

Your reference TWA 2/2/169  
Our reference MARSDC/335203-16

30 June 2020

The Secretary of State for Transport  
c/o Transport Infrastructure Planning Unit  
Zone 1/14-18  
Great Minster House  
33 Horseferry Road  
London  
SW1P 4DR

Dear Sir

**Transport and Works Act 1992, The Transport and Works (Applications and Objections Procedure) (England and Wales) Regulations 2006  
Application for the London Luton Airport Mass Passenger Transit System Order**

London Luton Airport Limited (**LLAL**) applies pursuant to section 6 of the Transport and Works Act 1992 for an Order under sections 1, 2 and 5 of that Act in the terms of the draft Order accompanying this application.

The draft Order provides powers relating to the operation of a passenger transit system, linking Luton Airport Parkway Station and the Central Terminal at London Luton Airport, and will provide byelaws governing the use of the passenger transit system and powers for the charging of fares and penalty fares.

Draft copies of the Order and the explanatory memorandum were submitted to the Transport Infrastructure Planning Unit (**Unit**) on 9 December 2019, in accordance with Rule 5 of the Transport and Works (Applications and Objections Procedure (England and Wales) Rules 2006 (**2006 Rules**).

LLAL asks that for the purposes of the 2006 Rules, the application date shall be taken to be 1 July 2020.

The documents accompanying this application have been amended to take into account the Unit's comments made in response to the applicant's Rule 5 submission, and at the request of the Unit we have provided further commentary on the applicant's approach to Environmental Impact Assessment in the appendix to this letter.

This letter is submitted pursuant to Rule 10 of the 2006 Rules, and is accompanied by four copies of each of the following documents:

1. a draft of the proposed Order;

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2. an explanatory memorandum;
3. a statement of aims;
4. a report summarising consultation undertaken;
5. a declaration as to the status of the applicant;
6. a list of all consents, permissions or licences required under other enactments which at the date of the application have been sought;
7. a funding statement; and
8. a Rule 18 waiver direction dated 29 April 2020.

We confirm that the appropriate application fee has been paid to the Unit.

All requests for further information and all notices or other documents required to be served upon the applicant should be sent to Addleshaw Goddard LLP, 3 Sovereign Square, Sovereign Street, Leeds LS1 4ER (Reference MARSDC).

Yours faithfully

*Addleshaw Goddard LLP*

**Addleshaw Goddard LLP**

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## Appendix - Statement on the need for an Environmental Statement or Screening Decision

### Introduction

1. This statement accompanies the application by London Luton Airport Limited (**LLAL**) to the Secretary of State in accordance with the Transport and Works (Applications and Objections Procedure) (England and Wales) Rules 2006 (**Rules**) for an order under sections 1, 2 and 5 of the Transport and Works Act 1992 (**TWA 1992**). It explains why the draft Order is not an EIA Order as defined in the 1992 Act and why, therefore, the applicant has not submitted an Environmental Statement or a screening decision with its application.
2. LLAL has obtained advice from Andrew Tait QC of Francis Taylor Building on the question of whether or not an Environmental Statement should be submitted with the application or a screening decision obtained from the Secretary of State. This statement is based on Mr Tait's advice.
3. The passenger transit system is currently being constructed pursuant to planning permissions granted by Luton Borough Council and Central Bedfordshire Council (**planning permissions**) details of which are set out in the Statement of Aims. Before the submission of the planning applications, a screening opinion was obtained from each authority under Regulation 6 of the Town and Country Planning (Environmental Impact Assessment) Regulations 2017. A copy of the screening decisions is enclosed.

### The law

4. Section 13A(4) of the TWA 1992 defines "EIA order" as an order authorising works or other projects:

(a) which are in a class listed in Annex I to Directive 2011/92/EU on the assessment of certain public and private projects on the environment (**EIA Directive**), or (ii) in a class listed in Annex II to the EIA Directive and, by virtue of their nature, size or location, likely to have significant effects on the environment, and

(b) which are not exempt works.

