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Dear Sir/Madam,

Consultation on a revised contractual regime at stations, affecting the Station Access Conditions and the Independent Station Access Conditions

Thank you for the opportunity to participate in this consultation. TfL considers that it could bring considerable benefits to the area of station development in London with its strategic overview, expertise and funding capability. TfL has been developing proposals to take direct control of station leases falling within the remit of its Concessions to realise this potential as part of wider proposals within the rail industry to develop longer station leases that would be held by the operator (rather than Network Rail). TfL would therefore welcome the opportunity to discuss the interface between all these leasing arrangements and the Station Access Conditions (SACs) with the ORR to develop and deliver an approach offering benefits to both parties and the rail industry in general. TfL notes that the consultation documentation is silent over the relationship between the revised SACs and the proposed station leasing arrangements.

TfL would have welcomed the opportunity to be consulted over the proposed changes to the SACs during their creation prior to the formal consultation stage. The changes proposed could have a fundamental effect on TfL's interests in the rail industry so it is appropriate for TfL to be involved in the development of such proposals from an early stage, given its role as the funder of LU, London Overground and the future Crossrail concession which is analogous to the DfT's role as the franchising authority for most of the remainder of the National Rail network.

TfL has a number of significant concerns over the proposed revisions to the SACs as currently configured. These are summarised below:

- The changes will add to the complexity of the Station Change process rather than reducing it which is the stated aim of process;
- The changes will limit the grounds under which an operator can object to a change, weakening the operator's negotiating position with third parties and making it harder for the rail industry to benefit from developments affecting its infrastructure;
- The proposals risk giving too much power to third party developers and could result in the rail industry having insufficient protection from the risks associated with third party development, particularly those generated by the failure of a third party developer and accidents/damage affecting the infrastructure of the railway;
- The proposals are too prescriptive. The approach taken does not reflect the full diversity of circumstances under which Station Change can occur and could result in sub optimal decisions. The SACs should provide a framework for the Station Change process that is not so prescriptive in terms of thresholds, compensation arrangements and other matters.

TfL, whilst keen to create an environment which positively encourages investment in rail infrastructure, has real concerns as to whether the anticipated changes represent a suitable framework to achieve that end.

Responses to the specific questions posed in the consultation document are provided below.

4.5 Do you agree that we should introduce the concept of "Exempt Activity" and adopt the definition as developed for the proposed Stations Code?

TfL does not agree with the revised definition and its incorporation into the proposed SACs. The existing SACs already accommodate the concept of Exempt Activity. If an activity turns out to be more intrusive than anticipated then the responsible party should still be liable for loss to other users and should not be able to avoid this responsibility by declaring an activity 'Exempt'.

It should be noted that the role of SFOs under the new long-term leasing arrangements is likely to be fundamentally different from the current position with a number of responsibilities/risks presently borne by Network Rail inevitably moving to the SFO. TfL would like to better understand those arrangements before the detail of any amendments to the Change Procedure is developed further to avoid too much power being vested in SFO's at the expense of other TOC/FOC users of the station.

4.21 Is £5,000 an appropriate level for assessing financial impact to determine the type of Change Proposal, subject to it being kept under review?

This aspect of the proposal increases the complexity of the process which runs counter to the stated objective of the consultation. It is likely that almost all Station Change proposals will exceed £5,000 which means the proposed threshold has little value. It should be noted that an appropriate financial impact threshold will always be difficult to determine; indeed the use of such a threshold may produce perverse outcomes where operators segment one large project into smaller packages to avoid the requirement to evaluate the financial impact on other parties. Circumstances could also arise where the financial impact ultimately transpires to be greater than the threshold once the works have commenced; a process would be required to address this eventuality adding to the complexity of the proposal compared to current arrangements.

Non quantifiable factors such as impact on brand and customer perceptions are also important to an operator and need to be considered as part of the Station Change process. Ignoring brand and customer perception issues will worsen the negotiating position of operators as they will no longer be able to object to a proposal if offered unsatisfactory compensation.

4.22 Do you have any views on the alternative proposals dealing with the circumstance when a single change proposal has a material impact on one station party, but not on another?

