



Response to ORR's technical consultation on the Schedule 4 possessions regime and Schedule 8 performance regime

This pro-forma is available to those that wish to use it to respond to our consultation. Other forms of response (e.g. letter format) are equally welcome.

Please send your response and any queries to performance.incentives@orr.gov.uk by 1 July 2022.

About you

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**This information will not be published on our website.*

This response is on behalf of the owning group and freight operator members of Rail Partners.

Overall approach

Question 1: Do you agree with ORR's position that train operators should be able to opt out of Schedule 4 in CP7, subject to limitations on timings of decisions to opt in or out?

Rail Partners' passenger operator members in principle broadly support the ability to opt-out, as it provides operators with the flexibility they need to reflect their own specific contractual and commercial situation in a reformed railway with new contracts. Operators that are on revenue risk (freight operators and certain passenger operators) are unlikely to opt out given the importance of Schedule 4 to their business models and are concerned about the weakened financial incentives on Network Rail if many operators do decide to opt out. We note ORR's intention only to allow a full opt-out but we flag that some operators may wish to have the

flexibility to opt out of certain elements of Schedule 4 to reflect the new contractual landscape resulting from rail reform which has yet to be determined.

Rail Partners supports the mechanism for open access operators to retain the right to opt out of ACS and receive limited compensation. Rail Partners supports ORR's proposals around the timing of the opt-out decision being prior to the start of each control period, with an ability to opt back in mid-control period in the circumstances set out in paragraph 1.23 of the consultation document

As acknowledged by ORR in the consultation document, appropriate incentives on Network Rail need to be maintained, particularly if a large number of operators do choose to opt out from the Schedule 4 mechanism. Rail Partners agrees with the proposed additional reporting requirements on Network Rail and for ORR to publish the information. However, close scrutiny will be needed to ensure that these incentives are effective in the longer-term. This includes ensuring that Network Rail has a strong understanding of the revenue and cost implications from service disruption in order to balance this against the costs of different types of possessions.

For operators outside the remit of GBR in the future, including freight operators, a possessions regime will be an even more crucial mechanism to compensate operators for the impact of possessions and to incentivise the infrastructure manager to minimise planned disruption. However, if too many operators opt-out completely from Schedule 4 the incentivisation properties of Schedule 4 could become significantly weakened. This will more likely be the case if freight compensation rates continue to be set at a non-cost reflective level.

ORR should set out criteria on how it will assess whether an increase in the number of possessions and/or an increase in the length of possessions is not justifiable given the amount of engineering work being undertaken. Furthermore, ORR should set out the potential regulatory remedies available if trends in possessions were not justifiable.

Question 2: We envisage that Schedule 8 will continue to apply between Network Rail/GBR and all operators. We would consider timely and practicable new proposals for alternative arrangements that meet legal requirements – these would need to be settled by autumn 2022 for them to be reflected in our PR23 decisions on charges and incentives. If current legislation is amended, it may be possible to adopt alternative arrangements that for example do not feature Schedule 8's financial payments. Do you agree with this position?

The Schedule 8 regime provides an important mechanism for incentivising Network Rail and operators to reduce delays thereby creating a secure and investable contractual environment for private operators. Rail Partners agrees with ORR's position and acknowledges the rationale behind not allowing for an opt-out at this time. Rail Partners also supports ORR's position of not proposing any changes to the regime for FOCs, charter operators, and passenger open access. In the freight sector, Schedule 8 also helps to create a strong focus on performance across customers, ports and terminals.

Rail Partners supports the timely and appropriate consideration of practicable new proposals that meet the necessary legal requirements and where changes would reduce the unnecessary administrative burden without harming the strong incentive for all parties to contribute to a high performing railway. Good performance is one of the key drivers of revenue. Even though the Plan for Rail states that many future Passenger Service Contracts will not contain revenue risk, it also states that there should be revenue incentives in contracts and at the right time some revenue risk transfer back to long-distance operators. Therefore, even if future legislative changes enables alternative arrangements, it is critical that strong performance incentives remain with GBR.

Question 3: Do you agree with ORR's proposal to limit the number of changes to Schedules 4 and 8?

Rail Partners agrees with ORR's proposal to limit the number of changes to Schedule 4 and 8. We support making a limited number of incremental changes. This will help ensure the system remains flexible enough to deal with the range of potential outcomes from the implementation from the Plan for Rail, without fundamentally changing the nature of the regime.

Schedule 4

Question 4: Do you agree with ORR's preferred approach to take forward the proposals detailed in chapter 2? Do you have comments on these proposals and the specific implementation approaches for each?

Rail Partners broadly agrees with ORR's position on the proposals they are minded to take forward as set out in the consultation document. More detail is provided below.

As detailed in our answer to Question 1, Rail Partners' passenger operator members broadly support ORR's intention to pursue Proposal A to introduce an opt-out mechanism to Schedule 4, whereby train operators could opt out of Schedule 4. Freight operator members of Rail Partners continue to be concerned about the incentive effects on Network Rail if a large number of passenger operators decide to opt out. It is important that strong reputational incentives on Network Rail through monitoring and reporting on the trend of possessions and regulatory intervention where necessary adequately replace the weakening of financial incentives, and that operators on revenue risk are not commercially affected. It is important that the introduction of an opt-out to Schedule 4 does not weaken the incentives of the possessions regime for operators sitting outside the direct remit of GBR.

