competence to act as a judicial authority in this case and accordingly declare EIL's appeal moot; alternatively

(b) To declare the Appeal inadmissible;

(c) In any event, to reject all requests made by EIL.

**IV.Summary of responses from interested parties**

17. In the Submission, EIL states that the interested persons who may be affected by the Appeal are "Other users (and potential users) of the Fixed Link". In its letter dated 13 May 2013, Eurotunnel identified SNCF, BRB and the UK and French governments as interested persons who may be affected by the Appeal.

18. Accordingly, the IGC informed SNCF, BRB and the UK and French governments of the Appeal by letters dated 20 June 2013, seeking their views on the issues raised by the Appeal pursuant to Article 12 of the RoP.

19. The IGC also invited all potentially interested parties to record their observations by publishing a notice on the IGC website on 4 June 2013.

20. The IGC received responses from (in chronological order) DB Schenker (**2 July 2013**), SNCF (**17 July 2013**), the DfT (**18 July 2013**) and Groupe Eurotunnel SA (**31 July 2013**).

21. The responses of DB Schenker, the DfT and Groupe Eurotunnel are summarised briefly in so far as relevant below in the sections relating to the points covered. In its letter dated 17 July 2013, SNCF stated that it did not currently wish to make observations on the Appeal.

22. On **31 July 2013** Jacques Gounon (Eurotunnel's chairman) wrote to the IGC stating that the appeal could not be dissociated from the arbitration previously brought by

EIL in 2001, as that arbitration focussed on the breakdown of Eurotunnel's costs. Mr Gounon also criticised the length of time the appeal process was taking.

23. On **12 August 2013**, the IGC responded to the letter from Mr Gounon dated 31 July 2013. The IGC rejected the allegations that the process was taking too long and reiterated its commitment to conducting the appeal process fairly and swiftly. It reminded the parties that the IGC would consider documentation in the appeal that had been submitted by the parties.

## V.Summary of correspondence relating to the Appeal

24. Following receipt of the Appeal, on **22 March 2013** the IGC wrote to Eurotunnel informing it that the IGC had received an appeal from EIL and setting out the procedure the IGC expected to follow in considering the appeal. The IGC invited Eurotunnel to submit its counter-submission, in accordance with the RoP by 19 April 2013. The letter was copied to EIL.

25. On **19 April 2013**, the IGC received a letter from Quinn Emanuel LLP, on behalf of Eurotunnel, acknowledging receipt of the letter dated 22 March 2013 and noting that, whilst EIL had lodged an appeal, this triggered an obligation on the IGC to fix a procedural calendar, including a date for EIL to file its submissions. Quinn Emanuel also made a number of comments about the IGC's alleged conflict of interest and about the fact of previous discussions between the IGC and EIL on the subject-matter of the Appeal. It also requested a period of time for the preparation of Eurotunnel's submissions at least equal to that enjoyed by EIL in the preparation of its own submissions.

26. On **22 April 2013**, the IGC wrote to Eurotunnel in response to Eurotunnel's letter of 18 March 2013 (which predated the Appeal) raising concerns about the JEC's working practices and Eurotunnel's right to fair treatment by the IGC. The IGC responded to those concerns, emphasising inter alia that the JEC strives to act fairly and impartially.

27. On **3 May 2013**, the IGC wrote to each of the parties, setting out the procedure for the conduct of the Appeal and noting that it would be inviting representations from

any interested parties. The IGC asked the parties to identify any interested parties in relation to the Appeal, if they wished to. The IGC invited EIL to provide the IGC with any further submissions it considered necessary, or to confirm in writing that it had no further submissions to make. The IGC noted in its letter to Eurotunnel that it had not yet received confirmation that Quinn Emanuel were instructed to act on its behalf and confirmed that EIL had been invited to make any further submissions.

28. On **7 May 2013,** EIL wrote to the IGC confirming that it had no further submissions to make at that time. It also noted that it did not propose any specific interested parties to be consulted.

29. By letter mistakenly dated 7 May 2013 but written and sent on **10 May 2013**, the IGC invited Eurotunnel to submit its counter-submission 28 days from the date of the letter and attaching an updated copy of the appeal process. That letter was also sent to EIL.

30. By letter dated **13 May 2013**, Eurotunnel noted that whilst the letter from the IGC inviting its counter submission was dated 7 May 2013, it had not in fact been received by Eurotunnel until 10 May 2013. Eurotunnel expressed its dissatisfaction with the deadline of 7 June 2013. It requested a timeframe of no less than three months for Eurotunnel to prepare its counter-submission and reiterated Eurotunnel's concerns as to the IGC's alleged lack of impartiality and the meetings undertaken between the IGC and EIL, prior to the submission of the appeal, as part of the IGC's regulatory functions. Eurotunnel requested copies of all the exchanges which had taken place between the IGC and EIL prior to the appeal being lodged.

31. On **20 May 2013**, EIL wrote to the IGC in respect of Eurotunnel's letters dated 19 April 2013 and 13 May 2013. Among other things, the letter set out EIL's views that the substance of the Appeal was straightforward and that the Appeal was a matter of normal regulatory business which should not prompt the kind of aggressive and quasi-litigious approach adopted by Eurotunnel. The letter contained a schedule setting out in detail EIL's response to the procedural and timing issues raised in Eurotunnel's letters.

32. On **27 May 2013**, the IGC responded to Eurotunnel's letter dated 13 May 2013 and challenged its allegations in respect of the legitimacy of the IGC as a regulatory

body for the Tunnel and its impartiality and independence. In consideration of Eurotunnel's comments relating to the timing of its counter-submission, the IGC extended the response deadline until 10 June 2013. It also addressed Eurotunnel's concerns about the format of any hearing.

33. As set out above, Eurotunnel submitted its counter-submission on **10 June 2013**.

34. On **20 June 2013**, the IGC wrote to the parties asking them to identify any parts of their submissions which they considered to be commercially confidential.

35. Also on **20 June 2013**, the IGC wrote to EIL inviting it to submit its reply to Eurotunnel's counter-submission by 4 July 2013.

36. Also on **20 June 2013**, and as set out above, the IGC wrote to the interested parties identified by Eurotunnel to invite any representations they wished to make in relation to the appeal by 18 July 2013. The responses of interested parties are summarised to the extent relevant below; they are therefore not referred to further in this section.

37. On **24 June 2013,** EIL wrote to the IGC to request an extension to the deadline for it to submit its reply until 18 July 2013, as a result of the number and complexity of new issues raised by Eurotunnel in its counter-submission. The IGC granted the extension sought by letter dated **25 June 2013**.

38. Eurotunnel wrote to the IGC on **26 June 2013** opposing EIL's request for an extension of time to submit its reply and criticising the failure by the IGC to obtain Eurotunnel's comments before doing so. It stated that there was no basis for granting the extension of time and asked the IGC to reiterate that the deadline remained 4 July 2013.

39. On **27 June 2013**, Eurotunnel submitted an amended counter-submission and new grounds and confirmed it had no redactions to make to it before it could be sent to interested parties.

40. On **18 July 2013**, EIL submitted its reply to Eurotunnel's counter submission ("the Reply"). In its cover letter, EIL highlighted mistranslations between the French and

English versions of Eurotunnel's submission and requested confirmation from Eurotunnel as to which was the governing text.

41. On **23 July 2013**, the IGC wrote to the parties inviting them to submit any representations in relation to the responses from the interested parties by 6 August 2013. It also invited Eurotunnel to submit any rejoinder to the Reply within 14 days.

42. On **24 July 2013**, Quinn Emanuel confirmed the Eurotunnel did not intend to file a rejoinder to the Reply, although that letter did comment further on the question of EIL's standing to bring the Appeal.

43. On **29 July 2013**, the IGC wrote to the parties to propose that the hearing be held on 2 October 2013.

44. On **5 August 2013**, EIL wrote to the IGC seeking clarification of the process in relation to the hearing of the Appeal. It also sought clarification as to the governing language version of Eurotunnel's counter-submission. EIL noted that it would challenge inaccuracies in Eurotunnel's submissions at the hearing.

45. On **6 August 2013**, Eurotunnel submitted its response to the representations made by DB Schenker on 2 July 2013. It noted that many of the representations related to freight traffic and that this was a separate issue to passenger traffic. Eurotunnel reiterated its position that the consultation process for the network statement is distinct from the bilateral justification work it was required to carry out with the IGC.

46. On **12 August 2013**, the IGC responded to EIL's letter dated 5 August 2013 and confirmed it would notify the parties of the administrative arrangements for the hearing at least 28 days prior to the hearing date.

47. On **19 August 2013**, Eurotunnel wrote to the IGC on the subject of timescales, any additional productions and the identity of the parties.

48. On **2 September 2013**, the IGC sent a letter to Eurotunnel about the hearing, appeal documentation and identity of the parties.

49. On **4 September 2013**, the IGC sent a letter to the parties concerning arrangements for the hearing.

## VI.Identification of grounds

50. Based on the parties' pleadings, the JEC considers that the issues to be determined by the IGC are as follows:

    (a) Two preliminary issues are raised by Eurotunnel in objection to the appeal:

        (i) Whether, as claimed by Eurotunnel, the IGC is not competent to hear the Appeal?

        (ii) Whether, as claimed by Eurotunnel, the Appeal is not admissible?

    (b) Two points of substance are raised by EIL:

        (i) Whether the NS complies with the requirements of the Regulation and the Directive?

        (ii) Whether the IGC should give any directions to Eurotunnel and, if so, what those directions should be?

51. These questions are linked. For the purpose of assisting the IGC in determining this Appeal, the JEC has addressed each of the four questions.

## VII.Applicable legal texts and procedure

52. The IGC was established pursuant to the Treaty. Article 10(1) provides that:

> "*An Intergovernmental Commission shall be established to supervise, in the name and on behalf of the two Governments, all matters concerning the construction and operation of the Fixed Link.*"

53. The principles and procedures to be applied with regard to the setting and charging of railway infrastructure charges and the allocation of railway infrastructure capacity are dealt with by the Directive. The relevant provisions of the Directive are as follows.

    (a) The 5th recital to the Directive states:

> "*To ensure transparency and non-discriminatory access to rail infrastructure for all railway undertakings all the necessary information required to use access rights are to be published in a network statement*".