This is an unnecessary complication created by the Financial Impact Test (FIT) which TfL considers should be withdrawn. If the FIT is implemented then TfL agrees that if any user meets the FIT the relevant procedure should be triggered and apply to all. TfL considers that a user that does not meet the FIT should still have a right to object, as changes can have significant non financial impacts on brand and customer perception.

4.23 Do you agree that we should introduce a separate minimum compensation threshold (set at the same level as the Financial Impact Test of £5,000) to determine the point at which consultees are eligible to receive compensation for a Material Change Proposal? Under this arrangement, a consultee must incur costs of £5,000 or more in its own right before compensation becomes payable. Once the threshold has been met, all compensation becomes payable for the affected consultee. Parties whose costs do not meet the £5,000 threshold will receive no compensation. We consider that this would make financial compensation arrangements consistent with other parts of the Station Change regime.

TfL considers this aspect of the change to be pragmatic if the FIT is implemented, although it will potentially disadvantage other users of the station whilst advantaging the SFO.

4.24 We would be interested in your views on how to deal with the situation where a series of Change proposals are made at separate stations, which individually do not meet the Financial Impact Test

threshold but when taken together do or could have a material impact on a consultee.

This is represents another example of the complexity created by the FIT, and demonstrates why it would be better to retain the current arrangements.

5.8 Do you have any comments on the proposed revised list of valid objections?

TfL does not consider that it is appropriate to attempt to specify all the grounds on which a party can object to a proposed change. Change procedures can apply to a range of diverse activities not all of which are foreseeable.

6.12 Do you have any suggestions on the terms of the "participation deed" that third party developers should be required to sign?

The participation deed makes reference to the Code. TfL would like to clarify what the term "Code" is referring to. Specifically is it the Stations Code as originally configured (and subsequently dropped) or does it refer to the SACs circulated last year?

TfL has fundamental concerns with the arrangements proposed for third party developers for the following reasons:

- For stations operated by a TfL Concession or LU, TfL may want to lead on matters relating to site development given its strategic, long term interest in the development of the public transport network. If a third party developer proposes a scheme, TfL should be able to discuss terms with them; hard wiring an approval process which gives the developer a right to proceed is unacceptable. It could be used inappropriately where a developer is in discussions with an SFO but decides it could get a better deal under the revised SAC process;

- There is a lack of clarity over who is sponsoring the change. LU has an extensive interface with the National Rail network in the London area. Title arrangements were put in place following the break-up of the British Transport Commission after the Transport Act 1962 that give LU and Network Rail (as the successor bodies to the original parties) protections and rights regarding works being undertaken on a particular network that may affect the other. If neither Network Rail nor the SFO lead a development (and are perhaps unable to stop it) the question arises of how these rights are to be enforced. It is vital that a third party developer gets the SFO and or Network Rail to lead the railway interface of any development to ensure such obligations are observed and that the interests of the rail industry parties involved are protected;

- Further consideration needs to be given to the circumstances where a third party developer fails. There needs to be a party with responsibility for reinstating the station and keeping it operational under these circumstances. At present this risk lies with Network Rail/the SFO but it is not clear who will pick up this responsibility under the new proposals. Third party developers should be required to have adequate insurance to cover such eventualities;
- It is inevitable that a developer will be seeking a long-term property interest in the station to justify the investment it is contemplating. That interest would have to be granted by Network Rail and the SFO (although under the longer term lease arrangements the SFO may be able to address this alone). The SACs need to be clear about the extent to which Network Rail and/or the SFO are compelled to grant such an interest to avoid uncertainty and confusion during the change process.

7.19 If public and private investors are to be treated in the same way:
(a) should we have one qualifying financial threshold and duration of interest and at what level should those be set?; or
(b) should we retain two financial thresholds and two different duration of interest time limits (to distinguish between the scale of different levels of investment) both of which can apply to a private or public investor?

TfL does not believe it is sensible or desirable to treat public and private investors in the same way because their motivations are fundamentally different.

7.20 If we retain the concept of Strategic Contributor with spending at a strategic spread of stations, should that entitle it to an interest just at those stations it has invested in or to all stations on that particular network?

TfL considers that where a Strategic Contributor invests at a number of stations it should have an interest in all the stations on the network where the investment has taken place, provided that the Strategic Contributor is a public sector body as indicated in the consultation documentation.

