



**Determination by the
Office of Rail and Road:**

**Appeal made by Network
Rail Infrastructure Limited
pursuant to Part M of the
Network Code against a
Determination of the
Timetabling Panel of the
Access Disputes Committee
dated 14 November 2017**

15 February 2018

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Introduction

1. This determination by the Office of Rail and Road (“ORR”) concerns the appeal made by Network Rail Infrastructure Limited (“Network Rail”) pursuant to Part M of the Network Code (“Part M”) against the determination of the Timetabling Panel of the Access Disputes Committee (“the TTP”) dated 14 November 2017 in respect of dispute reference TTP1174 (“the Determination”)¹.
2. The subject of the appeal is Network Rail’s dissatisfaction with three paragraphs of the Determination, which allowed the appeal by XC Trains Limited (“XCT”) against Network Rail’s decision to retime seven of its services’ arrival into Glasgow Central. The change was not requested by XCT in its Access Proposal, nor was it necessitated by a conflict between two such proposals.
3. In the Determination, it was held that Network Rail did not have the power to make such changes to Access Proposals when compiling the New Working Timetable unless there were conflicts between Access Proposals or with the Timetable Planning Rules currently in force. The Determination took the contrary view on this point to an earlier determination of the TTP on the same background facts (TTP1122), in which it was held that Network Rail did have such a power.
4. Network Rail appeals the Determination on the proper interpretation of the Network Code on this point. It appeals on the grounds that the Determination misconstrued the relevant provisions of Part D of the Network Code (“Part D”) and that, if the Determination was left as is, it would create a precedent that would have significant detrimental impact on the operation of Part D.
5. We note that Network Rail does not appeal the direction in the Determination for it to accept XCT’s Access Proposal². This appeal relates solely to the proper interpretation of the Network Code regarding Network Rail’s compilation of the WTT.

¹ Capitalised terms in this determination shall have the meaning given to them in the Network Code unless otherwise stated.

² Determination, paragraph 8.1.4

Relevant Provisions of the Network Code

6. The Network Code³ is a set of rules incorporated into, and forming part of, each access contract between Network Rail and holders of rights of access to the track owned and operated by Network Rail.
7. Part D sets out the rules for the revision of the timetable for the Network. Part M provides the process by which a party, dissatisfied with a decision of a TTP in relation to a dispute arising under Part D, can appeal the matter to ORR.
8. Part D imposes on Network Rail a general responsibility to establish a “*Working Timetable*”⁴ and sets out the process for revising the timetable and the respective roles of Network Rail and specified stakeholders (referred to as “*Timetable Participants*”). In particular, Network Rail is required to re-issue the Working Timetable in revised form twice in each year, following a consultation and specified revision process⁵.
9. The Network Code refers to the Working Timetable being developed prior to re-issue as the “*New Working Timetable*” (“the WTT”). In compiling it, Condition D2.6.3 provides that “*Network Rail shall be required and entitled to act in accordance with the duties and powers set out in Condition D4.2*”.
10. Condition D1.1.5 provides that “*In conducting the processes set out in this Part, decisions must be made by Network Rail in accordance with the principles set out in Condition D4*”.
11. Condition D4.2 is headed “*Decisions arising in the preparation of a New Working Timetable*”. Condition D4.2.1 contains two distinct obligations:

“In compiling a New Working Timetable in accordance with Condition D2.6, Network Rail shall apply the Decision Criteria in accordance with Condition D4.6 and conduct itself as set out in this Condition D4.2” (emphasis added).
12. The first obligation relates to the “*Decision Criteria*”, which are formed by a defined “*Objective*” (set out in Condition D4.6.1) and defined “*Considerations*” (set out in Condition D4.6.2). Condition D4.6.1 provides that:

“Where Network Rail is required to decide any matter in this Part D its objective shall be to share capacity on the Network for the safe carriage of

³ <https://www.networkrail.co.uk/industry-commercial-partners/information-operating-companies/>

⁴ Condition D1.1.1

⁵ Condition D2.1.2

passengers and goods in the most efficient and economical manner in the overall interest of current and prospective users and providers of railway services (“the Objective”).

13. Condition D4.6.2 provides that:

“In achieving the Objective, Network Rail shall apply any or all of the considerations in paragraphs (a)-(k) below (“the Considerations”) in accordance with Condition D4.6.3 below...”.

14. The provision then lists twelve considerations, including maintaining, developing and improving the capability of the Network, maintaining and improving train service performance and maintaining and improving an integrated system of transport for passengers and goods. Condition D4.6.3 sets out requirements on how Network Rail must apply the Decision Criteria, in particular where it appears that the application of two or more of the Considerations will lead to a conflicting result.

15. The second obligation relates to how Network Rail must conduct itself in compiling the WTT. Condition D4.2.2 provides that:

“Network Rail shall endeavour wherever possible to comply with all Access Proposals submitted to it in accordance with Conditions D2.4 and D2.5 and accommodate all Rolled Over Access Proposals, subject to the following principles:

(a) a New Working Timetable shall conform with the Rules and the applicable International Freight Capacity Notice applicable to the corresponding Timetable Period;

(b) each New Working Timetable shall be consistent with the Exercised Firm Rights of each Timetable Participant;

(c) in compiling a New Working Timetable, Network Rail is entitled to exercise its Flexing Right;

(d) where the principles in paragraphs (a), (b) and (c) above have been applied but Network Rail is unable to include all requested Train Slots in the New Working Timetable, the Train Slots shall be allocated in the following order of priority...”⁶.

⁶ Condition D4.2.2(d) goes on to set out an order of priority for different rights, giving priority to specified “Firm Rights” and rights which Network Rail has for “Network Services”, with “Contingent Rights” and other rights being given lower priority.

16. “Rules” is defined in Condition D1.1.11 as “*The Timetable Planning Rules and the Engineering Access Statement*”.

17. “Flexing Right” is defined as:

“a right, exercisable by Network Rail in allocating a Train Slot in the New Working Timetable, to vary a Train Slot: (a) sought in an Access Proposal; or (b) arising from a Rolled Over Access Proposal; or (c) sought in a Train Operator Variation Request, in any way within and consistent with the Exercised Firm Rights of the relevant Timetable Participant or, where the Train Slot which is being varied is a Strategic Train Slot, in any way without limitation”.

