Consultation Questions

1. **4.5 Do you agree that we should introduce the concept of "Exempt Activity" and adopt the definition as developed for the proposed Stations Code?**
   We support the view of ATOC, that this is a sensible suggestion, although the specific activity must not exceed the threshold of the Financial Impact Test in order to qualify as an Exempt Activity. Once that threshold has been exceeded, the affected TOCs are exposed to potentially significant costs in connection with the activity. Therefore, the TOCs should be consulted with regard to any potential exceeding of the threshold and, where appropriate, be able to make a claim for consultation.

2. **4.21 Is £5,000 an appropriate level for assessing financial impact to determine the type of Change Proposal, subject to it being kept under review?**
   Initially, this would be an appropriate level. However, a single figure does not reflect the vast differences in the relative sizes of stations. We believe it is too broad-brushed and it must be subject to regular review.

   However, in the interests of introducing a simpler, rather than more complex system, we are willing to support it. This issue is dealt with further in our answer to Question 5 below.

3. **4.22 Do you have any views on the alternative proposals dealing with the circumstances when a single change proposal has a material impact on one station party, but not on another?**
   We cannot envisage a scenario where one station party only would be affected as the station facilities etc. are common for all Station Beneficiaries. However, we believe that a single process would be the most appropriate course of action.

4. **4.23 Do you agree that we should arrange a separate minimum compensation threshold (set at the same level as the Financial Impact Test of £5,000) to determine the point at which consultees are eligible to receive compensation for a Master Change Proposal?**
   Yes, but it must be subject to regular review.

   We support the view of ATOC that the process must make it clear that those consultees who can demonstrate that they will experience at least a £5,000 impact as a result of both considering the proposal and its implementation are eligible to claim compensation and to object. If a party had to wait until it had incurred actual costs of over £5,000 before it was eligible to object, the deadline for objections would have passed. Once costs incurred by a consultee exceed £5,000, compensation would immediately become payable.

5. **4.24 We would be interested in your views on how to deal with the situation where a series of Change proposals are made at separate stations, which individually do not meet the Financial Impact Test threshold but when taken together do and could have a material impact on a consultee.**
   Where a series of proposals are made at separate stations and where such proposals can be linked (such as a scheme to install the same facility at a number of stations

along a particular route), they should be viewed together to assess whether or not the Financial Impact Test threshold has been met (and where it is met), then the consultee should be entitled to object and receive compensation.

Given that these types of linked works are likely to be undertaken by the proposer under a single contract, we do not envisage significant difficulties in being able to identify those proposals that are linked and those that are entirely separate.

Where similar schemes may be undertaken shortly after one another for good reason (such as a local trial followed by a wider roll-out), similar works at other stations on the same route within a fixed period should take all such schemes into account together in order to calculate whether or not the Financial Impact Threshold had been triggered.

Such a scenario must be considered to be a complete scheme and administered as such. Therefore, such schemes should be grouped by their "line of route" in order to ensure that Station Beneficiary TOCs do not lose income or incur additional expenses as a result of any proposed works.

6. **5.8 Do you have any comments on the proposed revised list of valid objections?**

We believe that the proposed list of objections is sufficient, but it would be helpful if ORR could produce a composite list for consultees to consider before the final conclusions are issued. Section 5 does not make the proposed grounds explicit and requires cross-referencing to the Stations Code documentation (which, by now, following its rejection, would have been disposed of by many Train and Station Operators).

7. **6.12** Do you have any suggestions on the terms of the "participation deed" that third party developers should be required to sign?

There still appears to be some ambiguity regarding the precise legal status of third party developers in relation to the proposed process. Whilst the Access Disputes Committee has confirmed that a developer would be liable to contribute to the ADC's funding by entering a cooperation agreement, it remains unclear what would happen if a developer did not pay the ADC levy. Furthermore, the ADC's response makes clear that disputes involving third party developments could well incur additional legal costs, which would be spread across the industry through the Resolution Service levy.

In addition, a related concern is that there is limited detail on what would happen should a third party developer go out of business, either before or during a scheme's implementation. In particular, should a scheme be left part-implemented it seems likely that any costs for putting it right would fall on the remaining industry parties, even though they may have objected to the proposal originally. We would therefore be interested to understand how the proposed "participation deed" would deal with these kinds of scenarios and how any costs that might arise would be met.

