ATOC

Association of Train Operating Companies

Stations and Depots Team
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CONSULTATION ON A REVISED CONTRACTUAL REGIME AT STATIONS: EMERGING CONCLUSIONS

Please find below our responses to the specific questions raised in the most recent consultation document on a revised contractual regime at stations.

As a more general point we remain of the belief that reform of the stations contractual regime and the outcomes it is intended to achieve must be viewed in the context of wider industry reform, in particular the changes to franchises to transfer full responsibility for stations to train operators under long term lease arrangements. While these reforms are still ongoing and it is difficult to see the final picture at this stage, it is likely that they will quite fundamentally change the incentives of industry parties and their approach to stations.

It is important to recall that many of the proposed changes to the stations contractual regime were first considered well before these wider industry reforms were initiated. As such, there may be instances where these more recent industry reforms address some of the issues identified as being the reason for making contractual reforms necessary in the first place. For example the transfer of maintenance and renewal responsibilities to train operators will create single-point accountability at stations; this will tackle some of the problems that have in the past been highlighted as barriers to encouraging third party investment (e.g. confusion over the respective roles of NR and TOCs) by clarifying who is responsible at a particular station for making decisions and effecting change. In this context we would strongly encourage ORR to consider how wider ongoing industry reforms might influence the way stations are managed in future so as to ensure that the rationale behind any proposed contractual changes, if considered necessary, remains sound.

As with our earlier responses, this submission is intended to reflect as far as possible the overall views of ATOC members. However, individual train operators may well have slightly differing views on particular aspects of the proposals and so we would encourage you to consider this response alongside those of individual operators.

I hope this response helps inform your thinking and we would be happy to engage further on any of these issues if you feel it would be helpful.

Yours sincerely

Alec McTavish
Director, Policy & Operations

Comments on specific consultation questions

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

   We believe that this is a sensible suggestion, although in addition, the activity must comply with all relevant statutory regulations and not exceed the threshold of the Financial Impact Test in order to qualify as an Exempt Activity. Once the threshold has been exceeded, affected operators are exposed to potentially significant costs in connection with the activity and thus should be consulted with regard to it and, where appropriate, be able to make a claim for compensation.

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

   We remain of the view that a single figure is too broad-brushed an approach due to the vast differences in the relative size of stations. However, in the interests of introducing a simpler, rather than more complex system, we are willing to support it. This issue is dealt with further in our answer to Question 5 below.

3. ***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?***

   We believe that a single process is the most appropriate approach.

4. ***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.***

   The process would need to make it clear that those consultees who can demonstrate that they will experience at least a £5,000 impact as a result of both considering the proposal and its implementation are eligible to claim compensation and to object. If a party had to wait until it had actually incurred costs of over £5,000 before it was eligible to object, the deadline for objections may have passed. Once costs incurred by a consultee exceed £5,000, then compensation would immediately begin to be payable.

5. ***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 and could have a material impact on a consultee.***

   Where a series of proposals are made at separate stations and where such proposals can be identifiably linked (e.g. a scheme to install the same facility at a number of stations along a particular route) they should be viewed together to assess whether or not the

Financial Impact Test threshold has been met, and where it is met, then the consultee should be entitled to object and receive compensation.

Given that these sorts of linked works are likely to be undertaken by the proposer under a single contract, we do not envisage significant difficulties in being able to identify those proposals that are linked and those that are entirely separate.

We recognise there may be instances where similar schemes may be undertaken shortly after one another for good reason e.g. a local trial followed by wider roll-out. Nonetheless there are some TOCs who are beneficiaries at a large number of stations and where the implementation of multiple sub-£5,000 threshold schemes could incur significant costs for them when considered in aggregate. Therefore, to prevent gaming one option could beto provide a mechanism such that, if a proposer who has already implemented one or more schemes subsequently wishes to propose additional similar schemes along the same route within a defined period (say twelve months), then all such schemes – either completed or proposed – would be taken into account together in order to calculate whether or not, cumulatively, the Financial Impact Threshold had been triggered.