18. “Train Slot” is defined as:

“a train movement or a series of train movements, identified by arrival and departure times at each of the start, intermediate (where appropriate) and end points of each train movement”.

Background to the Determination

19. In their Access Proposals for the December 2017 WTT, XCT and Abellio ScotRail Ltd (“ASR”) did not put forward material changes on the Edinburgh – Glasgow corridor, but submitted a number of Rolled Over Access Proposals.

20. In compiling the WTT, Network Rail decided to swap XCT’s services with those of ASR, so that a regular 30 minute interval could be provided on local services from Lanark to Glasgow Central. This meant retiming seven of XCT’s services’ arrival into Glasgow Central into slots previously held by ASR at xx15, with ASR to take XCT’s existing slots at xx12.

21. XCT brought an appeal to the TTP in respect of this decision (TTP1122). As part of the appeal, XCT challenged Network Rail’s power to make unilateral decisions regarding the structure of the WTT as it had done in this matter. XCT stated that (under Condition D4.6.1) Network Rail’s entitlement to apply the Decision Criteria arises only where it “*is required to decide any matter...*” and it was not so required in this matter, because there were no conflicting Access Proposals.

22. Network Rail contested this submission, making reference to its Flexing Right (under Condition D4.2.2(c)) and stating that this right is not limited to resolving conflicts.

23. In its determination of TTP1122⁷, on this point the TTP set out the following:

“The Panel noted the provisions of Condition D1.1.11 and, in particular, the definition of “Flexing Right” set out therein which allows Network Rail to use its Flexing Right in respect of “Rolled Over Access Proposals”... Neither this definition nor the provisions of Condition 4.2.2(c) constrain Network Rail’s use of its Flexing Right when compiling the New Working Timetable to be used only where there are conflicts between Access Proposals.

Having carefully considered the relevant provisions of the Network Code Part D and the proper interpretation of the words used, the Panel prefers and adopts the submissions made on behalf of Network Rail on this point.”⁸

24. Despite this finding, the TTP accepted XCT’s alternative submission that Network Rail had not properly applied the Decision Criteria in the matter⁹. Network Rail was directed to reconsider its decision.

25. Following its reconsideration, Network Rail made a further timetabling decision on 15 September 2017 which essentially adopted its previous decision.

26. XCT brought a further appeal in respect of this decision (TTP1174). A substantial focus of the appeal was that Network Rail had failed to properly apply the Decision Criteria in reaching its decision. But the appeal also considered a number of other issues.

The Determination

27. At an early stage in its consideration of the appeal¹⁰, the TTP raised the issue of principle of the extent to which Network Rail is entitled to make a decision on its own initiative rejecting or changing some aspect of an Access Proposal by reference to the Decision Criteria *“when no “decision” as such strictly needs to be made because there is no conflict with another Access Proposal or other specific overriding obstacle”*. The TTP noted that it was important to deal with this issue at the outset, because it was minded to depart from the determination in TTP1122 on this point.

⁷ This determination was given in full in writing on 29 September 2017, but the TTP gave indications of its consideration at the hearing on 8 September and in a provisional note of 11 September.

⁸ TTP1122, para 6.9

⁹ TTP1122, paras 6.10 – 7.2

¹⁰ Determination - Annex B, Opening Remarks to hearing dated 11 October 2017.

28. Network Rail was given the opportunity to address the TTP on this issue at the hearing on 11 October 2017 and the TTP subsequently considered the matter in detail and set out its reasoning in the Determination.
29. The TTP’s analysis of the proper interpretation of the Network Code started by setting out the relevant provisions: from the general obligation in Condition D2.6.1 to compile a new WTT, to the obligations in Conditions D2.6.3 and D4.2.1. It was stated that Condition D4.2.1 “*introduces directly the preamble to Condition D4.2.2*”¹¹, which, in the TTP’s view, the submissions in TTP1122 seemed to have ignored, whereby Network Rail is required to “*endeavour wherever possible*” to comply with all valid Access Proposals and accommodate Rolled Over Access Proposals, subject to the stated provisions such as the entitlement to exercise Flexing Rights.
30. The Determination stated that:

*“By this sequence the general responsibility stated in Condition D2.6.3 for NR to compile the New WTT gives rise to a specific duty expressed in the Condition D4.2.2 preamble to accept an Access Proposal or accommodate a Rolled Over Access Proposal wherever possible. For that duty to be in any way meaningful, the entitlement to which it is subject, to exercise NR’s Flexing Right under D4.2.2(c), must be intended to apply only if or to the extent necessary to enable it to perform such a duty, that is to say, to make possible the acceptance or accommodation of an Access Proposal that would otherwise be impossible...”*¹².

31. The Determination subsequently considered Condition D4 (entitled “*Decisions by Network Rail*”) and set out the different decisions which are required by the different provisions of that Condition¹³. Having done so, the Determination stated that:

“...Consequently NR’s stated obligation and corresponding right under Condition D4.6 entitled “Decision Criteria”, to achieve the Objective by applying the Considerations, which obligation is stated to arise “Where NR is required to decide any matter under this Part D” can be expected to arise only when a decision of a kind expressly contemplated somewhere in Part D – and therefore within a category picked up and regulated in Condition D4 – is actually needed.

And in the case of a Condition D4.2 “Decision arising in the preparation of a New Working Timetable” this therefore can only sensibly refer to a decision

¹¹ Determination, para 6.4.1

¹² Determination, para 6.4.2

¹³ under Conditions D4.1 to D4.5

*which is compatible with, or necessary to enable it to discharge, its other duties or obligations under Condition D4.2, including the need to resolve a conflict between Access Proposals or between an Access Proposal and some other technically supervening matter such as the TPRs, in a situation where without such resolution NR would otherwise be unable to discharge the overriding duty laid down in the Condition D4.2.2 preamble*¹⁴.

