

# **CHANNEL TUNNEL INTERGOVERNMENTAL COMMISSION**

**Decision No. 2013-001 of 25 October 2013**

*concerning the appeal submitted by Eurostar International Limited  
against France Manche SA and The Channel Tunnel Group Limited  
and relating to the Network Statement 2014*

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**The Channel Tunnel Intergovernmental Commission (hereafter referred to as the “Intergovernmental Commission”),**

- (1) Given the 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”);

- (2) Given the Intergovernmental Commission Regulation concerning use of the Channel Tunnel as signed in London on 23 July 2009 and Décret No. 2010-21 of 7 January 2010 publishing the said Regulation (hereafter referred to as “the Bi-national Regulation”);
- (3) Given Directive 2001/14/EC of the European Parliament and of the Council of 26 February 2001 concerning the allocation of railway infrastructure capacity, the levying of charges for the use of railway infrastructure and safety certification (hereafter referred to as “the Directive”);
- (4) Given Directive 2007/58/EC of the European Parliament and of the Council of 23 October 2007 amending Council Directive 91/440/EEC concerning development of Community railways and Directive 2001/14/EC concerning the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure;
- (5) Given Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area;
- (6) Given the Intergovernmental Commission’s Rules of Procedure for appeals brought under Article 12 of the Bi-national Regulation (hereafter referred to as “the Rules of Procedure”);
- (7) Given the appeal (and its annexes) submitted on 20 March 2013 by Eurostar International Limited (hereafter referred to as “Eurostar”), a company registered under English law under number 2462001, with its registered offices at Times House, Bravingtons Walk, London, N1 9AW, represented by its Director of Regulatory Affairs and Company Secretary, Gareth Williams, based at these offices in this capacity, and assisted by law firms Burges Salmon and August et Debouzy;

Eurostar bases its appeal on the failing of France Manche SA and The Channel Tunnel Group Limited (hereafter referred to as "Eurotunnel") to ensure appropriate transparency of their costs in their Network Statement and to justify the charging structure in accordance with Chapter II of the Directive as they are legally required to do. Eurostar reserves its position on other subjects, decisions or actions which give rise (or may give rise) to unjust treatment, discrimination or a right of appeal or complaint to the Intergovernmental Commission or any other court or organisation in anticipation of Eurotunnel complying with the requested instructions, in particular the justification required with regard to the charging principles and provision of corresponding invoicing information. This reservation includes the level of past and future charges (but is by no means limited to the latter);

Eurostar has requested that the Intergovernmental Commission make a decision and declaration on each of the three disputed issues below, expressed in the following terms:

Issue 1 – A decision and declaration that the charging scheme set out in the Network Statement 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 Bi-national Regulation and Directive 2001/14/EC;

Issue 2 – A decision and declaration that the structure of charges set out in the Network Statement has not been justified by Eurotunnel against the Charging Principles as required by Article 11.4 and Article 11.5 of the Bi-national Regulation;

Issue 3 – A decision and declaration that Eurotunnel did not conduct compliant and meaningful consultation (taking fair account of responses received) in relation to the Network Statement as required by Article 5.3 of the Bi-national Regulation;

In addition, Eurostar has requested the Intergovernmental Commission to direct Eurotunnel to:

- Justify the structure of charges set out in the Network Statement against the Charging Principles in accordance with Articles 11.4 and 11.5 of the Bi-national Regulation;
- In setting out such justification, provide adequate information to the level of detail which is required;
- Provide “*all relevant charging, accounting and funding information and evidence necessary to validate the structure of charges set out in the Network Statement against the Charging Principles*” and the “*relevant documents evidencing any market or market segment analysis relied up[on] in support of any purported mark-up sought on actual costs incurred*”<sup>1</sup>;
- Produce and publish a revised version of the 2014 Network Statement which is established, as a matter of transparency and structure, in accordance with the charging principles and permissible heads of charge for access to infrastructure as required by Article 11.4 of the Bi-national Regulation and Directive 2001/14/EC;

(8) Given the counter-submission (and its annexes) submitted on 10 June 2013 by France Manche SA, a company registered under French law under number 333 286 714, and The Channel Tunnel Group Limited, a company registered under English law under number 01811435, (hereafter referred to as “Eurotunnel”), assisted by law firm Quinn Emanuel Urquhart & Sullivan;

(9) Given the amended counter-submission submitted by Eurotunnel on 27 June 2013;  
Eurotunnel is of the view that the Intergovernmental Commission cannot act as a judicial authority for a number of reasons: the Intergovernmental Commission is both judge and party since Eurostar is owned by the French and UK governments and the Commission represents these governments; in functional terms, the Intergovernmental Commission is dependent on these governments; also, the Intergovernmental Commission combines the

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<sup>1</sup> Quotes from submissions or legal texts appear in this decision document in italics.

functions of regulator and judicial authority; and the Intergovernmental Commission has displayed partiality in favour of Eurostar since the start of the procedure;

Eurotunnel submits that Eurostar's appeal is inadmissible since it does not satisfy the requirements of Article 12 of Directive 2001/14/EC, and since Eurostar has not established its interest in bringing proceedings: Eurostar is not attacking a specific decision made by Eurotunnel and has merely alleged discrimination and hypothetical unfair treatment in abstract terms, whereas it is currently in a monopoly situation and will remain so throughout 2014. Eurotunnel is also of the opinion that Eurostar's appeal should be rejected since it represents an abuse of the procedure, Eurostar's rights being guaranteed by a contract stipulating a contractual guarantee which enables it to access the infrastructure and to verify charges in a precise manner.

