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Dear Paul,

Regulator's Consultation on Access Rights and Moderation of Competition

I am writing with the SRA's views on the consultation relating to Access Rights and Moderation of Competition (MoC) and highlighting the issues that your consultation document raises for the SRA. It would be useful for us to discuss these issues in detail before the Regulator publishes provisional conclusions. We would also wish to respond on this consultation further once we have had the opportunity to consider the responses of the other industry parties.

Our consideration of your consultation document is based on the need to ensure that your development of Model Clauses for Track Access Agreements does not create a conflict with future SRA strategies, including our Capacity Allocation Strategy, and the development of a favourable framework for Enhancement Investment by private sector parties other than Railtrack.

Costs of capital and the willingness of franchisees, freight operators and other third parties (contractors and financial investors) to invest in enhancements are related to the degree of uncertainty which investors perceive. The SRA wishes to ensure that your proposals for removable access rights and a flexible approach to Moderation of Competition do not increase the uncertainty for investors and operators. We have in mind the increased risk investors may perceive as a result of the proposed mandatory removal of access rights.

Access Rights: definition in Schedule 5

The SRA welcomes the Regulator's proposals for a template Schedule 5 and supports the changes made to the previous proposals in the September 2000 document. The SRA can appreciate the advantages in incorporating certain multilateral arrangements into the existing Track Access Conditions but would wish to understand further the advantages in incorporating the bilateral Schedule 5 rights into a proposed network code.

Change of access rights over time

You refer to permanent, involuntary removal of rights being subject to strict criteria and that access rights (or, more likely, specific elements of such rights) could be removed in certain very limited circumstances subject to compensation. We would expect that the elements of access rights which would be subject to potential mandatory removal would need to be clear to the operator prior to entering the track access agreement. It would be helpful if, as part of this consultation and before reaching provisional conclusions, we could consider the criteria you are proposing to adopt to give an indication of the risks that this proposal may generate to operators and investors. We would also wish to understand how use-it or lose-it powers would relate, for example, to the Thameslink 2000 Access option.

While the SRA agrees with the desirability of ensuring flexibility in long term access rights as the strategies for the railway industry develops, this has to be balanced carefully against the uncertainties such proposals for removable access rights might lead to. We would like to understand your intended limitations on these powers further.

The SRA also believes that the Regulator should have the power to preclude the possibility of the mandatory removal of access rights in appropriate cases, for example, where substantial investment in infrastructure or rolling stock is planned.

As your consultation paper recognises, uncertainty over new entrants and the resultant competition is a risk for investors. We suggest that your proposals take account of new classes of investors, eg. investors in SPVs and financial backers, who have no direct contractual relationship with track access agreements. There needs to be a procedure which ensures that clarity on the key regulatory areas of uncertainty – moderation of competition, exclusion of permanent mandatory removal of access rights, access to and possession of the affected parts of the network for enhancement works and journey times, service patterns and frequencies – can be achieved well in advance of financial close. The views of potential third party investors would be helpful to this consultation process.

Moderation of Competition

The proposals to create a flexible approach to MoC protection needs to be considered against the policy background and as you point out, the SRA strategies. The SRA's draft Directions and Guidance require SRA to develop a policy for the allocation of capacity among users. This policy is required to inform operators and to assist the Regulator in his consideration of proposed access agreements. The SRA will produce a strategy for Capacity Allocation for consultation early next year. The potential benefits/risks to investors/operators arising from your proposals for MoC need to be considered against this SRA strategy. We would wish to consider with you the best way to take this forward and the appropriate timescales in light of the SRA's requirement to consult on its strategies.

In relation to your proposals, SRA believes it is important to be clear as to the circumstances where MoC protection which has been contractually awarded could be withdrawn in return for an Access Protection Payment. SRA believes that these circumstances need to be clear at the time that MoC protection is awarded.

Methodologies for Compensation

We believe that the industry in general would support the need for flexibility in long term access rights, however to minimise the regulatory risk, a robust and clear methodology for compensation is required. Your proposed methodology is understandably at an early stage of development. However, further work, including consideration of worked examples to explore this area and all the variables, is we think required to provide greater certainty to the industry in relation to this aspect.

Implementation

The timescales required to implement the Regulator's proposals remain key to us in relation to the franchise extensions and replacements going forward. It would be desirable for the industry structure for access rights to be resolved by the time that new track access agreements may be required for franchise extension or replacement. MoC policy is also significant in relation to the franchise remapping process and the resultant proposed Continuation Agreements with Railtrack for Track Access agreements.

We believe that before forming an overall view on the access rights consultation, it is desirable to see the proposals for the liabilities regime and enhancement frameworks. I think that the other industry parties would have the same view and so we would wish to have the option to revise our views having had the opportunity to consider the Regulator's full proposals for model clauses.

In relation to the freight proposals under this consultation, again without the benefit of knowing what the proposals for freight model clauses will be, it is difficult to comment in detail on how the proposals may affect freight operators.

We would welcome the opportunity to discuss these issues in detail with you over the next few months prior to the publication of your provisional conclusions.

Yours sincerely,

Philip O'Donnell