(b) Article 3(1) provides that the infrastructure manger shall, after consultation with the interested parties, develop and publish a network statement. The phrase "network statement" is defined in Article 2(j) as:

> "*the statement which sets out in detail the general rules, deadlines, procedures and criteria concerning the charging and capacity allocation schemes. It shall also contain such other information as is required to enable application for infrastructure capacity*".

(c) According to Article 3(2):

> "*The network statement shall set out the nature of the infrastructure which is available to railway undertakings. It shall contain information setting out the conditions for access to the relevant railway infrastructure. The content of the network is laid down in Annex I.*"

(d) Annex I provides, so far as relevant:

> "*The network statement referred to in Article 3 shall contain the following information:*
>
> ...
>
> *2. A section on charging principles and tariffs. This shall contain appropriate details of the charging scheme as well as sufficient information on charges that apply to the services listed in Annex II which are provided by only one supplier. It shall detail the methodology, rules and, where applicable, scales used for the application of Article 7(4) and (5) and Articles 8 and 9. It shall contain information on changes in charges already decided upon or foreseen.*"

(e) Article 4(5) provides:

> *"Infrastructure managers shall ensure that the application of the charging scheme results in equivalent and non-discriminatory charges for different railway undertakings that perform services of equivalent nature in a similar part of the market and that the charges actually applied comply with the rules laid down in the network statement"*.

(f) Article 7(2) and (3) provide:

> "*Member States may require the infrastructure manager to provide all necessary information on the charges imposed. The infrastructure manager must, in this regard, be able to justify that infrastructure charges actually invoiced to each operator, pursuant to Articles 4 to 12, comply*

*with the methodology, rules, and where applicable, scales laid down in the network statement.*

*"Without prejudice to paragraphs 4 or 5 or to Article 8, the charges for the minimum access package and track access to service facilities shall be set at the cost that is directly incurred as a result of operating the train service.*"

(g) Article 8(1) to (3) provide:

"*1. In order to obtain full recovery of the costs incurred by the infrastructure manager a Member State may, if the market can bear this, levy mark-ups on the basis of efficient, transparent and non-discriminatory principles, while guaranteeing optimum competitiveness in particular of international rail freight. The charging system shall respect the productivity increases achieved by railway undertakings. The level of charges must not, however, exclude the use of infrastructure by market segments which can pay at least the cost that is directly incurred as a result of operating the railway service, plus a rate of return which the market can bear.*

*"2. For specific investment projects, in the future, or that have been completed not more than 15 years before the entry into force of this Directive, the infrastructure manager may set or continue to set higher charges on the basis of the long-term costs of such projects if they increase efficiency and/or cost-effectiveness and could not otherwise be or have been undertaken. Such a charging arrangement may also incorporate agreements on the sharing of the risk associated with new investments.*

*"3. To prevent discrimination, it shall be ensured that any given infrastructure manager's average and marginal charges for equivalent uses of his infrastructure are comparable and that comparable services in the same market segment are subject to the same charges. The infrastructure manager shall show in the network statement that the charging system meets these requirements in so far as this can be done without disclosing confidential business information.*"

(h) Article 30 as amended[1] provides:

"*1. Without prejudice to Article 21(6), Member States shall establish a regulatory body. This body, which can be the Ministry responsible for transport matters or any other body, shall be independent in its organisation, funding decisions, legal structure and decision-making from any infrastructure manager, charging body, allocation body or applicant. It shall furthermore be functionally independent from any competent body involved in the award of a public service contract. The body shall function according to the principles outlined in this Article whereby appeal and regulatory functions may be attributed to separate bodies.*

[1] By, relevantly, Directive 2007/58/EC, OJ 2007 L315/44.

*"2. An applicant shall have a right to appeal to the regulatory body if it believes that it has been unfairly treated, discriminated against or is in any other way aggrieved, and in particular against decisions adopted by the infrastructure manager or where appropriate the railway undertaking concerning:*

*a) the network statement;*

*b) criteria contained within it;*

*c) the allocation process and its result;*

*d) the charging scheme;*

*e) level or structure of infrastructure fees which it is, or may be, required to pay;*

*f) safety certificate, enforcement and monitoring of the safety standards and rules.*

*"3. The regulatory body shall ensure that charges set by the infrastructure manager comply with chapter II and are non-discriminatory. Negotiation between applicants and an infrastructure manager concerning the level of infrastructure charges shall only be permitted if these are carried out under the supervision of the regulatory body. The regulatory body shall intervene if negotiations are likely to contravene the requirements of this Directive.*

*"4. The regulatory body shall have the power to request relevant information from the infrastructure manager, applicants and any third party involved within the Member State concerned, which must be supplied without undue delay*

*"5. The regulatory body shall be required to decide on any complaints and take action to remedy the situation within a maximum period of two months from receipt of all information.*

*Notwithstanding paragraph 6, a decision of the regulatory body shall be binding on all parties covered by that decision.*

*In the event of an appeal against a refusal to grant infrastructure capacity, or against the terms of an offer of capacity, the regulatory body shall either confirm that no modification of the infrastructure manager's decision is required, or it shall require modification of that decision in accordance with directions specified by the regulatory body.*

*"6. Member States shall take the measures necessary to ensure that decisions taken by the regulatory body are subject to judicial review.*"

54. The Regulation on the use of the Channel Tunnel was adopted by the IGC on 23 July 2009. As is apparent from Article 1, it applies to the use of those parts of the

Channel Fixed Link necessary for the delivery of (inter alia) international passenger services, in accordance with (inter alia) the Directive.

55. Article 5 provides, so far as relevant:

> "*5.1 The Concessionaires shall develop, publish, keep up to date and modify as necessary a network statement for the Fixed Link ("the Network Statement") in accordance with Article 3 of and Annex 1 to Directive 2001/14/EC.*
>
> *5.2 The Network Statement shall contain all the information necessary to exercise access rights through the Fixed Link, in particular:*
>
> *...*
>
> *(d) the charging principles and tariffs;...*"

56. Article 11.4 provides that:

> "*The charges shall be established in accordance with the charging principles set out in Chapter II of Directive 2001/14/EC above, and in particular Article 8.2, with the exceptions listed to those principles, and to the permitted discounts and adjustments, taking into account performance and the possibility of reservation charges. The Concessionaires shall advise the Intergovernmental Commission if they intend to negotiate with a capacity requestor concerning the level of infrastructure charges. Such negotiations shall only be permitted if they are carried out under the supervision of the Intergovernmental Commission, which must intervene immediately if the negotiations are likely to contravene the requirements of Directive 2001/14/EC.*"

57. Article 11.5 provides that:

> "*The charging body must be able to justify the charges billed as against the charging principles set out in this Regulation and in Chapter I1 of Directive 2001/14/EC and, in particular, to show that the charging scheme has been applied to all railway undertakings in a fair and non-discriminatory way. The charging body must respect the commercial confidentiality of information provided to it by those requesting capacity.*"

58. According to Article 12:

> "*A railway undertaking or international grouping shall have a right of appeal to the Intergovernmental Commission if it believes that it has been unfairly treated, discriminated against or is in any other way aggrieved, and in particular against decisions adopted by the Concessionaires or, where appropriate, the railway undertaking, concerning:*

*(a) the network statement;*

*(b) the criteria contained within it;*

*(c) the allocation process and its result;*

*(d) the charging scheme;*

*(e) the level or structure of infrastructure fees which it is, or may be, required to pay; and*

*(f) arrangements for access to the network.*

*12.2 For the purpose of carrying out this appeal function the Intergovernmental Commission may call upon such bodies or experts appointed for that purpose, in conformity with Article 10(7) of the Treaty.*

*12.3 The Concessionaires and other interested parties shall supply to the Intergovernmental Commission, without undue delay, all relevant information requested by that body. In particular, the Concessionaires shall supply to the Intergovernmental Commission all the information necessary to enable that body to ensure that charges set by the Concessionaires are compliant with Chapter I1 of Directive 2001/14/EC and are non-discriminatory.*

*12.4 The Intergovernmental Commission shall take a decision and take action to remedy the situation within a maximum period of two months from receipt of all relevant information about an appeal or complaint. Notwithstanding Article 12.5, a decision of the Intergovernmental Commission shall be binding on all parties covered by that decision.*

*12.5 Pursuant to Article 76 of the Regulation of the Intergovernmental Commission on the safety of the Channel Fixed Link signed in London on 24 January 2007, the decisions of that Commission taken by virtue of bi-national regulations made pursuant to Article 10(3)(e) of the Treaty may be subject to judicial review by the authorities of either France or the United Kingdom under the conditions laid down by national law applicable to those authorities. The lodging of an application for judicial review before the authorities of one State precludes the lodging of an application for judicial review of the same matter before the authorities of the other State.*

*12.6 For the purpose of monitoring competition in the rail services market, in so far as it relates to the Channel Fixed Link, the Intergovernmental Commission, without prejudice to the national laws of the two states on competition policy, may call upon such bodies or experts appointed for that purpose, in conformity with Article 10.7 of the Treaty.*"

59. The Regulation was transposed into domestic law in the United Kingdom by virtue of the 2005 Order, as amended, and in France by virtue of Decree No 2010-21 of 7 January 2010.

60. The rules of procedure applicable to the Appeal are to be found in the RoP. As mentioned above, this report has been prepared pursuant to Article 9.2 of the RoP.

## VIII.Preliminary issues

61. This report first makes recommendations on the two preliminary issues raised by Eurotunnel.

### A. Preliminary issue 1: competence of the IGC to entertain the Appeal

62. The first preliminary issue is whether the IGC is competent to entertain the Appeal.

*1. The parties' submissions*

63. This issue has been raised by Eurotunnel and so it is appropriate to start by summarising Eurotunnel's submissions.

64. ET first submits that the IGC lacks independence from the States (the UK and France). It notes that EIL is jointly owned by SNCF, the *Société Nationale des Chemins de Fer Belges* ("SNCB") and London and Continental Railways ("LCR") and acts under the control of the Minister in charge of Transport in France and the DfT in the UK. Eurotunnel submits that the two States thus have a direct interest in the outcome of this dispute. It asserts that the IGC is a representative of the two States and that it is thus a judge in its own cause and therefore irretrievable conflicted.

