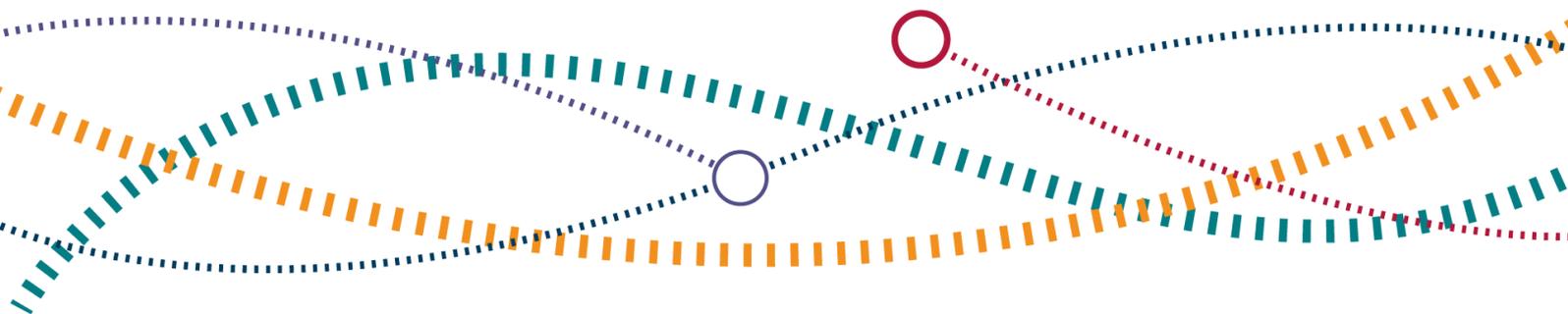




PR23 – Review of Schedules 4 & 8

Conclusions and consultation on outstanding matters

20 October 2022



Contents

Executive summary	3
1. Schedule 4 conclusions	6
2. Schedule 8 conclusions and consultation on outstanding matters	15
Annex A: Schedule 4 proposals not being taken forward	29
Annex B: Schedule 8 proposals not being taken forward	34
Annex C: Schedule 8 initial legal drafting proposals	47

Executive summary

This document presents our conclusions on the framework for Network Rail's Schedule 4 and 8 regimes for the next control period (CP7), as well as consultation questions on outstanding matters.

Network Rail's possessions and performance regimes compensate train operators for financial impacts arising from planned and unplanned service disruption. The possessions and performance regimes are contained within Schedules 4 and 8 of track access contracts. Schedule 4 places incentives on Network Rail to plan possessions efficiently so as to minimise disruption, and Schedule 8 places incentives on Network Rail and train operators to limit the disruption they cause and therefore to improve network performance.

As part of PR23, we have been reviewing the framework for these regimes. We published initial consultations in [June 2021 \(Schedule 8\)](#) and [September 2021 \(Schedule 4\)](#), followed by a combined [April 2022 'preferred options' consultation](#). The review has taken place against the backdrop of the UK Government's rail reform programme, which intends to create a new rail body, Great British Railways (GBR). There has also been rapid change to the industry's contractual arrangements due to the COVID-19 pandemic. Our April 2022 consultation proposed to retain the essential structure of Schedules 4 and 8, putting forward a limited set of proportionate and incremental changes on which we invited views from stakeholders.

We have taken our decisions on the CP7 incentives framework based on the existing legal requirements, while also ensuring the framework can be applied by GBR when it takes on responsibility for the national rail network. As such, we anticipate that this framework will apply for the duration of CP7. While we refer in this document primarily to Network Rail, our decisions are also therefore relevant for GBR as infrastructure manager.

In line with our proposal in the April 2022 consultation, we are going ahead with our plan to introduce an opt-out mechanism for Schedule 4. This provides operators, notably publicly-contracted operators, with the flexibility to respond to changes in the industry, while maintaining protections for those that require them. To mitigate any lost financial incentives on Network Rail, as part of the PR23 Policy Framework we are working to develop metrics that will monitor Network Rail's performance across network availability, possession planning and possession efficiency.

On Schedule 8, there are legal requirements for a performance scheme, which Schedule 8 currently fulfils. We therefore envisage that payments under the Schedule 8 performance regime will continue to apply to all operators. However, the UK Government has indicated

that there could be a change to these legal requirements in relation to GBR's future contracted operators, and that the removal of Schedule 8 payments for these operators is necessary for GBR to function as a combined infrastructure manager and franchise authority. We are therefore proposing to insert new clauses into Schedule 8 for GBR's future contracted operators. Through these clauses, if current legal requirements for a performance scheme are changed, ORR may issue a notice removing the majority of requirements for Schedule 8 payments for GBR's contracted operators. We are proposing that the regime would not change for non-GBR operators. We are also not proposing changes to delay attribution requirements for any party.

