

**Responses to September 2021 consultation on ORR's  
PR23 review of the Schedule 4 possessions regime**



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Joe Quill  
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E14 4QZ

13<sup>th</sup> December 2021

Dear Sir/Madam,

**Re: PR23 – Review of the Schedule 4 Possessions Regime**

Abellio Group and its subsidiary train operating companies (*East Midlands Railway, Greater Anglia, Merseyrail and West Midlands Trains*) welcome the opportunity to respond to the recent technical consultation on the review of Network Rail's Schedule 4 possessions regime for PR23.

As mentioned previously in our response to the consultation on PR23 review of Schedule 8, it is a challenging task for the ORR to start the periodic review process at a time of significant change due to the Covid-19 pandemic and during the implementation of the Williams-Shapps Plan, of which is still high level and short on detail.

We structure our response based on your consultation document published on 30<sup>h</sup> September 2021 and also include some general observations.

We have not responded to all the consultation questions, and our responses to the specific questions on which we have views are set out below.

**Chapter 2 – ORR's proposed approach and priorities**

1. *Do you have any views on the objectives and benefits of a mechanism such as Schedule 4, for the range of different industry parties, both in the current contracting model and once the rail transformation programme has been fully developed and implemented?*

One of the key objectives of the Schedule 4 possessions regime is to help align financial incentives between Network Rail and train operators and compensate train operators for the revenue loss and additional cost caused by planned service disruption attributable to Network Rail's Restrictions of Use on their routes. In doing so, it also helps Network Rail understand and quantify the impact of service disruption on train operators' costs and revenues to assist and drive its decision making such as possession planning at a local level.

The role of Schedule 4 has recently been altered, particularly for franchised operators when they are put under concession-style agreements or greater direct public sector control. The replacement of franchises with concession-style agreements has removed the revenue risk associated with planned disruption for these train operators, although recovery of costs remains a pertinent incentive, and for freight and open access operators, Schedule 4 is still a key mechanism to provide revenue and cost protection to their businesses.

In the current contracting model, the revenue compensation element of Schedule 4 has been neutralised for some train operators and, notably, all incentive effects upon Network Rail are effectively neutralised whilst it is not being held to account under its Informed Traveller licence obligations. If in future Network Rail is once again made accountable under Schedule 4 for Informed Traveller non-compliance, then regardless of train operators' individual contractual arrangements, the industry should not underestimate the value of the incentive properties in the regime placed upon Network Rail.

Schedule 4 is not just about financial compensation for train operators. Abellio believes it is too early to assess in any detail the relative merits of the Schedule 4 regime in the light of how little we know about the rail transformation programme and what it is going to look like in future at this stage to make an accurate assessment of its future relevance or otherwise. That said, we would like to place on record whilst any separation of train service operation and infrastructure/engineering remains in place, it is not unreasonable to expect that there needs to be a contractual incentive regime in place to manage that interface and protect both parties, which is the fundamental principle of Schedule 4.

*2. Do you have any views on whether we should make no fundamental changes to Schedule 4 in PR23, or, as proposed, pursue a small number of incremental reforms to ensure it remains fit for purpose as a baseline regime?*

We are broadly supportive of most of the changes proposed in the consultation document, which seem to be reasonable and enhancements to the regime that are borne out of the ORR's continued policy of improving the regime and keeping it relevant for all parties to date.

*3. Do you agree with the areas we have identified as priorities for PR23? Are there any other significant issues that we should seek to address?*

Generally, we agree with the areas identified in the consultation document as priorities for PR23 and do not believe that there are any other issues of significance in Schedule 4 that need to be addressed at the moment.

### **Chapter 3 – Proposal: Cross-cutting change across sector regimes**

**Proposal A:** To introduce an opt-out mechanism to Schedule 4, whereby train operators could completely or partially opt out of Schedule 4.

*4. Do you support proposal A? If an opt-out mechanism were to be implemented, would you support a complete (option A1) or partial opt-out (option A2)? Do you have any views on when operators should be allowed to opt out and what duration any opt out should have, as set out in paragraph 3.8?*

In light of recent changes to rail franchises and varying requirements regarding possession compensation arrangements, in our view the ability to opt-out is an improvement to the regime and will give train operators an element of flexibility to assist in adapting to future industry circumstances.

We welcome Proposal A in principle, but need to understand the mechanics of the opt-in and out options. There are many relevant factors such as the Access Charge Supplement (ACS) that need to be considered further in parallel which have not been mentioned in much detail in the consultation document. Franchised operators pay Network Rail a predetermined ACS, which is forecasted for the full five years of a control period, in return for receiving Schedule 4 compensation for planned possessions. Essentially, it provides Network Rail the funding for recovery of Schedule 4 costs to deliver expected possession activities in the base plan proposed for the control period.

This is mentioned in Paragraph 3.10; *‘Calibration could become more complicated, especially if operators are allowed to opt in and out within a control period’*. However, there is no detail on how the funding will be recalibrated and divided up between train operators who are given the options to opt in and out. It is not clear what the financial impact on train operators is if they decide on staying in or opting out completely/partially. It is important that train operators are given all required detail in order to make an informed decision when it comes to the options. ACS will be a key driver here and its calculation should be made more transparent.

It is assumed that any increased complexity in calibration of Schedule 4 as a result would be off set by the cost saving from opting out. However, our main concern is the potential for overall dilution of the incentive effects of the regime upon Network Rail, particularly whilst it is not being held to account for Informed Traveller non-compliance once operators exercise any rights to opt out. Not only would it eliminate the incentive effect for these individual operators, but it would doubtless weaken the effect of the incentives upon Network Rail in its dealings with train operators who have chosen to remain in the regime.

We believe that the point at which such a mechanism can be triggered needs more developed thought and appraisal. From a train operator's perspective, it is obviously preferable to be able to opt out or opt in when the National Rail Contract or Passenger Service Contract starts. However, we recognise that a Control Period start/end is perhaps more convenient from an industry perspective.

In addition to the two key questions about when to allow opt in/out and the duration, there are still questions to answer to ensure that this mechanism is feasible and robust for the industry during the transition period and GBR;

- Would there be an assumption that everyone is in, unless they have opted out?
- What scope would there be for opting back in at a future date?
- What is the proposed duration – for the duration of the concession agreement or until further notice? Will it have a break clause?
- Would a change in opt in/out status be ruled out within in the term of the franchise period or control period?

In 3.11, we note that the ORR seems to only contemplate a Complete opt out (Option A1) or Partial opt out (Options A2i + A2ii). Abellio wishes to understand whether we need to choose between these options – or all three options to be included in the model Track Access Contract?

## **Chapter 4 – Proposals: Passenger regime**

**Proposal B:** To increase incentives on Network Rail to notify possessions early once the “informed traveller” notification threshold (T-22) has been passed, either by introducing an additional notification threshold or by monitoring possessions notification on a more granular basis.

5. *Question 5: Do you support proposal B, implemented through option B2? Do you have any views on the options set out?*

Abellio welcomes any suggestions to improve Network Rail’s behaviour around notification of engineering activities to train operators in particular for encouraging Network Rail to minimise alterations to possessions at short notice. By doing so, it will minimise disruptions to train operators’ arrangements under the timetabling process so they can provide appropriate notice and timetable information to passengers to arrange for their travel plans.

As stated in the consultation document for Option B1, “*The main benefit is that it would maintain incentives on Network Rail to notify possessions before the late notification threshold*”. We would like to point out that the notification threshold at T-22 is to incentivise NR to produce the period possession plans i.e. DPPP/CPPP on time to include any additional possessions that have not been booked before D-26 for the timetable period. This provides train operators with the final information necessary to revise their service strategy for service alterations and a minimum of 4 weeks to prepare for a revised access proposal (the bid) to be submitted to Network Rail at T-18.

Effectively, it provides incentives for both NR and TOCs to meet the Informed Traveller timescales including T-12 timetable upload, and the current discount thresholds remain appropriate in relation to possession planning and the Informed Traveller process. Therefore, we believe that the introduction of an additional notification threshold between T-22 and T-12 will not generate significant benefits for train operators; neither will it disincentivise Network Rail from requesting additional or late changes to possessions at short notice. Having said that, it could be beneficial to have some attention on bridging the gap between T-12 and T-1 as currently Network Rail has no incentives or penalties to either requesting a late possession or upload passenger information once it is past the T-12 deadline.

The primary objective of Notification Factors in Schedule 4 formulaic compensation is to incentivise Network Rail to manage the planning of possessions more efficiently and to ensure that timetable information is uploaded in a timely manner for passenger information. In Abellio’s opinion, the crucial element of Notification Factors is the incentive for the publication of information by Network Rail, and not just about early notification of possessions to train operators.

For over a year, the financial incentive properties of Schedule 4 have been weakened and the contractual mechanism of Late Notification is being suspended temporarily due to the current Informed Traveller Recovery Plan for the industry, Option B2 is more preferable. Abellio welcomes more frequent reporting of possession notification on a granular basis. Option B2 will allow the ORR to monitor how Network Rail behave in relation to possession activities post T-22 and hold Network Rail to account for late notice possessions through their data collection and statistics.

Whilst at an operator level we do keep some records of late notice possessions at the moment, Network Rail is not held to account on this information other than the notification thresholds at three levels within Schedule 4. ORR need to work with Network Rail across all routes to establish a process to track all the late notified possessions and enable effective monitoring – sufficient data and good information will enable the industry and ORR to challenge Network Rail's performance in their management of possessions planning.

There is value in implementing Option B2. However, unless and until Network Rail is genuinely held accountable for what they do, nothing will change, and incentives need to be greater than purely reputational. We would prefer that there is a mechanism for enforcement of failures together with an explanation for the general public in order to have a real relationship with Network Rail's reputation. From Abellio's perspective, the ORR needs to give some teeth to Option B2; the incentive element of this option on Network Rail would seem weak and there needs to be a mechanism that rewards and penalises Network Rail's efficiency in this area to really encourage it to change its behaviour.

**Proposal C:** To develop a method and/or process for settling compensation claims for lengthy possessions and periods of sustained planned disruption.

6. *Question 6: Do you support proposal C? Do you have any views on options C1 and C2? Do you have a preference for one of the options?*

Abellio would support in principle any methodology which eliminates the possibility of letting legitimate claims on Network Rail being pushed into the long grass which appears to be the historic modus operandi.

We disagree with the statement in 4.13, *".....problem lies in the absence of detail in track access contracts about how compensation should be calculated. In addition, track access contracts also fail to provide much detail to help guide the negotiation process, such as provisions for a mediation process....."*. At the moment, there is sufficient detail in the track access agreement to determine compensation for Types 2 and 3 possessions; it is clear regarding when and where valid claims may be triggered. After this point, Abellio's collective industry experience has shown that in reality train operators' valid claims for uncontentious events such as engineering blocks often take several years to be paid by Network Rail due to its internal processes over which train operators have little input or ability to influence.

Costs are subject to opaque scrutiny processes with no transparency to train operators and Network Rail tends to interpret some of the terms inconsistently when rejecting train operators' claims for costs. Claims are often rejected by Network Rail's Claims Panel because of its lack of knowledge and awareness of the impact of possessions on train operators' businesses, such as specialist resources, implications on train crew and fleet movements etc, and claims are further delayed due to further clarification sought time after time. Network Rail's requests for ever more detailed clarification information on legitimately incurred and reasonable costs lead to open ended response times and make claims which are not disputed in principle far more difficult to process than should be the case. Train operators are pushed into the corner by this stalling behaviour and have no choice but to keep attempting to comply with such requests if they wish to recover any of their costs and losses in due course.

One of the fundamental issues arising from taking the parties so long to settle their claims for Type 2 or 3 possessions is Network Rail dragging its heels as it is not time-bound to close out claims. It is indisputably the case that these open-ended negotiations are protracted and costly. Despite our train operators having to pay out large sums attempting to respond to possessions in cooperation with Network Rail and to provide a creditable alternative service for passengers, GA; WMT and EMR all share similar experiences with regard to prolonged deliberations, often over several years, with Network Rail when simply trying to recover standard costs and losses that are genuinely incurred in good faith whilst cooperating with Network Rail to accommodate disruption to our businesses. In theory, train operators are protected from the initial outlay by the provision of Schedule 4, the expense involved with repeated claims submissions and discussions are not so a contractual methodology mandating timescales on both parties for scrutiny and due diligence processes during the assessment of claims and supporting information is something which would be welcomed by Abellio. We look forward to ORR's further proposals in this area for development.

From Abellio's point of view, Option C1 could hinder train operators' freedom to negotiate costs/losses as a consequence of the possessions because circumstances differ subject to the possession in question and the amended service strategy. Those circumstances can be very different depending on whether the possessions are taking place in summer or winter, holiday seasons or if any impact on any stations that may affect their rail replacement bus strategies. Also, amended service strategies are dependent on the geography of train operators' operating routes, network capacity/capability and station layouts. It is not clear what the high level methodology is for the proposed method of calculating payments. Hence, we are uncertain how all these different circumstances are to be covered in any specific formula and parameters, all of which could be costly to develop. We are concerned that the suggested spectrum of options proposed under Option C1 could lose the flexibility for train operators to be able to negotiate true costs and losses for the particular possessions that affect their businesses.

With reference to Option C2 to involve the use of an arbiter for resolving negotiations, there is already an established access dispute process stated in the track access agreement. This option exists under current ADRR rules as appended to the Network Code, toward which Abellio's TOCs already make a financial contribution. Moreover, we do not believe that this option will help reduce the length of time in closing out claims, but instead incur extra administrative costs to the industry.

**Proposal D:** To monitor and report on late possession changes and cancellations on a more granular basis.

*7. Do you have any views on the scale and impact of this issue? Do you have any views on our wider approach to monitoring possessions and how this can have the greatest impact on driving better possession planning in Network Rail?*

Abellio welcomes the ORR's proposal for strengthening its monitoring and reporting of late possession changes and cancellations as part of its wider CP7 monitoring and reporting

approach, as the impact of late possession changes and cancellations on our train operators' businesses remains high.

Closer monitoring of possession activities and movements would be helpful; more available data and reporting could help the industry understand the scale of problems and impacts they impose on train operators' businesses. However, we do not believe that Schedule 4 should be a tool to stop Network Rail from booking possessions too early. Schedule 4 is not a mechanism to bring about the wholesale change for possessions planning, this falls within the overall management of Network Rail.

The early Notification Factor is levelled with the Informed Traveller notification threshold at T-22. Therefore, in our opinion, the assertion of Network Rail notifying too many possessions early in order to receive the maximum discount is not compelling. There is a timescale attached to the Engineering Access Statement (EAS) which sets out the national process for negotiating and securing engineering access to the rail network. Sooner these possessions are booked in the EAS and being discussed with train operators, it is likely that these possessions are secured in the EAS. Then, these planned possessions are subject to constant reviews during Network Rail's internal planning processes with their contractors for routine maintenance or investment projects etc to ensure effective delivery of activities in a cost efficient way. Thus, late possession changes and cancellations are better managed within Network Rail through its control of various planning procedures for engineering access.

**Proposal E: To develop a tool to estimate Schedule 4 formulaic compensation**

*8. Would you find a user-friendly tool to estimate Schedule 4 formulaic compensation helpful? What are your views on the feasibility of developing an estimator tool? Should proposal E be a priority for PR23?*

We do not understand why this is required and what value will be added to the reform of Schedule 4 or other work streams.

There is an established base of resources in Milton Keynes that are responsible for the management of the Schedule 4 regime. Train operators and Network Rail alike have managed thus far to use the formulas in the track access contract to determine fairly precise amounts for Schedule 4 payments in both revenue loss and cost compensations for budgeting purposes and for a variety of requirements. Our train companies and Network Rail (Schedule 4 team) do this on a regular basis by applying the Schedule 4 algorithms in a spreadsheet. So, we do not see the point of having to develop another tool just for infrastructure projects planners.

We do acknowledge it can be difficult for third parties such as project planners to determine Schedule 4 estimates. Even production of a rough estimate requires good knowledge of the timetables and service strategy amendments necessitated as a result of the possession in question. Infrastructure project planners are too far removed from the coalface to properly understand the impact of their activities on train services, and it is more often the case that it is a lack of knowledge of the resultant amended timetable rather than a lack of understanding of Schedule 4 mechanisms which causes Schedule 4 estimates to be

inaccurate. The Schedule 4 mechanism is transparent and unchanging whereas it is the possession and the operators timetable in response to the possession which inevitably varies. It is often the case that sometimes, even train operators cannot accurately measure the full Schedule 4 impact of engineering works on their own train services until detailed amended timetables are finalised at T-18, due to the complexities of operating services over diversionary routes, at slower speeds, to and from different origin/destination points to normal operations, the tendency for late notice changes to engineering blocks which affect the services we can run etc etc.

Schedule 4 requires highly accurate inputs to produce accurate estimates of financial impacts that can be relied upon. As Network Rail has got an established Schedule 4 team to manage this subject on a daily basis, it will probably be more efficient to have the team to undertake the evaluation whenever it is required. Therefore, Abellio believes this proposal should not be a priority for ORR's PR23 work and does not fit with the scope of a periodic review.

**Proposal F:** To review the methodology for calculating the ACS for open access operators.

*9. Should proposal F be a priority for reform in PR23? Do you have any views on the proposed methodology for calculating the ACS for open access operators?*

We do not believe that Proposal F should be a priority for reform in PR23, although we would support any review of the ACS methodology which would improve transparency and accuracy for all train operators.

We hope above inputs are useful. If you have any further queries or would like to discuss any points from the above, please feel free to get in touch.

Yours faithfully,

Dave Kaye

Chief Operating Officer, Rail  
Abellio Group



## Response to ORR’s technical consultation on the PR23 review of the Schedule 4 possessions regime

This pro-forma is available to those that wish to use it to respond to our consultation. Other forms of response (e.g. letter format) are equally welcome.

Please send your response to [performance.incentives@orr.gov.uk](mailto:performance.incentives@orr.gov.uk) by **13 December 2021**.

Please contact Joe Quill at ORR with any queries: [joe.quill@orr.gov.uk](mailto:joe.quill@orr.gov.uk)

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\*This information will not be published on our website.

### Chapter 2: ORR’s proposed approach and priorities

We welcome views on our questions regarding ORR’s proposed approach to PR23.

**Question 1: Do you have any views on the objectives and benefits of a mechanism such as Schedule 4, for the range of different industry parties, both in the current contracting model and once the rail transformation programme has been fully developed and implemented?**

Under the RTP with the revenue risk moving from the operator to GBR there is a lesser requirement for a compensatory regime but there still requires to be an incentive on GBR to ensure that any pre-planned disruption is done in a timely, efficient and customer friendly manner, how this is to be done under a concession model needs some careful thought.

**Question 2: Do you have any views on whether we should make no fundamental changes to Schedule 4 in PR23, or, as proposed, pursue a small number of incremental reforms to ensure it remains fit for purpose as a baseline regime?**

Until such time as the future shape, funding arrangements and governance of the industry is developed we would not support any major changes to the regime at this time.

**Question 3: Do you agree with the areas we have identified as priorities for PR23? Are there any other significant issues that we should seek to address?**

One area that requires further development is around the opt out and the ACS, is the level of ACS from any single TOC related to the magnitude of the rate within S4.

### **Chapter 3: Proposal: Cross-cutting change across sector regimes**

We welcome views on the cross-cutting proposal in this chapter.

**Question 4: Do you support proposal A [to introduce an opt-out mechanism]? If an opt-out mechanism were to be implemented, would you support a complete (option A1) or partial opt-out (option A2)? Do you have any views on when operators should be allowed to opt out and what duration any opt-out should have, as set out in paragraph 3.8?**

We support proposal A, the opt out mechanism as contained within A1, the second could lead to perverse incentives to carry out many shorter possessions as these do not fall under the compensatory mechanism and may lead to inefficiencies in the delivery of maintenance and renewals as the compensation would not have to be included in any cost calculations. Opting out of the revenue compensation only would require significant re-working of the current formulaic cost model, the current cost recovery model as it stands is not fit for purpose, in our experience this element of S4 has been significantly undercompensating TOC's for costs.

### **Chapter 4: Proposals: Passenger regime**

We welcome views on this chapter's proposals for the passenger regime.

**Question 5: Do you support proposal B [to increase incentives on Network Rail to notify possessions early once the "informed traveller" notification threshold (T-22) has been passed], implemented through option B2 [to monitor and report on possessions notification on a more granular basis]? Do you have any views on the options set out?**

It makes sense to have some other factor between T22 and 22:00 on day A for B, whether this is a fixed point or a sliding scale we have no views on either but would like to see both a better recording system for the notification process as well as a clear incentive for NR to notify of any pre-planned disruption as early as possible.

**Question 6: Do you support proposal C [to develop a method and/or process for settling compensation claims for type 2 and type 3 possessions and periods of sustained planned disruption]? Do you have any views on options C1 [to develop a method for calculating cost and revenue loss compensation] and C2 [to specify in track access contracts a process for negotiating compensation claims for type 2 and type 3 possessions and periods of sustained planned disruption]? Do you have a preference for one of the options?**

Whilst we support better guidance on these types of ROU's as in our experience they tend to lean heavily on the TOC for resource and there is a very high burden of proof required by NR to

substantiate the costs incurred by the TOC. We think that it would be better to change the presumption of a backwards review of costs and losses actually incurred to one where a pre-agreement was the preference with risk placed on the party best placed to manage it. Pre-agreement would force NR and the TOC to plan early and collaborate.

We would support C1 if there is enough detail on the accepted Heads of Claim within the contract including a mechanism to review and add as situations arise. Option C2 whilst attractive would lead to more cost for each party as they provided experts reports etc to the arbiter.

**Question 7: Do you have any views on the scale and impact of this issue? Do you have any views on our wider approach to monitoring possessions and how this can have the greatest impact on driving better possession planning in Network Rail?**

No views on this issue currently.

**Question 8: Would you find a user-friendly tool to estimate Schedule 4 formulaic compensation helpful? What are your views on the feasibility of developing an estimator tool? Should proposal E be a priority for PR23?**

This would be useful but if there are changes in the short to medium term coming to the regime this would not be the best use of industry investment. This looks more like a NR BAU project rather than something that should be part of the review of access charges.

**Question 9: Should proposal F should be a priority for reform in PR23? Do you have any views on the proposed methodology for calculating the ACS for open access operators?**

We have no views on this question.

## **Chapter 5: Proposal: Freight regime**

We welcome views on this chapter's proposal for the freight regime.

**Question 10: Do you agree with our preferred high-level approach for the freight regime, to keep the current regime broadly unchanged for CP7? Are there other elements of the freight regime or its calibration that should be considered for reform in PR23?**

**Question 11: Do you consider we should review freight payment rates as a priority for PR23?**

**Question 12: Do you have any evidence on the appropriate level for freight Schedule 4 compensation and any views on how any increase might be funded? Do you have any views and evidence on the difference in freight compensation payments between service disruption and cancellation?**

**Are there any other comments you would like to make?**



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Please contact Joe Quill at ORR with any queries: [joe.quill@orr.gov.uk](mailto:joe.quill@orr.gov.uk)

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\*This information will not be published on our website.

### Chapter 2: ORR's proposed approach and priorities

We welcome views on our questions regarding ORR's proposed approach to PR23.

#### **Question 1: Do you have any views on the objectives and benefits of a mechanism such as Schedule 4, for the range of different industry parties, both in the current contracting model and once the rail transformation programme has been fully developed and implemented?**

Regardless of the detail of the contracting structure between Operators and funders and of the relationship between Network Rail and Operators, there will continue to be a need for mechanisms that rebalances the financial impact of Network Rail's planned disruption of operations and to incentivise Network Rail to minimise this disruption. With the rapid and dramatic changes in industry structure and risk allocation, the nature of the mechanisms will need to be flexible in their operation in order to align with the specific situation of individual Operators and their funders.

Arriva's experience with the operation of the TfL London Overground concession shows that a Schedule 4 type regime is necessary in that situation, particularly with a non-DfT transport authority client.

The Plan for Rail indicates that some GBR Operator contracts may include revenue growth incentives. This option suggests that a revenue impact regime such as is included in Schedule

4 may still be required in this situation as it will continue to be for fully commercial Open Access Operators.

As well as a revenue impact regime, a process that addresses the additional costs that all Operators incur when planned network disruption leads to Operators having to provide alternative service arrangements to meet the needs of passengers is also key to an effective mechanism. This cost impact regime must cover all Operators needing to amend their service provision to meet the needs of passengers, not just those directly affected by the planned Network disruption.

The current Schedule 4 regime benefits from being simple to deploy because of its mechanistic approach to the calculation of payments for most disruption events. In contrast, the mechanism for calculating the Access Charge Supplement (ACS) for all Operators (not just Open Access Operators) is opaque and complex.

The overarching objective of a Schedule 4 regime should be to ensure that Operators and Network Rail can act collaboratively to reduce the impact of planned network disruption on all passengers without this focus being diverted by having to undertake complex negotiations between industry parties to address revenue and cost impacts.

**Question 2: Do you have any views on whether we should make no fundamental changes to Schedule 4 in PR23, or, as proposed, pursue a small number of incremental reforms to ensure it remains fit for purpose as a baseline regime?**

As noted above, many aspects of the current Schedule 4 regime are effective and address a key issue in the relationship between Network Rail and Operators. Arriva feels that the current regime could be made more flexible so as to deal with the range of likely outcomes of the implementation of the Plan for Rail through a small number of incremental reforms without fundamental change.

**Question 3: Do you agree with the areas we have identified as priorities for PR23? Are there any other significant issues that we should seek to address?**

The deployment of Schedule 4 has continued to highlight a number of areas not addressed in the ORR proposals for change where Schedule 4 could be materially improved:

- The methodology for the calculation of the ACS for all Operators is complex and could be made more transparent. It is also unclear that the ACS approach is the most appropriate mechanism for the funding of the Schedule 4 regime – it would be simpler to have these costs included in the assessment of Network Rail's overall OMR costs.
- The recovery of costs that Operators incur as a result of planned network disruption is not effective in that not all costs are recovered and Operators who are not directly impacted by the network disruption but nonetheless incur additional costs providing services to passengers affected by the network disruption have no means to recover these costs.
- The current approach to incentivising Network Rail to plan network disruption effectively creates unintended impacts on Operators such that revenue loss and increased costs are under recovered.
- The current Schedule 4 regime does not create an effective environment for Operators and Network Rail can work collaboratively to reduce industry costs and minimise disruption to passengers.

- As identified in the provided fact sheet. Schedule 4 is funded in 2 ways, through the ACS payments received when the disruption is linked to maintenance and renewals work and through the project budget when the disruption relates to enhancements, yet payment of compensation in either situation is directly related to whether an operator pays the ACS. As a result of this operators who pay the ACS currently receive enhanced compensation at no additional cost to themselves, yet those operators who choose not to pay the ACS are not entitled to this enhanced compensation. On the face of it this appears discriminatory and the relationship between the source of funding for the compensation and compensation paid should be considered as part of this consultation.
- Where major engineering works are proposed, NR should work with operators to plan the most efficient use of the capacity possible, with the potential for competing aspirations for available capacity. Where operators choose not to pay the ACS, there remains a risk that NR could consider this in the planning process in order to reduce its Schedule 4 liability to those operators who do pay the ACS.
- Increasingly major engineering works are being undertaken across multiple weekends and type 3 RoU's are becoming increasingly rare, yet the impact on an operator remains the same but spread over a series of shorter RoU's. Whilst some protection exists with SPD, this is not always the case as the levels of trigger are set high and the trigger can be missed as a result of the notification factor used in notional revenue loss calculation, yet the disruption remains significant to the Operator. We would therefore urge a review of the way in which NR undertakes significant engineering works to ensure a closer alignment between their approach and the baseline schedule 4.
- Planned Network disruption impacts spread more widely across the Network than Schedule 4 envisages. In particular, Operators on parallel or intersecting routes often see large passenger flows migrating from the directly affected route generating significant additional net cost which are not reflected in a Schedule 4 payment to the affected Operators.

Arriva would suggest that these additional issues should be considered and addressed by ORR by further incremental reforms.

### **Chapter 3: Proposal: Cross-cutting change across sector regimes**

We welcome views on the cross-cutting proposal in this chapter.

**Question 4: Do you support proposal A [to introduce an opt-out mechanism]? If an opt-out mechanism were to be implemented, would you support a complete (option A1) or partial opt-out (option A2)? Do you have any views on when operators should be allowed to opt out and what duration any opt-out should have, as set out in paragraph 3.8?**

With the changes in the rail industry contractual architecture that are starting to occur post-COVID and in line with the Plan for Rail, creating a more flexible structure for Schedule 4 is necessary to address the different range of risks that different Operators may be exposed to. This flexibility should include the opportunity to opt out of elements of Schedule 4 as might be appropriate for individual Operators.

There is a risk that, if the number of Operators who do opt out of all or part of Schedule 4 was large, the incentives on Network Rail to plan network disruption effectively and to minimise the

impact of this disruption on Operators and passengers would be significantly diluted. In addition, visibility to Network Rail of the revenue and operating costs impacts of planned network disruption would be reduced materially. This may lead to a negative impact on the overall net costs of the industry impacting on funders budgets. Therefore, any option to allow opt outs would need to be balanced by changes to reinforce these incentives and to ensure continued visibility of the net financial impact of planned network disruption.

#### **Chapter 4: Proposals: Passenger regime**

We welcome views on this chapter's proposals for the passenger regime.

