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All those on the attached list

Dear colleagues,

ORR's criteria and procedures for the approval of track access contracts on the HS1 network- final conclusions

Purpose

1. The purpose of this letter is to inform the industry that we have today published our criteria and procedures ("C&Ps") for the approval of track access contracts on the HS1 network ("HS1") following our consultation in March 2010.¹ We also set out in this letter our response and final conclusions to the representations received to that consultation.

Background

2. During the passage of the Channel Tunnel Rail Link (Supplementary Provisions) Act 2008, the Government made a commitment that, as far as possible, the operation of the network should be subject to regulatory supervision. To effect this commitment, the Railways Infrastructure (Access and Management Regulations) 2005 ("the Regulations"), were amended in May 2009 to give us additional responsibilities concerning the economic regulation of HS1, commencing in October 2009.

3. One of the responsibilities we acquired related to the approval of terms of access by train operators to use HS1. On 15 March 2010, we consulted interested parties on our proposed criteria and procedures for the approval of framework agreements (referred to as track access contracts) for more than one timetable period on HS1.

Our consultation

4. We received ten responses to our consultation from a range of stakeholders. All respondents, who are listed at the beginning of **Annex A**, gave permission for us to publish their responses and these have been posted on our website.² We are grateful for

¹ Available at <http://www.rail-reg.gov.uk/server/show/ConWebDoc.10094>

² Available at <http://www.rail-reg.gov.uk/server/show/nav.2251>

all the helpful comments provided and the remainder of **Annex A** sets out the main points raised, our response and conclusions to those comments and any resultant changes to the C&Ps. There was general support from consultees for our proposals, but there were a number of issues that arose. These included the track access application process, the expression of access rights, consumption of capacity and the charging, performance, possessions and liabilities regimes. Although we have tried to respond to the points made by consultees in a reasonable degree of detail, we cannot deal with every individual point raised. However, I can assure consultees that all issues raised with us have been considered in finalising our conclusions and C&Ps.

The C&Ps

5. The C&Ps are now in place and available from our website³. We will expect train operators and HS1 Limited, together with any other interested parties, to follow the procedures set out when negotiating and submitting applications for access to HS1 received from this time forward. Accordingly, we would encourage any party considering seeking access to HS1 to familiarise themselves with the C&Ps before making any such application. As the C&Ps make clear (paragraph 1.4), we would also encourage any party seeking access to HS1 to discuss its plans first with HS1 Limited, as infrastructure manager.

6. It should be noted that our regulation of HS1 reflects the specific circumstances of HS1 and is not intended to create any expectation about our approach to regulation of the Great Britain national network ("GB national network"), or other networks, including any future high speed line.

7. There were no comments relating to the initial impact assessment therefore we have made no material changes. The final version is at **Annex B**.

8. If you have questions about this letter and its contents and/or the C&Ps themselves please contact Kara Johnson in the first instance at the above address or via email (kara.johnson@orr.gsi.gov.uk).

Yours sincerely



Brian Kogan

³ Available at <http://www.rail-reg.gov.uk/server/show/ConWebDoc.9850>

Responses to consultation questions and ORR's conclusions

Respondents to Consultation

- London TravelWatch ("LTW") (20 May 2010);
- Rail Freight Group ("RFG") (22 June 2010 & 6 July 2010);
- Transport Scotland ("TS") (6 July 2010);
- Eurostar International Limited ("Eurostar") (7 July 2010);
- Transport for London ("TfL") (7 July 2010);
- HS1 Limited (7 July 2010);
- Deutsche Bahn ("DB") (8 July 2010);
- DB Schenker Rail (UK) Limited ("DBS") (8 July 2010);
- Network Rail Infrastructure Limited ("Network Rail") (8 July 2010); and
- First Group plc ("First") (8 July 2010).

Chapter 2 - Background

2.14 - Consultees are asked to let us know of any aspect of the proposed C&Ps where they feel that either further clarity and explanation is required or an issue has not been covered.

Consultees' responses

1. HS1 Limited considered that it would be useful to set out the process for changing the C&Ps in the future; including which parties might be able to propose changes to the C&Ps.

2. HS1 Limited referred to paragraph 2.13 where ORR recognises that some international stakeholders may require further guidance and clarification and to paragraph 3.1 of Annex A, where it is noted that there may be a significant impact on operators outside Great Britain who have aspirations to use the network. HS1 Limited welcomed ORR's recognition of the impact on such operators and is concerned that steps are taken to minimise this impact.

ORR view & conclusion

3. We recognise HS1 Limited's point about confirming the change process and will add a paragraph to the introduction of the C&Ps. As we indicated in the introduction to the draft C&Ps, the document will be subject to ongoing review and may be revised and reissued from time to time to take account of further experience and changing circumstances. The new C&Ps will only be available via the ORR website rather than in hard copy. This will provide a convenient 'one-stop shop' for all those seeking guidance on track access and completion of the contracts in a comprehensive and transparent format.

4. Providing the document in an electronic format also enables it to be maintained and updated on a regular basis to reflect any new or revised policies and processes. This will ensure that our guidance is accurate and up to date and remains a valuable aid for the industry. We will, of course, consult on changes to policy as appropriate. We advise readers of the C&Ps to confirm via the ORR website that they are looking at the most recent edition. If an industry party considers that a change to the C&Ps is necessary, we will consider their views, consulting more widely if necessary, before making any change.

5. On HS1 Limited's second point, we would reiterate that we are very conscious that many of those needing to use the C&Ps will not be familiar with our processes and approach. We are more than happy to provide any further guidance and/or information required either in correspondence, over the phone or through meetings.

