

**Review of Part J (changes to access rights)
of the Network Code – A consultation
document**

December 2010

Contents

Executive summary	1
1. Introduction	3
Purpose	3
Background	3
Current Part J	4
Reasons for and scope of review	4
Regulatory Approach	6
Structure of document	7
Responses	8
Next Steps	9
2. Consultation issues – by condition.....	10
Introduction.....	10
Condition J1.....	10
Condition J2 – voluntary surrender and adjustment of access rights & Condition J3 – confidentiality	10
Condition J4 – failure to use (application by Network Rail).....	11
Condition J5 – failure to use (third party application).....	15
Condition J6 – reduction of cordon caps (failure to use).....	16
Condition J7 – freight transfer mechanism	17
Condition J8 – adjustment of cordon caps (freight transfer mechanism)	22
Condition J9 – access rights review meetings.....	22
Condition J10 – ORR’s consent and determination	24
Condition J11 – publication of documentation	25
Condition J12 – reasonable on-going commercial need	26
Condition J13 – dispute resolution and Condition J14 – appeal procedure ...	29
Annex A: Part J chronology	33
Annex B: List of consultees	39
Annex C: Summary of consultation questions	41
Annex D: Flow chart for proposed revised Condition J7 process.....	44
Annex E – Table showing the ADA process and timings for Part J disputes summarised from ADRR.....	45

Executive summary

1. Part J of the Network Code contains a number of mechanisms intended to ensure that rights to capacity which are not being used – or are being significantly under-used – can be removed from the train operator concerned and made available to others through changes to track access rights. These mechanisms were also intended to provide protection for train operators so that rights cannot be removed or adjusted without justification and to provide them with a process to challenge any proposed removal or adjustment.
2. These mechanisms are particularly relevant to freight train operators, where competition between operators requires fair and effective means of securing the surrender or transfer of rights for which an operator no longer has a reasonable commercial need.
3. Although Part J has been subject to a number of changes and reviews since it was introduced in 2004, most notably in October 2006, it has not been subject to a significant review. In response to:
 - (a) our own concerns about the usage and functionality of Part J, particularly in relation to the freight mechanisms;
 - (b) those raised by the freight industry itself, particularly in relation to the speed, costs and overall effectiveness of Part J; and
 - (c) various concerns raised by Network Rail and the Access Disputes Committee (ADC) about the effectiveness of some Part J processes;we are seeking industry views on those areas identified in this document that could potentially benefit from a review.
4. We are guided by Themes 1 and 5 of our 2009-2014 Corporate Strategy which focus on the needs of passengers and freight users, now and in the future and on the efficient use of capacity on the network respectively. As such, our broad aims are to improve the accessibility, usage and functionality of Part J and also to ensure that the transfer of access rights is as quick, cost-efficient and fair as possible to all parties. This work builds on the other areas that ORR and the industry have been working on over the last year, for

example, our review of access policy¹, the review of industry access planning arrangements², including the overhaul of the Part D timetabling process in the Network Code, the introduction of freight customer track access contracts³ and identifying strategic capacity on specific routes so it is safeguarded by industry process for use by all operators⁴.

5. This document seeks industry views by 16 March 2011 on our proposals, particularly on whether we have focused on the right issues and priorities and whether there are areas that we have overlooked or on which the industry would feel it helpful to have further input.
6. Following this consultation, and any stakeholder meetings which are requested by a party to this consultation, we intend to sponsor a revised Part J as a proposal for change through the usual industry democratic process under Condition C5 of the Network Code.

Office of Rail Regulation

22 December 2010

¹ <http://www.rail-reg.gov.uk/server/show/nav.2254>

² <http://www.rail-reg.gov.uk/server/show/nav.2253>

³ <http://www.rail-reg.gov.uk/server/show/nav.2250>

⁴ Information available from Network Rail's website
[http://www.networkrail.co.uk/browseDirectory.aspx?dir=Track Access\4 Strategic Capacity&pageid=4593&root=.](http://www.networkrail.co.uk/browseDirectory.aspx?dir=Track%20Access\4%20Strategic%20Capacity&pageid=4593&root=.)

Introduction

Purpose

- 1.1 The purpose of this document is to seek the views of interested parties in our proposed review of Part J, to ensure that it remains fit for purpose and meets the needs of today's railway.
- 1.2 This chapter provides:
 - (a) the background to, and purpose of, Part J;
 - (b) our reasons for carrying out the review and its scope;
 - (c) our proposed regulatory approach;
 - (d) the structure of the document and consultation arrangements; and
 - (e) next steps.

Background

- 1.3 Following a consultation by ORR in 2003, Part J of the Network Code came into effect on 10 January 2005. The main intention of Part J was to enable access rights either to be transferred between, or surrendered by, train operators to ensure that capacity that was not being used or was being significantly under-used could be released. The Network Code was considered the most appropriate platform for these mechanisms, rather than individual track access contracts, because it ensured that all operators were subject to the same provisions. Improvements to processes could be made relatively simply rather than requiring changes to multiple bilateral contracts.
- 1.4 We started a review of Part J in October 2005, largely as a result of a number of issues arising from the industry using or triggering several of the Part J conditions. This evolved into a two phase approach whereby the non-controversial elements to improve clarity and transparency were dealt with by ORR sponsoring drafting amendments to Part J in October 2006. The wider issues were then passed to the industry to take forward and resulted in a limited number of amendments being made a year later in October 2007. A

chronology setting out the history of Part J, including the coming into effect of Use Quota/Periods and reasonable ongoing commercial need, together with details of all modifications is at **Annex A**.

Current Part J

1.5 Part J provides that an operator's track access rights may be changed by:

- (a) a train operator voluntarily surrendering rights which it is not using (Condition J2);
- (b) Network Rail initiating a "use it or lose it" process (Condition J4);
- (c) a third party operator initiating a process to relieve an incumbent of its rights where it considers that the incumbent is not using the rights and it wishes to use the capacity on the network (Condition J5) and the transfer of any associated cordon caps (Condition J6);
- (d) a freight operator winning existing traffic from an incumbent operator (Condition J7) and the transfer of associated cordon caps (Condition J8).

1.6 Part J also sets out the process by which Network Rail and freight operators hold six monthly review meetings (Condition J9) at which they will consider whether the operator has rights for which it no longer has a reasonable ongoing commercial need. Condition J12 provides for rules or criteria to be established on the interpretation of the expression "reasonable on-going commercial need" which is used in several of the mechanisms in Part J in relation to freight operators.

Reasons for and scope of review

- 1.7 ORR continues to have concerns about the usage and functionality of Part J, particularly in relation to the freight mechanisms, as explained in the succeeding chapters to this document. Similar concerns have been expressed by both Network Rail and ADC.
- 1.8 We also continue to receive representations from freight customers that the process for the transfer of rights is slow, incurs significant costs, and focuses primarily on the needs of freight operators. Some freight operators have also

sought a review, most recently through their representations on our consultation on freight customer access contracts. In addition, two recent appeals have highlighted the lack of usability of parts of the mechanism.

- 1.9 Although we are not proposing a complete overhaul of Part J, we do consider that a review is timely in light of the ongoing concerns and in order to ensure it remains as user friendly, effective and efficient as possible. As explained above, ORR is committed to the review as part of its 2010/2011 Business Plan, particularly in relation to one of our key activities of putting consumers at the heart of regulation and all that we do.

Scope

- 1.10 This review is limited to revisiting and revising Part J to address issues which have arisen with it since the last review in 2005 so that Part J is effective and fit for purpose. It is neither intended to be a wholesale review of Part J, much of which is clear and works well, nor in any way to alter the purpose or function of Part J itself.

Independent rights holder

- 1.11 The issue of whether or not the industry should have an independent rights holder (or “Rights Co.” as it has been known in the past) arises on a regular basis whenever we look at the issue of freight rights and/or changes to the policies governing them. However, our position remains as has been stated on a number of previous occasions – we do not believe that creating a new body would be justified either in terms of cost or its ability to deal effectively or efficiently with the issues surrounding the transfer and/or removal of unused rights/train slots. In particular, we remain of the view that:
- (a) it would be difficult to justify the increased costs to the industry associated with establishing and maintaining such a body;
 - (b) it would create an extra layer of bureaucracy and would run counter to the aim of developing a greater degree of co-operative working within the industry which, in turn, should lead to improved efficiency and performance; and
 - (c) we would need to resolve a number of practical issues relating to the legal status, independence and authority of any such body.

- 1.12 Furthermore, we believe that the recently overhauled Part D timetabling process and the concept of strategic capacity, when it is introduced in due course, will negate many of the arguments and reasons originally put forward in support of an independent rights holder. Network Rail, as the infrastructure manager, remains the appropriate body to manage access and capacity on the national network.
- 1.13 Therefore, **we do not expect representations on this issue**. We are not aware of any new evidence that would support the establishment of an independent rights holder and the industry has moved on since the issue was last considered.