**Question 5: Do you support proposal B [to increase incentives on Network Rail to notify possessions early once the “informed traveller” notification threshold (T-22) has been passed], implemented through option B2 [to monitor and report on possessions notification on a more granular basis]? Do you have any views on the options set out?**

The current approach to incentivising Network Rail to plan Possessions effectively has the unintended consequence of penalising Operators as additional costs incurred by Operators do not reduce with increased notification timescales. It is also not clear that revenue losses are reduced to the extent assumed – this is particularly an issue with the increased proportion of journeys which are highly discretionary post-COVID.

In addition, during 2020 and the amended timetable planning process, Network Rail sought to implement a policy which effectively ignored notification factors and their requirement to meet the timescales set out in Part D and G of the Network Code. Whilst this was during a period of extenuating circumstance the fact that Network Rail sought this approach as opposed to attempting to deal with the missing of timescales suggests the incentive may not work as expected. The approach in B1 may go some way towards addressing this by introducing additional increments to the incentives available to NR, however given the impact on Operators is likely to be the same regardless of notification timescales subject the level of disruption, it may be more effective to increase penalties of missing timescales as opposed to increasing incentives.

The impact of late notice or changed Possessions on passengers should be recognised as should the impact on Operators costs as they deal with complex information requirements and the replanning of their operational plans. The incentives provided to Network Rail should be focused on reducing this.

Regardless, as noted earlier, Arriva would strongly support mechanisms, such as option B2 to increase the incentives on Network Rail to plan Possessions effectively – particularly if a large number of Operators were to opt out of Schedule 4. In that context, increased reporting and monitoring of Network Rail's performance in this area will be helpful but may not be sufficient.

**Question 6: Do you support proposal C [to develop a method and/or process for settling compensation claims for type 2 and type 3 possessions and periods of sustained**

**planned disruption]? Do you have any views on options C1 [to develop a method for calculating cost and revenue loss compensation] and C2 [to specify in track access contracts a process for negotiating compensation claims for type 2 and type 3 possessions and periods of sustained planned disruption]? Do you have a preference for one of the options?**

Arriva strongly agrees that, as ORR describe, the current arrangements to support the negotiation of recovery of increased costs and lost revenue associated with planned network disruption are ineffective and time consuming. In addition, they have a tendency to undermine efforts for Network Rail and Operators to work collaboratively.

Arriva believes that there are benefits from proceeding with a combination of the two options but firstly setting out a clear methodology for the assessment of non-formulaic compensation but also making clear the timescales within which agreement should be reached and the escalation process if a failure to agree occurs.

Arriva suggests that the methodology laid out should include at least a cross reference to the outputs of the formulaic approach so as to avoid the under/overcompensation risk that ORR highlight.

**Question 7: Do you have any views on the scale and impact of this issue? Do you have any views on our wider approach to monitoring possessions and how this can have the greatest impact on driving better possession planning in Network Rail?**

The current structure of Schedule 4 in terms of the incentives on Network Rail to plan Possessions effectively and for the negotiation of non-formulaic compensation do not support strong collaborative working. The proposals that ORR have made to incrementally develop Schedule 4, including increasing Network Rail's reporting and ORR's monitoring of the Possession planning process will assist in this area.

**Question 8: Would you find a user-friendly tool to estimate Schedule 4 formulaic compensation helpful? What are your views on the feasibility of developing an estimator tool? Should proposal E be a priority for PR23?**

Yes, a simple tool to estimate Schedule 4 formulaic compensation would be helpful. Developing such a tool should be feasible and should be a priority given that it would support the collaborative production of effective Possession plans and in ensuring that the whole industry cost of Possessions is visible to Network Rail in the event of significant numbers of Operators opting out of Schedule 4.

**Question 9: Should proposal F should be a priority for reform in PR23? Do you have any views on the proposed methodology for calculating the ACS for open access operators?**

The mechanism for calculating the Access Charge Supplement (ACS) for all Operators (not just Open Access Operators) is opaque and complex. Grand Central has repeatedly sought an ACS "quotation" from Network Rail in order to assess the benefits of entering into the full Schedule 4 regime but has been unable to secure such a "quotation" with Network Rail apparently struggling to undertake the necessary calculations.

Subject to any other changes made to the schedule 4 regime, any calculation of ACS for Open Access must be consistent with the calculation approach used for all operators.

The consultation document suggests a potential reason for Open Access not electing to pay the ACS is OA operators may expect the ACS payment to exceed the additional compensation received as a result of the ACS covering compensation the OA operator is already entitled to.

Whilst this is a valid point, of greater concern is the current relationship between the ACS payments and the schedule 4 compensation paid from Enhancement budgets. Going forward OA operators and those who choose to opt out of the ACS should not be excluded from schedule 4 compensation which is paid from enhancement project budgets with no relationship to the ACS.

Arriva would suggest that the ACS approach to funding Schedule 4 is unnecessarily complex and time consuming, adds significantly to the apparent complexity of Schedule 4 and lies behind many of the apparent confusion as to the arrangements in Schedule 4 that is evident.

As an alternative, Arriva would suggest that consideration should be given to funding Schedule 4 compensations for all Operators through Access Charges

If it is decided to continue with the ACS approach, then a simple and transparent mechanism for its calculation is essential so that all funders and all Operators can make informed decisions as to whether to opt in or out of Schedule 4.

## **Chapter 5: Proposal: Freight regime**

We welcome views on this chapter's proposal for the freight regime.

### **Question 10: Do you agree with our preferred high-level approach for the freight regime, to keep the current regime broadly unchanged for CP7? Are there other elements of the freight regime or its calibration that should be considered for reform in PR23?**

As the Freight possessions regime appears to be broadly fit for purpose, Arriva would broadly agree with ORR's preferred high-level approach.

### **Question 11: Do you consider we should review freight payment rates as a priority for PR23?**

Arriva believes that it is important that all aspects of Schedule 4 should be recalculated using the latest understanding on revenue elasticities, cost drivers and post-COVID changes in both areas.

### **Question 12: Do you have any evidence on the appropriate level for freight Schedule 4 compensation and any views on how any increase might be funded? Do you have any views and evidence on the difference in freight compensation payments between service disruption and cancellation?**

Arriva has no such evidence.

**Are there any other comments you would like to make?**

Arriva believes that it is important that all aspects of Schedule 4 should be recalculated using the latest understanding on revenue elasticities, cost drivers and post-COVID changes in both areas.



## Response to ORR’s technical consultation on the PR23 review of the Schedule 4 possessions regime

This pro-forma is available to those that wish to use it to respond to our consultation. Other forms of response (e.g. letter format) are equally welcome.

Please send your response to [performance.incentives@orr.gov.uk](mailto:performance.incentives@orr.gov.uk) by **13 December 2021**.

Please contact Joe Quill at ORR with any queries: [joe.quill@orr.gov.uk](mailto:joe.quill@orr.gov.uk)

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### Chapter 2: ORR’s proposed approach and priorities

We welcome views on our questions regarding ORR’s proposed approach to PR23.

**Question 1: Do you have any views on the objectives and benefits of a mechanism such as Schedule 4, for the range of different industry parties, both in the current contracting model and once the rail transformation programme has been fully developed and implemented?**

We believe it is important retain an incentive regime to ensure the effect of engineering possessions on our customers is minimised both now, and in the future, irrespective of which contracting model is in place.

**Question 2: Do you have any views on whether we should make no fundamental changes to Schedule 4 in PR23, or, as proposed, pursue a small number of incremental reforms to ensure it remains fit for purpose as a baseline regime?**

As we prioritise industry reform and cost efficiencies to improve value for money, we must take account of the industry’s changing commercial dynamics.

Key to driving this change will be to remove the inherent complexities and interfaces within the existing incentives regimes.

We see the start of CP7 as a key opportunity to implement meaningful change and a new access system. Focus and energy should be applied to implement reforms from the start of the five-year funding period from 1<sup>st</sup> April 2024.

Alongside this, we agree it is pragmatic to consider how changes could be made to strengthen the role of Schedule 4 as an incentive. This offers contingency in the context of uncertain timing and scope of necessary legislation changes.

**Question 3: Do you agree with the areas we have identified as priorities for PR23? Are there any other significant issues that we should seek to address?**

We are broadly supportive of the initiatives, notably to increase incentives to notify possessions earlier, and develop a tool for estimating Schedule 4 formulaic compensation.

The challenges experienced across the industry whilst applying the Schedule 4 regime during Covid highlight the regime needs to be simpler and more adaptable. Flexibility needs to be built into this mechanism to allow for substantial changes in traffic volumes and share within the Control period, reflecting the importance of adapting services to demand to balance growth with cost efficiency. The lack of flexibility with the way the regime has been calibrated for CP6 resulted in significant difficulties in forecasting and calculating Schedule 4 accurately. As well as driving significant industry resource requirements and inefficiencies, this limited the impact of Schedule 4 as an incentive.

We would also welcome a closer look at the following issues:

We continue to collaborate with other operators to mitigate the impact of planned engineering work on customers. When an Operator is only indirectly impacted by a Type 2 or Type 3 RoU, how do they submit a claim for any measures they have taken to mitigate the implications of passenger migration on behalf of directly impacted Operators: providing additional services, station staff etc

How could a directly impacted Operator claim additional compensation in order to facilitate another Operator providing 'services' on its behalf?

**Chapter 3: Proposal: Cross-cutting change across sector regimes**

We welcome views on the cross-cutting proposal in this chapter.

**Question 4: Do you support proposal A [to introduce an opt-out mechanism]? If an opt-out mechanism were to be implemented, would you support a complete (option A1) or partial opt-out (option A2)? Do you have any views on when operators should be allowed to opt out and what duration any opt-out should have, as set out in paragraph 3.8?**

Presumably, this option would mean Operators would pay the ACS annually. Would this affect NR's ability to budget long term?

In theory, an Operator could make an annual assessment of planned RoUs and decide whether or not to pay the ACS / receive S4. Whilst this may support greater forecasting accuracy, it could also represent an increase in workload for purely financial gains, rather than focussing on what is best for our customers.

We have always understood that S4 should not be used to optimise "income" – it is an incentive regime for NR to be as efficient as possible when planning engineering possessions and mitigate for associated revenue loss. Being allowed to opt out/in, fundamentally changes that to

a regime under which operators might be motivated to maximise “income” depending on the RoUs planned, rather than pushing for effective / least disruptive possession planning.

A consistent approach across operators will support greater stability in financial planning for CP7, as long as the ACS is calculated transparently and reflectively and builds in plans to reduce the disruptiveness of planned engineering work.

#### **Chapter 4: Proposals: Passenger regime**

We welcome views on this chapter’s proposals for the passenger regime.

**Question 5: Do you support proposal B [to increase incentives on Network Rail to notify possessions early once the “informed traveller” notification threshold (T-22) has been passed], implemented through option B2 [to monitor and report on possessions notification on a more granular basis]? Do you have any views on the options set out?**

Adding another notification threshold was discussed extensively for PR18 and decided against – presumably all those reasons for deciding against are still relevant. If we added another threshold, say at T14, we would need to reduce the 0.92 at T22 in order to attach any incentive value to the new T14 threshold. This would reduce the incentive value attached to T22 and potentially result in an increase in RoUs being notified after T22 and before T14 – not what we want to achieve.

We are supportive of working with Network Rail and the wider industry to increase visibility over possession planning timescales to strengthen the incentive for plans to be finalised earlier – to give greater certainty for customers.

**Question 6: Do you support proposal C [to develop a method and/or process for settling compensation claims for type 2 and type 3 possessions and periods of sustained planned disruption]? Do you have any views on options C1 [to develop a method for calculating cost and revenue loss compensation] and C2 [to specify in track access contracts a process for negotiating compensation claims for type 2 and type 3 possessions and periods of sustained planned disruption]? Do you have a preference for one of the options?**

We are not opposed to the development of a method/process for settling compensation claims. However, we would prefer that such a process be voluntary and only used as a “Level 2” tool, if negotiations are not successful at “Level 1”. The vast majority of Type 2 and 3 claims between Avanti and NR are settled successfully through the provision of evidenced costs and revenue loss figures which are discussed and agreed by Operator and Network Rail SMEs. Whilst this

process continues to work for us, we would look to avoid potentially making it more complex / less flexible.

Sustained Planned Disruption is complex, expensive and time-consuming. We would be keen not to add additional complexity to this process.

**Question 7: Do you have any views on the scale and impact of this issue? Do you have any views on our wider approach to monitoring possessions and how this can have the greatest impact on driving better possession planning in Network Rail?**

We would welcome a greater understanding of the extent to which RoUs are amended / cancelled after T22 as part of our ongoing collaboration with Network Rail. We would also be keen for a central database of how late changes / amendments are dealt with by Network Rail under Schedule 4. There have been instances in the past where the higher NF rate has not been paid against an RoU that was amended after T22 on the basis that its duration / geographical area was reduced. We made the argument that making late amendments to the timetable in response to the late RoU changes (albeit back to LTP in some cases) was still disruptive to our passengers and therefore those services should be paid at the higher NF. We were told it was our choice to put services back to LTP, but in reality, it would be totally unacceptable to our passengers to have disrupted journeys when the original RoU was no longer in place.

**Question 8: Would you find a user-friendly tool to estimate Schedule 4 formulaic compensation helpful? What are your views on the feasibility of developing an estimator tool? Should proposal E be a priority for PR23?**

Yes, given the complexity and variation in engineering work plans, overlaid on changes to timetables and passenger demand, there is a need for an improved industry forecasting tool to support financial certainty and greater efficiency.

**Question 9: Should proposal F should be a priority for reform in PR23? Do you have any views on the proposed methodology for calculating the ACS for open access operators?**

## **Chapter 5: Proposal: Freight regime**

We welcome views on this chapter's proposal for the freight regime.

**Question 10: Do you agree with our preferred high-level approach for the freight regime, to keep the current regime broadly unchanged for CP7? Are there other elements of the freight regime or its calibration that should be considered for reform in PR23?**

**Question 11: Do you consider we should review freight payment rates as a priority for PR23?**

**Question 12: Do you have any evidence on the appropriate level for freight Schedule 4 compensation and any views on how any increase might be funded? Do you have any views and evidence on the difference in freight compensation payments between service disruption and cancellation?**

**Are there any other comments you would like to make?**



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## Response to ORR's technical consultation on the PR23 review of the Schedule 4 possessions regime

This pro-forma is available to those that wish to use it to respond to our consultation. Other forms of response (e.g. letter format) are equally welcome.

Please send your response to [performance.incentives@orr.gov.uk](mailto:performance.incentives@orr.gov.uk) by 13 December 2021.

Please contact Joe Quill at ORR with any queries: [joe.quill@orr.gov.uk](mailto:joe.quill@orr.gov.uk)

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\*This information will not be published on our website.

### Chapter 2: ORR's proposed approach and priorities

We welcome views on our questions regarding ORR's proposed approach to PR23.

Question 1: Do you have any views on the objectives and benefits of a mechanism such as Schedule 4, for the range of different industry parties, both in the current contracting model and once the rail transformation programme has been fully developed and implemented?

DB Cargo (UK) Limited ("DB Cargo"), agrees with the ORR's view that the Schedule 4 possessions regime ("Schedule 4 regime") has two main functions: firstly to compensate train operators for the financial impact of planned disruption caused by Network Rail when it takes possession of the network, predominantly for engineering work; and secondly to provide incentives to Network Rail to reduce the amount of service disruption due to possessions and to provide advance notice of such possessions to users of its network.

However, DB Cargo believes there is also a third function in that a properly functioning Schedule 4 regime should also provide a key incentive to train operators to work with Network Rail over its possession proposals. That is, if train operators know that they will receive sufficient compensation from Network Rail through the Schedule 4 regime for planned disruption, they are more likely to co-operate with Network Rail over its disruptive possession proposals rather than having to challenge them through the formal industry dispute resolution

mechanisms set out in the Network Code which can add delay and management time for both train operators and Network Rail whilst such challenges are being resolved.

Whatever the future arrangements that will be introduced under the Rail Transformation Programme (“RTP”) for Government-concession passenger operators in this area, DB Cargo again agrees strongly with ORR’s view that a Schedule 4 regime will continue to be extremely important to freight and open access passenger operators given that the regime is intended to provide revenue and cost protection to fully commercial services. It is essential, therefore, that a Schedule 4 regime remains in place for such operators both in Periodic Review 2023 (“PR23”) and into the future through the implementation of the RTP.

**Question 2: Do you have any views on whether we should make no fundamental changes to Schedule 4 in PR23, or, as proposed, pursue a small number of incremental reforms to ensure it remains fit for purpose as a baseline regime?**

Normally, the five-yearly Periodic Review process provides the perfect opportunity to consider whether the mechanisms and metrics contained in the Schedule 4 regime remain appropriate or whether changes are required to rectify issues that have become apparent since the previous Periodic Review. However, with the publication of the Williams-Schapps Plan for Rail earlier this year, significant work will be undertaken by the rail industry over the coming years to develop and implement the RTP which will change significantly the face of the rail industry in the UK. It is likely that work on developing the RTP will carry on in parallel to PR23 and that therefore the RTP’s recommendations may not be available in time to be taken fully into account by ORR when making its PR23 determination. Consequently, to undertake a full review of Schedule 4 regime at this time would, in DB Cargo’s view, be counterproductive as any major changes proposed through that review may not prove to be consistent with the subsequent outcomes of the wider RTP. DB Cargo is therefore of the strong view that the regime should be left as is unless there are any clear and identifiable incremental changes that, if implemented, would bring immediate benefits.

**Question 3: Do you agree with the areas we have identified as priorities for PR23? Are there any other significant issues that we should seek to address?**

Given DB Cargo’s view expressed above (i.e. that the regime should be left as is unless there are any clear and identifiable incremental changes that, if implemented, would bring immediate benefits), it is not convinced that all of the areas identified by ORR in respect of the regime are in fact priorities for PR23. For example, in respect of the proposed Schedule 4 regime ‘opt-out’ mechanism whilst this may be attractive to some passenger operators, particularly those operating under Government concessions, it is inconceivable to DB Cargo that a freight operator would seek to ‘opt-out’ of the Schedule 4 regime following the implementation of PR23. Consequently, an ‘opt-out’ mechanism for freight operators is not seen by DB Cargo as a priority for PR23.

The other area indicated by ORR as a priority for the freight Schedule 4 regime, concerns the proposal to review, and if necessary, update freight compensation rates. For similar reasons to those set out by ORR in the consultation document, DB Cargo also considers that a review of the compensation rates in the freight Schedule 4 regime is long overdue. Consequently, DB Cargo is not surprised that this aspect is highlighted as a priority

Other aspects of the Schedule 4 regime that DB Cargo would suggest considering for review are as follows:

Notification factors – Currently, Network Rail pays lower liquidated freight payment rates under the freight Schedule 4 regime if the freight operator is advised of the possession in all material respects prior to 12 weeks in advance of the possession. Network Rail then pays higher liquidated freight payment rates if possessions are notified to the freight operator in all material

respects with less than 12 week's notice. Since the breakdown of the Informed Traveller T-12 process following the advent of COVID-19 pandemic, instead of freight operators receiving their confirmed Train Slots at least 12 weeks in advance, they have instead been receiving their confirmed Train Slots to much shorter timescales, sometimes as short as T-4 or T-6. However, despite this, freight operators still receive the lower scale of compensation because it is argued that the possession has still been notified more than 12 weeks out, it is only the planning of the Train Slots as a result of the possession that now takes more time. In DB Cargo's view, the most important part of the T-12 process is not when the possession itself is notified but when it receives its amended Train Slots as a result of that possession as it is only then that revised arrangements can be devised, resourced and discussed with its relevant customers. Consequently, DB Cargo believes that this aspect should be reviewed so that the freight Schedule 4 process reflects explicitly that Network Rail can only benefit from the payment of the lower freight payment rates if the revised Train Slots have been confirmed and advised to freight operators by T-12, not solely the details of the possession itself.

Cancellations – Under the freight Schedule 4 regime, Cancellations as a result of planned disruption are entitled to the Category 2 Enhanced Disruption Rate along with some other triggers (e.g. the use of an additional locomotive). However, arguably “Cancellations” are the worst form of disruption that a freight operator can endure as they invariably result in full revenue loss rather than solely additional costs. Consequently, a freight operator would always seek to operate a train rather than suffer a planned Cancellation. Consequently, DB Cargo believes that Cancellations should not in effect be classed on the same disruptive scale as some other perhaps ‘lesser’ Category 2 disruption triggers and should instead be subject to a higher freight payment rate from Network Rail (Category 2A Disruption Rate). Having a higher payment rate for Cancellations should provide Network Rail with an added incentive to ensure that a Cancellation is seen as a very last resort after all other options have been explored and discounted.

### Chapter 3: Proposal: Cross-cutting change across sector regimes

We welcome views on the cross-cutting proposal in this chapter.

**Question 4: Do you support proposal A [to introduce an opt-out mechanism]? If an opt-out mechanism were to be implemented, would you support a complete (option A1) or partial opt-out (option A2)? Do you have any views on when operators should be allowed to opt out and what duration any opt-out should have, as set out in paragraph 3.8?**

As indicated in its answer to Q3 above, DB Cargo does not believe introducing a Schedule 4 regime ‘opt-out’ mechanism for freight operators is a priority issue for CP7. Whilst such a mechanism may be attractive to some passenger operators, particularly those operating under Government concession contracts, it is inconceivable to DB Cargo that a freight operator would seek to ‘opt-out’ of the Schedule 4 regime following the implementation of PR23. The base freight Schedule 4 regime (available without the payment of an access charge supplement) currently provides the only mechanism for freight operators to receive a level of compensation towards their additional costs and losses from the effects of planned disruption on the network. DB Cargo therefore questions whether there would be any appetite at all for freight operators to require the ability to ‘opt-out’ of Schedule 4.

## Chapter 4: Proposals: Passenger regime

We welcome views on this chapter's proposals for the passenger regime.

Question 5: Do you support proposal B [to increase incentives on Network Rail to notify possessions early once the "informed traveller" notification threshold (T-22) has been passed], implemented through option B2 [to monitor and report on possessions notification on a more granular basis]? Do you have any views on the options set out?

Question 6: Do you support proposal C [to develop a method and/or process for settling compensation claims for type 2 and type 3 possessions and periods of sustained planned disruption]? Do you have any views on options C1 [to develop a method for calculating cost and revenue loss compensation] and C2 [to specify in track access contracts a process for negotiating compensation claims for type 2 and type 3 possessions and periods of sustained planned disruption]? Do you have a preference for one of the options?

Question 7: Do you have any views on the scale and impact of this issue? Do you have any views on our wider approach to monitoring possessions and how this can have the greatest impact on driving better possession planning in Network Rail?

Question 8: Would you find a user-friendly tool to estimate Schedule 4 formulaic compensation helpful? What are your views on the feasibility of developing an estimator tool? Should proposal E be a priority for PR23?

Question 9: Should proposal F should be a priority for reform in PR23? Do you have any views on the proposed methodology for calculating the ACS for open access operators?

DB Cargo considers itself not best placed to offer representations on the above questions in Chapter 4 (i.e. Q5 to Q9) as these questions are primarily aimed at passenger operators who are much better placed to respond meaningfully on the relevant suggested proposals set out in the consultation document. That said, any mechanisms to further incentivise Network Rail to notify possessions early (Q5) would indeed be welcomed by DB Cargo.

## Chapter 5: Proposal: Freight regime

We welcome views on this chapter's proposal for the freight regime.

Question 10: Do you agree with our preferred high-level approach for the freight regime, to keep the current regime broadly unchanged for CP7? Are there other elements of the freight regime or its calibration that should be considered for reform in PR23?

DB Cargo strongly agrees with ORR's preferred high-level approach for the freight regime (i.e. to keep it broadly unchanged for CP7). DB Cargo considers the regime is effective, works well, is easily administered and is now well understood, not only within Network Rail and the freight operators but also by many freight end customers and wider industry stakeholders. The fact

that the freight regime applies equally to all freight operators is another significant benefit. Given this, there is no pressing need in DB Cargo's view that the regime requires a fundamental overhaul in PR23, particularly now that work on implementing the RTP is about to begin in earnest.

**Question 11: Do you consider we should review freight payment rates as a priority for PR23?**

As indicated in its answer to Q3 above, DB Cargo considers that for similar reasons to those set out by ORR in the consultation document, a review of the compensation rates in the freight Schedule 4 regime is long overdue. However, carrying out such a review may not be quite that straightforward. This is because the compensation rates apply to all freight operators so they should ideally be based on an average of the costs incurred by all freight operators as a result of planned network disruption. Issues that would need to be considered and addressed in DB Cargo's view before any such review could commence in earnest include:

1. Involvement of at least the majority of freight operators.
2. How to convince freight operators to divulge their commercially sensitive cost base information.
3. As a consequence of 2 above, the review will need to be carried out by an independent third party under an agreement of strict non-disclosure.
4. What types of loss should be included in the review (e.g. short-run costs, long-run costs, loss of Revenue)?
5. Who will fund the review?

In addition, DB Cargo would want to understand how the revised rates, once calculated, would be used. For example, if the revised rates are calculated to be higher than they are currently, which is considered the most likely scenario, would those rates merely be used in substitute for the current lower rates from CP7 or would they only be permitted to be adopted by freight operators who have elected to pay an access charge supplement to fund the resulting increase in compensation payable by Network Rail? And indeed how would such access charge supplement be calculated and applied? This information certainly needs to be understood in DB Cargo's view as, hitherto, freight operators have not had any appetite for paying access charge supplements for increased compensation under the Schedule 4 regime.

**Question 12: Do you have any evidence on the appropriate level for freight Schedule 4 compensation and any views on how any increase might be funded? Do you have any views and evidence on the difference in freight compensation payments between service disruption and cancellation?**

In its answer to Q3 above, DB Cargo has suggested that as Cancellations are arguably the freight operator's worst form of disruption, there should be a higher freight payment rate that should apply to them rather than deeming them on a par to some other perhaps 'lesser' forms of disruption as they are currently.

From DB Cargo's perspective, given the purpose of the Schedule 4 regime is to compensate freight operators for their additional costs for planned disruption on the network, it has never seen the benefit in paying an access charge supplement for enhanced compensation merely to have that access charge supplement repaid as compensation for its additional costs incurred. If DB Cargo is merely receiving back its access charge supplement as compensation from Network Rail for its additional costs incurred, then it is in effect paying its own compensation. However, the level of compensation paid is directly linked to the number of trains cancelled or diverted. If the increase in payment rates results in NR/GBR being better incentivised to keep

trains running, then arguably the overall costs should in fact reduce and the regime could, as a result, perhaps be considered as 'self-funding'.

Are there any other comments you would like to make?

DB Cargo considers it is crucial that the freight Schedule 4 regime continues to apply across all freight operators and with the prospect of further geographical devolution within Network Rail that the freight Schedule 4 regime also continues to apply equally across the entire network.

DB Cargo hopes that the comments made in this response to the ORR's consultation document are helpful and it looks forward to working with ORR and the rest of the industry to take forward any changes ORR decides to make, which given its comments in this response, DB Cargo hopes are few in number, particularly in respect of the freight Schedule 4 regime.



Department  
for Transport

**From: Dan Moore**  
**Director, Rail Strategy and Analysis**

Great Minster House  
33 Horseferry Road  
London SW1P 4DR

Tel: [REDACTED]

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Dear Daniel,

#### **Response to the ORR's consultation on Schedule 4**

I am writing in response to the ORR's consultation on Schedule 4 as part of the Periodic Review 2023 process (PR23). I am grateful on behalf of the Department for Transport (DfT) for the opportunity to provide input and to set out our views.

#### **Overall points**

This consultation comes, as the ORR acknowledges, at a significant time of change in the industry. The commercial dynamics for most train operating companies (TOCs) have changed dramatically as the franchise system has ended and new contractual arrangements have been put in place for those TOCs contracted directly to the DfT. The Williams-Shapps Plan for Rail (the Plan for Rail) makes it clear that new commercial agreements be part of much broader reform to ensure that the railway better delivers for its customers and secures better value for money for taxpayers. As this reform process is underway with new arrangements being developed, we consider it is particularly important that the ORR's approach uses a suitable level of flexibility to be able to adapt to change and development while ensuring a stable enough environment for the industry to plan with the greatest level of certainty possible.

We fully acknowledge that the ORR, at this stage, must conduct the review on the basis of the current legislative position and we welcome steps in PR23 that support and enable reform. It will be particularly important to continue to work closely with the Rail Transformation team and Great British Railways Transition Team to ensure that the outcomes of PR23 are aligned with the future needs of the railway.

As a general matter, we consider that ensuring there are effective arrangements to incentivise the effective handling of possessions is important in securing a safe, reliable and efficient railway for customers and taxpayers. We therefore, to the extent that current arrangements are maintained, support simplifying Schedule 4 where possible, such as when removing elements which have limited practical impact, reducing or not adding administrative burdens, and while doing so does not have a negative impact on incentive effects.

### Specific points

We have not set out a detailed position on each of the issues included in the consultation, recognising that Network Rail and operators have more practical experience of the operation of Schedule 4. However, there are various issues raised upon which we have specific views and would be grateful for the ORR's consideration of these in response to the consultation.

