

FAO: Tim Rees
Department for Transport

Our Ref: MPG/BRI207.1

ALSO BY EMAIL

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LSERPENALTYNOTICE@dft.gov.uk

7 April 2022

Dear Sirs

Response to s.57C Railways Act 1993 Penalty Notice dated 17 March 2022

Our Clients: Bring Back British Rail & the Association of British Commuters

1. We write on behalf of our above named clients to provide views on the penalty notice issued on 17 March 2022 (the "Penalty Notice") and the proposal therein to impose a penalty of £23.5m on London & South Eastern Railways Limited ("LSER").
2. Nothing in this letter or the representations contained therein amounts to an acceptance of the level of the proposed fine, the extension of the contract in respect of the Thameslink franchise to the sister company Govia, or the state of disclosure of relevant information to our clients or into the public domain. In particular in relation to the last of these points our clients remain of the view that a large amount of material relating to the internal investigations conducted within the Go-Ahead Group should be disclosed by way of proper transparency and to enable public accountability.
3. Nevertheless, our clients are in principle pleased that a penalty has been proposed. We note the content of paragraph 44 of the Penalty Notice which recognises that the contraventions are without precedent. Accordingly, as a general point, we suggest the SoS should avail himself of the opportunity to set a penalty that sends a message to the industry that such dishonest actions shall have serious ramifications upon the TOCs concerned.

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4. The findings set out in paragraph 29 – 39 of the Penalty Notice are and can only be accepted at face value given that there the investigatory scope, findings and underlying documents have been withheld from public examination. The representations given in this letter therefore relate solely to the level of the proposed fine in relation to the findings as they are declared (without supporting material) within the Penalty Notice.
5. It is however observed that in the event that the SFO undertakes a further investigation of the underlying contraventions and LSER's conduct more widely in this matter, then additional grounds for penalties may arise and in that event we will be inviting the SoS to consider making a further decision under s.57A.

Numerical calculation

6. In general terms, we find it surprising that the figures of £29.72m and £23.5m as pre and post mitigation figures are presented at paragraph 57 without any attempt to set out how those figures have been constructed. This is particularly important in circumstances where the SoS recognises that there is no precedent for a similar fine, and so it is important for future determinations that there is at least an attempt at recording how the relevant factors have translated into numerical figures.
7. We are concerned that this lack of transparency may indicate that there have been commercial discussions between the DfT and LSER and / or its group companies to determine a commercially satisfactory fine. We would be grateful if you could disclose the existence of any such discussions, together with a gist of their content, and provide firm assurances that the SoS has disregarded any such pressure applied by the companies.
8. Assuming that there has been no improper pressure applied, we would expect that you could provide a skeletal note and / or table setting out how the proposed fine has been numerically calculated with reference to the financial position of LSER and its group companies.

Improper investigation

9. Whilst it is stated at paragraph 28 of the Penalty Notice that “*the SoS has taken account of all evidence*”, it is self-evident that such evidence largely emanated from an internal Company Investigation that lacked independence and transparency. All evidence referred to within the Penalty Notice and upon which the proposed fine is therefore based, has been provided via LSER and its group companies.
10. It is unclear what, if any, steps have been taken by the SoS to assure himself that he has received a complete and accurate picture of the nature and extent of the conduct of LSER with respect to the Overpayments. The fact that the SoS regards the breaches of the Good Faith Contraventions as “*very serious*” (paragraph 54) does not mean that the true position could not be worse than the internal investigation has presented. Unless and until a third party investigator is appointed to conduct a full investigation, it cannot be said with any confidence that the position presented by the Company Investigation is complete and accurate.
11. We note that no significant detail has been provided regarding the investigation of GTR save the confirmation that potential contraventions within that company have been considered. We are unclear how the DfT has seen fit to enter into a further three year contract with GTR for the operation of Thameslink without first obtaining greater clarity than appears to be presented in the Penalty Notice.
12. There remains no disclosure of the scope of the Company Investigation, nor any plan or outline of how the investigation would be undertaken. Those undertaking the investigation were stakeholders with an interest in its outcome.