This is something that Network Rail, the SFOs and the Station Beneficiary TOCs must discuss. There should be clear lines of ownership. Should the third party face financial difficulties at a later date, it is imperative that any third party owned installations which are critical to the operation of the station should not be removed

from the station.

8. **7.18** Should there be a distinction between public and private investors at all or should they be treated in the same way? Please explain the reasons for your view.
Provided that the same rules concerning the ability for consultees to claim compensation and to object and the grounds for objecting to the proposal are the same as those applicable to proposals sponsored by industry parties, then we are content to dispense with the categorisation.

However, once any items of train operation equipment or facilities have been installed and operated for the benefit of the SFO, Station Beneficiary TOCs and the public, they should be treated as being a Station Asset. If they remain the property of a private investor they could be removed on the "whim" of the owner or removed by any liquidators should the investor encounter liquidity difficulties.

9. **7.19** If public and private investors are to be treated in the same way:
(a) should we have one qualifying financial threshold and duration of interest and at what level should those be set?; or
(b) should we retain two financial thresholds and two different duration of interest time limits (to distinguish between the scale of different levels of investment) both of which can apply to a private or public investor?
A single system should apply. There should be one qualifying threshold, which we believe should be (£100,000) per station. The sponsor should be the SFO for any investment less than that.

The duration of interest should be five years in every case, except where the funder is continuing to pay for the repair and maintenance of the asset it has installed, in which case this would be for the life of the asset in question.

However, consultation with the third party funders in connection with any Change Proposal made after the installation of their funded works should be limited to the extent that the proposed works would adversely affect the asset that they had paid for. Third party funders should not have general rights of consultation in connection with future Change Proposals; the works proposed may concern an entirely different part of the station and have no bearing at all on the asset installed at the cost of the funder. Third party funders should have a right to object to a Change Proposal that proposed an adverse impact on, or the removal of, their funded asset, but they should have no right to claim compensation.

10. **7.20** If we retain the concept of Strategic Contributor with spending at a strategic spread of stations, should that entitle it to an interest just at those stations it has invested in or to all stations on that particular network?
It should only apply at those stations where the Contributor has made a significant investment. There is no justification for allowing it to become involved in the arrangements at stations it has not invested in.

However, it might be beneficial to involve it as an "interested party" at those stations in which it has not invested but might have well developed, workable proposals for the future.

11. **7.21** Are there other ways that a third party's "interest" in a station could be determined e.g. the length of interest to be determined by the life of the asset(s) that their investment has funded?
Please see the response to question 9.

The example given would be a good idea. It provides a life-period of the funded assets and removes any ambiguity at the life-expiry of the assets.

12. **8.10** We asked in our earlier consultation whether respondents agreed that:
(a) unless the parties agree otherwise, unresolved financial compensation issues should be dealt with via the dispute resolution process?; and
(b) an otherwise agreed Station Change should be allowed to proceed while the financial compensation issues are resolved?
We have set out above why we consider this approach is to be preferred, but if you do not agree,
please explain your reasons why; and please provide your suggestions for dealing with this situation.

The proposed approach is accepted subject to:

- Matters in dispute being capable of resolution quickly;
- Compensation being paid in a timely manner;
- Consultees being able to insist on payment of its costs on an emerging costs basis in general and pending resolution of any dispute.

Consultees should not be expected to subsidise a sponsor's scheme.

13 **8.34** Should loss of revenue (in addition to loss of profit) be capable of being included as part of any compensation claim?

Yes, this is very important. Revenue covers the costs that would be incurred in running a service and the associated facilities. If the service cannot run, the SFO and Station Beneficiary TOCs cannot get revenue for the train but they will have already incurred expenditure.

Loss of ticket revenue whilst disruptive works are being carried out is a significant area of potential loss for train operators that they should not be expected to bear themselves. Post works revenue loss is likely to be incurred for some period afterwards and it may be questioned whether, in some instances, the expected growth/revenue would ever be fully recovered. It should form part of the business case for the scheme.

14 **8.35** Do you have any comments on the proposal that no party can insist on compensation being payable by way of fixed-sum payment(s)? Rather this should be an issue for the parties to negotiate and agree, but ultimately it is for the proposer to decide if it wants to pay a fixed-sum compensation amount (whether by a single upfront payment or by instalments).
We support this proposal.