Other issues

Declaration of Specialised Infrastructure and prioritisation of services

Consultees' responses

6. RFG considered that there was an assumption that the hierarchy set out by the Declaration of Specialised Infrastructure would continue in perpetuity, thus subordinating freight users, even when no passenger services were running. It therefore raised the question as to whether ORR should review the appropriateness of this hierarchy in the first Periodic Review of HS1 in 2014, when more evidence of market development had been gathered.

7. DBS said that it had raised a number of concerns during the consultation on the declaration, which have not been addressed. It considers that these views remain valid and outlined them in its response. Briefly, it believed that:

- (a) Regulation 22 of the Regulations (which establishes the criteria for the Declaration of Specialised Infrastructure) had been misinterpreted and misapplied;
- (b) a designation of Specialised Infrastructure should only apply to parts of a network, rather than an entire network, and that the designation should create two levels of priority (specified and unspecified services), rather than the hierarchy which currently exists;
- (c) Regulation 22(3)(a) does not permit an infrastructure manager to designate particular sections of its infrastructure as Specialised Infrastructure unless suitable alternative routes for other types of rail transport service exist and are available. As the entire network has been declared as Specialised Infrastructure, the respondent contends that there are no other suitable alternative and available routes for continental freight gauge traffic.

8. DB proposed that a similar hierarchy be transposed into the framework agreements (and the HS1 Network Statement), whereby an international passenger train running a longer route is favoured over trains running a shorter route. It said that the distances should be calculated over all of the countries in which a train is running (not just the UK). DB's reason for proposing this lay in the complexities involved in organising a train over such routes involving various infrastructure managers and the associated problems of coordinating such trains with other services, both domestic and international. It suggested that such a proposal should be based on the German model, employed by DB Netz, the infrastructure provider.

ORR view and conclusion

9. We have taken the Declaration of Specialised Infrastructure as an established fact. HS1 Limited conducted a consultation process, including consulting us, in accordance with the Regulations. ORR would only have jurisdiction to review this if it was evident that the impact of the Declaration was inconsistent with the relevant legislation. If there were

competing requirements for access then, subject to the established priority order, we would expect HS1 Limited to act in a responsible manner and give due regard to ensuring that best use is being made of available capacity. We do not believe that there is an assumption, certainly not on our part, regarding the duration of the Declaration of Specialised Infrastructure. However, any decision to reconsider the Declaration of Specialised Infrastructure would be for HS1 Limited, taking into account the future development of rail markets.

Regulation of Stations and Depots

Consultees' responses

10. DB expressed concern that there would be no regulation of either station or depot facilities on HS1, which may compromise an operator planning to enter the market. DB also suggested that, by not regulating access to stations or depots, it would be extremely difficult for a new operator to gain access to such facilities.

ORR view and conclusion

11. Stations on HS1 do not fall within the scope of the access provisions contained in the Railways Act 1993 ("the Act"). By virtue of the Channel Tunnel Rail Link Act 1996, Stratford International, Ashford International, Ebbsfleet International and St Pancras International (upper level) are exempt from the access provisions of the Act. This means that we have no powers to approve access agreements for these stations. Sections 17 and 22A of the Act are not applicable, although the Regulations do apply. This means that there is still a general right of appeal to us where a party considers it has been unfairly treated or discriminated against in relation to the terms of access for the above stations. Please see our published guidance for further information on appeals under the Regulations⁴.

Chapter 3 - The process by which HS1 track access applications will be processed and considered

3.23 - Do consultees agree with our proposals to adopt the principles and approach set out above in considering applications for access to HS1?

Consultees' responses

12. Eurostar commented that in the section headed 'Track access contracts', which explains access rights, etc, it would be even better if it mentioned that for international railway undertakings (RU) the timetable must provide a seamless physical transition between Eurotunnel and HS1.

13. HS1 Limited was unclear how ORR would:

⁴ Available at <http://www.rail-reg.gov.uk/upload/pdf/275.pdf>

- (a) balance the recognition of HS1 Limited's business model, as a commercial operator, against ORR's statutory duty of putting the public interest above private commercial interests, when considering capacity allocation decisions. HS1 Limited did not consider that the public interest should be put above the commercial interests of HS1 Limited in the making of capacity allocation decisions, unless there was a method of compensating HS1 Limited, given that it is a commercial organisation with no ongoing government subsidy; and
- (b) address public interest in the context of international services, and how ORR would co-ordinate with other European regulators in decisions about capacity allocation, where such decisions would have effects beyond the UK.

14. HS1 Limited believes that the approach to the expression of access rights outlined in the ORR consultation document is not appropriate for HS1 and that access rights in new HS1 track access agreements should follow the approach in existing HS1 track access agreements, i.e. rights expressed in terms of daily quanta. HS1 Limited:

- (a) said that the example of flex provided in the consultation document (paragraphs 3.13-3.16) was not relevant for existing HS1 agreements. Rights in the extant agreements were expressed in terms of daily quanta, with no flex specified, rather than as firm rights to a path at a specific time with a defined amount of flex;
- (b) said that because HS1 is not a self-contained network it requires considerable flexibility in the way access rights are expressed;
- (c) considered that the expression of rights in terms of daily quanta gives sufficient flexibility to HS1 Limited to marry international and domestic timetable requirements. HS1 Limited pointed out that international train paths require coordination across the networks of several infrastructure managers. In accordance with Part D of the HS1 Network Code (and the Regulations), before consulting on the relevant working timetable, HS1 Limited agrees with other relevant infrastructure managers which international paths are to be included in the relevant working timetable. These international paths may only be adjusted if absolutely necessary. For domestic train paths, the timetable on HS1 needs to coordinate with the timetable on the GB national network and domestic operators are also likely to request clockface departures;
- (d) pointed out that HS1 has been declared Specialised Infrastructure (under Regulation 22 of the Regulations), the effect of which means that priority may be given to specified types of rail service in the allocation of capacity; and
- (e) considered that if a new operator was treated differently to existing operators, and was given a firm right to a train path at a specific time with a defined amount of flex, this would reduce the infrastructure manager's ability to timetable trains, and would be discriminatory inasmuch as the new operator would have superior rights to existing operators.

