1316/2013 CONNECTING EUROPE FACILITY (CEF) AND RAIL FREIGHT CORRIDOR (RFC) EXTENSIONS: SUBMISSION OF A LEGAL CHALLENGE

Thank you for your letter of 25 February and for clearing documents 5162/14, 5166/14 and 5528/14 from scrutiny.

You asked whether we had received a response from the Council Secretariat to the written statement we provided on the CEF Regulation (CEF) at Council on 5 December 2013. There has not been a response to this but we had not expected one as the statement was provided by us to explain why we were abstaining from the vote on CEF and to have this formally recorded. There are, however, some developments in respect of CEF which I would like to make the Committee aware of.

As you know we had concerns about the annex in the CEF Regulation proposing changes and extensions to the Annex to Regulation (EU) 913/2010 listing the “initial” Rail Freight Corridors (Simon Burns’ letter of 9 July 2013 and your letter of 31 July 2013).

We have also had concerns, on a number of grounds, regarding the manner in which this proposal was put forward by the European Commission:

- We consider that the Commission circumvented requirements under existing EU legislation and in doing so, has taken action that represents possible unlawful competence creep.
- The RFC extensions have not been agreed by the UK and are not supported by market and socio-economic benefit analysis, as required under the original RFC Regulation.
• We consider that the RFC extensions in the UK are subject to Article 172 of the Treaty on the Functioning of the EU (TFEU), paragraph 2 of which requires Member State approval for certain measures relating to their territory.

The situation as agreed at Council leaves the UK exposed to some potentially significant risks:

• The EU (and other Member States) will now have more influence on decisions of infrastructure use and transport planning which fall within Member State competence.

• Fundamentally, Network Rail could lose some capacity management flexibility or even have to set aside more capacity for international freight at the expense of well-used passenger services. This could be a particular issue on the heavily used West Coast Main Line (WCML) especially during construction of HS2 (because the construction works will themselves reduce capacity at times in certain places).

There are likely to be some financial costs and physical impacts to the UK’s rail network, however these are difficult to quantify with certainty at present.

The original RFC Regulation has a mechanism for RFCs to be extended. It requires the agreement of the Member States concerned and a positive market and socio-economic analysis. We believe that by proposing the amendments to the RFC Regulation in the CEF Regulation, the Commission was seeking to bypass these approval procedures. We consider that the RFC extensions in the UK are subject to Article 172 of the Treaty on the Functioning of the EU (TFEU) paragraph 2 of which requires Member State approval for certain measures relating to their territory. By abstaining from the vote on CEF the UK has not given its agreement.

More background on the CEF and RFC Regulations is at Annex A.

As a result of the above, and having consulted other Departments, we have decided to submit a legal challenge under article 263 TFEU to the Court of Justice of the European Union in relation to the CEF Regulation. This will be limited solely to the RFC extensions set out in Annex II of CEF, specifically the extensions in the UK past London. We are seeking their annulment which we consider to be severable from the rest of the CEF Regulation – so, importantly, this would not impact on the wider funding provisions in the CEF Regulation.

We remain committed to the importance of both national and international rail freight. If, in the future, there is a market case for extending the RFC, for international freight entering through the Tunnel, beyond London, we would have no objection in principle to this being proposed under the mechanisms in the existing RFC Regulation.
We believe engagement with other Member States, and stakeholders in general is an important part of this challenge to make it clear to other what action we are taking and why. We will be writing to them to set this out to try to address any potential concerns they might have.

I am writing in similar terms to William Cash MP, Chair of the Commons European Scrutiny Committee, Jake Vaughan, Clerk to your Committee, Sarah Davies, Clerk to the Commons Committee, Paul Hardy, Legal Adviser to the Commons Committee, Les Saunders, Cabinet Office and Margaret Browne, Departmental Scrutiny Coordinator.

Yours sincerely,

ROBERT GOODWILL
Background

CEF is the new finance regulation for the Trans-European Networks (TENs) covering Transport, Energy and Telecoms. Negotiations on this regulation resulted in a mechanism that amended the existing EU Rail Freight Regulation (913/2010) by requiring an extension to the existing EU Rail Freight Corridors (RFCs). This in turn requires the UK to extend its RFC route from London to Glasgow, Edinburgh, Felixstowe and Southampton.

The objective of the RFCs is to increase competitiveness of international rail freight and improve coordination across Europe. There are also requirements for at least a minimal level of capacity to be reserved for international freight traffic.

The UK supports RFCs where they have the agreement of the Member States concerned and are supported by market and socio-economic analysis. During the CEF negotiations the UK opposed the RFC extensions and made it very clear to the Commission that the proposed extension to the RFC would not align with existing UK freight operations nor have any socio-economic benefits.

Analysis undertaken under the original RFC Regulation (913/2010) found that there was no market justification for a rail freight corridor linking mainland Europe and the UK that extended beyond London.

With international freight predominantly entering the UK by sea-ports, the situation for the UK is very different compared to other Member States. Freight that arrives at deep sea ports like Southampton can also reach its end destination by domestic rail freight services, or by road.

The UK is of the opinion that the rail freight market throughout the EU is now fully open to competition and UK operators can, and do, operate in other Member States and vice versa. While it is arguable that the RFC extension may deliver some additional capacity for international freight on the network, our assessment is that this will be of limited value and any benefits are outweighed by the UK concerns set out in this letter.

It should also be noted that the majority of the RFC network and the key benefits of greater co-operation between infrastructure managers would be unaffected by the challenge. The most significant benefits to the market, in terms of reduced administrative burdens and greater co-operation between infrastructure managers to remove impediments to cross-border operations, arise from the original Rail Freight Regulation. They do not depend on the changes introduced by the CEF Regulation which we seek to challenge.