- **Opt-Out Options:** The DfT supports a full opt-out option for Schedule 4 to be available to provide flexibility to the system going forward. Should the ORR wish to proceed with partial or flexible opt-out variations, a strong rationale should be put forward for doing so, particularly to ensure clarity in the arrangements and to ensure coherence. At this point we have concerns about the practicability of partial or flexible opt-out options whilst ensuring a coherent and effective regime.
- **Notification Discount Factors (NDFs):** We support the ORR's consideration of better incentivising ways of working that promote efficient operation of the railway, and therefore believe that exploring options for monitoring and reporting and an additional threshold increment has merit.
- **Calculations for Schedule 4 costs:** We note the ORR's comments in the consultation with respect to creating a calculator for Schedule 4 costs. We are supportive of this measure as a sensible step toward simplification and ease of use, facilitating greater transparency and creating clearer incentives.
- **Access charge supplement (ACS):** While we understand the aim for greater flexibility in the inclusion of an additional ACS for open access operators, we have significant reservations around its inclusion given its likely infrequent use. We consider that this would be likely to inject greater complexity into the regime, requiring significant resources for limited benefit.
- **Schedule 4 Payment Rates:** We strongly support the ORR's suggestion of a review on the freight payment rate for Schedule 4 to ensure that it fully reflects the impacts of possessions on freight operators' business. We are keen that incentive effects operate in such a way as to ensure the best use of the network, allowing all operators to plan effectively and efficiently, while minimising disruption to the supply chain.

**Concluding remarks**

We very much look forward to continuing to work closely with the ORR during PR23, and as we implement the Plan for Rail at pace. Continuing to ensure the coherence of approach will be critical to ensuring a strong basis for a railway that better delivers for its customers and taxpayers.

We would be very happy to discuss any of the issues in this response.

Yours sincerely,

A large black rectangular redaction box covering the signature area.

Dan Moore



## Response to ORR's technical consultation on the PR23 review of the Schedule 4 possessions regime

This pro-forma is available to those that wish to use it to respond to our consultation. Other forms of response (e.g. letter format) are equally welcome.

Please send your response to [performance.incentives@orr.gov.uk](mailto:performance.incentives@orr.gov.uk) by **13 December 2021**.

Please contact Joe Quill at ORR with any queries: [joe.quill@orr.gov.uk](mailto:joe.quill@orr.gov.uk)

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\*This information will not be published on our website.

### Chapter 2: ORR's proposed approach and priorities

We welcome views on our questions regarding ORR's proposed approach to PR23.

#### **Question 1: Do you have any views on the objectives and benefits of a mechanism such as Schedule 4, for the range of different industry parties, both in the current contracting model and once the rail transformation programme has been fully developed and implemented?**

GWR Answer to Question 1:

We believe that the question regarding the contracting model once the rail transformation programme has been fully developed and implemented cannot be answered until the rail transformation programme is clear. There are particular features of the resulting contracts that will affect the requirements of a possessions compensation regime, in particular the operation of an environment where some operators are incentivised on passenger revenue.

With regard to the current contracting model, we agree with the objectives listed.

#### **Question 2: Do you have any views on whether we should make no fundamental changes to Schedule 4 in PR23, or, as proposed, pursue a small number of incremental reforms to ensure it remains fit for purpose as a baseline regime?**

GWR Answer to Question 2:

We believe that there is a number of longstanding issues with the operation of schedule 4, and in advance of the rail transformation programme the ORR should only make a very limited number of changes.

**Question 3: Do you agree with the areas we have identified as priorities for PR23? Are there any other significant issues that we should seek to address?**

GWR Answer to Question 3:

We do not believe that the opt-out mechanism to Schedule 4 should be a priority in advance of the rail transformation programme. Indeed, allowing an opt out in advance of this could further complicate the discussion of the regime to follow.

### **Chapter 3: Proposal: Cross-cutting change across sector regimes**

We welcome views on the cross-cutting proposal in this chapter.

**Question 4: Do you support proposal A [to introduce an opt-out mechanism]? If an opt-out mechanism were to be implemented, would you support a complete (option A1) or partial opt-out (option A2)? Do you have any views on when operators should be allowed to opt out and what duration any opt-out should have, as set out in paragraph 3.8?**

GWR Answer to Question 4:

We do not support the opt out, as a mixed regime of opted-in and opted-out operators would introduce perverse incentives during possessions. Additionally, allowing an opt out in advance of the rail transformation programme could further complicate the discussion of the regime to follow

### **Chapter 4: Proposals: Passenger regime**

We welcome views on this chapter's proposals for the passenger regime.

**Question 5: Do you support proposal B [to increase incentives on Network Rail to notify possessions early once the "informed traveller" notification threshold (T-22) has been passed], implemented through option B2 [to monitor and report on possessions notification on a more granular basis]? Do you have any views on the options set out?**

GWR Answer to Question 5:

Proposal B2 does not affect the level of compensation, but rather is intended to provide the data to manage NR's performance. We support this, but feel there will need to be a breakdown by how disruptive the possession was.

**Question 6: Do you support proposal C [to develop a method and/or process for settling compensation claims for type 2 and type 3 possessions and periods of sustained planned disruption]? Do you have any views on options C1 [to develop a method for calculating cost and revenue loss compensation] and C2 [to specify in track access**

**contracts a process for negotiating compensation claims for type 2 and type 3 possessions and periods of sustained planned disruption]? Do you have a preference for one of the options?**

GWR Answer to Question 6:

We do not support proposal C1, as the existing "formulaic" regime for Type 1s (costs and revenues) and Type 2s (revenues) is already a methodology and it is unclear whether a further formula could remove the need for an "actual loss" longstop

We support proposal C2 as the very lengthy delays to resolving Type 2 and Type 3 calculations with NR cause unnecessary industry costs

**Question 7: Do you have any views on the scale and impact of this issue? Do you have any views on our wider approach to monitoring possessions and how this can have the greatest impact on driving better possession planning in Network Rail?**

GWR Answer to Question 7:

Your request appears to be for input into Question 7 using toes' experience. This refers to Late Notification possession changes. This asks the fundamental question seeking the drivers for late notice possession changes. In addition it asks whether anything within Schedule 4 or within the possibilities of the Licence can help drive Network Rail behaviours (hence outcomes) in this regard.

[REDACTED]

[REDACTED]

The new timetable development process [REDACTED] may influence this and other aspects of the regime.

**Question 8: Would you find a user-friendly tool to estimate Schedule 4 formulaic compensation helpful? What are your views on the feasibility of developing an estimator tool? Should proposal E be a priority for PR23?**

GWR Answer to Question 8:

Yes we would very much value a user-friendly tool to estimate Schedule 4 formulaic compensation, which we believe would ideally be based on a user-friendly version of S4CS access to which could be shared between operators and NR. If the actual allocation tool and the forecasting tool are based on the same mechanism and inputs then the forecast output will be robust (so long as manual input judgements are factored in).

[REDACTED]

In addition GWR has its own forecasting tool which may help in the development of anything the ORR is looking for in this regard. [REDACTED]

**Question 9: Should proposal F should be a priority for reform in PR23? Do you have any views on the proposed methodology for calculating the ACS for open access operators?**

GWR Answer to Question 9:

There is a need to be aware in any proposed adjustment of the possibility of generating a perverse incentive on Network Rail.

## Chapter 5: Proposal: Freight regime

We welcome views on this chapter's proposal for the freight regime.

**Question 10: Do you agree with our preferred high-level approach for the freight regime, to keep the current regime broadly unchanged for CP7? Are there other elements of the freight regime or its calibration that should be considered for reform in PR23?**

GWR Answer to Question 10:

There is a need to be aware in any proposed adjustment of the possibility of generating a perverse incentive on Network Rail.

**Question 11: Do you consider we should review freight payment rates as a priority for PR23?**

GWR Answer to Question 11:

There is a need to be aware in any proposed adjustment of the possibility of generating a perverse incentive on Network Rail.

**Question 12: Do you have any evidence on the appropriate level for freight Schedule 4 compensation and any views on how any increase might be funded? Do you have any views and evidence on the difference in freight compensation payments between service disruption and cancellation?**

GWR Answer to Question 12:

There is a need to be aware in any proposed adjustment of the possibility of generating a perverse incentive on Network Rail.


<b>Are there any other comments you would like to make?</b>
I should be very grateful if the elements shown in brackets are redacted from publication please.



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Please contact Joe Quill at ORR with any queries: [joe.quill@orr.gov.uk](mailto:joe.quill@orr.gov.uk)

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### Chapter 2: ORR’s proposed approach and priorities

We welcome views on our questions regarding ORR’s proposed approach to PR23.

#### **Question 1: Do you have any views on the objectives and benefits of a mechanism such as Schedule 4, for the range of different industry parties, both in the current contracting model and once the rail transformation programme has been fully developed and implemented?**

The underlying principle of limiting changes to the current regime pending further information from the rail transformation programme is very important, in order to prevent difficulties in setting up the new ‘GB Railways’ contractual structure. Consistency in the Schedule 4 regime could make discussions re the financial elements of the new industry contracts easier.

In addition, customers need to be at the heart of the possession regime, A point which is often overlooked in developing changes to methodology.

**Question 2: Do you have any views on whether we should make no fundamental changes to Schedule 4 in PR23, or, as proposed, pursue a small number of incremental reforms to ensure it remains fit for purpose as a baseline regime?**

Whilst agreeing that there are longstanding issues with the current regime that do need to be addressed and that further incentives for Network Rail to improve its possession planning, would be welcome, the timing of any fundamental changes is not appropriate at this stage.

**Question 3: Do you agree with the areas we have identified as priorities for PR23? Are there any other significant issues that we should seek to address?**

The adoption of an opt out option, at this stage, will result in significant complications for future contractual discussions.

**Chapter 3: Proposal: Cross-cutting change across sector regimes**

We welcome views on the cross-cutting proposal in this chapter.

**Question 4: Do you support proposal A [to introduce an opt-out mechanism]? If an opt-out mechanism were to be implemented, would you support a complete (option A1) or partial opt-out (option A2)? Do you have any views on when operators should be allowed to opt out and what duration any opt-out should have, as set out in paragraph 3.8?**

As highlighted previously, an opt-out option is not appropriate at this stage and consideration is also required for the introduction in the long term. In addition to the point on perverse incentives, there are further concerns over Network Rail or its successor, being able to process a major regime through its systems. A new regime would of course, result in additional process/system requirements for operators without any obvious cost benefit.

## **Chapter 4: Proposals: Passenger regime**

We welcome views on this chapter's proposals for the passenger regime.

**Question 5: Do you support proposal B [to increase incentives on Network Rail to notify possessions early once the “informed traveller” notification threshold (T-22) has been passed], implemented through option B2 [to monitor and report on possessions notification on a more granular basis]? Do you have any views on the options set out?**

A proposal to improve Network Rail's planning process is supported, but as indicated, there are concerns about both major changes to the current financial structure pre GB Railways and changes to Network Rail's systems. Perhaps a regime outside of Schedule 4 with the ORR could incentivise Network Rail without a major system change.

**Question 6: Do you support proposal C [to develop a method and/or process for settling compensation claims for type 2 and type 3 possessions and periods of sustained planned disruption]? Do you have any views on options C1 [to develop a method for calculating cost and revenue loss compensation] and C2 [to specify in track access contracts a process for negotiating compensation claims for type 2 and type 3 possessions and periods of sustained planned disruption]? Do you have a preference for one of the options?**

Option C1 3) looks very much like the formulaic Schedule 4 and seems therefore, not to resolve the underlying issues. There has been various attempts at defining relevant compensation categories, latterly laid down in a Network Rail process. To-date, there has been little improvement in the process. The main problem area, based on experience, is the calculation of revenue loss. It may be useful to prescribe the methodology in calculating this, but this would be better undertaken by an independent body. Hopefully this would remove the need for arbitration.

**Question 7: Do you have any views on the scale and impact of this issue? Do you have any views on our wider approach to monitoring possessions and how this can have the greatest impact on driving better possession planning in Network Rail?**

Whilst being unable to give an idea of the scale of the issue, experience shows that cancellation of possessions has a significant impact on train planning teams, as work planned, needs to take place at a later date. There is also the concern that these changes have a significant impact customer perception of the industry. The ability to monitor the situation is important, but perhaps is s best undertaken by the ORR, rather than through a change in Schedule 4.

**Question 8: Would you find a user-friendly tool to estimate Schedule 4 formulaic compensation helpful? What are your views on the feasibility of developing an estimator tool? Should proposal E be a priority for PR23?**

This would be a very useful tool, particularly as projects such as the Transpennine Route Upgrade are developed. Such a model would assist Network Rail in understanding its project costs.

**Question 9: Should proposal F should be a priority for reform in PR23? Do you have any views on the proposed methodology for calculating the ACS for open access operators?**

No Comment

**Chapter 5: Proposal: Freight regime**

We welcome views on this chapter's proposal for the freight regime.

No Comment

**Are there any other comments you would like to make?**

No Comment



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Please contact Joe Quill at ORR with any queries: [joe.quill@orr.gov.uk](mailto:joe.quill@orr.gov.uk)

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\*This information will not be published on our website.

### Chapter 2: ORR’s proposed approach and priorities

We welcome views on our questions regarding ORR’s proposed approach to PR23.

#### **Question 1: Do you have any views on the objectives and benefits of a mechanism such as Schedule 4, for the range of different industry parties, both in the current contracting model and once the rail transformation programme has been fully developed and implemented?**

The Schedule 4 regime is an important mechanism for the industry. It acts to incentivise Network Rail to minimise planned disruption caused to freight operators and also provides a financial contribution to the cost of the disruption caused when Network Rail takes a possession. These remain important principles in the current railway structure and their importance will only increase in a reformed railway.

Under the new industry structure, freight operators will sit outside the direct remit of Great British Railways (GBR), while most passenger operators will operate under a concession-style model within the GBR structure. As freight operators will remain under an open access model, where they continue to bear revenue risk for the services that they operate, the Schedule 4 regime will continue to play a crucial role in reducing the risks that are faced operating and investing in that environment.

With most passenger operators sitting within the remit of GBR, there is a risk that without a balancing incentivisation regime, like Schedule 4, that the infrastructure manager could seek to minimise the impact of planned disruption to their own services, potentially to the detriment of operators sitting outside the remit of GBR, like freight operators.

As such Freightliner strongly believes that the Schedule 4 regime remains an important industry incentive scheme and for operators outside of the direct jurisdiction of GBR, will continue to be crucial in a reformed railway.

**Question 2: Do you have any views on whether we should make no fundamental changes to Schedule 4 in PR23, or, as proposed, pursue a small number of incremental reforms to ensure it remains fit for purpose as a baseline regime?**

The proposed reform of the railways as outlined in the Williams-Shapps Plan for Rail represents the largest restructuring of the rail industry since privatisation. The reform agenda will consume significant amounts of industry's time and resources over the months and years ahead. Freightliner therefore welcomes the ORR's proposed approach to PR23 that recognises the limited bandwidth of the industry to engage across multiple issues.

Freightliner supports ORR's proposal to pursue a small number of changes where there is demonstrable value in doing so. It is important to take advantage of the opportunity afforded by the periodic review to consider targeted and proportionate improvements.

**Question 3: Do you agree with the areas we have identified as priorities for PR23? Are there any other significant issues that we should seek to address?**

Freightliner broadly supports the priorities identified by the ORR for PR23 – in particular to review the freight compensation rates. However, we are not convinced that reviewing the methodology for the calculation of ACS for open-access operators should be a priority for CP7. As noted in the consultation, there is "*no information is available on the cost of this feature or what benefit they [freight operators] would gain in return*". Given the lack of information about how such a charge would function, how it would be calibrated and what benefits it would yield, Freightliner is concerned that any review of this charge would likely consume significant industry time and resource, without any clear demonstrable benefit.

Furthermore, we do not consider an opt-out of Schedule 4 to be a priority for the freight operators for PR23. We can understand the rationale to simplify money-flows for passenger operators under the remit of GBR, however such an opt-out would not be considered a freight priority for CP7 given that it is inconceivable that we would utilise such a mechanism.

#### Incentives around cancellations

In reviewing the freight compensation rates, Freightliner asks ORR to consider whether the current incentive on Network Rail to avoid cancelling freight services is sufficient. Currently a Category 2 liquated compensation rate is paid when a freight train is cancelled as a result of a planned possession under Schedule 4. In most cases where trains operate daily to facilities and resources are limited, it is not usually possible to recover the lost volume on the cancelled service. Currently the operator is eligible for £965 as a result of the cancelled service. This is the same amount that is paid was the train to still be able to run, but with reduced gauge or requiring a diesel locomotive instead of an electric locomotive. Loss of gauge, or changes in traction are very costly to freight operators and therefore it is right that they are paid as part of Schedule 4 Category 2, however in those instances the train is still able to operate.

Cancellations of freight trains are significant events, which are costly and have a reputational impact for the sector and therefore Network Rail should be incentivised to avoid this outcome. Currently the Schedule 4 liquated rates do not distinguish between these cancellations and other instances where Network Rail has been able to identify an alternative routing for the train.

An additional liquated rate (e.g. a Category 2b rate) would provide a stronger incentive on the infrastructure manager to avoid cancellations of freight services and a higher rate could more appropriately address some of the financial impact of the cancellation. This priority could be addressed as part of the review of freight compensation rates.

#### Notification timescales

We also note that for the passenger regime there is a proposal to “*increase incentives on Network Rail to notify possessions early once the “informed traveller” notification threshold (T-22) has been passed*”. While the freight regime is not the same, Freightliner notes some parallel issues, which we ask the ORR to consider. Currently where possessions are “*notified in all material respects*” to the freight operator in accordance with the Engineering Access Statement (EAS) then Schedule 4 compensation is applicable. Where the notification is later than EAS timescales then the higher rate of Service Variation is due. This is designed to incentivise Network Rail to notify possessions with good notice, to enable the freight operator to be able to plan to minimise the impact.

For freight operators and customers, the materiality of the impact of the possession on the train service is crucial. That means understanding the impact on the train – for example what any revised timings are, whether there is capacity on diversionary routes and whether the train can even still run. Those impacts are not known until Network Rail send through the revised timings for services. Aligned to the Informed Traveller process that should happen at T-14, with the final timings uploaded into downstream systems at T-12.

Over the past 20 months, Network Rail has not been meeting these Network Code timescales. Final timings have been provided for services at a much later stage (as low as T-4). However, Network Rail has maintained throughout that because the possessions themselves have been established following the usual Engineering Access Statement timescales, then Schedule 4 rather than Service Variation is applicable. As we cannot plan with any certainty until the train times have been established the impact of these late offers has been significant and it is of little comfort that the possessions themselves were established much earlier.

This has highlighted how the current Schedule 4 regime is not providing an incentive around the notification of the train plan as a result of planned disruption. Freightliner asks ORR to consider how PR23 could either provide clarification in this matter or explore what contractual changes could be applied to provide better outcomes.

### **Chapter 3: Proposal: Cross-cutting change across sector regimes**

We welcome views on the cross-cutting proposal in this chapter.

**Question 4: Do you support proposal A [to introduce an opt-out mechanism]? If an opt-out mechanism were to be implemented, would you support a complete (option A1) or partial opt-out (option A2)? Do you have any views on when operators should be allowed to opt out and what duration any opt-out should have, as set out in paragraph 3.8?**

While Freightliner would not opt-out of Schedule 4, we do understand the rationale for the proposal to introduce such a mechanism for passenger operators under the remit of GBR, as a means of simplifying money flows in the new vertically integrated structure post-reform. Under the proposed new operating contracts, the requirement for a compensation regime for those integrated passenger operators maybe limited and therefore having a mechanism to provide flexibility and simplify money-flows in this area could be helpful for these passenger operators.

Such an opt-out would not be a priority for Freightliner though. The Schedule 4 regime will remain an important mechanism for freight operators in CP7, to incentivise Network Rail/GBR to minimise planned disruption caused to freight operators and also to provide a financial contribution to the cost of the disruption caused when the infrastructure manager takes a possession.

As freight operators will remain under an open access model, post-reform, where they continue to bear revenue risk for the services that they operate, the Schedule 4 regime will continue to play a crucial role in reducing the risks that are faced operating and investing in that environment. This regime becomes even more crucial post-Reform with most passenger operators sitting within the remit of GBR, driving the need for a balancing incentivisation regime, like Schedule 4, to avoid the infrastructure manager potentially being incentivised to minimise planned disruption to their own services relative to open-access services.

#### **Chapter 4: Proposals: Passenger regime**

We welcome views on this chapter's proposals for the passenger regime.

**Question 5: Do you support proposal B [to increase incentives on Network Rail to notify possessions early once the "informed traveller" notification threshold (T-22) has been passed], implemented through option B2 [to monitor and report on possessions notification on a more granular basis]? Do you have any views on the options set out?**

n/a

**Question 6: Do you support proposal C [to develop a method and/or process for settling compensation claims for type 2 and type 3 possessions and periods of sustained planned disruption]? Do you have any views on options C1 [to develop a method for calculating cost and revenue loss compensation] and C2 [to specify in track access contracts a process for negotiating compensation claims for type 2 and type 3 possessions and periods of sustained planned disruption]? Do you have a preference for one of the options?**

n/a

**Question 7: Do you have any views on the scale and impact of this issue? Do you have any views on our wider approach to monitoring possessions and how this can have the greatest impact on driving better possession planning in Network Rail?**

n/a

**Question 8: Would you find a user-friendly tool to estimate Schedule 4 formulaic compensation helpful? What are your views on the feasibility of developing an estimator tool? Should proposal E be a priority for PR23?**

n/a

**Question 9: Should proposal F should be a priority for reform in PR23? Do you have any views on the proposed methodology for calculating the ACS for open access operators?**

n/a

## Chapter 5: Proposal: Freight regime

We welcome views on this chapter's proposal for the freight regime.

### **Question 10: Do you agree with our preferred high-level approach for the freight regime, to keep the current regime broadly unchanged for CP7? Are there other elements of the freight regime or its calibration that should be considered for reform in PR23?**

Freightliner agrees with the ORR's preferred high-level approach for the freight regime – noting the additional areas we have highlighted in our response to question 3 around cancellation incentives and notification timescales.

### **Question 11: Do you consider we should review freight payment rates as a priority for PR23?**

Freightliner agrees that the freight compensation rates should be reviewed as part of PR23 to ensure that they are set at a suitable level to provide sufficient incentives. The ORR states that "*Schedule 4 is intended to compensate freight operators for the additional operating costs they incur due to possessions*". However, the rates are currently not set on this basis. They are not currently designed to be cost reflective, but rather to provide a contribution to the additional costs incurred by freight operators as a result of planned disruption. Freightliner would be happy provide information to support any recalibration of rates, which could build on some of the data shared with consultants as part of the PR18 process to ascertain the cost of freight cancellations.

The consultation notes that any increase in compensation rates "*may be conditional on the payment of an ACS by freight operators*". Freightliner would query what the value of increasing Schedule 4 rates to make them cost reflective would be, if the increase is directly funded by the freight operators themselves through the ACS. Without seeing the details of any scheme, the value of the additional compensation would appear to be negated by the increase in charges. This risks complicating money-flows for no discernible benefit. Furthermore, if one of the key principles of Schedule 4 is to "*compensate freight operators for the additional operating costs*", then this approach would not align with this principle. Were the freight operators to pay for the compensation via an ACS, then in effect this off-sets the additional Schedule 4, meaning that the freight operators are not being compensated for the additional operating costs.

### **Question 12: Do you have any evidence on the appropriate level for freight Schedule 4 compensation and any views on how any increase might be funded? Do you have any views and evidence on the difference in freight compensation payments between service disruption and cancellation?**

Freightliner would be happy to work with ORR and industry partners to support any recalibration of compensation rates. This could build on some of the data shared with consultants as part of the PR18 process to calculate the cost of freight cancellations. Before we engage consultants to perform this analysis it would be beneficial to get a clear roadmap of how the outputs will be implemented. In PR18, we engaged Arup to produce this analysis, but our understanding is that the outputs were not implemented under the wider funding envelope. To avoid potentially costly and abortive work for PR23, Freightliner requests clarity on how the outputs will be utilised.

Disruption to services, as a result of planned disruption, is a substantial cost for freight operators and the current Schedule 4 regime provides a contribution to those additional costs. Cancellations pose significant issues for sector, resulting in reputational damage and loss of

revenue for the operator. Many of our services operate on a daily basis, so lost volume as a result of a cancellation cannot usually be recovered. The cancellation of freight services are therefore significant events that have reputational repercussions for the sector. The current Schedule 4 regime does not distinguish this impact. Schedule 4 Category 2 compensation rates are paid where planned disruption results in the cancellation of a freight train. The £965 paid under Category 2 is far short of the lost revenue and is the same rate paid were the train to run with reduced gauge or with a different traction type. Given the impact that cancellations have on freight operators and their customers, the introduction of an additional liquidated rate (e.g. a Category 2b rate) would provide a stronger incentive on the infrastructure manager to avoid cancellations of freight services and a higher rate could more appropriately address some of the financial impact of the cancellation.

In terms of how an increase in the rates, and the introduction of an additional liquidated rate, would be funded, it is important to consider how the incentivisation could improve outcomes. The Schedule 4 regime should be incentivising the infrastructure manager to minimise the planned disruption on freight services. If the rate is too low it is likely that the incentive is weak, but should the rates be more reflective of costs, then it would be expected that the incentive properties would be stronger and therefore the impact of disruption on freight services reduced. Less disruption caused to freight services would reduce the number of Schedule 4 events. This improved outcome should be considered alongside any analysis of funding position.

**Are there any other comments you would like to make?**

n/a



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<b>Full name</b>	Ian Kapur
<b>Job title</b>	Head of Strategic Access Planning
<b>Organisation</b>	GB Railfreight Ltd.
<b>Email*</b>	
<b>Telephone number*</b>	

\*This information will not be published on our website.

### Chapter 2: ORR’s proposed approach and priorities

We welcome views on our questions regarding ORR’s proposed approach to PR23.

#### **Question 1: Do you have any views on the objectives and benefits of a mechanism such as Schedule 4, for the range of different industry parties, both in the current contracting model and once the rail transformation programme has been fully developed and implemented?**

GB Railfreight believes that a Schedule 4-type mechanism is essential to ensure that rail freight operations remain a viable option into the future. As an Open-Access freight operator, GBRf needs clear visibility of planned disruption and needs to be adequately compensated when said disruption occurs. One of the most important requirements for a Schedule 4 mechanism is to incentivise the Infrastructure Maintainer to minimise significant disruption to users of that network.

As Network Rail Routes and key passenger operators become more integrated under the Rail Transformation programme, it is essential that correct and appropriate incentives are in place to ensure fair access to the network for freight operations, whilst understanding the need for growth and maintenance of the network. This is especially so right now, given the high environmental importance of moving freight by rail.

We cannot end up with all disruptive work only being planned for midweek nights/weekend as it would disproportionately affect freight operations over passenger operations. Any mechanism for the freight sectors needs to be consistent and visible between all freight operators.

It also is not quite clear how a Schedule 4 regime would work and be funded for Open Access operators only, were all franchised TOCs to opt out of the regime. There is no clarity as to how such a scenario might affect the actual compensation rates for freight operators.

**Question 2: Do you have any views on whether we should make no fundamental changes to Schedule 4 in PR23, or, as proposed, pursue a small number of incremental reforms to ensure it remains fit for purpose as a baseline regime?**

GB Railfreight supports the proposal to pursue incremental change to the current regime. This allows GBRf to analyse and adapt to changes in a structured and logical manner. GB Railfreight does not believe that a fundamental step-change is necessary however items such as updating the freight compensation rates are necessary and encouraged.

One Schedule 4 compensation trigger which is missing, and for which FOCs are not compensated at all, is the "Use of an additional member of traincrew" when there are planned service diversions. There are many occasions where the mileage diversion is <10 miles but another member of traincrew is needed to conduct a train over the planned diversionary route. This leads to additional traincrew costs but no formulaic means for recovery. It is a key missing component of the Schedule 4 mechanism.

**Question 3: Do you agree with the areas we have identified as priorities for PR23? Are there any other significant issues that we should seek to address?**

GBRf agrees with priorities identified in this consultation, with no significant issues to address at this point. However, one other area to which more consideration ought to be given is how we all reduce the onerous task of Category 3 claims, by either streamlining the process or working through some sort of enhanced rate (similar to the cancellation rates in Service Variation & Cancellation).

Also do note, above, the missing Schedule 4 compensation trigger for when additional traincrew need to be used for planned diversionary routes.

In response to comments in section 1.19 of this consultation, GBRf does not believe that Schedule 4 compensation rates have been too high for freight operations during the pandemic. This may be the view for the TOC services but certainly not for FOCs, as there was still planned disruption that took place and affected GB Railfreight.

### Chapter 3: Proposal: Cross-cutting change across sector regimes

**Question 4: Do you support proposal A [to introduce an opt-out mechanism]? If an opt-out mechanism were to be implemented, would you support a complete (option A1) or partial opt-out (option A2)? Do you have any views on when operators should be allowed to opt out and what duration any opt-out should have, as set out in paragraph 3.8?**

The major concerns for Open-Access freight operators such as GBRf is how the whole Schedule 4 regime would work were the majority or all the TOCs to opt-out. Apart from the financial aspect of that scenario, our real issue is that this proposal, if implemented, would lead to a massive reduction of incentive for Network Rail (or, in the future, GBR) to take freight operations, and the value of them to the UK economy, seriously into account when deciding on any balanced plan. This is a very big concern to freight operators as the Schedule 4 incentive effect on Network Rail (currently with all TOCs and FOCs involved) is very much an important part of our how we work together.

GBRf does not support the complete opt-out (Option A1) as for an Open-Access freight operator with no direct support on operational day-to-day costs from disruption, there needs to be an effective incentive and compensatory mechanism in place.

### Chapter 4: Proposals: Passenger regime

We welcome views on this chapter's proposals for the passenger regime.