Regulatory Approach

ORR's role and statutory responsibilities

- 1.14 We consider it appropriate in this instance to take the lead in reviewing Part J to ensure that we are meeting our regulatory obligations, particularly with regard to our statutory duties under the Railways Act 1993 (the Act). As consultees will be aware the regulatory framework applying to the consumption of capacity on the national network is set out in the Act, which sits within a framework of European legislation. This is explained in detail at the beginning of Chapter 2 of our "*Criteria and procedures for the approval of track access contracts - November 2009*" (C&Ps)⁵. As that document goes on to explain, a major part of our role is to ensure the fair and efficient allocation of capacity. This involves us having to make judgements about:
- (a) the realistic extent of spare capacity and the allocation of limited capacity between different requirements; and
 - (b) the appropriate balance between certainty (for a train operator) and flexibility (for Network Rail to accommodate the needs of all other passenger and freight train operators).

In exercising our functions and making such decisions we must have regard to our statutory duties, which are in the main set out in section 4 of the Act.

⁵ Available at <http://www.rail-reg.gov.uk/server/show/nav.2409>

- 1.15 Two of the strategic themes in our corporate strategy “Promoting safety and value in Britain’s railways: Our strategy for 2009-14”⁶ are to focus on passenger and freight customers, now and in the future (Theme 1) and to ensure the efficient use of capacity on the network (Theme 5). Our review of Part J is intended to support these two themes, by ensuring that we are both focussing on the needs of customers and ensuring the efficient use of capacity, through the medium of an effective Part J.
- 1.16 As already mentioned, this review is just one strand of other ongoing work under Themes 1 and 5. It builds on the work carried out as part of implementation of freight customer contracts. In addition, as a result of what freight users told us in our 2009-10 freight user survey, we are also carrying out freight market studies in two areas. The first is a rail freight market study to consider the future potential for rail freight and to review in detail the key drivers of growth and the main obstacles to delivering the full growth potential. This is a key piece of work that is part of our 2010-11 business plan. We are looking at the impact of competition (and blockages to competition) between train operators on rail markets, including the extent to which and where greater on-rail competition increases the competitiveness of rail freight with other modes. We will look for how regulation can respond effectively and swiftly to changing market needs and develop our approach accordingly.
- 1.17 Allied to the rail freight market study, we are also carrying out a study to review freight sites to consider whether the control of facilities by freight operators has had an impact on on-rail competition including any impact on customers’ ability to exercise choice between rail freight hauliers. We launched this on 10 September 2010⁷.

Structure of document

- 1.18 This document is structured as follows:
- (a) **Chapter 2** sets out the issues we have identified condition by condition and our proposals for dealing with them;
 - (b) **Annex A** provides a chronological history of Part J;

⁶ Available at <http://www.rail-reg.gov.uk/server/show/nav.78>

⁷ See <http://www.rail-reg.gov.uk/server/show/nav.2502>

- (c) **Annex B** lists consultees. It is our deliberate aim to have a large target audience for this consultation. We have included all train operators and other railway industry bodies, in addition to those parties we have identified as freight customers through our consultation on freight customer access contracts;
- (d) **Annex C** summarises the consultation questions;
- (e) **Annex D** contains a flow chart showing the proposed revised Condition J7 process; and
- (f) **Annex E** contains a table showing the Access Dispute Adjudication (ADA) process and timings for Part J disputes summarised from the Access Dispute Resolution Rules (ADRR).

Responses

- 1.19 In order to take this review forward, we welcome comments on any aspect of this document. In particular we welcome comments on the specific questions that we have raised within the text. For ease of reference, these are summarised at **Annex C**. Responses to this consultation should be sent in both hard copy and electronic format, to be received as soon as possible, but by no later than 16 March 2011, to:

Paul Carey
Office of Rail Regulation
One Kemble Street
LONDON WC2B 4AN

Email to: paul.carey@orr.gsi.gov.uk

- 1.20 Please note, when sending documents to us in electronic format that will be published on our website, we would prefer that you email us your correspondence in **Microsoft Word format**. This is so that we are able to apply web standards to content on our website. If you do email us a PDF document, where possible please:

- (a) create it from the electronic Word file (preferably using Adobe Acrobat), as opposed to an image scan; and

- (b) ensure that the PDF's security method is set to **no security** in the document properties

1.21 We shall make all responses available in our library, we shall publish them on our website and we may quote from them. If you wish all or part of your response to remain confidential, you should set out clearly why this is the case. Where your response is made in confidence, it should be accompanied by a statement summarising the submission (excluding the confidential information) which we can then use as above. We will publish the names of respondents in future documents or on our website, unless you indicate that you wish your name to be withheld.

1.22 Copies of this consultation document are available from our website⁸.

Next Steps

1.23 After the close of this consultation, we will consider all consultees' responses and decide whether there should be any change to our proposals or whether there are any other issues we need to address. We intend issuing our Final Conclusions and the revised Part J as a Proposal for Change (PfC) in accordance with Condition C5 of the Network Code during May 2011. Any changes introduced to Part J could necessitate consequential changes to other ORR documents, including our C&Ps and model contracts, and these will be made as soon as possible.

⁸ <http://www.rail-reg.gov.uk/server/show/nav.1>

Consultation issues – by condition

Introduction

- 1.24 This chapter sets out the issues that we have identified for review on each Part J Condition, together with our consultation questions. We have indicated where we have no issues with a specific Condition. The issues explored in this chapter have been raised following an internal ORR review and through comments received from various industry stakeholders, including freight operators, freight customers, ADC and Network Rail.
- 1.25 The issues we set out below are not necessarily exhaustive and we welcome consultees' feedback regarding any other issues with Part J which have arisen and which they feel may benefit from a review, including the reasons why.

Condition J1

- 1.26 This Condition is not used so we have no proposals regarding it. As the industry will recall it originally provided for an exclusion relating to protected rights, but was withdrawn as part of PfC 48.

Condition J2 – voluntary surrender and adjustment of access rights & Condition J3 – confidentiality

- 1.27 Part J2 provides for a train operator to surrender access rights voluntarily and apply to Network Rail for a specified adjustment of its access rights. Where a train operator is seeking to surrender its access rights, it may also receive compensation from Network Rail. Under the specified adjustment process, a train operator may seek to make a quality adjustment to its access rights. ORR consent is required for both processes and the train operator may refer any dispute with Network Rail for determination under the ADRR. Condition J3 sets out the process and requirements for the handling of any confidential information shared under Condition J2.

Issues

- 1.28 In line with Better Regulation principles, we no longer provide consent to any other changes to access rights (other than in relation to an increase or

decrease in Cordon Cap) that arise as a result of any of the other Part J processes. It would therefore be consistent with this for ORR's consent role in Condition J2 to be removed.

- 1.29 More generally, we understand that no train operator has used Condition J2. Following the inclusion of Condition J2 in the Network Code, a considerable amount of work was carried out in order to try and establish criteria on how and when compensation might be payable under J2. This work never reached a conclusion which the industry embraced and therefore, although Condition J2 allows for compensation to be payable where there has been a voluntary surrender, the basis for working out the compensation has not been set out.
- 1.30 We have discussed with Network Rail what the issues are with Condition J2 and what could be done to make Condition J2 more attractive to use. It is Network Rail's view that Condition J2 is only part of a package of tools available to enable contracts to be amended or terminated in order to allow capacity to be used in other ways, and that any changes to Condition J2 should be considered as part of this wider picture. On this basis, Network Rail considers that Condition J2 should be kept as it is until thinking in the wider perspective is developed.
- 1.31 As Condition J2 has not been used, we are not aware of any issues regarding the related confidentiality provisions in Condition J3.

Consultation questions

- 1.32 **Why do consultees think that condition J2 has not been used?**
- 1.33 **Should Condition J2 be made more attractive to use and, if so, how? Or do consultees agree that, for the time being, Condition J2 should remain as it is?**
- 1.34 **Are consultees aware of any issues regarding Condition J3 which need to be addressed?**

Condition J4 – failure to use (application by Network Rail)

- 1.35 Condition J4 sets out the process for Network Rail to seek the surrender of a train operator's unused access rights. It may do this where the train operator has failed to secure one or more Train Slots in the New Working Timetable in

respect of the Quantum Access Right or where the train operator has not used a train slot within the Use Period and Use Quota of 1 movement in 90 days. The train operator can object to the surrender either because the period of non use was due to non-economic reasons outside its control or related to an enhancement. Passenger operators may also object on the grounds that the train slots are required to meet franchise requirements and freight operators may object on the grounds that they can demonstrate Reasonable Ongoing Commercial Need (ROCN). Where the train operator does not object, the rights can be extinguished within 20 working days. If the parties do not agree, the dispute is referred for determination under the ADRR with any subsequent appeal referred to ORR.

- 1.36 We consider that there are a number of issues with Condition J4 as it is currently drafted.

Definition of “Quantum Access Right”

- 1.37 We are aware that the definition of Quantum Access Right has caused some confusion. Quantum Access Right is currently defined as meaning “..a Firm Right, any Contingent Right or any Level Three Right as such under an Access Agreement.....” We consider that this definition is confusing because it specifically references any Level Three Right but not any Level One or Two Right.
- 1.38 We presume that Level One and Level Two Rights were not specifically included in the definition, because they are Firm Rights. However, a Level Three Right is a Contingent Right and therefore does not need to be referred to separately. We consider that what is actually intended to be covered is any right under an access agreement. For this reason, we propose amending the definition of Quantum Access Right so that it is “..any right under an Access Agreement in respect of a number (or quantum) of Train Slots in any specified period (including rights to Train Slots in respect of additional trains or relief services), and includes part of such a right.”

