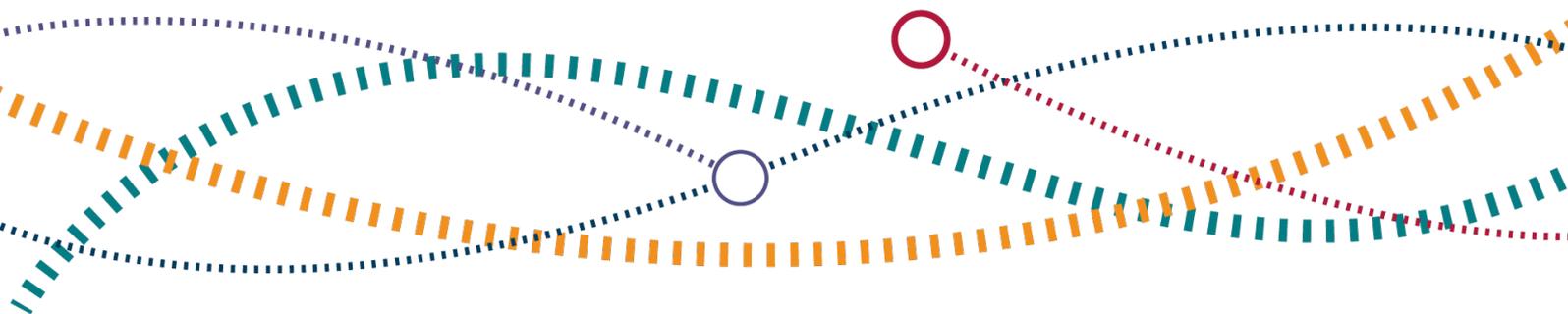




Implementing PR23: consultation on drafting changes to access contracts

11 July 2023



Contents

| | |
|--|-----------|
| 1. Introduction | 3 |
| 2. Changes to all track access contracts (passenger, freight and charter) | 8 |
| 3. Changes to passenger access contracts | 14 |
| 4. Changes to freight access contracts | 22 |
| 5. Changes to charter access contracts | 26 |
| 6. Changes to station access contracts | 28 |
| 7. Traction Electricity Rules | 30 |
| Annex A: Conclusions to drafting improvements consultation | 32 |
| Annex B: Schedule 4 Opt-in/Opt-out mechanism drafting | 38 |
| Annex C: Schedule 8 ‘switch-off’ mechanism for future GBR operators | 42 |
| Annex D: Implementation milestones and statutory process | 45 |
| Annex E: Responding to this consultation | 49 |

1. Introduction

- 1.1 The purpose of this consultation is to seek views on proposed drafting changes to track and station access contracts, which are necessary to give effect to our periodic review 2023 (PR23) decisions, in particular, for charges and incentives. The outcome of this consultation, along with the outcome of our final determination (which will be published in October 2023) will be reflected in the review notices we serve in December 2023, which commence the process of implementing PR23.

Background

- 1.2 PR23 is the process through which we determine what Network Rail Infrastructure Limited (“**Network Rail**”) should deliver through its role in operating, maintaining, and renewing the rail network in Great Britain using available funding in control period 7 (CP7). CP7 will run from 1 April 2024 to 31 March 2029.
- 1.3 On 15 June 2023, we published our PR23 [draft determination](#), setting out our proposed decisions for consultation. In October 2023, having considered stakeholders’ responses, we will publish our decisions in our final determination. We then need to implement our decisions, primarily to give effect to the new charges and incentives, by amending relevant access contracts.
- 1.4 This document sets out:
- (a) an overview of proposed drafting amendments to track and station access contracts, as well as the Traction Electricity Rules, all of which are necessary to give effect to the proposed decisions set out in our draft determination;
 - (b) other necessary changes as we move into the new control period, for example, dates amended so that they are correct for CP7; and
 - (c) conclusions to our October 2022 [consultation](#) inviting suggestions for improvements to the drafting of the model freight, passenger, and charter track access contracts. Our conclusions and the changes we are taking forward are outlined in **Annex A**.
- 1.5 Alongside this document we have published marked-up versions of the majority of model access contracts and Traction Electricity Rules which show all the proposed amendments to them. In addition to amendments to the model access contracts, further amendments are set out at **Annexes B** and **C**. Links to the marked-up

Office of Rail and Road | Implementing PR23: consultation on drafting changes to access contracts

versions of the model access contracts and Traction Electricity Rules are available below.

- [Public service operator \('PSO'\) passenger](#) (We no longer refer to 'franchised operators'. Instead, we describe any operator of public passenger rail services that are contracted or run by a public body as a 'public service operator');
- [Open access passenger](#);
- [Freight operator](#);
- [Charter operator](#);
- [Traction Electricity Rules](#).

1.6 There are three types of model freight contracts:

- (a) freight operator (a company which runs freight trains on the network);
- (b) freight customer (which pays a freight operator to move its goods on the railway, but which has secured its own access rights to do so); and
- (c) freight customer operator (a freight operator which operates trains on behalf of a freight customer under a drawdown notice).

1.7 Changes to the freight customer access contract are minimal, and, where necessary, these are explained within this document. For changes to the freight customer operator access contract, please see the mark-up of proposed changes to the freight operator access contract, as amendments are the same. **References to 'freight access contracts' in this consultation are references to changes to freight operator and freight customer operator access contracts only, unless otherwise specified.**

1.8 We are consulting on these changes to inform the final drafting that will be included in track and station access contracts and the Traction Electricity Rules on and from 1 April 2024. More detail on the implementation process, including a timetable of key milestones and the statutory process is set out in **Annex D**.

1.9 This consultation document is designed to be accessible. However, some related material is "draft for comment" and necessarily contains tracked changes to demonstrate our proposed amendments. This includes **Annexes B** and **C** of this consultation document and the marked-up model access contracts and the

Traction Electricity Rules. Please contact PR23@orr.gov.uk if you need any of these documents in a different format.

Structure of the document

1.10 Each chapter sets out the policy changes required to reflect the policy decisions made as part of PR23 which underpin our draft determination. This document is structured as follows:

- Chapter 2 sets out broadly common drafting changes that we propose to apply to **all track access contracts** (passenger, freight and charter) to implement PR23;
- Chapter 3 sets out proposed changes to **passenger access contracts (PSO and open access)**;
- Chapter 4 sets out proposed changes to **freight access contracts**;
- Chapter 5 sets out proposed changes to **charter access contracts**;
- Chapter 6 sets out proposed changes to **station access contracts** for which Network Rail is the facility owner or lessor (with the exception of those with full repairing and insuring leases, as Network Rail does not have responsibility for maintenance, repair or renewal for these);
- Chapter 7 sets out proposed changes to **Traction Electricity Rules**;
- Annex A is the conclusions to the drafting improvement consultation;
- Annex B sets out Schedule 4 drafting amendments for PSO and freight operators;
- Annex C sets out Schedule 8 drafting amendments for PSOs contracted to DfT, and who in future may be contracted to Great British Railways;
- Annex D provides an overview of the key milestones and statutory implementation process; and
- Annex E sets out how to respond to this consultation.

Responding to this consultation

- 1.11 We welcome comments on this consultation by **31 August 2023**. **Annex E** sets out how to respond including a [link to a proforma](#) that could be used to provide a response.
- 1.12 Please send all responses to PR23@orr.gov.uk or by post: Regulatory Policy Team, Office of Rail and Road, 25 Cabot Square, London, E14 4QZ.
- 1.13 We would be happy to attend a meeting during the consultation period to discuss particular drafting issues with stakeholders if this would be helpful.

Other processes relating to implementation of PR23

Bespoke provisions in contracts

- 1.14 This consultation focuses primarily on the amendments to Schedules 4, 7 and 8 of model track access contracts that will apply in CP7. Generally, we will replace the current Schedules 4, 7 and 8 wording in existing contracts with the drafting contained in the CP7 models when we implement PR23.
- 1.15 There will, however, be some exceptions to this. Some track access contracts contain bespoke provisions, such as provisions which take account of Scottish law, facility charges for investments or bespoke definitions in Schedule 8 for peak/off-peak services. We need to decide whether these provisions need to be rolled forward into CP7 when we apply the new model drafting.
- 1.16 On 27 January 2023, [we wrote to Network Rail customer teams and operators](#) asking them:
- to review whether there were any bespoke provisions in their contracts; and, if so,
 - to advise us whether they considered that these provisions should be retained, updated or removed from contracts when we apply the new model CP7 provisions.
- 1.17 We have reviewed the submissions sent to us and, alongside this consultation, we are writing to Network Rail and all operators to either set out the approach that we propose to take for any bespoke provisions, or to confirm that no bespoke provisions have been identified to us and that we will proceed on the basis that there are none. Interested parties have until 15 September 2023 to make representations to us if they disagree with our proposed approach. **Network Rail**

and all operators should review and respond (where necessary) to these letters by this deadline.

Calibration of access charges and incentive parameters

1.18 As well as the changes to access contracts required to implement PR23, there are other processes relevant to PR23 implementation:

- **production of the price lists for CP7:** Network Rail plans to publish draft versions of its CP7 price lists by the end of July 2023 (mid-August 2023 for the Fixed Track Access Charge (FTAC)), reflecting our draft determination. We strongly encourage operators to take this opportunity to review the draft price lists and identify any factual errors. In December 2023, Network Rail will publish its final price lists for CP7 which are fixed until the next periodic review (Price lists will be updated in advance of each year of CP7 to reflect CPI inflation). These will reflect our final determination decisions.
- **recalibration of the parameters in Schedules 4 and 8 of track access contracts:** while this document discusses the changes to the contractual wording of Schedules 4 and 8, the recalibrations of Schedules 4 and 8 parameters are being progressed through separate processes. Parameters are being released in a phased way between May and November 2023. More information on the recalibration of these regimes is available in our draft determination [policy position document on incentives](#).

