

THE OFFICE OF RAIL REGULATION'S REASONS FOR ITS CONCLUSIONS ON THE FRAMEWORK AGREEMENTS BETWEEN HS1 LIMITED AND EUROSTAR UK LIMITED AND BETWEEN HS1 LIMITED AND LONDON & SOUTH EASTERN RAILWAY LIMITED FOR PASSENGER SERVICES ON HIGH SPEED 1 TOGETHER WITH THE PROPOSED NETWORK CODE

Introduction

1. High Speed 1 Limited (HS1 Limited) consulted us on its proposed access contracts and associated documents when it consulted other stakeholders. Following our review of the documents, we identified a number of concerns, which we discussed at length with HS1 Limited. Many (but not all) of these coincided with those expressed by industry consultees.
2. On 14 August 2009 we wrote to the Department for Transport (DfT), confirming that if our powers concerning approval of these agreements had been in effect, and if Eurostar UK Limited (EUKL) and London and South Eastern Railway Limited (LSER) were content to enter into the agreements, we would have been prepared to approve them.
3. We have recently consulted on our approach to the regulation of High Speed (HS1) through a draft regulatory statement¹ and will very shortly publish the final version. It is to this regulatory statement that people should refer to understand this office's approach to carrying out our economic regulation functions concerning HS1 – the purpose of this reasons document is solely to explain our reasons for reaching our conclusions on the draft documentation provided to us and the main changes which have been made subsequently.

The process

4. On 19 June, as part of an industry wide consultation, we received a suite of documentation from HS1 Limited relating to the arrangements it proposed to put in place in relation to:
 - (a) *commercial and regulatory* matters, setting out the key principles and main changes to the current HS1 Network Statement, the structure and level of access charges, the proposed performance regime and the proposed regulatory framework, including ORR's future role;
 - (b) *operational* matters relating to the proposed terms and conditions for gaining access to HS1 and the Network Code;
 - (c) *dispute resolution*; and
 - (d) the proposed *framework track access agreements* with EUKL and LSER.

¹ http://www.rail-reg.gov.uk/upload/pdf/cons-reg_HS1.pdf.

A list of the documentation forming part of this consultation, together with the final agreed versions can be found at Annex A and copies are available from HS1 Limited's website².

Our statutory position

5. Our functions concerning approval of framework agreements for HS1 under the Railways (Infrastructure and Asset Management) Regulations 2005 as amended in 2009 came into effect on 1 October 2009, so the parties did not need our approval to enter into these contracts. Nevertheless, given our future role, HS1 Limited and DfT asked us to confirm whether we would have been prepared to approve these agreements (and the Network Code) had our role been in effect.

6. Our letter of 14 August³ noted that this confirmation:

“cannot fetter our discretion in relation to the future exercise of our functions: any individual decision, for instance on the approval of new or amended framework agreements or an appeal under the regulations, will have to be made in the light of all the relevant facts and circumstances at the time and our duties under the regulations (including, by virtue of regulation 28(1), our duties under s.4 of the Railways Act 1993).”

We also said that:

“In order to inform our future decisions, we will monitor whether the framework agreements are fairly balanced between HS1 Limited and the train operators, provide appropriate incentives, and are leading to desired outcomes in terms of capacity consumption, performance, levels of service disruption, etc.”

7. It is against this background that we reviewed the HS1 documentation.

Our review of the documentation

8. We arrived at our conclusions following a detailed consideration of all the relevant documentation, including reviewing the representations received by HS1 Limited in response to their letter of 19 June (list of consultees at Annex B), as well as extensive dialogue with both HS1 Limited and DfT and their respective legal teams. We also engaged directly with EUKL and LSER about their respective framework agreements.

9. It is fair to say that we had numerous detailed points on the documentation. In the light of subsequent discussion with HS1 Limited and DfT, and HS1 Limited's own parallel discussions with stakeholders, most of these were amended, corrected or deleted. Our review also identified a number of minor errors, which were also corrected. It is not the purpose of this reasons document to detail these changes. This document only deals with those issues which we considered would:

² <http://www.highspeed1.com/information/>

³ <http://www.rail-reg.gov.uk/upload/pdf/hs1-140809.PDF>

- (a) without resolution, result in ORR being unable to provide the prior-approval comfort that HS1 Limited wanted before it entered into the framework agreements;
- (b) significantly impact upon the regulation of HS1; and/or
- (c) have a material or significant impact upon other stakeholders.