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

We believe the proposed list of objections is sufficient however it would be helpful if ORR could produce a composite list for consultees to consider before it issues its final conclusions. Section 5 does not make the proposed grounds explicit and requires cross-referencing to Stations Code documentation.

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

We remain of the view that where a third party wishes to invest at a station it should reach prior agreement with the relevant SFO before a change is proposed and should be required to take all steps available to them to do so. Third party investors will have a wide range of reasons for investing and may well propose changes that will incur ongoing costs for the SFO and/or beneficiaries. In this context we believe it is vital third parties work with the SFO on proposed changes since it is the SFO who will retain safety and operational responsibility for the station throughout (and potentially beyond) the period of implementation.

We are concerned that there still appears to be some ambiguity regarding the precise legal status of third party developers in relation to the process. While the ADC has confirmed a developer would be liable to contribute to the ADC's funding by entering a cooperation agreement, it remains unclear what would happen if a developer did not pay the ADC levy. Furthermore, the ADC's response makes clear that disputes involving third party developments could well incur additional legal costs which would need to be recouped by the levy on all Resolution Service Parties i.e. these higher costs would be spread across the industry.

In addition we have a related concern that there is limited detail on what would happen were a third party developer to go out of business, either before or during a scheme's implementation. In particular, should a scheme be left part-implemented it seems likely that any costs for putting it right would fall to the remaining industry parties, even though they may have objected to the proposal originally. We would therefore be interested to

understand how the proposed 'participation deed' would deal with these kinds of scenarios and how any costs that might arise would be met.

8. ***Should there be a distinction between public and private investors at all or should they be treated in the same way? Please explain the reasons for your view.***

   Provided that the same rules concerning the ability for consultees to claim compensation and to object and the grounds for objecting to the proposal are the same as those applicable to proposals sponsored by industry parties, then we are content for both types of investor to be treated the same.

9. ***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?

   A single system should apply. There should be one qualifying threshold and this should be set at a higher level than £50,000, possibly £100,000 per station. The sponsor should be the SFO for any investment less than that.

   The duration of interest should be five years in every case, except where the funder is continuing to pay for the repair and maintenance of the asset they have installed, in which cases it would be for the life of the asset in question.

   However, consultation with the third party funders in connection with any Change Proposal made after the installation of their funded works should be limited to the extent that the proposed works would adversely affect the asset that they had paid for. Third party funders should not have general rights of consultation in connection with future Change Proposals; the works proposed may concern an entirely different part of the station and have no bearing at all on the asset installed at the cost of the funder. Third party funders should have a right to object to a Change Proposal that proposed an adverse impact on, or the removal of, their funded asset, but they should have no right to claim compensation.

10. ***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?***

    Only at those stations at which it has contributed. There is no justification for allowing it to become involved in the arrangements at stations it has not invested in.

11. ***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?***

    Please see the response to question 9.

12. ***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.

The proposed approach is accepted subject to:

- Matters in dispute being capable of resolution quickly;
- Compensation being paid in a timely manner;
- Consultees being able to insist on payment of costs on an emerging costs basis in general and pending resolution of any dispute.

Consultees should not be expected to subsidise a sponsor's scheme.

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

Yes, this is very important. Loss of ticket revenue whilst disruptive works are being carried out is a significant area of potential loss for train operators that they should not be expected to bear themselves. It should form part of the business case for the scheme.

14. ***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 instalments).***

We support this proposal.

15. ***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 SACs should stipulate that agreement of the timeframe for payment of the fixed sum is part of the negotiation for the fixed sum in question. Different payment arrangements may be appropriate for different schemes.