**Question 5: Do you support proposal B [to increase incentives on Network Rail to notify possessions early once the "informed traveller" notification threshold (T-22) has been passed], implemented through option B2 [to monitor and report on possessions notification on a more granular basis]? Do you have any views on the options set out?**

GB Railfreight supports Proposal B along with any other incentives for Network Rail to notify all operators of possessions as early as possible once the "Informed Traveller" threshold (specifically T-22 and no other date) has been passed. Both Options B1 and B2 are a betterment on the current position and Option B2 would push for greater clarity with the data and would give overall longer-term benefits.

The lack of control on the number of late notice possessions notified to operators each week needs every incentive and control necessary.

**Question 6: Do you support proposal C [to develop a method and/or process for settling compensation claims for type 2 and type 3 possessions and periods of sustained planned disruption]? Do you have any views on options C1 [to develop a method for calculating cost and revenue loss compensation] and C2 [to specify in track access contracts a process for negotiating compensation claims for type 2 and type 3 possessions and periods of sustained planned disruption]? Do you have a preference for one of the options?**

GBRf supports Proposal C and we believe a combination of both Options C1 and C2 would be desirable and would ideally be incorporated in any future structure.

The formulaic methodology needs to be able to compensate for the majority of disruption on the network with the ability to go outside this method for more significant items where there is on-going disruption.

There needs to be greater certainty for affected operators in understanding the likely levels of compensation, and their being made in a timely manner. Clear and precise timescales need to be embedded into all aspects of any compensation scheme so larger compensation claims do not take place over an extended period.

**Question 7: Do you have any views on the scale and impact of this issue? Do you have any views on our wider approach to monitoring possessions and how this can have the greatest impact on driving better possession planning in Network Rail?**

GBRf has heard of some of what is described, anecdotally, but cannot supply any supporting data on the topic. However, it is clear that changes to possessions are often made less than seven weeks before the delivery of the possession. That is a regular occurrence and too regularly causes GB Railfreight problems with planning its reasonable business requirements.

GB Railfreight therefore supports any wider approach to monitoring when possessions are proposed with a view to that data leading to firmer action on Network Rail and its planning. GBRf believes this will lead to a much more transparent way of working between all parties and give better visualisation of effects of possessions on end customers.

**Question 8: Would you find a user-friendly tool to estimate Schedule 4 formulaic compensation helpful? What are your views on the feasibility of developing an estimator tool? Should proposal E be a priority for PR23?**

This sounds like a very useful tool and GBRf supports such a user-friendly tool to estimate Schedule 4 formulaic compensation. This ought to be a priority for PR23 and, hopefully, not too difficult to implement.

**Question 9: Should proposal F should be a priority for reform in PR23? Do you have any views on the proposed methodology for calculating the ACS for open access operators?**

Whilst no open-access operator has ever chosen to pay an access charge supplement, this does not mean that a simplified process should not be investigated. More information would be needed as to the effectiveness of any change.

As “claims for actual losses” values can vary so greatly, due to the size & complexity of the job involved, it is very difficult for operators to assess the values of its losses and therefore endeavour to compensate against these with the most appropriate access charge supplement. That, in itself, makes the current process difficult.

Any new process would inherently move to a more complex methodology and therefore GBRf does not believe this is a priority for PR23.

**Chapter 5: Proposal: Freight regime**

**Question 10: Do you agree with our preferred high-level approach for the freight regime, to keep the current regime broadly unchanged for CP7? Are there other elements of the freight regime or its calibration that should be considered for reform in PR23?**

GB Railfreight agrees with ORR’s preferred high-level approach for the freight regime to keep the current regime broadly unchanged for CP7. GBRf sees that the current regime as broadly fit for purpose, but changes to one of the compensation triggers is also needed in order for the regime to be representative of the disruption and costs caused to freight operators.

Having up-to-date Category 1 and 2 figures for the freight sector will lead to more accurate and appropriate compensation payments and also provide a far better incentivising effect on Network Rail.

Greater visibility of possessions and their effect on services (Question 8) should be a priority, as should moving away from as many Category 3 type claims, by making Category 1 & 2 claims more representative as possible.

**Question 11: Do you consider we should review freight payment rates as a priority for PR23?**

A review of freight Schedule 4 payment rates for freight is a high priority for PR23. These rates were last updated 15 years ago and are, therefore, not representative of current operational costs particularly with respect to traincrew, locomotive leasing, wagon leasing, fuel, maintenance, and changes to variable track access charges over the last 15 years, to name but a few of the items to which Schedule 4 compensation is associated.

Taking the above items into account, the difference between the current actual payment rates for diversions and cancellations, and the additional costs incurred by operators does not accurately reflect the necessary compensation to make these changes cost-neutral.

By providing a more accurate freight payment rate, the incentivising effect on Network Rail to plan its possessions to avoid affecting freight services (either by diversion or a cancellation) would be greater. Disruptive possessions, particularly on midweek overnights and on Saturdays, have a disproportionate affect on freight services over the passenger equivalent, and not least with the current drive to effect modal shift from road to rail. The Government's current low-carbon environmental agenda has got to be at the forefront of the "direction of travel" with the Schedule 4 regime.

**Question 12: Do you have any evidence on the appropriate level for freight Schedule 4 compensation and any views on how any increase might be funded? Do you have any views and evidence on the difference in freight compensation payments between service disruption and cancellation?**

Far more initial work would need to be carried out and understood before any process of providing evidence, for undefined items, could commence.

**Are there any other comments you would like to make?**

Harper, Rhys

From: Richard Freeston-Clough <[REDACTED]>  
Sent: 29 October 2021 11:00  
To: PR23 Programme  
Subject: [EXTERNAL] FW: PR23 review of Schedule 4 possessions regime

Categories: Blue Category

**CAUTION:** This email originated from outside of the organisation. Do not click links or open attachments unless you recognise the sender and know the content is safe.

Dear Sir/Madam

Thank you for the opportunity to feed into this consultation on your review of Network Rail's Schedule 4 possessions regime.

As you will be aware, London TravelWatch is the statutory body representing London's transport users.

One of the key objectives in the current regime is: 'To provide incentives for Network Rail to minimise the level of service disruption as a result of possessions'. However, the current scheme only focuses on financial issues rather than the passenger ie Network Rail paying train companies compensation when they need to close lines to do engineering work. And it doesn't really encourage Network Rail to consider other service providers like TfL.

As a multi-modal watchdog we think it is really important for all transport operators including Network Rail to consider the needs of all passengers as part of the decision making process and the alternative routes that passengers can take at times of planned and unplanned disruption.

We have seen in recent months the impact of a lack of consideration of passenger needs by both Network Rail and Transport for London when they both decided to carry out engineering works over the Christmas period which will make it harder for passengers to get to Heathrow Airport by rail or Tube, particularly on Boxing Day when both services will be unavailable. We would like to see a possessions regime which makes it incumbent on Network Rail to ensure with operators and TfL that alternatives are available for passengers when particular lines are subject to engineering work, with high quality information across all media to ensure passengers are aware of their options so that a situation like that at Heathrow this Christmas can be avoided.

Kind regards

Richard

Richard Freeston-Clough  
Head of Advocacy, Operations & Communications

Follow us on [Twitter](#) and [You Tube](#)

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# LONDON TRAVELWATCH



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London TravelWatch is the operating name for the London Transport Users Committee

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From: PR23 Programme <[PR23@orr.gov.uk](mailto:PR23@orr.gov.uk)>  
Sent: 30 September 2021 10:34  
Subject: PR23 review of Schedule 4 possessions regime

Dear stakeholder,

We have today published an initial consultation on our review of Network Rail's Schedule 4 possessions regime.

This review forms part of ORR's next periodic review process (PR23) and follows our related consultation on the Schedule 8 train performance regime which was published earlier in the Summer.

In this consultation, we are reviewing how Network Rail's possessions regime may need to change –including in light of industry reform. We are proposing to make only one significant change to Schedule 4 by allowing all train operators to opt out (completely or partially) of Schedule 4, therefore giving them the flexibility to choose if they need a Schedule 4 type of protection. In addition to this, we have identified a small number of incremental improvements to Schedule 4 that we could take forward as part of PR23. We are seeking views on our proposals.

The consultation can be found on ORR's website [here](#). We are inviting responses by 13 December 2021, which can be sent to [performance.incentives@orr.gov.uk](mailto:performance.incentives@orr.gov.uk). Further guidance on how to respond is available at the above link.

For any queries on the consultation, please contact Joe Quill at [joe.quill@orr.gov.uk](mailto:joe.quill@orr.gov.uk)

Kind regards,

PR23 team



Peter Swatridge  
Head of Regulatory Economics  
Network Rail

Daniel Brown  
Director, Economics, Markets and Strategy  
Office of Rail and Road

13 December 2021

Dear Dan,

### **Network Rail's response to ORR's technical consultation on the PR23 review of the Schedule 4 possessions regime**

This letter sets out Network Rail's response to ORR's technical consultation on the "PR23 - Review of the Schedule 4 possessions regime", issued on 30 September 2021. GBRTT have confirmed that the content aligns to their view on reforms. The main body of this letter summarises the key points which Network Rail considers that ORR should factor into its review of the Schedule 4 possessions regime, and a high-level overview of our response to the priority areas for incremental reform proposed by ORR. The annexes contain detailed responses and supporting evidence for each of the proposed reform areas and our views on a number of the 'other options considered' by ORR.

The remainder of this letter is structured as follows:

- Summary
- Context of the PR23 review – Network Rail view
- Additional high-level Network Rail comments on ORR's proposed reform priority areas
- Suggested next steps
- Annex 1 – Network Rail's response to ORR's detailed incremental reform proposals
- Annex 2 – Network Rail's response to 'other options considered' by ORR
- Annex 3 – Technical consideration of the impacts of ORR's proposed reforms on calculating an Access Charge Supplement (ACS) for operators

### **Summary**

All railways need to be maintained and renewed to keep them safe and reliable in the interest of passengers and freight users. To do this in a safe and efficient way it is likely that trains will not be able to run for periods of time throughout the year. When this happens, it is important that possessions are done in a well-planned, cost effective and orderly way, keeping passengers informed whilst also recognising the trade-offs between more efficient (often longer) possessions and the broader passenger impacts of longer disruption versus the wider socioeconomic benefits and costs.

Train operations are often impacted by possessions - services can either be suspended fully, partially, or an alternative route may be offered. This disruption, though beneficial to operations



following works, can lead to additional costs directly attributable to the disruption and/or lost passenger fare revenues due to the predicted elasticities of passenger demand being affected by the perception that the railway is an unreliable mode of transport. Reasonable levels of compensation for disruption caused by possessions are therefore appropriate to protect train operators' businesses where they are exposed to such risks and to reduce passenger discontent. Historically, Schedule 4 has largely focussed on the former. PR23 presents an opportunity to rectify this in the interest of passengers and freight users such that the track and train come together to make better trade-offs between the efficacy of necessary possessions and the impact on end-users. It is important that any regime that ORR mandates helps to incentivise these trade-offs. It may also be necessary to make changes to the Network Code to obtain some of the benefits.

COVID-19 has accelerated change in the railway and led to reduced passenger demand – leading to the replacement of the Department for Transport's (DfT's) franchises with Emergency Recovery Measures Agreements (ERMAs) i.e. management contracts. ORR will need to be mindful of the impact of ERMA's (and the future formulation of how train operations are procured by governments) on its possessions' regime – most notably many train operators are no longer exposed to revenue risks at all.

The combination of the recently published Williams-Shapps Plan and the start of ORR's PR23 periodic review, represents a unique opportunity to radically improve the industry's possessions framework, both in the near-term and to advance the aims of the reformed and evolving railway through the Williams-Shapps Plan. Whilst it is recognised that ORR will need to work within the current legal and regulatory structure for PR23, it is vital that it is also mindful of the broader industry Plan and works closely with those setting the direction of travel for possessions arrangements in future. It is our view that ORR should use the PR23 process to support and complement wider industry reform.

### **Context of the PR23 review of train performance incentives – Network Rail view**

Since privatisation, Schedule 4 has provided a compensation mechanism to operators against losses associated with planned disruption outside of their control. Schedule 4 was also aimed at providing an incentive mechanism on Network Rail to minimise the disruption caused by possessions by managing them in an efficient way. It is supposed to provide a financial incentive for Network Rail to notify operators (and ultimately passengers) of planned disruption in a timely manner (through Notification Discount Factors). These incentive effects are however generally regarded as second order to the primary aim of providing revenue and cost compensation to operators.

It is worth reflecting on the size of the financial flows associated with Schedule 4. In 2019/20 the Schedule 4 Access Charge Supplement that train operators paid Network Rail was £333m, in return they received £329m in Schedule 4 compensation. Viewing Schedule 4 as a revenue insurance scheme, these numbers are notable for both their size and how, at a total level, they are closely matched. However, at a more granular level many issues exist, which we describe in our detailed response.



Whilst the Schedule 4 mechanism was arguably historically necessary, we must now recognise that things have moved on. As a result of Covid-19 and the wider aims of the rail reform programme (‘the Williams-Shapps Plan’), a large majority of operators no longer hold the revenue risks associated with fluctuations in demand. It is likely to remain this way for the foreseeable future with the introduction of concession style Passenger Services Contracts (PSCs). Furthermore, the Williams-Shapps Plan has clearly outlined the need for better whole-industry outcomes through increased alignment of track and train to deliver benefits to passengers, with one of the largest identified cost savings from this programme being an improvement to the efficacy of possessions.

In its PR23 review of the possessions’ regime, we firmly believe that everything ORR does should be aiming to progress the reform agenda as far as possible. This direction should be informed by the Williams-Shapps Plan and the direction set out by DfT in its response to this consultation. Our response, we believe, also reflects the aims of the reform programme. We have also consulted with GBRTT on their views which align with those set out in our full response, below. We will continue to work hard to further the aims of the Williams-Shapps Plan as we move through the PR23 process and work closely with GBRTT colleagues.

Following the direction of travel of the reform programme, we agree with the notion that DfT specified operators (in due course PSC operators) no longer require the Schedule 4 revenue protection mechanism, as they no longer face the revenue fluctuations associated with planned disruption. Revenue risk will, instead, be borne by GBR. As a result, GBR should be able to critically assess the trade-offs between cost efficient possessions, revenue losses and passenger disruption without the need for complex mechanisms such as Schedule 4 - as these money flows will be internalised in a reformed world.

Whilst we are of the view that Schedule 4 should no longer apply to DfT specified (ERMA/NRC/future PSC) operators, we agree with ORR that non-DfT specified operators (including Open Access and freight) are likely to desire a compensation mechanism to protect them from additional costs and revenue fluctuations outside of their control due to the revenue exposures they face. It is this residual Schedule 4 regime that ORR should focus on in PR23 to ensure that the regime is fit for purpose both now, and enduringly as the industry structure changes. A reformed regime through PR23 should focus on increased simplicity and transparency for the operators that still require it, and we therefore encourage ORR to reconsider any detailed ‘technical’ proposals to change Schedule 4 at this time (aside from small tweaks to improve the effectiveness of the existing regime). This should support the aims of the Williams-Shapps Plan, in advance of new railway legislation and in the interest of passengers and freight customers. Furthermore, if the reformed PR23 regime is successful in driving efficient possessions and better passenger outcomes for non-DfT specified operators, then GBR may wish to consider ‘replicating’ the regulatory approach for possessions through PSC contracts if some form of revenue risk is introduced for some of the train operators that it procures.

### **Additional high-level Network Rail comments on ORR’s proposed reform priority areas**

Based on ORR’s incremental reform proposals:



We endorse:

- ORR's proposal to include a **Schedule 4 'opt-out'** mechanism in CP7. DfT specified operators no longer require a revenue compensation mechanism for planned disruption as they are not exposed to revenue losses from possessions. Any cost effects of possessions that they experience will be covered by their contracts with DfT. It is therefore appropriate for these operators to fully 'opt-out' of the regime and seek alternative arrangements through their management contracts with funders. We also agree that this is feasible under the existing legal and regulatory frameworks.
- The proposal to **increase monitoring of early notification of possessions** by Network Rail. We agree that it is in the interest of passengers to provide them with good notice of planned disruption to their journeys. Increased monitoring of when notification is given by Network Rail should provide a strong reputational incentive to notify our customers as early as possible in their best interest. ORR will, however, need to consider the additional resourcing and costs of implementing such monitoring.
- We are interested in exploring the pros and cons of introducing an **additional Notification Discount Factor**. This consideration should take account of any potential benefits, weighed against the fact that there seems likely to be significantly fewer train operators covered by Schedule 4 in CP7.
- The possibility of introducing a prescriptive set methodology or a set of rules outlining the process for operators to claim actual losses for **Type 2 and Type 3 possessions**. Historically non-formulaic Schedule 4 claims have been rancorous, time consuming, and have caused tensions between Network Rail and operators, particularly in respect of revenue claims. Network Rail welcomes the proposal to better define this process, and we provide some of our own ideas as to how this process may be improved in more detail below.
- The potential introduction of a **Schedule 4 'calculator tool'** which could aid operators in understanding the expected levels of formulaic Schedule 4 compensation receivable for a given possession (or payable if they are commissioning the possession themselves). We would like to work with ORR on this further to understand the requirements of a 'calculator tool' and to discuss the associated resourcing and cost requirements (and the feasibility) of creating and maintaining a calculator tool in CP7. This proposal should, however, be concluded by ORR at a later date once it becomes clear how many train operators are likely to opt-out of Schedule 4 as the amount of work required may be disproportionate to the benefits if it is only relevant to a small number of operators.
- ORR's view that the freight regime is broadly fit for purpose. We also agree that the **freight regime needs a full payment rate recalibration** as this has not been done since PR08. If freight operators can provide robust evidence in a transparent way, we are open to the idea of updating freight Schedule 4 payment rates to reflect such evidence. However, ORR would also need to consider any changes to the expected Schedule 4 compensation payable by Network Rail as part of our CP7 funding settlement decision.
- Alongside any work to update Schedule 4 rates for freight operators we would like ORR to consider wider reform of the Network Code to minimise '**possessions blocking**' where this is acting against the interests of users of the railway.

We do not support:



- The additional options proposed for the Schedule 4 'opt-out' mechanism. Whilst we support ORR's proposal for a full opt-out of Schedule 4 (as discussed earlier), it is also proposing what it describes as a **Partial 'opt out'**. This would entail train operators either going onto an Open Access style regime (i.e. not paying an ACS but with the ability to receive compensation on a claims basis for Type 3 possessions only) or opting-out of the revenue compensation aspect of Schedule 4 but still receiving Schedule 4 compensation for cost losses. We disagree with the partial 'opt-out' option as it would add even more complexity to a regime that is already unwieldy. Such an approach would need an incredibly complex set of data and highly sophisticated modelling that is currently not achievable.
- The notion of **opt-out being flexible**. ORR has not been explicit about the terms of this, for example if an operator chooses to 'opt-in' partway through a control period it is not clear whether this would be based on the PR23 ACS model or on up-to-date information. ORR is also silent on what the rules would be for opting in or out. This would need to be well defined to prevent operators from 'gaming' the system by only taking out Schedule 4 'insurance' (through payment of an ACS) in the years where they are likely to receive a net benefit. So, whilst we can understand, in theory, what ORR may be seeking to achieve the lack of practical detail makes it hard for us to support the proposals at this stage. We would, however, be content to work with ORR to better understand what it is seeking to achieve and on the practical implications of such an approach.
- The **introduction of 'fines'** where Network Rail provides early notification of a possession and subsequently changes or cancels the possession at a later date. Imposing a fine on Network Rail would be disproportionate given the current lack of evidence to substantiate whether such an issue even exists and whether losses are actually suffered. We agree with ORR that a better approach at this stage would be to monitor if and when this happens before even considering ideas such as fines.
- The proposal to introduce a **new methodology for calculating an ACS for Open Access operators** which would exclude the estimated costs of compensation for Type 3 possessions. We are of the view that Open Access operators may not take up an ACS given that they never have historically. Additionally, this would require an entirely new and separate ACS model, which would require considerable additional work for Network Rail, both in terms of resources to build and maintain the new model and potential changes to the possession planning process to support it, with very few benefits given its likely limited uptake. Furthermore, other passenger operators may perceive this to be unduly discriminatory as their ACS also covers costs for Type 3 possessions. We, therefore, strongly disagree with this proposal.
- The dismissal of the proposal to remove the Sustained Planned Disruption (SPD) mechanism. We think that there is merit in removing SPD, as this causes unnecessary tension between Network Rail and operators and involves a lot of time and resource which is disproportionate to the amounts successfully claimed.

Generally, we are supportive of some of the reforms proposed by ORR and the context of its review.

**Annex 1** provides further information on Network Rail's view on each of ORR's priority areas of reform, supported by evidence in support of ORR's proposals where we agree, and evidence to counter ORR's proposals where we disagree.



We also discuss, in **Annex 2**, the 'other areas considered' in ORR's consultation, and whether we consider that there is further merit and evidence to suggest that these areas should be taken forward or dismissed at this early stage of the review.

### **Suggested next steps**

Once ORR has taken note of the feedback from its consultation, we believe that some sensible next steps may be as follows:

1. ORR should continue its engagement with the industry on Schedule 4. We would suggest, and support, ORR establishing an industry working group in the first half of 2022, to discuss the issues raised in stakeholders' responses. In due course, this group could then help oversee recalibration of any Schedule 4 parameters that need resetting for CP7. Network Rail would welcome continued and early engagement of this sort.
2. It would be very helpful if ORR could provide greater clarity on how it will take account of the PDFC review of passenger demand in the recalibration of Schedule 4 parameters, and the timings of this work.
3. We would welcome early sight of ORR's emerging views on the Schedule 4 regime before it publishes its second consultation on possessions. This will enable us to work with industry in a collaborative way to ensure a smooth recalibration process despite the condensed timescales to achieve this.

If you would like to discuss the content of this letter in more detail, please contact myself or my colleague Rachel Grashion ( [REDACTED] ).

Yours sincerely

Peter Swatridge



## ANNEX 1 – NETWORK RAIL’S RESPONSE TO ORR’S PROPOSED ‘PRIORITY AREAS FOR INCREMENTAL REFORM’ AND THE SMALLER ADDITIONAL CHANGES PROPOSED

For each proposed reform, identified in ORR’s consultation document, we provide a more detailed and evidenced response to the views set out in our covering letter above. The views expressed, below, reflect the overall view of Network Rail as a result of internal stakeholder engagement exercise across the business. This is something that we will continue to do throughout the consultation process, and we will continue to update ORR ‘in real time’ as far as possible to ensure that any emerging views across Network Rail are captured and considered.

Finally, this annex concludes with a short section on the anticipated ongoing costs to Network Rail associated with the changes proposed by ORR.



### Response to ORR’s technical consultation on the PR23 review of the Schedule 4 possessions regime

This pro-forma is available to those that wish to use it to respond to our consultation. Other forms of response (e.g. letter format) are equally welcome.

Please send your response to [performance.incentives@orr.gov.uk](mailto:performance.incentives@orr.gov.uk) by **13 December 2021**.

Please contact Joe Quill at ORR with any queries: [joe.quill@orr.gov.uk](mailto:joe.quill@orr.gov.uk)

<b>Full name</b>	Peter Swatridge
<b>Job title</b>	Head of Regulatory Economics
<b>Organisation</b>	Network Rail
<b>Email*</b>	



Telephone number*	██████████
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\*This information will not be published on our website.

## Chapter 2: ORR's proposed approach and priorities

We welcome views on our questions regarding ORR's proposed approach to PR23.

### **Question 1: Do you have any views on the objectives and benefits of a mechanism such as Schedule 4, for the range of different industry parties, both in the current contracting model and once the rail transformation programme has been fully developed and implemented?**

As discussed in our covering letter, we are of the view that ORR should have high regard to the rail reform programme, and the implications that this will have on the need (or lack thereof) to compensate some train operators for planned disruption through a regulatory regime such as Schedule 4.

Many operators now have management style contracts with the DfT (or other specifiers) which fully remove revenue risk, including the revenue fluctuations associated with planned disruption. This arrangement, therefore, removes the need for a revenue compensation mechanism such as Schedule 4, with funders taking on the revenue risks. We are, therefore, of the view that DfT (and potentially other specifiers) specified operators no longer need Schedule 4 and should therefore be able to 'opt-out' of the regime as ORR suggests.

Furthermore, Schedule 4 has historically also provided an 'incentive' on Network Rail to manage its possessions in an efficient way by providing discounts for early notification, and a net benefit where possessions are efficient through lower Schedule 4 payments than the ACS. We are of the view that this is no longer required or effective for the relationship between Network Rail and DfT specified operators due to the changing nature of the industry's arrangements. When GBR is set up, this will bring together track and train under single management that will have all the tools and information to make trade-offs between possession types, revenue loss, and most importantly outcomes for passengers. Having a separate regulatory regime between bodies within GBR control alongside internal arrangements would distort incentives, confuse accountabilities and diminish the overall business case for planned works, which would not be in the interest of passengers or the taxpayer.

Consistent with ORR, we still believe that there is a role for Schedule 4 for train operators that will still face revenue risk, such as Open Access (OA) and freight operators. Such train operators will still feel the impacts of planned disruption on their businesses and will likely desire compensation to

mitigate this effect. It is the Schedule 4 regime for these operators that ORR should focus its efforts on to ensure that the regime is fully fit for purpose, providing the right levels of compensation whilst also incentivising Network Rail to minimise the disruption that it causes to these train operators services.

**Question 2: Do you have any views on whether we should make no fundamental changes to Schedule 4 in PR23, or, as proposed, pursue a small number of incremental reforms to ensure it remains fit for purpose as a baseline regime?**

Following on from our response to Question 1, we believe that Schedule 4 will still play an important role for revenue risk facing operators. Therefore, reform of the existing Schedule 4 regime to ensure that it is fit for purpose for these operators is vital and should be the focus of ORR's efforts.

Whilst we agree that some incremental reform is necessary to maximise the effectiveness of the regime for revenue risk facing operators, the likely efficacy of all proposals will need to be considered alongside the 'costs of change'. ORR will need to consider if the reforms that it proposes are proportionate to the number of operators likely to benefit from any changes, particularly when weighted against the costs and resources required of the industry in doing so. This should become clearer as respondents state their views and the likelihood of 'opting-out' of the Schedule 4 regime, as the reforms and their net benefits will be better understood. ORR should take this into consideration before making any decisions around the level of incremental reform to be introduced.

Finally, we would like to work alongside ORR throughout the consultation process so that we are well informed of all proposals that are being considered for Schedule 4. ORR's decisions will likely have an impact on the overall cost to Network Rail of the Schedule 4 regime in CP7, something that all parties will need to be mindful of when considering Network Rail's funding requirements.

**Question 3: Do you agree with the areas we have identified as priorities for PR23? Are there any other significant issues that we should seek to address?**

Please see our covering letter for our high-level views on ORR's reform proposals. We also provide more detail in answer to the questions that follow.

### Chapter 3: Proposal: Cross-cutting change across sector regimes

We welcome views on the cross-cutting proposal in this chapter.

**Question 4: Do you support proposal A [to introduce an opt-out mechanism]? If an opt-out mechanism were to be implemented, would you support a complete (option A1) or partial opt-out (option A2)? Do you have any views on when operators should be allowed to opt out and what duration any opt-out should have, as set out in paragraph 3.8?**

Given the evolving nature of the contracts between DfT (and potentially other specifiers) and the operators that it specifies it feels reasonable that these operators should have the opportunity to 'opt-out' of Schedule 4 given that they will no longer require protection against revenue risk. We are therefore supportive of the introduction of an opt-out mechanism for these operators.

For non-DfT specified operators, we feel that there is still a role for Schedule 4 due to the different nature of these operators' businesses and the revenue risks that they are exposed to. We are, therefore, more unclear about the benefits of an 'opt-out' mechanism for these operators.

Overall, we are much more supportive of a complete 'opt-out' mechanism (A1) than a partial 'opt-out' mechanism (A2). A partial opt-out mechanism is likely to add an additional layer of complexity at a time where a key aim of the reform programme is to rationalise and simplify industry mechanisms in the interest of passengers. An Open Access style partial opt-out mechanism is unlikely to be taken up by DfT specified operators due to the removal of revenue risk. In addition, a partial opt-out mechanism that covers cost compensation only will require an entirely new ACS model to be designed and built such that it is calibrated to only cover the expected levels of Schedule 4 cost compensation. This will require significant resource and industry time as it will likely require assistance from specialised consultants over a number of months. Furthermore, it is highly unlikely that a 'cost only' mechanism will be required for DfT specified (future GBR) operators, as the cost compensation mechanisms for planned disruption are likely to be contained within the contract between the operator and DfT rather than through the Track Access Contract (TAC), which will mostly likely just be seen as a passthrough mechanism back to DfT (or GBR in future). This, therefore, leaves a small number of operators who may be interested in a partial opt-out mechanism as ORR describes. Given the revenue risk facing nature of the remaining operators, it is unlikely that take-up of a partial opt-out mechanism will be wide-spread, or even happen at all. ORR should consider whether the offer of a partial opt-out mechanism is proportionate given the likelihood of limited take-up against the potential costs of setting such a mechanism up.

We understand ORR's desire to have a Schedule 4 opt-out mechanism that is flexible during a control period and that it may provide additional benefits to operators by giving them the flexibility to take part in the regime at times when they feel protection against planned disruption is required. However, we would like to work with ORR to address some of our concerns regarding flexible opt-out before we would be supportive of such an approach.