Finally, Eurotunnel is of the view that Eurostar's appeal is based on conflating the information that Eurotunnel is required to provide to the Intergovernmental Commission in its capacity as regulator and much more restricted information required by third parties in connection with the Network Statement, which means that Eurostar is requesting information to which it is not entitled and interfering with justification tasks between the Regulator and the infrastructure manager. In any event, in Eurotunnel's view, Eurotunnel's charging system is perfectly compliant with the requirements of Directive 2001/14/EC;

- (10) Given the Reply submitted by Eurostar on 18 July 2013;
- (11) Given the letter notified by Eurotunnel on 24 July 2013 confirming that it would not submit a rejoinder;
- (12) Given the letter notified by DB Schenker Rail (UK) Limited on 2 July 2013 containing its representations on the appeal;

- (13) Given the letter notified by the UK Department for Transport on 18 July 2013 containing comments on the competence of the Intergovernmental Commission;
- (14) Given the letter notified by SNCF on 17 July 2013 stating that it had no representations to make;
- (15) Given the other correspondence exchanged with the parties and interested parties during the course of the appeal;
- (16) Given the report (hereafter referred to as “the JEC report”) of the expert body(hereafter referred to as the “Joint Economic Committee” or “JEC”) appointed by the Intergovernmental Commission for assistance with the appeal in accordance with Article 12.2 of the Bi-national Regulation submitted on 19 September 2013;
- (17) Given Eurostar’s written comments of 30 September 2013 on the JEC report;
- (18) After the following being heard at the hearing of 2 October 2013 by Chairman François Barry Delongchamps, members of the French Delegation Pierre Garnier and Gilles Sanson, and members of the UK Delegation Christopher Irwin (Head of Delegation), Caroline Wake and Agnès Bonnet:
- observations from Michel Bellier and Brian Kogan, the co-chairmen of the Joint Economic Committee ;
  - observations from Gareth Williams of Eurostar and James Flynn QC of Brick Court Chambers;
  - observations from Emmanuel Moulin of Eurotunnel and Philippe Pinsolle of Quinn Emanuel Urquhart & Sullivan;

**The Intergovernmental Commission, having discussed this matter at its meeting held on 25 October 2013 in Paris, hereby adopts the decision on the facts and legal reasoning concerning the Eurostar appeal, as set out below:**

### **I. Scope of the Intergovernmental Commission's decision**

1. As set out in Article 10.1 of the Rules of Procedure, as part of any decision, the Intergovernmental Commission is able to consider issues of jurisdiction, the admissibility of the appeal and the merits of the claim submitted to the Intergovernmental Commission.
2. This decision of the Intergovernmental Commission represents a decision on its competence, the admissibility of the appeal and the merits of the appeal.
3. The appeal was submitted by Eurostar, a railway undertaking, “the principal business of which is to provide services for the transport of passengers” as defined by the Directive (Article 2(k)) and concerns Eurotunnel, an infrastructure manager as defined by the Directive (Article 2(h)). The Intergovernmental Commission acknowledges that the issues raised by this appeal may impact other operators or potential operators using the Channel Fixed Link. The Intergovernmental Commission considers that the scope of its decision will cover relations between Eurotunnel and such operators.
4. The Channel Fixed Link is defined in the Treaty as “*a twin bored tunnel rail link, with associated service tunnel [...] together with the terminal areas for control of access to, and egress from, the tunnels and [...] any freight or other facility, and any road link between the United Kingdom and France which may hereafter be agreed between the High Contracting Parties to form part of the Fixed Link*”.
5. The Intergovernmental Commission acknowledges that railway undertakings only make use of some of the facilities thus defined. In this decision, the Intergovernmental Commission refers to the “Common Section” of the Fixed Link, as defined in Article 2 of the Bi-national Regulation “[...] that part of the Fixed Link which is normally used by all categories of trains for the delivery of the services described in Article 1.”. The services described in Article 1 are

*“[...] international passenger services, [...] international combined transport goods services, and [...] international freight services by railway undertakings [...]”.*

## **II. The appeal procedure**

6. In its counter-submission, **Eurotunnel** submitted that the Intergovernmental Commission has shown a lack of impartiality since the outset of the proceedings, in particular by refusing to grant Eurotunnel an equivalent timescale to prepare its counter submission to that enjoyed by Eurostar in preparation of the appeal.
7. **Eurostar** notes that *“Eurotunnel's complaint that it has not received the same time to prepare its defence as Eurostar had to formulate its claim is wholly misguided. This is a situation that commonly arises: whilst the time for bringing actions or appeals is often limited only by limitation periods (so that they may be brought many years after the act complained of), the defence is generally due within a much shorter period, with time running from the service of the claim.”*
8. The **Intergovernmental Commission** notes that in 2010 (following consultation with Eurotunnel) it adopted the rules for dealing with appeals submitted on the basis of the Bi-national Regulation (namely the Rules of Procedure) via a completely transparent process. Given the nature of the questions raised by Eurostar's appeal, the Intergovernmental Commission does not consider Eurotunnel is justified in maintaining that the three-month period it had in which to submit its counter-submission was inadequate.

## **III. On the competence of the Intergovernmental Commission to determine this appeal**

### *i. Independence of the Intergovernmental Commission*

#### *Arguments of the parties*

9. **Eurotunnel** asked the Intergovernmental Commission to declare that it does not have competence to hear this appeal on the basis that the Intergovernmental Commission is not sufficiently independent of Eurostar, the applicant bringing this appeal.

10. In its counter-submission, Eurotunnel claims that the Intergovernmental Commission is in no position to judge Eurostar's appeal, because it is not an impartial judge. Eurotunnel alleges that the Intergovernmental Commission represents the two Governments, in particular the Ministère des Transports in France and the Department for Transport in the UK. Eurotunnel submits that the governments "figure largely in directing the activities of the IGC". In addition, Eurotunnel submits that the situation creates a conflict of interest for the Intergovernmental Commission, as the French and British states own Eurostar (through SNCF in the case of France, and through London & Continental Railways in the case of the UK). It submits that these companies act under the control of the Ministère des Transports and the Department for Transport.

11. In its Reply, **Eurostar** submits that the functions of the Intergovernmental Commission have been "known about, intended and agreed upon by all parties for a significant number of years" and refers to the arrangements put in place by the Governments to guarantee the functional independence of the Intergovernmental Commission's members.

*Advice of the joint economic committee*

12. The **Joint Economic Committee** considers that independence should be construed in accordance with Article 30 of the Directive, which requires that the regulatory body be "*independent in its organisation, legal structure, and funding decisions from infrastructure managers, charging bodies, allocation bodies and applicants*".

13. Paragraph 81 of the JEC's report sets out its analysis of the independence of the Intergovernmental Commission in accordance with the Directive. The JEC also describes the set of arrangements adopted by the UK and France to safeguard the independence of the British and French delegations to the IGC.