10. In particular, we had concerns about the balance of the contractual arrangements which we felt were unduly weighted in favour of HS1 Limited, the monopoly infrastructure provider, and against the operators. We were also concerned that they contained a number of self modifying provisions. ORR has introduced model clauses for inclusion in access contracts using its powers under section 21 of the Railways Act 1993 (as amended). The reason for doing so was to ensure that there is a sound, straightforward basis to support a fair, equitable and transparent relationship between the parties. This includes ensuring the appropriate allocation of risk through incentives and the encouragement of a culture of compliance and delivery.

11. The particular areas of concern described in this reasons document relate to:

- (a) Schedule 5 of the framework agreements;
- (b) restrictions of use and the possessions regime;
- (c) liabilities regime;
- (d) track access charges;
- (e) periodic review arrangements;
- (f) performance regime; and
- (g) Network Code, in particular:
 - (i) Part C - code change arrangements, particularly the exclusion of any provision for ORR to propose changes;
 - (ii) Part E - environmental provisions;
 - (iii) Part I - dispute resolution arrangements; and
 - (iv) Part J - changes to access rights.

12. For ease of reference, we have set out our comments/reasoning on these issues against the individual documents.

Template Framework Agreement

13. Our main concerns with this document and the specific EUKL and LSER framework agreements related to Schedule 5 which contains details of the rights to the services that the operator is entitled to run. This was because we considered that the way in which the access rights were expressed had the potential for disputes and/ or uncertainty to arise over what capacity was being sold.

14. One of the major benefits of the model contract is having a standardised form of Schedule 5 which is understood by all train operators and makes it clear what capacity has been sold. However, whilst both the EUKL and the LSER framework agreements were loosely based on the model contract Schedule 5,

they were very different from each other and, in our view, had a number of shortcomings which are explained below. 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. A more detailed explanation of Schedule 5 and how it works can be found in Chapter 8 of our C&Ps document.

EUKL Framework Agreement

15. We had a number of specific concerns with Schedule 5, which are explained below.

Quantum of train slots

16. The proposed drafting relating to changes in quantum around bank holidays, additional quantum for ski services and additional quantum for summer services to Avignon was imprecise and would have required HS1 Limited to reserve far more capacity than the number of additional services which EUKL would have rights to run. HS1 Limited accepted our advice and provided more precise drafting which did not unnecessarily reserve capacity while retaining some necessary flexibility for EUKL.

Firm rights to connect with services through the tunnel

17. The proposed Schedule 5 contained firm rights for each of EUKL's train slots to be scheduled so as to connect at the Eurotunnel Boundary with a train slot to/from the Eurotunnel Boundary through the Channel Tunnel so that it forms part of an international train path. This was in addition to the general timetable coordination provision in Section 3 Paragraph 5 of the draft Passenger Access Terms. We noted that LSER's proposed Schedule 5 had no such provision. Our concern was that the times of EUKL's trains on HS1 could be dictated by the timetable through the tunnel and non-international services would have to fit around them. After discussions on this point, HS1 Limited deleted this provision from the final version of the contract. We are satisfied that the general timetable coordination provision (originally in the draft Passenger Access Terms but subsequently moved to Part D of the Network Code) is sufficient to align train slots on HS1 with those through the tunnel or on Network Rail's network.

Earliest and latest firm train slots

18. We questioned why the rights to the first train on certain days were earlier than Eurostar's existing timetabled services and rights to the last train of the day in some cases were later than Eurostar's existing services. HS1 Limited confirmed that although Eurostar did not currently run services at these times, HS1 Limited would be content to accommodate bids for services at those times as the route would be open.