Our concerns regarding a 'flexible' opt-out mechanism are as follows:

If the ACS continues to be set as part of the periodic review for the entire control period:

- In behaving rationally, operators would look at the information available to them at the time when choosing whether to opt-in or out of Schedule 4 each year.
- As this decision would be made much closer to the year in question than the point at which an ACS for the control period would have been determined, operators are likely to have much more information about the possessions due to take place, giving them a much more informed idea of the levels of compensation receivable vs the ACS payable.
- Therefore, unless the calculation of the ACS was made based on up-to-date information of future possessions there would be a considerable risk of train operators arbitraging the regime.
- In addition, unless the calculation of each ACS was carried out to a very high level of disaggregation, train operators would also be able to arbitrage the system by frequently opting in and out of the regime.

It seems to us that the only way that such sophisticated opting in and out could be legitimately managed would be that it would need to be calculated annually, based on up-to-date possessions data at a very high-level of disaggregation:

- This would, however, require significant additional funding and resource within Network Rail to create, update and maintain such a new and sophisticated ACS model.
- The annual recalibration would need to include the latest information about upcoming possessions plans to ensure that the ACS truly reflects the expected Schedule 4 costs for the upcoming year.
- The data would also need to be accurate at a high-level of disaggregation as the ACS calculation would no longer benefit from some of the averaging that is a feature of the current five-yearly approach.

- Due to the time needed to update and re-run the model in each year, it is likely that this would need to be done quite far in advance of the year in question. Once the model has been updated, the time between this and an operator's decision to opt-out would need to be kept to a minimum to avoid any information asymmetry.
- The above would likely require an increase in detailed levels of possession planning information, and in a more advanced timeframe – which may lead to wider-reaching changes to Network Rail's possession planning processes. This would necessitate further resource and increased costs to implement it.

If an opt-out mechanism is to be permitted then our preferred option would be to retain the existing approach whereby operators have to decide as part of the periodic review whether to opt-in for the entire control period. If more flexible opt-outs were to be introduced, a new approach whereby the ACS model is updated on an annual basis to reflect the information available at the time would need to be developed, with the operator given a short window of opportunity to opt-out of the regime once their ACS has been calculated and presented to them in each year. This approach could reduce the opportunity for perverse incentives and is well aligned with approaches taken by insurance brokers in other industries who will typically offer either a long-term policy at a fixed price with a fixed term (i.e. no opportunity to cancel during the agreed contract term), or an annual policy with insurance premiums updated in each year to take into account any new and emerging information about the insured. However, the costs and resource implications of developing such an approach, both in terms of the modelling and the impact on wider possession planning process, would be considerable.

Further to the above, ORR would also need to set out specific rules for the opt-out mechanism, including time windows for any annual opt-in (or out) decisions. Alternatively, it may be more appropriate to only allow opt-in (or outs) based on 'trigger events' such as when a new operator starts running on the railway. Without clearly defined rules there seems to us a significant risk of perverse incentives and an overall loss to Network Rail as a result of arbitrage of the regime.

Finally, we have some broader concerns around the implications of a Schedule 4 'opt-out' mechanism on the wider possessions system. At present, Schedule 4 provides operators (particularly open access and freight operators) with reasonable compensation for the possessions taken by Network Rail to ensure that operators businesses are not financially adversely impacted. If in future operators decide to 'opt-out' of the regime, possessions will continue to happen in the normal way, but operators may feel concerned about the impacts on their business once they have opted-out. If this is true then operators may consider using contractual mechanisms to block possessions, making it difficult for Network Rail to get the access to the network that it needs to keep it safe and high performing in the interests of passengers. If this does happen then tensions between train operators

and Network Rail are likely to increase, and vital engineering works could be delayed. Under GBR, future PSC operators will be part of the same body as the Infrastructure Manager (IM) and therefore are highly unlikely to ‘block’ possessions (this is also true prior to GBR set up due to the removal of revenue risk for these operators). However, revenue risk-facing operators (such as OA and freight) may seek to use contractual mechanisms such as Network Change in this way. To prevent this from happening we, therefore, encourage ORR to reconsider the appropriateness of an opt-out mechanism for non-DfT specified operators.

#### **Chapter 4: Proposals: Passenger regime**

We welcome views on this chapter’s proposals for the passenger regime.

**Question 5: Do you support proposal B [to increase incentives on Network Rail to notify possessions early once the “informed traveller” notification threshold (T-22) has been passed], implemented through option B2 [to monitor and report on possessions notification on a more granular basis]? Do you have any views on the options set out?**

Adding an additional Notification Discount Factor (NDF) after T-22 as ORR suggests could be helpful in encouraging NR colleagues to notify train operators of possessions earlier given the current absence of an incentive between T-22 and the late threshold. However, overall we agree with ORR’s proposal at this stage that it may be more appropriate to increase monitoring and reporting of possessions notification and passenger ticket buying patterns (which have likely changed as a result of Covid-19) so that any future decisions about NDFs can be made on an informed and well evidenced basis. Additionally, Network Rail is seeking to improve the way in which timetabling works in the future so as to allow a more passenger and freight end-user focussed approach that can adapt to changes more quickly. Whilst this is still being worked through by the industry, it is likely that timetabling processes will be different in CP7. This could have implications on both the relevance and appropriateness of existing NDFs and the need for potentially new NDFs that are aligned with new timetabling processes. We will work with ORR throughout PR23 to apprise them of these changes, as they become clearer (with an initial update on this in early 2022). At this stage we encourage ORR to reserve its position about setting NDFs for CP7, until the new timetabling process is clearer.

Following this, we would also like to work with ORR to understand their requirements with regards to additional monitoring and reporting to ensure that we have the systems capability and resourcing to meet these requirements on an ongoing basis throughout CP7.

**Question 6: Do you support proposal C [to develop a method and/or process for settling compensation claims for type 2 and type 3 possessions and periods of sustained planned disruption]? Do you have any views on options C1 [to develop a method for calculating cost and revenue loss compensation] and C2 [to specify in track access contracts a process for negotiating compensation claims for type 2 and type 3 possessions and periods of sustained planned disruption]? Do you have a preference for one of the options?**

Where operators are not opted-out of Schedule 4 in CP7, additional clarification of the methodology and/or process for calculating and evidencing actual cost and revenue losses for Type 2 and Type 3 claims could be helpful, particularly for revenue claims as this has historically been a difficult process.

Network Rail is keen to explore alternative ways to improve the overall approach to Type 2 and Type 3 Restriction of Use (RoU) compensation, such as:

1. Removing the ability for either party to “reopen” revenue loss claims. This could be superseded by a “formulaic tweak” to increase formulaic compensation levels for longer RoUs (or a +/- payment rate adjustment for certain circumstances);
2. Revisiting the existing bus cost formula to make it more cost-reflective than at present. This could negate the need for actual cost claims, saving operators and Network Rail time and resource. We do not support the introduction of formulae for other more minor costs;
3. Retaining the ability to “reopen” some costs for longer RoUs, but as per C2 introduce clearer contractual timelines for negotiations and specify the substantiation expectations. If negotiations are limited to evidenced costs only then the need for an arbiter is reduced;
4. Amending the contractual treatment of Type 3 possessions for Non-ACS paying operators (who do not currently receive formulaic compensation); and
5. Removal of Sustained Planned Disruption (SPD) provisions.

Each of these is discussed later in this section with the title of each corresponding to the numbered bullet points, above.

### **Contextual observations**

We recognise the issues with the current approach which ORR describes. We would, however, like to ensure that industry colleagues involved in this consultation are aware of an initiative introduced by Network Rail in 2019 to help the situation, as we believe this could provide a good starting point for some of the ensuing discussions.

In November 2019, Network Rail published (with RDG support) a “claims charter” (the Access Contract Claims Protocol) to support all parties in commencing the claims process collaboratively with a shared understanding of expectations, contributing to a reduced claim lifecycle. The Protocol reflects good practice from outside the rail industry, with input from independent loss adjusters. It contains several sections of direct relevance to Type 2 and 3 RoU negotiations. It has no contractual status but helps to inform discussions as a claim is developed. An independent survey carried out by Savanta ComRes in November 2020 indicated that, where used as intended, the Protocol is beginning to improve the experience for both claim parties. Further revision and reissue of the Protocol is imminent. We would be happy to talk to ORR and other consultation parties about the Protocol in more detail.

### **Scale of the issue**

The claims process can indeed be time-consuming, burdensome and create enormous lasting uncertainty for all parties about respective financial liabilities. As of 21 October 2021 there were 116 live RoU reopener claims nationally (97% of which are Type 3), with a breakdown shown in the table below.

<b>Type 2 or 3 RoU “reopened” claims</b>	<b>Number of live claims</b>	<b>Aggregate claimed value</b>
Cases reopened by TOCs against NR	48	£92m
Cases reopened by NR against TOCs	68	£55m

### **Time taken to resolve claims**

Many of these claims will take a long time to resolve, rarely under 2 years, and frequently in excess of 3 years, for the following reasons:

- i. Once registered in accordance with contractual timescales, there are no further deadlines until the statutory legal limitations are passed (6 years in England and Wales, 5 years in Scotland).
- ii. If parties do not engage each other promptly on the detail of a claim, respective positions become entrenched. It becomes increasingly more difficult to resolve over time, exacerbated even further when those left to resolve a claim are not necessarily those with the first-hand experience and knowledge of the case.
- iii. In cases where Network Rail seeks to recover sums already paid to TOCs under the formula, resolution is partly dependent on TOCs providing evidence of its own actual losses. This is understandably not a priority for TOCs, often leaving Network Rail with no option but to pursue dispute resolution to conclude such claims.

#### **1. Revenue loss compensation claims**

Revenue loss compensation accounts for the overwhelming majority of compensation by value, 80%-85% in every year since 2016/17, and is present in almost every claim (exceptions being of course Type 2 in which only costs are negotiated, and the occasional Type 3 if parties agree early on that the formulaic revenue sum is already sufficiently accurate).

Where revenue loss is involved in a claim it usually extends the negotiation process severalfold. The assessment of revenue loss is almost entirely dependent on modelling of hypothetical counter-factual scenarios and therefore highly complex, demanding significant time and resource from both Network Rail and operators.

There is, therefore, an argument for removing, from both parties, the ability to reopen revenue loss compensation claims. If there is evidence that TOC payment rates should instead increase in the case of longer RoUs, then it could be appropriate to instead have higher formulaic rates (with no ability for either party to reopen claims). We would be interested to explore this idea with ORR and industry in the coming months.

#### **2. Cost compensation claims (buses)**

We agree that cost compensation mechanisms could be improved, and we set out some thoughts below.

The cost compensation element of possessions claims is smaller and more straightforward than revenue loss, as unlike revenue loss, costs incurred can be proven easily based on evidence (invoices, receipts, plans, timesheets, materials, extracts from supplier contracts etc).

Negotiations on the cost element of a claim can usually be resolved within weeks of the substantiating evidence first being provided. These cases tend to become problematic only if a claimant cannot provide auditable evidence or demonstrate that a cost was genuinely incremental as a consequence of the disruption.

There is already a bus cost compensation formula which runs in parallel with the revenue loss formula. It is the default compensation option for all RoUs but can be reopened for Type 2 and 3 RoUs. It dates back to CP4 and works on the same “swings and roundabouts” principle as the revenue loss formula.

Network Rail considers that the bus cost compensation formula broadly works, although there could be scope to make it more accurate to case-specific factors such as geography, passenger volumes, time of day and advance notice of booking.

Network Rail would support work to revisit the bus cost formula along the lines we describe above. If the changes to the formula are effective, this could enable bus cost compensation to also become formula-only for all RoUs (i.e. not “reopenable” even for Type 2 and 3) as per ORR’s option C1.

### **Cost compensation claims (other items)**

Regarding other costs incurred during RoUs, operators are better placed to provide detail, but our own analysis of TOC cost compensation claims over several years suggests that costs tend to be roughly in the following ranges:

Bus costs (including vehicle hire and coordination staff):	75%-95% of total <b>costs</b>
Marketing/publicity:	5%-10%
Taxi costs (partly as a bus alternative for passengers with specific requirements but moreover for staff unable to get between usual locations, particularly drivers):	0%- 5%

Additional staff costs (train planning etc):	0%-5%
Other (alternative staff accommodation, additional cleaning, station signage etc):	0%- 5%

We believe that these more minor costs are better suited to an actuals-based regime based on the provision of evidence of incremental costs. We consider that the Access Contract Claims Protocol initiative already makes it simpler for operators to recover these costs from Network Rail, and we have seen no recent controversy concerning any of these items.

We are, therefore, not convinced that it is worthwhile developing formulae for other types of costs, on the basis that these are relatively small, and the loss can be demonstrated relatively easily.

### 3. Refining the process and contractual provisions

Costs in the above table are mostly already explicitly listed as allowable costs in track access contracts (definition of “*Type 2 Direct Costs*”) but as per ORR’s option C1 **we are content that other items could also be added to the contract as allowable costs** as long as it is equally explicit, for all parties’ benefit, that these must be reasonable costs which are genuinely incremental to an operator as a direct consequence of the disruption experienced.

However, we are wary of attempting to contractualise every part of the process, but **we agree that there could be merit in trying to encapsulate some of the core principles of evidence and minimum standards, as alluded to in both options C1 and C2.** Again, we would suggest using the Access Contract Claims Protocol as the starting point for some of these discussions.

**We agree with option C2 in that it would be helpful to at least set a date by which detailed substantiation must be provided (aligned with the principles and standards alluded to in the previous paragraph) and an earlier “end-date” than the statutory legal provisions of 5-6 years.**

If revenue loss claims (based on actuals) are removed and the other improvements, outlined above, are implemented, then **we would question the need for a separate “arbiter” set out in ORR’s option C2.** If the “end-date” were to be breached without resolution, the existing industry dispute

provisions already offer various resolution mechanisms. The industry could perhaps discuss whether one of the more facilitative solutions could become the first default option in the event of an unresolved claim (i.e. Early Neutral Evaluation, Mediation or Expert Determination, rather than the current go-to Adjudication option). However, it is important to remember that the reasons for dispute can themselves be very different and the contract should not constrain the parties in seeking an appropriate solution.

#### **4. Amending the contractual treatment of Type 3 possessions for Non-ACS paying operators**

Non-ACS paying operators (Open Access operators) currently claim on an actual cost and revenue loss basis for Type 3 possessions. There could be merit in considering changing this to a fully formulaic basis for all train operators (whilst potentially also including a re-opening provision for actual cost and revenue losses, as is currently the case for ACS paying train operators).

#### **5. Sustained Planned Disruption (SPD)**

- We believe that SPD was a well-intentioned attempt by the industry to provide a “safety net” for operators when the cumulative impact of RoUs becomes significant. In practice it has rarely been applied.
- We believe that an emphasis in PR23 on revisiting the revenue loss payment rates and/or potentially tweaking the formula if evidence supports doing so would be a better means to address the risk of long-running disproportionate losses. **We believe, therefore, that SPD as a safety net mechanism should be removed.**
- As a *quid pro quo* for removing SPD mechanism, non-ACS paying train operators (e.g. Open Access operators) could be provided with formulaic revenue and cost compensation on the same basis as those paying an ACS for Type 3 possessions (non-ACS paying operators would still not receive compensation for Type 1 and Type 2 RoUs).

**Question 7: Do you have any views on the scale and impact of this issue? Do you have any views on our wider approach to monitoring possessions and how this can have the greatest impact on driving better possession planning in Network Rail?**

With Network Rail's existing systems' capability it is incredibly difficult (if not impossible) to understand the frequency of late possessions changes and/or cancellations. Notwithstanding the technical difficulties in monitoring, the reasons underlying the late change and/or cancellation are likely to vary widely and would need to be looked at on a case-by-case basis before even considering imposing a fine or revoking a previous discount as is mooted in this consultation. Evidence from PR13 also indicated that a large proportion of rail users do not book their tickets until the day of (65%) or the 72 hours (13% - so 78% in total) directly prior to travel<sup>1</sup>, therefore the impact of late changes or cancellations of possessions would seem likely to have a minimal impact on passengers. Therefore, ORR's idea of imposing fines seems totally disproportionate. Also, it is unlikely that a fine would have the intended effect on Network Rail due to the fact that it is a public sector body working in the public interest, with taxpayer's money being used to pay for the fines and depriving the railway of the work that any such money was originally intended to fund (such as renewals).

If ORR can properly evidence that this is an issue, then later removal of the discount seems to be a more appropriate option than imposing a fine. However, we consider that for CP7 ORR should monitor the situation rather than introduce fines or clawing back discounts. We will support ORR with this by reporting on our possessions plans and any changes made in line with the capabilities of our existing possessions monitoring systems. To do this, we will need to carry out some preliminary work to understand whether additional monitoring of possessions cancellations/changes is best done through the Schedule 4 or access planning processes. We will also need to consider any additional resource requirements from such activities.

**Question 8: Would you find a user-friendly tool to estimate Schedule 4 formulaic compensation helpful? What are your views on the feasibility of developing an estimator tool? Should proposal E be a priority for PR23?**

We are content, in principle, with this proposal. However, we consider that it should be revisited by ORR at a later date once it becomes clear how many TOCs are likely to opt-out of the regime as the amount of work required may be disproportionate to the benefits if it is only relevant to a small number of TOCs.

This is further supported by the fact that Network Rail has already committed a lot of time and resource historically to come up with such a tool. Previous work suggests that such a tool is incredibly difficult, if not impossible, to create in a meaningful and accurate way due to the volatility of

<sup>1</sup> <https://www.orr.gov.uk/media/10758> - ORR commissioned report by SPA: Understanding And Testing Passenger Perceptions Of Complexity In Relation To Fares And Ticketing (Figure 1 – page 22)

the variables in the formula. One of the key issues is that the value of Schedule 4 payments is driven by the TOC's response to a restriction of use and not by the restriction of use itself, therefore creating a calculator for Schedule 4 is not necessarily in Network Rail's sole gift. We also have concerns about train operators' potential reliance on such a tool as its output would likely become the operator's 'expectation' of what they will receive (or have to pay when commissioning works). If the actual amount does not match or is not close to the calculator's predictions, this may give rise to disputes/queries which may take time to resolve leading to costly delays in work programmes.

**Question 9: Should proposal F be a priority for reform in PR23? Do you have any views on the proposed methodology for calculating the ACS for open access operators?**

We do not support ORR's proposal to introduce an additional ACS methodology for OA operators for the following reasons:

- It would introduce an additional layer of complexity at a time where simplification is being recommended by the reform programme
- It seems likely to lead to undue discrimination where:
  - Open Access operators are only expected to pay an ACS that covers Type 1 and Type 2 possessions in return for full compensation; and
  - Other passenger train operators will pay an ACS to cover Type 1, Type 2 and Type 3 possessions in return for the same levels of compensation.
- Open Access (OA) operators have not historically taken up an ACS, and it is unclear whether they will in the future.
- There are currently a small number of OA operators, therefore any additional work and associated costs to calibrate a new ACS model are likely to outstrip the perceived benefits. As with the flexible opt-out option considered in Question 4, any new model would need to be fed with additional detail in terms of possession plans which would likely lead to wider changes in the possession planning process to facilitate it, further increasing the implementation costs.

For the reasons listed above, we do not think that ORR should consider this proposal a priority in PR23. Instead, we consider that ORR should continue to focus on improving the effectiveness of the existing Schedule 4 regime to ensure that it is fit for purpose for revenue risk facing

operators that still require the regime. This could include changes to the existing OA regime by, for example, allowing OA operators to claim formulaic cost and revenue compensation for Type 3 possessions (along with the additional contractual provisions associated with this for current ACS paying TOCs). This reform would better align the passenger and OA regime, whilst also acknowledging the fact that OA operators do not pay an ACS (unless they choose to) and should therefore not receive compensation for the less disruptive Type 1 and Type 2 possessions.

## Chapter 5: Proposal: Freight regime

We welcome views on this chapter's proposal for the freight regime.

### **Question 10: Do you agree with our preferred high-level approach for the freight regime, to keep the current regime broadly unchanged for CP7? Are there other elements of the freight regime or its calibration that should be considered for reform in PR23?**

We agree with ORR that the freight regime is fit for purpose and therefore does not require significant change. Our only concern is around the number (and low value) of bespoke Schedule 4 claims received from operators which we discuss in more detail in our response to Question 11.

### **Question 11: Do you consider we should review freight payment rates as a priority for PR23?**

If freight operators can provide robust and transparent evidence, we would be content to update Schedule 4 payment rates to reflect this (or to consider other provisions outside of Schedule 4 to provide appropriate levels of compensation in agreement with routes and operators on a case-by-case basis). We would be happy to work with freight operators to do this as part of the recalibration process. However, if freight Schedule 4 payment rates were to be increased, we would also propose that ORR reforms the Network Code to minimise possession blocking, and reforms to the existing regime such that actual cost claims can only be made if they are above a minimum threshold (so that time and resources are not expended processing claims for small amounts of money). Network Rail currently sees a disproportionate number of bespoke freight Schedule 4 claims, which is burdensome on both parties. For example, as of 21 October 2021 there were 88 live claims with an aggregate claim value of £5.3m, these claims make up 20% of all operator claims despite accounting for only 2% of the total value. The claims are frequently of very low value individually – more than half of them are currently believed to be below £10k, and we regularly process claims below £1k, where the administrative burden on both parties typically outweighs the value of the claim. We consider, therefore, that a *de minimis* threshold should be set



for these Category 3 claims, possibly at £10k as is the case for passenger train operators. We believe that higher rates for Category 1 and 2 Disruptions could be a worthwhile *quid pro quo* for reducing the inordinate volume of small time-consuming claims associated with Category 3 Disruptions. We have endeavoured, in recent years, to improve the process so that this works more effectively for both Network Rail and FOCs but this is an area where the contractual structure is a real obstacle to improved working.

Finally, as part of its review of FOC payment rates, ORR will also need to consider any changes to the expected Schedule 4 compensation payable by Network Rail to freight operators in CP7 as part of our funding settlement decision, noting that it would otherwise be unfunded given that freight operators do not pay a Schedule 4 ACS.

**Question 12: Do you have any evidence on the appropriate level for freight Schedule 4 compensation and any views on how any increase might be funded? Do you have any views and evidence on the difference in freight compensation payments between service disruption and cancellation?**

We would expect freight operators to provide this evidence. If payment rates are increased, then we would also support the introduction of an ACS to fund this.

**Are there any other comments you would like to make?**

N/A

**ANNEX 2 - NETWORK RAIL'S RESPONSE TO ANNEX 3 OF ORR'S CONSULTATION ON OTHER AREAS CONSIDERED**

In ORR's consultation document, Annex 3 contains a table of additional areas for reform that it has considered and that it has concluded not to progress at this stage. In the table below we outline our views on each of these areas to outline whether we agree with ORR's proposal not to progress the proposal, or whether we believe that there is merit in continuing to pursue the proposal, and our reasoning.

Other proposal considered	Network Rail comment
Cross-cutting change: implement a single regime for open access, third party and freight operators	We agree with ORR that it should not pursue this further. It would be too time consuming and complex (and possibly would require new systems) to implement a one size fits all regime at this stage and it would also be disproportionate given the likelihood of operators opting-out of Sch 4 in CP7.
Passenger regime: Reviewing sustained planned disruption thresholds	Whilst we agree with ORR not to pursue this further, we also think that SPD should be removed in its entirety. This aligns with the proposal to remove SPP and would remove a rancorous claims process which puts NR at loggerheads with its customers.
Passenger regime: Offering compensation to operators indirectly affected by possessions	We agree with ORR not to pursue this further as it is a limited issue that would add additional complexity in a disproportionate way.
Passenger regime: estimating emergency timetable (ET) compensation payments costs in the ACS calculation	We agree with ORR not to pursue this further.



Cross-cutting: Excluding enhancements from Schedule 4	We agree with ORR not to pursue this further as it may be complex to implement at a time where the aims of the reform programme are to simplify the current processes and improve collaboration.
Passenger regime: Replace notification thresholds with a continuous discount	We agree with ORR not to pursue this further for the same reasons put forward by ORR.
Passenger regime: Introduce a modest penalty for late possession cancellation	ORR should not take this forward as there is a lack of evidence to support their claim and a fine is unlikely to have the intended effects that ORR perceives due to the public nature of NR.

## ANNEX 3- TECHNICAL CONSIDERATION OF THE IMPACTS OF ORR'S PROPOSED REFORMS ON CALCULATING AN ACS FOR OPERATORS

For each of the reforms proposed by ORR, we have considered the possible implications of this on the existing ACS model and whether a new model would be required. We have also started to consider whether the options proposed would be feasible under an ACS scheme approach and outline our reasoning in the table below.

ORR proposal	Impact on ACS modelling approach
Schedule 4 full 'opt-out' mechanism	<ul style="list-style-type: none"> <li>• We have some concerns around the suitability of the current model to reflect this approach accurately, and ability to improve this accuracy given the availability of data.</li> <li>• The current ACS model is designed to 'average out' risk to Network Rail. Running the current model with smaller number of operators, particularly smaller operators, would significantly impact the accuracy of the model.</li> <li>• This could be alleviated by creating a new model that is more granular, though this would need to be done on an annual rather than control period basis due to the level of information available closer to the time of a possession taking place.</li> <li>• We also consider that it may be worth keeping the overall functionality to calculate costs of possessions for all operators, even where they have opted out, to maintain visibility of possession costs and Network Rail's efficiency.</li> </ul>
Schedule 4 partial 'opt-out' mechanism with no ACS and compensation for Type 3 possessions only	<ul style="list-style-type: none"> <li>• We would need to re-design the ACS model to take into account operators selecting this option, adding complexity to an already complex and ill-understood process. This would also involve additional costs and resources to NR, at a time when NR is looking to make cost and headcount savings.</li> </ul>
Schedule 4 partial 'opt-out' mechanism with an ACS covering cost compensation only	<ul style="list-style-type: none"> <li>• We would need to re-design the ACS model to take into account operators selecting this option, adding complexity to an already complex and ill-understood process. This would also involve additional costs and resources to NR, at a time when NR is looking to make cost and headcount savings.</li> <li>• We may have to parallel run two ACS models if some operators choose this option and others choose to fully 'opt-in'</li> </ul>
Having a flexible Schedule 4 'opt-out' mechanism	<ul style="list-style-type: none"> <li>• As mentioned previously, we are not supportive of this approach, due to the likelihood of operators arbitraging the system - if this had happened during CPS we estimate that it could have led to additional Schedule 4 losses of c. £90m across the control period. The only way to mitigate this would be to completely re-design the ACS model to calculate an annual ACS based on more time specific inputs.</li> </ul>

	<ul style="list-style-type: none"> <li>• A complete re-design of the ACS model would be difficult and expensive to implement, and there would also be extremely limited opportunity to test the new model prior to it being implemented in practice due to the tight timescales and delays in the periodic review.</li> </ul>
Passenger regime – additional notification threshold and/or increased monitoring of early notification	<ul style="list-style-type: none"> <li>• An additional NDF would require an amendment to the ACS model to change unit rates used to take into account the new notification factor – we would need to back calculate historic possessions to identify new costs for all possessions that would have fallen under the new notification threshold, which would be time consuming to do. – We, therefore, agree with ORR that additional monitoring of possessions notification is the preferred option for CP7.</li> </ul>
Passenger regime – Enhanced definition of the methodology or process for type 2 and 3 loss claims	<ul style="list-style-type: none"> <li>• Not applicable.</li> </ul>
Passenger regime – penalising for or additional monitoring of late possessions changes and cancellations	<ul style="list-style-type: none"> <li>• Not applicable</li> </ul>
Passenger regime – create a calculator to estimate the expected Schedule 4 costs/compensation for a given possession	<ul style="list-style-type: none"> <li>• Not applicable.</li> </ul>
Passenger regime – Calculating an ACS for open access operators on a different basis to non-OA operators	<ul style="list-style-type: none"> <li>• Similar to the concerns we raised in respect of ORR’s opt-out proposal, the current ACS model is designed to work by averaging out risk to Network Rail. Running the current model for a smaller number of operators would lead to inaccurate ACS estimations.</li> <li>• Having a different calculation method for OA compared to non-OA would appear to us to discriminate against non-OA operators, and lead to additional complexity in the ACS model and perhaps require a parallel run of two ACS models, one for OA and one for other passenger operators.</li> </ul>



## Response to ORR’s technical consultation on the PR23 review of the Schedule 4 possessions regime

This pro-forma is available to those that wish to use it to respond to our consultation. Other forms of response (e.g. letter format) are equally welcome.

Please send your response to [performance.incentives@orr.gov.uk](mailto:performance.incentives@orr.gov.uk) by **13 December 2021**.

Please contact Joe Quill at ORR with any queries: [joe.quill@orr.gov.uk](mailto:joe.quill@orr.gov.uk)

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\*This information will not be published on our website.

### Chapter 2: ORR’s proposed approach and priorities

We welcome views on our questions regarding ORR’s proposed approach to PR23.

**Question 1: Do you have any views on the objectives and benefits of a mechanism such as Schedule 4, for the range of different industry parties, both in the current contracting model and once the rail transformation programme has been fully developed and implemented?**

No views.

**Question 2: Do you have any views on whether we should make no fundamental changes to Schedule 4 in PR23, or, as proposed, pursue a small number of incremental reforms to ensure it remains fit for purpose as a baseline regime?**

Where incremental reforms can be efficiently and effectively pursued to ensure Schedule 4 remains fit for purpose as a baseline regime, it makes sense to pursue these reforms.