7.21 Are there other ways that a third party's "interest" in a station could be determined e.g. the length of interest to be determined by the life of the asset(s) that their investment has funded?

TfL has no comment to make in relation to this question.

8.10 We asked in our earlier consultation whether respondents agreed that:

(a) unless the parties agree otherwise, unresolved financial compensation issues should be dealt with via the dispute resolution process?; and
(b) an otherwise agreed Station Change should be allowed to proceed while the financial compensation issues are resolved?
We have set out above why we consider this approach is to be preferred, but if you do not agree,
(a) please explain your reasons why; and
(b) please provide your suggestions for dealing with this situation.

TfL has no objection to the approach proposed.

8.34 Should loss of revenue (in addition to loss of profit) be capable of being included as part of any compensation claim?

If the loss of revenue is demonstrable and foreseeable then it should be included as part of the compensation claim. It is important for TfL to be involved in any discussions relating to loss of revenue at stations where it has a direct interest, as it will hold the revenue risk at these locations due to the Concessioning model applied. The SACs should facilitate this involvement.

8.35 Do you have any comments on the proposal that no party can insist on compensation being payable by way of fixed-sum payment(s)? Rather this should be an issue for the parties to negotiate and agree, but ultimately it is for the proposer to decide if it wants to pay a fixed-sum compensation amount (whether by a single upfront payment or by installments).

This issue will depend on the strength of the relevant covenants. The revised SACs will need to determine how to address a situation where a proposer (particularly a third party developer) cannot pay compensation when required.

8.36 If a consultee wishes to request payment by way of fixed-sum payment(s), do you agree: (a) that the request should be made within a defined period, and not at any time during the project? and

(b) if you do agree, what should the time limit be?

The requirement for a defined period is unnecessarily restrictive. The approach taken to determine payment will depend on the scale, impact and risk of the project and therefore needs to be determined on a case by case basis.

8.37 As currently drafted, the Co-operation Agreement envisages reimbursement of costs to the end of an operator's franchise. As highlighted in paragraph 8.21 above this may not be appropriate for all consultees. What period of reimbursement do you consider would be appropriate?

Parties suffering losses should normally be compensated for the duration that those losses apply, regardless of changes to franchise or concession agreements. Arrangements relating to the duration of compensation should be varied if both parties agree to this to ensure they are flexible enough to accommodate unusual circumstances. It is important to ensure that third parties are not given a perverse incentive to engage in development towards the end of franchises or concessions to minimize their requirement to pay compensation.

8.38 Do you agree that we should retain the provision for a developer to propose "Savings Suggestions" that can be taken to dispute if the parties cannot reach agreement on their terms? Do you agree with our preference to remove the proposer's entitlement to seek *any* information it requires?

TfL has concerns as to how this might work in practice. The operator of a facility has a responsibility to ensure safety and it is vital that it has an unfettered discretion where the saving suggested may in its opinion compromise safe operation. Subject to this consideration TfL is content with what is proposed as long as the arrangement is workable and does not create an undue administrative burden.

8.39 We are keen to hear your views, and the reasons for your views, on:

(a) whether a developer's liability should be uncapped;

TfL considers that a third party developer's liability should be uncapped, as the potential for the various parties in the rail industry to suffer significant losses arising from works near the railway is considerable. The tunnel collapse at Gerrards Cross demonstrates this point. The rail industry should not bear risks for the benefit of third party developers. The dispute resolution process should be used to offer developers protection from unfair or disproportionate claims.

(b) whether the introduction of a liability cap would be appropriate; and

TfL considers that a developer's liability should be uncapped.

(c) the level at which any liability cap should be set.

TfL considers that a developer's liability should be uncapped.

8.40 Should operators be able to recoup money from passengers e.g. by way of increased fares that are justified on the basis of an improvement resulting from a Station Change, in the same way that Vehicle Change is drafted?

This would be a commercial decision for the relevant operator. Adjusting fares to reflect the impact of developments at single stations is unlikely to be practicable in London because of the constraints imposed by the zonal fare system. Other factors are normally more important than station condition when

setting fares, particular the journey time and reliability offered by the train service provided and these will normally drive fare levels rather than developments at stations.