Condition J4.2.1(a)/J4.2.2

- 1.39 Condition J4.2.1(a) states that there is a Failure to Use where a train operator has failed to secure one or more Train Slots in the New Working Timetable in respect of that Quantum Access Right. Condition J4.2.2 qualifies Condition

J4.2.1(a) and says that Condition J4.2.1(a) will not apply to Level Two Rights, Contingent Rights or Level Three Rights where Network Rail has been unable to accommodate the Train Operator's access proposal into the New Working Timetable. However, Level Two Rights, like Level One Rights, are of course firm and Network Rail must accommodate them or it would be in breach of contract. In light of this, we do not think that reference to Level Two Rights in Condition J4.2.2 is correct and we think it should be deleted.

1.40 In addition, for the same reason set out in paragraph 2.15 we do not think reference to Level Three Rights in Condition J4.2.2 is necessary and therefore we propose deleting this too.

1.41 Our proposals for Condition J4.2.2 would mean that it would say that Condition J4.2.1(a) will not apply to Contingent Rights where Network Rail has been unable to accommodate the Train Operator's access proposal into the New Working Timetable.

Use Quota and Use Period

1.42 Another issue is whether the current Use Quota and Use Period are still fit for purpose. Under Condition J4.3 ORR determined the Use Quota and Use Period in 2005 as effectively 1 in 90 days⁹. We see the purpose of the Use Quota and Use Period as being tools to maximise capacity for future use. Whilst we are not aware of any issues regarding the Use Quota and Use Period in respect of passenger services, we consider that the Use Quota and Use Period could be made more effective in respect of freight services.

1.43 Condition J4.3.2 allows us to revise the Use Quota and Use Period. The Use Quota and Use Period were reviewed in June 2006 and in May 2008, however few responses were received and we considered that lack of evidence meant that we should not propose any changes.

1.44 There are various options for reviewing the Use Quota and Use Period. These include:

⁹ <http://www.networkrail.co.uk/browseDirectory.aspx?dir=%5Cnetwork%20code%5CChanges%20to%20Access%20Rights%5C3%20Part%20J%20Criteria&pageid=2889&root=>

- (a) keep Use Quota and Use Period as they are;
- (b) have a requirement that the Use Period and Use Quota would apply to each individual day of the week to which the access right relates. For example, for a SX right the Use Period and Use Quota would be assessed separately for Monday, Tuesday, Wednesday, Thursday and Friday. This would prevent a train slot that is obtained for one day of the week in respect of a SX right, blocking the access right being used by another train operator in respect of the other days of the week;
- (c) a slight variation on (b) above would be to assess requirements of rights going forward on the basis of the preceding year's use so that it would not be possible to retain rights to a path for more days per week than its average use over the 365 days immediately prior to the failure to use. For example, if across a year a SX right is only used to obtain a path once per week on average, the right should not be retained as a SX right and the freight operator would need to nominate a single day rather than continue to hold the right in respect of 5 days per week;
- (d) set a minimum percentage threshold for use of the rights. For example, across the Use Period, a certain percentage use of the rights would be required, for example, 60%.
- (e) set different minimum percentage thresholds for different commodities. For example, the percentages referred to in paragraph (d) above would vary according to commodity, e.g., the percentage use for coal might be less than percentage attributed to inter-modal.
- (f) have a tiered Use Period which depends upon how constrained capacity is believed to be. The Use Period could remain at 90 days where there is no capacity scarcity, 30 days where capacity scarcity is evident (e.g. WCML and MML) and 14 days where there is little or no spare capacity (e.g. Felixstowe to Ipswich or Perth to Inverness). Criteria for determining what is and what is not constrained capacity would have to be developed.

1.45 Network Rail has suggested options (b), (c) and (f) in recent discussions with us.

- 1.46 We would welcome consultees' views on how the Use Period and Use Quota could be more effective in acting as tools for maximising future capacity in relation to freight services.

Timings

- 1.47 Finally, we are aware that the Condition J4 process can take up to 8 months from start to finish, especially if it goes to dispute resolution. The main elements of this are the 90 day Use Period and then the dispute resolution timings. We are seeking views on options for the Use Period/Quota above and we address the timings of the dispute resolution process under Conditions J13 and 14 below. We consider that revisions to these two elements of the process will improve the Condition J4 process but welcome any other ideas consultees have to make the Condition J4 process quicker and more effective.

Consultation questions

- 1.48 **Do consultees agree that the definition of Quantum Access Right is confusing and requires amendment? If so, do consultees agree with ORR's proposal for the definition in paragraph 2.15?**
- 1.49 **Do consultees agree that reference to Level Two Rights and Level Three Rights in Condition J4.2.2 should be deleted?**
- 1.50 **Do consultees agree that the Use Period and Use Quota should be amended?**
- 1.51 **What are consultees' views on the options for the Use Period and Use Quota set out in paragraph 2.21?**
- 1.52 **Other than reviewing the Use Quota/Use Period and dispute resolution procedures, do consultees have any views how the Condition J4 process could be made quicker and more effective?**

Condition J5 – failure to use (third party application)

- 1.53 Condition J5 sets out the process for Network Rail to force the surrender of a train operator's unused access rights where Network Rail receives an application from another train operator. On receiving such an application

Network Rail must check that the applicant has reasonable commercial need for the access right and establish that the incumbent operator has failed to use the access right, before it serves a failure to use notice on the incumbent train operator. The incumbent train operator can object to Network Rail's request on the same grounds as in condition J4. Where the train operator does not object, the rights can be extinguished within 20 working days. If the parties do not agree, then dispute is referred for determination under the ADRR with any subsequent appeal referred to ORR.

Issues

- 1.54 Many of the issues relating to this condition are dealt with under our discussion of Condition J4. However, whilst J4 and J5 are separate because they had originally separate requirements, changes to the Network Code have removed most of these differences and it would therefore be possible to combine these conditions. This would potentially make Condition J5 easier to use. We are also seeking consultees' views on their experiences of using this condition.

Consultation questions

- 1.55 **What are consultees' experiences of using Condition J5? Do they consider it has worked well?**
- 1.56 **What are consultees' views on combining Conditions J4 and J5? Would this be beneficial?**

Condition J6 – reduction of cordon caps (failure to use)

- 1.57 Condition J6 sets out the process for the reduction of a freight operator's cordon caps where Network Rail serves a failure to use notice relating to a Level 2 Right under condition J4 or J5 and specifies under that notice that there should be a reduction in the level of cordon caps. If the freight operator agrees to the reduction, it occurs on the effective date specified in the notice. If the incumbent freight operator does not agree to the reduction then the dispute may be referred for determination under the ADRR and subsequently appealed to ORR.

Issues

- 1.58 Our review of Condition J6 has not highlighted any issues with the use of this condition.

Consultation questions

- 1.59 **Are consultees aware of any issues with Condition J6 that need to be addressed?**

Condition J7 – freight transfer mechanism

- 1.60 Condition J7 applies to freight train operators and is intended to enable the smooth transfer of rights where a freight train operator wins existing traffic from an incumbent freight operator. The process is triggered by an application from a freight train operator to Network Rail with Network Rail then seeking the surrender of the affected rights from the incumbent freight operator.
- 1.61 Condition J7 has been the most used process in Part J and has therefore been the subject of most disputes since its inclusion into Part J. These disputes and our review of Part J have highlighted a number of issues on which we would like consultees' views.

Issues raised by appeal ADP23

- 1.62 In January 2008 ORR determined an appeal¹⁰ brought by Network Rail and Freightliner Heavy Haul Limited against determination "ADP23" of the Access Disputes Panel ("ADP"). ADP23 was a joint reference brought by Network Rail and English Welsh and Scottish Railway Limited relating to the transfer of certain quantum firm rights and associated train slots and adjustment of certain cordon caps pursuant to conditions J7 and J8 of the Network Code.
- 1.63 The first issue highlighted by the ADP23 appeal was the lack of clarity of the drafting of condition J7.1.2. In particular, it was felt that the terms "provision of transport services", "third party" and "replace" could be more clearly defined. The current wording led the ADP to conclude that the applicant had to replace the incumbent with an identical or nearly identical use of the quantum firm rights. However, we held on appeal that this condition applied where the applicant was replacing the incumbent as the provider of the transport of

¹⁰ <http://www.rail-reg.gov.uk/upload/pdf/ADP23-orr-determ-160108.PDF>

goods by railway and it was not necessary that the applicant's services were identical to those provided by the outgoing incumbent. We consider that the drafting of condition J7.1.2 should be clarified to avoid any further misunderstanding regarding the intention of condition J7.