*The Intergovernmental Commission's decision*

14. The **Intergovernmental Commission** considers that it is functionally independent of the Governments' interest in Eurostar. In particular, the Intergovernmental Commission draws attention to the following points:

- a. The independence of the Intergovernmental Commission should be considered by reference to its role and objectives, which are derived from Article 30(1) of the

Directive. That provision expressly permits the regulatory body to be the ministry responsible for transport matters even though such ministries often have an interest in rail transport and appoint members of regulatory bodies.

- b. The Intergovernmental Commission is from a functional perspective independent of any infrastructure manager, charging body, allocation body or applicant, and in particular it is independent of the parties to this appeal. The Intergovernmental Commission accepts the analysis of the JEC at paragraph 81(g) and (h) of its report as to how the independence of the UK and French delegations from the Governments' interest in Eurostar is protected.
- c. Finally, Eurotunnel's concern that there is provision for a process of consultation between the two Governments in the event that the Heads of Delegation to the Intergovernmental Commission cannot reach agreement on its decision on the present appeal is a purely hypothetical concern. Agreement has been reached as set out in this decision.

15. The Intergovernmental Commission therefore concludes that it is sufficiently independent to hear this appeal.

*ii. Duality of the Intergovernmental Commission's regulatory and appeal functions*

*Arguments of the parties*

16. **Eurotunnel** asked the Intergovernmental Commission to declare that it does not have competence to hear this appeal on the basis of the Intergovernmental Commission's dual regulatory and appeal functions. Eurotunnel maintains that the Intergovernmental Commission lacks independence in its very structure because it adopts both the role of a regulator and that of an appeal body. According to Eurotunnel, this situation creates two problems: in the first instance, information received directly from the interested parties by the Intergovernmental Commission in its capacity as regulator influences the Intergovernmental Commission when taking decisions in its capacity as appeal body. Furthermore, since the information received by the Intergovernmental Commission in its regulatory role has not been shared with parties in the context of the appeal, the appeal procedure is invalidated from the outset as the parties have been denied the ability to assess and make submission on information which is pertinent to the current dispute.

17. In its Reply, **Eurostar** submits that it is a false dichotomy to argue that the Intergovernmental Commission lacks independence because it exercises both regulatory and control functions, at least as far as Article 6 of the European Convention on Human Rights and Fundamental Freedoms is concerned. Eurostar goes on to say that there is nothing inherently objectionable in the same regulatory body holding both the appeal and other regulatory functions and that there is nothing specifically objectionable in this particular case; rather, it is an acknowledged, sensible and standard feature of economic regulation in a number of sectors, and especially in the rail sector.

*Advice of the joint economic committee*

18. The **Joint Economic Committee** is of the opinion that there can be no objection in principle to the fact that the Intergovernmental Commission has such dual functionality. On the contrary, this is not unusual in the context of economic regulation, and Article 30(1) of the Directive itself stipulates that a single regulatory body may be responsible for both functions.
19. As to whether this situation might actually represent such a problem on the facts of this case, as submitted by Eurotunnel, the JEC made the following observations:

- (a) confidential discussions with Eurostar and Eurotunnel on the draft 2014 Network Statement were held against a different background and with different objectives; accordingly, neither these discussions nor the information received from the parties are relevant to the appeal and therefore will not be taken into consideration during the appeal process or when the Intergovernmental Commission takes its decision. In addition, all parties had access to the same information and documents in the course of appeal.
- (b) the fact that the Intergovernmental Commission has already commented on the 2014 Network Statement in no way prevents it from considering Eurostar's appeal. Its comments were formulated in a different context and cannot be regarded as a preliminary stage of the appeal. Its comments were formulated on the draft Network Statement and, as acknowledged by Eurotunnel, were not concluded views.

- (c) the Intergovernmental Commission's decision may be subject to a judicial review, enabling any party not satisfied with the outcome to seek an independent review of the decision, including any claim that the procedure might be unfair.

*The Intergovernmental Commission's decision*

20. Article 30 of Directive 2001/14/EC states that the regulatory body "*shall function according to the principles outlined in this Article whereby appeal and regulatory functions may be attributed to separate bodies*".
21. This means that the Member States may decide to entrust the regulatory and appeal functions to one and the same body.
22. Accordingly, Eurotunnel's assertion that the Intergovernmental Commission might lack independence in its very structure because it has adopted both the role of the regulator and the appeal body has no legal foundation because this particular situation is specifically envisaged by the Directive.
23. In addition, this claim has no factual foundation given that earlier exchanges between the JEC and the parties occurred independently of Eurostar's appeal, were not provided to the Intergovernmental Commission and therefore could not be taken into consideration by it. In terms of the evidence considered by Intergovernmental Commission in the course of the appeal, the parties have had access to the precisely same information and documents.
24. The Intergovernmental Commission therefore concludes that it is competent to determine the present dispute.

**IV.On the admissibility of the appeal**

*i. Interest in bringing proceedings*

*Arguments of the parties*

25. **Eurostar** submits its appeal in relation to the decisions, actions and behaviour of Eurotunnel as infrastructure manager of the Fixed Link in respect of:

- the Network Statement;
- the criteria contained in the Network Statement;
- the charging scheme in the Network Statement; and
- the structure of infrastructure fees which Eurotunnel may require Eurostar (and other operators) to pay, as set out in the Network Statement,

which, according to Eurostar, have led to unfair treatment and/or discrimination against Eurostar and other railway undertakings which operate or might be seeking to operate rail services through the Fixed Link.

26. In its counter-submission **Eurotunnel** maintains that Eurostar has no interest in bringing an appeal: Eurostar complains that it is a potential victim, but also claims a lack of transparency without detailing any specific consequences; it does not describe what form this discrimination or unfair treatment takes; its demands are vague, hypothetical and premature. As far as Eurotunnel is concerned, Eurostar could not be the victim of discrimination, unfair treatment or any such prejudice as it is still, to date, in a monopoly position.

27. In its Reply, **Eurostar** raises the wider notion of "*in any other way aggrieved*". It states that in order to be able to compete effectively, it requires transparency of access costs, both its own and those for potential undertakings in the rail sector, now rather than obtaining such transparency only in the year in which competing services commence. It goes on to note that it also requires transparency of its charges in order to compete effectively with undertakings outside the rail industry, including the Shuttle, ferries and air transport.