15. Finally, HS1 Limited pointed out that our consultation document gave conflicting information on whether consolidated contracts should be provided within 14 days or 28 days of amendments being made.

16. Network Rail was pleased that the general approach and principles proposed are closely aligned with those applied to its own network as operators may need to progress applications for both this and the GB national network simultaneously. It noted that it was ORR's intention to place all contracts concerning access to HS1 on the Public Register, in accordance with section 71(2) of the Act and sought clarification on the basis for publication, given that the Act does not apply to regulation of HS1. It was particularly concerned about the application of 71(2) (a) and (b).

17. First said that it was sensible generally to follow the UK model where appropriate because it was well tested and provided precedents.

ORR view and conclusion

18. We would expect that HS1 Limited would take into account the necessity of seamless transitions between relevant infrastructures when undertaking timetabling work. This includes taking into account any constraints based on the timetabling of services which originate from railway networks other than HS1 or the GB national network. We have made this point clear in the final C&Ps.

19. Our section 4 duties are engaged by Regulation 28(1). While we acknowledge HS1 Limited's commercial position and business model, it will be for the parties to outline their respective positions as part of the application process and to explain the commercial impact upon their respective businesses. As the C&Ps make clear, we must have regard to all of our section 4 duties, including our duty under section 4(1)(g) to enable persons providing railway services to plan the future of their businesses with a reasonable degree of assurance. This may require us to put other factors, including the public interest, above the private interests of HS1 Limited and the applicant. Our position remains that we will do so where appropriate, but we will have considerable regard to what the parties have agreed. Our decisions will be consistent with an efficient HS1 Limited making a reasonable return.

20. In terms of co-ordinating with other European regulators, we would of course expect them to be consulted as part of the application process for international services, along with other interested international organisations. We consulted a number of them as part of this exercise. It is also worth adding that we maintain regular contact with our European counterparts, so we will be well placed to raise any matters of policy or general matters of interest that may arise.

21. On the matter of the expression of rights, we should make clear that we did not approve the current contracts of Eurostar and London & South Eastern Railway Limited. One issue on which we had reservations was the expression of rights. In our letter of 30

October 2009⁵, we said “In future, we will expect Schedule 5 to be based on our model contract and any variations from it will need to be fully justified.” That statement does not mean that we shall necessarily expect HS1 Limited to sell rights with a higher degree of specification. However, we do not think that an operator should be prevented from applying for rights which are more precisely defined, and we would be prepared to consider the case for approving them. We also think that, regardless of the level of specification which we approve, the clearest way of recording the rights in the contract is to use the schedule 5 from our model contract. Using this will ensure, in future, that all rights are recorded in a uniform way, so that everyone can understand what capacity has been sold. We acknowledge that the existing model contract schedule 5 may not be entirely appropriate for HS1. For example, access rights for clockface departures could conflict with the declaration of specialised infrastructure and established international timetabling processes. We are therefore prepared to work with HS1 Limited and relevant train operators to develop a new version of the standard schedule.

22. We acknowledge HS1 Limited’s comments regarding new operators having ‘superior rights’ to existing operators and recognise that this could be deemed to be discriminatory. However, we would consider this issue on a case by case basis when deciding whether to approve such rights.

23. We confirm that consolidated contracts should be provided within 28 days of amendments being made. The final C&Ps have been updated to correct this error.

24. On Network Rail’s point about the public register, whilst it is true that section 71 of the Act does not directly apply to the regulation of HS1 by the Regulations, we believe that it is an appropriate test to apply. In any event, as the C&Ps state, we consider it appropriate to publish relevant HS1 documentation on the public register in the interests of openness and transparency. In terms of excluding information, we will have regard to the matters specified in section 71 (2) (a) and (b).

3.27 - Do consultees agree that it is appropriate to use standard access terms for applications made for HS1 based on HS1 Limited’s published framework agreements?

Consultees’ responses

25. The majority of consultees supported the use of standard access terms for access applications. Network Rail also supported the use of standard terms, but questioned the adequacy of the C&Ps and standard access terms (based on HS1 Limited’s published framework agreements) for applications for track access by non-passenger and freight train operator applicants. It also questioned the applicability of the framework agreement regime to operators of engineering trains and on-track equipment. First agreed that this was the right approach and would help to reduce disputes and

⁵ <http://www.rail-reg.gov.uk/upload/pdf/hs1-reasons-document-301009.pdf>

appeals. RFG said that the freight terms had yet to be finalised and it could not therefore comment. DBS made the same point, but added that there will be issues arising out of the ongoing discussions that may require ORR's consideration.