- 1.64 The second issue highlighted in ADP 23 was the proof the applicant had to provide to Network Rail in support of its application. The current position is that the application made by a train operator must specify two things. The first, under condition J7.3(b)(i), is the date on which the applicant requests that the quantum access rights take effect in its track access contract. The second, under condition J7.3(b)(ii), is that the quantum access rights sought are for the provision of transport services to a third party and the applicant will be replacing the incumbent in providing those services. In order to satisfy these requirements, Network Rail can rely on a statement from the applicant without seeking additional evidence. In discussions with Network Rail, it has been suggested that if the applicant had to produce a letter from the third party customer confirming the arrangement as part of its application, this might reduce the scope for dispute.
- 1.65 The third issue that arose in ADP 23 was how Y-paths related to transferring train slots are treated under Condition J7. Y-paths are paths that have a number of origins and/or destinations but have a common core section. Although ORR's determination in ADP23 did not deal with this issue specifically, we consider that it is not clear from the wording of Condition J7 whether all relevant Y-paths fall within the definition of "Rights Subject to Surrender" and so whether Y-paths related to the transferring train slots would also transfer. In order to clarify this, we consider that "Rights Subject to Surrender" could include Y-paths which relate to the train slots which are subject to surrender and are deemed necessary to transfer when applying certain criteria. Any such criteria will require careful drafting. We think the criteria could include consideration of various factors including:
- (a) the level of access rights using the paths in question (a Level 1 right would attract more need for the Y-paths to transfer than a level 2 or 3 right);
 - (b) the criticality of specific departure and arrival times for terminal purposes; and

- (c) the difficulty of finding alternative slots.

1.66 In addition, "Y-path" would need to be defined within Part J.

Consultation questions

- 1.67 **Do consultees agree that the drafting of Condition J7.1.2 requires clarification?**
- 1.68 **Do consultees think that requiring the applicant to produce a letter from the third party customer confirming their arrangement as part of its application may reduce the scope for dispute?**
- 1.69 **Do consultees agree that it is not clear how Y-paths are dealt with under Condition J7? If so:**
 - a) **Do consultees have any comments on our proposal for dealing with this issue including the criteria proposed?**
 - b) **Do consultees have any other alternative proposals on how this issue could be addressed?**

Issue – condition J7 process

- 1.70 In our discussions with Network Rail, it has proposed that Condition J7 would be simpler if only the applicant and incumbent were involved in the transfer process and Network Rail was involved for information purposes only. Network Rail considers that the current process, in which it acts as the party receiving applications and then serving and receiving notices on and from the incumbent, is overly bureaucratic. Moreover, where there is disagreement, it results in Network Rail being a main party to the dispute. Condition J7 was originally formulated in this way because Network Rail, as the infrastructure manager, is the common party to the track access agreements and is the party that has to actually transfer the rights in question.
- 1.71 We have also gathered from our consultation on freight customer access contracts and through one-to-one meetings, that various stakeholders are concerned by the length of time the Condition J7 process takes.
- 1.72 Whilst we do not want the process to be unnecessarily complicated, we do not think that it can simply be between applicant and incumbent, because

Network Rail ultimately is the common contractual party who has to decide whether the right should transfer. However, we have looked at the process and consider it could be simplified, with Network Rail only being involved where there is disagreement between the applicant and incumbent. However, where there is disagreement between the applicant and the incumbent we consider that Network Rail's involvement is inevitable and, indeed, required. We consider that revising the process in this way would mean that the process was quicker, which would benefit all that use it, as well as address some of the issues highlighted by Network Rail.

- 1.73 At Annex D we have set out how the process could be simplified. Currently the application is served on Network Rail, which then has 10 working days to either reject the application or serve it on the incumbent. This stage could instead involve the applicant serving the application directly on the incumbent, copied to Network Rail for information.
- 1.74 There would then be 3 possible scenarios:
- (a) the incumbent agrees to the surrender within 10 working days of receipt of the application. The applicant will then notify Network Rail (copied to the incumbent) who notifies ORR and the relevant access rights will be transferred between the access agreements; or
 - (b) the incumbent fails to respond to the application within 10 working days in which case the incumbent would be deemed to have accepted surrender. The applicant would then notify Network Rail (copied to the incumbent) who notifies ORR and the relevant access rights will be transferred between the access agreements; or
 - (c) within 10 working days of receipt of the application, the incumbent (copied to Network Rail) serves the applicant with a counter notice specifying either:
 - (i) that it considers the application to be invalid; and/or
 - (ii) that it has ROCN for all or any of the access rights sought and providing appropriate evidence. We appreciate that providing the appropriate evidence may raise commercial confidentiality issues. However, these could be dealt with by the incumbent being responsible

for identifying and redacting any commercially confidential information before it is sent to the applicant and Network Rail having a specific confidentiality provision placed upon it so that, if the incumbent and applicant cannot reach agreement, it could consider all relevant evidence.

- 1.75 In scenario (c) above, the parties would then have 5 working days to try to resolve the issue before referring it to Network Rail. Network Rail indicated that at this stage it would like each party to make a “Statement of its position” which would form the basis of its decision to agree with either the incumbent or the applicant. However, ORR considers that all the relevant information on which Network Rail should base its decision will be in the application and counter-notice and actually requiring a “statement of its position” would be unnecessary. Network Rail would then have 5 working days to reach a view on the merits of the incumbent’s counter notice. This decision could then be referred for determination in accordance with the ADRR and ultimately to ORR.
- 1.76 We consider that the benefits of the proposed Condition J7 process take into account Network Rail’s concern that the present process is over bureaucratic whilst, at the same time, making the process shorter and more effective for those freight operators that use it. Under the proposed process, where there is agreement that rights should transfer, the process would be at least two weeks shorter than now. In addition, under the proposal where there is no agreement that rights should transfer the process, before reaching the ADRR process, would be at least one week shorter than now.

Consultation questions

- 1.77 **Do consultees agree that the Condition J7 process could be improved?**
- 1.78 **Do consultees agree that Network Rail should not be substantially involved in the Condition J7 process until it is evident that the incumbent and applicant cannot agree?**
- 1.79 **Do consultees have any comments on our proposal for the Condition J7 process or any other views on how the process could be improved?**

Condition J8 – adjustment of cordon caps (freight transfer mechanism)

- 1.80 Condition J8 provides a process for the adjustment of cordon caps where a notice has been served under Condition J7 and Network Rail considers that there should also be an adjustment to the incumbent freight operator's cordon caps.
- 1.81 We are not aware of any issues regarding this condition.

Consultation question

- 1.82 **Are consultees aware of any issues regarding Condition J8 which need to be addressed?**

Condition J9 – access rights review meetings

- 1.83 Condition J9 sets out the process for holding regular rights review meetings between Network Rail and a freight operator. The process can be started by Network Rail or any train operator. No later than 20 working days before the meeting, Network Rail must serve a notice on the freight operator which contains the rights which it considers should be surrendered and the level of certain cordon caps which should be reduced because Network Rail believes that the freight operator is no longer using the rights and has no ROCN. The freight operator may agree to all, part or none of the proposal. Where there is agreement between Network Rail and the freight operator, the freight operator notifies Network Rail before the meeting (which then would not be needed) and Network Rail notifies ORR of the relevant variations within 10 working days. In the event of disagreement, the freight operator must notify Network Rail no later than 5 working days before the meeting (otherwise the freight operator is deemed to have agreed to the surrender) that it has ROCN. The parties must attempt to reach agreement at the rights review meeting and if agreement is not reached the parties refer the dispute for determination under the ADRR and potentially appeal to ORR.

Issues

- 1.84 We have never been copied in on the notice of a rights review meeting as required under Condition J9.2.2 and we understand that Network Rail has never held a "rights review meeting" in accordance with Condition J9. In

addition, a third party train operator has never exercised its right to ask for a rights review meeting to be held between Network Rail and a freight train operator. This indicates that Condition J9 is not as effective as it could be. In our discussions with Network Rail, it explained its customer relationship teams carry out regular reviews of rights held by their respective freight operator. Network Rail said that it has not followed Condition J9 because the process is too prescribed and adversarial which is no longer appropriate in an age when the industry is moving towards a more collaborative approach. It believes that Condition J9:

- (a) Is adversarial in that a J9 meeting must seek surrender of rights and only happens where there is a failure to agree;
- (b) does not provide for a situation where there may not be any rights to surrender;
- (c) does not take account of the high cost of carrying out regular 6 monthly reviews; and
- (d) does not lend itself to ensuring best use of resources and prioritisation.

1.85 Although Network Rail has not carried out a rights review meetings in accordance with Condition J9, in the case of one freight operator, it carries out a regular rolling review programme of access rights held by that operator which results in the parties submitting supplemental agreements for approval. Although Network Rail says that existing industry systems such as TOPS and TRUST do provide rights utilisation data, it is not in an accessible format and requires significant manual analysis. However, Network Rail is currently developing processes from the freight billing software which will enable it to monitor the use of rights more easily; its intention is that this programme will feed into the review process carried out by each Network Rail customer relationship team. Network Rail considers that Condition J9 should reflect the way it works with train operators, encourage a more collaborative dialogue for reviewing rights between Network Rail and freight operators, and be less bureaucratic.

1.86 Our view is that it is not necessarily the process by which Network Rail regularly reviews a freight operator's use of access rights that is important. Rather, it is that Network Rail is obliged to lead and carry out such a review,

and it does it frequently and effectively. We consider that Condition J9 could be re-drafted so that the process which Network Rail follows is not specified and, instead, the condition focuses on the output which Network Rail, working together with train operators, has to achieve at a rights review meeting. Any surrender of rights which Network Rail considered should take place following a rights review meeting could then be achieved by way of Condition J4.

- 1.87 We consider that any re-draft of Condition J9 should continue to allow third parties to trigger Network Rail's obligation to hold such meetings and the freight customer access work will extend this provision to cover Freight Customers holding access rights. We consider that the right to ask for a review should be extended to any 'Timetable Participant', to bring Part J in line with Part D. In addition, currently, we do not have the ability to oblige Network Rail to hold a rights review meeting with a freight operator and giving us the ability to do this would strengthen this condition.