**Question 3: Do you agree with the areas we have identified as priorities for PR23? Are there any other significant issues that we should seek to address?**

Nexus welcomes the priority to increase incentives on Network Rail to notify Possessions as early as possible once the “T-22” threshold has passed. From the perspective of Nexus planning for possessions and hence customers using the Tyne & Wear Metro, notification by 12

weeks prior to Possessions is a key milestone to allow effective advance communication of the planned disruption and alternative travel arrangements to customers, alongside providing sufficient time to plan for the Possession effectively (as Tyne & Wear Metro is a rapid transit, 'turn up and go' system, advance tickets are not sold so from a customer perspective the key requirement is being able to communicate the disruption and the alternative transport arrangements). Notification later than 12 weeks results in increasing difficulties to plan for and communicate Possessions effectively. In this context the current situation of there being no difference between notification at 21 weeks versus 2 days before a Possession is not customer-focussed.

### **Chapter 3: Proposal: Cross-cutting change across sector regimes**

We welcome views on the cross-cutting proposal in this chapter.

**Question 4: Do you support proposal A [to introduce an opt-out mechanism]? If an opt-out mechanism were to be implemented, would you support a complete (option A1) or partial opt-out (option A2)? Do you have any views on when operators should be allowed to opt out and what duration any opt-out should have, as set out in paragraph 3.8?**

No views – the ACS does not apply to Nexus' Schedule 4.

### **Chapter 4: Proposals: Passenger regime**

We welcome views on this chapter's proposals for the passenger regime.

**Question 5: Do you support proposal B [to increase incentives on Network Rail to notify possessions early once the "informed traveller" notification threshold (T-22) has been passed], implemented through option B2 [to monitor and report on possessions notification on a more granular basis]? Do you have any views on the options set out?**

As per the response to question 3 Nexus welcomes this incentive, as it provides more time to plan for the disruption and hence provide better information and service to customers. Nexus agrees that option B2 would be the preferred option as it provides granular information, rather than setting single or numerous thresholds that would be the case under option B1.

**Question 6: Do you support proposal C [to develop a method and/or process for settling compensation claims for type 2 and type 3 possessions and periods of sustained planned disruption]? Do you have any views on options C1 [to develop a method for calculating cost and revenue loss compensation] and C2 [to specify in track access contracts a process for negotiating compensation claims for type 2 and type 3 possessions and periods of sustained planned disruption]? Do you have a preference for one of the options?**

No views – this does not apply to Nexus' Schedule 4.

**Question 7: Do you have any views on the scale and impact of this issue? Do you have any views on our wider approach to monitoring possessions and how this can have the greatest impact on driving better possession planning in Network Rail?**

Nexus would welcome this increased monitoring. Whilst mostly this has not affected Tyne & Wear Metro, in the last 12 months there have been two instances of late notice Possession

cancellations by Network Rail. One of these was cancelled too late to be able to replan a full service (as it coincided with a Possession on the Nexus part of the Tyne & Wear Metro system, so the service for the two Possessions taking place had already been planned and it was not possible to simply restore the base timetable) and as a result customers had to use a bus replacement service despite no work taking place.

**Question 8: Would you find a user-friendly tool to estimate Schedule 4 formulaic compensation helpful? What are your views on the feasibility of developing an estimator tool? Should proposal E be a priority for PR23?**

Nexus would welcome a tool that could be used to estimate Schedule 4 formulaic compensation.

**Question 9: Should proposal F should be a priority for reform in PR23? Do you have any views on the proposed methodology for calculating the ACS for open access operators?**

No views.

## **Chapter 5: Proposal: Freight regime**

We welcome views on this chapter's proposal for the freight regime.

**Question 10: Do you agree with our preferred high-level approach for the freight regime, to keep the current regime broadly unchanged for CP7? Are there other elements of the freight regime or its calibration that should be considered for reform in PR23?**

No views.

**Question 11: Do you consider we should review freight payment rates as a priority for PR23?**

No views.

**Question 12: Do you have any evidence on the appropriate level for freight Schedule 4 compensation and any views on how any increase might be funded? Do you have any views and evidence on the difference in freight compensation payments between service disruption and cancellation?**

No views.

## **Are there any other comments you would like to make?**

As noted in the response to the ORR's recent Schedule 8 consultation, Nexus' Schedule 4 falls outside the Periodic Review process and has its own 5-yearly review provisions.



## Response to ORR’s technical consultation on the PR23 review of the Schedule 4 possessions regime

This pro-forma is available to those that wish to use it to respond to our consultation. Other forms of response (e.g. letter format) are equally welcome.

Please send your response to [performance.incentives@orr.gov.uk](mailto:performance.incentives@orr.gov.uk) by **13 December 2021**.

Please contact Joe Quill at ORR with any queries: [joe.quill@orr.gov.uk](mailto:joe.quill@orr.gov.uk)

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\*This information will not be published on our website.

### Chapter 2: ORR’s proposed approach and priorities

We welcome views on our questions regarding ORR’s proposed approach to PR23.

#### **Question 1: Do you have any views on the objectives and benefits of a mechanism such as Schedule 4, for the range of different industry parties, both in the current contracting model and once the rail transformation programme has been fully developed and implemented?**

The purpose of the current Schedule 4 regime is currently fit for purpose, however opportunities for improvement exist. The principles of a reputational incentive regime do not work as well as the financial one, resulting in behaviours such as declaring a work bank as a series of separate possessions rather than a blockade in order to avoid type 2 and type 3 possessions even though the customer sees no service for a duration over a line of route.

Whilst recognising the variety of operators and differing levels of risk this imports, and the need for incentives to drive efficient planning of possessions, as Northern are currently owned by DOHL, Schedule 4 largely represents a movement of money around the industry from one Government body to another. NTL does appreciate that not every operator is in the same financial position and that those operators on concession style contracts value the protection that Schedule 4 provides. It is worth noting that although NTL is currently government owned, this may not necessarily be the case throughout the next control period and therefore the Schedule 4 regime needs to still exist and with sufficient flexibility in the regime to accommodate any changes in circumstances of individual operators and to the risk allocation during the entirety of the control period.

NTL is of the view that the ongoing rail transformation should consider how best to incentivise Network Rail to carry out as much maintenance/enhancement work as possible within single planned possessions as this will reduce the impact on the passenger and ensure a more consistent service offering.

**Question 2: Do you have any views on whether we should make no fundamental changes to Schedule 4 in PR23, or, as proposed, pursue a small number of incremental reforms to ensure it remains fit for purpose as a baseline regime?**

NTL are comfortable with small changes to the regime that align to the changing nature of the rail end user. It is important that the system remains fit for purpose and flexible enough to deal with the range of outcomes from the current rail reform agenda, without fundamentally changing the nature of the regime.

Due to the impact of the Covid-19 pandemic, Weekends and bank holidays for example have increased patronage and so discounts associated with bank holidays in our opinion should be removed as Network Rail are potentially being incentivised to plan work for our busiest times which will have a higher impact on rail users.

NTL advocates incorporating a new incentive into the regime which aligns to both the duration of the possession and an assessment of planned work completion (with no subsequent further unplanned possessions required to complete the work). This could in theory tackle two issues – over running possessions and subsequent late notice possessions required to complete unfinished work, both of these occurrences cause disruption to rail users. It is important that Network Rail plans its work with a reasonable degree of certainty to minimise the impact to passengers, our suggestion could further emphasise the importance of well-planned maintenance and project activities. We would also suggest that it would be beneficial to include a factor in the regime that considers trains that are planned out of the timetable before the FWTT.

**Question 3: Do you agree with the areas we have identified as priorities for PR23? Are there any other significant issues that we should seek to address?**

NTL broadly agrees with the areas that ORR have identified as priority areas, however, we do wish to flag a couple of other areas which we believe is worth ORR considering:

- Is there an opportunity for the Schedule 4 regime be aligned with the Network Change process in order that the two processes can work in harmony?
- Remove sustained planned disruption and replace with a regime that looks at whole programme loss rather than possession or blockades only.
- Build into the regime a process to pre-agree bespoke compensation for non-template possessions(s) where it is known that the regime won't provide adequate compensation e.g. diversions off route that necessitate the flexing of 3<sup>rd</sup> party services, requirement to strengthen services. Currently it is difficult for operators such as NTL to recover all costs and at the moment the regime does not cater for operators indirectly impacted by the disruption and who incur additional cost as a result of the possessions. The UK rail network is complex, and it is rare for disruption impact to be contained to only one route, possessions are no different and the indirect impact can be wide.

### **Chapter 3: Proposal: Cross-cutting change across sector regimes**

We welcome views on the cross-cutting proposal in this chapter.

**Question 4: Do you support proposal A [to introduce an opt-out mechanism]? If an opt-out mechanism were to be implemented, would you support a complete (option A1) or partial opt-out (option A2)? Do you have any views on when operators should be allowed to opt out and what duration any opt-out should have, as set out in paragraph 3.8?**

NTL would not advocate changes to the current Schedule 4 ACS mechanism at this point in time due to the uncertainty the industry currently faces, in particular, The lack of clarity around Passenger Service Contracts, and the associated cost risk.

### **Chapter 4: Proposals: Passenger regime**

We welcome views on this chapter's proposals for the passenger regime.

**Question 5: Do you support proposal B [to increase incentives on Network Rail to notify possessions early once the "informed traveller" notification threshold (T-22) has been passed], implemented through option B2 [to monitor and report on possessions notification on a more granular basis]? Do you have any views on the options set out?**

NTL is of the view that there is perhaps little value add in the options as proposed due to the short duration left to which this process could be applied, as most of the possessions will have been agreed prior to the change. It is perhaps worth considering the proposed B2 option in order to obtain 1 - 2 years' worth of monitoring, noting that Schedule 4 is an incentive regime rather than a punitive one.

The purpose of B2, however, could be delivered through other means, but add value by scaling the level of change/work associated with the notification using trains affected or extended journey time which already exists within the regime. If the process was amended in order that exact notification dates for possessions were to be tracked via Schedule 4, this would require people to audit this for accuracy and there is a question as to whether the outputs would add any value to the process. It could therefore be more useful to monitor the impact of the changes instead, for example 10 changes that adjust the length of the possession by 10 minutes and affecting one train each time is less important than 1 change that affects 200 trains. Therefore it could be more powerful to incentivise Network Rail to minimise change by factoring in the overall impact of the possession change. This could help to raise awareness about the impact of changes on resource, costs and also on the customer.

**Question 6: Do you support proposal C [to develop a method and/or process for settling compensation claims for type 2 and type 3 possessions and periods of sustained planned disruption]? Do you have any views on options C1 [to develop a method for calculating cost and revenue loss compensation] and C2 [to specify in track access contracts a process for negotiating compensation claims for type 2 and type 3 possessions and periods of sustained planned disruption]? Do you have a preference for one of the options?**

NTL supports proposal C as there are flaws in the compensation process and in how claims are treated within Network Rail. The evidence requirements expected by Network Rail in relation to claims particularly when it comes to staff/resourcing costs is often unrealistic, and a high level of TOC resource is required in order to source the various forms of evidence required to make a claim. Often it takes multiple attempts to obtain Network Rail claims panel approval for costs incurred and the cost risk sits with the operator for often a substantial period of time whilst a lengthy process is progressed and concluded. Even at conclusion, it is often the case that not all costs incurred are successfully recovered.

Under option C1, Northern would look for the process to allow for inclusion of whole industry cost, i.e. where we aren't directly affected by the access, but will be part of delivering the right industry plan for our customers. An example of this could be where NTL are required to strengthen services on routes where the access isn't taking place. The current regime does not compensate operators for instances such as this and leads to operators being penalised for doing the right things by industry and rail users.

It would be important for a clear methodology to be set in how non-formulaic compensation would be assessed. Clear timescales would also need to be set outlining the process requirements i.e. timescales for agreement to be reached etc., it should also outline how the escalation process would work if parties fail to agree.

**Question 7: Do you have any views on the scale and impact of this issue? Do you have any views on our wider approach to monitoring possessions and how this can have the greatest impact on driving better possession planning in Network Rail?**

NTL agrees that monitoring of possessions would be a useful ongoing workstream and will provide clarity on the effectiveness of Network Rail's possession planning process.

NTL has experienced late notice changes to planned possessions and although there is a mechanism for operators to be able to claim compensation for costs incurred, there is still the potential for disruption to passengers and the regime does not address this. There is also the potential for an impact on reputation when planned works do not take place but where the train plan has been amended to accommodate. It is important that Network Rail plans its work with the passenger at the forefront of decisions and late notice changes to possessions should be very rare and only occur in situations where the change is completely unforeseen and unavoidable.

NTL is of the view that the ORR has an important role to play in monitoring delivery of possessions, tracking delivery of work within planned possessions and providing challenge when late notice changes occur.

**Question 8: Would you find a user-friendly tool to estimate Schedule 4 formulaic compensation helpful? What are your views on the feasibility of developing an estimator tool? Should proposal E be a priority for PR23?**

NTL believes that a tool would be beneficial when evaluating the impacts of large projects (e.g. TRU) for inclusion in Requests for Proposals and NTL's Annual Business Plan. Whether this should be a priority is debatable given the above proposals to opt out of revenue compensation, which is the element Northern have struggled to estimate in the past.

Although a tool would be of use, with the increases in TOC revenue impact and operational cost capabilities, if a tool is implemented then it may be useful to have firm guidance sitting alongside the tool. Firm guidance may be required in order to prevent either disputes of compensation prior to the possession or in some cases possessions being declined due to a lack of compensation in type 1 possessions.

**Question 9: Should proposal F should be a priority for reform in PR23? Do you have any views on the proposed methodology for calculating the ACS for open access operators?**

NTL would suggest that any change for open access operators should be in line with how calculations are applied to TOC's.

**Chapter 5: Proposal: Freight regime**

We welcome views on this chapter's proposal for the freight regime.

**Question 10: Do you agree with our preferred high-level approach for the freight regime, to keep the current regime broadly unchanged for CP7? Are there other elements of the freight regime or its calibration that should be considered for reform in PR23?**

NTL is comfortable with the proposed approach so long as the regime effectively compensates Freight operators for their costs and does not create any perverse incentives through the change e.g. planning schedules through all paths regardless of if there a business requirement.

**Question 11: Do you consider we should review freight payment rates as a priority for PR23?**

N/A

**Question 12: Do you have any evidence on the appropriate level for freight Schedule 4 compensation and any views on how any increase might be funded? Do you have any views and evidence on the difference in freight compensation payments between service disruption and cancellation?**

As the government agenda moves more freight to rail from road, the value to UK PLC will increase for these paths. Policy needs to set out the importance of freight within the whole rail hierarchy and from this appropriate penalties and funding associated based on socio economic factors, not just cost to rail industry.

Option A to fund: If this policy continues it may be appropriate to cancel passenger services to prioritise high value freight.

Option B to fund: ensure that the access footprint for possession work considers freight as an integral part of the rail system and not a flexible option.

**Are there any other comments you would like to make?**

NTL would value the opportunity to discuss views in more detail at industry workshops.



## Response to ORR’s technical consultation on the PR23 review of the Schedule 4 possessions regime

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Please contact Joe Quill at ORR with any queries: [joe.quill@orr.gov.uk](mailto:joe.quill@orr.gov.uk)

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\*This information will not be published on our website.

**This response is on behalf of independent owning group and freight operator members of RDG. All references to RDG in this response are references to independent owning groups and freight operators. This response does not represent the views of Network Rail.**

### Chapter 2: ORR’s proposed approach and priorities

We welcome views on our questions regarding ORR’s proposed approach to PR23.

**Question 1: Do you have any views on the objectives and benefits of a mechanism such as Schedule 4, for the range of different industry parties, both in the current contracting model and once the rail transformation programme has been fully developed and implemented?**

Schedule 4 remains an important mechanism for all operators, including freight and open access, serving a key function as a means of balancing the various financial impacts of Network Rail’s planned disruption of operations, while also incentivising Network Rail to minimise the disruption caused wherever possible.

However, the changes in industry structure stemming from the Plan for Rail necessitate a review of Schedule 4 to ensure that it remains fit for purpose. As risk allocation also changes, and the contractual architecture of the new railway becomes clearer, it is important that the mechanisms included in Schedule 4 are flexible enough to align with the individual circumstances of each

operator. These circumstances will differ between DfT passenger operators, open access operators, and freight operators, and will also vary over time as the contracting model evolves.

The Plan for Rail has indicated that long-distance operators could have some revenue risk in the future and other operators will still have a revenue growth responsibility, which suggests that a revenue impact regime will still be required by some passenger operators, just as it will for freight and open access operators. As a result, it is important that operators have greater flexibility in future to decide how much protection they require via Schedule 4. RDG welcomes ORR's proposals in this regard.

The white paper states that the majority of operators won't be on revenue risk under their new contracts. Consequently, these operators would not need the revenue loss components of Schedule 4. However, they will be on cost risk, so they will require the cost component of the regime. If this regime changes and the revenue component is removed for some operators, GBR will need to be transparent about how it intends to trade off infrastructure cost-efficiencies and the impacts on passenger and freight customers when deciding on its possession strategy. The review must also consider the evolving roles of other transport authorities (e.g., Transport for London, Transport for Wales, and Transport Scotland), who will also be carrying certain revenue and cost risks associated with planned network disruption.

As more becomes known about the Rail Transformation Programme, it will become easier to assess the relative merits and future relevance of the Schedule 4 regime for different operators. Likewise, as the interface between infrastructure/engineering and train service operation becomes clearer it will be easier to assess the contractual incentives that need to be in place.

It would be useful to hear more from ORR as to how it intends to keep pace with the ongoing reforms. ORR will need to remain agile in order to respond to the variety of potentially different regimes for different operators as they transition to new contracts.

In a reformed system, with greater integration on the passenger railway, particularly where operators hold concession style contracts with Great British Railways (GBR), the Schedule 4 regime will become even more critical to freight operators. A strong regime will help to protect rail freight against the perverse incentives that could otherwise exist as a result of GBR being the contract specifier while also being responsible for access and holding revenue risk for most passenger services.

The increasing demand for rail services in the UK, and proposals to remove red zone working will likely lead to a greater number of possessions in Control Period 7, so it is important that the regime is resilient, in this regard.

The current Schedule 4 regime does not work perfectly, and several issues have previously been raised, in particular relating to the additional costs that operators incur when planned network disruption leads to operators having to provide alternative service arrangements for passengers other than those directly affected.

Certain elements of Schedule 4 work well, as they are simple to deploy due to the formulaic calculation of payments. However, the complexity of particular mechanisms (such as ACS) and negotiations can end up diverting the industry's collective focus away from the key aim of reducing the impact of planned disruption on passengers.

**Question 2: Do you have any views on whether we should make no fundamental changes to Schedule 4 in PR23, or, as proposed, pursue a small number of incremental reforms to ensure it remains fit for purpose as a baseline regime?**

RDG supports ORR's proposal to pursue incremental change. This will help to ensure the system remains fit for purpose and flexible enough to deal with the range of potential outcomes from the implementation of the Plan for Rail, without fundamentally changing the nature of the regime.

**Question 3: Do you agree with the areas we have identified as priorities for PR23? Are there any other significant issues that we should seek to address?**

RDG agrees with the areas identified as priorities for PR23. There are a number of additional areas not addressed that may be worth considering as part of further incremental reform.

- The methodology for calculating ACS for all operators could be made more transparent. It may also be worth considering whether the ACS approach is the optimal means for funding the Schedule 4 regime as it may be simpler to have these costs included in the assessment of Network Rail's overall OMR costs. Despite there being little appetite from freight operators to join the ACS scheme, it would be beneficial to understand the rates that would be applied for freight.
- Schedule 4 is funded in two ways, either through the ACS payments received when disruption is linked to maintenance and renewals work, or through the project budget when disruption is related to enhancements. However, the payment of compensation for either of these situations is linked to whether an operator pays the ACS and as a result affects the compensation that operators receive. This divergence could be considered as part of the wider consultation.
- The recovery of costs that operators incur as a result of planned network disruption is not effective. Not all costs are recovered, and operators not directly impacted by the disruption, but who still incur additional costs, have no means to recover these costs. This becomes more important as operators go back to taking cost risk in the future Passenger Service Contracts.
- Disruption often spreads more widely than Schedule 4 envisages with operators on nearby routes often seeing significant larger passenger flows migrating from the affected route. This can generate significant additional costs that are not reflected in Schedule 4.
- The current regime does not create an effective collaborative environment for operators and Network Rail. The current approach to incentivising Network Rail can create unintended impacts on operators, leading to revenue loss and increased costs that are under recovered. Network Rail could also work better with operators to plan the most efficient use of capacity possible when major engineering works are proposed.

### **Chapter 3: Proposal: Cross-cutting change across sector regimes**

We welcome views on the cross-cutting proposal in this chapter.

**Question 4: Do you support proposal A [to introduce an opt-out mechanism]? If an opt-out mechanism were to be implemented, would you support a complete (option A1) or partial opt-out (option A2)? Do you have any views on when operators should be allowed to opt out and what duration any opt-out should have, as set out in paragraph 3.8?**

RDG supports further consideration of an opt-out mechanism in order to create a more flexible structure for Schedule 4.

The regime might need to be different for different operators and clients in the future, depending on the extent to which they are on revenue risk or have revenue growth incentives. Operators could be given the opportunity to opt out of certain elements in order to better cover the variety of different risks that different operators will be exposed to. As the contractual architecture of the new railway becomes clearer, it is important that the mechanisms included in Schedule 4 are flexible enough to align with the individual circumstances of each operator.

In deciding whether opt-outs are appropriate, it is important to consider the risk of a large number of operators opting out in whole or in part from Schedule 4. Were this to happen, the incentives on Network Rail that Schedule 4 is intended to provide would be significantly weakened. Furthermore, Network Rail's visibility of the estimated revenue and operating cost impacts would be substantially reduced. Any option that allows opt-outs would need to be well-balanced with changes to reinforce these incentives and ensure continued visibility of the net financial impact of planned network disruption.

Even if there were simply a balanced mix of some operators opting out while others did not, this could result in perverse incentives on Network Rail, (e.g., with regard to locations of work and the allocation of paths between operators).

However, it must be noted that due to the commercial nature of the rail freight sector, the Schedule 4 regime will remain very important to freight operators, so it is unlikely that they will utilise any opt-out mechanism.

### **Chapter 4: Proposals: Passenger regime**

We welcome views on this chapter's proposals for the passenger regime.

**Question 5: Do you support proposal B [to increase incentives on Network Rail to notify possessions early once the "informed traveller" notification threshold (T-22) has been passed], implemented through option B2 [to monitor and report on possessions notification on a more granular basis]? Do you have any views on the options set out?**

RDG supports Proposal B. There is currently a lack of incentive on Network Rail to make earlier notifications of possessions once the T-22 threshold has passed and Proposal B would help to address this. RDG supports Option B2 as it would provide more detail. ORR should work to establish a process that enables effective monitoring of any late notice possessions.

This proposal would be particularly important were a significant number of operators to opt-out of Schedule 4 (see our response to Question 4). In order for Option B2 to be most effective, ORR

will need to ensure that the incentive on Network Rail is strong enough to encourage the behaviour change.

The current approach has the unintended consequence of penalising operators, as additional costs incurred do not reduce with increased notification timescales. It is not clear that revenue losses are reduced to the extent assumed, something that is further complicated by the increased level of discretionary travel post-Covid. The impact on passengers of late notice or changed possessions should also be recognised alongside the associated impact on operator costs.

**Question 6: Do you support proposal C [to develop a method and/or process for settling compensation claims for type 2 and type 3 possessions and periods of sustained planned disruption]? Do you have any views on options C1 [to develop a method for calculating cost and revenue loss compensation] and C2 [to specify in track access contracts a process for negotiating compensation claims for type 2 and type 3 possessions and periods of sustained planned disruption]? Do you have a preference for one of the options?**

There is a mix of views between owning group members of RDG about proposal C and so further consideration should be given to this proposal and to both Options C1 and C2.

Developing a method for calculating cost and revenue loss compensation could provide greater certainty to affected operators regarding the compensation they could receive, and it could also serve to reduce the time and resources needed to negotiate compensation. However, C1 could hinder operators' flexibility in negotiating costs/losses as a consequence of the possessions, in the way that they currently can.

The involvement of an arbiter could serve to reduce the scope for prolonged, complex disputes. Due consideration would need to be taken to ensure it does not overlap with existing access dispute processes, which could lead to duplication and extra administrative costs.

It would be important to first set out a clear methodology for the assessment of non-formulaic compensation, which also makes clear the timescales within which agreement should be reached and how the escalation process would work if parties fail to agree. It would make sense for such a methodology to cross reference the formulaic process so as to avoid the risk of under or overcompensation.

**Question 7: Do you have any views on the scale and impact of this issue? Do you have any views on our wider approach to monitoring possessions and how this can have the greatest impact on driving better possession planning in Network Rail?**

RDG supports ORR's wider approach to monitoring possessions. This will help to encourage greater collaborative working between Network Rail and operators.

**Question 8: Would you find a user-friendly tool to estimate Schedule 4 formulaic compensation helpful? What are your views on the feasibility of developing an estimator tool? Should proposal E be a priority for PR23?**

Owning group members of RDG have differing views regarding the introduction of a tool to estimate Schedule 4 formulaic compensation. Some regard such a tool to be feasible and would be helpful in supporting industry collaboration when planning possessions. It would also enable the whole industry cost of possessions to be made visible especially in the event of a large number of operators opting out of Schedule 4.

However, others believe that consideration must be given to the processes and tools already in place to ensure there is no duplication. Established teams are already in place to manage this issue and it may therefore be more efficient to use existing means.

**Question 9: Should proposal F should be a priority for reform in PR23? Do you have any views on the proposed methodology for calculating the ACS for open access operators?**

The current mechanism for calculating ACS is complicated and adds to the overall complexity that surrounds elements of Schedule 4. While no open-access operator has ever chosen to pay an ACS, issues have been noted with the provision of ACS estimates which would help inform operators when making this decision.

**Chapter 5: Proposal: Freight regime**

We welcome views on this chapter's proposal for the freight regime.

**Question 10: Do you agree with our preferred high-level approach for the freight regime, to keep the current regime broadly unchanged for CP7? Are there other elements of the freight regime or its calibration that should be considered for reform in PR23?**

Yes, RDG agrees with the approached outlined in the consultation and sees a review of freight payment rates as a priority for PR23. The regime is fit for purpose for rail freight as it already provides a strong incentive for Network Rail to minimise planned disruption on the network and essentially holds freight operators cost-neutral when possessions are undertaken.

Currently no freight operator pays an access charge supplement in order to obtain greater cost coverage from cancellations. It is rightly noted in the consultation document that it is not clear what costs this would cover, how it would be calculated or how the ACS would be set. Therefore, it would be welcomed if ORR could set out how this would work in detail, such that freight operators could make an informed decision as to whether it would be suitable for their businesses – particularly ahead of significant industry change as the Plan for Rail is delivered.

**Question 11: Do you consider we should review freight payment rates as a priority for PR23?**

Yes, a review of freight payment rates within Schedule 4 should be a priority during PR23. Payment rates were last updated during PR08 and therefore are very likely to be outdated. This is in part due to the fact that operational costs have risen faster than inflation, but also due to the changing dynamics and customer base of the freight sector. In particular, it is felt by freight operators that the difference in payment rates paid for diversions and cancellations does not accurately reflect the true cost differential. With most freight services running on a scheduled basis for time-sensitive customers, and due to the busy nature of the GB rail network, it is usually the case that cancelled freight services are lost to road rather than rescheduled.

By providing a greater difference between the freight payment rates for freight services, the incentive on Network Rail to avoid the cancellation of services would be stronger. Additionally, after T-12, there is not a strong enough incentive for Network Rail to give as much notification as possible when they are required to cancel a freight service as a last resort. The late cancellation of services can lead to higher costs incurred by rail freight operators. The cumulative impact of multiple late cancellations on rail freight customers can also drive modal shift away from rail –

which not only has an impact on freight revenues but also contravenes government commitments to grow rail freight, support mode shift and decarbonise.

While a review of payment rates is supported, this must be conducted in a way which appreciates the competitive nature of the rail freight industry. Any costs incurred by operators as part of the review process could be minimised if it were done in conjunction with the payment rate review as mentioned in the Schedule 8 consultation (see RDG's Schedule 8 response on behalf of freight operators).

**Question 12: Do you have any evidence on the appropriate level for freight Schedule 4 compensation and any views on how any increase might be funded? Do you have any views and evidence on the difference in freight compensation payments between service disruption and cancellation?**

It is suggested in the consultation document that increased compensation levels could be funded through the payment of an ACS by freight operators.

As per the response to Question 10, more information is needed on how the scheme would work should freight operator revenue loss be incorporated into Schedule 4. If the ACS payment rate equalled the increase in payments from Network Rail then this would simply be adding further complexity when it is the ambition of industry to make the regime as simple as possible.

**Are there any other comments you would like to make?**

N/A

## **PR23 – Review of the Schedule 4 Regime**

### **Response from Rail Freight Group**

**December 2021**

1. Rail Freight Group (RFG) is pleased to respond to the consultation on the PR23 Review of the Schedule 4 Regime. No part of this response is confidential.
2. RFG is the representative body for rail freight in the UK, and we campaign for a greater use of rail freight, to deliver environmental and economic benefits for the UK. We have around 120 member companies including train operators, end customers, ports and terminal operators, suppliers including locomotive and wagon companies and support services.