65. In support of this submission, Eurotunnel points to the Treaty and the quadripartite Concession Agreement between France, the UK, France-Manche S.A and the Channel Tunnel Group Ltd, which refer to the IGC supervising and acting "in the name of and on behalf of" the States/Ministries of Transport. It claims that the French Transport Ministry "*figures largely in directing the activities of the IGC*" (Counter-submission, para 13). It also points to the fact that in the absence of agreement between the heads of the UK and French delegations, the dispute will be sent directly to the administrations of the two Governments who will then begin a process of consultation. According to Eurotunnel, the IGC cannot therefore ultimately be independent from the two States.

66. ET also points to the fact that the co-chairmanship of the JEC has for the last year been held by M. Jean-Paul Ourliac before he joined SNCF. Eurotunnel claims that there was a period of overlap between M. Ourliac's work in his capacity as co-chairman of the JEC and his position as State representative of the SNCF board of directors, which overlap creates a conflict of interest in the present dispute. In addition, Mr Gareth Williams (EIL's Director of Regulatory Affairs and Company Secretary) previously worked for the DfT and for the most part worked in relation to the cross-Channel market. In its letter dated 19 August 2013 Eurotunnel also mentioned the case of Mr Richard Brown, former Chairman of EIL and currently a member of the DfT.

67. According to Eurotunnel, the IGC is not independent of the States and thus the applicant, EIL, a private company owned jointly by SNCF, SNCB and LCR and operating under the control of the French Ministry in charge of Transport and the DfT in the UK. This conflicts with the requirement of Article 30(1) of the Directive for the regulatory body to be independent. Article 12 of the Regulation, which designates the IGC to settle disputes, does not comply with the Directive.

68. Eurotunnel's second main submission is that the IGC lacks independence because it assumes the role of regulator and the functions of control and supervision. The JEC is the body responsible for leading the economic regulatory work (which has been ongoing in relation to the NS for over a year). As part of this regulatory work, Eurotunnel must justify its fee system under Article 11.4 of the Regulation. Eurotunnel submits that in this regulatory capacity the IGC obtained information from the parties to the present dispute without proper regard to due process. Specifically, it has treated information and discussions held with EIL as confidential, even though that information is relevant to the present dispute. EIL has made criticisms of Eurotunnel's fee system and its compliance with European directives but they have not been shared with Eurotunnel even though they will inevitably be taken into account by the IGC during the drafting of its decision on the Appeal.

69. ET submits that by having access to information provided to it outside the present dispute and by failing to disclose it to Eurotunnel, the IGC appears to have in fact taken a position on the issue which is now being put to it in its adjudicatory

capacity. Eurotunnel refers to a letter from the IGC to Eurotunnel dated 12 February 2013 which in Eurotunnel's submissions demonstrates "[t]he IGC's alignment of views with Eurostar this early in the process" (Counter-submission, para 48). That letter noted that the IGC "still holds many concerns about the transparency and accuracy of the Network Statement and considers that they remain unresolved in the published version for 2014". Eurotunnel also refers to the IGC's comments in that letter on paragraph 6.1 of the NS and Eurotunnel's charging structure. Eurotunnel submits that the IGC has thus prejudged the merits of the Appeal.

70. According to Eurotunnel, therefore, "[t]he IGC cannot act as the adjudicating authority in this case without breaching the most fundamental principles of justice, in particular those laid down in Article 6 of the European Convention on Human Rights" (Counter-submission, para 53).

71. In its Reply, EIL has responded to these submissions. It submits that the IGC is the proper authority to decide the Appeal. Its response may be summarised as follows.

72. On the issue of the IGC's independence, EIL first notes that the IGC's functions and its constitution "have been known about, intended and agreed upon by all parties for a significant number of years" (Reply para 7). EIL submits that it would be particularly reprehensible if Eurotunnel sought, by its objections, to arrive at the conclusion that EIL's appeal could not be heard in any forum at all.

73. Secondly, EIL submits that questions of independence and impartiality must be assessed taking into account the express right of the parties to seek judicial review of the IGC's decision. It refers to jurisprudence of the ECtHR according to which there is no breach of Article 6 ECHR where proceedings are subject to subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of Article 6(1) ECHR. In EIL's submission, Eurotunnel's Article 6 complaint is premature and inappropriate.

74. Thirdly, EIL refers to the IGC's letter of 27 May 2013 which explains the arm's length mechanisms that have been put in place to ensure the IGC's functional independence from the two States. It notes that whilst a superficially similar point may be part of infraction proceedings recently commenced by the Commission, those proceedings can have no legal effect on the Appeal and, in any event, the

Commission's concerns do not appear to relate to the IGC's powers where there is an active complaint.

75. Fourthly, EIL submits that Eurotunnel's complaints in respect of M. Ourliac and Mr Williams make no sense. M. Ourliac has left the IGC and can exercise no influence over the IGC. As for Mr Williams, Eurotunnel has not explained how the fact that he used to work for the DfT would influence the IGC.

76. As for the fact that the IGC exercises both regulatory and control functions, EIL submits that Eurotunnel has drawn a "false dichotomy, certainly so far as Article 6 ECHR is concerned" (Reply, para 13). Regulatory and control functions are for Article 6 purposes largely treated alike and are usually contrasted with disciplinary or quasi-penal activities. In EIL's submission, there is nothing inherently objectionable in the same body conducting both appeal and other regulatory functions and there is nothing specifically objectionable in this case.

77. As for whether the IGC has prejudged the outcome of the Appeal, EIL submits that Eurotunnel's complaints are unjustified, but in any event it would have no objection to the IGC adopting an approach whereby it created a specific file relating to this appeal, including in that file only documents which had been provided by the parties and deciding the appeal only by reference to those documents.

78. The preliminary issue of independence of the IGC was also specifically addressed by the DfT in its letter dated 18 July 2013, submitted to the IGC on behalf of the Secretary of State for Transport ("SoS"). Those observations were limited to whether the IGC is independent of the British and French Governments who have a vested interest in EIL.

79. The SoS observes that the independence of the British Delegation to the IGC is guaranteed by a combination of (i) Article 4A of the 2005 Order (as amended), under which at least two members ("the ORR members") must be appointed following consultation with the ORR and taking into account its recommendation, and (ii) a MoU between the DfT and the ORR dated 19 July 2007, under which only the ORR members (one of whom must be Head of Delegation) may carry out the IGC's functions under the Directive (including the Appeal). The SoS and other members of the Government are precluded from trying to influence the ORR

members that regard. Although the MoU is not legally binding, the Government treats it, in practice, as an obligation with which it must comply.

*2. The JEC's recommendation*

80. The JEC's recommendation is that the IGC should not accept Eurotunnel's submissions on the first preliminary issue. The JEC's reasons are set out below.

(i) Independence of the IGC

81. Turning first to the question of whether the IGC is sufficiently independent. Article 30 of the Directive requires independence "*in its organisation, funding decisions, legal structure and decision-making from any infrastructure manager, charging body, allocation body or applicant*" The JEC is of the opinion that the following points are of particular relevance:

(a) The independence requirement in Article 30(1) of the Directive reflects the principle common to the laws of the Member States of the EU (and in Article 6 of the ECHR, a provision whose application to the present proceedings is not certain) that nobody should be judge in his or her own cause.

(b) The ECtHR case law can therefore be applied by analogy in assessing the concept of independence as it is used in Article 30(1) of the Directive (with reference to the relevant case law of the ECtHR: e.g. *Campbell and Fell v UK* (28 June 1984) Series A No. 32. The fairness of the procedure must be viewed as a whole and in the light of the issues that are to be determined by the IGC.

(c) Yet the procedural rights guaranteed by Article 30(1) of the Directive are governed by EU law and are not based exclusively on application of Article 6 of the ECHR as considered by the ECtHR. The Directive, in recommending the creation of a body responsible for ensuring satisfactory application of the rights granted to the railway undertakings, has imposed requirements in order to ensure the independence of the regulatory body from any infrastructure manager, charging body, allocation body or applicant, as well as from the parties in question, and has laid down the procedural guarantees that are required in this respect. By its constitution and its composition, the IGC meets

the requirements of Article 30(1) of the Directive. The Regulation provides supplementary procedural guarantees. The independence of the regulatory body is assessed objectively with respect to its executive powers and with respect to the parties in question in accordance with established criteria:

> "*In order to establish whether a body can be considered "independent", regard must be had, inter alia, to the manner of appointment of its members and their term of office, to the existence of guarantees against outside pressures and to the question whether the body presents an appearance of independence* (*see, inter alia, the Campbell and Fell judgment of 28 June 1984, Series A no. 80, pp. 39-40, para. 78).*" (ECtHR, Langborger v Sweden, 22 June 1989, Series A, No. 55, para. 32).

(d) The independence of the IGC is therefore to be considered by reference to its role and its objectives, which are drawn directly from Article 30(1) of the Directive, a provision which expressly permits the regulatory body to be the ministry responsible for transport matters, even though such ministries (or the Governments of which they form part) often have an interest in rail transport and the appointment of its members.

(e) The IGC is functionally independent of any infrastructure manager, charging body, allocation body or applicant, and, specifically, of the parties represented in the present Appeal. In the sub-paragraphs that follow, the JEC discusses the arrangements made by the UK and France to protect the independence of the IGC delegation.

(f) The members of the ***UK delegation*** are appointed by the SoS. As already stated, such appointment cannot in itself be objectionable.