ORR view and conclusion

26. We are content that HS1 Limited's published framework agreements represent a reasonable basis going forward. However, we consider that there are two critical components of the way in which rights are described in future contracts. First, the expression of rights should be as clear as possible, so that everyone knows what capacity has been sold. Second, it needs to strike the right balance between a specification which provides the appropriate amount of commercial certainty for the train operator, and one which allows the necessary amount of operational flexibility for HS1 Limited. We made this point in our reasons document⁶ for our conclusions on the Eurostar and LSER agreements. We also note DBS's comments, in relation to Schedule 5 (see paragraph 42 below), that the "standard expression of freight access rights in Schedule 5 of the HS1 track access contract should mirror, as far as is possible, the expression used in the freight model contract for the national network". We are not persuaded that the Schedule 5 in HS1 Limited's published framework agreement completely achieves the necessary balance as it only contains firm rights to quantum and earliest and latest trains. For this reason we consider that Schedule 5 in future contracts should be based on ORR's own model contract Schedule 5. This is not to say that we expect HS1 Limited to sell firm rights to all the characteristics of train slots described in Schedule 5, but we do expect our model Schedule 5 to be used as a starting point. We shall want to understand the reasons for any proposed departures from it before we approve them. The C&Ps will be updated to reflect this point and we will attach the template Schedule 5 as an annex to that document.

27. More generally, as more applications are received and we gain experience, the standard terms can be reviewed and revised and we will of course always be happy to consider any suggestions for improving them. Furthermore, as stated in Chapter 6 of the C&Ps, we will always be willing to consider bespoke departures from the standard terms.

28. As noted in the consultation document, standard freight terms are still being finalised by HS1 Limited, and it is our intention to supplement the C&Ps with more information as it becomes available. In the Operator Agreement with Network Rail (CTRL) Limited, there is a deadline to resolve this issue by the end of 2010. As to the applicability of the standard terms to operators of engineering trains, we accept that they may not be appropriate. Such services, defined as Network Services in the Railways Act 1993 do not require approval under sections 17 to 22A as they are providing services on behalf of the Infrastructure Manager. There is no such "cut out" under the Regulations so some kind of Framework Agreement might be necessary. We will need to discuss this further with HS1 Limited and will update the C&Ps when we have reached a conclusion.

⁶ Available at <http://www.rail-reg.gov.uk/upload/pdf/hs1-reasons-document-301009.pdf>

3.45 - Do consultees agree that this list captures all the relevant bodies?

3.49 - Do consultees agree that the industry should be responsible for conducting most industry consultations on track access applications?

Consultees' responses

29. Respondents suggested that LTW, Passenger Focus, the European Rail Freight Association, RailNet Europe and OTIF (Intergovernmental Organisation for International Carriage by Rail) should be added to the consultation list. HS1 Limited said the list should include relevant train operators and potential train operators who have shown an interest in operating on HS1 and Ministries of Transport in countries other than Belgium and France where relevant to new international services.

30. HS1 Limited agreed and said that it would take the lead on consultations on track access applications. It also sought clarification on what would be considered 'special circumstances' as stated in paragraph 3.63 of our consultation document. Eurostar agreed with the proposition that the industry should be responsible for conducting most industry consultation on track access applications. It is very important that the arrangements for conducting consultations on track access are robust, process driven and timely in execution. LTW also recommended that the ORR sets out in more detail the nature, procedure and timescales for consultations.

31. First also agreed that this should be the default approach, but considered that it might be difficult to accurately identify interested parties, for the purposes of either agreed or disputed applications, and suggested that HS1 Limited maintain a register of interested parties. Others who commented on this agreed the approach.

32. DB suggested that ORR establishes and maintains periodic contact with both the Channel Tunnel Intergovernmental Commission (IGC) and the French rail regulator, ARAF, to ensure that there is a joined-up approach to the efficient allocation of capacity. DB also stressed the need for cooperation between HS1 Limited and international infrastructure managers such as Infrabel, DB Netz and Prorail.

ORR view and conclusion

33. It is our intention to capture the views of all existing and potentially interested and affected parties. We do not have any doubts over the inclusion of the bodies listed above, so these have been inserted into the C&Ps at the relevant paragraphs for the purposes of consultation arrangements. As already mentioned, ORR has well established contacts with other relevant regulatory bodies.

34. ORR is confident that HS1 Limited is aware of the importance of communicating effectively with other infrastructure managers, and wishes to note its support for all ongoing successful cooperation between HS1 Limited and other infrastructure managers. HS1 Limited has confirmed that it will adopt/incorporate this list into a "Register of Interested Parties" which it will use for consultations.

35. The published C&Ps now include, as an Annex, a Code of Practice (“CoP”) for consultation arrangements to the C&Ps. The CoP clarifies the process and timescales for consultation, whilst still retaining the degree of flexibility which the consultation and application process necessarily requires.

36. We consider that ‘special circumstances’ include situations where there are disputed applications for access or disputed applications for extensions of use.

3.76 - Do consultees agree that an expiry date of three months following ORR approval is reasonable and appropriate?

37. In our consultation document, we said that we would time limit our approval, giving up to three months from the date of our approval for the parties to enter into the agreement or amendment to an agreement, after which our approval would lapse.

Consultees’ responses

38. The RFG considered that three months was not enough time for operators running trains internationally to secure the relevant contracts and operational arrangements prior to the commencement of services. HS1 Limited, Eurostar and First thought that this was a reasonable time period.

ORR view and conclusion

39. We would not usually approve an agreement unless we believed the applicant had a firm intention to enter into it. Whilst it may occasionally take longer than three months for an operator to secure all the relevant contracts in order to commence services, parties have the opportunity to make representations for an extension to this three month period. Provided that the reasons for seeking an extension were adequately justified, we would consider the request accordingly.