16. ***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?***

The end of an operator's franchise is appropriate for franchise operators. For Network Rail, we consider the end of the control period to be the appropriate cut-off. We will leave it for the individual non-franchised train operator consultees to respond on the timescale that would be appropriate for them**.**

17. ***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?***

    No, we do not agree with this. The developer may not be a train operator, or may be a train operator operating under a very different business model, and what it proposes may be wholly inappropriate for the consultee in question. A consultee should not be exposed to the risk of being forced to adopt an approach that is wholly unsuitable (and may even be detrimental) to its business merely to save the proposer money.

    Do you agree with our preference to remove the proposer's entitlement to seek any information it requires?

    Yes.

18. ***We are keen to hear your views, and the reasons for your views, on:***

    (a) whether a developer's liability should be uncapped;
    (b) whether the introduction of a liability cap would be appropriate; and
    (c) the level at which any liability cap should be set.

    A developer's liability should be uncapped. We do not believe a cap would be appropriate. If a cap were introduced, the SFO/other consultees would be required bear any the costs that they may incur above the level of the cap, which is inequitable.

19. ***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 Network Change is drafted?***

    Improvements at a single station do not of themselves justify fare increases. Station improvements cannot be compared to track improvements in this way. Track improvements can result in improved journey times and increased service reliability, which are matters than can justify a fare increase. A new shopping complex, or even a new car park, at a particular station will not justify this. Therefore, we do not consider it appropriate to take potential future fare increases into account when assessing the benefits of a scheme, as these will have been driven by external factors that are entirely independent of works undertaken at a particular station on the route.

20. ***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?***

    See answer above. Fare increases are not driven by individual station improvements. It would be wrong to link the two in this way.

However, it would seem appropriate to have regard to other sources of income that would directly result from a scheme, such as increased retail revenue or increased car park revenue as a result of a station car park having increased capacity.

21. ***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?

    Yes.

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

    Yes.

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

    Not applicable.

22. ***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).***

    Alternative accommodation needs to extend beyond 'Core Facilities' and should extend to any accommodation used by the consultee in connection with its rail business, except where the consultee agrees otherwise.

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

    Yes.

24. ***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

    Yes.

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

    The required wording of the undertaking that the proposer must provide in these circumstances should be set out in the SACs. It should be a full indemnity for costs/losses

that affected parties may incur in connection with the failure to implement in accordance with the terms of the approved Change Proposal.

25. 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?

Yes.

26. Do you think that that the protections contained in Part G:

(a) should be incorporated into the proposed new "Notifiable Change" process?; or

No. For the reasons given in our previous response on this issue, incorporating Part G into the Notifiable Change process as proposed does not replicate in full the existing protections in G6 e.g. passing on of compensation to an affected SFO (G6.2) and the requirement to comply with an SFO's reasonable requirements with regard to safety and security (G6.4).

(b) should remain in Part G of the revised SACs, separate from the Station Change provisions?

We support this approach, as it preserves the current protections.

27. 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.

This is a helpful suggestion that we support.

28. We wish to hear from respondents on what (regulatory) impact – positive or negative - you believe that the proposed changes will have on you.

The introduction of an additional registration process will increase bureaucracy. In addition, the suggestion that an approved Change Proposal will lapse if it is not registered within the 28-day window will introduce a new 'trap' for a scheme sponsor, as non-registration may have been as a result of an administrative oversight. The sponsor would have to start the Change Procedure all over again and obtain approval a second time which would add unnecessary time and cost and would delay implementation. This seems a very high price to pay for an administrative oversight, particularly as the new register is not one that any party or body is actually required to maintain. (We presume that the scheme sponsor may register an approved Change Proposal as well as the SFO, as the SFO may have objected to it.)

Perhaps a less draconian approach would be to prohibit implementation of an approved proposal until it had been registered and impose a longer timeframe for registration, perhaps three months.

On the positive side, it would be helpful for franchise bidders and other prospective new users to be able to access a register to see what Change Proposals had been approved at a particular station.

29. 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.

The new process needs to be accompanied by a set of guidance notes and templates to assist the parties in working with it, rather than stream-lining the process itself any further. We believe that further steam-lining is likely to result in the removal or dilution of important protections for consultees.