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24 April 2019

Dear Mike,

Office of Rail and Road periodic review of HS1 Ltd ("PR19")

1. Thank you for Eurostar's letter of 15 February 2019, setting out Eurostar's request for the current periodic review process to be suspended for two months to allow your team to focus on the planning process for the UK's exit from the European Union (the "EU"). Eurostar's request and subsequent alternative proposal were considered by the ORR board at its meeting on 18 April 2019 and this letter sets out the board's decision and the reasons for that decision.
2. We would also like to thank you for the time that you, along with other passenger and freight operators affected by HS1's plans for 2020-25, have taken to engage in the process for PR19 since ORR's initial consultation in September 2017. This has required the deployment of resources for an extended period and Eurostar's views on the "complex and challenging issues" emerging in PR19 that are referred to in Eurostar's letter have been taken into account during ORR's progressive assurance of HS1's planning.

The PR19 timetable

3. By way of context, we note that ORR's periodic review of route funding of HS1 is set out in, and given effect by, the Concession Agreement entered into between the Secretary of State and HS1. Schedule 10 to the Concession Agreement sets out the planning which HS1 must undertake and the decision which ORR is required to make. ORR undertakes its role in accordance with its statutory duties as set out, in particular, in the Railways Act 1993 and the Railways (Access, Management and Licensing of Railway Undertakings) Regulations 2016.
4. Schedule 10 to the Concession Agreement also sets out a process to be followed where a periodic review is being conducted. As set out in our letter dated 27 February 2019, the Concession Agreement was amended in December 2017 to ensure a process that was fit for purpose for PR19.
5. The amendments to Schedule 10 were intended to ensure an extended period of engagement between HS1, its stakeholders and ORR. It was hoped that this would allow for the drawing out of the major issues of focus at an early stage so that all

parties could develop their views well before submission of HS1's final¹ Five Year Asset Management Statement ("5YAMS") (at least 10 months before the end of the preceding control period) and the publication of ORR's Draft Determination (at least six months before the end of the preceding control period).

6. ORR and HS1 are required to follow the process for the periodic review set out in Schedule 10 unless, following such public consultation as they consider appropriate, ORR, HS1 and the Secretary of State jointly agree to vary the process².
7. In the early stages of the periodic review, ORR is required to publish a "*Periodic Review Process Document*", which provides further detail on the process, timescales and approach for the periodic review. We published *ORR's approach to PR19* in January 2018, setting out a timetable of key milestones in the PR19 process in line with the process set out in Schedule 10. We also noted that there may be specific issues that occur which require additional intermediary steps in the process.
8. The PR19 process leads up to the start of the new control period ("CP3"), on 1 April 2020.

Our consideration of this matter

9. Further to Eurostar's request, in our letter to stakeholders dated 27 February 2019 we undertook a consultation on how we should respond to the request with stakeholders of the HS1 network, appending a copy of Eurostar's letter dated 15 February 2019 (which set out Eurostar's reasons for the request).
10. In Eurostar's letter dated 15 February 2019, Eurostar requested a two month suspension of the PR19 process, delaying the 5YAMS consultation stage so that it starts at the beginning of May 2019, rather than the end of February 2019. In our letter, we noted that our understanding was that Eurostar was not seeking to delay the start of CP3. We also stated that it would not have been possible to delay the publication of the draft 5YAMS and the start of formal public consultation (on 28 February 2019) as the required change to the Concession Agreement process would not have been possible in the timescales.
11. We noted that it did not appear to us that it would be feasible to delay the submission of the final 5YAMS to ORR by two months without also varying latter stages in the process.
12. Our letter put forward an option of delaying a number of stages in the process, including the final 5YAMS submission, the Draft Determination and the Final Determination. We also put forward an option of inserting an additional step in the current process to allow Eurostar to make representations on HS1's plans to ORR at a later stage, such as mid-June 2019, with HS1 having a short period to reply before ORR finalises the Draft Determination. In addition, we noted that if there is no change,

¹ In this letter, we refer to the 5YAMS HS1 submits to ORR following its public consultation as the '*final*' 5YAMS, because this is the language used in the Concession Agreement. However, we note that the 5YAMS submitted at that point is not strictly final. It may be revised at a later stage, in particular to implement the findings of the Draft Determination.

² See paragraph 13 of Schedule 10 to the Concession Agreement

to the extent Eurostar considers that it is unable to properly engage with the draft 5YAMS, it has a further opportunity to provide views as part of the public consultation on the PR19 Draft Determination (commencing on 30 September 2019).

