

Role of the IGC in the monitoring of contracts, economic performance and the financial affairs of the channel fixed link

1. Following the transfer of responsibility for the economic regulation of certain activities of the concessionaires for the channel fixed link (as described in Article 1(2) of the Treaty of Canterbury and Article 2 and Annex I of the quadripartite Concession Agreement) to ARAFER and ORR (respectively the national rail regulatory body within the meaning of Directive 2012/34/EU in France and the UK), it is important for us to identify clearly the concession monitoring tasks (beyond security and safety) which still rest with the IGC.
2. The channel fixed link concession includes several components and activities:
 - a. railway activities in the form of railway infrastructure management and railway freight and passenger services through the channel fixed link (now subject to economic regulation by the national rail regulatory bodies);
 - b. non-railway activities in the form of shuttle operations (the control of which primarily continues to be the responsibility of the IGC, but subject to economic regulation by the national rail regulatory bodies in limited areas); and
 - c. all other non-railway activities at the terminal areas (the control of which continues to be the sole regulatory responsibility of the IGC).
3. As set out above, the regulation of shuttle operations is primarily the responsibility of the IGC. It is worth noting, however, that the national rail regulatory bodies may need to understand enough about the costs and revenues of the shuttle operation so as to ensure that there is no cross-subsidisation with railway activities.
4. The subsidiaries of Groupe Eurotunnel SE which sell services to third parties in areas other than those listed under point 2 are not part of the concession. Their activity can, however, affect the economic situation of the concessionaires and, in that context, the national rail regulatory bodies may, again, need to understand enough about their costs and revenues to ensure that activities which are regulated by national rail regulatory bodies are not subsidising other activities within the Eurotunnel group.
5. In general, the IGC remains responsible for supervising, in the name and on behalf of the two Governments, all matters concerning the construction and operation of the channel fixed link in accordance with Article 10(1) of the Treaty of Canterbury. Furthermore, in accordance with Article 10(2) of the Treaty of Canterbury, the IGC exercises the rights and obligations of the Governments under the concession with regard to the concessionaires, other than those relating to the amendment, extension, suspension, termination or assignment of the concession.
6. Clause 12.4 of the Concession Agreement requires the concessionaires to give public notice of their tariffs (which would include those for the shuttles and services operated on the terminal areas) in a manner approved by the IGC. The concessionaires must also notify the IGC of the tariffs and of any increase in them at least 15 days before they come into force. In respect of charges for railway infrastructure, Article 56(6) of Directive 2012/34/EU obliges each national rail regulatory body to ensure that

charges set by infrastructure managers comply with Section 2 of Chapter IV to Directive 2012/34/EU, as implemented in its own State, and to ensure those charges are non-discriminatory. Article 56(2) of Directive 2012/34/EU also requires the rail regulatory bodies to control the contents of the network statement, including the level or structure of infrastructure charges.

7. The IGC is responsible under Clause 17.1 of the Concession Agreement for approving the initial provision of and any significant increase in the operation of ancillary facilities open to the public or of benefit to users of the channel fixed link. Under clause 17.2 of the Concession Agreement any use of the channel fixed link other than as permitted by or pursuant to the Concession Agreement (especially any use for transmission of energy or telecommunications) requires the prior consent of the IGC.
8. Clause 27.1 of the Concession Agreement provides that, in accordance with Article 10 of the Treaty of Canterbury, the IGC is established to supervise, in the name and on behalf of the Governments, all matters concerning the construction and operation of the channel fixed link.
9. This includes, under Clause 27.6 of the Concession Agreement, the provision by the concessionaires to the IGC of an annual report of their activities and the submission of any reports or information deemed necessary by the IGC relating to the performance of the concessionaires of their obligations under the Concession Agreement.
10. The concessionaires must comply with Clause 14.1 of the Concession Agreement and ensure that the channel fixed link is at all times maintained and operated in such a condition as is necessary for it to be used for the purpose for which it is designed. Under Clause 39.3 of the Concession Agreement, the concessionaires must also ensure that all immovable property and movable property necessary for the construction or operation of the channel fixed link is in good working order and in a good state of repair at the end of the concession period. It can be argued the IGC has a duty to monitor the performance of the concessionaires' obligations under the Concession Agreement in this regard.
11. The regulatory bodies and the IGC have drawn attention to several issues where the closeness of competence means there will be times when mutual consultation is desirable. These include powers to request information from the concessionaires in relation to the concessionaires' charges and accounts; powers to impose penalties; powers in relation to performance; and powers in relation to maintenance, repair and renewal of infrastructure. This consultation should follow the framework of cooperation set out in Annex A.

Annex A

Co-operation between ARAFER, ORR and the IGC

This annex establishes how ARAFER and ORR, in their respective roles as the national rail regulatory bodies for the channel fixed link, will manage cooperation with the IGC on issues of common interest.

ARAFER and ORR have agreed to cooperate with each other under the terms of a cooperation agreement. It is also necessary and desirable for ARAFER and ORR to establish with the IGC some procedures to manage co-operation with the IGC for a number of reasons:

- It is a requirement under Article 56.3 of Directive 2012/34/EU that “*Member States shall ensure that these authorities jointly develop a framework for information-sharing and cooperation aimed at preventing adverse effects on competition or safety in the railway market*”;
- The binational regulation of 18 March 2015 :
 - requires the IGC and the regulatory bodies to “*exchange information as necessary to discharge their respective functions*” (Article 2.2);
 - requires the regulatory bodies to “*keep the IGC informed of their working arrangements*” (Article 3.4);
 - states that if, in spite of the common working arrangements established by ARAFER and ORR, “*it appears likely that the regulatory bodies will adopt decisions or opinions that do not have an aligned legal and practical effect across the entirety of the Channel Fixed Link, they shall, before adopting these, consult all interested parties, including the IGC*” (Article 3.5); and
 - states that the regulatory bodies “*may consult the IGC and the IGC may make any representations to them on any issue and at any point in (their decision making) process.*” (Article 4.2).
- Legal analysis from ARAFER and ORR on the scope of powers of the different bodies indicates that there are some areas of legitimate common interest in the oversight and regulation of the channel fixed link. It is therefore desirable to share information and manage communication between the bodies in a predictable manner, so as to be effective and avoid any confusion.

Cooperation process

- 1) The Binational Committee (BNC) chair to write to the IGC chair each year with the response of ARAFER and ORR to Eurotunnel’s network statement, and to invite participation from the IGC in any consultations on this conducted by the national rail regulatory bodies.
- 2) Annual meeting between the heads of delegation to the Permanent Service and the Joint Economic Committee of the IGC to discuss the network statement and identify any areas of shared interest.

- 3) Occasional meetings (normally annual) between the heads of delegation to the BNC and IGC to review issues of shared interest and working arrangements.
- 4) Ad hoc mechanism for the heads of delegation to the BNC and IGC to address any urgent issues.
- 5) The IGC informs the regulatory bodies in good time about its planned plenary meetings and any other meetings where the attendance of the national rail regulatory bodies would be beneficial or appropriate. The national rail regulatory bodies are invited to delegate observers to these meetings.