Rail Partners strongly supports ORR's proposal to take forward Option B2 – ORR monitoring and reporting on possessions notification on a more granular basis – with passenger owning groups and freight operators noting the importance of early notification of possessions from Network Rail.

There continues to be a mix of views between owning group members of Rail Partners regarding ORR's intention not to take forward proposal C. Some operators would welcome the clarity and potential administrative/ time savings that a

methodology for calculating cost and revenue loss compensation for lengthy possessions and periods of sustained planned disruption could bring. However, there is concern by some that such a methodology is unnecessary and would limit operators' ability to negotiate the costs and losses they incur as a result of possessions.

Rail Partners supports ORR's intention to take forward proposal D to monitor and report on late possession changes and cancellations on a more granular basis.

We note that ORR is minded not to take forward proposal E to develop a tool to estimate Schedule 4 formulaic compensation. Some owning group members of Rail Partners expressed interest in a formulaic tool for Schedule 4 compensation and so we agree with ORR that the concept should be kept under review by Network Rail.

Rail Partners does consider that there would be benefit in pursuing Proposal F to review the methodology for calculating the ACS for open access operators. The current mechanism for calculating the ACS is considered to be unduly complicated and lacks transparency. Previously, Network Rail has been unable to provide estimated ACS costs to a passenger open access operator upon request. Reviewing the methodology and calculations for the ACS would enable open access operators to make informed decisions on whether to participate in the full Schedule 4 regime – though it is unlikely that an open access operator would opt to do so. While it has not been identified as a priority, operators do think there would be merit in reviewing ACS estimates, particularly if as per Proposal G, an ACS is introduced to fund the additional costs required to update freight compensation rates.

Rail Partners supports ORR's intention to review and, if appropriate, update freight compensation rates – proposal G. Freight operator members of Rail Partners believe that current compensation rates significantly under-represent the costs incurred due to disruption from possessions. We believe that the current arrangements, where no ACS is payable to fund the current levels of compensation, should remain. As is the case today, estimated compensation levels should be funded through additional funding from railway funders. Higher compensation levels would still remain a very small proportion of Network Rail's revenue requirement and importantly would likely provide better incentives on Network Rail thereby reducing the overall disruption of planned possessions on freight operators.

If the payment of an ACS is required by freight operators to qualify for higher, cost-reflective Schedule 4 rates, then the net payments will likely remain the same, given that the freight operators are in effect funding the additional Schedule 4. If the net payments remain the same, it is unclear what the benefit of cost-reflective rates would be if they are funded solely via the ACS. Cost reflective Schedule 4 rates should drive better incentives on Network Rail and therefore are supported by freight operators, but the funding of those rates should not be levied by way of a charge on the freight operators.

Schedule 8

Question 5: Do you agree with ORR's preferred approach to only take forward one of our initial proposals? Do you have any comments on this proposal?

Rail Partners agrees with ORR's preferred approach to only take forward Proposal G. Updating the evidence base underpinning the calculation of the Network Rail payment rate is important to ensure rates are accurate and reflect the commodities currently being carried. It is important that the scope of this work is appropriately set out and considers both long-run and short-run costs and revenue impacts of unplanned disruption, to ensure that it captures all of the impact of poor performance. It should also consider the longer and heavier freight trains that operators are now running and therefore the increased impact that delays have on operators and their customers. As noted in a previous response, it will be important to understand how this relates to the calculation of other relevant rates.

Are there any other comments you would like to make?

n/a

Thank you for taking the time to respond.

Publishing your response

We plan to publish all responses to this consultation on our website.

Should you wish for any information that you provide to be treated as confidential, please be aware that this may be subject to publication, or release to other parties or to disclosure, in accordance with the access to information regimes. These regimes are primarily the Freedom of Information Act 2000 (FOIA), the UK General Data Protection Regulation (UK GDPR) the Data Protection Act 2018 (DPA) and the Environmental Information Regulations 2004.

Under the FOIA, there is a statutory code of practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this, if you are seeking confidentiality for information you are providing, please explain why. If we receive a request for disclosure of the information, we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on ORR.

If you are seeking to make a response in confidence, we would also be grateful if you would annex any confidential information, or provide a non-confidential summary, so that we can publish the non-confidential aspects of your response.

Any personal data you provide to us will be used for the purposes of this consultation and will be handled in accordance with our privacy notice, which sets out how we comply with the UK General Data Protection Regulation and Data Protection Act 2018.

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In responding to this consultation you consent to us:

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- publishing your response on our website (unless you have indicated to us that you wish for your response to be treated as confidential as set out above.)

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Format of responses

So that we are able to apply web standards to content on our website, we would prefer that you email us your response either in Microsoft Word format or OpenDocument Text (.odt) format. ODT files have a fully open format and do not rely on any specific piece of software.

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