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Dear Office of Rail and Road (“ORR”),

**EVOLYN’S APPLICATION FOR DIRECTIONS UNDER SECTION 17 OF THE RAILWAYS ACT 1993**

1. Evolyn refers to the ORR’s letter dated 8 November 2024 in relation to Evolyn’s application relating to Temple Mills International Depot (“TMI”) under section 17 of the Railways Act 1993 (the “Act”) and the letter of response from Eurostar International Limited (“Eurostar”) dated 25 September 2024 (“Eurostar’s Representations”).
2. This letter sets out Evolyn’s reply to Eurostar’s Representations.

Purpose and framing of the application

3. The purpose of Evolyn’s application is not, at this point in time, to seek a direction requiring Eurostar to enter into an access contract. That is why the application, at paragraph 2.3, states, “*there is not any contract or draft made yet*”, and at paragraph 2.4 states, “*the anticipated date for the commencement date is 1/04/2026 at the moment*” (emphasis added). Of course, a direction requiring Eurostar to enter into an access contract may be necessary in the fullness of time, if ongoing negotiations fail. However, the primary purpose of Evolyn’s application at this stage is to obtain information about the capacity at TMI (as a “*railway facility*”)<sup>1</sup> from Eurostar (as the “*facility owner*”).<sup>2</sup>
4. The ORR has published guidance dated 5 March 2024 on the “*Criteria and procedures for the approval of depot access agreements*”. In that guidance, the ORR deals specifically with section 17 applications, and in that context states, “*We expect facility owners to engage in negotiations with prospective users in an open, constructive and responsive way. Facility owners should provide prospective users with necessary information in a timely manner.*”

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<sup>1</sup> Under section 17(2)(c), one variety of “*railway facility*” is “*a light maintenance depot*”. Evolyn understands that Eurostar accepts that TMI is (at least) “*a light maintenance depot*”.

<sup>2</sup> Under section 17(6) of the Act, “*facility owner*” means “*any person—(a) who has an estate or interest in, or right over, a railway facility; and (b) whose permission to use that railway facility is needed by another before that other may use it [...]*”. Evolyn understands that it is common ground that Eurostar is the “*facility owner*” in respect of TMI.

5. The “*necessary information*” must include information about capacity. That is for several reasons:
- a. It is not possible to have a sensible commercial dialogue about the use of a railway facility unless both parties understand the capacity of that facility.
  - b. The withholding of material information, including information about capacity, is incompatible with the principle (enshrined in the legislation)<sup>3</sup> that the treatment of applicants ought to be fair and non-discriminatory. More broadly, it is incompatible with both the letter of and the policy objectives behind competition law.
  - c. For applicants such as Evolyn to be able to sign contracts with rolling stock manufacturers or leasing companies (which will typically undertake to maintain the rolling stock on an ongoing basis, or at least to assist with that maintenance), they must have confidence that facilities will be available to maintain that rolling stock.
  - d. Information about TMI is especially crucial, because it is the only depot in the UK designed for use by international train services.
  - e. If it later becomes necessary for Evolyn to pursue its section 17 application in order to direct Eurostar to enter into an access contract, Evolyn will need to know whether there is capacity at TMI and how much. Otherwise, there is risk that Evolyn will be misled into making an application for access to capacity that does not in fact exist.
  - f. The ORR’s own assessment of any application by Evolyn is likely to be materially assisted by knowing what TMI’s actual capacity is, and by Evolyn’s application being tailored to the precise available capacity at TMI.
  - g. Until recently, the European Commission’s implementing regulation imposed a specific obligation on “*operators of service facilities*” to “*provide indicative information on available service facility capacity*”.<sup>4</sup> The implementing regulation was revoked (insofar as it applied in Great Britain) on 4 March 2024.<sup>5</sup> However, the explanatory notes accompanying the revoking instrument state, “*The impact of revocation is expected to be very limited*”.<sup>6</sup> It would therefore be surprising if the effect of the revocation

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<sup>3</sup> The Railways (Access, Management and Licensing of Railway Undertakings) Regulations 2016 (the “**Regulations**”), regulation 32.

<sup>4</sup> Commission Implementing Regulation (EU) 2017/2177, article 6(2), read with point 2(e) of annex II to Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area.

<sup>5</sup> Railways (Revocation and Consequential Provision) Regulations 2024/127, regulations 1(2), 1(3), and 2, and schedule 1, fourth item.

<sup>6</sup> The explanatory notes are available at <<https://www.gov.uk/government/publications/the-railways-revocation-and-consequential-provision-regulations-2024-explanatory-notes/8b9a2200-a5ba-49d6-910f-29046c188b42>> (last accessed 29 November 2024). The implementing regulation is addressed as the eighth item in the notes.

were to deprive Evolyn (and other applicants) of their ability to procure material information from Eurostar (and other facility owners). Indeed, the ORR's own guidance quoted in paragraph 4 above (published the day after that revocation) shows that the ORR considers that such an obligation to provide capacity information in a timely manner does still exist.