2. Changes to all track access contracts (passenger, freight and charter)

- 2.1 This chapter sets out proposed amendments to passenger (both PSO and open access operators), freight and charter track access contracts. We set out in the subsequent chapters changes that are specific to a particular type of access contract.
- 2.2 In addition to the changes highlighted in this chapter, **Annex A** rows A and B sets out proposals to improve drafting in the track access contracts.

Changes to Schedules 4, 7 and 8

Change to inflation indexation formula

- 2.3 Charges, payment rates and other relevant parameters in Schedules 4, 7 and 8 are indexed by inflation. For CP7, we need to amend the formula that is used to index these; specifically, we need to remove the Initial Indexation Factor (IIF). This is because Network Rail's CP7 Strategic Business Plan (SBP) has been developed using the final year of the current control period as the base year (2023-24). This was not the case in PR18, when the penultimate year of the control period was used as the basis for Network Rail's CP6 plan. For CP6, this meant that charges for Year 1 initially had to be adjusted to reflect two years' CPI inflation (through the Initial Indexation Factor, or IIF). For CP7 this will not be necessary, as price lists will be presented in 2023-24 prices (consistent with Network Rail's SBP). This means that contract prices can be used as the starting point for indexing prices for the year commencing 1 April 2024.
- 2.4 As such, we are proposing to amend the inflation indexation formula in all relevant places in Schedules 4, 7 and 8 where the IIF applies, to remove this factor. The definition of "Initial Indexation Factor" will also be deleted from the definitions in Schedule 4, 7 and 8 where applicable. The required consequential amendments for the different types of access contract that are affected are set out below:
- (a) *PSO Access Contract*: Schedule 4 (paragraphs 1.1 (definitions of "SPD Cost Threshold No.1" and "SPD Cost Threshold No.2"), 4.2 (definition of EBMPR), 14.2 and 14.3), Schedule 7 (paragraphs 2.1, 2.2, 3.1, 3.3. and 8) and Schedule 8 (paragraphs 9.1, 13.1 and 19.2).

Office of Rail and Road | Implementing PR23: consultation on drafting changes to access contracts

- (b) *Open Access Contract*: Schedule 4 (paragraphs 1.1 (definitions of “SPD Cost Threshold No.1” and “SPD Cost Threshold No.2”), 4.2 (definition of EBMPR), 14.2 and 14.3), Schedule 7 (paragraphs 2, 3.1, 3.3. and 8) and Schedule 8 (paragraphs 9.1 and 13.1).
- (c) *Charter Access Contract*: Schedule 7 (paragraphs 3.1, 4.1, 4.2 and 7.1) and Schedule 8 (paragraph 7.2.2).
- (d) *Freight Access Contract*: Schedule 7 (paragraphs 2.7.2 and 2.7.3).

2.5 We consider that removing the IIF from these Schedules is the simplest approach to implementing this required change to contracts. However, we welcome views on alternative ways to implement this, for instance retaining but amending the application of the IIF.

2.6 For clarity, this does not reflect any policy change to the indexation of charges and other payment rates, nor any changes to our treatment of inflation. This change is necessary to account for the fact that Network Rail’s CP7 price lists (and other payments rates) will be presented in a different base year to those in CP6.

Schedule 8

Provision for recalibration within control period

2.7 We are introducing a provision to allow for the update of Schedule 8 parameters during the control period (see [draft determination policy position on Schedules 4 & 8 incentive regimes](#), paragraphs 3.28 to 3.42). The provision will allow parameters to adjust during the control period, in the event of a material change in circumstances, to better reflect industry conditions. The provision will be introduced in each of the passenger, freight and charter Schedule 8 regimes. The scope of any recalibration, in terms of sectors, operators and parameters, will be decided at the time, based on the nature of the material change in circumstances. In order to retain flexibility, most parameters are included in the contractual provision.

2.8 In the passenger access contracts, we are proposing amendments to paragraph 17. In the charter access contract, we are proposing to insert a new paragraph 11. In the freight access contracts, we are proposing to insert a new paragraph 13.

Other amendments

Relevant dates

- 2.9 Relevant dates have been amended throughout all the access contracts to reflect that CP7 will run from 2024 to 2029, and references to CP6 changed to CP7 where appropriate. The document referred to in the definition of “Table E2B” will also need to be updated for CP7. We will confirm this in our final determination.

Discontinued provisions

- 2.10 The decision was made in PR18 to remove the **route-level efficiency benefit sharing (REBS) mechanism** and the **capacity charge** from relevant access contracts. However, where necessary, arrangements were retained to ensure charges incurred prior to 1 April 2019 remained liable to be paid when invoiced during CP6. Provisions in respect of REBS and the capacity charge are no longer in the model contracts, and any new PSO access contracts entered into during CP6 do not include them. We now intend to remove relevant provisions from all relevant access contracts which were entered into during CP5 or before.

REBS

- 2.11 We intend to delete references to “REBS” from those access contracts that contain them. The required amendments for different types of access contract that are affected are set out below:
- (a) *Passenger Access Contracts*: We intend to delete the definition of “Route-Level Efficiency Benefit Share” from Part 1 of Schedule 7 and delete and replace with ‘Not Used’ Part 3 of Schedule 7.
 - (b) *Freight Access Contracts*: We intend to delete the definition of “Route-Level Efficiency Benefit Share” from Part 1 of Schedule 7 and delete references to it from paragraph 2.1.4 of Schedule 7. We will replace with ‘Not Used’ paragraph 10 of Schedule 7.

Capacity Charge

- 2.12 We also intend to delete references to “Capacity Charge” from access contracts. Required amendments for different types of access contract that are affected are set out below:
- (a) *PSO Access Contracts*

Office of Rail and Road | Implementing PR23: consultation on drafting changes to access contracts

- (i) Part 1, Schedule 7: we intend to delete the definition of “Capacity Charge” and amend the definition of “Variable Charge” to remove reference to “Capacity Charge” within it;
 - (ii) Part 2, Schedule 7: we intend to, at paragraph 1 within the Principal formula, delete K_t and delete its corresponding definition; delete and replace with ‘Not Used’ paragraph 6; delete and replace with ‘Not Used’ paragraph 10.1(a)(iii); and
 - (iii) Part 6, Schedule 7: we intend to delete and replace with ‘Not Used’ paragraph (j).
- (b) *Open Access Contracts*
- (i) Part 1, Schedule 7: we intend to delete the definition of “Capacity Charge” and “Capacity Charge Wash-up” and amend the definition of “Variable Charge” to remove reference to “Capacity Charge” within it;
 - (ii) Part 2, Schedule 7: we intend to, at paragraph 1 within the Principal formula, delete K_t and KW_t and delete their corresponding definitions; delete and replace with ‘Not Used’ paragraph 6; delete and replace with ‘Not Used’ paragraph 10.1(a)(iii); and
 - (iii) Part 6, Schedule 7: we intend to delete and replace with ‘Not Used’ paragraph (j).
- (c) *Freight Access Contracts*
- (i) Paragraph 1, Schedule 7: we intend to delete the definition of “Freight Capacity Charge” and “Freight Capacity Charge Wash-up”;
 - (ii) Paragraph 2, Schedule 7: we intend to delete references to “Freight Capacity Charge” from paragraph 2.1 and delete and replace with ‘Not Used’ paragraph 2.3.
- (d) *Charter Access Contracts*
- (i) Part 1, Schedule 7: we intend to delete the definition of “Charter Capacity Charge”, “Charter Capacity Charge Wash-Up” and amend the definition of “Track Charge” to remove reference to “Charter Capacity Charge”;

Office of Rail and Road | Implementing PR23: consultation on drafting changes to access contracts

- (ii) Part 2, Schedule 7: we intend to, at paragraph 1 within the Principal formula, delete K_t and KW_t and delete their corresponding definitions; delete and replace with 'Not Used' paragraph 8; delete and replace with 'Not Used' paragraph 11.1(a)(iii) and delete and replace with 'Not Used' paragraph 11.1(b); and
- (iii) Part 6, Schedule 7: we intend to delete and replace with 'Not Used' paragraph (g).

Schedule 9

- 2.13 Schedule 9 of each track access contract places an annual cap on the level of liabilities between Network Rail and operators. Under our current policy the default liability cap for freight and charter is set at £6.5 million (2017-18 prices). Operators may also negotiate individual caps above or below the £6.5 million default cap.
- 2.14 The cap is indexed annually by CPI. It has come to our attention that several operators entering into new contracts during CP6 have been using the £6.5 million cap at the start of their contract without indexing it to the correct price base for the year in which the contract started. This has had the effect that operators are operating on different default caps, dependent on when their contract started.
- 2.15 To correct this and bring default caps back in line, we propose updating the indexation formula for Schedule 9 in the model freight operator, freight customer and charter track access contracts as well as specified operator's contracts as described below. Although we are not proposing amendments to the indexation formula in model passenger access contracts, we are proposing an amendment to the definition of "Contract Year".