Chapter 4 - The expression of access rights and the consumption of capacity

4.13 - Would consultees find it helpful for ORR to provide further guidance on the completion of Section 5? If so, in what respect?

Consultees’ responses

40. Eurostar’s view was that the expression of rights as set out is reasonably clear and that no further guidance should be required. However, it repeated the need to ensure that the written expression of rights on HS1 recognised the fact that international train paths also involve other infrastructure companies. In addition, there also needs to be recognition that to high-speed operators journey times are crucially important both in terms of access rights and as a delivered output.

41. HS1 Limited:

- (a) rightly pointed out that the reference in the question should have been to Schedule 5;
- (b) said that further guidance is unnecessary; and
- (c) did not understand what further standardisation is intended given that there is already a template Schedule 5.

42. DBS considered that the standard expression of freight access rights in Schedule 5 of the HS1 Limited track access contract should mirror, as far as is possible, the expression used in the freight model contract for the GB national network. It would seem perverse, in DBS's view, to have different expressions of access rights for the two networks, particularly as the same service is most likely to operate over both HS1 and the GB national network.

43. Network Rail welcomed initiatives to standardise the expression of access rights in track access contracts. First supported the guidance and in particular welcomed the statement in the document, "*The access rights set out in Schedule 5 of the standard track access contracts are the key description of what the train operator is buying from HS1*". It referred to recent suggestions that on the GB national network rights should be less well defined and that operators should rely on the Decision Criteria more - a view to which it does not subscribe.

ORR view and conclusion

44. We will keep the situation under review and if necessary propose changes after we gain experience and knowledge from applications received. Any changes made would of course be subject to consultation. It is of course still open to stakeholders to seek bespoke provisions in line with the arrangements set out in the C&Ps.

4.40 – Do consultees agree that we have captured all relevant issues?

45. Views expressed on this question are dealt with elsewhere in this document.

4.41 – Are there any areas on which further clarification would be helpful?

Disputed applications

Consultees' responses

46. First believes that the supporting information included as part of a disputed application should be made generally available, if it has a material effect on the capacity of the network involved. It cited recent examples of consequential effects on GB national network maintenance caused by the letting of capacity, which only came to light after the capacity had been allocated. It went on to suggest that the infrastructure manager should be required to show that they have adjusted their maintenance plans and that capacity is not only available to operate trains, but also to carry out any increased maintenance

requirements flowing from the letting of capacity. This is particularly important where speed and performance are a vital part of the access rights being purchased.

ORR view and conclusion

47. In line with our current practice for disputed applications on the GB national network, we will publish details of the disputed application and the determination, together with any supporting information, subject to the exclusion of any commercially sensitive and confidential aspects. We have reviewed the paragraphs in the C&Ps to make our policy on publication clearer (see paragraphs 3.85 and 3.89). On the specific issue of maintenance, we agree that the infrastructure manager should be required to show that maintenance strategies can be adapted, if necessary, to meet the increased letting of capacity. Our application forms require the provision of information on the impact the capacity being sought will have on maintenance activities (see section 4.3).

ORR's review of access policy

Consultees' responses

48. First referred to our consultation on access policy. It felt that a number of aspects of that consultation might affect these proposals and asked us to state how we anticipate the outcome of that process affecting the policy applying to HS1. More generally, it wanted to understand how policies on the wider UK network and HS1 will be kept in step going forward.

ORR view and conclusion

49. We need to keep the C&Ps under review to make sure they remain fit for purpose, remain in line with international processes and meet the changing requirements of the railways, which we always try to do. This will not change now that we are the regulator of HS1, and using the C&Ps for the GB national network as our starting point for HS1 is a good example of this. If anything comes out of our review of access policy or any other piece of work that may have an impact or effect on HS1 we will take this into account and where appropriate consult on any changes to our C&Ps. HS1 Limited is now of course part of the consultation arrangements (it was consulted on the review of access policy) for the national network so will also have an opportunity to comment and make representations if it wishes to do so.

WebTAG Guidance

Consultees' responses

50. HS1 Limited does not believe that WebTAG guidance is relevant for international passenger services and asked for clarification.

ORR view and conclusion

51. We remain of the view that WebTAG is relevant although we recognise that it may need to be augmented by additional analysis. Whenever we conduct a cost benefit analysis to compare alternative uses of capacity, we will use a transport appraisal methodology as part of our assessment that is consistent with government guidance, such as WebTAG in the case of England (including London). It is also the case that WebTAG guidance should be seen as a requirement for all projects/studies that require government approval and is a best practice guide for projects/studies that do not require government approval. We accept that there are likely to be circumstances, in particular due to the international nature of the HS1 services, where additional analysis needs to be undertaken because WebTAG does not provide sufficient support. In such circumstances where we have to deviate from WebTAG and have to make assumptions that are different from the guidance, we will highlight those differences and say why.

Track access contracts for freight operators

Consultees' responses

52. RFG, whilst recognising that ORR has a duty to ensure the efficient use of network capacity, questioned whether it was reasonable to expect freight operators to provide such stringent evidence as a prerequisite for getting access to HS1, particularly, detailing specific customer requirements, as it was considered to be more onerous than the evidence required of passenger operators. This is particularly important for the growing cross channel retail business where customer details may well change on a weekly basis.

ORR view and conclusion

53. We do not believe that the requirements on freight operators are onerous or overly stringent – they are certainly no more than those required on the national network. It is also worth noting that we do not actually specify what evidence is required, rather, we provide some examples of the sort of information that might be included.