13. We received five responses to our consultation letter. On 18 March 2019, we attended a meeting with HS1 and DfT to discuss the responses received and different options for responding to Eurostar's request.
14. Based on our consideration of the consultation responses, our understanding of the positions of the parties, and in view of the provisions of the Concession Agreement, at our board meeting on 26 March 2019 we decided to add a step in the process giving Eurostar the opportunity to make representations directly to us by mid-June, after the submission of the final 5YAMS by HS1 in May. Under this option, HS1 would then have the opportunity to consider and respond to those representations
15. Subsequent to this decision being made, an alternative proposal was made to us by Eurostar (as part of a meeting between Eurostar, ORR, HS1 and DfT) and further representations were made to us by HS1 on its position. We determined that these matters should be considered again by the ORR Board and that its decision of 26 March 2019 should be revisited.
16. In our letter to stakeholders dated 8 April 2019 we gave stakeholders the opportunity to comment on two options to vary the process involving a one-month delay to the final 5YAMS being submitted to ORR. In a letter to HS1 of the same date, we also requested that HS1 formally confirm its position on whether it would be agreeable to vary the process set out in the Concession Agreement to accommodate either of these two options. We received two responses to our second consultation letter, and HS1's response. This further information was provided to the ORR Board in revisiting the decision.
17. During our consideration of this matter, we have considered the proposals for changes to the process put forward by Eurostar as well as a broad range of different options which might assist Eurostar in fully engaging with the PR19 process. For ease of reference, we set out below the options which have been considered in the most detail:
 - a) No change option – Making no change to the current PR19 process.
 - b) Option 1 - Making no formal change to the PR19 process prescribed in the Concession Agreement, but inserting an additional step in the current process to allow Eurostar to make representations on HS1's plans after the final 5YAMS is submitted to ORR, by mid-June 2019, with HS1 having an opportunity to respond.
 - c) Option 2 – Delaying the final 5YAMS submission by one month (from 31 May 2019 to 1 July 2019) and otherwise retaining the existing milestones.
 - d) Option 3 – Accepting Eurostar's original proposal to delay the final 5YAMS submission by two months (from 31 May 2019 to 31 July 2019). Compressing later stages prior to publication of the Final Determination (by 7 January 2020).
 - e) Option 4 - Delaying the final 5YAMS submission by one month (from 31 May 2019 to 1 July 2019), delaying the publication of ORR's Draft Determination by two weeks (from 30 September 2019 to 14 October 2019) and otherwise retaining the

existing milestones. (This was Eurostar's alternative proposal, put forward in April 2019).

Consultation responses

18. We received views from six stakeholders: HS1, Network Rail (High Speed), London and Southeastern Railway, DB Cargo (UK), the Department for Transport ("DfT") and Eurostar. As stated in our letter, all correspondence responding to the consultations will be published on our website. A number of key points made are set out below.

19. All respondents acknowledged the challenges relating to the UK's exit from the EU.

HS1

20. HS1 noted that it has already undertaken a number of initiatives with its customers to ensure a proactive and transparent approach for PR19. It has also needed to procure additional resources to manage and respond to risks relating to the UK's exit from the EU.

21. HS1 would prefer to retain the existing process rather than a two month delay. HS1 noted that it has structured its resources around the current process and that any change to the timescale of PR19 could undermine the robustness of the periodic review and cause significant expense. HS1 also considered that any reduction in the timescales in the current process would move away from a fit for purpose process and limit HS1's ability to consider matters that would affect its core business.

22. HS1 was concerned that any changes to the process for the implementation of ORR's Final Determination (at the end of the PR19 process) would impact upon its ability to implement its plans in time for the start of the next control period, including updating contractual documents and mobilising delivery plans.

23. In addition, HS1 noted that there is ongoing uncertainty in relation to the UK's exit from the EU, in particular around the date of exit, raising the prospect that any change to the process would be because of a separate process which itself is subject to change. There could be further pressure to delay the process in the coming months.

24. In relation to Option 1, HS1 raised a concern that this option may affect the procedural integrity and fairness of the consultation process by providing one stakeholder with additional time and, potentially, sight of other stakeholder's submissions before making its own. HS1 was also concerned that Option 1 may affect the status of the final 5YAMS and require additional work for both ORR and HS1. Notwithstanding these concerns, in the spirit of being flexible, HS1 would prefer Option 1 to a two month delay, subject to clarification of the above concerns.

25. HS1's response to our request dated 8 April 2019 was that it would be agreeable to a variation implementing Option 2 above, if ORR is comfortable that it has sufficient resources to bear the reduction in its preparation of the Draft Determination. HS1 saw no reason why such a change could not be implemented quickly.

