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Date:
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By email

Dear Philip

Periodic Review 2013 - On-rail competition: Consultation on options for change in open access

Thank you for the opportunity to respond to this consultation. This response sets out some general observations before dealing with some of the specific issues raised (attached at Annex A).

The Scottish Government's ambition is to have a railway that offers value for money, ensures that the railway industry acts in a coordinated, integrated manner, and, most importantly, has passengers' interests at its heart.

Your consultation document rightly recognises the need for the ORR to balance its statutory duties under section 4 of the Railways Act, particularly those to promote competition in the provision of railway services and to have regard to the funds available to the Scottish Ministers and Secretary of State.

As you will be aware, the Scottish Government is, by any measure, the main investor in rail infrastructure and services in Scotland. The Scottish Ministers are therefore of the view that protecting this investment should be regarded as a key consideration and priority in the development and application of policies relating to on rail competition. In simple terms, higher levels of competition and revenue abstraction create potential risks of higher franchise subsidy levels for the Scottish Government as funders and a less stable ScotRail and Caledonian Sleeper franchise, neither of which is desirable.

In general, rail passenger services in Scotland are highly subsidised and dominated by social rather than commercial operations which are much less likely to attract competition from open access operators. In Scotland open access continues to provide niche tourism operations, which we continue to welcome. In addition, the ScotRail franchise is tightly specified and makes full use of the available track capacity, particularly across the Central Belt routes and on rural single lines. Taken together, this raises questions over the specific role of open access within a complex (with rural, inter-city and commuter routes), highly subsidised and heavily utilised network such as Scotland.

In terms of the options presented, we remain concerned that the level of detail provided does not allow for detailed consideration as to how these would affect rail passenger services in Scotland. Any proposals which go beyond the current not primarily abstractive test present a risk to franchise revenues, including the potential cherry-picking of key revenue flows.

I can confirm that Transport Scotland does not require any of this response to remain confidential.

Yours sincerely



STEVEN McMAHON

Consultation Questions

Q1. Do you agree that we have identified the key barriers to open access competition? Do you consider that the steps we are taking will help to address these barriers or that there are other actions we should be taking? Do you agree that, given the plans for other work outlined above, the remaining barriers imposed by the NPA test are important?

We agree that some barriers have been appropriately identified but we remain concerned that the proposed steps will not address these barriers in a manner that is satisfactory to Transport Scotland, primarily for the reasons set out in the main body of this response.

Fundamentally open access is restricted in Scotland because there are very few profitable operations available under the current regime and capacity is restricted. We would be concerned by any new steps being introduced to require Network Rail to develop timetables to increase capacity that could adversely impact upon existing operations that we both specify and subsidise.

We do, however, agree that the barriers imposed by the NPA test are important.

Q2. What implications do you think that industry developments such as ERTMS, electrification and changes in EU law could have for our approach to on-rail competition? Are there other developments that could have an impact on our approach?

We believe that any impact is likely to be small although in the case of EU law it would depend on the detail of the changes.

Q3. What are your views on Option 1? If we were to retain the current NPA test and structure of charges for open access what effect do you think changes to the economics of the railway and to capacity would have on the scope for and levels of open access competition? Do any factors other than those listed above favour (or not favour) Option 1?

Before any decision is taken to move away from Option 1 it is vital that we are able to understand the benefits and demonstrate that they are affordable. Based on the information available it is not clear that this is the case with the current proposals. The Scottish Government is unlikely to reduce the extent to which we contract for rail passenger services, nor is this likely to be desirable in the Scottish domestic context for the reasons set out in the main body of this response.

Q4. What are your views on Option 2? Should the mark-up be calculated on the basis of 100% of excess abstraction? Do any factors other than those listed above favour (or not favour) Option 2? What do you think of the feasibility of building a commercial case based on policy as described here? What changes/guarantees/mitigations would be needed to make this work?

There is insufficient evidence available to form a clear position. However, in general we have significant concerns over the appropriateness of such an approach and how it would work in practice.

Q5. What are your views on Option 3? What do you think of the feasibility of building a commercial case based on policy as described here? Are there any key practical or other issues that we have missed?

We believe that an approach driven by general rules is unlikely to be appropriate. Any expansion in open access should be case specific. Your own assessment set out in paragraph 3.55 clearly demonstrates the potential problems for funders and demonstrates the difficulty of mixed franchising and open access operation.

Q6 Do you agree that the process described would be appropriate under Options 2 and 3? If not, what changes would you make and why?

Under the scenario whereby a bid did not pass the NPA test it may be more appropriate to treat the application on bespoke case-specific manner to ensure adequate cognisance of all relevant factors. Such an approach may help better align with our policy objectives which underpin our investment in the railways.

Q7. Do you agree with the approach to estimating mark-ups, particularly the use of generation and abstraction forecasts to decide whether mark-ups should be applied and, in the case of Option 2, the size of the mark-up? Should OAOs be able to appeal the mark-up in the light of subsequent data?

We broadly agree with the approach set out in these circumstances given the complexities around forecasting generation and abstraction.

Q8. Do you agree that no mechanism should be introduced to address Network Rail's additional revenue through mark-ups? If not, what mechanism should be used?

We have some concerns around this approach. Whilst it may be simple, correcting for over-recovery at the next Control Period appears to be too detached.

Ultimately if Network Rail receives more revenue from network users than it needs to deliver the required network then that should flow back to the funders in the same way as if they outperformed their efficiency target. As the network funder of last resort we should be preferential beneficiaries to any extra income over the longer term.

Q9 Do you consider that, under any of the options considered in this document, the profile of mark-up payments should be tailored so as to address concerns over the ability of open access operators to pay in the early years of new services?

No.

Q10 Does the review of mark-ups at periodic reviews cause problems for OAOs' planning of their operations?

No. This would be consistent with other regulatory processes. OAOs should be protected by the ORR's general duties.