Turnaround times

19. This provision purportedly gives Eurostar a firm right to a turnaround time of no less than 55 minutes at St Pancras – but it goes on to say that if HS1 Limited reasonably considers that another time is necessary and that other time is sufficient to meet the reasonable turnaround requirements of an international train operator, the parties shall negotiate how to fulfil the reasonable requirements of the train operator.

20. We had two concerns with this provision. First, the second part of the provision effectively undoes the firm right which the provision purports to give EUKL and secondly, the provision did not set out what happened if the parties could not agree a revised minimum turnaround time.

21. ORR's view is that minimum turnaround times should be left to the Rules of the Plan (RotP) unless there is a very good reason to have a specific time in the contract. Under the HS1 network code, EUKL can bid for a turnaround time different from that in the (RotP) and HS1 Limited should give it unless it has a very good reason for not doing so which is supported by the decision criteria. We therefore considered this provision was unnecessary and suggested deleting it.

22. Following discussions with EUKL, HS1 Limited said that the parties did not want to delete the provision but agreed to add some drafting so that, if the parties did not reach agreement on a revised turnaround time, then the time in the RotP would prevail. Whilst we still consider this provision unnecessary, as the turnaround time in the RotP will prevail if necessary, we did not have a strong objection to its retention.

Platform rights

23. The draft contained firm rights for EUKL's trains to be scheduled so that arriving and departing services would not use the same island platform. We questioned this as it implied that a train should not be scheduled to arrive and later depart from the same platform. HS1 Limited explained that this was meant to reflect the security requirements at St Pancras which prevented different trains arriving and departing from the same island platform at the same time. The provision was amended to say that trains would be scheduled in a manner consistent with the security requirements.

Station Calls

24. We questioned why there were no rights for EUKL to call at the intermediate stations on HS1. HS1 Limited said that the "permission to use" in Section 3, paragraph 1.2(g) of the Passenger Access Terms included permission to call at any station for which the train operator either had a station access agreement or was the station facility owner. While we agreed that this provision would give EUKL permission to call at the intermediate stations, it certainly did not give it firm rights to do so. We advised that if EUKL wanted firm rights then they should be included in Schedule 5 which is where all the rights to services are specified. For clarity we also suggested that even contingent rights should be included in Schedule 5. The final version was amended to include firm rights for EUKL to call at St Pancras and Ebbsfleet International.

LSER Framework Agreement

25. This document raised similar issues in relation to Schedule 5 to those on the EUKL agreement.

Expiry Date

26. The expiry date was defined as the earlier of the expiry date or termination date of the franchise agreement, unless replaced by another franchise agreement. It did not specify what the expiry date would be if the

franchise agreement was replaced by another franchise agreement, so would potentially have been open ended. In our view this was not consistent with the provisions relating to the duration of framework agreements in the Access and Management Regulations or our LTAC policy. The Expiry Date was amended to the earlier of 31 December 2014 and 6 months after the expiry date of the franchise agreement which is in accordance with our policy of approving access contracts with a reasonable overhang after the end of a franchise agreement.

Earliest and latest train slots

27. The proposed framework agreement set out the times of the Total Operating Day 0600 – 2330 then set out a complex series of exceptions which disapplied these times in nearly every instance. It was also unclear why LSER was limited to a certain number of trains during these extended times. We suggested that the rights to earliest and latest trains could be simplified along the lines of our model contract, as had been used in the EUKL agreement. Our suggestions were accepted and revised provisions were inserted into the final version of the agreement.

Turnaround times

28. The contract states that the turnaround times at St Pancras should be no less than 7 minutes in the morning peak and no less than 10 minutes in the off-peak, or as agreed from time to time in accordance with the RotR/RotP. Our view was that minimum turnaround times should be left to the RotP unless there is a very good reason to have a different time in the contract. As the last part of this provision refers to the RotR/RotP, we considered it unnecessary and recommended that it be deleted.

29. The parties decided to delete the provision.

Platform Rights

30. We questioned why LSER required firm rights to certain platforms at St Pancras, Ebbsfleet and Stratford. Our policy is that platforming should be left to the Decision Criteria unless there are exceptional reasons for a train operator to have firm rights to use specific platforms. In practice, these are the only platforms that could be used so there is no need for firm rights. These rights were removed from the final version of the agreement.