15 **8.36** If a consultee wishes to request payment by way of fixed-sum payment(s), do you agree:
(a) that the request should be made within a defined period, and not at any time during the project? and
(b) if you do agree, what should the time limit be?
The SACs should stipulate that agreement of the timeframe for payment of the fixed sum is part of the negotiation for the fixed sum in question. Different payment arrangements may be appropriate for different schemes. Fixed sum payments

should relate to up-front payments. Once the work has started, Emerging Cost and profit element should apply.

16 **8.37** As currently drafted, the Co-operation Agreement envisages reimbursement of costs to the end of an operator's franchise. As highlighted in paragraph 8.21 above this may not be appropriate for all consultees. What period of reimbursement do you consider would be appropriate?
The end of an operator's franchise is appropriate for franchise operators. For Network Rail, we consider the end of the control period to be the appropriate cut-off**.**

Where any incoming franchisees are not provided with compensation through the Franchise payments, reimbursement of costs must continue.

17 **8.38** Do you agree that we should retain the provision for a developer to propose "Savings Suggestions" that can be taken to dispute if the parties cannot reach agreement on their terms?
No, we do not agree with this. The developer may not be a train operator, or may be a train operator operating under a very different business model, and what it proposes may be wholly inappropriate for the consultee in question. A consultee should not be exposed to the risk of being forced to adopt an approach that is wholly unsuitable (and may even be detrimental) to its business merely to save the proposer money.

Do you agree with our preference to remove the proposer's entitlement to seek any information it requires?
Yes

18 **8.39** We are keen to hear your views, and the reasons for your views, on:
(a) whether a developer's liability should be uncapped;
(b) whether the introduction of a liability cap would be appropriate; and
(c) the level at which any liability cap should be set.
A developer's liability should be uncapped. We do not believe a cap would be appropriate. If a cap were introduced, the SFO/other consultees would be required bear any the costs that they may incur above the level of the cap, which is inequitable.

19 **8.40** Should operators be able to recoup money from passengers e.g. by way of increased fares that are justified on the basis of an improvement resulting from a Station Change, in the same way that Network Change is drafted?
Improvements at a single station do not of themselves justify fare increases and fares are currently regulated under constraints imposed in Franchise Agreements. Station improvements cannot be compared to track improvements in this way. Track improvements can result in improved journey times and increased service reliability, which are matters than can justify a fare increase. A new shopping complex, or even a new car park, at a particular station will not justify this. Therefore, we do not consider it appropriate to take potential future fare increases into account when assessing the benefits of a scheme, as these will have been driven by external factors that are entirely independent of works undertaken at a particular station on the route.

We would suggest a similar method as Network Change.

20 **8.41** In assessing the amount of compensation payable, is there any reason why it is not acceptable to net off the likely ability of an operator to recoup money from its passengers or other sources of revenue?
See answer to 19 above. Fare increases are not driven by individual station improvements and there is a great deal of uncertainty in valuing improvements in terms of fare box uplift and how this is projected forward. It would be wrong to link the two in this way.

However, it would seem appropriate to have regard to other sources of income that would directly result from a scheme, such as increased retail revenue or increased car park revenue as a result of a station car park having increased capacity.

21 **8.42** We propose that the payback of overpaid compensation should be free of interest as long as it is paid back within a defined period of time, otherwise interest becomes payable, backdated to the date of the payment request:
(a) Do you agree with this approach?
Yes.

(b) Is 28 days an appropriate period for payback?
Yes.

(c) If you do not agree either with the approach or with the payback period, please provide your alternative suggestions.
Not applicable

22 **8.53** Paragraph 8 of Annex 1 to the revised SACs sets out a list of Core Facilities at stations. We propose that the provision of alternative accommodation in the revised SACs should extend beyond those "Core Facilities" and seek your views on what those additional facilities should include (e.g. the "Station Facilities" as set out in paragraph 10 of Annex 1 to the current SACs, or something wider).
Alternative accommodation needs to extend beyond 'Core Facilities' and should extend to any accommodation used by the consultee in connection with its rail business, except where the consultee agrees otherwise.

They should cover all common facilities at the station that are used (or available for use) by all Station Beneficiary TOCs.