32. The TTP concluded that Network Rail does not have the power or right to apply the Decision Criteria in the abstract, generally or on its own initiative, as it compiles the WTT nor, in the context of the facts of the appeal, to exercise its Flexing Right unless there is a decision required to be made because of conflicting proposals¹⁵. It was considered that the exception to this might be if there was some overriding contractual or technical reason for rejecting or changing an Access Proposal with no conflict – such as non-compliance with the Timetable Planning Rules¹⁶.
33. This conclusion was adopted in the formal determination. The paragraphs which are the subject of this appeal are emphasised below:

“8.1.1 As a matter of legal entitlement: the meaning of the relevant provisions of Part D of the Network Code (12 July 2017 Edition), particularly Condition D4 “Decisions by Network Rail” is that Network Rail does not have the power or the right to apply the Decision Criteria in the abstract, generally or on its own initiative or for whatever motive, to any part of the process of compiling a New Working Timetable; nor, in the context of compiling a New Working Timetable, to exercise its Flexing Right – or apply the Decision Criteria to the exercise of a Flexing Right – unless it is required to make a decision regarding acceptance of an Access Proposal or Rolled Over Access Proposal because it conflicts with another Access Proposal or Rolled Over Access Proposal or gives rise to an irresolvable conflict with the Timetable Planning Rules for the time being in force.”

8.1.2 As a matter of legal entitlement: Network Rail’s application of the Decision Criteria in Condition D4.6, if the same were applicable, as recorded in its document (undated) produced to XC on 15 September 2017 entitled “Network Rail’s application of Network Code Part D, 4.6 – TTP1122 Decision Criteria”, was not valid or sufficient to justify a rejection of the xx12 arrival times into Glasgow Central station for XC’s seven 1Sxx [sic] services

¹⁴ Determination, para 6.4.3

¹⁵ Determination, para 6.5

¹⁶ Determination, para 6.6

requested in XC's Rolled Over Access Proposal for the December 2017 Timetable...

8.1.5 As a matter of legal entitlement: under the Network Code as presently constituted and incorporated in Timetable Participants' Track Access Contracts, NR is not entitled to reject an otherwise contractually valid and compliant Access Proposal or Rolled Over Access Proposal otherwise than in accordance with the relevant provisions of the Network Code for the time being in force" (emphasis added).

34. The effect of paragraph 8.1.2 of the Determination is that the appeal succeeded irrespective of Network Rail's ability to apply the Decision Criteria, because the TTP did not consider that its application of the Decision Criteria in any case could justify the refusal of the Access Proposals in this case.

35. Although not part of its formal determination, the Determination also set out the following observations:

"The generality and obviously beneficial intention of the wording of the Objective of the Decision Criteria in Condition D4.6, taken by itself, could give the impression that it is somehow generally applicable to the conduct of business by Network Rail. There seems to have been a number of instances where NR has construed the Objective and the Considerations as introducing the possibility of regarding a decision to do something generally for the good of the rail industry in its opinion – such as tidy up the Timetable and make rail more competitive with other modes of transport. However laudable an objective that might be, in my understanding that is not the kind of decision that the contract... actually "requires" NR to make, and we have to go by the contract..."¹⁷.

36. Finally, we note that the Determination cited the previous determinations of the TTP in TTP834 and TTP324 as other examples displaying an inclination by Network Rail to apply the Decision Criteria in a manner which is not permitted by the Network Code¹⁸.

¹⁷ Determination, para 7.2

¹⁸ Determination, para 7.3

ORR's handling of the appeal

37. On 21 November 2017, Network Rail gave notice that, in accordance with Condition 3.1.1 of Part M, it wished to challenge certain paragraphs of the Determination, on the grounds that they incorrectly stated the position regarding its powers under the Network Code and would be likely to have a significant detrimental impact if left as a precedent. This notice was served by e-mail on XCT, ASR and West Coast Trains Limited ("WCT") (an interested party in TTP1174) on 21 November 2017.
38. On 30 November 2017, ORR wrote to the parties to advise them that ORR was minded to hear the appeal. ORR reminded the parties other than Network Rail that, in accordance with Condition M5, they had until 5 December 2017 to serve on Network Rail, ORR and the other parties any notice stating that they opposed the appeal and, insofar as reasonably practicable, attach any evidence on which they wished to rely.
39. On 4 December 2017, XCT made representations on the appeal to ORR and Network Rail (the "Response"). XCT stated that it believed the Determination should be upheld by ORR and Network Rail's particular role in the Timetabling Process between D-40 and D-26 clarified. XCT submitted that other Timetable Participants should be given the opportunity to make representations.
40. WCT confirmed on 4 December 2017 that it had no representations to make in respect of the appeal. ASR did not make any representations.
41. On 5 December 2017, ORR wrote to Network Rail and the other parties confirming that, as the issue was of sufficient importance to the industry, ORR would hear the appeal.
42. On 13 December 2017, ORR wrote to the parties, outlining the proposed process for the appeal and asking Network Rail to provide any representations it wanted to make in respect of the Response and other parties to provide any representations on the proposed process, by 18 December 2017. ORR advised the parties that, on the basis of the information received at that point, the appeal would be limited to a review of the decision of the TTP, in accordance with Condition M7.1.1 of Part M. ORR also advised the parties that it did not propose to hold an oral hearing and would not request representations from other Timetable Participants at that time, but would keep the matter under review.

43. No parties made representations on ORR’s proposed process. On 18 December 2017, Network Rail wrote to ORR with its further representations (the “Reply”)¹⁹.

Network Rail’s appeal

44. Network Rail’s notice of appeal dated 21 November 2017 stated that it wished to appeal paragraphs 8.1.1 and 8.1.5 of the Determination and the words “*if the same were applicable*” in the second line of paragraph 8.1.2 of the Determination²⁰.

The Notice of Appeal set out the following grounds:

- That the Determination is wrong because Network Rail has the power to make decisions when compiling the WTT, and the provisions of Condition D4.2.2 do not constrain this power when compiling the WTT to be used only where there are conflicts between Access Proposals.
- That if the Determination is left, it will create a precedent which is likely to have a significant detrimental impact on the operation of Part D, as it will prevent Network Rail from achieving the Objective set out in Condition D4.6.1.²¹

45. Network Rail submitted that the TTP misconstrued the relevant provisions of Part D and that the proper interpretation is that adopted in TTP1122; it is entirely within its contractual entitlement to make a change concerning the WTT, even where no such change has been requested²².