Station Calls

31. As with EUKL we questioned why there were no rights for LSER to call at the intermediate stations on HS1. For the same reasons discussed above, the final version was amended to include firm rights for LSER to call at St Pancras International, Ebbsfleet International and Stratford International.

Passenger Access Terms

32. We had a number of detailed points on this document.

Section 3 – operational provisions

33. We did not understand why the “permission to use the routes” provisions in paragraph 1.1 and the stabling provisions in paragraph 1.4 of the draft Terms had been changed from the equivalent in clauses 5.1 and 5.8 respectively of

our model contract. Following discussions on these points, the parties agreed to use the provisions in the model contract.

34. Paragraph 5.1 of the draft Terms contained provisions relating to the coordination of the timetable for services on HS1 with the services through the tunnel or on Network Rail's network. We suggested that these provisions would sit better in Part D of the Network Code and they were subsequently moved there.

35. Paragraph 6 of the draft Terms related to the agreement of changes to the agreement in connection with the Olympic Games. Our concern was that this provision did not provide for what happened in the event that the parties could not reach agreement. The final agreement includes a provision for such a dispute to be referred to the disputes resolution procedure and the outcome to be binding on the parties.

Section 4 - restrictions of use

36. We were concerned that the proposed possessions regime would not provide adequate incentives for HS1 Limited to minimise possessions and to notify train operators early of any possessions they wanted to take. We sought further information from HS1 Limited as to what mechanisms are in place to ensure possessions are minimised. We were content that the Rules of the Route process provided an incentive for HS1 Limited to notify possessions early. We were also content that the revenue that HS1 Limited would receive from operating additional services would provide an additional financial incentive to minimise possessions.

37. We were also concerned that the proposed possessions regime maintained the distinction between Part G (network change) restrictions of use and other possessions. This distinction had created problems on the national network. For example, until recently, Network Rail was alleged to have a disincentive to enhance the network as possessions compensation was higher under Part G. Given that it is unlikely that enhancements will be made to the network in the first control period we were content to leave the proposed provisions but will monitor the impact going forwards.

38. We will monitor the operation of the possessions regime in the first control period and, should issues arise, we will consider amending the regime as part of the next periodic review.

Section 5 – liability

39. We had a number of concerns with the proposed liability regime, which included low caps and did not compensate operators for loss of revenue arising from breaches of the agreement. We consider that liability caps should not be set at a level that might be readily reached. We were concerned that these caps had been set solely with a view to restricting risk for HS1 Limited, with little regard to the value of the contract, or to the commercial effect on train operators of HS1 Limited breaching the contract. Whilst we acknowledged that Network Rail's business model is different from that of HS1 Limited, particularly in relation to its government guarantee and ability to spread risks across operators, we did believe that our approach to setting the liability caps for Network Rail offered insights for setting liability caps for HS1 Limited.

40. The work on liability caps for Network Rail is described in the passenger contract model clauses final policy conclusions and final conclusions⁴. As part of the development of these conclusions we employed consultants PriceWaterhouseCoopers to undertake some research into liability caps in contracts. The key conclusions of this work were that:

- it is standard practice to cap liability at the value of the contract;
- while the value of the contract may be put in different ways (profit, turnover) it is generally turnover that is used to determine the value of the contract.

41. For Network Rail we determined the value of the contract to be the track access charges and in particular the variable charge, as it is this that is the revenue at risk if services do not operate. Based on the experience of claims after Hatfield we considered that a liability cap of three times the variable charge was appropriate, subject to a minimum cap of £10m. For freight and open access operators the minimum cap is set at £5m. We also introduced a minimum cap of £5m for smaller operators.

42. We consider that the liability cap for HS1 Limited should be based on the revenue at risk. The revenue at risk for HS1 Limited can be defined in a number of ways. For example it could be defined broadly as the total revenue that HS1 Limited receives from each contract. However, even if the operator was not present, HS1 Limited would still receive much of this income, for example common costs are simply apportioned across operators. Revenue at risk could therefore be defined as the avoidable costs of not operating the service, or more narrowly the variable charge from the service. If we use variable costs as an indication of the revenue at risk this gives a total cap of around £8m per year for HS1 Limited. We considered that setting caps equal to the variable charge should be the minimum cap that we should be prepared to approve.