23 **9.8** Do you agree that re-instatement of the original position should be considered on a case by case basis?
Yes, but any amendments should be enjoyed by all Station Beneficiary TOCs, not just those who were involved with the re-instatement.

24 **9.9** Do you agree:
(a) with the introduction of a Relevant Undertaking in which a proposer must undertake to compensate station parties for costs/losses that they might incur if the development is not implemented in accordance with the terms of the original Station Change proposal;
Yes

and

(b) that affected parties should be able to object to the terms of the relevant undertaking?
The required wording of the undertaking that the proposer must provide in these circumstances should be set out in the SACs. It should be a full indemnity for

costs/losses that affected parties may incur in connection with the failure to implement in accordance with the terms of the approved Change Proposal.

25 **9.10** Do you agree that an incomplete scheme should be subject to a new Station Change proposal so that the optimum outcome can be negotiated between the parties?
Yes – if a scheme is not finished by the original developer, the Station Change must reflect what was done up to the time that work ceased. A fresh Station Change proposal must then be produced and circulated to all Station Beneficiary TOCs (and approved by ORR) relating to the works that are planned to take place for the completion of the scheme.

26 **10.8** Do you think that that the protections contained in Part G:
(a) should be incorporated into the proposed new "Notifiable Change" process; or No?
For the reasons given in our previous response on this issue, incorporating Part G into the Notifiable Change process as proposed does not replicate in full the existing protections in G6, e.g. passing on of compensation to an affected SFO (G6.2), and the requirement to comply with an SFO's reasonable requirements with regard to safety and security (G6.4);

(b) should remain in Part G of the revised SACs, separate from the Station Change provisions?
We support this approach, as it preserves the current protections.

We believe that these should remain in Part G of the revised Station Access Conditions.

27 **11.5** We will consider whether it is appropriate that, following agreement of a Station Change by the parties, ORR approval to any consequential amendment (to a Station Access Agreement) might be obtained 'in principle', to allow registration and implementation to proceed before formal section 22 approval of an amendment to an access agreement is given. We invite comments on this suggestion.
We support this helpful suggestion. Under the current procedures, Station Changes for stations (especially those relating to the provision of equipment or other facilities which do not require prior ORR authorisation) can be held up within the ORR system for periods of time.

28 **14.5** We wish to hear from respondents on what (regulatory) impact – positive or negative - you believe that the proposed changes will have on you.
The introduction of an additional registration process will increase bureaucracy. In addition, the suggestion that an approved Change Proposal will lapse if it is not registered within the 28-day window will introduce a new 'trap' for a scheme sponsor, as non-registration may have been as a result of an administrative oversight. The sponsor would have to start the Change Procedure all over again and obtain approval a second time which would add unnecessary time and cost and would delay implementation. This seems a very high price to pay for an administrative oversight, particularly as the new register is not one that any party or body is actually required to maintain. (We presume that the scheme sponsor may register an approved Change Proposal as well as the SFO, as the SFO may have objected to it.)

Perhaps a less draconian approach would be to prohibit implementation of an approved proposal until it had been registered and impose a longer timeframe for registration. It has been suggested that three months would be appropriate.

On the positive side, it would be helpful for franchise bidders and other prospective new users to be able to access a register to see what Change Proposals had been approved at a particular station.

Having considered the above, Arriva Trains Wales has no fixed opinion. It will depend on the proposer (Station Facility Owner, Network Rail, Station Beneficiary TOCs or third party).

However, no third party should be permitted to submit a Station Change Proposal to the ORR for approval unless it can provide valid proof that it has the required funding to complete the proposed works (and, ideally, putting the funding into escrow before the works commence). No third party company should start work on a scheme and then pull out, leaving Network Rail or the Station Facility Owner to finish off the work and incur costs for completing a scheme that they might not have been in complete agreement over in the first place.

29 **14.5** While we have raised specific questions, summarised in chapter 13, we equally welcome respondents' views on any aspect of the proposed modifications, including if respondents consider we could go further in stream-lining the process. The new process needs to be accompanied by a set of guidance notes and templates to assist the parties in working with it, rather than stream-lining the process itself any further. We believe that further steam-lining is likely to result in the removal or dilution of important protections for consultees.

The proposed process should be subject to regular review in order to smooth out any faults, stream-line the process and, where possible, reduce costs incurred by the Station Facility Owner or Station Beneficiary TOCs.