Consultation questions

- 1.88 **What are consultees' views on Condition J9 as it is currently drafted?**
- 1.89 **Do consultees agree with our proposal to focus on output rather than process and ORR having the ability to force Network Rail to hold rights review meetings?**
- 1.90 **What are consultees' views on what a rights review meeting should involve?**
- 1.91 **How often should rights review meetings be held?**
- 1.92 **Do consultees agree with the proposal to allow any Timetable Participant to force Network Rail to hold a rights review meeting?**

Condition J10 – ORR's consent and determination

- 1.93 Condition J10 provides that ORR can elect to give its consent to part only of the modifications submitted to it under Condition J2 and to modify the cordon cap adjustment for which its consent is sought under Condition J8.

Issue

- 1.94 For the reasons given in paragraph 2.5 above under Condition J2, we are proposing that the requirement for ORR consent to the surrender of a train operator's access rights under Condition J2 should be removed. This would also remove the need for the corresponding ability under condition J10 for us to consent to part only of any modifications submitted under condition J2.13.
- 1.95 Condition J10 also provides ORR with the power to modify any cordon cap increase or reduction which is submitted for approval under Condition J8. We consider that this role is still required as it is appropriate that we continue to act as the custodian of cordon caps as they have a multilateral effect. However, we consider that there is no need for this specific power to be included in a separate condition; as it deals with circumstances that have occurred under Condition J8 it would seem sensible to incorporate the drafting into that condition.
- 1.96 In effect, our proposals mean that Condition J10 would no longer be required.

Consultation questions

- 1.97 **Do consultees agree that ORR's ability to consent to part only of the modifications submitted under condition J2 is no longer required?**
- 1.98 **Do consultees agree that ORR should retain the ability to modify cordon cap adjustments submitted under Condition J8? If so, do consultees agree with the proposal to incorporate this power into Condition J8?**

Condition J11 – publication of documentation

- 1.99 Condition J11 sets out the circumstances in which Network Rail must publish notices received and issued under Part J.

Issue

- 1.100 The industry working group established under the Part J review in 2005 considered that it would be beneficial for templates of all the notices under Part J to be produced. This has not occurred. There have been various instances of notices being the subject of disputes and we consider that the existence of templates of the various notices would have gone some way to preventing these disputes occurring. We therefore propose producing

template notices and consider that Condition J11 should be amended to place an obligation on Network Rail to publish, review and keep the template notices up to date.

Consultation question

1.101 What are consultees' views on our proposal to produce template notices and to amend Condition J11 to place an obligation on Network Rail to publish, review and keep the template notices up to date?

Condition J12 – reasonable on-going commercial need

1.102 This condition provides for rules or criteria to be established on the interpretation of ROCN, which is used in several of the mechanisms in Part J as they affect freight operators. ROCN is determined and published by Network Rail, following consultation with the appropriate franchising authority and freight operators, and after approval from ORR.

Issues

1.103 We understand that ROCN has been a source of dispute in a number of cases since the provisions were first brought into effect in 2005. We believe that one of the reasons for the problems is that ROCN has never been reviewed to ensure that it remains fit for purpose and meets the changing requirements of the industry.

1.104 Based on the evidence available to us, we believe that ROCN is not proving to be valuable in its current form and, indeed, is seen by some stakeholders, including Network Rail, as hindering the effective use of the relevant Part J processes. We believe that it is ambiguous, open to interpretation and lacking transparency, which has led to game playing and delaying tactics. We question whether we need to have a separate ROCN document and propose that we do away with it and incorporate a much simpler process with clear outputs, obligations and requirements within Condition J12 itself. Incorporating ROCN into a condition in Part J would of course mean that any changes to it would have to go through the change process set out in either Condition C5 or C8. However, we do not see this as being an issue given that the existing ROCN has not been reviewed in some 5 years and what we are proposing will provide a clearer and more transparent process.

- 1.105 We believe that the industry should follow the basic principles that ORR follows in considering applications for track access contracts as set out in our C&Ps¹¹. This means that the onus should be on the incumbent operator to provide robust evidence, such as a contract, to demonstrate that they continue to need the rights in question. If it is clear that the incumbent has been using the rights for the traffic for which it has lost the contract then it should not be able to claim ROCN. Similarly, an incumbent operator should not be able to use the fact that it has a contract in the pipeline or new business on the horizon to claim ROCN. In such cases it can apply for a timetable variation for the required paths in the usual way through the Part D timetabling process. In circumstances where an incumbent claims that the right is part used for more than one customer, or even for the same customer but for different traffic, the onus should again be on it to supply robust evidence. We would expect the incumbent to be able to justify retention of the access rights subject to a transfer request only where that customer's original traffic or part of it, warranting the granting of the access rights in the first instance is still contracted to be moved by the incumbent.
- 1.106 We believe that these principles should also apply to “call off” contracts, i.e., those contracts where a freight operator has agreed to stand ready to haul traffic on an occasional, as-required basis, and which are “evergreen” – that is, they do not expire unless one or both of the parties triggers a terminating clause. This has the effect of ossifying the timetable and consuming capacity, with some such rights being used very seldom, if at all.
- 1.107 We believe that it is unnecessary for an operator to have rights in its track access contract which may never be used, especially where the call-off contract is “evergreen”. Instead they should seek a timetable variation under the Part D timetabling process when the traffic is available to be hauled, and should not typically expect to operate a call-off contract under a firm right, unless the operator can demonstrate in its application for the rights that they are being used on a regular ongoing basis.
- 1.108 In considering the ROCN evidence presented by an incumbent we believe that Network Rail would need to look at a number of other factors, including past usage of the rights. We also believe that where there is a dispute,

¹¹ See footnote 5 – paragraphs 4.47-4.50

customers/end users should be asked for advice on the traffic in question. Freight operators will still have the protection of the industry disputes mechanism.

- 1.109 At the moment the ROCN criteria deal with reductions in cordon caps which have arisen as a result of a failure to use under Conditions J4 or J5, where a rights review meeting results in removal of rights from a track access agreement under Condition J9 and where there has been a transfer of access rights under Condition J8. The criteria are both written and formulaic. Our view is that the criteria can be simplified, be mainly formula focused and be incorporated within Conditions J6 and 8.

Proposals

- 1.110 The drafting of Condition J12 is to be overhauled to incorporate ROCN, providing for a simple and transparent process with clear outputs, obligations and requirements.
- 1.111 The criteria regarding reduction in cordon caps be simplified and be incorporated within Conditions J6 and J8.

Consultation questions

- 1.112 **What are consultees' experiences of using ROCN?**
- 1.113 **Do consultees agree that ROCN requires simplification?**
- 1.114 **Do consultees agree with our approach of incorporating a simplified ROCN in Condition J12 or do they consider there are other approaches with more merit?**
- 1.115 **Do consultees agree that:**
- (a) **the rights required to fulfil a call-off contract should not typically operate under a firm right and should be applied for under a timetable variation, unless the applicant can demonstrate that the rights are being used on a regular ongoing basis; and**
 - (b) **holding a call-off contract is insufficient justification for claiming ROCN and the associated path unless there is evidence that the call-off contract is being used regularly?**

- 1.116 Do consultees agree that the ROCN criteria applicable to cordon cap reduction could be simplified and incorporated into Conditions J6 and J8? Do consultees have any other views on how the ROCN criteria applicable to cordon cap reductions could be improved?**

Condition J13 – dispute resolution and Condition J14 – appeal procedure

- 1.117 Condition J13 sets out certain circumstances under Part J where, if the relevant parties have failed to reach agreement, they may refer their dispute for determination in accordance with the ADRR and, in the event that any of the parties is dissatisfied with the ADRR determination, they may appeal to ORR under Part M.
- 1.118 Condition J14 is wider than Condition J13 and gives any Access Party the right to refer “any matter concerning the operation of Part J” for determination in accordance with the ADRR and, in the event that any Access Party is dissatisfied with the decision reached under the ADRR, they may appeal to ORR under Part M.

Issues

- 1.119 The first issue we have identified is whether it is necessary to have two separate conditions dealing with dispute resolution. We are not aware of any disputes which have been referred for determination under Condition J14 and it is not clear to us what Condition J14 adds to Condition J13. We also think that there could be some practical difficulties with the application of Condition J14. For example, Condition J14 does not specify timescales within which a matter has to be referred for determination.
- 1.120 We consider that the drafting of Conditions J13 and J14 could be amalgamated and simplified so that there is one dispute resolution condition which, in effect, makes any of the final decisions in Part J appealable within 5 working days of the decision. Would this be desirable? If so, who should be able to refer a Part J issue for determination? Should this right be limited to the parties concerned or should it be a right of any Access Party?
- 1.121 Through our consultation on freight customer access contracts and through one-to-one meetings, we have also identified a second issue with the dispute resolution procedure in Part J. This is that some organisations are

dissatisfied with the time taken to go through the Part J process and then to resolve any disputes; at first instance through the ADRR and then on appeal to ORR. We have learnt from our involvement in Part J appeals, such as the ADP23 appeal that the time taken and costs incurred in cases can be significant and can impact greatly on the businesses concerned. We consider the timings of the Condition J4 and J7 processes under the sections dealing with those conditions but comment in this section on the time taken to go through the dispute resolution procedure.