46. In relation to its application of the Decision Criteria, Network Rail made the following points:

- The circumstances in which Network Rail is required to achieve the Objective under Condition D4.6.1 (where it “*is required to decide any matter*”) are very widely drafted, with no definition of what is meant by “*decide*” in this context. When construed in light of the provisions of Part D as a whole (in particular Conditions D1.1.1 and D1.1.5 and D2.6.1) it is clear that Network Rail has a general obligation to compile the WTT.²³
- Condition D4.2.1 sets out a general responsibility to apply the Decision Criteria when compiling the WTT, but does not specify or constrain the circumstances in which Network Rail makes decisions concerning the WTT. It can make any

¹⁹ The Notices of Appeal, the Response and the Reply are available [here](#).

²⁰ Notice of Appeal, paragraph 2.1

²¹ Notice of Appeal, paragraph 2.2

²² Notice of Appeal, paragraphs 3.20 and 4.1

²³ Notice of Appeal, paragraphs 4.2 – 4.7

decisions, so long as it complies with Condition D4.2 and applies the Decision Criteria.²⁴

47. In relation to the application of Condition D4.2.2, Network Rail noted that what the Determination describes as the preamble to the Condition is relied upon heavily²⁵. Network Rail made the following points:

- The obligation to “*endeavour wherever possible*” to accommodate access proposals does not mean, because it simply does not say, that Network Rail may only make decisions about the WTT when a conflict between Access Proposals must be resolved. The interpretation adopted in the Determination involves writing in words into Part D which are not present.²⁶
- The obligation to accommodate Access Proposals is expressly subject to the principles which are set out in Condition D4.2.2, including Network Rail’s entitlement to exercise its Flexing Right. That entitlement is not limited to only where there is a conflict between Access Proposals; it is limited only to ensuring consistency with Exercised Firm Rights.²⁷
- Network Rail is required to take decisions in order to compile the WTT and there is no constraint on it to take decisions only where there is a conflict. It makes relevant decisions by applying the Decision Criteria so that the network can be efficiently run, with all users and providers being clear as to the WTT which will apply.²⁸

48. Network Rail further submitted that the appeal was of importance to the industry as a whole, for the following reasons:

- The interpretation adopted in the Determination will operate to prevent it from achieving the Objective (as defined in Condition D4.6.1). In particular, Network Rail will not be able to propose changes for prospective users and providers of railway services, as they will not have submitted Access Proposals.²⁹
- If the Determination is upheld, Network Rail’s role in compiling the WTT will become one of “*passive bystander*”, other than where it is resolving disputes. This will risk the WTT growing haphazardly.³⁰

²⁴ Notice of Appeal, paragraph 4.8

²⁵ Notice of Appeal, paragraph 4.9

²⁶ Notice of Appeal, paragraph 4.10 – 4.11

²⁷ Notice of Appeal, paragraphs 4.12 - 4.15

²⁸ Notice of Appeal, paragraphs 4.16 – 4.17

²⁹ Notice of Appeal, paragraph 4.22

³⁰ Notice of Appeal, paragraph 4.22

- It is not in the interests of orderly and good planning for Network Rail to be required to identify a specified category of decision before it can take action to achieve the Objective – it is required to make large numbers of timetabling decisions, few of which are challenged.³¹
- If Network Rail can only make changes to the WTT where there are conflicting Access Proposals, its ability (as required under Condition 1.23 of its Network Licence) to run an efficient and effective process and initiate changes to relevant industry processes will be frustrated.³²
- Overall, the Determination as it stands will create a precedent which is likely to have a significantly detrimental impact on the operation of Part D.³³

49. The decision which is appealed is set out in paragraph 8.1.1 of the Determination. Network Rail appeals the words “*if the same were applicable*” in the second line of paragraph 8.1.2 of the Determination, on the basis that the Decision Criteria were applicable to the decisions it made in the matter³⁴. Network Rail also appeals paragraph 8.1.5 of the Determination, on the basis that it is adopted to support the argument that Network Rail cannot take decisions other than where there are conflicting access proposals³⁵.

50. Network Rail is not appealing the finding in the Determination that its application of the Decision Criteria was not valid and is not appealing the remedy ordered by the TTP.

XCT’s response to the appeal

51. In the Response, XCT opposed the appeal on the basis that the Determination set out the correct interpretation of the Network Code. In particular, XCT made the following points:

- Condition D4.6.1 applies only where Network Rail is “*required*” to make a decision and there is no such requirement unless conflicting Access Proposals are submitted.³⁶

³¹ Notice of Appeal, paragraphs 4.23 – 4.24

³² Notice of Appeal, paragraphs 4.25 – 4.26

³³ Notice of Appeal, paragraph 4.27

³⁴ Notice of Appeal, paragraph 4.20

³⁵ Notice of Appeal, paragraph 4.19

³⁶ Response, page 1

- In relation to Condition D4.2.2, there is no ambiguity in the opening wording, which requires Network Rail to comply with all Access Proposals “*wherever possible*”.³⁷
- It is not correct to say that the Determination, if upheld, reduces Network Rail’s role to that of a passive bystander, because the Network Code gives Network Rail a separate responsibility of facilitating and coordinating dialogue with Timetable Participants prior to Access Proposals being submitted. It is at this stage that Network Rail has the power to be involved in influencing the WTT.³⁸
- To the extent that Network Rail refers to obligation under its Network Licence, those obligations refer to allowing persons providing railway services to plan their business with a reasonable degree of assurance – this aligns with the need for Network Rail to comply wherever possible with Access Proposals submitted to it.³⁹
- TTP834 and TTP324 are both consistent with the Determination, and Network Rail did not choose to appeal those determinations⁴⁰.

Network Rail’s reply

52. Network Rail made the following points in the Reply:

- Contrary to what was submitted by XCT, the Notice of Appeal identified the broad requirements on Network Rail relating to the WTT. Condition D4.6.1 states that Network Rail can decide “*any matter*” where required to do so under Part D.⁴¹
- Network Rail does not dispute the meaning of the words “*wherever possible*” in Condition D4.2.2, but these words do not support the interpretation set out in the Determination.⁴²
- TTP324 does not support the Determination in the manner submitted by XCT⁴³.