28. At the hearing, Eurostar argued that insufficient transparency in the network statement is a more than adequate basis for the complaint. It submitted that such transparency is a regulatory requirement and that it makes sense for transparency to be required in the Network Statement as it is the one common point of reference for all operators. The Network Statement is the place to which all operators can go to obtain reassurance that the methodology of charging is equitable and compliant with the law, both in the nature of the costs it seeks to recover and how those costs are allocated between users (see page 8 lines 24 to 29 of the hearing transcript). It submitted that the test for standing under Article 12 of the Bi-national Regulation is a generous test and is deliberately designed to be easily satisfied (page 9 lines 12-14). Eurostar suggested that if the Intergovernmental Commission were to accept

Eurotunnel's arguments on standing and competence, it would lead to the conclusion that Eurotunnel is not subject to regulatory oversight (page 9 lines1-4).

29. Eurostar further submitted that the appeal was not premature because it would not be enough merely to have access to transparent information at the point at which rival services are introduced since investment decisions are generally taken well in advance of operations commencing. Eurostar noted that access charges for the Channel Tunnel are its single largest business cost and explained that transparency and a proper explanation of these costs are important in determining whether it will be able to make further long-term investment decisions or develop new markets on the basis of marginal business cases (page 14, line 33 to page 15, line 14 of the hearing transcript).
30. In response at the hearing, Eurotunnel submitted that it is not sufficient for Eurostar simply to allege it has suffered a prejudice; it must be identified concretely. Eurotunnel argued that Eurostar had difficulties in identifying the shortcomings of the Network Statement, for the simple reason that there are none (page 18 lines 42- 45 and page 19 lines 1-8 of the hearing transcript).

*Advice of the joint economic committee*

31. The **Joint Economic Committee** considers that this appeal is admissible.
32. It points out that Article 12.1 of the Bi-national Regulation, based on Article 30.2 of Directive 2001/14/EC is drafted in general terms: the appellant does not need to prove that it has actually been the victim of unfair or discriminatory treatment as demonstrated by the expression "*or in any other way aggrieved*"; further, although the appellant's belief must be a reasonable one, the interest in bringing proceedings is assessed on a subjective basis as evidenced by the expression "*believes*".
33. To support its recommendations, the Joint Economic Committee considers the meaning of "aggrieved" in the United Kingdom and France. It points out that in both jurisdictions the threshold is a relatively low one. It goes on to conclude that the appeal is admissible.

*The Intergovernmental Commission's decision*

34. Article 12.1 of the Bi-national Regulation, which reflects Article 30(2) of Directive 2001/14/EC, states that “*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 in this document;*
- c) the allocation procedure and its results;*
- d) the charging scheme;*
- e) the level or structure of infrastructure fees which it is, or may be, required to pay;*
- f) arrangements for access to the network”.*

35. This provision demonstrates that a railway undertaking has the right of appeal to the Intergovernmental Commission against a decision by the infrastructure manager concerning the Network Statement where the railway undertaking in question believes that it is “aggrieved” by that decision.

36. The Intergovernmental Commission notes that in paragraph 3.3 of its appeal, Eurostar suggested it was bringing this action on behalf of itself and other operators (“...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” (emphasis added). While the Intergovernmental Commission accepts that the issues raised by this appeal may affect other operators or potential operators using the Tunnel, the Intergovernmental Commission notes that Eurostar is permitted to lodge an appeal only where it itself believes it has been discriminated against, unfairly treated, or is in any other way aggrieved.

37. The admissibility of Eurostar's demands is assessed by the Intergovernmental Commission solely by reference to whether Eurostar has demonstrated a sufficient belief that Eurotunnel's decision, in this case publication of the current version of the 2014 Network Statement without (in Eurostar's view) proper regard to the legislative requirements, has led to Eurostar being unfairly treated, discriminated against and/or in any other way aggrieved.
38. The Intergovernmental Commission notes that evidence of damage is not required by Article 12.1 of the Bi-national Regulation in order to bring an appeal. That provision is broadly worded: an applicant does not need to demonstrate it has been the victim of actual unfair or discriminatory treatment. Rather, the threshold for standing is subjective and focuses on whether an applicant believes it has been treated unfairly, suffered discrimination, or is in any other way aggrieved. The Intergovernmental Commission also notes that the examples from relevant domestic case law on what is meant by "aggrieved" cited in the JEC's report support the conclusion that the threshold for standing is relatively low. Eurostar's argument that it is important for it to have a clear understanding of the basis on which Eurotunnel proposes to base the charges applicable to its competitors in the context of the Network Statement is relevant in this regard.
39. Furthermore, the purpose of this appeal is to obtain transparency of information about charges from Eurotunnel. It follows that requiring evidence of damage as a condition of the admissibility of such an appeal, would have the effect of denying an applicant (in this case Eurostar) any effective right of appeal in circumstances where the information is not transparent.
40. Based on the above, the Intergovernmental Commission accepts that Eurostar believes it is aggrieved due to what it perceives to be the inadequate transparency of the charging scheme set out in the Network Statement and the costs on which the charges are based.
41. The Intergovernmental Commission therefore concludes that Eurostar is in principle entitled to bring the present appeal, subject to consideration of Eurotunnel's "abuse of procedure" argument, which the Intergovernmental Commission now turns to consider.

*ii. Abuse of procedure*

*Arguments of the parties*

42. **Eurotunnel** maintains that Eurostar's appeal is likewise inadmissible because it represents an abuse of procedure: the conditions of Eurostar's right to operate in the Channel Tunnel are defined by the provisions of back-to-back agreements which reflect the Railway Usage Contract<sup>2</sup>(hereafter referred to as "the RUC") and it is not so much the transparency of the Network Statement which concerns Eurostar as the impact on existing agreements between the parties to the RUC.
43. It adds that Eurostar's appeal, which complains of the lack of transparency of the Network Statement with respect to the breakdown of Eurotunnel's costs, cannot be dissociated from the arbitration exercise initiated by the Railways<sup>3</sup> in 2001 as part of the contractual mechanism for verifying charges and costs invoiced by Eurotunnel under the terms of the RUC.
44. **Eurostar** is not contesting that it is subject to a specific charging scheme, namely that of the RUC. However, its competitors will obtain access to the Tunnel on the basis of the charging scheme set out in the Network Statement (which is itself purported to be based on the same scheme as that in the RUC). Eurostar submits it is entitled to transparency with respect to access costs, both its own and those of competitor undertakings in the rail sector. In any event, according to Eurostar, Eurotunnel itself accepts that Eurostar has the status of an "interested party" with regard to the Network Statement, as evidenced by the fact that the draft version of that statement is submitted to Eurostar before adoption.