Section 13A(5) provides that works or other projects are exempt if the Secretary of State directs or decides in accordance with rules made under section 6 that an environmental impact assessment is not required in respect of those works or projects. Section 13A(6) defines "environmental statement" as a statement which by rules under section 6 is required to accompany an application for, or be prepared in connection with the publication of a proposal to make, an EIA order.

5. Rule 7(1) requires an applicant when making an application to submit an EIA "*in relation to any proposed works which are to be covered by that application, if those works constitute a project which is of a type mentioned in Annex I or, subject to paragraph (2), Annex II of the Directive.*" The proviso in (2) is where the Secretary of State notifies the applicant of his screening decision, pursuant to a screening request, that EIA is not required.
6. The draft Order does not contain proposals to carry out works. However, Rule 4(1) defines works as "*any works that may be authorised by an order made under section 1, 3 or 7 but in Rules 7, 8, 11 and 16 [the rules relating to EIA]...shall also include any matter that may be authorised by such an order.*"
7. Paragraph 2.29 of the DfT's *Guide to TWA Procedures* states as follows:

*"For the purposes of the Directive, a 'project' means the execution of construction works or of other installations or schemes, or other interventions in the natural surroundings*

*and landscape including those involving the extraction of mineral resources. Hence, it is not only proposed works that might be covered by the Directive. For example, a project might include a material change in the use of land. The Applications Rules reflect this possibility, by defining "works", for the purposes of the EIA-related provisions in the Rules, as including any matter that may be authorised by an order. Applicants will therefore need to consider whether their proposals, even if they do not make provision for works, might nevertheless amount to a project for the purposes of the Directive. However, in the TWA context, it is most likely to be works proposals [emphasis added] that would be covered by the Directive."*

8. Paragraph 1.20 of the same guidance also makes clear that even if an environmental statement had already been submitted with an earlier planning permission, this would not obviate the need for submission of an environmental statement with a Transport and Works Act Order (TWAO) application where required by the Rules.

### **Application of the law to the draft Order**

9. All the Articles of the draft Order contain matters that are "authorised in the draft Order" (as defined in Rule 4(1)) and thus constitute "works" as defined in the Rules. However, they do not constitute a "project" and, therefore, cannot engage the requirement to submit an environmental statement or obtain a screening opinion.
10. To explain the point in more detail, although the matters authorised by the draft Order relate to a project within Annex II to the Directive (in this case, under paragraph 10(h): "*Tramways, elevated and underground railways, suspended lines or similar lines of a particular type, used exclusively or mainly for passenger transport*"), they do not themselves comprise a "project" as defined in Article 1 of the Directive and repeated in the DfT Guidance at paragraph 2.31. Nor is there any change to, or extension of, a project (paragraph 13(a) of Annex II). No construction works or other interventions, such as a material change of use, would be authorised by the draft Order; no development within the meaning of the Town and Country Planning Act 1990 would be authorised. As a generality, therefore, that which would be authorised under the draft Order is not capable of having environmental effects.
11. It is possible to argue that Article 3 differs from the generality in so far as providing statutory authority for operation and maintenance, not least since maintenance is defined in Article 2 as including alteration, removal, reconstruction and replacement. However, it is submitted that the correct analysis of the scope of Article 3 is that it merely empowers a particular operator to operate and maintain the passenger transit system so as to provide a defence in nuisance and the like. In so far as planning permission is required for its subsequent removal or reconstruction (for example), the power to maintain does not remove that requirement. Accordingly, the grant of a power to a particular operator to operate the passenger transit system for the purposes of providing a defence in relation to nuisance and making other provision regulating the operation of the passenger transit system does not constitute a "project" within the meaning of the Directive and thus does not fall within the scope of Rule 7. On this basis it would not be an EIA order within the meaning of section 13A(4) of the TWA 1992.
12. This conclusion is in line with the jurisprudence of the Court of Justice of the European Union on the meaning of "project" in the 1985 EIA Directive, which does not differ in this respect from the 2011 Directive. The case of *Brussels Hoofdstedelijk Gewest v Vlaamse Gewest* (2011, C-275/09) concerned the renewal of an environmental permit to operate Brussels airport (distinct from a planning permit which authorises the execution of certain works). In the case, Advocate-General Mengozzi stated in his Opinion that "*the very concept of a "project", as defined in Article 1 of the [1985] Directive, entails the carrying out of activities which alter the physical reality of a specific place*. This is also apparent from the case law..." (para. 21) and proceeded to consider the issue further "*on the absurd assumption that the operation of Brussels airport could be*