³⁷ Response, page 1

³⁸ Response, pages 1 - 2

³⁹ Response, page 2

⁴⁰ Response, page 2

⁴¹ Reply, paragraphs 4 - 6

⁴² Reply, paragraph 7

⁴³ Reply, paragraphs 8 - 10

ORR's consideration of the appeal

53. ORR has carefully considered the issues involved in the appeal and has considered in detail the Determination and the entirety of the submissions made by Network Rail and XCT.

54. Paragraph 8.1.1. of the Determination, the principal paragraph which is the subject of this appeal, provides that:

“...Network Rail does not have the power or the right to apply the Decision Criteria in the abstract, generally or on its own initiative or for whatever motive, to any part of the process of compiling a New Working Timetable; nor, in the context of compiling a New Working Timetable, to exercise its Flexing Right – or apply the Decision Criteria to the exercise of a Flexing Right – unless it is required to make a decision regarding acceptance of an Access Proposal or Rolled Over Access Proposal because it conflicts with another Access Proposal or Rolled Over Access Proposal or gives rise to an irresolvable conflict with the Timetable Planning Rules for the time being in force”.

55. It is acknowledged by both Network Rail⁴⁴ and XCT⁴⁵ that Network Rail is required by Condition D4.2.2 to “endeavour wherever possible to comply with all Access Proposals submitted to it”, subject to a number of principles.

56. In practical terms, this obligation to “comply with all Access Proposals” (“the Obligation to Comply”) is given effect when Network Rail includes the Train Slots requested in Access Proposals⁴⁶ in the WTT it has compiled, as opposed to including one or more varied Train Slots in the WTT and/or refusing to include one or more requested Train Slots altogether.

57. The principles to which the Obligation to Comply is expressed to be subject include Network Rail’s entitlement to exercise its Flexing Right. However, whilst the Obligation to Comply and the principles to which it is subject describe how Network Rail must conduct itself in compiling the WTT, Network Rail is also required to apply the Decision Criteria⁴⁷.

⁴⁴ Reply, paragraph 7

⁴⁵ Response, page 1

⁴⁶ This section of the determination refers to Access Proposals, but for this purpose ORR considers that the provisions apply in the same way to Rolled Over Access Proposals.

⁴⁷ Conditions D4.2 and D4.6

58. This appeal relates to the interaction between the Decision Criteria, the Obligation to Comply and Network Rail's Flexing Right. This determination covers these issues in turn.

The role of the Decision Criteria

59. Network Rail appeals the finding in the Determination that the Decision Criteria are not engaged unless there is a conflict between Access Proposals or with the Timetable Planning Rules.

60. As stated above, the Decision Criteria are formed by the Objective (defined in Condition D4.6.1) and the Considerations (defined in Condition D4.6.2). ORR notes that:

- Condition D4.6.1 provides that “*Where Network Rail is required to decide any matter in this Part D its objective shall be to share capacity on the Network for the safe carriage of passengers and goods in the most efficient and economical manner in the overall interest of current and prospective users and providers of railway services...*”;
- Condition D4.6.2 provides that “*In achieving the Objective, Network Rail shall apply any or all of the considerations...*” (emphasis added) - setting out twelve considerations which are broad in coverage; and
- Condition D4.2.1 provides that, in compiling a WTT, “*Network Rail shall apply the Decision Criteria...*”⁴⁸.

61. ORR considers that it is fundamental to a proper understanding of the provisions relating to the Decision Criteria that the wording of Condition D4.6 imposes an obligation on Network Rail. The provisions do not confer an entitlement or power. The obligation is to achieve the Objective (applying the Considerations) where Network Rail “*is required to decide any matter*”. In relation to the compilation of the WTT, Network Rail's obligation is reinforced by the language of Condition D4.2.1.

62. The meaning of the words “[*w*]here Network Rail is required to decide any matter in this Part D” in Condition D4.6.1 must, in ORR's view, be interpreted in light of the fact that they explain the extent of Network Rail's obligation, rather than qualifying its powers.

63. In the Determination, the TPP considered that the above words mean that the Decision Criteria are engaged only where a decision is “*expressly contemplated*”

⁴⁸ The provisions are set out more fully at paragraphs 11 – 14 above.

somewhere in Part D” and that, in the context of compiling the WTT, this could only sensibly be a reference to decisions relating to a conflict or some other “*technically supervening matter*”, such as the Timetable Planning Rules⁴⁹. The Determination adopted XCT’s submission⁵⁰ that, other than in these situations, Network Rail is not required to make any decision in compiling the WTT⁵¹.

64. As explained in the Determination⁵², Part D sets out a number of decisions which Network Rail is required to make. Network Rail submitted that Condition D4.6.1 is very widely drafted and that, when Part D is considered as a whole, there are clear general obligations imposed on it relating to the compilation of the WTT such that Condition D4.6.1 applies generally to decisions it makes when compiling the WTT⁵³.
65. ORR agrees that Condition D4.6.1 applies generally to such decisions. In particular, we note the following points:
- Condition D1.1.1 imposes a general responsibility on Network Rail to establish the WTT and Condition D2.6.1 obliges Network Rail to compile the proposed WTT. Network Rail will necessarily be required to make many decisions as it compiles the WTT. It is a natural reading of the words in Condition D4.6.1 that the Decision Criteria apply to all such decisions.
 - This is supported by Condition D4.2.1, which expressly provides that Network Rail shall apply the Decision Criteria in compiling the WTT and does so without qualification. Condition D1.1.5 similarly requires that in conducting the processes prescribed by Part D (including the compilation of the WTT) decisions shall be made in accordance with the principles set out in Condition D4 (which include the Decision Criteria). These provisions are inconsistent with the argument that the Decision Criteria are relevant only to specified types of decision.
 - ORR does not agree that “*decisions*” are required only where there is a conflict between Access Proposals or with the Timetable Planning Rules. Network Rail’s responsibility for compiling the WTT means that, in practice, it must decide whether to include, vary or reject each Train Slot requested in an Access Proposal (doing so in accordance with the provisions of Part D). Any such decision is binding unless overturned by an appeal⁵⁴.