(g) The independence of the UK delegation is protected in the following way:

(i) Pursuant to Article 4A(2) of the 2005 Order (as amended), the SoS must ensure that two members of the UK delegation are appointed following consultation with the Office of Rail Regulation (the independent regulator designated under Article 30(1) of the Directive for Great Britain, except the Channel Tunnel). The power of appointment must be exercised specifically with a view to facilitating the performance by the IGC of its obligations under Article 4(1) of the 2005 Order (i.e. its

obligations as regulator for the Channel Tunnel in accordance with Article 30 of the Directive). When appointing members of the UK delegation, therefore, the SoS is legally required to exercise her power of appointment to assist with giving to the IGC an independent character.[2]

(ii) Pursuant to the MoU, the head of the UK delegation and one other member must be appointed by the SoS following consultation with the ORR and taking its recommendations into account. These two members are referred to as the "ORR members" (MoU, para 1). Under the MoU, only the ORR members of the UK delegation may carry out the IGC's "regulatory functions" (defined in the MoU as its functions under the Directive and the 2005 Order, which for this purpose includes the Regulation). Under the MoU, the SoS, the non-ORR members of the UK delegation and any other member of the Government are precluded from trying to influence the ORR members in carrying out the regulatory functions. The MoU further protects the independence of the ORR members by requiring them to be appointed for a fixed term of no more than five years during which time they cannot be dismissed otherwise than on very limited grounds. The MoU thus prevents the Government from having an influence on the operation of the IGC and its decisions in accordance with the Directive.[3]

(iii) In relation to the individual cases raised by Eurotunnel, Mr Williams and Mr Brown, neither is a member of the IGC and the JEC is not aware of any evidence to suggest that either has sought to exercise any influence over the conduct of this appeal otherwise than in accordance with the procedures laid down for the representation of the relevant

[2] It might be noted in addition that Article 4(1) of the 2005 Order requires the IGC to comply with its obligations under Article 12 of the Regulation. Article 12 includes functions involving the determination of civil rights. The obligation on the SoS to exercise his power of appointment to assist with giving to the IGC an independent character therefore also from this combination of provisions (and, indirectly, from section 6 of the Human Rights Act 1998).

[3] Although the MoU is not legally binding, the JEC understands that the Government treats it, in practice, as an obligation with which it must comply. Further, the JEC's understanding is that the Government has always complied with the MoU. The current Head of Delegation (Christopher Irwin) and the other ORR member, Brian Kogan, were both appointed in accordance with the procedure envisaged by the MoU.

parties. The JEC therefore sees no reason to question the independence of the IGC, either as a matter of objective reality or subjective appearance, by reference to these individuals' past employment history.

(h) Turning to the ***French delegation***, the independence of the IGC members in each of their functions is inherent in the status accorded to them.

(i) The following terms of Decree No. 86-342 of 11 March 1986 on the establishing the Intergovernmental Commission to supervise all matters concerning the construction and operation of the Channel Fixed Link and the Safety Authority, as published in the Official Journal of 12 March 1986, are applied stringently to the members of the IGC:

> "*Article 1 – "The French Delegation to the Intergovernmental Commission which is responsible for supervising all matters concerning the construction and operation of the Channel Fixed Link shall be constituted as follows:*
>
> *- two members and two alternate members representing the Minister for the Economy, Finance and Budget;*
>
> *- two members and two alternate members representing the Minister for Foreign Affairs;*
>
> *- one member and one alternate member representing the Minister for Home Affairs and Decentralisation;*
>
> *- two members and two alternate members representing the Minister in charge of Transport.*
>
> *The General Secretariat of the Commission is provided by the departments of the Ministry in charge of Transport.*
>
> *The members of the French Delegation and the General Secretariat are appointed by Prime Ministerial Decree at the suggestion of the ministries in question.*
>
> *The Head of the French Delegation is appointed by Prime Ministerial Decree from the members of the delegation.*"

(ii) The members of the French Delegation are appointed by Prime Ministerial Decree and not by the Minister for Transport, and are not part of the Direction générale des infrastructures, des transports et de la mer (DGITM) (Department for Infrastructure, Transport and the Sea)

which is responsible for SNCF, and are thus not liable to experience any conflicts of interest on questions concerning rail regulation.

(iii) The Head of the French Delegation, who is responsible for taking decisions of the IGC together with the Head of the UK Delegation, is currently a member of the Ministry of Foreign Affairs, appointed by the Prime Minister.

(iv) Individuals appointed by the French government thus are functionally independent from the administration of the Ministry in charge of transport and are completely independent of any infrastructure manager or any railway undertaking. In addition, SNCF, the majority shareholder in EIL, but with only two representatives on the board of this operator, is in turn a public institution of industrial and commercial nature (EPIC in French), and is thus a legal entity under public law, distinct from the State, and with autonomy of management in this respect (Article 24 of *loi n°82-1153 du 30 décembre 1982 d'orientation des transports intérieurs*). As a result, SNCF could not exercise any influence over the IGC via the Ministry for Transport, in accordance with the objective stipulated in Article 30 of the Directive.

(i) With regard to the position of M. Ourliac, he is not a member of the IGC, has not had any involvement in this appeal, nor played any role in the process. M. Ourliac was appointed one of the State representatives on the Board of governors of the SNCF by decree on 7 March 2013. From that date, he immediately ceased to act as an advisor to the IGC.

(j) As for Eurotunnel's submission that the Treaty and Regulation envisage a process of consultation between the two Governments in the event that the Heads of Delegation to the IGC cannot reach agreement on the IGC's decision on the present appeal (see Article 10.5 and 18(a) of the Treaty), the JEC notes that, unless and until such disagreement manifests itself, this concern is a hypothetical one. The JEC also notes that Article 18 is to be read with Article 19, which provides for a process of arbitration chaired by a third country national in the event of disputes between the two States, to be

appointed in the event of disagreement by the President of the CFEU: see Article 19(2)(c).

82. For all of the foregoing reasons, the JEC's view is that the IGC is sufficiently independent of the States/parties for it to be competent to hear the Appeal.

(ii) The IGC's dual regulatory and control functions

83. The JEC now turns to the second point raised by Eurotunnel, namely whether the IGC's dual regulatory and control functions should prevent it from entertaining the Appeal – in particular, the fact that the IGC has, as part of its regulatory work, had discussions with and received information from EIL in connection with Eurotunnel's then draft network statement for 2014.

84. JEC does not consider that there can be any objection of principle to the endowing the IGC with such dual functions – on the contrary, such a situation is commonplace in the context of economic regulation, and Article 30(1) of the Directive itself envisages that a single body may be entrusted with both functions.

85. As for Eurotunnel's specific submission that its due process rights have been infringed by virtue of the facts that the IGC (a) held confidential discussions with EIL (and, of course, Eurotunnel itself) regarding Eurotunnel's draft network statement for 2014 and (b) expressed concerns in its letter of 12 February 2013 regarding the sufficiency of information provided in the NS, the JEC makes the following observations:

(a) The discussions with the parties were held in a different context and for a different purpose. Such discussions, and information received from the parties, are not relevant and will not be taken into account in relation to the IGC's decision on the Appeal. The IGC has already confirmed that it will have regard only to the information provided and submissions made to it in the context of the Appeal (see the IGC's letter to Eurotunnel of 27 May 2013). All parties will have access to the same information and submissions. In the circumstances, there is no question of the IGC reaching a decision on the basis of information unavailable to one or more parties.

(b) The fact that IGC has commented on the Network Statement already, pursuant to the process of consultation foreseen in Article 5.3 of the Regulation, should not bar it from hearing this appeal. First, those comments were based on the version of the NS at the time. Secondly, they were not concluded views (as Eurotunnel itself points out).[4] Thirdly, the comments were made in a different context and not as part of an ongoing stage of these proceedings.

(c) Finally, Article 30(6) of the Directive, Article 12.5 of the Regulation and Article 10.8 of the RoP each provide for judicial review of decisions of the IGC, enabling a dissatisfied party to obtain an independent review of the decision, including on grounds of alleged procedural unfairness.

86. For the foregoing reasons, the JEC's view is that the regulatory and control functions of the IGC do not prevent it from hearing the appeal.

**B. Preliminary issue 2: admissibility of the appeal**

87. The second preliminary issue raised by Eurotunnel relates to the admissibility of the appeal.

*1. The parties' submissions*

88. ET submits that the Appeal is inadmissible on two bases. The first is that EIL lacks standing to bring the Appeal. The second is that the Appeal is an abuse of the procedure contemplated in Article 12 of the Regulation. Eurotunnel's submissions on each point are summarised below.

89. ET submits that EIL lacks standing because its claims are hypothetical in every respect. EIL does not complain of being the victim of discrimination or unfair treatment but merely that it hypothetically could be such a victim. Moreover, EIL does not specify what this discrimination or unfair treatment would consist of. In Eurotunnel's submission, this is unsurprising: EIL could not be the victim of discrimination, unfair treatment or any such prejudice as it is still in a monopoly

[4] See Counter-submission, para 51: "those conclusions do not reflect the status of the discussions between Eurotunnel and the IGC the day this work [i.e. the IGC's regulatory work] was interrupted by EIL's appeal". Note : the French and English version of the counter submission are different.

position. EIL is the only operator of passenger services through the Channel Tunnel and will continue to be in 2014. Its monopoly position will therefore be preserved until at least 2015. In this context, EIL's claims in respect of the NS are purely speculative and premature. According to Eurotunnel, these claims are contrary to the purpose of Article 12 of the Regulation: the purpose of that provision is not to create a mechanism by which any person may, in the abstract, rely on the provisions of the Directive regardless of an identified prejudice or damage suffered.

90. ET next submits that the Appeal constitutes an abuse of the procedure envisaged by Article 12 of the Regulation. Eurotunnel points out that EIL's right to operate in the Channel Tunnel is governed by the Rail Usage Contract ("RUC"), signed on 29 July 1987, between Eurotunnel on the one side and the respective national railways ("the Railways") on the other. EIL benefits from the RUC by virtue of a Back-to-Back Agreement concluded on 10 May 1994. The RUC concerns the principles and conditions for the usage of the infrastructure by the Railways, including the pricing framework. In consideration of the right to access half of the Tunnel's capacity, the Railways (and therefore EIL) must pay the usage charges and a portion of Eurotunnel's operating costs. The calculation of the fees and operating costs paid by EIL for the circulation of its trains in the Tunnel is entirely based on the principles contained in the RUC. Eurotunnel points to an arbitration initiated by the Railways (on EIL's behalf) under the RUC in 2001 regarding *inter alia* the calculation of Eurotunnel's operating costs. That arbitration led to a partial award in 2005 and then to a settlement agreement. The parties to the RUC subsequently concluded an agreement on the distribution of the operating costs in 2006 which is still in force. Eurotunnel states that these texts are the only texts applicable to the relationship between Eurotunnel, the Railways and EIL. Eurotunnel submits that EIL is seeking to challenge precisely the principles contained within these texts by instigating the present proceedings.