43. Variable costs vary across operators and would not provide an appropriate cap for small operators. On Network Rail's network we have a minimum cap of £5m, however we would not expect variable charges and so the cap for nearly all operators on HS1 to reach this level. For connection agreements we have a minimum liability cap of £1m. Given that connection agreements cover very small parts of the network we would expect the minimum cap on HS1 Limited to be at least this level. We therefore considered that the minimum liability cap for HS1 Limited that we should be prepared to approve should be £1m.

44. We also considered whether it was appropriate that any liability claims should, as proposed by HS1 Limited, exclude loss of profit, loss of revenue and consequential losses. We considered that liability claims should include these losses and appropriate provisions were included in the passenger access terms.

45. We will consider further whether the proposed liability caps set at the variable charge with a minimum cap of £1m are appropriate to HS1 Limited.

⁴ These documents can be accessed at: <http://www.rail-reg.gov.uk/upload/pdf/158.pdf> and <http://www.rail-reg.gov.uk/upload/pdf/171.pdf>

As we explain in paragraph 43 of our regulatory statement, we expect to set out and consult on the type of liability caps we would approve for contracts on HS1 in our criteria and procedures for HS1 (see paragraph 79 below). Any change would not affect the caps in existing contracts, but could affect the caps we would be prepared to approve in future.

Section 7 – track access charges

46. We had a number of concerns regarding the track access charging provisions:

- Some provisions appeared to allow HS1 Limited to levy charges without ORR approval;
- The notification period required by HS1 Limited so as not to levy a capacity reservation charge appeared excessive at four timetable periods;
- The wash-up provisions were not formulaic and as drafted could have been interpreted to require train operators to pay charges even though they were unable to operate services through no fault of their own; and
- The scope of the access charges review provisions was insufficient.

47. The proposed track access charge provisions allowed HS1 Limited to levy further investment recovery charges, additional OMRC charges resulting from a Network Change and Congestion Tariff without ORR approval. We did not consider that this would provide sufficient protection to train operators. HS1 Limited therefore amended the contract so that these charges required ORR approval.

48. The proposed provisions required train operators to provide HS1 Limited with four timetable periods of notice to avoid the capacity reservation charge. We considered that this was excessive and would impose significant costs to operators who were seeking to reduce service levels. Following discussions, HS1 Limited agreed to reduce the notice period required to avoid the capacity reservation charge to the timetable year after the year in which the notice was given, i.e. two years at most. HS1 Limited also included provisions to ensure that the capacity reservation charge would not be levied if the service could not be operated through no fault of the train operator.

49. The wash-up provisions allow HS1 Limited to recover its costs should traffic and, for pass through costs, costs differ from that forecast. We were concerned that the proposed provisions could be subject to different interpretations. We therefore asked HS1 Limited to alter the provisions so that they became formulaic. HS1 Limited has also adjusted the wash-up for OMRC A1, variable charges, so that it does not collect charges where a service does not operate due to a cancellation attributed to HS1 Limited. The wash-up for pass through costs has also been amended to ensure that any change to charges requires ORR approval.

50. The proposed periodic review provision only allowed the level of OMRC A and OMRC B (the directly incurred and long term costs) to be

amended through a periodic review. The provision also gave no time period for a periodic review or mechanism for an interim review.

51. As the future regulator of High Speed 1, we considered it important that the re-opener provisions were sufficiently broad, to enable us to ensure contractual incentives are working correctly. The periodic review is the only opportunity to change all contracts at once and would help to ensure that changes to contracts would not be discriminatory. On the time period for the periodic review, although this is dealt with in the concession agreement it is important that these terms were reflected in the contract as well to provide protection to operators.