⁴⁹ Determination, paragraph 6.4.3

⁵⁰ Reply, page 1

⁵¹ Determination, paragraph 5.6

⁵² Determination, paragraph 6.4.3

⁵³ Notice of Appeal, paragraphs 4.2 – 4.8

⁵⁴ Condition D4.7

- The wording of the Network Code therefore strongly supports the interpretation that Network Rail has an obligation to apply the Decision Criteria to all of the decisions it makes and we see no reason why a limitation should be implied. The nature of the Objective and Considerations are such that they are of relevance generally to the compilation of the WTT. It is entirely consistent with the purpose of the Decision Criteria that they should apply to all decisions which Network Rail makes in compiling the WTT, so that there is a consistent driver in decision making which affects the interests of many and varied parties. In contrast, we do not consider that it would align with the purpose of the Decision Criteria if Network Rail was only required to apply them to certain decisions.

66. Our interpretation is, therefore, that the Decision Criteria apply when Network Rail is making decisions under Part D. They do not operate unless Network Rail is making such a decision; nor do they entitle Network Rail to make a decision which it could not otherwise make. What they do is govern what decision should be made, taking into account the options which are available under Part D. For this reason, the applicability of the Objective and Considerations to all decisions does not create an incompatibility with other parts of the Network Code. (To the extent that this is what was meant by the TTP's reference to Network Rail having no power to apply the Decision Criteria "*in the abstract*"⁵⁵ we agree with the Determination on this particular point.)
67. The Determination made reference to two previous determinations⁵⁶ which XCT referred to as supporting the position adopted in the Determination⁵⁷. However, we do not consider that these determinations provide any further reasoning which alters the above analysis⁵⁸. The fact that a previous determination was not appealed does not alter our determination on the proper interpretation of the Network Code.
68. In conclusion, ORR considers that Condition D4.6 sets out the specified Objective and Considerations which apply to all decisions which Network Rail makes relating to the compilation of the WTT under the provisions of Part D. ORR does not agree with the findings set out in the Determination, to the extent that they conclude otherwise⁵⁹.

⁵⁵ Determination, paragraph 8.1.1

⁵⁶ Determination, paragraph 7

⁵⁷ Reply, page 2

⁵⁸ In addition, the Determination in TTP324 considered the wording in a previous version of the Network Code which had different wording to the wording being considered in this appeal.

⁵⁹ In particular, ORR considers that the Decision Criteria apply as set out above whether or not an Access Proposal conflicts with another Access Proposal. We do not agree with the premise set out in paragraph 8.1.1 of the Determination that such a conflict changes the position.

Condition D4.2.2 and the Decision Criteria

69. Under Condition D4.2.1, in compiling the WTT Network Rail must both apply the Decision Criteria and conduct itself as set out in Condition D4.2 (meaning, in effect, as set out in Condition D4.2.2). The obligation on Network Rail to apply the Decision Criteria, must therefore be considered in conjunction with Condition D4.2.2.
70. Condition D4.2.2 provides a general obligation on Network Rail to endeavour wherever possible to comply with Access Proposals (the Obligation to Comply). As noted previously, that obligation is not absolute, but is qualified by a number of principles.
71. In the Determination, the TTP considered that Network Rail (and the TTP in TTP1122) had failed to give sufficient consideration to the “*overriding duty laid down in the Condition D4.2.2 preamble*”⁶⁰.
72. We do not find any support in the Network Code to justify the Obligation to Comply set out in Condition D4.2.2 being given the status of an overriding duty. Elsewhere in Part D, where a provision is intended to be overriding this is stated expressly (as set out in Condition D4.4.1(c)). If it were intended that the Obligation to Comply should have this status, we consider that it would have been stated. The use of the words “*shall endeavour wherever possible*” do not on their face denote an overriding obligation.
73. Instead, we agree with Network Rail that Condition D4.2.2 sets out a general obligation which is expressly subject to certain principles⁶¹. Where Network Rail is deciding whether to include all requested Train Slots in compiling the WTT or to vary or reject one or more requested Train Slots, it must conduct itself in accordance with the Obligation to Comply and those principles (in conjunction with the application of the Decision Criteria).
74. ORR considers that the following further points can be taken from the wording of Condition D4.2.2:
- ORR considers that Condition D4.2.2 can helpfully be described as setting out a framework for how Network Rail compiles the WTT. The provision sets out how Network Rail must conduct itself when considering the Access Proposals which have been made.

⁶⁰ Determination, paragraphs 5.6 and 6.4.3

⁶¹ Notice of Appeal, paragraph 4.12

- The Obligation to Comply requires that Network Rail “*shall endeavour wherever possible*” to comply with Access Proposals. This amounts to a broad principle in favour of Train Slots being included in the WTT as requested.
- The Obligation to Comply is subject to various principles. However, the principles are not a simple list of individual exceptions, allowing Network Rail to deviate from the Obligation to Comply in particular circumstances. The different principles work in conjunction with each other and must be applied in particular ways.
- Conditions D4.2.2(a) and D4.2.2(b) set out requirements which Network Rail must ensure the WTT meets: conformity with the Timetable Planning Rules, the Engineering Access Statement and the applicable International Freight Capacity Notice and consistency with Exercised Firm Rights. Network Rail must not include requested Train Slots in the WTT, if this would mean that the resulting WTT breaches these principles.
- Condition D4.2.2(c) sets out Network Rail’s entitlement to exercise a Flexing Right – considered further below. Unlike the principles in paragraphs (a) and (b), which impose obligations on Network Rail, this principle reflects Network Rail’s entitlement to flex.
- Condition D4.2.2(d) sets out how Train Slots should be allocated where Network Rail is unable to include all requested Train Slots in the WTT. However, the allocation of Train Slots in the stated order of priority may only take place where Network Rail has first applied the principles in “*paragraphs (a), (b) and (c)*”. We consider that, although Condition D4.2.2(c) confers an entitlement on Network Rail to exercise its Flexing Right, Condition D4.2.2(d) imposes an obligation on Network Rail to consider whether or not to do so prior to allocating Train Slots in the prescribed order of priority and, ultimately, being able to reject one or more Train Slots requested in Access Proposals (where they do not have sufficient priority).

75. As noted above, the Network Code must be applied so as to give meaning to both the obligation on Network Rail to apply the Decision Criteria and the obligation to conduct itself as set out in Condition D4.2.2.

