

Office of Rail and Road
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By email: StationsandDepots@orr.gov.uk

13 November 2024

Dear Office of Rail and Road

Application by VTE Holdings Limited (VTE) for Directions Under Section 17 of the Railways Act 1993

- 1 Eurostar refers to Office of Rail and Road's (**ORR**) letter dated 25 October 2024 in relation to VTE's Application to ORR for a Depot Access Contract relating to Temple Mills International Depot (**TMI**) under section 17 of the Railways Act 1993 (the **Act**) and Eurostar's letter dated 5 November 2024 identifying interested persons in relation to VTE's application
- 2 This letter sets out Eurostar's initial written representations in respect of VTE's application.

Overview of Eurostar's written representations

- 3 Eurostar considers that the appropriate primary process for considering access to TMI is set out in its Service Facility Description for TMI in compliance with the Railways (Access, Management and Licensing of Railway Undertakings) Regulations 2016 (the **Regulations**). It would not be appropriate for that process to be bypassed in favour of VTE's premature request for access to be considered under s17 of the Act.
- 4 Due to the nature of VTE's application, ORR should not and, indeed, is in no position in practice or under the Act to make a direction pursuant to s17. VTE's application is presumptive and lacking in essential detail. Eurostar submits that there is simply not the information available to ORR for it to exercise any power or discretion it has and, in any event, that it has no such power or discretion in respect of VTE because VTE has not submitted a valid s17 application. It appears probable that VTE's premature application was in itself triggered by and a response to the prior premature s17 application of Evolyn dated 23 August 2024 also in respect of access to TMI and, for completeness, Eurostar notes that there are now two competing s17 applications in respect of TMI.
- 5 Eurostar considers, moreover, that ORR's existing standard process for considering access applications is not designed or suited to considering an access application that relates ultimately to a cross-border, high-speed passenger rail service. To consider such applications, ORR would need to set out clearly specific criteria and procedures for approval of depot access agreements that relate to high-speed passenger rail services necessitating bi-national and international approvals and consents. Such requirements are plainly not comparable to other depot access scenarios on the mainline network.
- 6 Eurostar considers that ORR should not take forward its consultation process or at least in its conventional form for standard depot access applications. Instead, it would be appropriate for ORR to remit the initial decision about the depot access contract sought by VTE back to the process of engagement set out in Eurostar's Service Facility Description for TMI (a copy of which is enclosed), which is already on foot and had, in Eurostar's and VTE's views, been facilitating constructive engagement on many issues.
- 7 Eurostar expands on those points in the next section of these written representations.

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- 8 Notwithstanding those points and in significant part because of the impediments that the limited detail in VTE's application imposes, Eurostar reserves its right to be consulted further and to make further submissions if further application particulars are provided by VTE and/or once ORR confirms the specific process that will apply for this depot application and Evolyn's, given their unconventional nature.

Written representations on VTE's application and the appropriate process for considering access to TMI

- 9 Eurostar has set out in detail the process for considering access to TMI in its Service Facility Description for TMI (the **Access Process**). The Access Process is wholly rooted in the terms and requirements of the Regulations.

- 10 The Access Process is designed to reflect, in particular, certain sensible and obvious considerations for access to TMI, namely:

- (a) Does the applicant have rolling stock capable of accessing TMI?
- (b) Can that rolling stock be maintained at TMI?
- (c) Is there sufficient spare capacity to maintain that rolling stock at TMI?
- (d) Is the applicant willing to pay the costs of maintaining the rolling stock at TMI?

- 11 Eurostar does not know whether any (or all) of these considerations will be barriers to permitting VTE access to TMI. Eurostar has been working through each of them with VTE. There has not been a failure to agree by reason of the fact that the process is not well advanced. To the contrary, VTE acknowledges in its application that the Access Process has been facilitating "*constructive discussions*". The Access Process will identify, assess, consider and test the particulars of VTE's application. It is the primary process to be used by any entity seeking access to TMI. That process is substantially and materially incomplete.

- 12 Eurostar wishes directly to address an assertion in VTE's application that relates to Eurostar's conduct to ensure that ORR has a full and correct factual understanding. Namely, VTE's application states:

"...when another party submitted a S17 application for access for the same facility, Eurostar indicated that the resources required to progress our application will not be made available pending a decision has been made on that S17 application. We are therefore left with no alternative other than to progress our own S17 application to secure access to Temple Mills depot." (emphasis added)

- 13 Eurostar in fact informed VTE in correspondence as follows:

"Eurostar believes [the process specified in Eurostar's Service Facility Description for TMI] remains the appropriate primary process for considering access to TMI. However, Eurostar considers that it is appropriate to pause that engagement with VTE Holdings temporarily for now while Eurostar awaits clarity from ORR on its process and approach in respect of Evolyn's application." (emphasis added)

Evolyn's application created a material amount of uncertainty around what and/or how the process of access to TMI would be managed. Eurostar sought clarity from ORR in its letter dated 25 September 2024.