#### ***General Comments***

3. The Schedule 4 regime is an important part of the contractual and regulatory framework for freight operators and their customers. The regime compensates operators for losses incurred through cancelled and diverted trains and acts as an incentive on Network Rail to manage possessions effectively.
4. As outlined in the consultation, the Schedule 4 regime is generally considered to work well for freight, subject to the comments regarding the payment rates. However there are a number of areas for consideration either in this review or as part of the wider work on reform. We have made some general comments below, and then our specific comments on the questions.
5. Firstly, as part of a drive for cost efficiency and improve safety there is pressure for longer possessions and blockades. This can be at odds with the need to grow freight and operate more at weekends and overnight. The proposals for PR23 need to be cognisant of this changing dynamic, and the need for proper incentives to keep trains running, diverted where necessary.
6. Secondly, there is a distinction for operators and customers between cancellation of a service, and diversion. Whilst both have operational costs, diversion enables the goods to still be delivered by rail and is highly valued by customers compared to losing the train. The current regime may not sufficiently differentiate between the two meaning that the incentive to divert trains is weaker.
7. Finally, and as outlined in the consultation, the regime could potentially change significantly if passenger operators choose, or are required to, opt out. From a financial perspective this is clearly logical for NR/GBR who would otherwise face a 'money-go-round between their infrastructure and operational roles.

8. However this change would significantly weaken the incentive effect on NR/GBR to minimise disruption, as the regime would only be extant for a small part of the traffic. If the regime is to be switched off in this way, ORR may need to consider whether other supporting measures for example in scorecards or targets need to be stronger to ensure that NR/GBR are incentivised to minimise the disruption from possessions to all operators.

### ***Comments on Specific Questions***

9. *Question 1.* As outlined above the regime is, and will continue to be, a fundamental part of the regulatory and contractual structure needed for freight and is vital to incentivising NR/GBR to keep the network open for freight or compensate when it cannot. As customers look to increase their use of rail, including more weekend and overnight services, this is more important than ever.
10. *Question 2.* We agree that, given the scale of change ahead through rail reform, a proportionate and light touch approach to PR23 is appropriate.
11. *Question 3.* We agree with the proposed areas. Additionally, we ask ORR to consider whether the Schedule 4 regime is providing sufficient incentive on Network Rail to notify freight operators of the impact that possessions will have on their services. The on-going System Operator challenges mean that freight operators are not being informed of revised timings/diversions/cancellations of services until much after Network Code timescales prescribe. Without understanding the impact of the possession on the train service, freight customers cannot plan their business with certainty. We ask ORR to consider whether the current Schedule 4 regime is sufficiently incentivising Network Rail in this respect.
12. *Question 4.* We believe it is unlikely that any freight operator would choose to opt out of the regime and have no comment on the different options. However, as outlined above, if passenger services become outwith the regime the incentive on NR/GBR to manage possessions effectively will be significantly weakened, and the ORR should consider whether other measures need to be strengthened accordingly.
13. *Questions 5-9* No comment
14. *Question 10.* We agree with the overall approach to the freight regime.
15. *Question 11.* We agree payment rates should be reviewed. This is particularly important if passenger operators opt out, as with a weaker incentive the challenges for freight will increase, and as a minimum more accurate rates should be used.

16. *Question 12.* We do not understand why freight operators should be forced to pay an ASC in order to correct an inaccuracy in the rates. In other parts of PR23 there is no expectation that parties would have to pay to have rates corrected (for example, Network Rail would not need to pay a charge for the recalibration of variable charges). To pay an ASC to receive more accurate payment rates would simply offset any increase in rates, meaning that the net compensation rate remains inaccurate.
17. The level of compensation paid is directly linked to the number of trains cancelled or diverted. If the increase in payment rates results in NR/GBR being better incentivised to keep trains running, then the overall costs should in fact reduce. If the rates are inaccurate it is likely that the incentive for the infrastructure manager to minimise disruption will be weak.
18. The review should consider whether the payment rates properly consider the difference between diversion and cancellation and incentivise NR/GBR to keep trains running even when diverted.



## Response to ORR's technical consultation on the PR23 review of the Schedule 4 possessions regime

This pro-forma is available to those that wish to use it to respond to our consultation. Other forms of response (e.g. letter format) are equally welcome.

Please send your response to [performance.incentives@orr.gov.uk](mailto:performance.incentives@orr.gov.uk) by **13 December 2021**.

Please contact Joe Quill at ORR with any queries: [joe.quill@orr.gov.uk](mailto:joe.quill@orr.gov.uk)

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\*This information will not be published on our website.

### Chapter 2: ORR's proposed approach and priorities

We welcome views on our questions regarding ORR's proposed approach to PR23.

**Question 1: Do you have any views on the objectives and benefits of a mechanism such as Schedule 4, for the range of different industry parties, both in the current contracting model and once the rail transformation programme has been fully developed and implemented?**

Current contracting model:

Whilst revenue/cost risk is does not currently sit with operators, we do believe Schedule 4 is still useful as an incentive mechanism for NR. We feel that is important to incentivise possession planning that allows for optimal passenger communication of any disruption.

Once rail transformation programme has been fully developed/implemented:

To allow for a full assessment of Schedule 4 in the future we would need to understand more about how risk will be contractually distributed. We do however believe that there is value in an incentive mechanism for the infrastructure manager and given that we as an operator would likely still incur costs during disruption, it is right that these costs are compensated. This in turn helps to show how costs are distributed in the industry.

If we were to consider the purpose of Schedule 4 more broadly alongside a rethinking of how possession planning works, for example to allow for possessions that are more convenient to passengers, then we would be open to a more radical discussion on Schedule 4. However, if possession planning is to remain as it is currently, then we believe Schedule 4, or a regime like it, is a useful tool.

**Question 2: Do you have any views on whether we should make no fundamental changes to Schedule 4 in PR23, or, as proposed, pursue a small number of incremental reforms to ensure it remains fit for purpose as a baseline regime?**

SETL believe that incremental changes that provide flexibility will provide some benefits until wider reform, in particular Proposal C

**Question 3: Do you agree with the areas we have identified as priorities for PR23? Are there any other significant issues that we should seek to address?**

SETL agree with the issues identified as priorities.

We would also add that one issue we have encountered as an operator is the relative slowness of the process to amend the Schedule 4 system. We have been looking to update our contractual VTPs under Schedule 4, and we have found this process with Network Rail has been quite drawn out despite broad agreement between the parties. We would like to see a clearer, more established process be put in place for any amendments required under Schedule 4, with visibility of this process given to operators.

### **Chapter 3: Proposal: Cross-cutting change across sector regimes**

We welcome views on the cross-cutting proposal in this chapter.

**Question 4: Do you support proposal A [to introduce an opt-out mechanism]? If an opt-out mechanism were to be implemented, would you support a complete (option A1) or partial opt-out (option A2)? Do you have any views on when operators should be allowed to opt out and what duration any opt-out should have, as set out in paragraph 3.8?**

SETL would like further information on how an opt-out mechanism would work at an industry-level. If operators were to opt-out of Schedule 4 en masse, would there still be an incentive on Network Rail to plan possessions in the interests of passenger communication? If this incentive is structurally required, how can this incentive be protected?

In the context of this, we believe that the optimum proposal for an opt-out mechanism would be Option A2 (ii) – the removal of the revenue loss compensation – as this would retain some compensation/incentives for all type of possessions and considers that flexibility will be a key requirement for operators going forward. Whilst revenue loss may not be a factor, providing appropriate passenger handling response regardless of the possession length would currently impact base operating costs.

SETL consider that it would make sense to align opt out with the fiscal year so that business planning processes can accommodate/reflect any change. Without a shorter period for opt out decisions will be risk adverse.

## Chapter 4: Proposals: Passenger regime

We welcome views on this chapter's proposals for the passenger regime.

**Question 5: Do you support proposal B [to increase incentives on Network Rail to notify possessions early once the “informed traveller” notification threshold (T-22) has been passed], implemented through option B2 [to monitor and report on possessions notification on a more granular basis]? Do you have any views on the options set out?**

SETL agree that additional incentive after the ‘Informed Traveller’ deadline has passed would be useful. Of the two options proposed, we believe that Option B2 is potentially stronger, as it does not add additional complexity to the Schedule 4 regime. We would like to understand, however, how the data gathered by the ORR would then be used and processed, to allow us to assess whether the reputational incentive used in this Option is sufficient.

Option B1 also has merits, depending on the threshold and the level of discount – we would also like to see further detail on this Option.

**Question 6: Do you support proposal C [to develop a method and/or process for settling compensation claims for type 2 and type 3 possessions and periods of sustained planned disruption]?**

**Do you have any views on options C1 [to develop a method for calculating cost and revenue loss compensation] and C2 [to specify in track access contracts a process for negotiating compensation claims for type 2 and type 3 possessions and periods of sustained planned disruption]? Do you have a preference for one of the options?**

SETL are strongly in agreement that a new approach for agreeing compensation claims for type 2 and type 3 possessions is needed. The length of time taken to resolve compensation claims and the significant use of time and resources that this requires mean that a new approach would be of considerable benefit.

Our principal view is that there should be a mutually agreed framework which sets out what compensation should be paid for and the process for agreeing this compensation. We note that Network Rail currently have their own guidance on these two elements, but we believe that this is ineffective because it is not a mutually agreed document, with no input from operators into its design. We therefore prefer Option C2 and would like to see this developed further.

Option C1 would work alongside the current regime, so we believe this is a proposal which we would like to see more detail on. Our current reservation is that it could lead to less accurate compensation to operators especially for large possessions as passenger handling plan requirements and costs can vary significantly.

**Question 7: Do you have any views on the scale and impact of this issue? Do you have any views on our wider approach to monitoring possessions and how this can have the greatest impact on driving better possession planning in Network Rail?**

The majority of late change affecting SETL are additional possessions, usually caused by infrastructure defects being discovered and not coinciding with an existing planned possession. Cancelled possessions are much rarer, and usually caused by resourcing or

deconfliction issues. There is no evidence of overbooking of possessions to ensure the maximum discounted notification factor.

SETL agree that additional monitoring of Network Rail by the ORR is appropriate in order to develop a richer set of data on the subject and to help identify any systemic planning failure that could be addressed. SETL would like to see further detail on how this data will be monitored and how this data and analysis will be shared with operators.

**Question 8: Would you find a user-friendly tool to estimate Schedule 4 formulaic compensation helpful?**

SETL believe that there would be merit in having a tool to estimate Schedule 4 formulaic compensation. This will allow for both NR and operators to be more closely aligned in their planning and budgeting. This tool would need to be fully understood by both parties for it to be beneficial.

**What are your views on the feasibility of developing an estimator tool? Should proposal E be a priority for PR23?**

Whilst SETL can see the merit in this tool, we do not believe this should be a priority. Addressing the void when dates are missed by incentivising NR stands out as more of a priority.

**Question 9: Should proposal F should be a priority for reform in PR23? Do you have any views on the proposed methodology for calculating the ACS for open access operators?**

**Chapter 5: Proposal: Freight regime**

We welcome views on this chapter's proposal for the freight regime.

**Question 10: Do you agree with our preferred high-level approach for the freight regime, to keep the current regime broadly unchanged for CP7? Are there other elements of the freight regime or its calibration that should be considered for reform in PR23?**

N/A

**Question 11: Do you consider we should review freight payment rates as a priority for PR23?**

N/A

**Question 12: Do you have any evidence on the appropriate level for freight Schedule 4 compensation and any views on how any increase might be funded? Do you have any views and evidence on the difference in freight compensation payments between service disruption and cancellation?**

N/A

**Are there any other comments you would like to make?**



## Response to ORR's technical consultation on the PR23 review of the Schedule 4 possessions regime

This pro-forma is available to those that wish to use it to respond to our consultation. Other forms of response (e.g. letter format) are equally welcome.

Please send your response to [performance.incentives@orr.gov.uk](mailto:performance.incentives@orr.gov.uk) by **13 December 2021**.

Please contact Joe Quill at ORR with any queries: [joe.quill@orr.gov.uk](mailto:joe.quill@orr.gov.uk)

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\*This information will not be published on our website.

### Chapter 2: ORR's proposed approach and priorities

We welcome views on our questions regarding ORR's proposed approach to PR23.

**Question 1: Do you have any views on the objectives and benefits of a mechanism such as Schedule 4, for the range of different industry parties, both in the current contracting model and once the rail transformation programme has been fully developed and implemented?**

A mechanism is required to ensure that parties operating outside the future Great British Railways (GBR) framework can receive compensation for the cost and revenue impacts of closures initiated by Network Rail. If this were not available such operators would have no recompense for the financial impacts of planned closures nor any way to control their volume, suffering adverse financial impacts that their funders would then have to address. This requirement applies both now and once the rail transformation programme has been fully implemented.

**Question 2: Do you have any views on whether we should make no fundamental changes to Schedule 4 in PR23, or, as proposed, pursue a small number of incremental reforms to ensure it remains fit for purpose as a baseline regime?**

We have no objection to the incremental reforms proposed. It is critical that the principle of the regime (providing compensation to operators for revenue loss and extra costs incurred during closures) is retained for operators to use for the reasons outlined in our response to question one. The calculation of such compensation should be conducted on a transparent basis. Network Rail should receive a reasonable settlement at the start of each Control Period to

cover the costs it expects to incur under Schedule Four and should be required to remain within this, retaining the savings generated by achieving greater levels of efficiency and incurring the financial penalty of additional compensation if more possessions are required than forecast.

**Question 3: Do you agree with the areas we have identified as priorities for PR23? Are there any other significant issues that we should seek to address?**

We consider that ensuring that possessions are notified as early as possible is key, provided that such notifications are reliable and do not lead to late notice changes. Late notice changes undermine customer confidence in the railway so every effort should be made to minimise these, particularly in the post Covid environment where usage of the rail network has become more discretionary.

### **Chapter 3: Proposal: Cross-cutting change across sector regimes**

We welcome views on the cross-cutting proposal in this chapter.

**Question 4: Do you support proposal A [to introduce an opt-out mechanism]? If an opt-out mechanism were to be implemented, would you support a complete (option A1) or partial opt-out (option A2)? Do you have any views on when operators should be allowed to opt out and what duration any opt-out should have, as set out in paragraph 3.8?**

We have no preference between options. Our view is that operators need to have certainty over the availability of compensation for revenue loss and additional costs arising from possession arrangements. The focus should be on ensuring as far as possible that any regime reflects actual revenue loss and the additional costs incurred.

### **Chapter 4: Proposals: Passenger regime**

We welcome views on this chapter's proposals for the passenger regime.

**Question 5: Do you support proposal B [to increase incentives on Network Rail to notify possessions early once the "informed traveller" notification threshold (T-22) has been passed], implemented through option B2 [to monitor and report on possessions notification on a more granular basis]? Do you have any views on the options set out?**

The aim should be to ensure that the informed traveller threshold is met as often as possible using information that proves reliable i.e. does not change on the eve of the possession. This is important to ensure that customers of the railway can plan their journeys on a reliable basis. Network Rail should be incentivised to deliver these objectives. Please also note our response to question seven which relates to these matters.

**Question 6: Do you support proposal C [to develop a method and/or process for settling compensation claims for type 2 and type 3 possessions and periods of sustained planned disruption]? Do you have any views on options C1 [to develop a method for calculating cost and revenue loss compensation] and C2 [to specify in track access contracts a process for negotiating compensation claims for type 2 and type 3 possessions and periods of sustained planned disruption]? Do you have a preference for one of the options?**

We agree that a methodology should be used to calculate cost and revenue loss compensation. This should specify what elements can be included in the calculation and set out a precise methodology for calculating revenue loss to avoid disputes in this complex area.

TfL has an existing methodology for calculating the revenue loss from closures. We would be happy to share the approach we take if that would be helpful.

**Question 7: Do you have any views on the scale and impact of this issue? Do you have any views on our wider approach to monitoring possessions and how this can have the greatest impact on driving better possession planning in Network Rail?**

We do not have any views on the scale and impact of this change. Monitoring would be useful to judge the extent to which NR is notifying early and then making changes later. This could then facilitate a discussion around what represents a realistic notification timescale and how this can be linked to passenger facing systems.

**Question 8: Would you find a user-friendly tool to estimate Schedule 4 formulaic compensation helpful? What are your views on the feasibility of developing an estimator tool? Should proposal E be a priority for PR23?**

Such a tool would be very useful provided that it could accurately reflect all the parameters that need to be covered.

**Question 9: Should proposal F should be a priority for reform in PR23? Do you have any views on the proposed methodology for calculating the ACS for open access operators?**

We have no comments to make in relation to this question.

## **Chapter 5: Proposal: Freight regime**

We welcome views on this chapter's proposal for the freight regime.

**Question 10: Do you agree with our preferred high-level approach for the freight regime, to keep the current regime broadly unchanged for CP7? Are there other elements of the freight regime or its calibration that should be considered for reform in PR23?**

We have no comments to make in relation to this question.

**Question 11: Do you consider we should review freight payment rates as a priority for PR23?**

We have no comments to make in relation to this question.

**Question 12: Do you have any evidence on the appropriate level for freight Schedule 4 compensation and any views on how any increase might be funded? Do you have any views and evidence on the difference in freight compensation payments between service disruption and cancellation?**

We have no comments to make in relation to this question.

**Are there any other comments you would like to make?**

We have no further comments to make.



## Response to ORR's technical consultation on the PR23 review of the Schedule 4 possessions regime

This pro-forma is available to those that wish to use it to respond to our consultation. Other forms of response (e.g. letter format) are equally welcome.

Please send your response to [performance.incentives@orr.gov.uk](mailto:performance.incentives@orr.gov.uk) by **13 December 2021**.

Please contact Joe Quill at ORR with any queries: [joe.quill@orr.gov.uk](mailto:joe.quill@orr.gov.uk)

<b>Full name</b>	Chris Dellard
<b>Job title</b>	Head of Access Planning
<b>Organisation</b>	Transport for Wales Rail Ltd (TfWRL), also representing Transport for Wales (TfW). This is a joint TfWRL / TfW response in terms of the Wales and Borders Network Rail network only. TfW Group will be seeking a separate discussion with ORR on the potential related impacts for the CVL network TAAs.
<b>Email*</b>	[REDACTED]
<b>Telephone number*</b>	[REDACTED]

\*This information will not be published on our website.

### Chapter 2: ORR's proposed approach and priorities

We welcome views on our questions regarding ORR's proposed approach to PR23.

**Question 1: Do you have any views on the objectives and benefits of a mechanism such as Schedule 4, for the range of different industry parties, both in the current contracting model and once the rail transformation programme has been fully developed and implemented?**

See our response to Question 4.

**Question 2: Do you have any views on whether we should make no fundamental changes to Schedule 4 in PR23, or, as proposed, pursue a small number of incremental reforms to ensure it remains fit for purpose as a baseline regime?**

No particular views.

**Question 3: Do you agree with the areas we have identified as priorities for PR23? Are there any other significant issues that we should seek to address?**

Yes.

### **Chapter 3: Proposal: Cross-cutting change across sector regimes**

We welcome views on the cross-cutting proposal in this chapter.

**Question 4: Do you support proposal A [to introduce an opt-out mechanism]? If an opt-out mechanism were to be implemented, would you support a complete (option A1) or partial opt-out (option A2)? Do you have any views on when operators should be allowed to opt out and what duration any opt-out should have, as set out in paragraph 3.8?**

In Wales, we expect that Schedule 4 will still have an important role to play in incentivising Network Rail to plan possessions in an efficient way that limits their impact on TfW Rail's services and customers. We welcome ORR's recognition of the importance of a mechanism like Schedule 4 to devolved rail authorities, which is summarised in paragraph 2.4 of the consultation.

However, the prospect of certain operators opting out of Schedule 4 presents a risk to TfWRL and other devolved operators where they share lines of route with those operators. In Wales, Network Rail's Schedule 4 exposure on certain of TfWRL's routes could be reduced (such as on the South Wales Mainline and the North Wales Coast). This could result in Network Rail giving less consideration to the end user when planning possessions on those routes.

### **Chapter 4: Proposals: Passenger regime**

We welcome views on this chapter's proposals for the passenger regime.

**Question 5: Do you support proposal B [to increase incentives on Network Rail to notify possessions early once the "informed traveller" notification threshold (T-22) has been passed], implemented through option B2 [to monitor and report on possessions notification on a more granular basis]? Do you have any views on the options set out?**

This has been considered before but is probably less useful than it might have been even 3-5 years ago, because Network Rail's access planning teams have become much better in controlling access to the network. Late notice (post T-22) possessions are now fewer in number as a result. T-22 as a cliff-edge sends a strong and simple message to Network Rail about the importance of the current Informed Traveller process and we see no benefit in diluting that message. So, we do not consider there to be any need for further incentives.

We would not be against option B2 (Monitor and report on possessions notification on a more granular basis) if the industry felt that it would be of benefit. Having national oversight of the reasons behind late notice possessions might help the industry to understand trends or areas of concern. Network Rail will already have such information.

**Question 6: Do you support proposal C [to develop a method and/or process for settling compensation claims for type 2 and type 3 possessions and periods of sustained planned disruption]? Do you have any views on options C1 [to develop a method for calculating cost and revenue loss compensation] and C2 [to specify in track access contracts a process for negotiating compensation claims for type 2 and type 3 possessions and periods of sustained planned disruption]? Do you have a preference for one of the options?**

We agree that the transactional processes for Type 2 and Type 3 claims can take a lot of time. The idea of standardised payments for certain cost categories is attractive. However, the current arrangements allow operators to claim actual costs precisely because longer possessions (nominally set at 60hrs+, which must include at least one non-bank holiday weekday) can have unusual requirements on operators that are not apparent, or would be cost-ineffective, with shorter possessions. Being able to claim for any costs for possessions that qualify as Type 3 allows operators and Network Rail to agree to novel approaches to provide appropriate customer service at an efficient cost. We feel that it is important to retain this flexibility.

Network Rail has improved its claims handling processes over the past few years, which are now more transparent. Network Rail's Claims Protocol is useful, and we look forward to being able to use the online claims management portal that is being developed. Network Rail's claims panel provides consistency. So, while we would agree that the processes are still slow and at times frustrating for operators and Network Rail alike, we do not believe that additional contractual provisions are necessary for further improvements.

**Question 7: Do you have any views on the scale and impact of this issue? Do you have any views on our wider approach to monitoring possessions and how this can have the greatest impact on driving better possession planning in Network Rail?**

We tend to feel that that late possession cancellations and changes are not as big a problem as they once were. It seems to us that operators and Network Rail have both got better at engaging with each other through a collaborative approach. Operators are perhaps more confident to ask the right questions of Network Rail to ensure that possessions are genuinely required in the first place, and then to follow the progress of larger possessions to ensure that

they are still on course to be delivered (e.g. confirmation that engineering haulage has been secured; provision of Gantt charts to show planned delivery milestones; presentations from, and direct engagement with, the work requestors). The cost to Network Rail of cancelling possessions late is very great (e.g. wasted resource costs), which is an incentive in itself.

**Question 8: Would you find a user-friendly tool to estimate Schedule 4 formulaic compensation helpful? What are your views on the feasibility of developing an estimator tool? Should proposal E be a priority for PR23?**

Network Rail has such a tool. Some operators have developed their own tools over the years; TfWRL uses an Excel-based tool which provides estimates that are good enough for budgeting. If the tool is easy to use and accurate then this could be useful, but we don't think it is a priority.

**Question 9: Should proposal F should be a priority for reform in PR23? Do you have any views on the proposed methodology for calculating the ACS for open access operators?**

No comments.

## **Chapter 5: Proposal: Freight regime**

We welcome views on this chapter's proposal for the freight regime.

**Question 10: Do you agree with our preferred high-level approach for the freight regime, to keep the current regime broadly unchanged for CP7? Are there other elements of the freight regime or its calibration that should be considered for reform in PR23?**

No comments.

**Question 11: Do you consider we should review freight payment rates as a priority for PR23?**

No comments.

**Question 12: Do you have any evidence on the appropriate level for freight Schedule 4 compensation and any views on how any increase might be funded? Do you have any views and evidence on the difference in freight compensation payments between service disruption and cancellation?**

No comments.

**Are there any other comments you would like to make?**

No.

## Rail

Buchanan House,  
58 Port Dundas Road  
Glasgow G4 0HF  
Direct Line: [REDACTED]  
[REDACTED]



Date: 21  
December 2021

Joe Quill  
Office of Rail and Road  
By email only [joe.quill@orr.gov.uk](mailto:joe.quill@orr.gov.uk)

Dear Joe,

### **Consultation: Review of the Schedule 4 possessions regime**

I attach Transport Scotland's reply to the above Consultation.

We note the ORR's plan to publish consultation responses on its website. TS are content for the attached response to be published in line with your standard publishing practices.

Should you or the team have any queries about the material submitted, do not hesitate to contact Kieran McLachlan, Raymond Convill or me.

I am also copying our reply to Sheona MacKenzie and Liz McLeod, ORR Glasgow Office.

Yours faithfully,

**Frazer Henderson**  
**Head of Rail Policy**



## Response to ORR’s technical consultation on the PR23 review of the Schedule 4 possessions regime

This pro-forma is available to those that wish to use it to respond to our consultation. Other forms of response (e.g. letter format) are equally welcome.

Please send your response to [performance.incentives@orr.gov.uk](mailto:performance.incentives@orr.gov.uk) by **13 December 2021**.

Please contact Joe Quill at ORR with any queries: [joe.quill@orr.gov.uk](mailto:joe.quill@orr.gov.uk)

<b>Full name</b>	Kieran McLachlan
<b>Job title</b>	Senior Rail Regulation Manager
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\*This information will not be published on our website.

### Chapter 2: ORR’s proposed approach and priorities

We welcome views on our questions regarding ORR’s proposed approach to PR23.

#### **Question 1: Do you have any views on the objectives and benefits of a mechanism such as Schedule 4, for the range of different industry parties, both in the current contracting model and once the rail transformation programme has been fully developed and implemented?**

In general, and in a similar vein to responses submitted by Transport Scotland (TS) to other recent ORR consultations, our view is that the approach to Schedule 4 should be aligned to efficient delivery of rail services, should promote collaboration and alignment, not be overly complex or over-bureaucratic, be flexible and able to adapt to any specific needs of the Scotland route. And, the policies adopted, must be underpinned by a whole system approach. In practical terms, this would mean the ORR facilitating an opt-out for operators from Schedule 4 to create a more straightforward, transparent process.

In addition to funding Network Rail (NR) in Scotland, since the introduction of the Emergency Measures Agreements between TS and Abellio ScotRail and SERCO Caledonian Sleepers, most rail services in Scotland are now largely fully funded by the Scottish Government. With

passenger revenues still deflated and little evidence of a return to pre-pandemic amounts, this funding arrangement is likely to continue as we move to the future operator models such as public sector controlled ScotRail Trains Ltd. Therefore, whilst NR may still aim to inform operators/passengers early, under the current Schedule 4 model, from TS's perspective, the argument that there is a financial incentive to do so is limited, and in practice, Schedule 4 will continue as an inefficient movement of money between TS, NR, Caledonian Sleeper and ScotRail.

As a government body NR should be planning possessions effectively and notifying operators of possessions in a timely way as part of their statutory duty to provide an operational rail network to the UK/Scottish taxpayer. There ought not to be a "financial incentive" on NR to undertake their statutory duty. However, it is recognised that some form of incentive may be required to ensure this is carried out effectively. This may not be a financial incentive but could instead work similarly to the ORR's escalator process for example, where reputational risk acts as a safeguard to ensure accountability.

Therefore, in addition to the proposal around the Schedule 4 opt-out, TS would ask the ORR to confirm what other proposals it might consider in respect of incentivising NR to inform operators/passengers of planned disruption? How would the ORR work with TS to ensure NR continue to inform passengers and operators of planned disruption as early as possible?

Para 3.10 states a potential downside of any opt-out as **"...it could result in a loss of information on the impact of possessions on rail services."** Similar to above, NR as a public body should be recording this data in order to learn and improve as part of their statutory duty to the UK/Scottish taxpayer. The opt-out need not be a barrier to NR's data gathering.

Any future arrangements should evolve with industry reform and whatever is developed must align with the industry structure for Scotland agreed with the Scottish Ministers. Any change for the Scotland route should be in line with Scottish Ministers' interests and not rely solely on proposals stemming from the Williams-Shapps review which ultimately may prove inappropriate in Scotland.

Further to this, it is important that any review of Schedule 4 is aligned with the Industry Timetable Process Reform (ITPR) project which is ongoing. Significant changes are proposed to timetable processes which will impact on how the "Informed Traveller" arrangements work and how often changes will be made to the timetable. Suitable consideration will need to be taken of ITPR workstreams.

Additional questions TS has, which may help inform discussions / considerations would be:

- How much does Schedule 4 cost NR to manage internally?
- Does it impact on NR's ability to deliver cost reductions/efficiencies?
- How much is it anticipated it would cost NR to manage each of the proposed Schedule 4 changes?

- Is it substantially less than the current costs of managing Schedule 4?

**Question 2: Do you have any views on whether we should make no fundamental changes to Schedule 4 in PR23, or, as proposed, pursue a small number of incremental reforms to ensure it remains fit for purpose as a baseline regime?**

A whole systems approach to rail means that TS, NR, ORR and SRT/Caledonian Sleepers should be working efficiently and through collaboration. TS believes that appropriate reform of the regulatory arrangements, including Schedule 4, would offer a fundamental benefit to such an approach.

It is TS's view that the proposed Schedule 4 "opt-out" promises to simplify what is otherwise an unnecessarily complicated funding mechanism by removing barriers to collaboration and allowing for more efficient engagement and decision making between all parties. Whilst we recognise there may be challenges that arise, these challenges should be tackled in collaboration and should not prevent fundamental change.

However, given the prospect of broader changes as a result of the DfT's Rail Reform agenda, TS believe that in respect of these Schedule 4 proposals, the proposed incremental reforms (with the opt-out being the first step) are appropriate.