76. ORR considers that this means that the circumstances in which Network Rail must consider exercising its Flexing Right (prior to allocating Train Slots in the prescribed order of priority) include not only where it cannot include all Train Slots without the resulting WTT breaching the principles in Conditions D4.2.2(a) and D4.2.2(b), but also where Network Rail cannot achieve the Objective (taking into account the Considerations) by including all requested Train Slots in the WTT.

77. In practice, Network Rail will have many interconnecting decisions to make as it compiles the WTT. It must apply the Decision Criteria (to achieve the Objective, applying the Considerations) to all decisions, taking into account the Train Slots which have been requested and the different options which are available to it in line with the above framework.
78. The Objective requires Network Rail to share capacity “*for the safe carriage of passengers and goods in the most efficient and economical manner in the overall interest of current and prospective users and providers of railway services*” (applying the Considerations). Network Rail must have a robust justification for why its decisions in compiling the WTT achieve the Objective in light of the Access Proposals made by Timetable Participants.
79. It follows from the above that ORR does not agree with the explanation of the role of the Decision Criteria set out in paragraph 8.1.1 of the Determination. ORR concludes that the Decision Criteria have a fundamental role to play in the framework for Network Rail’s decisions relating to the compilation of the WTT (as set out in Condition D4.2).

Network Rail’s entitlement to exercise its Flexing Right

80. In this case, Network Rail sought to exercise its Flexing Right (as set out in Condition D4.2.2(c)) to make a change to Train Slots requested in an Access Proposal.
81. The Flexing Right entitles Network Rail to vary Train Slots, provided certain rights are respected. As set out above, ORR considers that Network Rail must consider whether to exercise its Flexing Right (prior to allocating Train Slots in the prescribed order of priority) where it cannot achieve the Objective by including all requested Train Slots in the WTT or where it cannot do so without the WTT breaching the principles in Conditions D4.2.2(a) or D4.2.2(b).
82. It was held in the Determination that Network Rail was not entitled to exercise its Flexing Rights other than where there is a conflict between Access Proposals or with the Timetable Planning Rules⁶². It appears to ORR that two points were key to the TTP’s conclusion.

⁶² Determination, paragraph 8.1.1 – ORR notes that the Determination did not refer to other important principles contained in Condition D4.2.2, such as where there is a conflict between Access Proposals and Exercised Firm Rights.

83. The first point is that the TTP considered the Obligation to Comply in Condition D4.2.2 to constitute an “*overriding duty*”⁶³. For the reasons set out above, ORR does not agree that this is correct.
84. The second point is that it was stated in the Determination that, for the Obligation to Comply to be in any way meaningful, the Flexing Right must be intended to apply only if necessary to enable Network Rail to perform that obligation⁶⁴.
85. ORR agrees with Network Rail⁶⁵ and the determination of TTP1122⁶⁶ that the wording of Condition D4.2.2 and the relevant definitions set out in Condition D1.1.11 do not limit Network Rail’s entitlement to exercise its Flexing Right in the way set out in the Determination. Condition D4.2.2(c) does not itself limit the circumstances in which Network Rail may exercise its Flexing Right when compiling the WTT. Further, the definition of Flexing Right requires Network Rail to respect specified Exercised Firm Rights, but otherwise does not limit the circumstances in which the right may be used.
86. In the Determination it was nevertheless considered that a limitation should be implied into Condition D4.2.2(c), limiting the Flexing Right to apply only where there is a conflict, to give the Obligation to Comply meaning.
87. As a matter of contractual interpretation, ORR acknowledges that there may be circumstances where a provision needs to be implied into the Network Code, as would be the case within any such contract. However, this will not be done lightly. As a matter of law, a provision will not be implied into the Network Code unless it is necessary to give it business efficacy or such a limitation is so obvious that it goes without saying.
88. Having given detailed consideration to this issue, ORR considers that there is insufficient justification to imply the limitation set out in the Determination into Condition D4.2.2(c) and that it would be wrong to do so. We do not consider that such a limitation is necessary to give the Network Code business efficacy or that such a limitation is obvious. We note that we have not identified any wording in the provisions of Part D as a whole which would support such an implied limitation.
89. ORR does not agree with the Determination that a limitation needs to be implied into the circumstances in which Network Rail may exercise its Flexing Right to make the

⁶³ Determination, paragraph 6.4.3

⁶⁴ Determination, paragraph 6.4.2

⁶⁵ Notice of Appeal, paragraph 4.15

⁶⁶ TTP1122, paragraph 6.9

Obligation to Comply meaningful (such that it would be necessary or obvious that a term should be implied):

- As set out above, there are circumstances where Network Rail must consider whether to exercise its Flexing Right (prior to allocating Train Slots in the prescribed order of priority). However, where the Objective (taking into account the Considerations) is met by including all requested Train Slots in the WTT, and where doing so will not lead to the WTT breaching the principles in Conditions D4.2.2(a) or D4.2.2(b), Network Rail has no basis for either varying or rejecting a Train Slot. (We consider that this alone gives meaning to the Obligation to Comply.)
- Wherever Network Rail makes a decision as to how to exercise its Flexing Right, it must again apply the Decision Criteria. It does not have an unfettered discretion to make changes in any way it chooses, but must achieve the Objective (applying the Considerations).
- Unless the relevant Train Slot is a Strategic Train Slot, the Flexing Right must be exercised in a way which is consistent with the Exercised Firm Rights of the relevant Timetable Participant. These rights are protected.
- Moreover, where a Timetable Participant does not agree with the way in which Network Rail has applied the Decision Criteria in making a decision, the Timetable Participant is entitled to appeal that decision to the TTP as set out in Part D. Network Rail will be required to justify its decisions.

90. Furthermore, the Decision Criteria (which we consider must be applied to all decisions) point strongly against any such implied limitation on Network Rail's entitlement to exercise its Flexing Right. As noted above, the Objective and Considerations suggest that they will be applied generally to the compilation of the WTT, rather than only where there is a conflict. For example, the Objective includes consideration of interests of prospective users as well as current ones and the Considerations cover, for example, the improvement of an integrated system of transport⁶⁷.