- 14 Eurostar further discussed with VTE that Evolyn's s17 application meant that ORR might direct an outcome that could be incompatible with VTE's interest in accessing TMI, which could in turn render work done bilaterally redundant with associated time and cost risk for Eurostar and VTE. Eurostar considered, pending the clarity it had sought from ORR, that it was appropriate to pause work temporarily under the Access Process. Eurostar obviously hoped for a resolution of the issue as soon as possible so that it could resume consideration of the VTE and Evolyn applications under the Access Process. For completeness, Eurostar had, in any event, continued some engagement with VTE about a process for assessing the technical compatibility of VTE's proposed fleet with the facilities at TMI.

15 Eurostar and VTE have been engaging constructively to gather evidence and explore what is or might be possible. In particular, the parties have, as mentioned above, been seeking to establish terms of reference for independent reviews of capacity at TMI and technical compatibility of VTE's proposed rolling stock with the infrastructure at TMI. That (or equivalent) analysis will be an essential consideration in any process relating to access to TMI and must be completed in any event for proper consideration of access factors.

16 At this stage:

- (a) It has not been independently considered whether there is sufficient capacity at TMI for the maintenance services VTE seeks. In its application response to question 2.2, VTE states it believes that "*capacity exists*" for its stated requirements (which are significant). It is not clear on what basis VTE has formed that view. Any assumptions underpinning that view have not been shared with or tested by Eurostar. As ORR is aware, Evolyn has also approached Eurostar in relation to access to TMI, which is an additional factor for consideration in respect of capacity.
- (b) VTE has not demonstrated that its proposed rolling stock is technically compatible with the infrastructure at TMI. The rolling stock that Eurostar understands VTE proposes to procure is materially different from any rolling stock that has previously been serviced at TMI. Further, while VTE has apparently identified rolling stock that it would like to procure, which has been the basis of the initial discussions about technical compatibility that have happened to date, Eurostar understands that VTE has not procured any rolling stock and there is no certainty at this stage that VTE will be able to use the rolling stock it has identified (which will need to be homologated within each of the regulatory jurisdictions across which VTE's proposed services will run – Eurostar understands that the manufacturer has not yet successfully homologated rolling stock in any of those jurisdictions).
- (c) VTE does not have access to HS1 and any rolling stock cannot physically access TMI unless that is in place.
- (d) It has not been assessed how, if possible, each requested service might feasibly be delivered. It should be noted that technical compatibility with TMI's rail infrastructure (which, as above, has not yet been established) does not guarantee that each requested service can feasibly be delivered at TMI.
- (e) The elements required to deliver relevant services (including initial training and ongoing competency training, management, specific safety and other requirements associated with each service etc.) have not been assessed or determined.
- (f) The price of each relevant service has not yet been considered.
- (g) Service considerations and actions required within TMI and by VTE have not been identified or assessed (e.g., signage, information for the reprogramming of specific machinery, training, ensuring ongoing competences etc.).

With regard to the above, VTE states that "*changes*" and "*enhancements*" to TMI will be required to facilitate VTE's requirements at the depot. VTE has not stated (and Eurostar does not know) what they will be or explained its basis for asserting that they will be minor, immaterial and easily accommodated. No assumptions underpinning VTE's views have been shared with or tested by Eurostar (including any associated costs to be borne by VTE whether by way of charges or otherwise).

17 For the avoidance of doubt, the process that Eurostar is conducting in accordance with the TMI Service Facility Description is not subject to any unreasonable delay. Since VTE first approached Eurostar in late May 2024, substantive work has been done. An initial, in-house capacity analysis – which was explicitly not the independent analysis that would be used to determine whether there was sufficient capacity to accommodate VTE's stated requirements – has been shared with VTE for comment (this was the same internal capacity analysis provided to Evolyn). Draft terms of reference for the independent technical compatibility assessment have been prepared by Eurostar and shared with VTE (VTE has not yet commented on these despite indicating that it would).