Route Utilisation Strategy

54. Our consultation document (paragraph 4.3) states that HS1 Limited intends to publish a form of RUS similar to those in use on the GB national network, covering the year 2015 onwards.

Consultees' responses

55. RFG was concerned that any such RUS should adopt an inclusive approach in terms of the identification of potential demands for services, use transparent procedures and criteria for option generation and the evaluation of alternative decisions on capacity allocation, and only be established after full stakeholder consultation. RFG considered that

there was a risk that some freight users might be disadvantaged by any perpetuation of the hierarchy set down in the Declaration of Specialised Infrastructure.

ORR view and conclusion

56. We understand that HS1 Limited intends to produce a RUS but considers it more appropriate to develop this when the business has been sold and the new owners have acquired sufficient railway and rail customer knowledge. Although we have no formal role in its development, we would expect that the establishment of any such RUS should be carried out in full consultation and cooperation with stakeholders.

Chapter 5 - Charging, Performance, Possessions and Liabilities

5.10 - Do consultees agree that, given the commercial arrangements that apply to HS1, prepayment of charges is appropriate?

Consultees' responses

57. Several respondents considered that pre-payment of access charges would be a significant barrier to entry for smaller train operators and consequently have opposed the method of pre-payment of track access charges.

58. In TfL's view, pre-payment of access charges could be viewed as discriminatory against smaller organisations and runs counter to ORR's intention to model the C&Ps on existing practices. The RFG also invited ORR to consider how removing the need for the pre-payment of charges could be enforced without unduly restricting the growth of competitive services.

59. DBS stated that it would be opposed to the levying of charges in advance, which should instead be levied at the end of each period, and based on the number of trains operated, as is the case on the GB national network. DBS also said that it was its understanding that the proposed HS1 freight access terms will incorporate arrangements based on levying charges in arrears.

60. Whilst First understood the need to protect the credit position of HS1 Limited, it could not see any justification for making payments more than one month in advance. Requiring prospective operators to pay significant sums in advance would be a significant barrier to entry for some. Likewise, Eurostar appreciated the reasoning behind the pre-payment mechanism but questioned whether retaining the pre-payment model was necessary once a consistent flow of payments had been established, and the commitment made by an operator had been realised.

61. RFG has made numerous submissions to HS1 Limited about the composition of freight charges. Many issues are still outstanding. However, as regards the specific details of this consultation RFG had no further comments to add. It noted that HS1 is (at least presently) Government owned and that the majority of current and anticipated services will be operated by European state owned organisations, for whom cash flow is

unlikely to be a significant concern. Pre payment of access charges is therefore only likely to be a barrier to entry for smaller commercial organisations seeking to operate open access services. As such, RFG said that it would oppose the requirement to pre pay access charges. As ORR's duties include the promotion of competition, it considered that ORR will have to consider how this can be enforced without unduly restricting the growth of competitive services

62. HS1 Limited said it did not believe that it was appropriate for the C&Ps consultation to reopen matters of commercial principle (as had been done in Section 5 of the consultation). The HS1 Passenger Access Terms and Framework Track Access Agreements were developed following consultation with the industry and negotiation with the two existing operators Eurostar and LSER. ORR has stated that, had its powers been in effect it would have been prepared to approve the Eurostar and LSER agreements. HS1 Limited believes strongly that the HS1 Passenger Access Terms should apply equally to all passenger operators and that it would be inappropriate for different terms to apply to new passenger operators which could put them in a better or worse position in comparison with existing passenger operators.

63. HS1 Limited referred to paragraph 2.18 of the consultation where we noted that it was not our intention *"to seek in any way to undermine or suggest that revisions should be made to the two access contracts already extant on the HS1 network"*. HS1 Limited believes that changing the prepayment and liability arrangements for new operators but not for existing operators would so undermine these contracts. HS1 Limited also believes that different prepayment and liability arrangements for operators in the same market segment would be discriminatory and therefore contrary to the Regulations.

64. Specifically on the pre-payment method HS1 Limited did not believe that there should be any changes to it. It said that, if payments were to be made in arrears, HS1 Limited would need to raise additional working capital, in particular to finance its quarterly advanced payments to Network Rail (CTRL) Limited under the Operator Agreement. This would increase the Operation, Maintenance and Renewal Charge and cause HS1 Limited to reconsider its debt structure and seek other forms of credit protection.

ORR view and conclusion

65. We have carefully considered this issue further and believe that given the particular circumstances of HS1 Limited and its commercial arrangements that there remains justification for pre-payment of charges – we have of course previously intervened in this matter to ensure the pre-payment period was reduced from 6 months to 3 months. In coming to this conclusion, we have had regard to the points HS1 Limited has previously made:

- (a) the need to achieve credit protection for HS1 Limited– although HS1 Limited considered other options in discussion with DfT and train operators, it seemed to be generally accepted that advance payments were the most cost effective way of achieving the credit protection required;

- (b) the fact that HS1 Limited's financial strategy has been developed around prepayment in terms of its debt financing and cash flow predictions and the arrangements under sub-contracts.
- (c) HS1 Limited's obligation to make pre-payments to NR CTRL under the Operator Agreement it has in place – if payments were to be made in arrears, HS1 Limited would need to raise additional working capital (in particular, to finance its advance payment to NR(CTRL) under the Operator Agreement) which would increase OMRC; potentially reconsider its debt structure and seek other forms of credit protection.