91. ORR considers that the provisions of the Network Code envisage that there will be circumstances where Network Rail may not achieve the Objective by including all requested Train Slots in the WTT, even where there are no conflicts with other proposals or the Rules (or with the applicable International Freight Capacity Notice or Exercised Firm Rights). This might include where requested Train Slots would, if accepted in the WTT, give rise to a clear and substantial safety or performance

⁶⁷ Condition D4.6

concern. In such a situation, Network Rail would in the first instance be required to consider whether to exercise its Flexing Right and should only allocate Train Slots in the prescribed order of priority in Condition D4.2.2(d) (and ultimately reject one or more requested Train Slots) to the extent that it is unable to vary requested Train Slots in a manner which will achieve the Objective (and will lead to a WTT which is consistent with the principles in Conditions D4.2.2(a) and D4.2.2(b)).

92. Network Rail submitted that, if it can only make changes to the WTT where there are conflicting Access Proposals, its ability to run an efficient and effective process (as required by Condition 1.23 of its Network Licence) will be frustrated. ORR agrees that such a limitation would have a detrimental impact on the efficiency and the effectiveness of its process. However, Condition 1.23 provides that Network Rail must run an efficient and effective process and, where necessary and appropriate, initiate changes to industry processes. This means that, if Network Rail were to consider the Network Code to be ineffective, it should initiate changes to the processes set out in it. For this reason, although ORR considers that a limitation should not be implied, we do not consider that the reference to Condition 1.23 assists.
93. XCT submitted that the reference in the network licence to enabling persons providing railway services to plan their businesses with a reasonable degree of assurance, supports the position set out in the Determination⁶⁸. We do not agree that the need for a reasonable degree of assurance means that any Access Proposal must be accepted without question unless there is a conflict. The need for a reasonable degree of assurance is a commercial interest of Timetable Participants; one of the many interests that must be balanced as part of the application of the Decision Criteria⁶⁹.
94. Network Rail also submitted that if its Flexing Right could only be used where there is a conflict, this would risk the WTT growing haphazardly⁷⁰. ORR considers that there is merit in this submission. Where Timetable Participants submit Access Proposals, they are perfectly entitled to do so on the basis of their own interests. Network Rail's ability to exercise its Flexing Right to achieve the Objective, provides a mechanism by which the WTT may grow in a controlled manner, taking into account all relevant interests.
95. We acknowledge the point made by XCT⁷¹ that Condition D2.3.4(b) imposes a separate obligation on Network Rail to identify improvements to the WTT through the facilitation and coordination of dialogue. However, the existence of this provision is

⁶⁸ Response, page 2

⁶⁹ See Condition D4.6.2(f)

⁷⁰ Notice of Appeal, paragraph 4.22

⁷¹ Response, page 2

entirely consistent with Network Rail's ability to exercise its Flexing Right at a later stage, even where there is no conflict.

96. ORR concludes that the proper interpretation of Condition D4.2.2 is that Network Rail must consider whether to exercise its Flexing Right (prior to allocating Train Slots in the prescribed order of priority and, ultimately, rejecting one or more Train Slots requested in Access Proposals):
- where achieving the Objective (taking into account the Considerations) means that Network Rail cannot include all Train Slots in the WTT as requested⁷², or
 - where Network Rail cannot include all requested Train Slots in the WTT without the resulting WTT breaching the principles in Conditions D4.2.2(a) or D4.2.2(b).
97. This aligns with the wording used and ORR does not consider that a limitation should be implied. It follows that Network Rail is not limited to exercising its Flexing Right only where there is a conflict between Access Proposals or with the Timetable Planning Rules.

Overall Conclusions

98. ORR concludes that paragraph 8.1.1 of the Determination misconstrued Part D of the Network Code, both in relation to its findings on the application of the Decision Criteria and on the application of Network Rail's Flexing Right.
99. These are clearly issues of importance and ORR agrees with Network Rail that paragraph 8.1.1 of the Determination, if allowed to stand, creates a precedent which would have a significantly detrimental impact on the operation of Part D of the Network Code by limiting Network Rail's ability to vary requested Train Slots and the extent of its obligation to achieve the Objective.
100. Network Rail also appeals the inclusion of the words "*if the same were applicable*" in paragraph 8.1.2 of the Determination. ORR concludes that these words constitute a misconstruction of Part D of the Network Code. The Decision Criteria were applicable to Network Rail's decision in this matter.
101. Finally, Network Rail appeals paragraph 8.1.5 of the Determination on the basis that it is adopted to support the argument that Network Rail cannot take decisions other than where there are conflicting Access Proposals.

⁷² This would include, but would not be limited to, where there is a conflict between Access Proposals.

102. While ORR acknowledges that the paragraph was included to support this argument, the wording of paragraph 8.1.5 is that Network Rail is not entitled to reject an otherwise contractually valid Access Proposal other than in accordance with the relevant provisions of the Network Code which are in force. ORR considers that, as a standalone paragraph, this is an accurate description of the position set out in Condition D4.2 of the Network Code. For this reason, Network Rail's appeal does not succeed on this particular point.

ORR's Determination

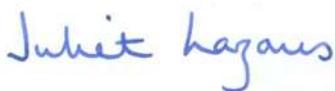
103. In light of the considerations above and having considered the Notice of Appeal and other relevant documents, ORR determines in relation to Network Rail's appeal that:

- the Determination misconstrued Part D in finding that the Decision Criteria apply only to specified decisions made by Network Rail in its compilation of the WTT, as opposed to all such decisions;
- the Determination misconstrued Part D in finding that Network Rail is entitled to exercise its Flexing Right only in circumstances where there is a conflict between Access Proposals or with the Timetable Planning Rules; and
- in relation to both issues, the Determination would, if allowed to stand, create a precedent which will have a significant detrimental impact on the operation of Part D.

104. Consequently, ORR determines that the appeal in relation to paragraphs 8.1.1 and the words "*if the same were applicable*" in paragraph 8.1.2 of the Determination succeeds, that they are wrong and should be, in effect, struck out from the Determination.

105. ORR determines that the appeal in relation to 8.1.5 of the Determination does not succeed and that this paragraph is not wrong and so stands.

106. ORR reiterates that the other paragraphs of the Determination, including the remedy which the TTP directed Network Rail to accept, were not subject to an appeal and so stand.



Juliet Lazarus

Director of Legal and Competition

Duly Authorised by the Office of Rail and Road

15 February 2018