6. Evolyn started the process of negotiating with Eurostar for access to TMI as long ago as 27 July 2023.<sup>7</sup> Eurostar writes that *"The parties have been engaging constructively to gather evidence and explore what is or might be possible"*.<sup>8</sup> So far, though, Eurostar has failed to provide Evolyn with any usable information about TMI's capacity. Instead, Eurostar has simply claimed, *"it difficult to see that there is sufficient capacity available to meet an assumption that we can permanently allocate 2 roads"*.<sup>9</sup> Given that Eurostar is the only entity using TMI, Eurostar can reasonably be expected to know the capacity of TMI with much greater certitude. Moreover and in any event, Evolyn finds the claim of it being difficult to see there being sufficient capacity implausible, given that Eurostar itself has announced its intention to increase its fleet by 30% (from 51 trains to 67) and its passenger numbers by 60% from (19 million *per year* to 30 million) by 2030,<sup>10</sup> of which 11 million are on train services between the UK and continental Europe.<sup>11</sup> Indeed, Evolyn understands that the HS1 network was originally designed to accommodate up to 17,400,000 million passengers per year.<sup>12</sup>
7. Evolyn clearly ought to be provided with more detailed information in order to assess Eurostar's claims of capacity and to make proposals accordingly. Information of that nature ought to be available. When Eurostar (in its current form) was created (as a joint venture between the Société Nationale des Chemins de Fer Français and London & Continental Railways), the European Commission reviewed the proposed concentration. In response to competition concerns that the Commission identified, Eurostar offered commitments, which were to last ten years from June 2010. Among the commitments were the following:
  - a. *"68. [...] [Eurostar] commits that it will make access to light maintenance services at [TMI] available on fair and non-discriminatory terms."*
  - b. *"69. If there is no or insufficient space or capacity at [TMI] at the time of the request, [Eurostar] commits that it will make space or capacity available to the extent reasonably required. In this specific context, it is*

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<sup>7</sup> Evolyn's application, section 2.2.

<sup>8</sup> Eurostar's Representations, at paragraph 12.

<sup>9</sup> See Eurostar's communication dated 19 July 2024, quoted in Evolyn's application, section 2.2.

<sup>10</sup> Eurostar, *"Eurostar to invest in up to 50 new trains as it reports strong financial performance"* (17 May 2024), available at [https://mediacentre.eurostar.com/mc\\_view?language=&article\\_id=ka4Rz000007RgGriAK](https://mediacentre.eurostar.com/mc_view?language=&article_id=ka4Rz000007RgGriAK) (last accessed 29 November 2024)

<sup>11</sup> Fixed Link – Railway Network – OPEN ACCESS Statistical Declaration 2025.

<sup>12</sup> Usage Contract dated 29 July 1987, subscribed by The Channel Tunnel Group Limited, France-Manche, S.A., The British Railways Board and La Societe Nationale Des Chemins De Fer Francais, at clause 3.2.1 (i)(a).

*agreed that a reasonable requirement shall be for [Eurostar] to grant access to [TMI] for one train at any given time during a 24 hour period."*

8. Therefore, during the period of the commitments (i.e., until 2020), it appears that Eurostar had a view on capacity at TMI and on what competing services could be accommodated at the facility. It is not clear why similar information could not be provided today.
9. It cannot be said that Evolyn's request is premature. In places, Eurostar appears to say that information about capacity cannot or should not be provided before Evolyn has established the "*technical compatibility*" of its rolling stock.<sup>13</sup> That takes matters backwards. As noted above, sales of rolling stock will depend to some extent on the availability of maintenance facilities, and TMI is the only light maintenance depot in the UK designed for use by international train services. Therefore, the natural order of operations is for Evolyn to find out information about capacity before it procures rolling stock (which it can then do in light of any constraints or technical issues that transpire from the capacity information).
10. As noted at paragraph 4 above, the ORR's guidance states that "*necessary information*" must be given in the context of section 17 applications. Therefore, Evolyn's section 17 application provides the proper context for the ORR to facilitate the provision of information about capacity.
11. If Eurostar (whether voluntarily or following intervention from the ORR) provides satisfactory information about capacity, or makes a satisfactory proposal about how and when that information is to be provided, Evolyn asks that that information or proposal be made public on the ORR's website.
12. If the ORR considers that another procedural route would be more appropriate for the purposes of eliciting the relevant information from Eurostar,<sup>14</sup> then Evolyn would be grateful for an indication to that effect.
13. The above ought to be sufficient for the ORR to resolve the matters arising at this stage. However, Evolyn briefly addresses below two further issues that Eurostar has raised (although it reserves the right to address these two issues fully at the appropriate stage).

#### Evolyn's experience

14. In its representations, Eurostar has sought to call into question Evolyn's understanding of running a railway business.<sup>15</sup>
15. That suggestion is inappropriate and misplaced. Evolyn and its investors are well aware of the complexities associated with running a railway business. Eurostar's

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<sup>13</sup> See, for example, Eurostar's Representations, at paragraphs 12, 13.b, 13.d, and 25.b.