91. ET submits that the RUC contains a very precise control mechanism enabling the verification of Eurotunnel's usage charges and operating costs. Under it, EIL is able to obtain information that is much more detailed than that requested in the context of the Appeal.

92. ET submits that instead EIL has chosen artificially to position itself in the field of EU law to challenge the pricing and fee systems governed by the RUC under the more general principles governed by the Treaty and the Concession. Eurotunnel submits that "[t]he instant proceedings are merely a pretext under which to challenge the existing agreements between the parties to the Usage Contract, in addition before the wrong jurisdiction" (Counter-submission, para 104). It contends that the Directive cannot be interpreted to amend retrospectively the RUC so as to deprive Eurotunnel of its contractual rights. Such retrospective amendment would have to be subject to compensation to Eurotunnel in order to comply with Article 1 of the First Protocol to the ECHR ("A1P1").

93. EIL's submissions in response are contained in the Reply.

94. EIL submits that it has standing to bring the Appeal. Article 12.1 of the Regulation contains a very broad standing requirement, including the expression "any other way aggrieved", which EIL describes as a "catch-all" expression. EIL submits that it is rightly aggrieved by the lack of transparency and insufficient information in the NS. EIL adds that there is nothing hypothetical about its grievance in respect of the NS. It points out that the European passenger rail market, including the Fixed Link, is open to competition. EIL submits that in order to compete effectively, current and potential railway undertakings need transparency of Eurotunnel's costs now, rather than obtaining such transparency only in the year in which competing services commence. Investment decisions are necessarily made a number of years in advance and require evaluation of the business case. That in turn requires transparency of access costs (both its own and those of competitors). EIL submits that the absence of such transparency is of real current prejudice to it. Further, the cross-Channel passenger market has various participants offering various modes of transport exerting differing degrees of competitive constraints on one another. Accordingly, EIL may be said to be in competition with such other modes. In order to compete effectively, EIL needs transparency of its costs and an assurance that they are incurred by reference to legitimate charges.

95. EIL next submits that the Appeal does not constitute an abuse of procedure. The right of appeal under Article 12 of the Regulation is available to EIL and has been invoked. It does not include a condition that it may only be invoked as a last resort,

and any such condition would be contrary to EIL's EU law rights. The mere existence of a contractual right (under the RUC and Back-to-Back Agreement) does not exclude public law regulatory rights.

96. EIL submits that in any case the two courses of action open to it are not even sufficiently similar to be said to run in parallel: they are different courses of action with different outcomes. The RUC right relates solely to information under the heads of charge set out in the RUC, whereas the right arising under the Directive and the Regulation are that heads of charge should be reconciled to the Charging Principles. The NS failed to include the relevant information by reference to the Charging Principles and so the appropriate course to rectify this omission is for EIL to appeal to the IGC.

97. Finally, EIL submits that Eurotunnel's argument as to whether EU law can subsequently amend a private law contract (a proposition that EIL does not accept) is irrelevant, given that EIL's appeal relates to the NS.

98. In its letter of 24 July 2013, Eurotunnel claims that in the Submission EIL only relied on the "unfair treatment" and "discrimination" elements of Article 12 of the Regulation. Eurotunnel notes that the Reply now seeks to rely on the expression "any other way aggrieved". Eurotunnel contends that "EIL's change of stance is opportunistic".

*2. The JEC's recommendations*

99. The JEC's view is that the IGC should find the Appeal to be admissible, for the following reasons.

*Standing*

100. The JEC turns first to whether EIL has standing to pursue the Appeal. The JEC notes that Article 12.1 of the Regulation, which mirrors in material respects Article 30(2) of the Directive, is broadly worded. An appellant does not need to demonstrate that it has been the victim of actual unfair or discriminatory treatment: that much is clear from the expression "or in any other way aggrieved". Likewise, the use of the word "believes" indicates that a subjective rather than objective test is to be applied – although the JEC takes the view that the belief of an appellant must

be a reasonable one, this wording does not suggest that the standard is a difficult one to meet.[5]

101. Taking the test at its broadest, the requirement is that the appellant must show at least that it believes itself to be "aggrieved" in some way. In the domestic law of the UK, that expression has been given a relatively wide meaning in the context of standing to challenge decisions of public authorities. For instance, in *Merger Action Group v Secretary of State for Business, Enterprise and Regulatory Reform* [2008] CAT 36 at [39] *et seq* the UK Competition Appeal Tribunal (CAT), in considering the concept of a person "aggrieved" for the purposes of section 120 of the Enterprise Act 2002 (EA02), stated that it saw "*no reason why the factors that inform the question of standing should be wholly different*" in that context compared with the ordinary test of "sufficient interest" in UK judicial review proceedings (see [41]). Ultimately, however, it was a question to be determined "*in the light of all the circumstances of the case*" (see [44]). The CAT also referred to *Attorney General of the Gambia v N'Jie* [1961] AC 617, 634, where Lord Denning said this:

> "*The words 'person aggrieved' are of wide import and should not be subjected to a restrictive interpretation. They do not include, of course, a mere busybody who is interfering in things which do not concern him but they do include a person* ***who has a genuine grievance because an order has been made which prejudicially affects his interests***" (emphasis added).

102. Likewise, under French law an "interest in bringing proceedings" is accepted on quite a broad basis. In its decision of 29 July 1998, *Syndicat des Avocats de France*, the *Conseil d'Etat* confirmed the existence of "a constitutional principle of the right to bring a legal appeal". This leads to a general presumption that the mere fact of belonging to a given legal category or possessing a specific "characteristic" *ipso facto* confers the standing to bring proceedings. Therefore, in France, any appellant with a direct and sufficient interest may admissibly bring proceedings.

103. This concept of an "interest in bringing proceedings" was considered by Government Commissioner Mosset (Conclusions on CE 26 October 1956

[5] DB Schenker observes that it has no evidence to provide either way that EIL (or DB Schenker itself) has been dealt with unfairly or discriminated against by ET. It would, however, welcome transparent information to provide comfort and assurance that it is being treated equally with Eurotunnel's wholly owned rail freight subsidiaries, not simply on cost but also on operational practice.

*Association Générale des Administrateurs Civils*), who said the following: "*recognition of an interest in bringing an appeal …is subject to a dual condition. The contested decision must "aggrieve" the appellant materially or morally, with undesirable consequences for the latter in some respect or other. However, these undesirable consequences must also aggrieve the appellant in a particular capacity or respect and belong to a defined and restricted category ... The appellant must be in a specific situation with respect to the act".*

104. However, in addition to this "subjective" conception of an interest in bringing proceedings, the JEC should also note a tendency towards an "objective" conception of this interest based on the notion of standing corresponding to the pre-defined legal situation of the individual or group and which would confer on the latter interest in bringing proceedings from an institutional viewpoint.

105. If these tests are applied, and in particular a test of whether EIL (believes that it) has a "genuine grievance" because the decision to adopt the NS in its current form prejudicially affects EIL's interests, then the JEC considers that the appeal is admissible. The charging provisions of the NS represent the offer of terms for access to the Fixed Link, setting the level of charges for competitors to EIL. The JEC considers that this is of potential concern to EIL, without in any way accepting that EIL has the standing to bring proceedings if it bases its appeal on behalf of other railway undertakings which operate or which might otherwise seek to operate rail services.

106. The JEC considers that there is force in EIL's argument, at para 26 of the Reply, that it is important for EIL to have a clear understanding of the basis on which Eurotunnel proposes to base its charges to EIL's competitors under the NS. The purpose of the NS in respect of charges is to set out the basis that any competitors to EIL who wish to make use of the Fixed Link will be charged. Obtaining such an understanding only once competing services commence is, as EIL submits, insufficient, bearing in mind that investment decisions are commonly made well in advance of the investments coming to fruition and that, in order to make such decisions, a proper understanding of EIL's and competitors' likely access costs will be necessary.

107. From this perspective, the fact that, as Eurotunnel alleges, the structure of charges in the NS is based on the same principles as those in the RUC does not demonstrate that they are consistent with the requirements of the Directive and the Regulation. It should be noted that the charges in the RUC were put in place prior to the adoption of the Directive and are not based on the Charging Principles and exceptions set out in the Directive. This tends to reinforce the prejudice alleged by EIL: if the NS is in need of modification to reflect the requirements of the Directive and the Regulation, then it is potentially important for EIL to know the nature of such modification in advance, rather than to be compelled to wait until a challenge is brought by a competitor, which might lead to a material alteration to the competitive situation, potentially including a reduction in the costs faced by EIL's competitors.

108. In addition, as EIL is already paying charges to Eurotunnel, albeit under the RUC, it appears to the JEC that it has certain direct and individual rights under Article 11.5 of the Regulation and Article 7(2) of the Directive to obtain justification of those charges. It appears to the JEC that those rights are also of potential relevance to the question of whether EIL has a sufficient interest in the subject matter of this appeal.

109. In the JEC's view, therefore, from the point of view of English law, it cannot be said that EIL falls into the category of a "mere busybody who is interfering in things which do not concern [it]", to quote Lord Denning in *N'Jie*. Similarly, with regard to French law, EIL as appellant has a direct and sufficient interest in bringing proceedings. If one or more of EIL's grounds of appeal are valid, then EIL is in the JEC's view aggrieved by the shortcomings identified.

110. The JEC notes that Eurotunnel has not actually contested EIL's submission that it is aggrieved. As noted above, in its letter of 24 July 2013 Eurotunnel merely refers to what it describes as EIL's "opportunistic" "change of stance" in the Reply. In that letter, Eurotunnel declined to file a rejoinder. The JEC accepts that EIL first referred to its being "aggrieved" in the Reply rather than in the Submission, which refers only to "unfair treatment of, and/or discrimination against, Eurostar (and other operators)". The JEC considers, however, that it was reasonable for EIL to respond to Eurotunnel's plea of admissibility by reference to the specific requirements of Article 12 of the Regulation and that it would not therefore be

appropriate to determine the issue of admissibility exclusively by reference to the terms of the Submission. In reaching this finding on admissibility, the JEC does not in any way prejudge the ***merits*** of the grounds of appeal either in respect of "establishment" of Eurotunnel's charges (see Article 11.4 of the Regulation) in respect of "justification" of the charges billed (see Article 11.5).