Freight, freight customer and charter access contracts

- 2.16 We propose revising the Schedule 9 indexation formula for these access contracts, uplifting the £6.5 million default cap to 2023-24 prices, reflecting inflation since PR18. We propose to update the indexation formula to ensure that the cap and subsequent annual indexation is consistent across operators. Amendments will be made to existing freight, freight customer and charter access contracts that have relied on the £6.5 million default cap in accordance with the marked-up versions of the model access contracts published alongside this consultation. Operators with freight customer access contracts should note that there will be one difference to the freight marked up model in that we will cross-refer to Clause 1.1 for the definition of 'Consumer Price Index' rather than Schedule 7 as this is where this definition is located in the freight customer access contracts. We are

Office of Rail and Road | Implementing PR23: consultation on drafting changes to access contracts

not proposing to change Schedule 9 for any operators that have negotiated their own cap individually with Network Rail.

- 2.17 Alongside changes to the model access contracts, we will also update our guidance and general approvals to reflect how the default rate is entered into new contracts.

Open access

- 2.18 Open access operators negotiate individual caps. Therefore, we are not proposing to adjust any existing access contracts for these purposes. We are however proposing to bring the definition of 'Contract Year' detailed in the open access model contract in line with that in the PSO model access contract. As such, it will be amended and moved from Clause 1.1 to Schedule 9 in the model access contract.

PSO

- 2.19 PSOs also negotiate individual caps. We are not proposing to adjust any existing access contracts for these purposes. We are however proposing an amendment to the definition of 'Contract Year' set out in the PSO model access contract.

3. Changes to passenger access contracts

- 3.1 In addition to the proposals set out in Chapter 2, this chapter sets out proposed amendments relevant only to passenger track access contracts. We set out:
- (a) changes which affect both open access and PSO access contracts;
 - (b) changes which only affect open access operator access contracts; and
 - (c) changes which only affect PSO access contracts.
- 3.2 In addition to the changes highlighted in this chapter, **Annex A** at rows C-E sets out proposals to improve drafting in the track access contracts.

Changes which affect both open access operator and PSO access contracts

Schedule 4

Timetabling process changes: reopener provision

- 3.3 Network Rail has made timetable change proposals, known as Better Timetabling for Passengers and Freight (BTPF). The proposal allows up to three timetable changes per year, which may have significant impacts on Schedule 4.
- 3.4 In the [draft determination policy position on Schedules 4 and 8 incentives](#) (paragraphs 2.13 to 2.18), we set out how Schedule 4 may be impacted as a result of any introduction of BTPF.
- 3.5 It is uncertain whether the BTPF proposals will go ahead. If they do go ahead, the change could reduce the notice period for giving operators details of the informed traveller timetable from 12 weeks to eight weeks before services are due to operate. Under Schedule 4, operators receive a discount on the level of revenue loss for early notice of possessions. With the reduction in the number of weeks that the informed traveller timetable is available this would mean Network Rail would receive a higher discount against more possessions than previously. Conversely, shortening the earliest date at which timetables are published to eight weeks reduces the amount of notice passengers will have about forthcoming disruption due to possessions, lowering the level of discount Network Rail

Office of Rail and Road | Implementing PR23: consultation on drafting changes to access contracts

receives. In order to account for these changes, the access charge supplement (ACS) would need to be recalculated.

- 3.6 If BTPF goes ahead, it is likely to affect the level of Schedule 4 payments. As such we would need to recalculate the ACS if a decision is taken to proceed with BTPF. Proceeding with BTPF may also require amendments to other parts of Schedule 4, such as the notification factors and thresholds. Changes may include, but not necessarily be limited to, amendments to: Schedule 4, paragraph 9; Annex A to Part 3 of Schedule 4; and Part 5 of Schedule 4.
- 3.7 Schedule 10 of access contracts sets out the process to be followed where modifications are consequential upon, or necessary to give full effect to, any changes to the Network Code. We consider that, should changes be taken forward, the procedure set out in Schedule 10 would allow ORR to make amendments to Schedule 4 that are consequential upon changes to Part D of the Network Code. As such, we do not consider that it is necessary to make any changes to the model access contracts to accommodate this.

Other amendments

- 3.8 A reference to 'clause' rather than 'paragraph' has been included in the Open Access model access contract and some passenger operators' contracts at paragraph 2.8(a) of part 3 to Schedule 4. We are therefore proposing to correct relevant references.

Schedule 7

Variable Usage Charge (VUC) default period

- 3.9 Train operators applying for a new VUC rate use the default VUC rate while their application is in progress. If they have been overcharged for the VUC during the period that the application is in progress, they can apply for a refund once the new VUC rate is approved.
- 3.10 Currently, train operators can apply for a refund back to the start of the control period during which a new VUC rate application has been made. As part of PR23, Network Rail has consulted and concluded on limiting the period during which train operators can be refunded for the use of VUC default rates, to a maximum of 12 months from the introduction of a vehicle to the network (see paragraph 3.12 of Network Rail's [recalibration conclusions document](#)). We confirmed in our draft determination that we are supportive of this change (see paragraph 3.43 of our [PR23 draft determination policy position on access charges](#)). As such, we propose to amend the definition of "VUC Default Period" set out in Part 1 of Schedule 7.

Office of Rail and Road | Implementing PR23: consultation on drafting changes to access contracts

Removal of Partial Fleet Metering (PFM)

3.11 Partial Fleet Metering is one charging approach that is currently available to train operators who pay the traction electricity (EC4T) charge. However, no operator has applied to use this charging approach under the Traction Electricity Rules since it was introduced in PR13. We confirmed in our draft determination (paragraph 3.51 of our policy position on access charges) that we intend to remove the PFM charging approach from the start of CP7. We are therefore proposing to delete the definitions of “PFM Rate” and “PFM Rate List” from Part 1 of Schedule 7 and the associated references at in Part 1 and paragraphs 4.1.1 and 4.1.2 of Schedule 7.

Removal of new bespoke modelled EC4T consumption rates

3.12 We also confirmed in our draft determination (paragraph 3.58 of our policy position on access charges) that we intend to remove the facility to obtain a new bespoke modelled EC4T consumption rate from the start of CP7. Consequently, there will be no further supplements to the Traction Electricity Modelled Consumption Rates List in CP7. We propose to amend paragraph 9 of Part 2 such that it only refers to supplements to the Track Usage Price List. Amendments are also required to the definitions of “Traction Electricity Modelled Consumption Rates List” and “Traction Electricity Modelled Default Rate Period”, and the definition of “Traction Electricity Modelled Default Rate Reconciliation Period” will be deleted.

Removal of generic modelled EC4T consumption rates

3.13 We are proposing to delete references to generic consumption rates, as these are being removed from the Traction Electricity Modelled Consumption Rates List in CP7. These references are currently contained in the definition of “New Modelled Train” and “train category i”.

Removal of RPI

3.14 We are proposing to delete the definition “RPI” from Part 1 of Schedule 7 as this will not be used in the model contracts.

Changes to open access operator access contracts

Front end

3.15 We are proposing to move the definition of “Public Holiday” from Schedule 4 and Schedule 5 to Clause 1 of the open access model contract as this definition is used throughout the access contract and the duplication is not required.

Schedule 4

Opt-in mechanism

- 3.16 We are introducing a Schedule 4 opt-in mechanism for open access operators for CP7 (see [draft determination policy position on Schedules 4 & 8 incentives](#), paragraph 2.2 to 2.12). Currently open access operators do not pay an ACS but receive limited compensation from Schedule 4. The new mechanism provides an opportunity for open access operators to opt in and pay an ACS in order to receive full Schedule 4 compensation.
- 3.17 To inform existing operators' decisions on whether to opt in or out, Network Rail will supply indicative ACSs in August. After receiving their indicative ACS, operators will have up to eight weeks to decide whether they want to opt in. This decision will last for the entirety of CP7.
- 3.18 Where an operator has indicated that it wishes to opt in for CP7 its Schedule 4 will reflect this and be drafted as per the amended PSO model Schedule 4 but excluding the new clause A1. Where an operator has decided not to opt in, it will retain its Schedule 4 provisions as per its existing contract.
- 3.19 New open access operators may also decide whether to opt in or out when entering into new contracts. Network Rail will provide an indicative ACS to inform the open access operator's decision within three months of receiving all information necessary for producing an ACS estimate.

Schedule 8

Sustained poor performance mechanism

- 3.20 The sustained poor performance (SPP) mechanism provides for additional compensation to be payable to a train operator when lateness and cancellations attributable to Network Rail reach a specified threshold, beyond which the standard Schedule 8 formula may significantly undercompensate the operator. The SPP mechanism is currently only contained in the model PSO contract, but we have proposed to extend the financial protection to open access operators (see [draft determination policy position on Schedules 4 and 8 incentives](#), paragraphs 3.43 to 3.44).
- 3.21 To give effect to this policy, we are proposing to include new paragraphs 19 and 20 of Schedule 8, and Appendix 3 to Schedule 8. In addition, a consequential amendment to paragraph 17 of Schedule 8 will be made by inserting new paragraph 17.5. This change will enable amendments to be made to Appendix 3 as a consequence of changes to Appendix 1 and mirrors the drafting in the PSO

Office of Rail and Road | Implementing PR23: consultation on drafting changes to access contracts

model access contract. We are also proposing to amend the definitions of “Relevant Losses” and “SPP Threshold” in the front end of the access contract to correct the cross reference.