- 18 While Eurostar understands that VTE is keen to progress matters, VTE has not identified grounds of urgency underlying its application. No such urgency is evident. VTE does not currently operate any rail services and lacks the key regulatory components to do so until clear regulatory timeframes are in place. Eurostar believes that VTE does not yet have any of the relevant train operating licences or safety certifications or, Eurostar understands, appropriately homologated rolling stock (indeed, any rolling stock) or any of the access that it requires to operate its proposed services. As acknowledged in ORR's Guidance for international rail operators starting rail operations into Great Britain, these intertwined issues are pre-requisites to operating an international passenger service (see e.g., paragraph 1.3). Based on correspondence and VTE's application, Eurostar understands that VTE's application has been precipitated by Evolyn's s17 application (itself also highly premature), which is regrettable. The further circumvention of the appropriate primary process for considering access is symptomatic of the difficulties that the lack of clarity in ORR's approach to considering access is generating.
- 19 Any depot access contract for TMI will be wholly otiose unless VTE obtains all related accesses, consents, approvals and certifications for its international passenger service and proposed high-speed rolling stock. As stated in Eurostar's letter to ORR of 5 November, obtaining those will involve a wide group of interested persons and interested parties. The position of those interested persons and interested parties in respect to VTE's proposals could be relevant considerations in determining whether a depot access contract should be granted. However, any conditions that may ultimately be attached to related access, consents, approvals and certifications will also likely have a material impact on any services VTE ultimately operates and, consequently, on any maintenance services that will be required. It therefore is not clear whether the depot access currently sought will be the same as that which VTE ultimately requires.
- 20 That VTE seeks to circumvent the Access Process to initiate a s17 application to ORR that is devoid of particulars is disappointing. That is particularly the case as the discussions that Eurostar had been having with VTE under the Access Process had been constructive and meaningful. Eurostar is concerned that ORR appears to be countenancing displacing the Access Process to take forward VTE's and Evolyn's applications. This is particularly concerning since the standard s17 application process (as set out by ORR) does not appear to be designed to deal adequately with a single application of the nature of accessing TMI over HS1 and for the purpose of international high speed rail passenger services (see further submissions on this below), let alone two concurrent and competing applications (see further submissions on this below).
- 21 Indeed, as set out in paragraphs 22 and 23 below, Eurostar observes that it is very possible that VTE's application (like Evolyn's) is not a valid application under s17 of the Act at all, in which case neither VTE nor Evolyn has submitted a valid application and ORR has no power or discretion under s17 of the Act to make any direction. ORR should therefore decline to take the purported applications forward, including because s17 has not been engaged.
- 22 VTE's application form has only been partially completed. VTE has answered only seven out of the seventeen substantive questions. The answers that VTE has provided are materially lacking in detail. VTE has provided no evidence in support of any part of its application. ORR will note from previous s17 depot applications made to it and that proceeded to ORR decision (as available on ORR's website), that VTE's application is striking for its lack of detail and incompleteness.
- 23 Contrary to the mandatory conditions set out in paragraph 2(1) of Schedule 4 to the Act (as reflected at paragraph 3.52 of ORR's Criteria and procedures for the approval of depot access agreements), VTE's application does not:
- (a) contain proper particulars of the rights or terms of access VTE is seeking;
 - (b) contain a copy of the agreement VTE is seeking (see paragraph 3.68 of ORR's Criteria and procedures for the approval of depot access agreements) or specify the terms VTE proposes should be contained in the access agreement it is seeking; or
 - (c) include all representations VTE wishes to make regarding the rights or terms of access it proposes should be contained in the access agreement it is seeking.

