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17 March 2014

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Suad Chowdhury
Contracts and Partnership Manager
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Dear Chinua and Suad,

Approval of New Passenger Framework Track Access Agreement between HS1 Ltd and London & South Eastern Railway Limited from 31 December 2014 to 31 December 2024

Introduction

1. The Office of Rail Regulation (“ORR”) has today approved the new framework track access agreement between HS1 Limited (“HS1”) and London & South Eastern Railway Limited (“LSER”) (jointly the parties), submitted to us formally on 13 March 2014 under The Railways Infrastructure (Access and Management) Regulations 2005 (as amended) (“the Regulations”). This follows an earlier informal submission of a draft agreement for our consideration. The purpose of this letter is to set out the reasons for our decision.

Purpose of the agreement

2. The purpose of this agreement is to allow the continuation of LSER domestic passenger services currently operated on the HS1 network for a duration of 10 years (six of which would be beyond the expiry of LSER’s franchise).

Consultation

3. A pre-application consultation was carried out in line with the HS1 Criteria and Procedures document. The following issues and objections were raised by the following consulted parties:

- a. Eurostar International Limited (“EIL”) offered the general comment that they were concerned with the removal of earliest and latest trains from the proposed agreement. HS1 has confirmed that that the removal of references to earliest and latest trains was as a result of ORR’s workstream on the [model Schedule 5](#)

[template for framework agreements](#) on HS1 in 2012. The removal of earliest and latest train slots is consistent with the conclusions of this document and the model template; earliest and latest train slots have been removed from the model template as they are covered by the relevant Engineering Access Statement and the Timetable Planning Rules.

- b. Sian Prout, Head of the DG MOVE Rail Unit at the European Commission, responded to the pre-application consultation with a number of points of concern, as follows:
 - i. The charging framework is not set out within the proposed agreement; this is not transparent and possibly discriminatory.
 - ii. The proposed agreement specifies certain rolling stock; this could preclude other operators who wish to use other rolling stock
 - iii. The proposed agreement only stipulates penalties (in the case of modifying or terminating the agreement) for the infrastructure manager, and not for the operator.
 - iv. The duration of the proposed agreement renewal is 10 years, twice the length of the duration allowed under paragraph 5 of Article 42 of European Commission Directive 2012/34/EU.

Both HS1 and ORR have been in dialogue with the Commission to attempt to alleviate their concerns. ORR considers that many of the concerns stem from a reading of only the proposed agreement, without consideration given to the contents of HS1's network statement, the HS1 passenger access terms and the HS1 network code. ORR's view on the concerns is as follows:

- a. Whilst the Commission is correct that the proposed agreement does not contain the charging framework, this is because the charging framework is set out in full in HS1's network statement and the methodology and formulae for calculating the charges are set out in the HS1 passenger access terms, and is thus applied in a transparent and non-discriminatory manner, with both of these documents being publicly available. The Commission also questioned why the charges were fixed for 10 years. ORR has explained to the Commission that charges are not fixed for 10 years, but subject to an annual indexation, as well as to five-yearly periodic review by ORR; provisions also exist for a 'wash-up' of charges on an annual basis.
- b. Rolling stock are identified in framework agreements to provide transparency to all that only authorised rolling stock is being used (only two types of passenger rolling stock being currently authorised for use on the HS1 network), because elements of the access charges are based

on the type of rolling stock used and because different types of rolling stock will consume different amounts of capacity.

- c. Article 42(4) states that framework agreements *may* contain penalties should it be necessary to modify or terminate the agreement – not that they *must* contain penalties. Nevertheless, it has been noted to the Commission that section 6 of the HS1 passenger access terms sets out the provisions for termination of the framework agreement, and any penalties that may apply to both parties.
- d. It has been clarified that the proposed agreement is not a renewal, but a separate, standalone agreement. Paragraph 6 of Article 42 states that *'Framework agreements shall, in principle, cover a period of five years, renewable for periods equal to their original duration. The infrastructure manager may agree to a shorter or longer period in specific cases. Any period longer than five years shall be justified by the existence of commercial contracts, specialised investments or risks.'* HS1 has notified the Commission that the justification for the agreement beyond 5 years is to underpin commercial contracts. Further, the Commission has questioned whether the contract is a commercial contract, and has argued that a 10 year contract will create additional risk for the infrastructure manager. ORR has clarified that the underpinning contract (the franchise agreement) is a commercial contract, whilst noting that the DfT rather than ORR is responsible for the franchising system in the UK. We have also posited that a 10 year contract guarantees income for the infrastructure manager over a longer period, and thus results in less risk for the infrastructure manager. As there is currently a significant amount of available capacity on the HS1 network, there is little risk for HS1 that it will not be able to accommodate any future applicants for the duration of the agreement.

Discussions are ongoing with Frank Jost and Sian Prout at the Commission concerning these points, largely in relation to principles for Framework Agreements in general.

ORR review

4. As noted above, during our review we asked HS1 to provide further details on their response to EIL's concern regarding the removal of references to earliest and latest trains.

ORR's conclusions

5. Pursuant to Regulation 28(1) of the Regulations, in considering the application and in reaching our decision, we are required to weigh and strike the appropriate balance in discharging our statutory duties under section 4 of the Railways Act 1993 (as amended). Approval of this application is consistent with these duties; in particular our duties to:

- protect the interests of users of rail services;
- promote the use of the railway network in Great Britain for the carriage of passengers and goods, and the development of the railway network, to the greatest extent that ORR considers economically practicable;
- contribute to the development of an integrated system of transport of passengers and goods;
- promote competition in the provision of railway services; and
- enable persons providing railway service to plan the future of their businesses with a reasonable degree of assurance.

Conformed copy of the track access contract

6. We will place a copy of the framework agreement on our public register and our public website.

Yours sincerely

A handwritten signature in black ink, appearing to read 'David Reed', written in a cursive style.

David Reed