52. The concession agreement contains detailed provisions in respect of periodic reviews and changes were made to access contracts to align these provisions. It was agreed that the periodic review provisions in the contract would cover:

- (a) all elements of operating, maintenance and renewal costs (directly incurred, long term costs and pass through costs (including the decision on the elements to be included in pass through costs);
- (b) indexation of operating maintenance and renewal costs (including input price inflation assumptions);
- (c) wash-up provisions for operating, maintenance and renewal costs;
- (d) review event provisions for adjusting operating maintenance and renewal costs;
- (e) provisions relating to carbon reduction commitment costs;
- (f) provisions relating to freight supplement;
- (g) all elements of possessions regime (excluding cap); and
- (h) all elements of performance regime (excluding cap)

53. In addition, as train operators do not have rights under the concession agreement, the access contracts set out key aspects of the procedure that must be followed by ORR if an access charges review is to be implemented including consulting operators on its process and any changes to the contract.

54. In addition to the changes that we proposed, HS1 Limited has introduced provisions to allow a new charge for Carbon Cost which would recover a fair and equitable element of the costs relating of carbon reduction commitments from the Climate Change Act 2008. We were content to approve this as it provided for us to approve any charge.

55. We continue to have concerns regarding the requirement for train operators to pay parts of the track access charges (IRC, OMRC and Capacity Reservation Charge) around three months in advance. We will consider this issue further and would expect to set out and consult on our view on the type of payment arrangements we would approve for future contracts on HS1 in our criteria and procedures for HS1 (see paragraph 79 below).

Section 8 – performance regime

56. The performance regime is somewhat different to that on Network Rail's network in that it does not intend to provide full compensation for performance

as this was considered to place too high a risk exposure on HS1 Limited. Instead HS1 Limited will make payments when delay minutes exceed a very poor performance threshold and will receive a bonus when delay minutes are below a further very good performance threshold.

57. In addition instead of a TOC on self provision (where train operators pay compensation based on the delays they cause to themselves) it is a TOC on TOC regime (where train operators pay compensation based on the delays they cause to others). This is similar to the freight regime on the mainline network.

58. We had three main areas of concern with the arrangements: First, that the cap on payments was too low to ensure adequate incentives to improve performance and secondly, that the lack of a TOC on TOC benchmark for performance may distort incentives; and thirdly, the uncertainty around the modelled thresholds.

59. HS1 Limited originally proposed a cap on performance payments paid by HS1 Limited at 1.5% of IRC/OMRC or £500,000, with HS1 Limited bonuses will be capped at 25% of the cap. We were concerned that the cap appeared low and it may not effectively incentivise HS1 Limited to improve performance. HS1 Limited agreed to increase the cap to 3% of IRC/OMRC from March 2012 onwards.

60. The proposed performance regime did not include TOC on TOC benchmarks and so payments would be made for all TOC on TOC delays. This would mean that compensation would be payable even for an expected level of delay increasing money flows and the costs of operating on the network. This may particularly benefit operators with high compensation rates. HS1 Limited has introduced a TOC on TOC benchmark to ensure payments are only made for performance below benchmark.

61. The performance regime has been calibrated based on modelling results. Some comments were received at the workshop about whether the chosen parameters are correct. Given the uncertainty we considered, and HS1 Limited agreed, that, after 18 months of operation it was important that there is a wash-up mechanism which requires all operators to enter into revised parameters after 18 months of operation based on the experience of performance on the route. We have also ensured that the performance regime, other than the cap, is subject to the periodic review.

62. HS1 Limited, at our request, has also revised the drafting of Part 2: Paragraph 3 to clarify the way in which payments are adjusted in the event of a cap being met.

Section 9 - Miscellaneous

63. Paragraph 5.2 deals with amendment of the contract. Under the proposed version HS1 Limited had limited ORR's role in approving amendments to an extent we considered unjustified. Following discussion with HS1 Limited this paragraph was amended so that, other than in very limited circumstances such as changes to communication details, modifications expressly contemplated by the Schedules or modifications effected in accordance with the HS1 network code, no amendment of any provision of the contract shall take effect unless it has been approved by ORR.