**Question 3: Do you agree with the areas we have identified as priorities for PR23? Are there any other significant issues that we should seek to address?**

TS broadly agrees with the proposed priorities which are:

**Proposal - cross-cutting across the passenger and freight regimes:**

- To introduce an opt-out mechanism to Schedule 4, whereby train operators could completely or partially opt out of Schedule 4.

**Proposals specific to the passenger regime:**

- To increase incentives on Network Rail to notify possessions early once the "informed traveller" notification threshold (T-22) has been passed, either by introducing an additional notification threshold or by monitoring possessions notification on a more granular basis.
- To develop a method and/or process for settling compensation claims for lengthy possessions and periods of sustained planned disruption.

**Proposal specific to the freight regime:**

- To review, and if necessary, update freight compensation rates.

However, as highlighted above and in specific relation to the passenger regime, any review of Schedule 4 should be aligned with the ongoing the Industry Timetable Process Reform project and should be able to adapt to the outcomes of Rail Reform.

### **Chapter 3: Proposal: Cross-cutting change across sector regimes**

We welcome views on the cross-cutting proposal in this chapter.

**Question 4: Do you support proposal A [to introduce an opt-out mechanism]? If an opt-out mechanism were to be implemented, would you support a complete (option A1) or partial opt-out (option A2)? Do you have any views on when operators should be allowed to opt out and what duration any opt-out should have, as set out in paragraph 3.8?**

When considering an opt-out mechanism we would ask the ORR to consider the practicalities of any other proposed mechanism. We would not wish to replace a complicated process with another equally complicated process. Option A2 (partial opt-out), proposes to introduce a new process the main benefit of which (flexibility to operators), appears to be outweighed by the complexity it may add should various operators choose different contractual arrangements. Any opt-out mechanism and the duration of any opt-out mechanism should be based on the time/effort/cost it takes to manage. From a TS perspective, the option which is best value for money to the Scottish taxpayer should be the one used.

Option A1 (full opt-out) appears to offer the most sensible approach as it would remove the complexity of the current arrangements. However, if the option of an opt-out were available to licence holders, how likely is a negative impact on other operators and how could NR and the ORR mitigate against this? For example, if the main operator on a route does not opt-in, is there a risk that NR will be more inclined to proceed with disruptive possessions on the basis that the financial impact of compensating smaller operators is likely low(er)?

If an opt-out mechanism is to be introduced, is the ORR aware of or has it considered what implications this may have for open access operators and cross border operators? Does the ORR have any concerns and/or potential mitigations which could be taken to minimise these concerns?

### **Chapter 4: Proposals: Passenger regime**

We welcome views on this chapter's proposals for the passenger regime.

**Question 5: Do you support proposal B [to increase incentives on Network Rail to notify possessions early once the "informed traveller" notification threshold (T-22) has been passed], implemented through option B2 [to monitor and report on possessions notification on a more granular basis]? Do you have any views on the options set out?**

TS supports the proposal for a more granular monitoring proposed in option B2 as more aligned to the role of NR as a Government body and their statutory responsibilities to the UK/Scottish taxpayer, and likely to give better data and allow better calibration and decision making.

Option B1 appears to have been proposed in PR18 and later dismissed. Is there a specific reason the ORR has chosen to reconsider this proposal?

**Question 6: Do you support proposal C [to develop a method and/or process for settling compensation claims for type 2 and type 3 possessions and periods of sustained planned disruption]? Do you have any views on options C1 [to develop a method for calculating cost and revenue loss compensation] and C2 [to specify in track access contracts a process for negotiating compensation claims for type 2 and type 3 possessions and periods of sustained planned disruption]? Do you have a preference for one of the options?**

TS's view is that in order to ensure NR are taking and releasing possessions with the least disruption possible, the objective must be to calculate the compensation payment fairly and quickly. From a TS perspective, use of the proposed opt-out obviates the need for any form of arbitration or formulaic solution.

More generally, such arrangements - even if accurate - would most likely not reduce costs to the Scottish taxpayer, and continue to limit resource available to conduct NR's statutory duty of maintaining a safe railway.

TS would be content to consider these points further if necessary.

**Question 7: Do you have any views on the scale and impact of this issue? Do you have any views on our wider approach to monitoring possessions and how this can have the greatest impact on driving better possession planning in Network Rail?**

It is disappointing that this proposed level of granular reporting hasn't been being provided to date. However, as TS is a funder and not an operator we cannot comment on the scale or impact of this issue. However, we agree with the ORR that any changes or cancellations carry a cost to NR, operators, and passengers, and should therefore be kept to a minimum. Therefore, we would be grateful if any such evidence gathered through this consultation be shared with TS.

As funder, there is a difficulty in doing a like for like comparison of anticipated final cost estimates (AFCs) between renewals projects and enhancement projects due to Schedule 4 compensation costs currently being excluded from operation maintenance & renewals (OM&R) project AFCs but included in enhancement project AFCs. Similarly for comparing actual costs between renewals/enhancement projects. This differential in treatment of compensation costs will also make it difficult (and likely more costly) to report/monitor the full impact of changes to possessions. Any future monitoring of possessions must also include the monitoring of possessions related to enhancement projects as well as OM&R projects. As such there may be benefit in splitting out any compensation costs from enhancement project AFCs. This should make future granular monitoring reporting easier to produce and should ensure the total impact is being accurately reported.

**Question 8: Would you find a user-friendly tool to estimate Schedule 4 formulaic compensation helpful? What are your views on the feasibility of developing an estimator tool? Should proposal E be a priority for PR23?**

TS believes that any such tool which could reduce the amount of time spent in calculating and administering compensation costs would be welcomed. However, as it is likely that any such tool would need to be available prior to the beginning of PR23, how feasible would the creation and launch of this tool be by then?

Use of the proposed Schedule 4 opt-out would remove the need for such tool from a TS perspective. However, if a tool is made available we would request access should things change.

**Question 9: Should proposal F be a priority for reform in PR23? Do you have any views on the proposed methodology for calculating the ACS for open access operators?**

As far as possible one method should be used to reduce cost/time burden in administering. It would be helpful to understand prior to entering another Control Period as to why open access operators continue to choose not to opt in for ACS and the added protection. The ORR has offered some potential reasons as to why this may be. TS would be interested to hear what open access operators think about this proposal. If there is a likelihood this would encourage more operators into the industry then it may be an option we wish to consider.

**Chapter 5: Proposal: Freight regime**

We welcome views on this chapter's proposal for the freight regime.

**Question 10: Do you agree with our preferred high-level approach for the freight regime, to keep the current regime broadly unchanged for CP7? Are there other elements of the freight regime or its calibration that should be considered for reform in PR23?**

TS believes that high level approach appears to be reasonable. Given that it is rail freight operators who will be likely to lose / gain from any changes they may be best placed to respond to issues around the mechanics of the current regime.

However, the ORR is aware of the funding challenges the rail industry is facing and if the proposed changes are likely to result in an increase in costs to NR and therefore to TS/SG we would like time to review this.

**Question 11: Do you consider we should review freight payment rates as a priority for PR23?**

Scottish Ministers' Guidance to the ORR is clear, and shows their support for rail freight and rail freight growth. If the ORR has evidence or receives evidence from operators which suggests a new payment rate will help deliver on these objectives then TS will be happy to review these proposals.

Given the length of time since reviewed and the potential that this outdated compensation calculation may be preventing more freight being transported by rail, then yes it should be considered as a priority for PR23.

**Question 12: Do you have any evidence on the appropriate level for freight Schedule 4 compensation and any views on how any increase might be funded? Do you have any views and evidence on the difference in freight compensation payments between service disruption and cancellation?**

TS has no evidence of the above and this would have to be gathered from rail freight operators directly. However, disruption and line closures can impact operators and their customers. In addition, they disrupt the key role that rail freight plays in adding value to the economy.

As the ORR are aware, the rail industry as a whole is facing an unprecedented financial challenge largely due to the fall in passenger numbers and therefore revenue. This financial challenge will require savings across the rail sector as a whole. If the ORR has evidence or receives evidence from freight operators which suggests increased compensation will be required by FOCs going forward TS will be content to review and consider these proposals.

**Are there any other comments you would like to make?**



## Response to ORR’s technical consultation on the PR23 review of the Schedule 4 possessions regime

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Please send your response to [performance.incentives@orr.gov.uk](mailto:performance.incentives@orr.gov.uk) by **13 December 2021**.

Please contact Joe Quill at ORR with any queries: [joe.quill@orr.gov.uk](mailto:joe.quill@orr.gov.uk)

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\*This information will not be published on our website.

### Chapter 2: ORR’s proposed approach and priorities

We welcome views on our questions regarding ORR’s proposed approach to PR23.

**Question 1: Do you have any views on the objectives and benefits of a mechanism such as Schedule 4, for the range of different industry parties, both in the current contracting model and once the rail transformation programme has been fully developed and implemented?**

Schedule 4 plays an important function within Network Rail’s planned disruption process for all operators, passenger, freight, and open access. However, as the contractual landscape ahead of the rail reform programme transforms, it is important to allow for agility and transparency within its mechanisms to enable better decision making for all passengers, operators and Network Rail.

**Question 2: Do you have any views on whether we should make no fundamental changes to Schedule 4 in PR23, or, as proposed, pursue a small number of incremental reforms to ensure it remains fit for purpose as a baseline regime?**

At a time of much movement within the industry, a fundamental change to a key mechanism does not feel like the correct approach. As such c2c supports ORR’s proposal to pursue incremental change.

**Question 3: Do you agree with the areas we have identified as priorities for PR23? Are there any other significant issues that we should seek to address?**

Whilst c2c agrees with ORR's identified priority areas for PR23, we would also like to signpost ORR to the following item that we feel needs to be addressed:

At present it is unclear what level of cost and revenue risk will be transferred between Great British Railways and operators under the new contracts. Therefore, c2c proposes that ORR prioritises how ORR, operators, Network Rail and Great British Railways could work together to make the necessary incremental changes at each transformation stage to ensure alignment with industry change.

**Chapter 3: Proposal: Cross-cutting change across sector regimes**

We welcome views on the cross-cutting proposal in this chapter.

**Question 4: Do you support proposal A [to introduce an opt-out mechanism]? If an opt-out mechanism were to be implemented, would you support a complete (option A1) or partial opt-out (option A2)? Do you have any views on when operators should be allowed to opt out and what duration any opt-out should have, as set out in paragraph 3.8?**

c2c supports a partial opt out that enables compensation for the most disruptive and/or long-term possessions for those operators who can utilise this. However, if operators do opt out, then the incentivisation for Network Rail could lessen which may impact other operators still participating in Schedule 4. C2c proposes that necessary KPIs are reviewed, between ORR and Network Rail, to ensure a baseline is always retained.

**Chapter 4: Proposals: Passenger regime**

We welcome views on this chapter's proposals for the passenger regime.

**Question 5: Do you support proposal B [to increase incentives on Network Rail to notify possessions early once the "informed traveller" notification threshold (T-22) has been passed], implemented through option B2 [to monitor and report on possessions notification on a more granular basis]? Do you have any views on the options set out?**

C2c supports Proposal B. B2 seems practical in that it can be used to set thresholds in future.

**Question 6: Do you support proposal C [to develop a method and/or process for settling compensation claims for type 2 and type 3 possessions and periods of sustained planned disruption]? Do you have any views on options C1 [to develop a method for calculating cost and revenue loss compensation] and C2 [to specify in track access contracts a process for negotiating compensation claims for type 2 and type 3**

**possessions and periods of sustained planned disruption]? Do you have a preference for one of the options?**

C2c supports Proposal C – in developing a method for calculating cost and revenue loss then it could potentially reduce industry time negotiating such items. The involvement of an arbiter is welcomed by c2c because at present, Type 2 and Type 3 possessions disputes are laborious in their management and provide ample opportunities for the relationship between Network Rail and Operators to decline. C2c requests, that in the scenario an arbiter role is adopted, the ORR clearly defines how this would work in practice with the current dispute resolution process within the Track Access Agreement.

On a related note, c2c queries whether the £10k threshold is still the appropriate base number for excess costs and whether a percentage uplift against the formulaic calculation might be more appropriate. Often small operators fall pennies short of this threshold in the current one size fits all number.

**Question 7: Do you have any views on the scale and impact of this issue? Do you have any views on our wider approach to monitoring possessions and how this can have the greatest impact on driving better possession planning in Network Rail?**

C2c supports ORR's approach to possession monitoring as we believe this will enhance and encourage better joint working in this area.

**Question 8: Would you find a user-friendly tool to estimate Schedule 4 formulaic compensation helpful? What are your views on the feasibility of developing an estimator tool? Should proposal E be a priority for PR23?**

This should be a priority and one that might help operators determine the scale of risk to participating in Sch 4 at the outset of the control period. In terms of EBM, a key component of compensation; this is calculated based on Viable Transfer Points set out in the TAA. VTPs however don't necessarily reflect the realities of passenger travel. The VTPs for a possession might be two rural, unstaffed stations with no waiting facilities for onward bus travel. The EBM calculations should be reflective of "real world" situations where the operator will move the passengers to the next realistic transfer point (an interchange station for instance) that isn't compensated for under EBM and is then at risk for the cost of a better experience for the passenger.

**Question 9: Should proposal F should be a priority for reform in PR23? Do you have any views on the proposed methodology for calculating the ACS for open access operators?**

C2c supports the RDG's view for this item.

## **Chapter 5: Proposal: Freight regime**

We welcome views on this chapter's proposal for the freight regime.

**Question 10: Do you agree with our preferred high-level approach for the freight regime, to keep the current regime broadly unchanged for CP7? Are there other elements of the freight regime or its calibration that should be considered for reform in PR23?**

C2c supports the approach outlines in the technical consultation paper for freight operator colleagues.

**Question 11: Do you consider we should review freight payment rates as a priority for PR23?**

Yes, c2c understands that this is a priority area for freight operator colleagues and supports this review as such.

**Question 12: Do you have any evidence on the appropriate level for freight Schedule 4 compensation and any views on how any increase might be funded? Do you have any views and evidence on the difference in freight compensation payments between service disruption and cancellation?**

No comment.

**Are there any other comments you would like to make?**

N/A



## Response to ORR’s technical consultation on the PR23 review of the Schedule 4 possessions regime

This pro-forma is available to those that wish to use it to respond to our consultation. Other forms of response (e.g. letter format) are equally welcome.

Please send your response to [performance.incentives@orr.gov.uk](mailto:performance.incentives@orr.gov.uk) by **13 December 2021**.

Please contact Joe Quill at ORR with any queries: [joe.quill@orr.gov.uk](mailto:joe.quill@orr.gov.uk)

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\*This information will not be published on our website.

### Chapter 2: ORR’s proposed approach and priorities

We welcome views on our questions regarding ORR’s proposed approach to PR23.

#### **Question 1: Do you have any views on the objectives and benefits of a mechanism such as Schedule 4, for the range of different industry parties, both in the current contracting model and once the rail transformation programme has been fully developed and implemented?**

- The future Great British Railways (GBR) will need to develop its own set of strong performance incentives in relation to the proposed new Passenger Service Contract concession-style contracts with a focus on operators and the infrastructure manager coming together under the new body to improve performance across the network as a whole.
- It is apparent that the need for a compensation mechanism such as Schedule 4, to protect operators against the negative revenue impacts of engineering works and other planned disruption, could largely disappear under new industry arrangements where one body manages both infrastructure and the revenue risk for the majority of passenger services.
- However, it is recognised that some mechanism will still be required to provide revenue and cost protection to fully commercial services such as freight and open access

operators, and potentially to bodies such as West Midlands Rail Executive in the event that financial responsibility for regional rail services is devolved or partly devolved from GBR/HMG (see further comments below).

- Whilst it is possible that Schedule 4 might be amended, the scale of the structural changes to the rail industry envisaged under the Great British Railways proposals are such that a wholly new regime to replace both Schedule 4 and Schedule 8 would appear to be appropriate.

**Question 2: Do you have any views on whether we should make no fundamental changes to Schedule 4 in PR23, or, as proposed, pursue a small number of incremental reforms to ensure it remains fit for purpose as a baseline regime?**

- Given the uncertainty over the continuation of Schedule 4 under GBR an incremental approach with minor reforms seems sensible.

**Question 3: Do you agree with the areas we have identified as priorities for PR23? Are there any other significant issues that we should seek to address?**

- Third party funders of rail enhancements, such as West Midlands Rail Executive, West Midlands Combined Authority and Local Authorities also has a direct interest in Schedule 4 through the impact it has in relation to capital project costs, which are often significant.
- Any review of Schedule 4 (or design of any replacement mechanism) should consider whether it is really sensible to artificially inflate the cost of publicly-funded capital projects, just to provide operators with a revenue stream that they have to pay back to government

### **Chapter 3: Proposal: Cross-cutting change across sector regimes**

The proposed opt-out mechanism may have some merit in advance of the establishment of GBR.

One of the issues with Schedule 4, which such an opt-out might address is that operators are compensation for planned disruption, even when the works undertaken during such disruption ultimately result in better performance, enhanced station facilities or other improvement which is of tangible (and often financial) benefit to the operator.

With the government now effectively funding and underwriting the financial risks of both the infrastructure owner and of the majority of passenger operators, the ability to opt out could allow welcome simplification of current, wholly internal, industry financial transactions which effectively serve little purpose at the “whole industry” level.

**Question 4: Do you support proposal A [to introduce an opt-out mechanism]? If an opt-out mechanism were to be implemented, would you support a complete (option A1) or partial opt-out (option A2)? Do you have any views on when operators should be allowed to opt out and what duration any opt-out should have, as set out in paragraph 3.8?**

A complete could result in a welcome simplification of current arrangements, whereas there is a risk that a partial opt-out might bring added complexity, which would be undesirable.

## **Chapter 4: Proposals: Passenger regime**

We welcome views on this chapter's proposals for the passenger regime.

**Question 5: Do you support proposal B [to increase incentives on Network Rail to notify possessions early once the "informed traveller" notification threshold (T-22) has been passed], implemented through option B2 [to monitor and report on possessions notification on a more granular basis]? Do you have any views on the options set out?**

This would appear to add more complexity to the current regime, when the ORR's focus ought to be on simplification and reduction of the administrative burden on the industry.

**Question 6: Do you support proposal C [to develop a method and/or process for settling compensation claims for type 2 and type 3 possessions and periods of sustained planned disruption]? Do you have any views on options C1 [to develop a method for calculating cost and revenue loss compensation] and C2 [to specify in track access contracts a process for negotiating compensation claims for type 2 and type 3 possessions and periods of sustained planned disruption]? Do you have a preference for one of the options?**

This would appear to add more complexity to the current regime, when the ORR's focus ought to be on simplification and reduction of the administrative burden on the industry.

**Question 7: Do you have any views on the scale and impact of this issue? Do you have any views on our wider approach to monitoring possessions and how this can have the greatest impact on driving better possession planning in Network Rail?**

No comment.

**Question 8: Would you find a user-friendly tool to estimate Schedule 4 formulaic compensation helpful? What are your views on the feasibility of developing an estimator tool? Should proposal E be a priority for PR23?**

Any simplification would be welcome in principle but developing such a tool could divert resources from elsewhere in the industry.

**Question 9: Should proposal F should be a priority for reform in PR23? Do you have any views on the proposed methodology for calculating the ACS for open access operators?**

No comment.

## **Chapter 5: Proposal: Freight regime**

We welcome views on this chapter's proposal for the freight regime.

**Question 10: Do you agree with our preferred high-level approach for the freight regime, to keep the current regime broadly unchanged for CP7? Are there other elements of the freight regime or its calibration that should be considered for reform in PR23?**

No comment.

**Question 11: Do you consider we should review freight payment rates as a priority for PR23?**

No comment.

**Question 12: Do you have any evidence on the appropriate level for freight Schedule 4 compensation and any views on how any increase might be funded? Do you have any views and evidence on the difference in freight compensation payments between service disruption and cancellation?**

No comment.

**Are there any other comments you would like to make?**

### **Role of Locally Accountable Bodies in future Passenger Service Contracts**

As a locally accountable rail body, WMRE currently jointly specifies and manages the National Rail Contract for West Midlands Trains with the Department for Transport.

However, WMRE continues to have limited control over the experience of West Midlands passengers, when this is negatively impacted by engineering works or other planned disruption. Greater involvement of WMRE, as a service specifier, is therefore sought in relation to the planning of scheduled disruption on the rail network and, in particular, the arrangements for mitigation of negative impacts on passengers.

WMRE is already seeking earlier delivery of additional devolved powers over regional rail services under the Passenger Service Contracts which might involve a degree of exposure to commercial risk and suitable measures will need to be introduced to limit this risk.

Such measures and financial safeguards might include:

- o devolution of funding from central Government to WMRE which is commensurate with the devolution of control over (and commercial risk from) local service specification and concession contract management
- o caps on risk exposure for devolved organisations from events such as planned disruption
- o HMG or GBR underwriting the risk of significant revenue decline as a result of planned disruption

### **Focus on the End Users**

In the context of greater local control and decision-making that is closer to the end user, it should be noted that one of the principal perceived failings of Schedule 4 is that it focuses on operator compensation rather than on the negative impacts of planned disruption suffered by passengers.

Schedule 4 **should not** be a key determinant of future possessions strategy and TOCs, Network Rail and funders / specifiers (and the future Great British Railways) need to consider a different approach to maintaining, renewing and upgrading the network which focuses on passenger & freight customer outcomes.



## Response to ORR’s technical consultation on the PR23 review of the Schedule 4 possessions regime

This pro-forma is available to those that wish to use it to respond to our consultation. Other forms of response (e.g. letter format) are equally welcome.

Please send your response to [performance.incentives@orr.gov.uk](mailto:performance.incentives@orr.gov.uk) by **13 December 2021**.

Please contact Joe Quill at ORR with any queries: [joe.quill@orr.gov.uk](mailto:joe.quill@orr.gov.uk)

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\*This information will not be published on our website.

### Chapter 2: ORR’s proposed approach and priorities

We welcome views on our questions regarding ORR’s proposed approach to PR23.

#### **Question 1: Do you have any views on the objectives and benefits of a mechanism such as Schedule 4, for the range of different industry parties, both in the current contracting model and once the rail transformation programme has been fully developed and implemented?**

We are sceptical as to the historic benefits of the Schedule 4 regime, and even more sceptical as to whether it should have a long-term future, at least for non-open-access passenger operators.

We doubt that, in practice, the application of the regime has much, if any, material effect on Network Rail’s decisions as to planning possessions, and that a simplistic market-theory-based approach is relevant to an organisation of the nature of NR. What Schedule 4 has however done is add materially to the costs of running the railway – and provide a disincentive to its renewal and enhancement, be it anything from constructing a new station to electrifying a line:

- Directly in that the Schedule 4 costs are added to the total cost of maintenance and enhancement; and

- Indirectly, in that the administration of the Schedule 4 regime (including dealing with disputes arising from it) itself entails a real cost that the railway as a whole must bear.

In the case of enhancements, with which WYCA (and our predecessor entity the West Yorkshire Passenger Transport Executive, Metro) has experience as a funder, it is also questionable whether it is appropriate for the funder of, say, a new station to be paying compensation to the incumbent TOC under Schedule 4 for the possessions necessary to construct a facility that will bring direct benefits, such as additional revenue, to that TOC itself.

Even when passenger operations were mostly in the hands of (quasi-)commercial private-sector franchisees, Schedule 4 matters were often factored in to the calculation of the premium / subsidy lines of franchise bids, so in effect ultimately the money concerned could be considered public funds moving from one part of the railway to another, without achieving any tangible benefit.

It has also been suggested that Schedule 4 payments could even occasionally provide a perverse incentive to TOCs *not* to minimise the operation of rail-replacement buses – or at least that in some cases it has failed to provide enough incentive for them to work together with NR to minimise the need for RRBs.

As the ORR consultation documents appear to acknowledge, in a future where the bulk of passenger operations are in the hands of concession-holders who do not take revenue risk, with the infrastructure remaining with the public-sector Network Rail, and both under the “guiding mind” of GBR, the sense in Schedule 4 payments appears even further open to question.

On the other side of the equation, it is our experience that, while there is still room for improvement, NR has greatly improved its possession planning in recent years in terms of working together with operators (and indeed with wider stakeholders such as ourselves) in a more collegiate manner, in order to identify the right balance of efficiency, cost-effectiveness, timing and balance of disruption. Allied to this, there is an increasing recognition in NR that lessons can be learned from the planning and management of past possessions in order to improve future ones, again done by working in collaboration across the industry: this is something we have for example observed in the early phases of improvement works on the trans-Pennine mainline, and we hope that the industry will very soon have the opportunity to imply that best practice as TRU is finally implemented. We do not believe that Schedule 4 has played a significant role in this evolution – the railway has as a whole recognised that it is the right thing to do in terms of “putting the passenger – and freight customer – first”.

This being the case, we would on the face of it favour a move towards ultimately abolishing Schedule 4 for the main passenger operators, i.e. those operating under operating contracts of the new pattern – and moving towards a more coordinated way of planning, managing and learning from possessions and disruption, where information and collegiate working are the keys. We appreciate that the position of open-access passenger operators, and of the freight sector as long as this operates on a wholly “open-access” basis, is different, and that many of our comments as above do not apply to them in the same way. This response should therefore **not** be taken as applying to those elements of the railway.

**Question 2: Do you have any views on whether we should make no fundamental changes to Schedule 4 in PR23, or, as proposed, pursue a small number of incremental reforms to ensure it remains fit for purpose as a baseline regime?**

As above, we would wish to see Schedule 4 phased out for passenger operators on standard concession-style gross-cost operating contracts.

**Question 3: Do you agree with the areas we have identified as priorities for PR23? Are there any other significant issues that we should seek to address?**

We suspect that this is covered by our comments above.

### **Chapter 3: Proposal: Cross-cutting change across sector regimes**

We welcome views on the cross-cutting proposal in this chapter.

**Question 4: Do you support proposal A [to introduce an opt-out mechanism]? If an opt-out mechanism were to be implemented, would you support a complete (option A1) or partial opt-out (option A2)? Do you have any views on when operators should be allowed to opt out and what duration any opt-out should have, as set out in paragraph 3.8?**

In keeping with the above, our favoured option would be the abolition of Schedule 4 for passenger operators on national rail contracts. Logically, we would therefore say that the ability to opt out of it would be a potential intermediate step in the right direction, if it were found that such an intermediate step were needed; but is it really needed? If it is, then we would suggest that, other than for open-access and freight operators, the default position should be the disapplication of Schedule 4, with an *opt-in* requiring specific and clear justification.

### **Chapter 4: Proposals: Passenger regime**

We welcome views on this chapter's proposals for the passenger regime.

**Question 5: Do you support proposal B [to increase incentives on Network Rail to notify possessions early once the "informed traveller" notification threshold (T-22) has been passed], implemented through option B2 [to monitor and report on possessions notification on a more granular basis]? Do you have any views on the options set out?**

In line with our comments above, we are doubtful that traditional financial incentives are actually particularly effective in seeking to change NR behaviour. What we consider more valuable, in achieving what are clearly laudable goals such as better advance notification of possessions, is rather a collaborative approach to the planning of infrastructure works, especially but not only major interventions, and the sharing of best practice, based on operators and NR working together. It follows from this that we do agree that monitoring and reporting on possessions notification (as well as other aspects of possessions, both from the operator and the NR side) would be valuable, as a tool to identifying, sharing and propagating best practice.

**Question 6: Do you support proposal C [to develop a method and/or process for settling compensation claims for type 2 and type 3 possessions and periods of sustained planned disruption]? Do you have any views on options C1 [to develop a method for calculating cost and revenue loss compensation] and C2 [to specify in track access contracts a process for negotiating compensation claims for type 2 and type 3 possessions and periods of sustained planned disruption]? Do you have a preference for one of the options?**

While these aspects are likely to be relevant where Schedule 4 continues to apply, such as in the case of open-access passenger and freight operators, we do not express a view on them here.

**Question 7: Do you have any views on the scale and impact of this issue? Do you have any views on our wider approach to monitoring possessions and how this can have the greatest impact on driving better possession planning in Network Rail?**

We believe this is covered by our comments under no. 5 above. Cross-industry collaboration before, during and after possessions appears to be the key here, but we would agree that obtaining and using the best possible information about alterations and cancellations to possessions is desirable in terms of informing best practice – provided that the information can be obtained without itself adding inefficiency and cost to NR.

**Question 8: Would you find a user-friendly tool to estimate Schedule 4 formulaic compensation helpful? What are your views on the feasibility of developing an estimator tool? Should proposal E be a priority for PR23?**

In light of the above, we have no views on this.

**Question 9: Should proposal F should be a priority for reform in PR23? Do you have any views on the proposed methodology for calculating the ACS for open access operators?**

We have no views on this.

## **Chapter 5: Proposal: Freight regime**

We welcome views on this chapter's proposal for the freight regime.

**Question 10: Do you agree with our preferred high-level approach for the freight regime, to keep the current regime broadly unchanged for CP7? Are there other elements of the freight regime or its calibration that should be considered for reform in PR23?**

We have no views on this.

**Question 11: Do you consider we should review freight payment rates as a priority for PR23?**

We have no views on this.

**Question 12: Do you have any evidence on the appropriate level for freight Schedule 4 compensation and any views on how any increase might be funded? Do you have any views and evidence on the difference in freight compensation payments between service disruption and cancellation?**

We have no views on this.

**Are there any other comments you would like to make?**

We would comment that while we did not submit a response to the recent consultation about the future of the Schedule 8 compensation regime, we consider that many of the above arguments apply, *mutatis mutandis*, equally strongly to that: we would also question the long-term need to retain that regime, at least for the core passenger operators operating under the emerging national rail contracts.