*Advice of the joint economic committee*

45. The **Joint Economic Committee** recommends that Eurotunnel's submissions should be rejected. It notes that Article 12.1 of the Bi-national Regulation and Article 30(2) of the Directive confer a right to appeal on any aggrieved railway undertaking. That right of appeal is not conditional: in particular, there is nothing in the wording of the legislation that excludes the possibility of an existing customer (paying charges under a pre-existing contract) bringing an appeal. The ability of Eurostar to seek verification of the usage charges levied under the RUC and of Eurotunnel's operating costs is not a substitute for Eurostar's rights under the Directive and Bi-national Regulation. Nor, in the Joint Economic Committee's view, does the arbitral award in 2005 make the appeal inadmissible.

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<sup>2</sup> The Usage Contract signed on 29 July 1987 between the Channel Tunnel Group Limited, France-Manche S.A. ("the Concessionaires"), the British Railways Board and *La Société Nationale des Chemins de fer Français*("the Railways").

<sup>3</sup> "Railways" has the meaning given in the RUC (see note 1 above).

*The Intergovernmental Commission's decision*

46. Article 4(5) of Directive 2001/14/EC specifically stipulates that infrastructure managers must ensure that “*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*”.
47. This means that it must be possible to compare access costs resulting from the RUC with access costs for competitor undertakings resulting from the Network Statement. To this end, it is necessary to ensure that the charging scheme is transparent.
48. While the 2014 Network Statement contains an equivalence principle (“*the Eurotunnel Network Statement applies the charging structure of the Railway Usage Contract and offers all operators equivalent liberalised access conditions to the Channel Tunnel rail network without distorting competition conditions*”<sup>4</sup>), in actual fact, neither the RUC nor the Network Statement enable interested parties to satisfy themselves that such equivalence of access is observed.
49. The Intergovernmental Commission further notes that the right of appeal conferred under Article 12.1 of the Bi-national Regulation is not conditioned. The wording of this provision does not suggest that an existing customer of an infrastructure manager paying charges under a pre-existing contract should not be permitted to bring an appeal. In principle therefore, Eurostar is entitled to lodge an appeal in relation to the Network Statement, the criteria contained within it and the charging scheme.
50. Irrespective of the conclusion of the arbitration concerning Eurostar’s access to the necessary accounting and finance information, the arbitration award could only affect its position under the RUC. Eurostar’s appeal under the Bi-national Regulation is justified, as it relates to the transparency of access charges applicable to Eurostar and its competitor undertakings in the railway sector as are required to be set out in the Network Statement. Accordingly, the locus to bring an appeal is not affected by the arbitration award determined in 2005<sup>5</sup>.

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<sup>4</sup> Eurotunnel 2014 Network Statement, paragraph 1.2.

<sup>5</sup> Further, although the Intergovernmental Commission requested Eurotunnel to provide any information in relation to the arbitration award, that it considered to be relevant to the appeal, this information was provided very late in the proceedings and in any event after the deadline granted to the parties to provide any further information (i.e. by 11 September 2013).

51. The Intergovernmental Commission therefore rejects Eurotunnel's contention that Eurostar's appeal amounts to an abuse of procedure. It follows that Eurostar's appeal to the Intergovernmental Commission is admissible.

## **V. On the grounds of the appeal**

### **Issue 1 – Eurotunnel has failed to provide proper transparency of its costs in its 2014 Network Statement in accordance with the charging principles contained in Chapter II of Directive 2001/14/EC**

#### *Arguments of the parties*

52. At paragraph 3.10(a) of its Submission, Eurostar asks the Intergovernmental Commission for a decision and declaration that:

*“...the charging scheme set out in the Network Statement 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 Bi-national Regulation and Directive 2001/14/EC, being:*

- i. the costs directly incurred as a result of operating the specific services operated by the paying railway undertaking (as required by Article 7(3) of Directive 2001/14/EC);*

*plus potentially*

- ii. a mark-up...*

*and/or*

- iii. a higher charge on the basis of the long term project costs of the specific investment project which is the Fixed Link...*

- iv. ...*

*And in each case with the charges structured to be based on:*

- v. *Current actual costs...*
- vi. *The share of usage actually operated using the Fixed Link; and*
- vii. *A proper allocation of costs and long term project costs between railway undertakings and other users of the Fixed Link (including the Shuttle)..."*

*Arguments of the parties*

53. **Eurostar** contends that the description of the charges in just two categories (“reservation fee” and “per passenger toll”) in the Network Statement does not meet the requirements of the Bi-national Regulation in relation to transparency, and in particular does not demonstrate how the structure of charges envisaged by the Directive is complied with.
54. **Eurotunnel** accepts it has an obligation to provide sufficient information to railway undertakings in the Network Statement to enable informed decisions to be made about whether to operate through the Channel Tunnel and to ensure that the conditions of access and the charges are understandable and predictable. Eurotunnel submits that, to this end, its Network Statement is compliant in terms of transparency: it draws the Intergovernmental Commission’s attention to the information provided in Article 1.2, Article 6.1-6.3 and Annexes 3 and 4.
55. Eurotunnel submits that the provisions of Article 8(2) of the Directive, which it argues wholly apply to the Fixed Link, permit it to adopt a charging scheme that does not follow the model in the Directive (based on the recovery of marginal costs) that is envisaged for publicly-funded infrastructures. This also means that Eurotunnel does not apply any mark-ups as permitted by Article 8(1).
56. In its reply, **Eurostar** notes Eurotunnel’s acceptance of the requirements applicable to Network Statements and submits that Eurotunnel’s current Network Statement does not address them adequately as it clearly lacks “appropriate details”, “sufficient information” or

“necessary information” as set out in the Directive and in European Commission guidance on good practice for Network Statements.

57. Eurostar objects to Eurotunnel’s interpretation of Article 8(2) of the Directive. Eurostar notes that, whatever interpretation is adopted, it would still be incumbent on Eurotunnel to explain transparently in the Network Statement the parts of the charges that relate to long-term debt, the impact of the restructuring of that debt on the charges, and any mark-up or profit that is applied.