- 1.122 A Part J appeal is first of all referred for determination in accordance with the ADRR. The ADRR have recently been re-drafted and new rules were introduced so that from 1 August 2010 an ADA is prescribed as the first stage forum for Condition J13 and J14 appeals. Despite this, we understand from the ADC that the quickest that a dispute generally reaches a hearing following the ADA process for Part J disputes is around 13 weeks from receipt of the dispute. A table showing the ADA process and timings for Part J disputes summarised from the ADRR is attached at Annex E.
- 1.123 The ADC has raised with us the possibility of shortening the time it takes to resolve a dispute by omitting the ADRR stage for Part J disputes so that any Part J disputes are automatically passed to ORR for determination. However, we think that the resolution of Network Code disputes should be an industry-led process and that our involvement should only be necessary where there are issues of multilateral concern to be resolved. In addition, having a two stage process means that issues which can more easily be resolved are filtered out and never get to the appeal stage. For example, 12 Part J disputes have been filed with the ADC since 2004 but only 2 of these reached ORR on appeal. If a single dispute resolution process had been in place during this period then ORR would have had six times more cases to deal with, which would have led to us diverting resource to matters which did not necessarily require our involvement.
- 1.124 In response to the ADC's proposal, we consider that the timings of the ADA process could be shortened. We note from the process attached at Annex E, that it takes up to 5 weeks for the parties to the dispute to exchange statements of case and then up to a further 7 weeks for a hearing date to be agreed and for the hearing to take place. We think that the timeframe for serving statements of case could be reduced to 7 days for each statement

with the safeguard for the parties that, if they required more time to serve their statement, they could apply to the Hearing Chair for an extension of time. In addition, whereas at the moment the timeframe for setting and holding a hearing date starts once the statements of case have been exchanged, we think that the hearing date could be set by the Hearing Chair earlier in the process once he or she has been appointed, so that the hearing could take place within 4 weeks of statements being exchanged. These changes would mean a reduction of 5 weeks in the timings of the dispute process. We welcome your views on these proposals for reducing the time of the ADA Part J dispute process or any ideas you may have to make the process quicker so as to meet the concerns raised. We appreciate that any change to ADA timeframes or processes would require changes to be proposed to the ADRR and not Part J but we could sponsor any required changes as part of our conclusions on this workstream.

- 1.125 The second stage of the dispute resolution process is that the ADA decision can be appealed to us. The procedure for such appeals is set out in Part M of the Network Code. ORR appeal decisions on Part J matters on average take about 4 months to be issued from the date of reference of the appeal. Appeals take this long because of the timeframe for exchange of evidence under Part M and because the complexity of the appeal cases means that detailed written determinations are usually required.
- 1.126 We accept that in some circumstances our appeal decisions are required quickly. In at least one timetabling dispute we have dealt with under Part M, we have proposed an expedited procedure to ensure that the decision would be made prior to the date of operation of the disputed train slots and we proceeded, with the parties' consent, to expedite the procedure. We consider that having a general right to expedite our process would be of benefit to those who may want to appeal a Part J (or Part D) ADA determination to us. Rather than relying on having to obtain the parties' consent, Part M could set out an express power for us to expedite the appeal procedure. Any appellant wanting us to exercise our right to expedite the procedure would have to justify to ORR on filing its appeal why it was necessary to expedite it. We appreciate that this would require a change to Part M but we could sponsor such a change as part of our conclusions on this workstream. We welcome your views on this proposal or any other ideas you have for speeding up our appeal process where required.

Consultation questions

- 1.127 Should Conditions J13 and J14 be amalgamated and simplified? If so, who should be able to refer a Part J dispute for determination in accordance with the ADRR and in what timescales?**
- 1.128 Do consultees agree with our proposals for shortening the timescales of the ADA process for Part J disputes? If not, do consultees have any other views on how the process could be made quicker?**
- 1.129 Do consultees think including an express power within Part M enabling ORR to expedite its appeal procedure is a good idea?**
- a) If so, to what type of cases should the expedited procedure be applied?**
 - b) If not, do consultees have any other views on how ORR's Part M appeal procedure could be made quicker?**

Annex A: Part J chronology

Date	
June 2001-December 2003	<p>ORR consults on introduction of Part J.</p> <ul style="list-style-type: none"> • Model clauses for track access agreements: access rights and moderation of competition June 2001 • Changes to access rights and moderation of competition: draft conclusions July 2003 • Model freight track access contract: a consultation document July 2003 • Model freight track access contract: draft conclusions December 2003
June 2004	ORR publishes final conclusions document on changes to access rights (Part J)
July 2004	ORR publishes proposal for change (PfC) under C8 to include new Part J into Network Code.
August – October 2004	ORR consults on use quota/use period.
January 2005	Part J takes effect, use quota/use period established.
June 2005	Reasonable Ongoing Commercial Need (“ROCN”) criteria approved by ORR.
October 2005	Review of Part J starts. Part J industry working group established.
2006	Network Rail undertakes to review ROCN criteria.
October 2006	<p>Substantial revision of Part J (PfC38):</p> <ul style="list-style-type: none"> • Existing arbitration mechanism replaced and dispute resolution done through ADC. • ORR’s consent role limited to those areas which could have an adverse impact on network capacity (adjustment of access rights where service characteristics may change and changes to cordon caps). • Allowed for provisions linked specifically to access right (defeasance/carve out mechanisms) in incumbent’s TAA to be transferred with access right under J7. • Obligation on freight operators (“FOCs”) to surrender unused rights for which there is no ROCN. • Allowed FOCs to request rights review meetings and allow 3rd party FOCs to force RRM’s between NR and another FOC. • Revised timescales to make Part J quicker and more efficient.

Summer 2007	Part J working group disbanded.
October 2007	<p>Further changes to Part J (PfC44).</p> <ul style="list-style-type: none"> • Scope of the Part J widened to include contingent access rights; • New appeal mechanism (Condition J14) to allow any Access Party to challenge any matter arising from the operation of Part J; • Scope of Condition J5 widened so train operators are not prevented from seeking the surrender of an access right by the incumbent by the fact that Network Rail has not declared a section of the network to be “Congested Infrastructure”; • extending the timescale by which Network Rail can issue a Relevant Response under Condition J2.2 from 20 to 30 Working Days; • Condition J4.2.2 amended so that Level Two Rights can be removed from a FOC under the Failure To Use process, even if the Incumbent operator did not bid for them by the Priority Date; • ensuring that, where a Counter Notice is issued in response to a Failure to Use Notice (Condition J4), Third Party Failure to Use Notice (Condition J5) or Third Party Notice (Condition J7), including where the Incumbent operator considers the Notice to be invalid, this information is clearly notified to Network Rail and (where appropriate) the Applicant.
October 2008	<p>Changes to Part J under PfC47</p> <ul style="list-style-type: none"> • Modifications to allow ensure access rights must not be surrendered where they are in a TAO. • Consequential changes to J7 following changes to definitions. • Changes relating to timescales in J7
January 2009	Removal of exclusion in J1 on protected rights (PfC48).
January 2010	Changes to reflect changes to ADRR (PfC54).

Condition	Modification / issue	PfC No.	Date
J1 – Exclusion relating to protected rights	Removed from Network Code because dealt with under policy on TAOs.	PfC48	January 2009
J2 – Adjustment of access rights	J2.1 - new obligation on FOCS/Passenger Train Operators (“TOCs”) to surrender rights when no longer needed. To discourage FOCS from retaining access rights.	PfC38	October 2006

	J 2.2 Inclusion of 20 working day timeframe to improve timescales.	PfC38	October 2006
	J2.2 – timescales changed to 30days to bring J2 into line with other provisions in the network code.	PfC44	October 2007
J3 – Confidentiality and information for J2	Correction of references in 3.14. 3.15 and 3.16	PfC33	September 2005
	Consequential changes to J3 as a result of changes to ADRR rules	PfC54	January 2010
J4 – Failure to use	J4.4(a) &(b) deleted to bring Part J into line with the Railways Infrastructure (Access and Management) Regulations 2005.	PfC38	October 2006
	J4.6(b) replaced by new condition because use of train slot after failure to use notice had been issued would meet use quota.	PfC38	October 2006
	J4.7, 4.8, 4.9 & 4.12 modified and 4.13 deleted to reflect revised consent notification procedures.	PfC38	October 2006
	J4.2 & J4.6 - Definition of 'Quantum Access Right' amended to include L2 and L3 rights. L2s originally excluded because of concerns that they could be removed where Network Rail was unable to timetable an L2 right. Decided that L3 access rights should be caught by Part J because applicant could be forced to make spot bids whilst incumbent retains L3 rights and under the FTAC an operator may only make spot bids for 6 months.	PfC44	October 2007
	J4.9 - New drafting to place obligation on Incumbent to formally notify Network Rail of reasons for rejecting surrender of access rights.	PfC44	October 2007
	J4.10 – New drafting to allow passenger TOCs to object on grounds of ROCN. Previously objection could only be on grounds relating to freight.	PfC47	October 2008
	Consequential changes to J4.12 as a result of changes to ADRR rules	PfC54	January 2010
J5 – Failure to use (3rd party)	Drafting on congested infrastructure removed as did not need to be defined separately.	PfC38	October 2006
	J5.1 - timescales improved and obligation on Network Rail to inform FOC why request has failed.	PfC38	October 2006