66. However, we have noted the consultees' ongoing concerns regarding the proposed pre-payment method. We want to ensure that the pre-payment mechanism does not act as a barrier to entry for new small operators, and will monitor to see if it has this effect. We are also prepared to consider applications from new entrants containing provisions for payment in arrears, so long as the access charges paid to HS1 Limited reflect the reasonable additional costs it incurs as a result of the change.

67. HS1 Limited has explained that the situation for freight operators is not the same as for passenger operators. As a result the Freight Access Terms will provide for payment in arrears. It has argued that it is not possible to predict the number of freight trains in advance as freight operators will need to develop a market for freight on HS1. During this time, freight operators are more likely to spot bid rather than run regular timetabled trains. The intention is therefore to charge freight operators in arrears (consistent with how passenger operators are charged for spot bids).

5.27 - We are seeking the industry's views on the appropriate risk allocation for future framework agreements, including appropriate liability caps and liability arrangements contained within Part G of the HS1 Network Code.

Consultees responses

68. Several respondents were supportive of ORR considering changes to the liability cap regime and suggested that the basis for liabilities on HS1 should be no different to that on the GB national network, with liability being subject to an overall cap. Network Rail supported the consistency of the arrangements proposed with those applicable to the GB national network. However, it would wish to comment further on risk allocation issues with regard to non-passenger and freight train operator framework agreements, which are not addressed in the consultation and where different considerations may apply.

69. Eurostar said that the current risk allocation was the subject of considerable discussion and negotiation during the process of concluding its access agreement with HS1 Limited. Apart from affordability, it felt there was no reason why the risk allocation should not reflect the balance and level of liability to be found on the GB national network. Should ORR choose to revise this part of the access regime in the future, then it would expect to be able to enjoy the same risk allocation as other operators using HS1.

70. DBS believes there is no reason why the liability arrangements for HS1 framework agreements cannot broadly mirror the arrangements in place on the GB national network. It considered that, given the size of HS1 compared to the GB national network, and the small number of trains which HS1 accommodates, a minimum liability cap of £1m, as proposed by ORR, would be a reasonable approach to adopt. Finally, it considered that the liability principles adopted in respect of Part G of the HS1 Network Code, should also follow those employed on the GB national network with a presumption that the party sponsoring any changes to HS1 should be responsible for compensating those parties affected by the change less any benefit those parties may receive as a result of the change.

71. RFG supported ORR's intention to review and propose changes to the liability cap regime.

72. HS1 Limited again disagreed with the re-opening of this matter of commercial principle. Its view is that the current risk allocation for existing framework agreements, including liability caps and liability arrangements, is appropriate for future framework agreements and therefore there should be no change to the arrangements in the HS1 Passenger Access Terms and HS1 Network Code for future framework agreements. It also pointed out that as a result of ORR's earlier concerns, the liability cap was changed to the variable charge, with a minimum of £1 million (indexed) per operator. This is the liability cap that applies in the Eurostar and LSER track access agreements which ORR would have been prepared to approve had its powers been in effect. This increased the liability cap for HS1 Limited from £2m to £7m per annum. In summary, HS1 Limited said it had already accepted a much higher liability cap than that which was negotiated with the train operators and believes that a further increase above the already agreed liability levels would be unjustified.

73. First noted that a liability only arises when one party experiences a loss caused by the actions or omissions of another. It considered that capping a liability does not affect the amount that is lost and only affects those who will bear those losses. It believes where a party breaches a contract, there needs to be a good reason why a party should not bear the loss due to any breach for which it is responsible. First considered it unreasonable where the value of the contract is small, or a small business contracts to provide services to an industry with the risks of the rail industry, to expect them to bear the full losses. Furthermore, it considered that it was also reasonable to expect parties to take out adequate insurance. In conclusion they saw no good reason why liabilities on HS1 should be any different to those on the GB national network.

ORR view and conclusion

74. We stated in our consultation document that we remain convinced that the current liability regime for HS1 should achieve the principles of efficient allocation of risk, clarity of liabilities for failure to comply with access obligations and distinction between operational failures and breaches of contract. But, despite an increase in the maximum liability cap, from £2m to £7m per annum, we remained concerned that the level of the caps was too low.

75. Having reviewed the position further and listened to consultees' responses, including the arguments put forward by HS1 Limited, we have decided to leave the liability regime as it is for the time being. We are content to base our approach to setting liability caps for HS1 on that of the GB national network and evidence to date suggests the regime is fit for purpose.

76. If in time there are operators who feel that the liabilities are not appropriate to them then it is open to them to put forward alternative proposals as part of their access application. We will consider these as we would any other request for bespoke provisions in line with our policy set out in paragraph 6.2 of the C&Ps. In the longer term, we will look at the impact of the caps and, if we feel that they are acting in a perverse way, we would expect to look again at our published policy.

Other issues

Performance regime

Consultees' responses

77. Whilst acknowledging the difficulties of establishing what performance can reasonably be expected to be delivered on a new network, First noted that performance significantly affects the value of an access right to an operator. Where a network operator fails to supply the performance the operator could reasonably have expected when planning its business, or indeed an operator itself affects that performance, it is reasonable to expect their losses to be compensated by the network operator, or the train operator concerned. Equally where an operator receives performance beyond what it could reasonably have expected when purchasing the rights, it is reasonable for the increased value of those rights to be reflected in payments to the network operator. The same is true for a train operator performing above expectations. It is on this basis that we believe performance regime proposals should be judged.