*Advice of the joint economic committee*

58. The **Joint Economic Committee** considers that the Network Statement does not contain sufficient information to meet the requirements of the Bi-national Regulation, or the Directive. In particular, the JEC notes that the requirement for the Network Statement to set out “the methodology, rules and, where applicable, scales used for the application of Article 7(4) and 7(5) and Articles 8 and 9 [of the Directive]” is not met.

59. The JEC recommends that, in order for the required transparency to be achieved, the section of the Network Statement concerning charges should be amended so that it clearly identifies, for each of the charges, the part related to the cost-directly incurred of operating train services and the part related to the other costs of the project. The JEC notes that Eurotunnel purports not to apply any mark-ups, and recommends that in the event Eurotunnel seeks to recover such mark-ups then this must be shown in the Network Statement. In the JEC’s view, this identification should be supported by an explanation of the methodology used by Eurotunnel for the application of Articles 7, 8 and 9 of the Directive.

*The Intergovernmental Commission’s decision*

60. The Intergovernmental Commission considers that the legal basis for starting to determine what level of transparency is required in the Network Statement is to be found in Article 3 of, and Annex I to, the Directive, which are transposed by Article 5 of the Bi-national Regulation.

61. Article 3(1) of the Directive requires the infrastructure manager to develop and publish a network statement after consultation with interested parties. According to Article 3(2), the network statement:

*“shall contain information setting out the conditions for access to the relevant railway infrastructure. The content of the network statement is laid down in Annex I.”*

62. Annex I to the Directive states that the Network Statement shall contain (*inter alia*):

*“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.”*

63. The Intergovernmental Commission also notes recital (5) to the Directive, which states “*To ensure transparency and non-discriminatory access to rail infrastructure for all railway undertakings all the necessary information to use access rights are to be published in a network statement.*”

64. In the Intergovernmental Commission’s view, the requirement in Annex I to the Directive to describe “the methodology, rules and, where applicable, scales used” for the application of the Charging Principles in the Network Statement means Eurotunnel must, when describing its charging system, set out all costs relating to railway services using the Common Section and provide details of the method used to ensure those costs are reflected in the total charges.

65. Therefore, to ensure transparency , the Network Statement must contain an explanation of how the Charging Principles (set out in Chapter II of the Directive) are applied, including, as appropriate, any elements of costs recovered in accordance with Articles 7(4), 7(5), 8(1) and 8(2). Therefore, the Network Statement must clearly identify the total costs related to the Common Section, i.e. :

- a. The costs of operation and maintenance, which must include the costs directly incurred by Eurotunnel as a result of the operation of particular types of train service;
- b. The initial investment costs incurred by Eurotunnel as amortised (annually);

- c. The debt costs of the Tunnel together with a reasonable return on equity, including the remuneration of capital investments;
  - d. Any other cost category which may be applicable.
66. The Intergovernmental Commission notes that its interpretation of the Directive's requirements does not prevent Eurotunnel from levying charges which recover the long-term costs of the Fixed Link; the Directive simply requires Eurotunnel to explain in the network statement more clearly how it does so.
67. When deciding how the Directive's requirements should be met, the Intergovernmental Commission also considers it appropriate to refer to the practice found in regulated network statements produced by railway infrastructure managers elsewhere in France and the UK. In common with the practice of RFF (the French infrastructure manager), Network Rail and HS1 (UK infrastructure managers) to provide details of costs levied on different types of railway undertakings, Eurotunnel should provide in the Network Statement a description of the method by which the charges reflect the apportionment of costs between the different users of the Common Section.
68. The Intergovernmental Commission therefore expects to see in the Network Statement an explanation of how Eurotunnel's total charges recover the total costs, set out in accordance with the categories in paragraph 65, and an explanation of how those costs are apportioned between railway undertakings using the Common Section.
69. The 2014 Network Statement self-evidently does not contain such information. The passages referred to by Eurotunnel in its counter-submission, namely sections 1.2, 6.1, 6.2 and 6.3 and Appendix 4, are inadequate. In particular, section 6.1 does not describe the charging method, let alone in detail. To the extent that it discusses the way in which charges have been set, it is limited to references to the framework established by the RUC. Section 6.2 relates to freight transport and so it is outside the scope of this appeal. Section 6.3 is a summary of Appendix 4. Section 6.3 and Appendix 4 are limited to stating that the charging regime for passenger trains is based on a (fixed) reservation fee per train and an access fee per passenger; and to noting that the charging system has been designed to be equivalent to the charges in the RUC.

70. Finally, the Intergovernmental Commission notes Eurotunnel's argument at the hearing that the fact that it operated a charging scheme pursuant to the RUC prior to the Directive's entry into force entitles it to maintain that scheme. However, in the Intergovernmental Commission's view the requirements of the Directive in terms of transparency of the charging scheme to be set out in the Network Statement are not affected by the existence of a charging scheme contained in a contract entered into prior to the Directive's entry into force.
71. The Intergovernmental Commission accordingly determines that Eurotunnel's 2014 Network Statement does not contain appropriate details of the charging scheme nor sufficient information on the charges that apply to the services provided by Eurotunnel and therefore does not satisfy all the requirements of the Directive and the Bi-national Regulation.

**Issue 2 – Justification of the structure of charges in the Network Statement by Eurotunnel as required by Articles 11.4 and 11.5 of the Bi-national Regulation**

72. At paragraph 3.10(b) of its Submission, **Eurostar** asks the Intergovernmental Commission for a decision and declaration that:
- “...the structure of charges set out in the Network Statement has not been justified by Eurotunnel against the Charging Principles as is required by Articles 11.4 and 11.5 of the Bi-national Regulation”.*

*Arguments of the parties*

73. **Eurostar** submits in its appeal that justification of the structure of charges set out in the Network Statement against the Charging Principles [in Chapter II of the Directive] is required to be provided in the Network Statement and that this requirement is not achieved by Eurotunnel's reduction of the charges to the “reservation fee” and “passenger toll” components. Eurostar notes that the effect of Eurotunnel's failure to provide this justification is to prevent railway undertakings from scrutinising that charges are calculated in accordance with Charging Principles, rather it merely allows them to identify the level of fees for access.
74. **Eurotunnel**, in its counter-submission, agrees that its charging scheme is subject to a justification requirement, but submits that this justification must be provided to the

Intergovernmental Commission in accordance with Article 11.5 of the Bi-national Regulation. Eurotunnel finds no requirement to provide the level of justifications and information sought by Eurostar to railway undertakings: it notes that justifying the charging scheme to the regulator requires Eurotunnel to share with the Intergovernmental Commission commercially confidential information provided by railway undertakings. It argues that it would be a breach of Article 11.5 for it to provide this information to competing undertakings.