*regarded as a “project” within the meaning of the Directive”* (para. 26). The Court held that the renewal of an existing permit to operate an airport cannot in the absence of any works or interventions involving alterations to the physical aspect of the site be classified as a project, assuming there is no “project splitting” to avoid EIA. There is no project splitting in the case of the draft Order since all the development has been authorised by the planning permissions.

### **Precedent: previous decisions of the Secretary of State on TWAO applications**

13. Where TWAOs deal only with powers which do not involve authorisation of development, the Secretary of State has not required the submission of an environmental statement. Examples include the decision of the Secretary of State dated 16 April 2013 on the Transport for Greater Manchester (Light Rapid Transit System) (Miscellaneous Provisions) Order; the decision dated 22 August 2017 on the Network Rail (Felixstowe Branch Line Acquisition)(Agreements for Transfer) Order and the decision dated 27 March 2019 on the Midland Metro (Birmingham City Centre Extension, etc.) (Edgbaston Extension Land Acquisition) Order 2019. In the case of those orders, the decision letter has recorded that *“as the Order does not include any development requiring planning permission”* no environmental statement was submitted.
14. The London Cable Car Order 2012 included an almost identical provision to Article 3 of the draft Order. In the Secretary of State’s decision letter dated 9 February 2012, it was noted that since the applicant *“has separately obtained the planning permissions and other consents required for the construction of the cable car system, the order does not include authorisation for that development. [The Applicant] did not, therefore, include with the Order application an environmental statement or a request for deemed planning permission for construction of the system.”*
15. The question was directly in issue in connection with the Cambrian Railways Order 2017 which authorised the undertaker to operate and use the Cambrian Railways in circumstances where their construction and use had previously been authorised. The objectors contended at a public inquiry that as the proposed Order would enable operations on the railway to be resumed, an environmental statement should have been submitted with the Order application. The applicant argued that the Order would only provide for the transfer of existing powers relating to the railway and not for any new works therefore no environmental impact assessment was required. The Secretary of State concluded that *“it was unnecessary to submit an environmental statement with [the] application since the Order would not authorise any development, including development of a sort that would require an environmental impact assessment.”* Although the position is not directly comparable to the draft Order, it is nonetheless useful in showing that the key issue is whether there is any authorisation under a TWAO of development that could require an environmental impact assessment. The draft Order would not authorise any such development.

### **Suitability of a screening request**

16. LLAL’s view that neither an environmental statement nor a screening request is required is further reinforced by Article 7(5) of the Rules which describes the information that should be provided with a screening request:
  - a. a plan sufficient to identify the land affected by the works in question;
  - b. a description of the proposed works, including in particular –
    - (a) a description of the physical characteristics of the works and, where relevant, of demolition works; and

- (b) a description of the location of the works, with particular regard to the environmental sensitivity of geographical areas likely to be affected;
- c. a description of aspects of the environment likely to be significantly affected by the works; and
- d. to the extent the information is available, a description of any likely significant effects of the works on the environment resulting from –
  - (a) the expected residues and emissions and the production of waste, where relevant; and
  - (b) the use of natural resources, in particular soil, land, water and biodiversity.

17. In the context of the powers sought in the draft Order, and in view of the above requirements, it is difficult to identify how a screening request could be substantiated, especially given that the Order will not authorise works.

### **Conclusion**

18. LLAL submits that a screening opinion is not required and an environmental statement does not need to be submitted with the application because the Order does not seek powers for anything that constitutes a "project" as defined in the EIA Directive.