Reduction for reputational damage

13. Paragraph 4.9 of the 2008 Enforcement Policy states inter alia that “*The extent to which the contravention has resulted, or will result, in the operator losing any performance payments or suffering any other adverse consequence under the terms of its franchise agreement*” **may** be taken into account when determining whether to impose a penalty.

A similar provision allowing for an adjustment in the second limb of the penalty assessment process is provided at paragraph 4.12.

14. Reliance upon such alleged reputational loss is irrational and improper in circumstances where any reputational loss is not linked to or caused by the operation of the terms of the franchise agreement, as required by the wording of the Enforcement Policy. Even if this is wrong, we note that:

- a. The dishonest actions that have led to the imposition of the proposed fine are solely the result of the conduct of individuals and corporate decisions within LSER and its group. It has only itself to blame and it should not benefit from a discount on the fine because the particular heinous actions may have created a reputational loss. Such an approach serves only to reduce the deterrent effect of the SoS's powers to impose such a penalty on other TOCs;
- b. There has been no representation (it appears) from the company itself as to what the value of such reputational damage would be, nor is any calculation given by the SoS;
- c. Any discount for reputational damage is unlikely to accurately reflect the real loss unless such an assessment has been undertaken by forensic analysis by an independent third party. There is no evidence that this has taken place;
- d. The value of any reputational damage to a company that existed purely as an SPV for the franchise and no other purpose must by any logic be zero;
- e. If reputational damage has in fact been suffered by LSER's ultimate shareholders and is taken into account by the SoS, then we note:
 - i. This is most certainly not a factor considered within paragraphs 4.9 or 4.12 of the Enforcement Policy in any event. The penalty is proposed to be applied to LSER and not to those ultimate shareholding companies and therefore their interests are not in fact relevant to the determination of the fine;

- ii. In any event, the group companies of LSER did as a matter of fact exert control and influence over LSER, including in particular at director level, and so even if reputational damage has occurred to these companies then it is not unfairly borne since it was entirely within their purview to oversee the decisions of the LSER board. Indeed the evidence is that Go-Ahead Group plc's Audit committee *"explicitly considered the accruals in respect of the Overpayments, including in two successive meetings in July and August 2019. The evidence indicates Go-Ahead Group plc and LSER director level presence at those meetings, and that the meetings considered whether LSER should change its approach and disclose the Overpayments to the Department, and decided that it should not do so"* (paragraph 43.5.4), indicating that it is similarly culpable for deliberate dishonest breaches. It would be quite wrong to credit LSER and indirectly the group companies despite their wrongdoing;
- iii. The SoS has determined to continue to contract Govia to operate the Thameslink franchise for three years, thus evidencing that there has been no relevant reputational damage to group companies to be accounted for.

Active concealment

15. There is some suggestion in the Penalty Notice that the SoS has welcomed and *"taken into account"* the co-operation of LSER. To the extent that this co-operation has had any impact whatsoever on the level of the proposed fine, we consider this entirely inappropriate.
16. As set out at paragraph 56.4 of the Penalty Notice, LSER did not itself co-operate with the DfT. Instead, it actively sought to conceal its dishonest conduct until as late as May 2021. It is these actions that we believe require further investigation by the SFO and we are surprised and disappointed that the SoS has not confirmed that the matter has been passed to the SFO for criminal investigation. In our view, based on the limited

information placed into the public domain, such conduct appears to be grounds for investigation of potential offences under the Fraud Act 2006. These are serious matters that are firmly in the public interest and demand full exposure.

17. It appears that the only co-operation that took place arose from the LSER Independent Committee from its establishment on 11 August 2021. If that committee was truly independent then LSER cannot derive a benefit from its co-operation with the DfT since LSER was not causative of it. The approach adopted by the SoS in this regard therefore indicates a recognition that LSER Independent Committee was not independent.

18. We would be grateful if the above could be taken in account in the SoS's deliberations on the proposed fine.

Yours faithfully

A handwritten signature in cursive script that reads "Devonshires".

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