*Advice of the joint economic committee*

75. The **Joint Economic Committee** starts by noting that the justification requirement in Article 11.5 of the Bi-national Regulation relates to charges billed rather than the charging scheme (or “structure of charges”). The JEC interprets Article 11.5 as meaning Eurotunnel is required to provide the Intergovernmental Commission with any information about charges that it needs or requires, and as meaning that Eurostar (and indeed any railway undertaking paying access charges to Eurotunnel) is entitled to receive from Eurotunnel a justification of the charges it pays by reference to the Charging Principles supported by an explanation of the costs on which the charges are based.

*The Intergovernmental Commission’s decision*

76. Article 11.5 of the Bi-national Regulation, on which Eurostar bases its case in this respect, requires a charging body to be able to “*justify the charges billed as against the charging principles 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...*”.

77. The Intergovernmental Commission notes that Article 11.5 does not specify to whom such justification is required. It is clear, however, that this provision derives from Articles 4(5) and 7(2) of the Directive, the latter of which provides that:

*“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...comply with the methodology, rules...laid down in the network statement.”*

(Emphasis added.)

78. The Intergovernmental Commission does not wholly accept the JEC's view that Eurotunnel is required, under Article 11.5 of the Bi-national Regulation, to justify its charges to any railway undertaking paying those charges by reference to the charging principles. The IGC considers that the requirement in this article only refers to how the charging system set out in the Network Statement is applied in the charges invoiced. The wording of Article 7(2), taken together with Article 30(3), of the Directive envisages that a justification that the charges invoiced comply with the Network Statement must be made by the infrastructure manager to the relevant regulatory body – in this case, the Intergovernmental Commission. The Intergovernmental Commission considers that the final sentence of Article 11.5 supports this interpretation: if the infrastructure managers were required to make this justification to the railway undertakings rather than solely to the regulatory body, then it is difficult to see how the charging body could "*respect the commercial confidentiality of information provided to it by those requesting capacity*".
79. In the Intergovernmental Commission's view, it is appropriate for railway undertakings such as Eurostar to receive assurance that the charges billed to them by Eurotunnel are justified and comply with the Network Statement. While the Intergovernmental Commission would encourage Eurotunnel to provide as much relevant information as it can in response to such requests, it is for the Intergovernmental Commission to ensure that the method of calculation used by the infrastructure manager in order to set the structure and level of its charges, in relation to its actual costs, is compliant with the legislation and that the charges have been applied in a non-discriminatory way across the infrastructure manager's network.<sup>6</sup>
80. The Intergovernmental Commission notes that Eurostar has not asked the Intergovernmental Commission to consider, as part of this appeal, any justification of charges actually billed to Eurostar. Although Eurostar itself does pay charges to Eurotunnel under the RUC, it does not appear that the appeal is based on any allegation that Eurotunnel has failed to justify those charges by reference to the Network Statement. Eurostar's complaint is rather that Eurotunnel must "*justify the structure of charges set out in the Network Statement against the Charging Principles*" (emphasis added). The Intergovernmental Commission does not consider that any such requirement is to be found in either Articles 4(5) or 7(2) of the

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<sup>6</sup> The Intergovernmental Commission notes that the implementation of Directive 2012/34/EC will require infrastructure managers to provide such justification directly to railway undertakings paying charges.

Directive or Article 11.5 of the Bi-national Regulation. Those provisions relate to the justification of “*charges actually applied*”, “*charges actually invoiced to each operator*” and “*the charges billed*”, not to the structure of charges set out in a network statement.

81. Accordingly, the Intergovernmental Commission considers that justification of the method for calculating its charges is required to be provided to the regulatory body. However, the Intergovernmental Commission notes that it has taken into account the requirements of Article 11.5 in its finding on the first ground of appeal. In particular, the fact that Eurotunnel can be required to justify the actual charges levied on railway undertakings by reference to the “*methodology, rules...laid down in the network statement*” and on a non-discriminatory basis is, in the Intergovernmental Commission’s view, a material factor in determining the level of detail that should be provided in the Network Statement itself. In addition, to enable the Intergovernmental Commission to continue carrying out its role under Article 11.5 of the Bi-national Regulation in ensuring the compliance of Eurotunnel’s charges with the legislation, Eurotunnel is required to provide all necessary information on its charges to the Intergovernmental Commission when requested, including any which might be considered to be commercially confidential. This should include details of the method by which the charges reflect the apportionment of costs between the different users of the common section.

### **Issue 3 –On the request for adequate and meaningful consultation in relation to the Network Statement**

82. Finally, at paragraph 3.10(c) of its Submission, Eurostar has requested a decision and declaration that:

“*Eurotunnel did not conduct compliant and meaningful consultation (taking fair account of responses received) in relation to the Network Statement as required by Article 5.3 of the Bi-national Regulation*”.

#### *Arguments of the parties*

83. **Eurostar** alleges that Eurotunnel did not take its observations on the draft 2014 Network Statement seriously as those observations did not lead to any follow-up, engagement or response from Eurotunnel; this is confirmed, according to Eurostar, by the brief nature of the timescale granted to the interested parties to prepare their observations (between 9 November 2012 and 9 December 2012) and the timescale for Eurotunnel to consider those observations

prior to publication of the Network Statement (from 9 December 2012 to 24 December 2012), which led to the Network Statement being published without Eurostar's concerns being properly taken into account.

84. **Eurotunnel** believes that it has complied with its consultation obligations: it consults Eurostar every year on the draft Network Statement and both Eurostar and the other consulted parties, especially the Intergovernmental Commission, regularly communicate their observations which are taken into consideration by Eurotunnel wherever possible. According to Eurotunnel, the consultation obligation does not require it to incorporate all observations from all consulted parties.

85. In its Reply, **Eurostar** submitted that adequate and meaningful consultation did not mean that Eurotunnel should incorporate all the observations of the consulted parties. On the other hand, since the observations are specifically concerned with a draft Network Statement, they must be conscientiously taken into consideration when the said document is finalised.