Changes to PSO access contracts

Schedule 4

Opt-in/opt-out mechanism

- 3.22 We are introducing a Schedule 4 opt-out mechanism for PSOs for CP7 (see [draft determination policy position on Schedules 4 & 8 incentives](#), paragraphs 2.2 to 2.12). Currently PSOs have Schedule 4 and pay an ACS in order to receive compensation. The opt-out mechanism allows them to opt out where they will not pay an ACS and not receive any compensation.
- 3.23 To inform existing operators’ decision on whether to opt in or out, Network Rail will supply indicative ACSs in August 2023. After receiving their indicative ACS, operators will have up to eight weeks to decide whether they want to opt out. This decision will last for the entirety of CP7, apart from under specific circumstances (these are outlined in paragraph 2.10 of our draft determination policy position on Schedule 4 & 8 incentives).
- 3.24 To account for this policy change, we have inserted new clauses A1 in Part 3 of Schedule 4 to allow PSOs to opt in or out during the control period where specific circumstances apply. Where an existing operator indicates that it wishes to opt out from the start of CP7, its new clause A1 will reflect this as per **Annex B**.
- 3.25 New PSOs may also decide whether to opt in or out when entering into new contracts. Network Rail will provide indicative ACS to inform the PSO on its decision within three months of receiving all information necessary for producing an ACS estimate.

Reopener for consequential changes to ACSs following within-control period changes to Schedule 8 payment rates

- 3.26 As included in our draft determination policy position on Schedules 4 and 8 incentives (paragraph 2.19 and Chapter 3), there is the possibility of Schedule 8 being recalibrated within the next control period in the event of a material change in circumstances. Schedule 8 payment rates are used in the calculation of Schedule 4 revenue loss payments, and thereby affect the required ACS. In the event that Schedule 8 payment rates change, we may need to recalculate the ACS in Schedule 4 to prevent this being incorrectly set.

Office of Rail and Road | Implementing PR23: consultation on drafting changes to access contracts

- 3.27 It is therefore necessary to include a reopener provision to allow the ACS to be recalculated in the event that this is required as a result of a change to Schedule 8 payment rates during CP7.
- 3.28 To account for this, we have inserted a new paragraph 15 in Part 3 to Schedule 4 which will allow ORR to amend Part 5 of Schedule 4 should this occur.

Schedule 7

Network grant and related provisions

- 3.29 As part of PR23, we have reviewed the grant dilution provisions in passenger operators' track access contracts. Under the current provisions, operators are required to pay a share of any shortfall in network grant payments three months after the date that a payment is missed. We have proposed to reduce the length of time between a dilution event being triggered and an additional FTAC payment from operators from three months to one month (this is set out in Section 4 of our [PR23 draft determination policy position on the financial framework](#)).
- 3.30 On that basis, we are proposing to amend paragraph 3.1(b) (ii) and (iii) of Part 3A of Schedule 7, so that train operators pay Network Rail a Grant Compensation Amount one month after the Grant Dilution Date. This change applies to both English & Welsh grant arrangements, and Scottish grant arrangements (although we note that the rest of the drafting in Part 3A of the model relates to English and Welsh grant arrangements).
- 3.31 In some operators' access contracts, Part 3A, paragraph 3.2, the definition of 'P', (in sub-paragraph (a)) is not consistent with the model. As such, we are proposing to amend these access contracts to include reference to paragraph 2.1(b) so that they align with the model.

Removal of FTAC wash-up mechanism

- 3.32 The calculation of the fixed track access charge (FTAC) includes a volume incentive mechanism known as a 'wash-up'. This mechanism adjusts an operator's annual FTAC in proportion to variations in timetabled train miles, relative to a pre-determined baseline.
- 3.33 As part of PR23, we have decided to remove this mechanism (see paragraph 1.7 of our October 2022 [conclusions document on access charges](#)). This means that operators' FTACs will continue to be set as an annual charge, based on traffic forecasts derived in advance of the start of CP7. This requires us to amend the formula for calculating this charge, as set out in Part 2 of Schedule 7.

Office of Rail and Road | Implementing PR23: consultation on drafting changes to access contracts

- 3.34 We are therefore proposing to remove FW_t formula from Part 2 paragraph 1, paragraph 2A in its entirety, Remove 10.1(a) (vi) of Part 2 and (l) from Part 6 and paragraph 10.1(a)(vi) from Part 6, along with any associated definitions.
- 3.35 We note that this mechanism was not actually operationalised in CP6. However, it is contained within Schedule 7 of operators' track access contracts (with the difference between baseline and timetabled traffic effectively set to zero for the whole of CP6). For this reason, we still need to amend the relevant sections of Schedule 7.

Schedule 8

Schedule 8 'switch-off' mechanism for GBR's future PSOs

- 3.36 We are introducing what we refer to as a 'switch-off' mechanism to allow for the removal of relevant Schedule 8 payments between Great British Railways (GBR) and its contracted operators, if GBR is established and if there is sufficient legislative change to permit the removal of payments. See our draft determination policy position on Schedules 4 and 8 incentives, paragraphs 3.8 to 3.17. We intend that this mechanism will take effect if (1) there is a change to the legal requirements for a performance scheme in the Railways (Access, Management and Licensing of Railway Undertakings) Regulations 2016 ('the 2016 Regulations'), and (2) ORR issues a notice giving effect to the mechanism.
- 3.37 The contractual changes would, if implemented, have the effect, for GBR's PSO operators, of stopping the main regular Schedule 8 payments, known as 'Performance Sums' (Schedule 8, paragraphs 9 and 10), as well as payments under Sustained Poor Performance provisions (Schedule 8, paragraph 18). It would leave intact some limited payments relating to adjustments to previous payments (Schedule 8, paragraph 6.3), the resolution of disputes (Schedule 8, paragraph 12.2) and the costs of assessing and implementing any amendments to Schedule 8 Appendix 1 and the Performance Monitoring System (Schedule 8, paragraph 17.4).
- 3.38 The mechanism includes the ability for Schedule 8 payments to be 'switched back on', which could be required in the event of a future change to an operator's commercial contractual model.
- 3.39 The 'switch-off' mechanism is only being introduced for those public service operators currently contracted by the Department for Transport, as these are the PSOs that we expect to be contracted by GBR if it is formed. As such, the clauses implementing the 'switch-off' mechanism will not be included in the PSO model contract. The draft determination policy position on Schedules 4 and 8 incentives

Office of Rail and Road | Implementing PR23: consultation on drafting changes to access contracts

(paragraph 3.17) sets out the position for operators contracted by other bodies such as Transport Scotland.

- 3.40 To give effect to this policy, we are proposing changes to paragraphs 12 and 18 of Schedule 8. Because this amendment will not be included in the model PSO access contract going forward, we have not included an amendment in the marked-up version published alongside this consultation. Full details of the proposed changes are instead detailed at Annex C to this document.

Other amendments

- 3.41 To address a typographical error in two of the formulae in paragraph 9.1 of Schedule 8 (definition of NRWAML) we propose to change “MNLr” to read “MLNR”.

4. Changes to freight access contracts

Overview

- 4.1 References to 'freight access contracts' in this consultation are references to changes to freight operator and freight customer operator access contracts only, unless otherwise specified.
- 4.2 This chapter sets out proposed amendments relevant only to freight track access contracts (in addition to the changes already highlighted in chapter 2).
- 4.3 **Annex A row F** then sets out further proposals to improve drafting in the track access contracts.

Front end

- 4.4 We are proposing to update the baseline figure in the definition of "Service Variation Sum" in line with Network Rail's recalibration of the parameters in Schedules 4 and 8 of track access contracts.
- 4.5 We are proposing to delete the definition of "RPI" from Clause 1.1 of the Freight Customer access contract as this will no longer be used in the model.

Schedule 4

Opt-out mechanism

- 4.6 We are introducing a Schedule 4 opt-out mechanism for freight operators for CP7 (see [draft determination policy position on Schedules 4 & 8 incentives](#), paragraphs 2.2 to 2.12). Currently, freight operators receive compensation from Schedule 4, but the mechanism allows them to opt out altogether. This decision should be made by October 2023, in line with decisions in the passenger regime, and will last for the entirety of CP7. As freight operators do not pay an ACS for Schedule 4, freight operators will independently decide whether to opt out or continue to receive compensation.
- 4.7 Where an existing operator has indicated that it wishes to opt out for CP7 its Schedule 4 will reflect this with the insertion of a new clause A1 in Part 1 as per **Annex B**.

Timetabling process changes: reopener provision

- 4.8 As set out at paragraphs 3.3 to 3.7 above, Network Rail has made timetable change proposals, known as BTPF.
- 4.9 It is uncertain whether the BTPF proposals will go ahead. If they do go ahead, it will affect the freight sector, but, as with the passenger access contracts, the freight and freight customer access contracts include a provision at Schedule 10 to enable changes to be made to access contracts consequential upon or necessary to give full effect to, any change to the Network Code. On that basis, we do not consider that it is necessary to make any changes to the model access contracts to accommodate this.

Schedule 7

Removal of Coal Spillage Charge Rate definition

- 4.10 In PR18, we decided to remove the coal spillage charge. The definition of Coal Spillage Charge Rate is currently only included in the freight operator access contract. As the charge no longer exists, we are proposing to delete the definition from part 1 of Schedule 7 of this access contract.