*Abuse of procedure*

111. The JEC now turns to whether the Appeal constitutes an abuse of legal procedure, as alleged by Eurotunnel. In summary, the JEC does not consider that (i) the existence of the RUC, and the ability of EIL, via the Railways, under the RUC to verify Eurotunnel's usage charges and operating costs, renders the Appeal an abuse of the procedure envisaged by Article 12.1 of the Regulation or (ii) that the arbitral award issued in 2005 renders the appeal inadmissible.

112. The starting point is the language of Article 12.1 itself (and that of Article 30(2) of the Directive), which confers a right to appeal on a railway undertaking that considers itself to be aggrieved. Apart from the subject matter of the appeal, that right of appeal, which is conferred by EU law, is not qualified in any way, and the JEC sees no basis for reading in any such qualification. Certainly, there is nothing in the statutory wording that excludes the possibility that an existing customer of the network manager paying charges under a pre-existing contract should not be permitted to bring an appeal. In principle, therefore, EIL is perfectly entitled to bring an appeal to the IGC against decisions adopted by Eurotunnel concerning (*inter alia*) the NS, the criteria contained within it and the charging scheme.[6]

113. In addition, the JEC agrees with EIL's submission that the ability of EIL to seek verification of the usage charges levied by Eurotunnel under the RUC, and of Eurotunnel's operating costs, is not a substitute for EIL's rights under the Directive and Regulation. As EIL has noted, its contractual right relates solely to information under the heads of charge set out in the RUC, whereas the rights arising under the Directive and the Regulation are more extensive, requiring not only that charges actually applied can be justified by reference to the NS (see Article 4(5) of the

[6] It follows that the JEC cannot accept Eurotunnel's submission that the RUC and Back-to-Back Agreement are the only texts applicable to the relationship between Eurotunnel and EIL.

Directive) but also that the NS itself conforms to the requirements of the Charging Principles (see Article 3(2), Annex I and Articles 7 to 9). If, as is alleged by EIL, the NS fails to include the relevant information by reference to the Charging Principles, such failure can only be challenged by way of an appeal under Article 12.1 of the Regulation.

114. The JEC has not been provided with the precise terms of the arbitral award issued in 2005. For the reasons mentioned in paragraph 105 the JEC considers that an arbitral award issued in relation to the RUC signed between Eurotunnel, SNCF and BRB does not render an appeal by EIL relating to the compatibility of the Network Statement and the Regulation inadmissible.

115. The JEC observes that the questions of standing and of whether the Appeal constitutes an abuse of procedure are interlinked. If, as the JEC considers, EIL can reasonably take the view that it is "aggrieved" by the NS, on the basis it needs to understand more fully the basis on which future competitors will be charged for access to the Fixed Link, then the only way in which it can obtain that fuller understanding is by making an appeal to the IGC: exercising its contractual rights under the RUC could never achieve that result.

116. For all of the foregoing reasons, therefore, the JEC's recommendation is that the Appeal should be declared admissible.

## IX.EIL's grounds of appeal

117. This section of the report sets out the JEC's recommendations concerning EIL's grounds of appeal. As with the preliminary issues the JEC first sets out, in respect of each ground relied on, a summary of the parties' submissions and then the JEC's recommendations.

### <u>Ground 1</u>: Eurotunnel has failed to give proper transparency of its costs and to justify the structure of its charges in accordance with Chapter II of the Directive.

118. The first ground of appeal is that, in the NS, Eurotunnel has failed to give proper transparency of its costs and to justify the structure of its charges in accordance with Chapter II of the Directive. EIL seeks a decision and declaration that the

charging scheme set out in the NS is not, with regard to issues of transparency and structure, established in accordance with the Charging Principles and permissible heads of charge for access to infrastructure as required by Article 11.4 of the Regulation and by the Directive. EIL also seeks a decision and declaration that the structure of charges set out in the NS has not been justified by Eurotunnel against the Charging Principles as required by Articles 11.4 and 11.5 of the Regulation.[7]

*1. The parties' arguments*

119. In the Submission, EIL submits that the approach in the NS of reducing the charges to two categories (a reservation fee and a per passenger toll) provides no, or minimal, transparency; the NS does not achieve the requirement of the Regulation in relation to transparency and justification by reference to the Charging Principles and compliance with the structure of charges required by the Directive.

120. In its counter submission, Eurotunnel contends that it has respected its obligations under the Directive. First, it submits that the NS is adequately transparent. It contends that Article 11.5 of the Regulation imposes an obligation on Eurotunnel to justify its charging scheme to the IGC, in its capacity as regulator, and not to any other parties. Such justification work, which requires Eurotunnel to provide access to its accountancy records and to justify the details of its calculations, has been ongoing for over a year. That process requires Eurotunnel to divulge confidential information given to it by railway undertakings. If Eurotunnel has to divulge that information such that it is made known to competing railway undertakings, Eurotunnel's obligation under Article 11.5 of the Regulation to keep the information confidential will be breached. Eurotunnel submits that, contrary to EIL's suggestion, this justification procedure does not create any rights which railway undertakings can deploy against Eurotunnel.

121. Eurotunnel accepts that it is under an obligation to provide information to railway undertakings by way of its network statement. It contends that the object of the legislation is to give such undertakings sufficient information in order that they may

[7] DB Schenker's intervention acknowledges EIL's concerns regarding transparency and the structure of Eurotunnel's charges: while the NS is very clear on the level of charges levied, it is silent on how those charges are derived from and reflect Eurotunnel's costs. DB Schenker is also concerned that the charging regimes for international rail freight and freight Shuttles are very different and that a consequence is to make road freight using freight Shuttles more attractive to end customers.

decide whether to operate through the Channel Tunnel. They should be able to understand and predict the general access conditions and charging scheme of the Tunnel, but Eurotunnel is not required to report its calculations, which are confidential and quite complex, or to justify its costs or supply supporting documentation. EIL's application to obtain justifications and additional information is, in Eurotunnel's submission, unfounded.

122. Eurotunnel further submits that the information contained in the NS complies with legislative requirements. Article 1.2 of the NS provides a general explanation of the context of the Tunnel. Article 6.1 corresponds to the charging scheme methodology, describing it in detail; Article 6.2 corresponds to the rules under which the charging scheme is established; and Article 6.3 sets out the applicable rates for passenger trains. Finally, Annexes 3 and 4 describe the scales of charges as well as give the specific prices for each offer.

123. ET submits that it is prepared to justify the compliance of its tariff framework in the context of the justification procedure before the IGC. It submits, however, that EIL has fundamentally misinterpreted the regulatory provisions of the Directive. Eurotunnel submits that:

(a) EIL attempts to expand the scope of the Directive to include the distribution rules between the road system and the rail system, even though the road system is excluded from the scope of the Directive. Likewise, EIL attempts to give the Directive a much wider scope than it has with regard to the nature of the costs that the Directive aims at: the Directive applies only to the fee structure of the railways' infrastructure and does not target the separate and more general question of the costs of the Fixed Link itself.

(b) ET is not required by the Directive to justify a charging scheme that follows the pattern for State funding, which justifies the minimum costs under Article 7(3) of the Directive. This interpretation, which EIL wrongly defends, is not supported in the Regulation. Eurotunnel's situation corresponds precisely to the exception provided for in Article 8(2) of the Directive:

(i) the Tunnel was a specific investment project, based entirely on private funding, for the purpose of constructing infrastructure that is unique within Europe;

(ii) the project dates from the signing of the Concession Agreement on 14 March 1986 and came into operation on 1 June 1994, which is less than 15 years before the entry into force of the Directive;

(iii) as there is no funding from the States, the charges must necessarily be greater than the costs actually incurred in the operation of the rail service so that the project can be fully realised. Eurotunnel received two forms of guarantee under the RUC: the ability to charge for rail services and the promise that revenue would remain stable independent of the amount of traffic, without which the project would never have come into being. Eurotunnel's debt restructuring in 2007 did not have an effect on the amount of these charges. Eurotunnel's current charging reflects that which is provided for in the RUC and is the return on investment of the construction of the Tunnel. The investment is of the order of £10 bn or EUR 14 bn. This investment should have produced a reasonable rate of return, but the lower level of traffic than originally predicted had led to disastrous investment returns and as a result the financial restructuring of Eurotunnel.

(iv) the Fixed Link has created a direct inter-capital mode of transport, reducing the travel time and allowing for a significant market share gain for the railways over aerial transport, demonstrating a gain in efficiency.

(c) In this regard, Eurotunnel claims that Article 11.4 of the Regulation is explicitly concerned with Article 8(2) of the Directive and that the IGC has specifically confirmed that Article 8(2) specifically addresses Eurotunnel's situation.

124. In its Reply, EIL submits a compliant network statement must set out (a) what is actually being charged; (b) how those charges are calculated; and (c) how those charges relate to costs recoverable under the Directive, such that an existing or new user can easily understand on a transparent basis what is being charged and on what

legal and financial basis. EIL submits that these requirements arise from the Directive itself, the Regulation, EU Commission Guidance statements on the Directive and EU principles of transparency. In EIL's submission, Eurotunnel's stance falls far short of these requirements: as things stand, railway undertakings know how much Eurotunnel requires them to pay for access but cannot scrutinise how the charges are calculated in accordance with the Charging Principles.

125. EIL contends that a purposive approach should be adopted to the interpretation of Eurotunnel's obligations under the Directive and Regulation. The purpose of the Directive is anchored in the liberalisation of the European passenger rail market. Referring to various recitals to the Directive, EIL submits that in order for that market to be opened up to competition it is necessary that railway undertakings have access to the network on fair and transparent terms, to the ultimate benefit of consumers.

126. EIL notes Eurotunnel's acceptance that certain requirements apply to a network statement. EIL points to Article 2(j), Article 3 and Annex I to the Directive (described above), which contain what EIL refers to as "minimum requirements", and to an Annex A of a document published by the Commission entitled "Best Practice Guide for Railway Network Statements".

127. EIL further submits that Eurotunnel is obliged to charge on the basis of the Charging Principles, that obligation being subject to the requirements of transparency. Referring to recital 5 to the Directive, EIL submits that in the regime established by the Directive and the Regulation transparency is manifested through the network statement. This includes an obligation that Eurotunnel justify, in the NS, its charges by reference to the Charging Principles. EIL takes issue with Eurotunnel's submission that Article 11.5 of the Regulation limits Eurotunnel's duty in this regard to justifying its charges to the IGC: EIL submits that this is inconsistent with the wording and purpose of Article 11.5.