26. However, HS1 would not be minded to agree to a variation implementing Option 4, on the basis that the compression of the period HS1 has to consider the Draft Determination and revise the 5YAMS may result in material adverse consequences for its business. Our understanding of HS1's position is that this point applies equally to

any other option which reduces HS1's timescale for completing steps to be less than the prescribed period set out in the Concession Agreement.

27. HS1 reiterated its view that the procedural integrity and fairness of the process must be maintained and that accordingly it considered that any additional time provided to Eurostar should also be provided to other stakeholders.

Network Rail (High Speed)

28. HS1's infrastructure operating partner, Network Rail (High Speed), considered that Option 1 seems sensible. It stated that it would not support a delay to the latter stages in the process (and so it would not support Options 3 and 4 above). Because of the increase in the CP3 renewals workbank and the need for planning and other work, the current determination dates should be held.

London and Southeastern Railway

29. London and Southeastern Railway stated that it was unable to support any delay in the process, as it would be detrimental to its ability to conduct activities relating to the expiration of its current franchise in June 2019. London and Southeastern Railway noted that a potential solution could be for HS1 to extend its consultation on the draft 5YAMS by two weeks, with a commitment to revisit the process thereafter (given more could then be known about the EU withdrawal process).

DB Cargo

30. DB Cargo acknowledged the issues and stated that it would not object to the options of either suspending or varying the process.

DfT

31. DfT acknowledged the large amount of work in a number of areas which Eurostar has undertaken in preparation for the UK's exit from the EU and the vital importance of that work. DfT noted that the PR19 timetable should remain aligned with the current HS1 stations periodic review which it is undertaking. However, DfT supported the positive consideration of Eurostar's request and the various options to address it. DfT envisaged any extension being granted only one time.

Eurostar

32. In response to our second consultation letter, Eurostar's letter dated 11 April 2019 reiterated that Eurostar has faced quite exceptional regulatory and commercial challenges to ensure continued operation of Eurostar services in light of the uncertainty around the UK's exit from the EU. Although Eurostar had provided provisional views to HS1 on the draft 5YAMS, these underline the importance of the issues and the need for further work.
33. Eurostar considered that Option 1, allowing Eurostar's considered views to be put forward after the 5YAMS is finalised and ORR has done further work, would be deeply prejudicial to Eurostar. Eurostar considered that such an approach would mean that the largest operator exposed to commercial risk from the outcomes would be excluded at a crucial stage and so the process would be fatally flawed.

34. Eurostar noted that it would now be able to free up resources to focus on PR19. For it the critical element is that it should have a reasonable further period to formulate a response before HS1 finalises the 5YAMS for submission to ORR. Both Option 2 and Option 4 above secure this, provided that Eurostar is allowed at least five weeks to respond. Eurostar would not object to either of these two options, but prefers Option 4 as it gives ORR slightly more time to prepare the Draft Determination.

ORR Board decision

35. The ORR Board considered the issue at its meeting on 18 April 2019 and its decision and the reasons for that decision are set out below.

36. We have given Eurostar's request thorough consideration and have considered a number of different options. Our starting point in considering options was that any change to the process should ensure that the process remains fair, transparent and proportionate and that ORR is able to undertake thoroughly the role set out in the Concession Agreement. In addition, as noted above, the Concession Agreement significantly constrains changes to the process which ORR can make unilaterally. Many options (including any suspension of the PR19 process) could be implemented only with the agreement of HS1 and the Secretary of State.

Impact of exit from the EU

37. We note the extensive work that HS1 and its customers have undertaken to prepare operationally for the UK's exit from the EU. We acknowledge the additional pressures on Eurostar in particular and the detailed work which Eurostar has undertaken in a number of areas, some of which ORR has also been involved in.

38. At a Special European Council on 10 April 2019, the Council agreed to delay the UK's exit from the EU until 31 October 2019 or such earlier date as the withdrawal agreement is ratified. We acknowledge that the issue will continue to have an impact on Eurostar and other stakeholders in the coming months.

39. Eurostar considers that the challenges caused for its business by the UK's exit have precluded it from fully engaging in HS1's consultation on the draft 5YAMS (which took place between 28 February 2019 and 10 April 2019), noting that it did have an opportunity to submit its provisional views.

40. We note that Eurostar will in any case have a substantial opportunity to engage in the PR19 process through the public consultation on the Draft Determination and that we expect that there will be other opportunities for Eurostar to provide its views on particular issues.

