

From: Tom Cole
ORR, Head of Competition
28 April 2020

Dear Stakeholder,

ORR letter to rolling stock leasing industry on the Transparency Order

We write further to ORR's recent review of the remedies that were made and accepted by the Competition Commission ("the **CC**"), following its market investigation in 2009 into the passenger rolling stock leasing market. In our review, we focused on the Transparency Order (the "**Order**") and Undertakings, for which ORR is responsible for ensuring compliance. ORR also has powers under the Enterprise Act to monitor the operation and continued appropriateness of the Order. We are grateful to all industry stakeholders who cooperated and provided input into our review.

ORR chose to conduct its review now, as ten years have elapsed since the market investigation. Our view is that now is not the time to refer the Order to the Competition and Markets Authority for possible revocation or variation. Our review found that the Order remains relevant and has been helpful in increasing transparency and improving negotiation between Train Operating Companies ("**TOCs**") and ROSCOs.

In light of potential changes to the structure of the industry, and the possible impact of the COVID-19 pandemic, we may choose to revisit the market if, for example, there are substantive changes in the near future likely to impact the operation of the Order. Equally, if we receive evidence of non-compliance, or if we receive complaints relating to the market we will take action. Any such steps will be considered in the context of our prioritisation criteria. We assess such matters on a case-by-case basis.¹

The CC's market investigation in 2009 identified features in the passenger rolling stock leasing market which prevented, restricted, or distorted competition. To tackle these issues, the CC

¹ See <https://orr.gov.uk/about-orr/how-we-work/how-we-prioritise-our-activities>

imposed and accepted remedies. The Order was imposed to help TOCs² to compare lease rental offers and to challenge the ROSCOs more effectively over lease rental terms. The Order requires all ROSCOs to provide franchised TOCs with a set list of information at the point of making any lease rental offer for rolling stock³ to operate on franchised passenger services.

Given ORR's role under the terms of the Order, we are keen to ensure that ROSCOs have regard to both the spirit as well as the content of the Order and we hope that this letter will assist you achieving this.

Compliance with the Order

We were pleased to note that we found no evidence of non-compliance. However, as part of our consultation we did note that some new entrants to the market believed that the Order was not applicable to them, on the basis that they had entered the rolling stock leasing market post-2009.

For the avoidance of doubt, we would like to remind industry participants that the Order applies irrespective of when a ROSCO was created or when it entered the market. All ROSCOs must self-assess to ascertain whether the Order applies to them and comply with the terms of the Order if their activities are caught by its scope.

Information Requirements under the Order

Under the Order, when a ROSCO makes an Indicative Offer (as defined by the Order) ROSCOs are required to provide a set list of information to Potential Lessees (passenger franchise TOCs).

Parts 2, 3 and 5 of the Order contain the detailed requirements on what information must be provided. We encourage all ROSCOs to read these parts of the Order carefully, as they contain detail on how ROSCOs must comply with the Order. In particular, there is an obligation on ROSCOs, amongst others, to obtain and give details of the Proposed Lease, to provide an

² For the purposes of the Order we refer to Train Operating Companies providing passenger rail services in Great Britain under a Franchise Agreement

³ Rolling stock is captured by the Order where, at the date of the Indicative Offer, it has operated or is currently operating for the carriage of passengers in Great Britain



estimate of the premiums and to give copies of the existing Lease Agreement to passenger franchise TOCs.⁴ Compliance with the spirit of the Order, (which is aimed at facilitating open and fair negotiations), as well as the letter of the Order, is likely to limit the need for any further regulatory intervention in the market.

Supply of information and submission of compliance reports to ORR

Under the Order, ORR is responsible for monitoring compliance with the Order. Any person to whom the Order applies must submit annual compliance statements to ORR. If directed by ORR, ROSCOs must also provide additional information, such as audited reports.

We would like to take this opportunity to remind you that it is your responsibility to ensure that you are aware of the Order's contents and that you comply with its provisions. If you are unsure as to whether the Order applies to your company, or the nature of your obligations, we recommend that you seek legal advice.

Yours sincerely,

Tom Cole

Head of Competition

Office of Rail and Road

⁴ The Order sets out the Information Requirements, Provision of Lease Agreement and Additional compliance obligations to Potential Lessee at parts 2, 3 and 5 respectively.