Amendment to formula for biomass infrastructure cost charge (ICC)

- 4.11 In PR18, we introduced an ICC for freight services transporting biomass. This is described in Schedule 7 as a freight specific charge. This charge was phased-in over the course of CP6 (this phase-in profile was set out in Table 2.1 of our [2018 periodic review final determination – Supplementary document – Charges & incentives: Infrastructure cost charges conclusions](#)).
- 4.12 As the biomass ICC will not be subject to a phase-in profile in CP7, the formula for calculating the biomass ICC can be aligned with the formula for other freight ICCs. We therefore propose to remove part (b) of the definition of a Freight Specific Charge Rate and include ESI Biomass Vehicles within part (a) of the definition.

Variable Usage Charge (VUC) default period

- 4.13 Train operators applying for a new VUC rate use the default VUC rate while this application is in progress. If they have been overcharged for the VUC during the period that the application is in progress, they can apply for a refund once the new VUC rate is approved.
- 4.14 Currently, train operators can apply for a refund back to the start of the control period during which a new VUC rate application has been made. As part of PR23,

Office of Rail and Road | Implementing PR23: consultation on drafting changes to access contracts

Network Rail has consulted and concluded on limiting the period during which train operators can be refunded for the use of VUC default rates, to a maximum of 12 months from the introduction of a vehicle to the network. We confirmed in our draft determination that we are supportive of this change. As such, consistent with passenger track access contracts, we propose to amend the definition of “VUC Default Period” set out in Part 1 of Schedule 7.

Removal of new traction electricity modelled consumption rates

- 4.15 We also confirmed in our draft determination that we intend to remove the facility to obtain a new bespoke modelled EC4T consumption rate from the start of CP7. Consequently, there will be no further supplements to the Traction Electricity Modelled Consumption Rates List in CP7. We therefore propose to amend paragraph 2.2.2 to 2.2.14 of Schedule 7 such that they only refer to supplements to the Track Usage Price List.

Addition of traction electricity default modelled consumption rate

- 4.16 As part of PR23, Network Rail has said at paragraph 4.37 of its recalibration conclusions document that it will introduce a set of default modelled EC4T consumption rates for freight operators in CP7. These rates will replace an existing set of generic consumption rates which will be removed from the traction electricity modelled consumption rates list in CP7. This change will align the EC4T billing regime for freight more closely with passenger operators.
- 4.17 As such, we are proposing amendments to freight access contracts to reflect the availability of a default modelled consumption rate. These changes are the addition of definitions for “New Modelled Train”, “Traction Electricity Modelled Default Rate” and “Traction Electricity Modelled Default Rate Period” and updating paragraph 2.4.1.2.

Removal of RPI

- 4.18 We are proposing to delete the definition of “RPI” from Part 1 of Schedule 7 as this will not be used in the model contracts.

Schedule 8

Prolonged disruption sum

- 4.19 We understand from members of our PR23 Schedule 4 and 8 freight and charter recalibration working group, an ORR-convened industry group, that the Schedule 8 prolonged disruption amount is no longer in use (see draft determination policy

Office of Rail and Road | Implementing PR23: consultation on drafting changes to access contracts

position on Schedules 4 and 8 incentives, paragraph 3.55). Network Rail had said that, when a prolonged track closure takes place, with no alternative route available, it now issues a restriction of use and provides short notice possession compensation under Schedule 4. We therefore proposed that the prolonged disruption sum should be removed from the freight Schedule 8 regime.

- 4.20 We are therefore proposing to amend paragraphs 7 and 8.2.2(b) of, and Appendix 3 to, Schedule 8 and delete relevant definitions from paragraph 1 of, and Appendix 1 to, Schedule 8. As a consequential amendment we are also proposing to amend the definition of 'Indexed Figures' in part 1 of Schedule 7.

Incident cap exposure levels

- 4.21 Schedule 8 incident caps limit the exposure of operators to delay liability from individual incidents. There is currently an incident cap that offers a 30% exposure level of delay minutes beyond the cap. In the draft determination policy position on Schedules 4 and 8 incentives (paragraph 3.56), we noted our understanding that this option has not been taken up by any operator in CP6, so we proposed that this option should be removed so that zero exposure is the only option for operators.
- 4.22 To give effect to this change we are proposing to amend paragraphs 4.1.1 and 11 of Schedule 8 and delete definitions from paragraph 1 of Schedule 8 which are relevant only to those paragraphs.

5. Changes to charter access contracts

- 5.1 In addition to the proposals set out in Chapter 2, this chapter sets out proposed amendments relevant only to charter access contracts.
- 5.2 In addition to the changes highlighted in this chapter, **Annex A** rows G and H sets out proposals to improve drafting in the track access contracts.

Schedule 7

Amendment to formula for calculating slot charge

- 5.3 Charter operators pay a slot charge to Network Rail. The slot charge for steam-driven services varies depending on the length of the journey (with journeys that are defined as exceeding 250 miles attracting a higher charge per journey).
- 5.4 As part of PR23, Network Rail has proposed combining the slot charges for steam services into a single uniform rate for all journey lengths (see paragraph 3.52 of Network Rail’s recalibration conclusions document). We confirmed in our draft determination (paragraph 3.68 of our policy position on access charges) that we are content with this change to the steam slot charge.
- 5.5 To reflect this, we are proposing to amend the formula for calculating this charge as set out in paragraph 4 of part 2 of Schedule 7, to remove references to “journey type j” (which currently distinguishes the charge by journey length). This will ensure the formula for this charge is consistent with Network Rail’s CP7 price list.

Schedule 8

Incident cap exposure levels

- 5.6 As explained in paragraph 4.21 and 4.22, Schedule 8 incident caps limit the exposure of operators to delay liability from individual incidents. There is currently an incident cap that offers a 30% exposure level of delay minutes beyond the cap, but we have proposed that this option is removed so that operators have zero exposure beyond the cap (see draft determination policy position on Schedules 4 and 8 incentives, paragraph 3.56).

Office of Rail and Road | Implementing PR23: consultation on drafting changes to access contracts

- 5.7 To give effect to this change we are proposing to amend paragraphs 4.3.1 and 9 of Schedule 8 and delete definitions from paragraph 1 of Schedule 8 which are relevant only to those paragraphs.

6. Changes to station access contracts

Station Long Term Charge

Recalibration

- 6.1 When we implement PR23, we will revise the station long term charges (LTCs) set out in station access contracts. This is based primarily on Network Rail's recalibration of LTCs.
- 6.2 Network Rail plans to publish its draft price list by the end of July 2023, setting out draft LTC rates for each station on its network. Our formal approval of recalibrated LTCs will be provided later this autumn, once Network Rail has finalised its recalibration exercise and we are satisfied that it reflects all the decisions made in our final determination. The review notice that we issue for station access contracts in December 2023 will reflect Network Rail's final price list for the station LTC (published alongside review notices).

Indexation arrangements

- 6.3 As explained in chapter 2 paragraphs 2.3 to 2.6 above, we are proposing to make changes to inflation indexation arrangements in Schedules 4, 7 and 8 of operators' track access contracts, to remove the IIF in the formulae which adjust charges and payment rates by CPI inflation each year.
- 6.4 This change is also relevant to station LTCs, as Network Rail's station LTC price list will be set in 2023-24 prices. We therefore propose to amend the indexation formulae relating to the station LTC to reflect this change, in line with the change described above. Specifically, we propose deleting the "Initial Indexation Factor" definition and amending condition 42.2.1 in the Independent Station Access Conditions (ISACs) and condition 11.2.1 in the National Station Access Conditions (NSACs).
- 6.5 We propose to amend Condition 42.2.1, paragraph (i) of the ISACs as follows:
- (i) subject to paragraph (ii) below, in relation to the relevant year commencing on 1 April 2024, S_{t+1} shall have the value specified in paragraph 2 of Annex 8 ~~multiplied by the Initial Indexation Factor and in relation to the next following year, S_{t+1} shall have the same value~~; and

Office of Rail and Road | Implementing PR23: consultation on drafting changes to access contracts

6.6 We propose to amend Condition 11.2.1, paragraph (i) of the NSACs as follows:

(i) subject to paragraph (ii) below, in relation to the relevant year commencing on 1 April 2024, S_{t-1} shall have the value specified in paragraph 3 of Annex 9 ~~multiplied by the Initial Indexation Factor and in relation to the next following year, S_{t-1} shall have the same value.~~

6.7 As with track access contracts, while we consider this is the simplest approach to implementing this required change to station access conditions, we welcome views on alternative ways to implement this (e.g. retaining but amending the application of the IIF in these conditions).

7. Traction Electricity Rules

- 7.1 The Traction Electricity Rules set out rules and provisions relating to the calculation of traction electricity (EC4T) charges. These rules are incorporated into the track access contracts of PSO and freight operators. They can be amended, where necessary, in order to implement changes made as part of a periodic review.
- 7.2 As part of PR23, we will need to amend the Traction Electricity Rules to give effect to some provisional decisions we have made concerning the administration of the EC4T charge. We plan to do this by including amendments set out in our review notices. This will ensure that the changes are aligned with amendments to Schedule 7 of the relevant track access contracts.
- 7.3 The rest of this chapter sets out the relevant changes we are proposing.

