



# Department for Transport

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BY EMAIL

[Matthew.Garbutt@devonshires.co.uk](mailto:Matthew.Garbutt@devonshires.co.uk)

Your Ref: MPG/BRI207.1

Dear Sirs/ Devonshires Solicitors LLP

## **Anticipated award of Southern, Thameslink and Great Northern franchise to GTR**

### **Your Client: Bring Back British Rail**

1. Thank you for your letter dated 1 February 2022.

#### Factual Matrix

2. We note the summary of the factual matrix you have provided in your letter. We consider that it is necessary to clarify certain aspects. However, where we have not commented with respect to any item in your letter, this does not mean that it is accepted as relevant or as an accurate characterisation of the matter, and the Secretary of State's position is reserved in full.
3. London & South Eastern Railway ("**LSER**") operated the Southeastern franchise until 17 October 2021. LSER is a subsidiary of Govia Limited ("**Govia**") which is owned 65% by Go-Ahead Group ("**GAG**") and 35% by Keolis (together the "**Owning Groups**"). Govia Thameslink Railway ("**GTR**") which operates the Thameslink, Southern and Great Northern ("**TSGN**") franchise, a sister company of LSER, is also owned by Govia.
4. GTR, although a sister company of LSER, is managed and operated as a separate entity and by a separate executive management from LSER.
5. Following Department for Transport ("**Dft**") officials uncovering potential contraventions of its franchise agreements with LSER, the Secretary of State determined that the Southeastern franchise would not be re-awarded to LSER when the franchise expired on 17 October 2021. As such, SE Trains Limited was appointed as the Operator of Last Resort to operate the services previously operated by LSER.
6. The Secretary of State has previously enforced the terms of the TSGN franchise agreement, including through appropriate compensation and remediation actions in respect of GTR's role in respect of disruption to services experienced in 2016 and 2018.

### Assurances Sought

7. At present no decision has been made in respect of the arrangements to be put in place on the expiry of the current TSGN franchise agreement.
8. The Secretary of State is required to comply with s.26 of the Railways Act 1993 (the "**RA1993**") and the Policy published pursuant to s.26(1) RA1993 (the "**Award Policy**")<sup>1</sup>. In circumstances where a franchise expires in a situation where there has not been a competition for a replacement operator, the Award Policy permits and it has been common practice, as permitted by the Award Policy, for a direct award to be made to the incumbent operator, unless there is an appropriate reason not to do so (as was the case with the Southeastern franchise.)
9. In considering whether a direct award is made to the incumbent operator, the Secretary of State will consider all relevant factors as required by paragraph 14 of the Award Policy. This includes: (a) business and service continuity; outcomes for passengers, value for money, affordability, delivery risk and the continued quality of the franchise proposition; (b) broader market or programme considerations, the delivery of major projects and investment, franchise remapping, impacts on the wider UK rail network and impacts that extend beyond or arise after the term of the franchise agreement in question; and (c) the wider government objective of enabling the continued provision of passenger rail services by private sector operators.
10. As noted above, at present no decision has been taken. Once the Secretary of State has made a decision in accordance with the Award Policy the relevant information will be published in the usual course.

### Requests

11. We note your numerous requests and address these in turn below, adopting your lettering. We note at paragraph 14 of your letter, you request that we consider and respond to your request on the basis of anticipated litigation in the event that GTR continue to operate the TSGN franchise after March 2022. We do not consider that such an approach is appropriate in circumstances where no decision has been taken by the Secretary of State in relation to that franchise. The Department will consider the content of any letter under the Pre-Action Protocol for Judicial Review (and any disclosure obligations which might follow) if and when any such letter is received.
12. For the avoidance of doubt, we are not treating your requests as requests for information under the Freedom of Information Act 2000 and are instead providing you with information in the spirit of openness and transparency.
  - a. A potential contravention of its franchise agreements in relation to payments made to (and money retained by) LSER was identified by DfT officials and followed up with further questions and requests for information. LSER co-operated in providing documentation and information. In light of this, the DfT had reason to believe the LSER had committed contraventions of its franchise agreements and demanded that the relevant sums be repaid. LSER repaid the sums requested and additional sums and co-operated with the DfT's ongoing requests for further information. Following this, the Owing Groups and LSER set up a committee and instructed external legal and financial advisers to conduct an investigation (the "**Investigation**") and support the provision of relevant information and documentation to the DfT.

In addition to its initial work and subsequent investigations, the DfT has considered the reports of the Owing Group's external advisors and the underlying documents and accounting records concerning LSER's conduct. Various contraventions of the franchise agreements have now been admitted by LSER and the Owing Groups.

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<sup>1</sup> Statement of policy on the exercise of the Secretary of State's power under section 26(1) of the Railways Act 1993, March 2013

The Secretary of State is following due process under the RA1993 including considering whether to impose a penalty. The DfT is content that the process that is being followed will provide the information required for the relevant decisions to be made on a robust basis. The Secretary of State is not bound by the outcome of the Investigation but rather the processes in place at the DfT will ensure that all relevant information is taken into account. At the present time, no decision has been made and it would be inappropriate to comment or provide further information in this regard until the process outlined in the DfT's Enforcement Policy: Rail Franchise Agreements and Closures 2008 (the "**Enforcement Policy**") has been completed.

- b. LSER's Owning Groups formed an independent committee (the "**IC**") led by their respective chairs. The IC appointed external lawyers and accountants to conduct the Investigation and report on their findings. The costs of conducting this Investigation, the preparation of the reports and providing information and documentation to the DfT are at the expense of the Owning Groups.

We confirm that the DfT had input into the work which was undertaken as part of the Investigation. The IC has provided the DfT with both interim and final reports prepared by its external advisors resulting from the Investigation. The DfT is not in a position to provide copies of any reports at this stage.

- c. As explained above, at the present time no decision has been taken in relation the TSGN franchise.
- d. In considering any decision in relation to the TSGN franchise, the Secretary of State will take into account all relevant factors in accordance with the Award Policy published under the RA1993 (see paragraph 9 above).
- e. The GIAA review is due to be delivered to the Department within the first quarter of 2022. The Department will carefully consider the GIAA's advice and take action as appropriate.

#### Provision of Information

- 13. We note your assertion that you can see no basis that the placing of the Investigation reports into the public domain would be prejudicial to commercial interests. You will however appreciate from this letter that the Secretary of State is bound by obligations of confidentiality under the RA1993 and under the relevant franchise agreements (which survive termination). The Department recognises the benefit of transparency and openness and will make public relevant information and documentation at the appropriate time.
- 14. After preparing a draft response to your letter of 1 February 2022, we have received your letter dated 11 February 2022, which contains a large number of further requests. In the circumstances, we have decided that it is appropriate to send a response to your letter dated 1 February and will consider separately the further points raised in your letter dated 11 February 2022.

Yours faithfully



Tim Rees

**Market Lead, Cross-London Market**