ORR view and conclusion

78. We accept the points made by First but would point out that the regime is intended to incentivise train operators and HS1 Limited to improve operational performance as opposed to being a mechanism for full compensation to the affected party. Given the lack of experience of performance management on HS1, we think it is important to allow more time for the performance regime to bed in. It has been agreed with HS1 Limited that, following the first 18 months of operation, all operators will enter into revised performance regime parameters based on the experience of performance on the network. HS1 Limited is working with existing operators to ensure the performance regime is working effectively and is not producing perverse incentives or outcomes. We will be closely involved in this review.

6.27 – Do consultees agree that we have captured all the issues?

6.28 – Are there any areas on which further clarification would be helpful?

79. No additional issues raised other than those covered above.

Impact Assessment of HS1 Criteria and Procedures	
Date: October 2010	Stage: Final
PID reference: HS1 Form A	Version: 2.0

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Section 1: The issue

What is the issue?

1.1. Following an amendment made to the Regulations in May 2009, ORR has responsibilities concerning the economic regulation of HS1 which came into effect in October 2009.

Why are we intervening?

1.2. One of the new responsibilities covers terms of access by train operators to use the line. We are required to establish, implement and use a system to efficiently and transparently regulate access to the network

What is the desired outcome?

1.3. To create a fair, open, efficient and transparent method of regulating access to HS1.

When will we review the success of the intervention?

1.4. Review will be ongoing, as the processes we consult on are modified (according to consultation), adapted, implemented and used by the industry.

Section 2: The options

Option 1: Do nothing

2.1. Whilst having the most minimal material impact on all parties concerned, the 'do nothing' option is not a viable option.

2.2. We are required by the Regulations to take on regulatory functions regarding HS1 in the same way that the Railways Act 1993 requires us to perform a similar role on the GB national network.

Option 2: Criteria and Procedures

2.3. The preferred option is to produce a set of criteria and procedures for the approval of track access applications on HS1. This document will, where possible, be based on the tried and tested principles of the GB national network C&Ps.

2.4. The proposed C&Ps will be consulted on as widely as possible, incorporating both domestic and international parties, in order that all parties have the opportunity to provide their views.

2.5. Our C&Ps will be:

- clear and transparent;
- written in plain English;
- consistent in their use of language, with all terms properly defined and understood;
- as simple and as easy to follow as possible; and
- aimed at avoiding unnecessary burdens on the UK and international rail industry.

Section 3: The preferred option

Impact on stakeholders/duty holder

3.1. We expect that the impact will vary depending on the stakeholder group concerned:

- HS1 – The C&Ps document may initially have a high impact and should help HS1 Limited to comply with its general obligations such as non-discrimination. As the infrastructure manager, HS1 Limited will wish to fully review, and comment on our consultation. HS1 Limited will then be responsible for ensuring that the final criteria and procedures are adhered to when handling all applications made (or provide adequate explanations for any departures from the C&Ps). Over time, we consider that the impact will lessen as the C&Ps become more 'bedded down' and familiar to HS1 Limited. There may be small additional administrative costs incurred from the utilisation of application forms and standard template contracts.
- Domestic operators – We consider that the impact on domestic operators who are either currently using, or may aspire to use, HS1 to be positive. These operators will be familiar with the C&Ps used on the GB national network, for which the principles are largely the same.
- International operators – We consider that there may be a significant impact on operators outside of Great Britain who have aspirations to use HS1 – and potentially other parts of the national network. Most European operators will not have a comparative document to the C&Ps to govern access on their own domestic network. There may also be an issue regarding translation and understanding of the issues discussed in the consultation document, and subsequent C&Ps document. There may also be small additional administrative costs incurred from the utilisation of application forms and standard template contracts. However, the C&Ps will be particularly beneficial to new operators who would not be so familiar with the process and terms of getting access to HS1.

Impact on specific consumer groups

3.2. As follows :-

- Disability – This policy involves allocation and utilisation of track access capacity only and is disability neutral.
- Gender – This policy involves allocation and utilisation of track access capacity only and is gender neutral.
- Race – This policy involves allocation and utilisation of track access capacity only and is race neutral.
- Other - We do not consider that the impact of this policy would vary across consumer groups

Impact on health and safety

3.3. None

Impact on sustainable development

3.4. We consider that there may be a positive impact on sustainable development, as the opening up of access on HS1 to other operators will increase journeys made and routes available on HS1.

Impact on competition

3.5. There will be a positive impact on competition as a greater number of passenger (and potentially freight) operators use HS1.

Geographic impacts

3.6. This proposal will only affect HS1, and so will initially only affect the South East of England. We do, however, expect to consult all operators, irrespective of their geographic location.

Statutory duties

3.7. Our statutory duties under section 4 of the Railways Act 1993 (“the Act”) are engaged by Regulation 28(1) of the Regulations to the extent that they are relevant and consistent with the Council Directives.

Overall impact

3.8. We believe that the overall impact on the wider industry following the introduction of a C&Ps document will be minimal. Owing to preliminary meetings with the infrastructure manager, and the familiarity of domestic operators with our GB national network C&Ps, we believe the impact and potential burden on these two groups will be minimal. The only significant impact might be felt by international operators who wish to respond on our consultation with a view to commencing operations on HS1.

Conclusion

3.9. We are obliged by the Regulations to introduce a system whereby access to HS1 is regulated. We believe that the approach we are taking is open and transparent, fair

and robust, and is consistent with our duties under the Regulations. The primary benefit to the industry is the assurance that access to HS1 will be considered in a fair and open manner, with due regard to the governing legislation.