64. Paragraph 5.7 deals with the application of the Contracts (Rights of Third Parties) Act 1999. HS1 Limited had proposed to exclude the express provision which provides that ORR shall have the right under the Contracts (Rights of Third Parties) Act 1999 to enforce directly such rights as have been granted to it under the contract. Following discussions, HS1 Limited agreed to reinstate this provision.

Network Code

65. We again had numerous detailed points on the Network Code, but as with the other documentation, these were subsequently amended, corrected or deleted in the light of discussions with HS1 Limited and DfT. Nevertheless, we did have a number of significant concerns with the proposed Network Code, which we felt did not achieve a proper balance between the interests of the parties and in our view lacked transparency. These related in the main to Parts C, E, F, G, I and J and are dealt with below.

Part C – modifications

66. Under the proposed Part C, ORR had no right to either make a proposal for change for consideration by all affected parties or to make modifications to the HS1 Network Code. Our role in approving changes to the Network Code was also heavily fettered. Given our future regulatory in respect of the approval of framework agreements, in particular, we considered that it was essential that there were mechanisms, similar to those in the Network Code for the national network. This is to ensure that we can make or propose changes if we feel they are reasonably required and where, without such a modification, either:

- (a) the interests of any affected parties would be unfairly prejudiced; or
- (b) our regulatory function would be fettered and we would not be able to fulfil our statutory duties.

67. Following this the code was amended to enable ORR to require modifications where we consider these are reasonably required provided that, among other things, such modifications do not prejudice the ability of HS1 Limited to perform its obligations under the Concession Agreement or otherwise unduly harm the financial position of HS1 Limited. ORR's role in approving changes to the Network Code proposed by HS1 Limited or a train operator is subject to the same conditions.

Part E – environmental protection

68. As initially drafted, the proposed Part E obliged operators to develop and comply with an Environmental Policy that was consistent with HS1 Limited's Environmental Policy and so placed greater environmental obligations on the operators. In addition, only HS1 Limited was entitled to propose an Environmental Requirements Change and as part of the approval process, there was no provision for ORR to reject a proposal. This fettered our discretion in that proposed approval process.

69. HS1 Limited revised Part E to take account of our comments. In particular the code now provides that train operators develop an Environmental Policy that has due regard to the Environmental Policy produced by HS1 Limited and to good industry practice rather than requiring consistency with HS1 Limited's policy.

Part F – vehicle change & Part G – network change

70. Both the proposed Parts F & G provided that any preliminary estimates by HS1 Limited of the likely impact of a Vehicle or Network Change would be non-binding. We were concerned that this would place an unfair burden on train operators to take responsibility for assessing the impact of any proposed changes. Furthermore, both parts provided that any preliminary response to a proposed Vehicle or Network Change would not be binding on HS1 Limited but that it would be binding on train operators, unless they indicated otherwise. We were of the view that this was unreasonable and that HS1 Limited should take responsibility and also provide for its preliminary response to be binding on it, unless it indicated otherwise. HS1 Limited accepted our advice and amended Parts F & G accordingly.

71. We were concerned about HS1 Limited's proposals to exclude compensation for loss of revenue under both Parts F & G as this was inconsistent with the position under the Network Code and appeared to skew the balance of risks and responsibilities under the contract in favour of HS1 Limited. We discussed our concerns with HS1 Limited. HS1 Limited was concerned about its unlimited liability under Parts F and G. Given this concern we were content to leave the compensation provisions as drafted but will monitor the impact of these provisions in the first control period.

Part I – dispute resolution

72. HS1 Limited acknowledged that the Dispute Resolution Procedure needed to be reviewed. Part I of the HS1 Network Code contains specific provision for HS1 Limited and relevant train operators to work together to undertake such a review with a view to agreeing by 1 December 2009 (or later if the parties agree) whether any amendments should be made.

73. ORR was concerned that there was no mechanism for ensuring this important issue was resolved if agreement was not reached between the parties. HS1 Limited therefore agreed to include a provision stating that in the event that the parties have not by 31 March 2010 agreed a revised disputes resolution procedure, ORR will be entitled to require HS1 Limited to make a proposal for change under Part C. The purpose of this proposal would be to implement a revised disputes resolution procedure which satisfies the criteria specified in Part I in new condition I3.3.