128. Turning to the content of the NS, EIL submits that it is patently inadequate: it clearly lacks the "appropriate details", "sufficient information" or "necessary information" (to coin the wording of the Directive) to satisfy the requirements of transparency. It also fails to meet the structural and methodological requirements

of the Directive. There is no transparency as to how the component charges are calculated, structured, broken down, linked to costs and what elements may or may not link to costs not wholly related to railway undertakings. In EIL's submission, there is nothing in the NS (or in Eurotunnel's counter-submission) that could be described as a methodology.

129. EIL takes issue with Eurotunnel's interpretation of the Directive. EIL does not accept Eurotunnel's view that Article 7(3) does not apply to it. Even if Eurotunnel is right to say that Article 6(1), second paragraph and Article 8(2) apply here, EIL sees no reason why this would lead to the disapplication of Article 7(3). It cannot be inferred from the terms of Article 8(2) that there is no need to establish the basic direct cost, by reference to which a "higher" charge may be imposed. Referring to Case C-556/10 *Commission v Germany* (at paras. 79-90), EIL submits that the CJEU clearly envisaged that actual charges might lie on a spectrum between the two extremes, with the charges based on direct costs (under Article 7(3)) being supplemented by additional permissible charges relating to other heads of cost, including those under Article 8(2) if its conditions were met.

130. EIL submits that even if Eurotunnel were correct in its view that Article 8(2) of the Directive is the only applicable Charging Principle, it would still have to explain whether the charges were based on the long-term costs of the project, whether the project increases efficiency and/or cost-effectiveness, and whether the project could not otherwise have been undertaken (i.e. without the higher charges being imposed). It is particularly unsatisfactory that the NS provides no information as to the proportion of the charges which relate to long-term debt, any mark-up or uplift applied or the impact of the restructuring of the debt in 2007. EIL further submits that the counter-submission raises more questions than answers (for example, as to the costs "associated" with the alleged initial investment of EUR 14 bn in 1994 and as to what the "costs of constructing and operating" the Tunnel are and in what proportion railway undertakings are being asked to bear such costs).

*2. The JEC's recommendations*

131. In order to address the competing arguments outlined above, it will be necessary for the IGC to reach a view as to the true construction of the Directive, on which the

Regulation is based, and in particular to determine the nature of the obligations imposed on Eurotunnel to establish a network statement and to justify its charges.

132. The JEC considers that the Regulation reflects the strict application of the Directive – it is not suggested by either party that it has failed to do so, with the result that it is sufficient to interpret the requirements of the Directive in order to determine the outcome of this appeal.

133. Under Article 3(1) and (2) and Annex I, paragraph 2, of the Directive, as implemented in the Regulation, Eurotunnel is required to establish the NS on a basis that meets the following requirements:

(a) It must "*contain appropriate details of the charging scheme as well as sufficient information on charges that apply to the services listed in Annex II which are provided by only one supplier*".

(b) It must "*detail the methodology, rules and, where applicable, scales used for the application of Article 7(4) and (5) and Articles 8 and 9*".

(c) Finally, it must "*contain information on changes in charges already decided upon or foreseen*".

134. The JEC considers that the second of these requirements is the most important, in respect of this appeal, and that this in turn requires the IGC to take a view as to the meaning of Articles 7(3)-(5) as well as 8 and 9 of the Directive.

135. Eurotunnel's essential submission on this issue is that its charges are determined exclusively by reference to Article 8(2) of the Directive, on the basis that it is exclusively funded from private means and that the costs of the Fixed Link are recoverable under Article 8(2), which clearly exceed the direct costs that form the minimum basis for charging under Article 7(3) of the Directive (on this last point, see Case C-556/10 *Commission v Germany* (and specifically the conclusions of the Advocate-General in para. 80).

136. The JEC does not agree with this analysis. The JEC considers that the starting point for charging is Article 7(3) and that the specific provisions referred to in Annex I of the Directive, Article 7(4) and (5) and Articles 8 and 9, provide for supplementary

charges of various kinds that can be levied in addition to the basic charge levied under Article 7(3).

137. In the specific case of Article 8(2), this permits the levying of an additional charge in respect of major infrastructure projects, subject to the conditions set out in that paragraph. There is nothing in Article 8(2) to suggest that its scope is limited to projects funded exclusively out of private funds, although any public funding of a project would obviously need to be taken into account in assessing what charge could be levied. Likewise, the JEC does not consider that Article 8(2) requires a comparison between the costs of the infrastructure project and any direct charges – the expression "higher charges" is naturally construed to mean charges that are ***additional*** to those applicable under Article 7(3), not that those additional charges viewed in isolation are necessarily higher than the costs directly incurred in running the entire network.

138. The JEC considers that the position of Eurotunnel and the Fixed Link is exceptional in so far as Eurotunnel is the infrastructure manager for a very limited asset whose capital costs are exceptionally large. In other cases that could equally fall within the scope of Article 8(2), where an infrastructure manager is responsible for a large network and an infrastructure project relates to a limited asset or class of assets within that network (for example, an electrification scheme of part of the network or the upgrading of a series of bridges or tunnels), the purpose of Article 8(2) is to enable the infrastructure manager to levy an exceptional charge to finance that project. This construction is supported by Article 4(4) of the Directive, which permits localised charging in respect of Article 8(2).

139. This analysis is further confirmed by the recent judgment of the CJEU in Case C-556/10 *Commission v. Germany* (28 February 2013, para. 87), which finds that the principles underlying Article 7(3) and Article 8(1) "are not interchangeable". In making this finding, the CFEU followed the Opinion of Advocate-General Jaaskinen who, having found that "*the provisions of Directive 2001/14/EC present a complex system that sets out the factors which must be taken into account when determining infrastructure charges*" (para. 76), concluded that:

> "*With regard to the Commission's argument that Paragraph 14(4) of the General Railways Law contains lacunae because that provision does not always make it*

> *possible to determine with certainty whether and when to apply the direct costs principle provided for in Article 7(3) of Directive 2001/14 or the total costs principle provided for in Article 8(1) of Directive 2001/14, I consider that that argument might be based on a false dichotomy. As I stated above, in my view, the directive does not provide for two alternative methods but for a range comprising a minimum, namely the cost that is directly incurred, and a maximum, corresponding to the full costs incurred by the infrastructure manager. Between those extremes, the manager may apply additional charging criteria provided for in the directive, and discounts according to the conditions of Directive 2001/14 and, possibly, the charging framework adopted by the Member State" (para. 83).*"

140. Although this case concerned the application of Article 8(1) rather than Article 8(2), the JEC considers that the analysis of the CJEU and of the Advocate-General is consistent with the above analysis, and in particular that the Member States should make it clear when and the extent to which they are departing from the "minimum" charging scheme provided for in Article 7(3).

141. In conclusion, the interpretation of the Directive by Eurotunnel appears to be incorrect and, in so far as it concedes that it has only applied Article 8(2) (which concerns the long term costs of a specific investment project) – thus excluding Article 7(3) (which relates to the costs directly incurred as a result of operating the train service). It is apparent that the content of the Network Statement is not in accordance with Annex I of the Directive, which requires in particular that the Network Statement should "*detail the methodology, rules and, where applicable, scales used for the application of Article 7(4) and (5) and Articles 8 and 9*".

142. Viewed from this perspective, the requirements imposed by Article 3(2) and Annex I, para. 2, of the Directive are for the network statement to identify the "*cost that is directly incurred as a result of operating the train service*" in accordance with Article 7(3) but also to set out "*the methodology, rules and, where applicable, scales used for the application of Article 7(4) and (5) and Articles 8 and 9*".

143. Assessing the submissions of the parties against this framework, the JEC considers that EIL's essential contention (at Issue 1, para. 3.10(a) of the Submission) should be accepted, namely that the NS in its current form does not contain sufficient information to satisfy the requirements of the Directive (and the Regulation).

144. In order to remedy this defect, the JEC therefore recommends that the Network Statement for 2015, in so far as it concerns the articles relevant to charging for passenger services, should be presented under the following revised format:

(a) First, to show, for each tariff, the sum corresponding to the costs directly incurred in operating the railway service on which all charging systems must be based and the sum corresponding to the other costs relating to the long term costs of the project.

(b) The JEC notes that, in its counter submission, Eurotunnel has indicated that it has not applied "mark-ups" within the meaning of Article 8.1 of the Directive. However, in the event that Eurotunnel seeks to recover such mark-ups, it must then show, for each tariff, the sum corresponding to those mark-ups.

(c) In addition, Eurotunnel should describe in detail in the NS "*the methodology, rules and, where applicable, scales used*" for the application of Articles 7, 8 and 9.

145. Point 2 of the issues as formulated in the Notice of Appeal is that, in the Network Statement, Eurotunnel has not ***justified*** the charges set out in the Network Statement by reference to the charging principles as required by Articles 11.4 and 11.5 of the Regulation.

146. EIL requests from the IGC a decision and a declaration to this effect and, in concrete terms, that Eurotunnel should provide it with the relevant accounting information.

147. Eurotunnel maintains that it cannot be required to provide such justifications otherwise than to a Member State on the basis of Article 7.2 of the Directive or to the IGC on the basis of Article 11.5 of the Regulation.

148. In specific terms, the Directive, and in particular Annex 1 thereto, provides that the chapter of the Network Statement devoted to the charging principles and tariffs must contain "*appropriate details of the charging scheme as well as sufficient information on charges that apply to the services listed in Annex II that are provided by only one supplier*".

149. Article 11.5 of the Regulation specifies that the charging body "*must be able to justify **the charges billed** as against the charging principles set out in this Regulation and in Chapter II of the Directive and, in particular, to show that the charging scheme has been applied to all railway undertakings in a fair and non-discriminatory way. The charging body must respect the commercial confidentiality of information provided to it by those requesting capacity*" (emphasis added).