8.41 In assessing the amount of compensation payable, is there any reason why it is not acceptable to net off the likely ability of an operator to recoup money from its passengers or other sources of revenue?

The ability of an operator to recoup money from new facilities provided by a development should be recognized by the compensation process where this can be defined in a transparent manner, for example in terms of the provision of new retailing facilities in a station that the TOC has control over. Various constraints also need to be recognized by the process, including the nature of the zonal fare systems and the fare setting process in London and elsewhere which is driven by a wide variety of political and economic factors.

8.42 We propose that the payback of overpaid compensation should be free of interest as long as it is paid back within a defined period of time, otherwise interest becomes payable, backdated to the date of the payment request:

(a) Do you agree with this approach?

TfL considers that overpaid compensation should not be returned with interest where this situation has arisen because the level of compensation has changed as the project has progressed. If compensation is overpaid because of a genuine error it should be repaid with interest.

(b) Is 28 days an appropriate period for payback?

(c) TfL has no comment to make in relation to this question.

(c) If you do not agree either with the approach or with the payback period, please provide your alternative suggestions.

TfL has no comment to make in relation to this question.

8.53 Paragraph 8 of Annex 1 to the revised SACs sets out a list of Core Facilities at stations. We propose that the provision of alternative accommodation in the revised SACs should extend beyond those "Core Facilities" and seek your views on what those additional facilities should include (e.g. the "Station Facilities" as set out in paragraph 10 of Annex 1 to the current SACs, or something wider).

TfL has no comment to make in relation to this question.

9.8 Do you agree that re-instatement of the original position should be considered on a case by case basis?

The key question in relation to reinstatement of the original position is who should pay for this especially in a situation where a developer has become insolvent part way through works. TfL considers that guidance should be provided on this point within the SACs, and that the initiator of the development should meet all the associated reinstatement costs.

9.9 Do you agree:

(a) with the introduction of a Relevant Undertaking in which a proposer must undertake to compensate station parties for costs/losses that they might incur if the development is not implemented in accordance with the terms of the original Station Change proposal; and

This question lacks clarity. TfL does not believe it would be appropriate to allow a party who has obtained approval to make a Change to cancel the project before the works start, although they should remain liable for expenses incurred by other parties during the Change process. If something different is delivered or the works are commenced but never completed, then the party sponsoring the change should be liable for the losses and costs suffered by other industry parties. The party sponsoring the change should have sufficient insurance to cover these costs.

(b) that affected parties should be able to object to the terms of the relevant undertaking?

The relevant undertaking must be compulsory.

9.10 Do you agree that an incomplete scheme should be subject to a new Station Change proposal so that the optimum outcome can be negotiated between the parties?

TfL disagrees with this approach. If the development is not completed as planned then there should be an automatic right to re-instate the previous position, with the initiator of the development meeting the associated costs and the losses suffered by other 'innocent' parties. The initiator of the development should also fund the completion of any revised scheme agreed between the parties following a failure to complete the original scheme.

10.8 Do you think that that the protections contained in Part G:
(a) should be incorporated into the proposed new "Notifiable Change" process?; or
(b) should remain in Part G of the revised SACs, separate from the Station Change provisions?

TfL has no comment to make in relation to these questions.

11.15 We will consider whether it is appropriate that, following agreement of a Station Change by the parties, ORR approval to any consequential amendment (to a Station Access Agreement) might be obtained 'in principle', to allow registration and implementation to proceed before formal section 22 approval of an amendment to an access agreement is given. We invite comments on this suggestion.

TfL agrees to the suggested approach.

14.5 We wish to hear from respondents on what (regulatory) impact – positive or negative - you believe that the proposed changes will have on you. Also, while we have raised specific questions, summarised in chapter 13, we equally welcome respondents' views on any aspect of the proposed modifications, including if respondents consider we could go further in stream-lining the process.

Based on the evidence and comments made in this consultation response TfL considers that the proposed changes will have a negative impact on the regulatory environment in which TfL operates. TfL considers that it can bring a strategic, long term approach to the development of stations under its direct control in London that will benefit the rail industry in general and would welcome the opportunity to work with the ORR to ensure that the SACs facilitate this.

Yours sincerely,

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