Section 14 Partial Fleet Metering (PFM)

- 7.4 As set out in paragraph 3.11, we intend to remove the PFM charging approach from the start of CP7. To give effect to this change, we are proposing to delete paragraph 14 from the Traction Electricity Rules. We also intend to remove the associated definitions: “Derived Rate”, “Initial PFM Rate”, “Opt-in Notice”, “Partial Fleet Metering”, “PFM Data Threshold”, “PFM Data Threshold Failure”, “PFM Effective Date”, “PFM Financial Spreadsheet”, “PFM Fleet”, “PFM Qualification Threshold”, “PFM Rate”, “PFM Rates List”, “PFM Year”, “PFM Year 1”, “PFM Year 0”, “Previous PFM Year” and “Unmetered Vehicle”. We are also proposing amendments to the explanatory note, the definitions of “Metered Train Operator” and “Train Category”, and paragraphs 2.4 and 18.2.

Section 18 Cost and volume wash-up

- 7.5 As part of PR23, we have confirmed that we will remove the loss incentive mechanism from the EC4T volume wash-up (see paragraph 2.61 of our October 2022 conclusions document on access charges). This requires us to make some changes to paragraph 18 of the Traction Electricity Rules, specifically the volume reconciliation formula in paragraph 18.2 and in the cost reconciliation formula in 18.3. We are therefore proposing some amendments to simplify these formulae, reflecting the removal of the loss incentive mechanism.

Annex 3 Distribution System Loss Factors (DSLFs)

- 7.6 Network Rail has recalibrated its Distribution System Loss Factors (DSLFs) for CP7. As part of its recalibration conclusions document (Table 12), it has set out a revised set of DSLFs for each Electricity Supply Tariff Areas (ESTA). These will need to be reflected in Annex 3 of the Traction Electricity Rules, which sets out the DSLF for each ESTA. We have therefore updated the table in Annex 3 accordingly.
- 7.7 We are also aware that Network Rail has proposed some changes to the boundaries of some ESTAs in advance of CP7. If these changes are agreed, the relevant ESTA descriptions in Annex 5 of the Traction Electricity Rules will need to be updated accordingly. However, we have not included these proposed changes as part of this consultation, as they are not directly related to PR23 and are being consulted on separately.

Other changes

- 7.8 As explained in paragraph 3.13, we intend to remove generic modelled consumption rates from the Traction Electricity Modelled Consumption Rates List in CP7. Consistent with this, we are proposing to delete reference to these rates from the definition of 'Train Category' in part 1 of the Traction Electricity Rules.

Annex A: Conclusions to drafting improvements consultation

A.1 In October 2022 we [invited views](#) from current and prospective access parties on potential improvements to the drafting of access contracts. We were clear that this was an opportunity to improve the clarity and consistency of the contractual drafting in the model contracts and we stated that we were seeking proposals to address:

- uncertainty or ambiguity in the drafting;
- aspects of the contractual drafting which stakeholders consider do not reflect the established policy intent;
- inconsistent wording within contracts;
- opportunities for simplification of the drafting, while retaining the established policy intent; and
- suggestions for new wording to reflect other relevant developments, such as technological improvements in billing processes, or possible improvements to processes associated with Schedules 4, 7 and 8.

A.2 Feedback for the purposes of this exercise was not required on:

- (a) the substance of our PR23 policy development relating to charges and incentives, and any contractual changes required to implement this; and
- (b) any potential changes which may arise, or which require change to contracts, as part of the UK Government's rail reform programme.

A.3 We received two responses, from Network Rail and GWR, containing 11 discrete proposals (a small number of others were made, but subsequently withdrawn, and we do not therefore include them here).

A.4 The following table sets out the proposals that were made (and not withdrawn), and our response to each proposal.

Table A.1 Proposals for drafting improvements and our response

| Drafting change reference | Model contract(s), Schedule(s) | Issue/proposal raised by stakeholder | Our response |
|--|---|--|--|
| Changes affecting Passenger (Open Access and PSO), Freight and Charter Access Contracts | | | |
| A | Passenger, Freight (including the freight customer access contract), Charter Front end (all), Schedule 5 (Charter) Schedule 8 (Passenger only) | <p>There are dated technological communications references in the track access contract, for example to facsimile transmission which is now not in use.</p> <p>There should be a presumption to allow for email, rather than this be subject to agreement by the parties. It should be possible that other digital or electronic forms may also be agreed.</p> | <p>At clauses 16 and 18 and (where applicable) Schedule 5, paragraph 3.6(e) and Schedule 8, paragraph 15 we are proposing amendments to remove references to facsimile transmission. At clauses 16 and 18 we are proposing to remove the requirement to agree in advance to the use of email.</p> <p>Note: ORR will not make changes to Schedules 1 and 3. As applicable, parties should agree relevant amendments to remove reference to 'fax' as they see fit.</p> |

Office of Rail and Road | Implementing PR23: consultation on drafting changes to access contracts

| Drafting change reference | Model contract(s), Schedule(s) | Issue/proposal raised by stakeholder | Our response |
|---|---|--|---|
| B | Passenger Charter, Freight (including the freight customer access contract). Front end | There should be an allowance for a delay to payments in the absence of provision of a purchase order number. | At clause 16.1.3 we are proposing an amendment to explicitly reference a requirement for a purchase order number to be provided. |
| Changes affecting Passenger Access Contracts (Open Access and PSO) | | | |
| C | Passenger, Schedule 4 | <p>Within 10 days of receipt of a statement from Network Rail under Schedule 4 paragraph 13.2, the Train Operator shall notify Network Rail of any aspects of the statement which it disputes, giving reasons for any dispute.</p> <p>It was proposed that “10 days” be amended to “10 working days” to provide sufficient time, for example during holiday periods.</p> | We are proposing to amend the reference from 10 days to 14 days in Schedule 4, paragraph 13.2. This meets the requirements of the request and is consistent with the current drafting in the rest of the paragraph. |
| D | Passenger, Schedule 4 | Steps should be taken to further promote upfront compensation agreements, as provided for in Schedule 4, paragraph 2.11. In practice the opportunity is rarely pursued, and the current contractual wording does not encourage such agreements. | We are proposing amendments that will clarify the wording of Schedule 4, paragraph 2.11. At present the paragraph is long, and we consider it can be sensibly split to add clarity. |

Office of Rail and Road | Implementing PR23: consultation on drafting changes to access contracts

| Drafting change reference | Model contract(s), Schedule(s) | Issue/proposal raised by stakeholder | Our response |
|---|--------------------------------|---|--|
| E | Passenger, Schedule 4 | There should be an amendment to the Schedule 4 dispute resolution process to provide more contractual structure, with a view to enabling better progression of claims. | We are proposing amendments to Schedule 4, paragraph 10 which provides more structure for resolution by building in timeframes. |
| Changes affecting Freight Access Contracts | | | |
| F | Freight Schedule 4 | There is currently no provision in Schedule 4 for a train which terminates short of destination but then later continues to that destination on a new schedule. Thus an addition should be made to the definition of “Category 1 Disruption”. | We are proposing amendments that add the scenario described to the definition of “Category 1 Disruption” in Schedule 4, paragraph 1.1. |
| Changes affecting Charter Access Contracts | | | |
| G | Charter Schedule 8 | Network Rail said that interim payments have never been used in the charter regime and there is only a final payment once all disputes have been resolved. Network Rail therefore proposed that the charter regime be brought into line with the freight regime, which reflects actual working practices. | We are proposing amendments, to Schedule 8, paragraph 7.1.1 and the deletion of paragraph 7.1.4. We note that this change will remove the right to interim payments where there is a dispute and for interest to be paid. |

Office of Rail and Road | Implementing PR23: consultation on drafting changes to access contracts

| Drafting change reference | Model contract(s), Schedule(s) | Issue/proposal raised by stakeholder | Our response |
|--|--|---|--|
| H | Charter Schedule 8 | The current wording can extend the period in which the Charter Service Variation Sum (as defined in paragraph 1 to Schedule 8) can be claimed by up to seven weeks. The process should be shortened, bringing it in line with the freight Schedule 8 regime (at Schedule 8, Appendix 3, Clause 4) and with established working practices. | We are proposing amendments to Schedule 8, paragraph 3.4 that will shorten the period in which claims can be made. |
| Proposals not being taken forward | | | |
| I | Passenger, Charter, Freight Front end | The definition of a force majeure (clause 17) is subjective in the case of weather events. The definition should be stated more clearly and objectively, which would assist in reducing an otherwise increasing amount of industry time spent discussing this issue as a result of climate change. | We are not proceeding with this proposal. Forming a definition of force majeure weather events would be a significant undertaking with potentially far-reaching impacts and is therefore out of scope of this exercise. |
| J | Charter Schedule 8 | A proposal was made to simplify the reporting arrangement within Schedule 8, paragraph 3.5 which would then align it with the process for the freight regime and would be consistent with current working practice. | We are not proceeding with this proposal. The complexity of the drafting amendments required and the limited time and resources available mean that we are not able to take this forward as part of PR23. |

Office of Rail and Road | Implementing PR23: consultation on drafting changes to access contracts

| Drafting change reference | Model contract(s), Schedule(s) | Issue/proposal raised by stakeholder | Our response |
|---------------------------|--------------------------------|--|--|
| K | Charter Schedule 8 | A proposal was made to simplify the reporting arrangements within Schedule 8, paragraph 4.5 and it was proposed to align it with the process for the freight regime, which it was suggested is consistent with current working practice. | We are not proceeding with this proposal. The complexity of the drafting amendments required and the limited time and resources available mean that we are not able to take this forward as part of PR23. |

Annex B: Schedule 4 Opt-in/Opt-out mechanism drafting

B.1 This annex sets out drafting for PSO and freight access contracts in relation to the Schedule 4 Opt-in/Opt-out mechanism.