41. However, having fully considered Eurostar's representations, consulted with stakeholders on the issue and considered their views, we consider that in these particular circumstances it is appropriate to further enable Eurostar to engage in the PR19 process. We do not consider that no change is the most appropriate option.

HS1's consultation on the draft 5YAMS

42. Eurostar's original request was for a two month suspension of the PR19 process, delaying the 5YAMS consultation stage so that it starts at the beginning of May 2019, rather than the end of February 2019. As noted above, there was insufficient time

following the request to delay HS1's publication of the draft 5YAMS and the commencement of the public consultation.

43. We note that London and Southeastern Railway suggested that HS1 could have extended its consultation on the draft 5YAMS. This consultation has now closed, although we note that (provided it complies with the Concession Agreement) how HS1 runs its consultation of stakeholders prior to submission to ORR is in the first instance a matter for HS1.
44. We acknowledge that, for Eurostar to have substantially more time to make representations before the submission of the final 5YAMS to ORR, it is likely that the submission of the final 5YAMS would need to be delayed.

Delaying HS1's submission of the final 5YAMS to ORR

45. We note that Eurostar's letter dated 15 February 2019 proposed a delay while protecting the ultimate schedule for the protection of charges. As noted in our consultation letter, our understanding is that Eurostar is not seeking to delay the start of CP3. Such a delay could have significant ramifications on all parties and ultimately disrupt passengers and freight users. No other stakeholder has proposed a delay to the start of CP3.
46. Eurostar's letter dated 15 April 2019 noted Eurostar's view that a delay to the Final Determination would be unlikely to have '*material real-world consequences*'. However, following the Final Determination HS1 is required to implement that determination for CP3 and we consider that it is valid that HS1 should have the reasonable period of time for implementation which is set out in the Concession Agreement. We consider that materially compressing this period could cause significant difficulties for HS1 and ultimately risk the implementation of our Final Determination.
47. Therefore, on the basis that the date for the publication of the Final Determination should remain the same (7 January 2020), we have considered whether it would be appropriate to delay HS1's submission of the final 5YAMS to ORR. We have considered a range of options for changes to the process which would involve such a change, including in particular Options 2, 3 and 4 above.
48. Taking into account the representations of stakeholders and all of the relevant circumstances, we do not consider that it would be appropriate to delay HS1's submission of the final 5YAMS (by either two months or one month). In particular:
 - a) The current process was only recently set out to ensure a process that was fit for purpose for PR19. It was intended to allow ORR and others an appropriate time period for the undertaking of a robust process, whilst keeping the consideration of the issues sufficiently close in time to the start of the new control period to maximise the availability of relevant information. The dates set out in the Concession Agreement, adopted in *ORR's approach to PR19*, were intended to be the latest dates which will allow sufficient time, rather than target dates which might be flexed.
 - b) The PR19 process sets out various stages for ORR, HS1 and stakeholders to complete particular steps. However, in reality, the ORR PR19 project team will be working on analysis of the relevant issues for substantially the whole period from receipt of the final 5YAMS to the publication of the Final Determination. This means

that a delay of HS1's submission of the final 5YAMS by one month reduces ORR's period of analysis from (approximately) seven months to six months. This is a material reduction.

- c) We have already commenced detailed work interrogating the draft 5YAMS. However, HS1 is entitled to make any changes it considers appropriate following its public consultation. Once ORR has received the final 5YAMS, it has greater certainty in relation to HS1's plans for the control period, in relation to which ORR must make a decision.
- d) The period from HS1's submission of the final 5YAMS and ORR's publication of the Draft Determination is currently four months (31 May 2019 to 30 September 2019). A one month delay would remove the month of June from ORR's period of completing analysis in a number of different workstreams. With the resources available at our disposal taking into account ORR's statutory functions in other areas, we are concerned that July, August and September alone would not allow sufficient time for the thorough consideration of the issues which appears to us to be appropriate. As part of this concern, we note that, given the need for governance processes to be completed in September, this would leave July and August as the key months for ORR's consideration of the final 5YAMS at a working level, when during August engagement with stakeholders and external consultants is typically more challenging and staff planned leave has a greater impact.
- e) There are a range of important issues for ORR to determine as part of PR19. Initial indications show that in some of these areas there is substantial difference between the positions of key stakeholders. This further emphasises the importance of ORR undertaking rigorous analysis and compression of the above timescales could potentially have a material impact on this.
- f) It has been made clear to us that the allowance of several weeks for a public consultation on our Draft Determination is an important step which will allow all parties to conduct proper analyses and provide considered responses to our minded-to decision before we make our Final Determination. For Options 3 and 4 to be viable, we may need to compress the period for public consultation and we are concerned that this could materially prejudice other stakeholders.