<sup>14</sup> For example, the ORR might consider that the appropriate route might be an appeal under Regulation 32, perhaps framed on the basis that required information about TMI's capacity has not been properly included in HS1's network statement. Such a procedural route might be complicated by HS1's involvement—although the ORR might take the view that an appeal could be framed as being in respect of Eurostar's failure to provide information to HS1 under Regulation 13(3).

<sup>15</sup> Eurostar's Representations, at paragraph 23.

mistake is to label as inexperience what is in reality increasing frustration with Eurostar's 16-month delay in providing proper information about capacity at TMI. In addition, Evolyn's team is comprised of people with extensive experience in the sector.

#### The ORR's processes

16. Eurostar has also sought to suggest that the ORR's existing processes are somehow ill-suited to dealing with any application by Evolyn for access to TMI, because the rail services in question are international.<sup>16</sup> Eurostar even goes so far as to say that that the ORR should issue "*bespoke guidance*", and/or (even more extraordinarily) that "*TMI should be exempted from the scope of s.17 of the Act*".<sup>17</sup>
17. Evolyn disagrees with Eurostar's suggestion. The legislation does not distinguish between national and international rail services. For example:
  - a. Section 6 of the Act contains the concept of a "*relevant European licence*", which is defined to mean "*a European licence which an operator relies on to provide a Channel Tunnel service*". Under section 80(1A) of the Act, holders of "*relevant European licences*" are required to furnish information to the ORR. Thus, international rail undertakings are subject to the ORR's jurisdiction.
  - b. The delegated legislation makes that even clearer: Regulation 4(1) states, "*These Regulations apply to domestic and international rail traffic*". Similarly, Regulation 13(j) provides that a network statement must set out "*the measures taken by the infrastructure manager to ensure fair treatment of [...] international services*".
  - c. The ORR's guidance dated 28 July 2021 on "*Access to the rail network and service facilities, infrastructure management and appeals*", on pages 9 and 10, indicates that Regulations 5(1) and 6(1) (i.e., the Regulations about making infrastructure available to railway undertakings) both apply in principle to international services. If that is true, it is hard to see why regulation 6(2) (i.e., the Regulation about making service facilities available to railway undertakings) would have a different scope. Evolyn suggests that it does not.
  - d. The same guidance, on page 48, states that the ORR considers both HS1 Limited and Eurotunnel to be infrastructure managers.
18. Further, Eurostar does not explain how or why the existing processes are unsuitable. Eurostar says that Evolyn will need "*bi-national and international approvals and consents*",<sup>18</sup> permission to access St Pancras International Station and HS1,<sup>19</sup> and

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<sup>16</sup> Eurostar's Representations, at paragraphs 5, 6, 8, and 28 to 32.


<sup>17</sup> Eurostar's Representations, at paragraph 33.

<sup>18</sup> Eurostar's Representations, at paragraph 5; cf paragraph 32.

<sup>19</sup> Eurostar's Representations, at paragraph 30.

“special security arrangements”.<sup>20</sup> That may all be true, but it makes no difference to Evolyn’s access to TMI, still less to Evolyn’s prior need for accurate and precise information on capacity of TMI. Access to one element of the necessary infrastructure and services cannot be contingent on pre-existing access to all the other elements—otherwise, no access could ever be granted. In any event, even if it were necessary, the need for all relevant approvals to be given could easily be catered for through the use of (for example):

- a. indications from the ORR in principle, whereby the ORR could state that it was minded to make a particular direction, provided other conditions were met; and/or
  - b. conditional directions, whereby the ORR could direct that an access contract be entered into once all relevant approvals had been given; and/or
  - c. appropriate conditions precedent in the access contract.
19. It would not be fair or appropriate for the ORR to change its processes in response to an application. Whether as a matter of fairness and natural justice, as a matter of legitimate expectation, or under a free-standing principle of public law, the ORR ought to follow its existing policies and procedures.<sup>21</sup> Adopting new policies or procedures in response to an application would be unfair to Evolyn and its investors, who are relying on the ORR’s existing guidance. In any event, as explained above, any features of Evolyn’s application that arise because of its international nature could, if thought necessary, be accommodated through the use of straightforward conditionality mechanisms.
20. As to Eurostar’s argument that TMI should be exempted from the scope of section 17, the ORR simply has no power to do that. TMI is within the scope of the legislation. The ORR cannot amend or repeal that legislation. Eurostar’s argument is an attempt to put TMI—and thus its international rail service—beyond the reach of competition and should be rejected.

Yours sincerely, 



Evolyn Mobility Ltd.

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<sup>20</sup> Eurostar’s Representations, at paragraph 31.

<sup>21</sup> See, for example, Van Hare KC *et al* (eds), *De Smith’s Judicial Review* (9th ed, Sweet & Maxwell 20223 w/supp 2024), at paragraphs 7-018 and 9-032.