Part J – changes to access rights

74. The proposed Part J provided HS1 Limited with a number of provisions that appeared to entitle it to act unilaterally with limited protections for train operators. It provided no mechanism for the train operator to seek to retain its rights or for negotiating and agreeing the surrender of rights or any form of recourse to a dispute mechanism. In particular, Part J as originally drafted, provided HS1 Limited with:

- (a) sole discretion to give notice to a train operator requiring it to refrain from submitting Bids or exercising rights for some or all of the Unused Capacity for the remainder of the term of the agreement.; and
- (b) an entitlement to serve a failure to use notice on a train operator when HS1 Limited considers that certain conditions were met.

75. HS1 Limited accepted our views and revised Part J to provide criteria against which a train operator could argue an ongoing reasonable need for its access rights and to make clear that it would act reasonably.

76. The proposed Part J also contained a condition J3 which would apply in circumstances where the HS1 infrastructure had been declared congested. This provided, among other things for the suspension of firm rights held by a train operator which could not be exercised owing to the infrastructure being congested. We were concerned by the potential effect of this condition, which HS1 Limited explained was intended to protect them from any breach or default where HS1 Limited is unable to satisfy any bids under Part D. We required this condition to be deleted and replaced with language which explained that, in the event of the infrastructure becoming congested, HS1 Limited and the train operator will work together to make any such amendments to the HS1 Network Code as are required in the circumstances.

Railway Systems Code

77. Although we were slightly surprised that the Aims, in Section 2, did not include some overarching phrases about promoting safety, value, efficiency, good customer information, etc. as well as the more specific systems issues that are covered, we were content with the document.

Performance Data Accuracy Code

78. We had no comments on this document, which clearly built upon the lessons learned from the Railtrack/Network Rail PDAC and came across as a good document. The Review processes in Section 7, including report publishing, are particularly welcome and we have asked HS1 Limited to provide us with copies of these reports, at least to start with.

Next Steps

79. As the Regulatory Statement reflects, HS1 is different from the national rail network, and it is likely that some aspects of our published approval criteria may not be appropriate to HS1. Therefore, we will consult on our criteria and procedures for the approval of framework agreements on High Speed 1, aiming to come to conclusions by the end of January 2010. We will be seeking consultees' views on, among other matters, the appropriate risk allocation for future framework agreements, including appropriate liability caps, liability arrangements contained within Part G of the network code, and the appropriateness of prepayment of charges, where the approach taken in the EUKL and LSER agreements differs from our approach on the national network.

Office of Rail Regulation

30 October 2009

Documentation forming part of this consultation

- (i) Proposed HS1 Network Statement (June 2009 consultation version)
- (ii) Template Passenger Framework Track Access Agreement (June 2009 version)
- (iii) The Passenger Access Terms (June 2009 version)
- (iv) Template Freight Framework Track Access Agreement (June 2009 version)
- (v) The Freight Access Terms (June 2009 version)
- (vi) HS1 Network Code (June 2009 version)
- (vii) Comparison of HS1 Network Code (October 2008 consultation version against June 2009 version)
- (viii) HS1 Emergency Access Code (June 2009 version)
- (ix) Comparison of HS1 Emergency Access Code (October 2008 consultation version against June 2009 version)
- (x) HS1 Performance Data Accuracy Code (June 2009 version)
- (xi) Comparison of HS1 Performance Data Accuracy Code (October 2008 consultation version against June 2009 version)
- (xii) HS1 Railway Systems Code (June 2009 version)
- (xiii) Comparison of HS1 Railway Systems Code (October 2008 consultation version against June 2009 version)
- (xiv) Disputes Resolution Agreement (including Deed of Accession)
- (xv) Revised DRA Deed
- (xvi) EUKL Framework Track Access Agreement
- (xvii) LSER Framework Track Access Agreement

Consultees responding to HS1 Limited's letter of 19 June

BLS

DB Schenker

EUKL

LSER

National Express

Network Rail

RfG

Stephenson Harwood

TfL

Veolia