	J5.4 amended to allow ROCN as grounds for objecting to 3 rd party notice.	PfC38	October 2006
	New definition of Quantum Access Right (see J4 above).	PfC44	October 2007
	J5.1(b) - Existing condition replaced to allow applicant to require Network Rail to serve notice of surrender of rights to Incumbent where it has ROCN.	PfC44	October 2007
	J5.5 - New condition to provide for any counter-notice to be served on applicant to encourage further discussion with Network Rail, resubmission of the 3rd party notice or appeal under J14.	PfC44	October 2007
J6 – C/Cap reduction (failure to use)	J6.2. amended and J6.3 inserted to allow for new consent/notification arrangements.	PfC38	October 2006
	Consequential changes to J6.3 as a result of changes to ADRR rules	PfC54	January 2010
J7 – freight transfer mechanism	Modification to ensure defeasance/carve out mechanisms are transferred with the access right.	PfC38	October 2006
	J7.2 & J7.7 changes to improve effectiveness of Part J and oblige Network Rail to inform FOC why its application failed.	PfC38	October 2006
	J7.4(c) & J7.6.2 make link between train slot and access right specific.	PfC38	October 2006
	J7.5, J7.6.3 & J7.9 J7.10 (deleted) consents/notifications changes	PfC38	October 2006
	J7.8 Revised condition to reflect changes to dispute resolution provision	PfC38	October 2006
	Replacement of definition Quantum Firm Right with Quantum Access Right so that it includes L3 rights	PfC44	October 2007
	J7.6.1(a)&(c) - New drafting to place obligation on Incumbent to formally notify Network Rail of reasons for rejecting surrender of access rights. New drafting to provide for any counter-notice to be served on applicant to encourage further discussion with Network Rail, resubmission of the 3rd party notice or appeal under J14.	PfC44	October 2007
	J7.4(c) - Deleted because definition of 'Quantum Access Right' makes this condition superfluous.	PfC47	October 2008
	J7.8. – Replacement condition which amended timescale of 10 days to 15 days to resolve inconsistency between definition of	PfC47	October 2008

	ADRR Determination and conditions J7.8.2 & J7.8.1		
	Consequential changes to J7.8 as a result of changes to ADRR rules	PfC54	January 2010
J8 – Adjustment of cordon caps	J8.2.1 New drafting to confirm link between J8 & J7 and allow cordon cap/ cordon cap location to be included/adjusted	PfC38	October 2006
	J8.2(h) deleted, J8.2.9 amended, J8.2(j)-(n) deleted, new J8.4 to reflect new dispute resolution procedures and consent/notification arrangements.	PfC38	October 2006
	New J8.3 to provide process for new cordon/cordon cap to be included because new cordon may be needed to protect capacity or an increase for a FOC may match the other FOC cordon cap decrease. Condition also allows cordon cap increase independently of corresponding decrease to incumbents cordon cap.	PfC38	October 2006
	Definition of Quantum Access Right inserted to include L3 rights.	PfC44	October 2007
	Consequential changes to J8.4 as a result of changes to ADRR rules	PfC54	January 2010
J9 – Rights review meetings	Allow FOCs to request rights review meetings & 3 rd parties to request rights review meetings.	PfC38	October 2006
	J9.3.1, J9.4.2, J9.6, J9.7 new drafting for revised consent/ notification procedures.	PfC38	October 2006
	J9.1.4 – new condition provides for Network Rail responding to applicant with reasons for refusing to hold rights review meeting with another operator to allow for re-submission or appeal.	PfC44	October 2007
	Consequential changes to J9.7 as a result of changes to ADRR rules	PfC54	January 2010
J10 – ORR consent/determination (Arbitration to Oct '06)	Arbitration provisions removed because network code ADC process incorporated for determination of Part J disputes.	PfC38	October 2006
J11 – Obligation to publish notices	New drafting to oblige network Rail to publish all Part J notices.	PfC38	October 2006
	J11 revised to show that ORR's consent is only required for certain adjustments which	PfC38	October 2006

	increase amount of access rights held made pursuant to J2 or J8.		
J12 - ROCN	Correction to references.	PfC33	September 2005
	J12.1 and J12.2 amended to allow ROCN to be revised	PfC38	October 2006
J13 – Dispute resolution	New condition. Original arbitration procedure removed, network code ADC process incorporated for Part J disputes.	PfC38	October 2006
	Consequential changes to J13 as a result of changes to ADRR rules	PfC54	January 2010
J14 – Appeal procedure	New condition to allow a request for rights review meeting with another operator is enforceable and is included under general appeal provisions.	PfC44	October 2007
	J14.2 – condition amended to include potential access parties and align the condition with the new definition of 'Access Parties'	PfC47	October 2008
	Consequential changes to J14.2 as a result of changes to ADRR rules	PfC54	January 2010
Use Quota/Use period	<p>January '05 - Use quota/period established in January '05 of 1 train movement in 90 days (pro-rata'd for use only on certain days)</p> <p>December '06 - proposed a reservation charge for access rights but industry responses supported administrative solutions to dealing with reserving capacity rather than charging mechanisms.</p> <p>March '08 - consulted industry on amendments to use quota/period including evidence of manipulation to meet the quota, whether use quota was working effectively and whether the criteria should just apply to loaded wagons.</p> <p>May '08 – Use quota/period not amended due to lack of evidence. Conclusions letter said that the strengthened conditioned J9 would provide the best way to address any problems and Network Rail should be using this more actively in the future.</p>		

Annex B: List of consultees

Access Disputes Committee	London Underground
Aggregate Industries	London TravelWatch
Arriva Trains Wales	Maersk
Asda	Marks & Spencer
Associated British Ports	Mayor of London
Association of Train Operating Companies	MDS Transmodal
Boots	Mendip Rail
C2C Rail	Merseyrail
Centro	MerseyTravel
Chiltern Railways	National Express East Anglia
Clydeport Operations	Network Rail Infrastructure Limited
CMA CMG	Nexus
Coalpro	Norfolkline
Colas Rail	Northern Rail
Corus UK	North Yorkshire Moors Railway
Cross Country Trains	NYK Line
Crossrail	Olympic Delivery Authority
DB Schenker	Passenger Focus
Department for Transport	Port of Tyne
DFDS Seaways	Potter Group Holdings
Diageo	ProLogis
Direct Rail Services	Rail Freight Group
DP World	Rail Freight Operators' Group
Drax Power	Roadway Container Logistics
East Midlands Trains	Royal Mail
East Coast Mainline Company	RWE Npower
EDF Energy	Sainsbury
E.ON Energy	Scottish Coal
Europorte	Scottish Power
Eurostar	Scottish Southern Energy
First Capital Connect	Serco
First Corporate Shipping	South West Trains
First Great Western	South Yorkshire PTE
First Transpennine	Southeastern
First Scotrail	Southern Railway
Freight Transport Association	Tarmac
Freightliner Group	Tesco
GB Railfreight	The Malcolm Group
Grand Central	Transport for London
Greater Manchester PTE	Transport Scotland
Hanjin Shipping	UK Coal
Hanson	UK Major Ports Group
Highspeed 1	Victa Railfreight
Heathrow Express	Virgin West Coast
Hull Trains	Welsh Assembly Government
Hutchinson Ports UK	West Coast Railway Company
International Power	West Yorkshire PTE
John G. Russell	WSMR