49. It follows that we do not consider that any of Options 2, 3 and 4 would be appropriate in the circumstances. For completeness, as noted above, the options including delaying the submission of the 5YAMS would require an agreed variation of the process and on the basis of our current understanding HS1 would not be agreeable to implementing Options 3 or 4 because of the reduced timescales for its actions in the process. In particular, we would therefore not be able to implement Eurostar's alternative proposed option (Option 4) even if we did consider it to be appropriate.

Option 1 (Adding step to the process)

50. In contrast to the above options, we consider that adding an additional step into the process (Option 1 above) is an appropriate, fair and pragmatic response to Eurostar's request taking into account the circumstances in which Eurostar finds itself and all other relevant circumstances. This will further assist Eurostar in ensuring that it can engage in the PR19 process to the greatest extent possible.

51. Option 1 would facilitate Eurostar making representations at a later point while retaining the milestones in the process which align with the process set out in the Concession Agreement as recently amended and retaining alignment with the current process for DfT's stations periodic review.
52. In the responses to the consultation only Eurostar objected to Option 1, stating that such an option would make the process fatally flawed, on the basis that it would not be able to provide its views at a crucial stage. We do not agree that Option 1 would make the process flawed. HS1 will be in a position to take into account Eurostar's provisional views in preparing the final 5YAMS for submission to ORR. But, in any case, the 5YAMS submitted at that point is not a final position. It is the starting point of ORR's detailed analysis of HS1's plans for the control period following its public consultation. The 5YAMS will be subject to a detailed process of scrutiny by ORR, taking into account the views of stakeholders.
53. Under Option 1, at the point Eurostar is given the opportunity to make representations in June, ORR will have made no final decisions. Subsequently ORR will set out its minded-to decisions in the Draft Determination. These will not be final decisions and any responses to the public consultation will be duly considered before the Final Determination.
54. Under Option 1, ORR still receives the final 5YAMS at the end of May, giving certainty in relation to HS1's plans for CP3 at that point in time and allowing ORR to commence scrutiny of this in detail. But if Eurostar makes representations in June and HS1 considers it should change its plans in light of those representations, it will be able to propose changes in response.
55. HS1 has not objected to Option 1, but raised some concerns and we address these as follows:
- a) For the reasons set out above, we consider that in these particular circumstances it is appropriate to add an additional step to further enable Eurostar to engage in the PR19 process. Other stakeholders have been supportive of this. It is consistent with procedural fairness for Eurostar to be given a further opportunity to make representations. We will continue to keep the PR19 process under review to ensure that it remains fair, transparent and proportionate.
 - b) HS1 will have received a number of responses to its consultation on the draft 5YAMS. The publication of those responses is, in the first instance, a matter for HS1. However, we agree that these need not be published straight away and we have no objection to HS1 holding publication until later in the process to remove any perceived risk of Eurostar obtaining an unfair advantage.
 - c) We do not consider that the status of the final 5YAMS is affected. It should set out HS1's plans for CP3 at that point in time.
 - d) Option 1 will involve ORR undertaking further work to consider any representation which Eurostar makes in June. HS1 will have an opportunity to consider those representations and give such response as it considers appropriate. We will consult HS1 on the appropriate length of time for this, taking into account the nature of Eurostar's representations. We expect that this will work form part of a

continued period of engagement between HS1's submission of the final 5YAMS and publication of the Draft Determination.

Conclusion

56. Therefore, we have decided on Option 1 above (reconfirming the ORR Board's decision of 26 March 2019); to add an additional step in the process to allow Eurostar to submit any representations it has on HS1's plans to us by mid-June, with HS1 having a short opportunity to respond to any representations before we make our Draft Determination at the end of September 2019. We will not propose any formal variation of the process set out in the Concession Agreement.
57. We note that the public consultation on the Draft Determination will also allow Eurostar and other stakeholders a significant opportunity to make representations on ORR's preliminary conclusions. ORR will consider any such representations fully before making the Final Determination.
58. We also expect there to be further opportunities in the coming months for Eurostar and other stakeholders to contribute their views, in particular on specific issues being considered.

Next steps

59. Our existing workplans will be updated to reflect the additional step described above and we will confirm to Eurostar the exact timescale for its further representations shortly.
60. Further, ORR will continue to keep the detailed process under review.
61. We look forward to your continued input to PR19. I am copying this letter to HS1 and DfT and it will also be published on our website.

Yours sincerely



John Larkinson

cc Dyan Crowther, HS1
 Dan Moore and Arthur Borkwood, DfT