PSO

B.2 PSOs which opt out as described in paragraphs 3.22 to 3.25 of this consultation will have the following provision added into their contract in place of the model contract Paragraph A1 at the start of Part 1, Schedule 4 (with related appendices added at the end of Schedule 4).

Proposed amendments:

A1. Effect of Schedule

A1.1 This Schedule 4 shall have no effect save for

- (a) this paragraph A1; and
- (b) paragraph 1.1 of Part 3 and any further paragraphs of Part 3 necessary to give effect to paragraph 1.1 of Part 3, until a notice has been served pursuant to paragraph A1.2.

A1.2 The Train Operator may serve a notice, in the form set out in appendix 4A to this Schedule, informing Network Rail that the whole of this Schedule 4 shall have effect (an “Opt-in Notice”). This Opt-in Notice may only be served in the event of:

- (a) the award of a franchise agreement following re-tendering of the Franchise Agreement;
- (b) a change in identity of an operator of a franchise agreement that is not as a result of A1.2(a) and which results in a significant change in the Services; or
- (c) the Train Operator entering into a franchise agreement with a new franchising authority in accordance with the Act.

A1.3 The Train Operator must serve a notice given pursuant to paragraph A1.2 on Network Rail (and shall provide a copy to ORR) three months prior to the relevant event in paragraph A1.2(a), (b) or (c) above, so that the relevant event and the Opt-in Notice take effect on the same day.

Office of Rail and Road | Implementing PR23: consultation on drafting changes to access contracts

A1.4 Where an Opt-in Notice has been served and taken effect, the Train Operator may serve a notice, in the form set out in appendix 4B, informing Network Rail that this Schedule 4 shall have no effect, save for this paragraph A1 and paragraph 1.1 of Part 3 (and any further paragraphs of Part 3 necessary to give effect to paragraph 1.1 of Part 3) (an “Opt-out Notice”). This Opt-out Notice may only be served in the event of:

- (a) the award of a franchise agreement following re-tendering of the Franchise Agreement;
- (b) a change in identity of an operator of a franchise agreement that is not as a result of A1.4(a) and which results in a significant change in the Services; or
- (c) the Train Operator entering into a franchise agreement with a new franchising authority in accordance with the Act.

A1.5 The Train Operator must serve a notice given pursuant to paragraph A1.4 on Network Rail (and shall provide a copy to ORR) three months prior to the relevant event in paragraph A1.4(a), (b) or (c) above, so that the relevant event and the Opt-out Notice take effect on the same day.

APPENDIX 4A – OPT-IN NOTICE

[Name of train operator representative]

[Position]

Telephone: [xxx]

E-mail: [xxx]

[Date]

[Enter name of person specified in paragraph 1 of Schedule 1 to the contract]

Network Rail Infrastructure Limited

[Enter address specified in paragraph 1 of Schedule 1 to the contract]

Dear [Enter name of person specified in paragraph 1 of Schedule 1 to the contract]

Opt-in to the Schedule 4 Restrictions of Use provisions

This is an Opt-in Notice in respect of Schedule 4 of the track access contract between Network Rail Infrastructure Limited and [Enter train operator name here], dated [insert date of track access contract] (“the contract”).

Office of Rail and Road | Implementing PR23: consultation on drafting changes to access contracts

[Enter train operator name here] hereby exercises its right to opt in to all of the Schedule 4 provisions, pursuant to paragraph {delete as appropriate [A1.2(a)], [A1.2(b)] or [A1.2(c)]} of Part 3 to Schedule 4 to the contract.

I have sent a copy of this notice to the Head of Access and Licensing at the Office of Rail and Road and to the Head of Regulatory Economics at Network Rail [and any other person at Network Rail entitled to a copy as set out in paragraph 1 of Schedule 1 to the contract].

Yours faithfully

[Name of train operator representative]

APPENDIX 4B – OPT-OUT NOTICE

[Name of train operator representative]

[Position]

Telephone: [xxx]

E-mail: [xxx]

[Date]

[Enter name of person specified in paragraph 1 of Schedule 1 to the contract]

Network Rail Infrastructure Limited

[Enter address specified in paragraph 1 of Schedule 1 to the contract]

Dear [Enter name of person specified in paragraph 1 of Schedule 1 to the contract]

Opt-out from the Schedule 4 Restrictions of Use provisions

This is an Opt-out Notice in respect of Schedule 4 of the track access contract between Network Rail Infrastructure Limited and [Enter train operator name here], dated [insert date of track access contract] (“the contract”).

[Enter train operator name here] hereby exercises its right to opt out of the provisions of Schedule 4, pursuant to paragraph {delete as appropriate [A1.4(a)], [A1.4(b)] or [A1.4(c)]} of Part 3 to Schedule 4 to the contract.

This notice does not apply to paragraphs A1 and 1.1 of Part 3 of Schedule 4, and any further paragraphs of Part 3 necessary to give effect to paragraph 1.1 of Part 3.

Office of Rail and Road | Implementing PR23: consultation on drafting changes to access contracts

I have sent a copy of this notice to the Head of Access and Licensing at the Office of Rail and Road and to the Head of Regulatory Economics at Network Rail [and any other person at Network Rail entitled to a copy as set out in paragraph 1 of Schedule 1 to the contract].

Yours faithfully

[Name of train operator representative]

Freight

B.3 Freight operators who opt out as described in paragraph 4.6 to 4.7 of this consultation will have the following additional provision added into their contract at the start of Part 1, Schedule 4.

Proposed amendments:

A1. Effect of Schedule

A1.1 This Schedule 4 shall have no effect save for

- (a) this paragraph A1; and
- (b) paragraph 1.1 of Part 1 and any further paragraphs of this Schedule 4 necessary to give effect to paragraph 1.1 of Part 1.

Annex C: Schedule 8 ‘switch-off’ mechanism for future GBR operators

- C.1 As described at paragraphs 3.36 to 3.40, we are introducing what we refer to as a ‘switch-off’ mechanism to allow for the removal of relevant Schedule 8 payments between GBR and its contracted operators, if GBR is established and there is sufficient legislative change to permit the removal of payments. To give effect to this, the following amendments (shown in red) will be included in PSO access contracts of those operators which may in future contract with GBR.
- C.2 Relevant operators are:
- (a) Abellio East Anglia Limited;
 - (b) Abellio East Midlands Limited;
 - (c) First Greater Western Limited;
 - (d) First MTR South Western Trains Limited;
 - (e) First Trenitalia West Coast Rail Limited (formerly Virgin Trains) (T/A Avanti West Coast);
 - (f) Govia Thameslink Railway Limited;
 - (g) London North Eastern Railway Limited;
 - (h) Northern Trains Limited;
 - (i) SE Trains Limited;
 - (j) The Chiltern Railway Company Limited;
 - (k) TransPennine Trains Limited;
 - (l) Trenitalia c2c Limited;
 - (m) West Midlands Trains Limited; and
 - (n) XC Trains Limited.

Proposed amendments:

12. Payment procedures

12.1 *Payments and set-off*

- (a) In respect of any and all Performance Sums for which Network Rail and the Train Operator are liable in any Period, the aggregate liabilities of Network Rail and the Train Operator shall be set off against each other. The balance shall be payable by Network Rail or the Train Operator, as the case may be, within 35 days after the end of the Period to which the payment relates.
- (b) Subject to paragraph 12.2, and save as otherwise provided, all other sums payable under this Schedule 8 shall be paid within 35 days after the end of the Period to which such payment relates.

12.2 *Payments in the event of dispute*

Where any sum which is payable under this paragraph 12 is in dispute:

- (a) the undisputed amount shall be paid or set off (as the case may be) in accordance with paragraph 12.1;
- (b) the disputed balance (or such part of it as has been agreed or determined to be payable) shall be paid or set off (as the case may be) within 35 days after the end of the Period in which the dispute is resolved or determined; and
- (c) from the date at which such balance would but for the dispute have been due to be paid or set off, the disputed balance shall carry interest (incurred daily and compounded monthly) at the Default Interest Rate, unless the dispute relates to an incident the responsibility for which is the subject of a Joint Inquiry, in which case interest shall be payable at the prevailing base rate of Barclays Bank plc.

12.3 *Application of paragraph 12.4*

Paragraph 12.4 shall apply if:

- (a) the provisions in the Railways (Access, Management and Licensing of Railway Undertakings) Regulations 2016 relating to the performance scheme are amended; and
- (b) ORR issues a notice to the parties confirming that paragraph 12.4 shall take effect.

12.4 *Restrictions on payments*

Save in relation to paragraph 12.2, no payments under paragraph 12.1(a) and/or paragraph 18 shall be made from the date, which may be retrospective, specified in the notice issued by ORR under paragraph 12.3(b).

12.5 *Reinstatement of payments*

Where paragraph 12.4 applies, ORR may issue a subsequent notice to the parties reinstating the payments under paragraph 12.1(a) and/or paragraph 18 from the date specified in the subsequent notice.

18. Compensation for sustained poor performance

18.1 *Definitions*

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In this paragraph 18, unless the context otherwise requires:

"Average Periodic Liability" means one thirteenth of the sum of all values of NRPS (as that term is defined in paragraph 9) to be calculated by deducting the sum of all values of NRPS for which the Train Operator is liable from the sum of all values of NRPS for which Network Rail is liable in each case in respect of the relevant Calculation Term;

"Calculation Term" means the 13 Periods immediately preceding each Periodic Liability Date;

"Periodic Liability Date" means the first day of the first, fourth, seventh and eleventh Periods in each Relevant Year ignoring for these purposes any Period that commences before the Transition Date as referred to in clause 19; and

"SPP Threshold" means the value specified in respect of the end of the relevant Calculation Term in Appendix 3 (as indexed in accordance with paragraph 19).