150. The JEC interprets these provisions to mean that Eurotunnel must be able to:

(a) provide Member States and the IGC with any necessary or requested information on charges;

(b) justify its charges to any railway undertaking paying those charges, by reference to the charging principles, so as to set out how those charges relate to (i) the costs directly incurred, levied in accordance with Article 7(3) of the Directive (ii) the long term costs of the project, levied in accordance with Article 8(2) of the Directive and, (iii) where appropriate, any mark-up which has been levied in accordance with Article 8(1) of the Directive, and so as to include a list of the cost categories included under each heading.

151. To the extent that EIL demands that the charges levied under the NS should be justified to EIL itself, the JEC recalls that EIL is invoiced and billed under the RUC. However, there is a principle of equivalence written into these terms in the latest NS published by Eurotunnel: "*The charges published in the Network Statement have been designed to provide fair and non-discriminatory open access reflecting the charging framework of the Usage Contract". In addition, notwithstanding the fact that the charges that EIL currently pays are levied under a contract, Article 7.2 of the Directive and 11.5 of the Regulation both appear to confer rights on EIL to demand **justification** of its charges by reference to the Network Statement in order to ascertain that it is being treated in a "fair and non-discriminatory way*".

152. In those circumstances, the JEC considers that, although EIL may be invoiced and billed under the RUC, it is entitled to demand from Eurotunnel justification for its tariffs by reference to the tariffs levied under the NS.

153. The JEC therefore recommends that, once the NS for 2015 has been established in compliance with the Directive, Eurotunnel should be in a position to justify each of its tariffs. To the extent that Eurotunnel considers that certain information is commercially sensitive, then it must be able to provide details of the cost elements comprising the charge and justify the relevant tariff to the regulatory body.

**<u>Ground 2</u>: Eurotunnel did not conduct compliant and meaningful consultation in relation to the NS as required by Article 5.3 of the Regulation.**

154. EIL's second substantive ground (formulated as Issue 3 in the Submission, para. 3.10(c)) is that Eurotunnel failed to discharge its duty to consult on the draft network statement for 2014 ("the draft NS") prior to its adoption.[8]

155. EIL states that the Eurotunnel circulated the draft NS on 9 November 2012, inviting consultation responses by 9 December 2012, i.e. very shortly before the due date for publication of the NS. EIL sent its response on 7 December 2012, making very clear EIL's concerns. According to EIL, there was no follow-up, engagement or response from Eurotunnel to that consultation response: the NS was published without taking EIL's concerns properly into account.

156. In its counter-submission, Eurotunnel contends that it respected its duty to consult under Article 5.3 of the Regulation. It has consulted EIL yearly on its draft network statement. EIL and other consulted parties, notably the IGC, regularly gave Eurotunnel their comments, which Eurotunnel took into account as much as possible. The obligation to consult does not, however, impose any duty on Eurotunnel to integrate all of EIL's comments into the NS.

[8] DB Schenker shares EIL's concern that its consultation response has not been properly taken into account by Eurotunnel, and considers that improvements could be adopted by Eurotunnel to improve the way in which the NS is consulted upon and published: responding to consultees (individually or collectively) explaining why their respective comments have been accepted or rejected is not only good practice but also reduces uncertainty and wasted time.

157. In its Reply, EIL contends that Eurotunnel's counter-submission misses the point. EIL does not assert that proper consultation requires Eurotunnel to accept all suggestions from consultees. It does, however, require that the proposal that is being consulted on be at a formative stage and does require that the product of consultation be conscientiously taken into account at the time of finalising the approach to be taken. EIL does not accept that Eurotunnel took EIL's response into account. Rather, Eurotunnel approached the exercise with a closed mind, determined that it would provide no more information than it wished to.

158. Eurotunnel's letter to the IGC dated 24 July 2013 does not address this issue further.

*2. The JEC's recommendations*

159. The JEC considers that this ground should be rejected.

160. The starting point is Article 3(1) of the Directive, which provides relevantly:

> "*The infrastructure manager shall, after consultation with the interested parties, develop and publish a network statement...*"

161. Article 5.3 of the Regulation provides:

> "*The Concessionaires shall consult all the interested parties, including the Intergovernmental Commission, on the draft Network Statement, allowing a reasonable deadline to respond.*"

162. The JEC notes that under English law, where a public body is under a duty to consult before taking a decision, (i) the consultation must be undertaken at a time when the proposals are still at a formative stage; (ii) the consultation must include sufficient reasons for particular proposals to allow consultees to give intelligent consideration and an intelligent response; (iii) adequate time must be given for this purpose; and (iv) the product of consultation must be conscientiously be taken into account when the ultimate decision is taken: see *R v North and East Devon Health Authority, ex parte Coughlin* [2001] QB 213 at [108]. What procedural fairness requires will depend on the nature of the issues on which consultation is required (in addition to any statutory requirements that may be imposed).

163. Under French law, in order to be compliant, the consultation must be "effective, loyal and complete" (conclusions of *Braibant* at EC 15 March 1974, *National CGT-FO Union of Civil Servants and Inland Trade and Pricing Officers*). The judge confirms the reality of the consultation and assesses the grounds invoked to justify any lack of consultation, if specified (EC 26 avril 1974, *Student Liaison Committee on University Renovation, CLERU*), he monitors the composition and operation of the consulted organisation (EC Sect. 13 March 1970, *Minister of State for Cultural Affairs c/Dame Benoist d'Anthenay*). The judge may even be required to submit, in some areas where questions of fact are important, that if the time between the consultation and the decision is too long, this invalidates the decision (11 December 1987, Minister for Home Affairs c/ Stasi). The authority remains free to make its decisions. The consultation may be entered into well before the decision, as early as the preliminary investigation.

164. The JEC considers that, notwithstanding the fact that Eurotunnel's obligations to consult are governed by statute and are imposed on a private company, these principles give helpful guidance as to the nature of Eurotunnel's duty to consult under Article 5.3 of the Regulation. As infrastructure manager, Eurotunnel is performing a quasi-public function and the JEC takes the view that it is right to interpret the nature of its procedural obligations in accordance with the standards applicable to a public body in an equivalent legal and factual situation.

165. Applying those principles to the present facts, the JEC does not consider that any breach of Article 5.3 has been demonstrated:

    (a) Whilst it is true that the NS was not amended to reflect EIL's concerns about transparency and the structure of charges, the JEC considers that that alone is insufficient to support EIL's submission that Eurotunnel approached the consultation process with a closed mind. Indeed, the NS shows a number of changes from the draft on which Eurotunnel consulted, as was recognised by the IGC's letter to Eurotunnel dated 12 February 2013. That demonstrates, in the JEC's view, that Eurotunnel was prepared to consider the views of consultees even if it did not agree with all of those views.

(b) As to principles (iii) and (iv) above, it is true that the time allowed for responses was relatively short and that the NS does not contain reference to the views of consultees. However, it is clear from the documents appended to the appeal that this is an ongoing topic of debate between Eurotunnel and EIL and the JEC considers that EIL has in reality had sufficient opportunity to makes its views known. The fact that Eurotunnel does not agree with EIL's criticisms is not a sufficient basis for this procedural ground to succeed.

**X.The JEC's recommendation as to the IGC's decision and directions**

166. For the reasons set out above, the JEC's recommendation is that the IGC should uphold Ground 1 of the Appeal and should reject Ground 2 of the Appeal.

167. If the IGC agrees with this recommendation, it will need to consider whether, as part of its decision, to give directions to Eurotunnel pursuant to Article 12.4 of the Regulation with a view to remedying the situation; and, if so, what those directions should be.

168. The directions sought by EIL are set out at para 3.11 of the Submission. It requests the IGC to direct ET:

(a) To justify the structure of charges set out in the NS against the Charging Principles, in accordance with Articles 11.4 and 11.5 of the Regulation. Such justification should, in EIL's submission, identify and set out what portions of which charges under the NS are in respect of charges permitted under each of Articles 7(3), 8(1) and 8(2) of the Directive respectively, with the charges in respect of each Article separately identified.

(b) To provide information "to a level of detail reasonably required" concerning such justification (para 3.11(b) of the Submission sets out the information that, in its submission, should be provided).

(c) To provide:

(i) all relevant charging, accounting and funding information and evidence necessary to validate the structure of charges set out in the NS against the Charging Principles, such information and evidence to be

categorised, itemised and identified by reference to each of the separate permitted heads of charge under the Charging Principles; and

(ii) relevant documents evidencing any market or market segment analysis relied on in support of any purported mark-up sought on actual costs incurred.

(d) To produce and publish a revised 2014 network statement that is, as a matter of transparency and structure, established in accordance with the Charging Principles and permissible heads of charge for access to infrastructure as required by Article 11.4 of the Regulation and by the Directive.

169. In its counter-submission, Eurotunnel did not comment on EIL's request for directions.

170. In the light of the above analysis, the JEC considers that any remedy that the IGC may be minded to make should be in the form specified in paragraphs 144 and 150 above, namely:

(a) the Network Statement for 2015, in so far as it concerns the articles relevant to charging for passenger services, should be presented under the following revised format:

(i) First, to show, for each tariff, the sum corresponding to the costs directly incurred in operating the railway service on the basis of which all charging systems must be based and the sum corresponding to the other costs relating to the long term costs of the project.

(ii) The JEC notes that, in its counter submission, Eurotunnel has indicated that it has not applied "mark-ups" within the meaning of Article 8.1 of the Directive. However, in the event that Eurotunnel seeks to recover such mark-ups, it must then show, for each tariff, the sum corresponding to those mark-ups.

(iii) In addition, Eurotunnel should describe in detail in the NS "*the methodology, rules and, where applicable, scales used*" for the application of Articles 7, 8 and 9.

(b) Once the Network Statement for 2015 has been brought into line with the Directive, Eurotunnel should:

(i) provide the IGC with any necessary or requested information on charges;

(ii) justify its charges to any railway undertaking paying those charges, by reference to the charging principles, so as to set out how those charges relate to (i) the costs directly incurred, levied in accordance with Article 7(3) of the Directive (ii) the long term costs of the project, levied in accordance with Article 8(2) of the Directive and, (iii) where appropriate, any mark-up which has been levied in accordance with Article 8(1) of the Directive, and so as to include a list of the cost categories included under each heading.

To the extent that Eurotunnel may consider that certain information would represent a breach of commercial confidentiality, then it must be in a position to justify the relevant tariff to the regulatory body.

**Co-chairs of the Joint Economic Committee:**

**Brian KOGAN** **Michel BELLIER**