- 24 In these circumstances, Eurostar invites ORR to make appropriate inferences about the operational maturity of VTE's proposals, in addition to the validity of its application.
- 25 ORR must exercise its powers and any discretion in the manner it reasonably considers to be best calculated to further its general duties under s4 of the Act. Given the lack of information VTE has provided, or that is otherwise available, about its proposed services, it is simply too unclear at this stage for ORR to reach a conclusion that directing Eurostar to enter a depot access contract with VTE would be the best way to further the delivery of those general duties.
- 26 The inadequacy of VTE's application is a material impediment to any of ORR, Eurostar, any interested person or any interested party properly engaging with or responding to it. The incompleteness of VTE's application is undoubtedly symptomatic of its prematurity and its reactionary nature in the face of Evolyn's application (which is at least equally as problematic). It also calls into question whether VTE has a sufficient understanding of the complex matters in which it has engaged.
- 27 The onus is (and properly should be) on VTE to provide all the information required for all relevant parties to consider and respond to the application. ORR recognises that in the certification it requires from applicants, which is an attestation that the information provided is not just true but also "*complete*". VTE has not done that.
- 28 The following are non-exhaustive examples of the substantive issues that ORR is simply not able to consider at this stage because VTE has provided no particulars or evidence to allow ORR to make informed decisions against its section 4 duties:
- (a) VTE's application asserts that its access to TMI will facilitate the provision of "*additional services between the UK and Europe, providing choice for customers*" but VTE has provided no supporting detail or evidence. It is quite possible that VTE's services would be primarily abstractive from the services that Eurostar already operates (not least because of the material capacity constraints elsewhere in the relevant network(s)) and/or would have a deleterious impact on service provision and cost. Similarly, it also cannot be assumed that ORR imposing access to privately owned infrastructure on non-negotiated terms is likely to promote private investment into railway infrastructure in the future.
 - (b) As set out above, work is ongoing to test whether VTE's proposed rolling stock is technically compatible with the infrastructure at TMI. As set out above, the rolling stock that VTE proposes to procure is materially different from any rolling stock that has previously been maintained at TMI. Work needs to be progressed and, ultimately, to be conducted independently in accordance with the Access Process. In any event, full technical compatibility does not guarantee that each requested service may feasibly be delivered by TMI. Service delivery might be infeasible, as one example, where a rolling stock's technology for receiving the service and TMI's technology for delivering the service are incompatible.
 - (c) Further, it is not at this stage certain that rolling stock that VTE proposes to use will be procured. VTE will need to ensure that the rolling stock it procures can access TMI and is (or is capable of being) homologated under five different regulatory regimes (the Channel Tunnel has very particular safety-related requirements). That might well necessitate a change of approach from VTE in due course.
 - (d) Because, in breach of the requirements of the Act, VTE has not provided a copy of the contract it proposes be directed or any details of its terms and conditions Eurostar cannot comment directly on any proposals. However, as set out in Eurostar's Service Facility Description for TMI, Eurostar anticipates that any depot access agreement it enters will be based on elements of the ORR model depot access agreement, with additional provisions covering TMI specific matters, such as security requirements, agreed specification of services etc. Nevertheless, because no third party has previously sought and obtained access to TMI, no template depot access agreement has been prepared. TMI's unique conditions could necessitate potentially material changes to ORR's model access provisions. In this regard, it should also be borne in

mind that Eurostar's lease is from the Secretary of State for Transport and is materially different from the Network Rail standard form of depot lease.

- 29 It would be irrational for ORR to take forward VTE's application. The application is not sufficiently advanced for ORR to decide that it has met the quality threshold even to be considered.
- 30 For completeness, ORR has no jurisdiction to direct a depot access contract at TMI for any maintenance services that are not light maintenance services. VTE apparently seeks access to TMI for the purpose of obtaining services that are not light maintenance services. VTE seeks access for the purposes of "Overhaul Hours: 132 x 16 hour slots every 6 years, plus 312 x 16 hours lots every 11-12 years". Under s83 of the Act:

"light maintenance" (without more) means —

(a) the refuelling, or the cleaning of the exterior, of locomotives or other rolling stock; or

(b) the carrying out to locomotives or other rolling stock of maintenance work of a kind which is normally carried out at regular intervals of twelve months or less to prepare the locomotives or other rolling stock for service;

and, for the purposes of paragraph (b) above, "maintenance work" includes the detection and rectification of any faults" (emphasis added).

Any access in relation to the purpose of receiving heavy (or other than light) maintenance services must be excluded from ORR's considerations.

- 31 For the avoidance of doubt, nothing said above is intended to suggest that ORR should not retain its usual appellate role under the Railways (Access, Management and Licensing of Railway Undertakings) Regulations 2016 in relation to grievances about matters that are within its jurisdiction and competence, should VTE ultimately be unsatisfied with the Access Process.

Written representations on a s17 process for high-speed, international passenger services

- 32 As stated above, Eurostar's primary position is that the process for considering access to TMI should be dealt with in accordance with the Regulations and Eurostar's Service Facility Description. That process, which had already commenced, should be permitted to continue and ORR should decline to proceed further with any parallel s17 process.
- 33 In any event, as stated above, Eurostar submits that the current s17 process is not adequate to deal with the unique and unprecedented situation of an access application to a depot such as TMI and which would be underpinned by unconventional proposed services over HS1 and international operation. Eurostar considers that it would be illogical to consider depot access to TMI in isolation from the related need for access to the necessary stations and relevant infrastructure in the United Kingdom, France, Belgium, the Netherlands and the Channel Tunnel to deliver the service and operations seemingly proposed by VTE. These are pre-conditions of VTE's depot access application as recognised in ORR's Guidance for international rail operators starting rail operations into Great Britain. TMI cannot physically be accessed by rail without also having access to HS1. TMI is a privately owned and operated facility that is inherently and solely a component in the operation of a cross-border service. The current s17 processes of ORR are, Eurostar submits, designed only for access to depots on the conventional mainline rail network and associated rolling stock.
- 34 While ORR could take account of written representations from the wide group of interested persons and interested parties engaged by that holistic process specifically in relation to access to TMI, it cannot take a central coordinating role in respect of the broader access required for VTE's proposed international passenger service. The operation of an international passenger service requires a holistic consideration of technically complicated and systemically complex legal, regulatory, security, political and practical issues. Only some of these aspects are within ORR's jurisdiction. ORR has no jurisdiction or regulatory competence, either solely or at all, in respect of French, Belgian, Dutch or Channel Tunnel