*Advice of the joint economic committee*

86. The **Joint Economic Committee** is of the opinion that this ground of complaint should be rejected in the light of Article 3.1 of Directive 2001/14/EC and Article 5.3 of the Bi-national Regulation, and having considered English and French law concerning the meaning of the consultation obligation for a public organisation. Specifically, according to the Joint Economic Committee, the fact that the Network Statement contains a number of changes compared to the draft version on which Eurostar was consulted, as acknowledged by the Intergovernmental Commission in its correspondence with Eurotunnel dated 12 February 2013, demonstrates that Eurotunnel is prepared to consider the views of the consulted parties, even if, ultimately, Eurotunnel does not agree with all of these views. Furthermore, whilst it is true that the timescale granted to interested parties to formalise their observations was relatively short and the Network Statement did not ultimately contain any references to the views of the consulted parties, this is a matter under constant discussion between Eurostar and Eurotunnel. Therefore despite the relative shortness of the timescale, the Joint Economic Committee considered that Eurostar did in fact have sufficient opportunity to make its views known and that there was nothing to suggest that Eurotunnel had not taken those views into account.

*Further observations of the parties*

87. **Eurostar** submitted at paragraph 35 of its written comments on the JEC report, that this obligation to consult is an EU law obligation and that it is therefore inappropriate to consider only the requirements of English and French administrative law when considering the standard of consultation that should be achieved. Eurostar refers to the European Commission's Consultation "*Towards a reinforced culture of consultation and dialogue; General principles and minimum standards for consultation of interested parties by the Commission*" (COM 2002-704) as a guide to the requirements of EU law in this respect.

*The Intergovernmental Commission's decision*

88. Article 3.1 of Directive 2001/14/EC stipulates that "*the infrastructure manager shall, after consultation with the interested parties, develop and publish a network statement obtainable against payment of a duty which may not exceed the cost of publishing that statement*". This provision imposes an obligation to consult interested parties on a draft of the Network Statement, prior to its adoption and publication.
89. This obligation is detailed in Article 5.3 of the Bi-national Regulation, which stipulates that "*the Concessionaires shall consult all interested parties, including the Intergovernmental Commission, on the draft Network Statement, allowing a reasonable deadline to respond*".
90. The obligation to consult interested parties, including the Intergovernmental Commission, on the draft Network Statement, necessarily brings with it an obligation to allow those parties a reasonable period in which to respond. However, neither of these two texts specifies the extent of the consultation obligation.
91. In the absence of more detailed provisions, the Intergovernmental Commission considers that Eurotunnel is obliged to seek the views of interested parties by sending them its draft Network Statement. This process must be such as to ensure that a meaningful consultation exercise takes place. In particular, the timescales granted between notification of the draft and submission by consultees of their views, on the one hand, and between submission of those views and finalisation of the Network Statement, on the other hand, must be reasonable.

However, Eurotunnel is not bound by the views of consultees: the extent of its obligation is to consider all views before reaching that decision.

92. In the current situation, the fact that Eurotunnel consulted the interested parties is not in dispute and the latter were able to make their observations known. It is clear that Eurotunnel amended the draft in response to some of these observations, as demonstrated by the fact that the Network Statement was modified as a result of the consultation process. The Intergovernmental Commission notes that the legislation does not require Eurotunnel to follow up or reply to consultation responses.
93. Finally, Eurostar has not demonstrated that the timescale of one month granted between notification of the draft and formulation of the views, or the timescale of one month granted between formulation of the views and finalisation of the Network Statement, were not reasonable.
94. The Intergovernmental Commission notes that DB Schenker also raised concerns about the consultation process in its representations on the appeal. DB Schenker considered that responding to consultees (either individually or collectively), explaining why comments have been accepted or discounted, is a matter of good practice, which also reduces uncertainty. The Intergovernmental Commission agrees that it would be a matter of good practice to do so. Whilst it is not strictly required as a matter of law, the Intergovernmental Commission encourages Eurotunnel to adopt such good practice in future.
95. The Intergovernmental Commission considers that it has not been demonstrated that Eurotunnel failed to conduct compliant and meaningful consultation on its draft Network Statement.

## **VI. Determination of the Intergovernmental Commission**

**For the reasons set out above, the Intergovernmental Commission hereby determines:**

**Article 1** The Intergovernmental Commission is competent to hear Eurostar's appeal.

**Article 2** Eurostar's appeal to the Intergovernmental Commission is admissible.

**Article 3** Eurotunnel's Network Statement for 2014 does not comply with all the requirements of Article 5.2 of the Bi-national Regulation on the use of the Channel Tunnel of 23 July 2009 or Article 3 of, and Annex I to, Directive 2001/14/EC (as amended) on the allocation of railway infrastructure capacity, and the levying of charges for the use of railway infrastructure, and safety certification. Pursuant to Article 12.4 of the Bi-national Regulation, the Intergovernmental Commission therefore directs that the Network Statement should be amended as follows:

- (a) First, the Network Statement must clearly identify the total costs related to the Common Section, i.e.:
  - i. The costs of operation and maintenance, which must include the costs directly incurred by Eurotunnel as a result of the operation of particular types of train service;
  - ii. The initial investment costs incurred by Eurotunnel as amortised (annually);
  - iii. The debt costs of the Tunnel, together with a reasonable return on equity, including the remuneration of capital investments;
  - iv. Any other cost category which may be applicable.
- (b) Secondly, it must show in sufficient detail "*the methodology, rules and where applicable, scales used*" for the application of the charging principles. As a minimum, the Network Statement must include an explanation both of Eurotunnel's total charges set out by reference to the categories of cost indicated in Article 3(a) above and of the method to apportion those costs between railway undertakings using the Common Section.

**Article 4** The justification referred to in Article 7(2) of the Directive and Article 11.5 of the Bi-national Regulation concerns the charges billed. The necessary information is to be provided, when required, by Eurotunnel to the Intergovernmental Commission.

**Article 5** Eurotunnel adequately consulted Eurostar on the Network Statement in accordance with the requirement in Article 5.3 of the Bi-national Regulation.

**The Secretariat supporting the Chairman of the Intergovernmental Commission is charged with notifying the parties of the present decision which will be published subject to any commercial confidentiality requirements.**

**For the French delegation:**

**François Barry Delongchamps**

**Head of the French Delegation**

**Chairman of the Intergovernmental Commission**

**For the UK delegation:**

**Christopher Irwin**

**Head of the UK Delegation**