18.2 **Indemnity**

Network Rail shall indemnify the Train Operator against all Relevant Losses in accordance with this paragraph 18 if, and to the extent that, the Average Periodic Liability shows Network Rail has exceeded (that is, equalled or been worse than) the relevant SPP Threshold. For the avoidance of doubt, Relevant Losses for the purpose of providing compensation for sustained poor performance under this paragraph are to be measured in comparison to the position the Train Operator would have been in had Network Rail met the NRPP.

18.3 **Determination of Relevant Losses**

Subject to paragraph 18.4, the liability of Network Rail under paragraph 18.2 for sustained poor performance (SPPL) shall be determined in accordance with the following formula:

$$SPPL = RL - PS$$

where:

RL means the Train Operator's Relevant Losses arising as a direct result of Minutes Delay and Cancelled Stops during the Calculation Term in each case insofar as these do not arise as a result of an incident for which the Train Operator is allocated responsibility pursuant to paragraph 5.3; and

PS means the sum of all values of NRPS (as that term is defined in paragraph 9) to be calculated by deducting the sum of all values of NRPS for which the Train Operator is liable from the sum of all values of NRPS for which Network Rail is liable in each case in respect of the relevant Calculation Term;

18.4 **Restrictions on claims by Train Operator**

The Train Operator shall not be entitled to make a claim for Relevant Losses pursuant to this paragraph 18:

- (a) if and to the extent that it has previously recovered those Relevant Losses whether under this paragraph 18 or otherwise; or
- (b) in relation to any Calculation Term or part of it that precedes the Transition Date as referred to in clause 19; or
- (c) for any Period or any Relevant Losses incurred after the date, which may be retrospective, specified in the notice issued by ORR under paragraph 12.3(b).

Annex D: Implementation milestones and statutory process

The Implementation process and timeline

D.1 The timetable for implementation is set out in Table D.1 below.

Table D.1 Timetable for contractual implementation

| Date | Milestone |
|---------------------|--|
| 11 July 2023 | Publication of this consultation on drafting amendments to access contracts. |
| Mid-July 2023 | ORR writes to Network Rail and access parties regarding bespoke provisions. |
| By end of July 2023 | Network Rail publishes its draft track usage price list and draft price list for station long term charges. |
| Mid-August 2023 | Network Rail publishes draft price list for the fixed track access charge (which applies to public service operators). |
| Mid-August 2023 | Network Rail provides indicative Schedule 4 access charge supplements to passenger operators, to support operators' decisions on whether to opt in or out of Schedule 4. |
| 31 August 2023 | Deadline for responses to this consultation. |
| 15 September 2023 | Deadline for Network Rail and access parties to make further representations to ORR on bespoke provisions. |
| Mid-October 2023 | Operators give their decisions to Network Rail on whether to opt in or out of Schedule 4, and Network Rail provides operators' decisions to ORR. |
| October 2023 | ORR publishes its final determination for CP7. |
| By 20 December 2023 | ORR publishes and serves review notices on operators and other relevant parties, setting out the changes to access contracts including those that are required to give effect to our final determination. Network Rail publishes its final price lists for CP7, setting out the specific access charge rates that would be payable by access parties. |
| February 2024 | Deadline for Network Rail to provide objection(s) on the review notice(s) to ORR. Where no objection(s) are received, ORR publishes and serves a notice of agreement on operators. Following the |

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| Date | Milestone |
|---|---|
| (Exact timings dependent on date of review notices) | publication and service of the notice of agreement, operator(s) will have not less than 28 days to give notice that it wants to terminate its access contracts. |
| Mid-March 2024 | ORR publishes and serves review implementation notices on operators, confirming that the review will be implemented by 1 April 2024. |
| 1 April 2024 | CP7 begins. Changes to access party contracts, including new access charges, take effect. |

Statutory process for implementing a periodic review

D.2 The statutory process for implementing access charges reviews (the formal term for a periodic review) is set out in Schedule 4A to the Railways Act 1993. This requires us to serve a series of notices:

- (a) a review initiation notice;
- (b) review notices;
- (c) notices of agreement; and
- (d) review implementation notices.

D.3 A review initiation notice formally sets out our intention to carry out an access charges review. On 9 June 2023, we issued a [review initiation notice](#) for England and Wales and a [review initiation notice](#) for Scotland relating to both track and station access agreements.

D.4 Once we have reached our conclusions (i.e. our final determination) in an access charges review, we then issue review notices to begin the implementation process. These must:

- (a) state our conclusions and the reasons why we have reached those conclusions. We will do this by referring to our published final determination documentation in the notice;
- (b) specify the changes which we propose to make to any access agreements for or in connection with giving effect to our final determination. This will include:

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- (i) any changes to the financial parameters in Schedules 4 and 8 of track access contracts arising from recalibration undertaken as part of PR23; and
- (ii) the inclusion of references to Network Rail's CP7 price lists (or in the case of station access contracts, amendment of long-term charge values);
- (iii) state the date on which we propose that each of those changes should come into operation; and
- (iv) specify a period of not less than six weeks from the date of issue of the review notices in which Network Rail may object to any of the proposed changes.

- D.5 As required by the Act, we will send a physical copy of the review notices containing revised provisions to Network Rail, each affected access party, the Scottish Ministers, the Secretary of State and HM Treasury and anybody else identified on the face of the review notice. We intend to serve review notices by 20 December 2023. At the same time, we expect to approve the price lists produced by Network Rail that will set out the access charges to be paid by train operators in CP7.
- D.6 We will publish the review notices on our website after making any appropriate redactions.
- D.7 Consistent with previous practice, our review notices will also include a provision providing that if we approve or direct amendments to an access agreement after we have served the review notice but before it comes into effect, those later amendments will come into effect subject to the changes we propose in the review. If there is any conflict between the changes we propose in the review notice and the changes we have approved or directed subsequently, the latter will take precedence.
- D.8 Any access contracts entered into after the date we issue our review notices cannot be included within the scope of the notice. Nonetheless, from the start of CP7, the provisions in these contracts will need to be consistent with PR23. We will therefore ensure there are arrangements in those contracts to enable this to happen. We will also need to make similar arrangements for those contracts that may be entered into shortly before the review notice is issued.

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- D.9 If Network Rail objects to any review notice, we may issue a new review notice or make a reference to the Competition and Markets Authority (CMA). Should we issue a new review notice, then Network Rail would have a further period of not less than six weeks to make any objections to the new notice.
- D.10 If Network Rail does not object to the review notices, we must then serve a 'notice of agreement' on each beneficiary to an access agreement. The beneficiaries then have a period of 28 days to give notice to terminate their access agreements, should they wish to do so.
- D.11 Following the expiry of this 28-day period, we will publish review implementation notices, stating that our determination is to be implemented on 1 April 2024 as proposed in the review notices.

Annex E: Responding to this consultation

- E.1 This consultation closes on 31 August 2023.
- E.2 This [link to a proforma](#) is available if you wish to respond to our consultation on drafting changes to access contracts. Other forms of response (e.g. letter format) are equally welcome, though we would be grateful if these could be structured broadly in line with the areas listed on the proforma, to aid our review of responses.
- E.3 Please send all responses to PR23@ORR.gov.uk or by post: Regulatory Policy Team, Office of Rail and Road, 25 Cabot Square, London, E14 4QZ.
- E.4 We plan to publish all responses to this consultation on our website early in 2024. Please refer to the section on confidentiality below for further information.

Format of responses

- E.5 So that we are able to apply web standards to content on our website, when sending documents to us, we would prefer that you send your correspondence to us in Microsoft Word format or OpenDocument Text (.odt) format. This allows us to apply web standards to content on our website.
- E.6 If you do send us a PDF document, where possible please:
- Create it directly from an electronic word-processed file rather than sending us a scanned copy of your response; and
 - Ensure that the PDF's security method is set to "no security" in the document properties.

Confidentiality

- E.7 Should you wish any information that you provide, including personal data, to be treated as confidential, please be aware that this may be subject to publication, or release to other parties or to disclosure, in accordance with the access to information regimes. These regimes are primarily the Freedom of Information Act 2000 (FOIA), the UK General Data Protection Regulation (UK GDPR), the Data Protection Act 2018 (DPA) and the Environmental Information Regulations 2004.

Office of Rail and Road | Implementing PR23: consultation on drafting changes to access contracts

- E.8 Under the FOIA, there is a statutory code of practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this, if you are seeking confidentiality for information you are providing, please explain why. If we receive a request for disclosure of the information, we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding to ORR.
- E.9 If you are seeking to make a response in confidence, we would be grateful if you would annex any confidential information, or provide a non-confidential summary, so that we can publish the non-confidential aspects of your response.
- E.10 Any personal data you provide to us will be used for the purposes of this consultation and will be handled in accordance with our [privacy notice](#) which sets out how we comply with the UK GDPR and the Data Protection Act 2018.

Consent

- E.11 In responding to this consultation, you consent to us:
- handling your personal data for the purposes of this consultation;
 - publishing your response on our website (unless you have indicated to us that you wish for your response to be treated as confidential as set out above).
- E.12 Your consent to either of the above can be withdrawn at any time. Further information about how we handle your personal data and your rights is set out in our privacy notice.



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