railway infrastructure. Pursuant to the Channel Tunnel Rail Link Act 1996, ORR has no powers to make access directions in relation to St Pancras International Station or HS1 under s17 of the Act – all of which is necessary for any requirement to access TMI to exist at all.

- 35 VTE's application is atypical. It is not a general application for access to a depot in connection with the operation of standard passenger services on Network Rail's rail network. It is an application relating to a specific cross-border passenger service that will operate on unique (within the United Kingdom) and foreign railway infrastructure. Eurostar is not aware of a precedent depot access application determination relating to the operation of high-speed trains for international passenger services. Inputs and consents will be required from governmental, regulatory, police and security and border authorities in the United Kingdom, France, Belgium, the Netherlands and the European Union as well as the Channel Tunnel Intergovernmental Commission. Amongst other things, special security arrangements are required for access to TMI and otherwise for the operation of an international passenger service.
- 36 ORR's existing access processes are not suited to considering access for an international rail service. There is nothing to account for the requirements for such a service to involve access to the Channel Tunnel or to French, Belgian or Dutch railway infrastructure.
- 37 If ORR anticipates that it will be involved in giving directions in the future in relation to access in connection with the operation of an international passenger service, it should issue bespoke guidance following an appropriate consultation process that should provide the transparency for all affected parties to consider and setting the additional and unique criteria and procedures that would be in place to approve access to a facility dedicated to high-speed international passenger trains.
- 38 For the avoidance of doubt, while Eurostar, as previously indicated, will participate in ORR's consultation on its Guidance for international rail operators starting rail operations into Great Britain, that guidance does not constitute detailed, bespoke guidance of the sort discussed in paragraph 37 above. ORR appears to recognise that, stating that the guidance is "*high-level*", "*a starting point*", "*not a complete guide*" and not inclusive of all areas of relevant regulation or a "*statement of ORR's policy about how [it] will carry out [its] role in regulating access*".
- 39 For completeness, as previously indicated in Eurostar's initial written representations relating to Evolyn's application, potentially, TMI should be exempted from the scope of s17 of the Act.

Written representations on dealing with Evolyn's and VTE's applications

- 40 Logically, consideration of Evolyn's and VTE's applications should be coordinated and/or the applications should be dealt with in parallel. Given the competitive sensitivity of information required, it is acknowledged that dealing with them on a consolidated or joint basis would be challenging. However, that does not mean that ORR cannot deal with them in a coordinated manner so as to ensure process efficiency and to ensure that competing applications over similar rights take account of each other. To do otherwise appears likely to be procedurally unfair and generative of unreasonable duplication of time and cost burdens as well as potentially clashing or impossible outcomes.
- 41 The applications are similar in nature, appear to seek similar rights (insofar as Eurostar can tell from the limited detail contained in the application documents) and are likely to require consideration of many of the same matters. Eurostar has been able to make most of the same points in its initial written representations, *mutatis mutandis*, in respect of both applications. Each application is likely to impact upon and inform the other in manifold ways.
- 42 Consideration of that nature can be facilitated through the Access Process. If, contrary to Eurostar's submissions, ORR considers it should deal with the two applications in the first instance, ORR must set out its proposed process for coordinating its review and allow interested parties the opportunity to comment on it.

Matters to be excluded from Publication

- 43 Eurostar does not consider there to be any part of this letter that should not be published on the basis that such publication would or might seriously and prejudicially affect the interests of a person or body. Eurostar is content for ORR to provide a copy of this letter to VTE and Evolyn.

Eurostar hopes that its representations assist ORR. Eurostar will continue to seek constructive engagement with VTE and Evolyn but does not consider that ORR should continue its consideration of either application. Eurostar would be grateful for ORR's written confirmation that access matters should primarily be considered within the scope of the Access Process, including because it will inform how Eurostar is to continue its engagement with VTE and Evolyn in relation to the access they seek to TMI.

Yours faithfully,



On behalf of Eurostar International Limited