LaFarge Aggregates London Midland London Overground	Wrexham & Shropshire Zim Shipping
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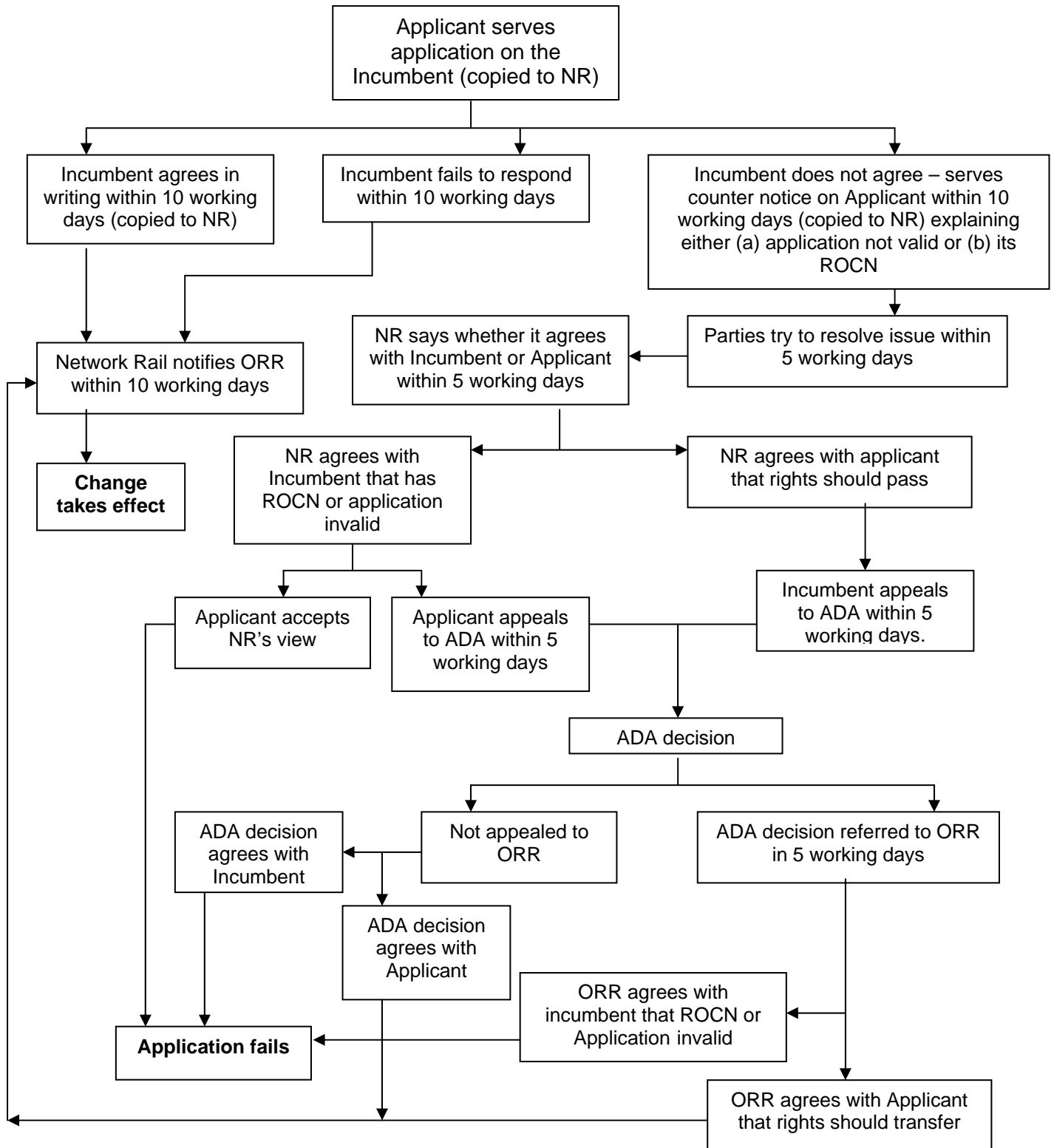
Annex C: Summary of consultation questions

1.	Why do consultees think that Condition J2 has not been used? (paragraph 2.9)
2.	Should Condition J2 be made more attractive to use and, if so, how? Or do consultees agree that, for the time being, Condition J2 should remain as it is? (paragraph 2.10)
3.	Are consultees aware of any issues regarding Condition J3 which need to be addressed? (paragraph 2.11)
4.	Do consultees agree that the definition of Quantum Access Right is confusing and requires amendment? If so, do consultees agree with ORR's proposal for the definition in paragraph 2.15? (paragraph 2.25)
5.	Do consultees agree that reference to Level Two Rights and Level Three Rights in Condition J4.2.2 should be deleted? (paragraph 2.26)
6.	Do consultees agree that the Use Period and Use Quota should be amended? (paragraph 2.27)
7.	What are consultees' views on the options for the Use Period and Use Quota set out in paragraph 2.21? (paragraph 2.28)
8.	Other than reviewing the Use Quota/Use Period and dispute resolution procedures, do consultees have any views how the Condition J4 process could be made quicker and more effective? (paragraph 2.29)
9.	What are consultees' experiences of using Condition J5? Do they consider it has worked well? (paragraph 2.32)
10.	What are consultees' views on combining Conditions J4 and J5? Would this be beneficial? (paragraph 2.33)
11.	Are consultees aware of any issues with Condition J6 that need to be addressed? (paragraph 2.36)
12.	Do consultees agree that the drafting of Condition J7.1.2 requires clarification? (paragraph 2.44)
13.	Do consultees think that requiring the applicant to produce a letter from the third party customer confirming their arrangement as part of its application may reduce the scope for dispute? (paragraph 2.45)

14.	Do consultees agree that it is not clear how Y-paths are dealt with under Condition J7? If so: a) Do consultees have any comments on our proposal for dealing with this issue including the criteria proposed? b) Do consultees have any other alternative proposals on how this issue could be addressed? (paragraph 2.46)
15.	Do consultees agree that the Condition J7 process could be improved? (paragraph 2.54)
16.	Do consultees agree that Network Rail should not be substantially involved in the Condition J7 process until it is evident that the incumbent and applicant cannot agree? (paragraph 2.55)
17.	Do consultees have any comments on our proposal for the Condition J7 process or any other views on how the process could be improved? (paragraph 2.56)
18.	Are consultees aware of any issues regarding Condition J8 which need to be addressed? (paragraph 2.59)
19.	What are consultees' views on Condition J9 as it is currently drafted? (paragraph 2.65)
20.	Do consultees agree with our proposal to focus on output rather than process and ORR having the ability to force Network Rail to hold rights review meetings? (paragraph 2.66)
21.	What are consultees' views on what a rights review meeting should involve? (paragraph 2.67)
22.	How often should rights review meeting be held? (paragraph 2.68)
23.	Do consultees agree with the proposal to allow any timetable participant to force Network Rail to hold a rights review meeting? (paragraph 2.69)
24.	Do consultees agree that ORR's ability to consent to part only of the modifications submitted under condition J2 is no longer required? (paragraph 2.74)
25.	Do consultees agree that ORR should retain the ability to modify cordon cap adjustments submitted under Condition J8? If so, do consultees agree with the proposal to incorporate this power into Condition J8? (paragraph 2.75)
26.	What are consultees' views on our proposal to produce template notices and to amend Condition J11 to place an obligation on Network Rail to publish, review and keep the template notices up to date? (paragraph 2.78)
27.	What are consultees' experiences of using ROCN? (paragraph 2.89)
28.	Do consultees agree that ROCN requires simplification? (paragraph 2.90)
29.	Do consultees agree with our approach of incorporating a simplified ROCN in

	Condition J12 or do they consider there are other approaches with more merit? (paragraph 2.91)
30.	<p>Do consultees agree that:</p> <p>(a) the rights required to fulfil a call-off contract should not typically operate under a firm right and should be applied for under a timetable variation, unless the applicant can demonstrate that the rights are being used on a regular ongoing basis; and</p> <p>(b) holding a call-off contract is insufficient justification for claiming ROCN and the associated path unless there is evidence that the call-off contract is being used regularly? (paragraph 2.92)</p>
31.	Do consultees agree that the ROCN criteria applicable to cordon cap reduction could be simplified and incorporated into Conditions J6 and J8? Do consultees have any other views on how the ROCN criteria applicable to cordon cap reductions could be improved? (paragraph 2.93)
32.	Should Conditions J13 and J14 be amalgamated and simplified? If so, who should be able to refer a Part J dispute for determination in accordance with the ADRR and in what timescales? (paragraph 2.104)
33.	Do consultees agree with our proposals for shortening the timescales of the ADA process for Part J disputes? If not, do consultees have any other views on how the process could be made quicker? (paragraph 2.105)
34.	<p>Do consultees think including an express power within Part M enabling ORR to expedite its appeal procedure is a good idea?</p> <p>(a) If so, to what type of cases should the expedited procedure be applied?</p> <p>(b) If not, do consultees have any other views on how ORR's Part M appeal procedure could be made quicker? (paragraph 2.106)</p>

Annex D: Flow chart for proposed revised Condition J7 process



Annex E – Table showing the ADA process and timings for Part J disputes summarised from ADRR

<u>ACTION</u>	<u>TIME PERIOD</u>	<u>TOTAL TIME PERIOD</u>
The Secretary shall appoint a Hearing Chair appropriate to the dispute		ADC indicated that the appointment of a Hearing Chair and Industry Advisors may take a few days.
The Hearing Chair may give appropriate directions to any or all aspects of the procedures to be followed and shall expressly require (under Rule G11) the parties to reconsider whether any third parties not already identified and notified may be directly affected by the outcome of the dispute – the parties would be required to notify the Secretary of the identity of any such parties.		
The Claimant(s) shall serve upon the Secretary and each other Involved Party, a written statement of its claim.	Within 14 days of the appointment of the Hearing Chair	Serving statements from parties takes around 35 days in total. Time runs from appointment of Hearing Chair.
The other party(s) shall serve upon each other Involved Party a written statement of its defence.	Within 14 days of the claimant(s) written statement	
The Claimant(s) may serve upon each Involved Party a reply limited to responding to new matters and contentions of law raised in the statement of defence and any counterclaim or related claim raised.	Within 7 days of the respondents statement of defence	
The Secretary shall write to all parties to inform them that a hearing date will be set and to inquire whether any party intends to make an application for alternative or varied directions and/or directions hearing at this stage.		
The Secretary shall agree with the Hearing Chair and Parties a hearing date and estimated length of hearing.	Before the date 14 days after the statements of case have been finalised.	It can take up to 49 days from statements being served for a hearing to take place. Time runs from

<p>If a date cannot be agreed between the parties the Hearing Chair shall determine the hearing date. The Secretary shall write to all Involved Parties to confirm the date.</p>	<p>The hearing date shall be within 35 days of the date it is agreed or determined.</p>	<p>service of statements.</p>
<p>Overall timing</p>		<p>At our meeting with the ADC it was suggested that it may take around 13 weeks before a hearing actually takes place. The specific timing elements amount to a maximum of around 12 weeks. These timings run from when a Hearing Chair has been appointed. In addition to this, time must also be allowed for appointment of the hearing chair.</p>