In addition, we are proposing an approach to add flexibility to Schedule 8 in CP7 by allowing for a mid-control period recalibration, if we consider it necessary. This could allow the regime to respond better to material changes in circumstances during the control period such as an external shock to demand.

In this document, Chapters 1 and 2 set out in greater depth our conclusions for Schedules 4 and 8 respectively.

Consultation and next steps

This document contains consultation questions on the scope of the application of Schedule 8 and a proposal to add flexibility to Schedule 8 in CP7. Please send responses by email to performance.incentives@orr.gov.uk by **9 January 2023**. We will continue to work with the Department for Transport (DfT), Transport Scotland and other devolved rail authorities (who will continue to exercise their existing powers and responsibilities in relation to rail), and wider industry, on the matters under consultation.

In addition, as explained in this document, we have started work to recalibrate Schedules 4 and 8 for CP7. This phase will culminate in the production and expected approval of parameters to enter each operator's track access contract ahead of CP7.

The currently-expected timings of the remaining PR23 milestones are summarised below.

Milestone	Information	Date
Deadline for consultation responses	Deadline for responses to Schedule 8 consultation questions in this document	9 January 2023
ORR Draft Determination	Draft of ORR's decisions on all policy matters for Schedule 4 & 8 regimes	June 2023

Milestone	Information	Date
ORR Final Determination	Confirmation of ORR's decisions on all policy matters for Schedule 4 & 8 regimes	October 2023
Schedule 4 & 8 parameters finalised	ORR approval of final Schedule 4 & 8 parameters	November 2023
Review Notices	Publication of Review Notices by ORR, confirming parameters for CP7	December 2023

Legal consultation on drafting of schedules

Alongside this conclusions document, we have issued a [consultation on improvements to the drafting](#) of Schedules 4, 7 and 8 of model access contracts (Schedule 7 relates to track access charges). The consultation invites suggestions for improvements to these schedules in model passenger, freight and charter track access contracts.

The scope of the legal consultation is limited to changes to improve the existing drafting of these schedules, rather than changes that are required to give effect to our policy decisions set out in this document. A full consultation on updates to model contracts will follow in summer 2023, shortly after our draft determination. This will reflect all policy decisions, as well as feedback received through the consultation.

1. Schedule 4 conclusions

Summary

We will provide all passenger and freight operators with the option to opt out of Schedule 4. For publicly-contracted passenger operators, the decision will be whether to fully opt in or out of the regime – operators that opt out will no longer pay the Schedule 4 access charge supplement (ACS). Open access passenger operators will retain the choice to fully opt in (and pay an ACS) or continue to receive limited Schedule 4 compensation, only for the most disruptive possessions and sustained planned disruption, while paying no ACS. Freight operators currently receive Schedule 4 compensation without paying an ACS – their choice will be whether to remain in the regime or opt out and stop receiving benefits.

Operators will need to decide whether to opt in/out before the start of CP7 and the decision will last for the full control period, except in certain specified circumstances.

To mitigate the opt-out mechanism's potential to reduce financial incentives on Network Rail to minimise planned disruption, we will introduce enhanced monitoring and reporting of Network Rail's management and notification of possessions. This will be included as part of the PR23 Policy Framework, which sets out how we will hold Network Rail/GBR to account for the outcomes it must deliver for the funding it receives in CP7.

Recalibration of Schedule 4 metrics is now proceeding, with important input from the Schedules 4 & 8 Recalibration Working Groups.

Scope of application of Schedule 4

April 2022 consultation

- 1.1 In our [April 2022 consultation](#), we said we were minded to offer all operators (passenger and freight) the option to opt out of Schedule 4 in CP7. We considered that an opt-out mechanism could provide operators with the flexibility to adjust to rail reform in line with their commercial circumstances.
- 1.2 We proposed that the option should be limited to a full opt-out option only, rather than including an option to opt out from either the revenue or cost compensation components of Schedule 4. This overall approach would limit the complexity of Schedule 4, as having two or more types of scheme would increase the steps

involved in calculating the ACS for operators. This limitation would apply to publicly-contracted passenger operators (those contracted or directly-operated by a franchise authority such as DfT or Transport Scotland) and freight operators. Open access operators would retain the right to choose not to pay the Schedule 4 ACS, as now, and receive basic Schedule 4 compensation.

1.3 Finally, we said we expect operators to decide whether to opt in or out in advance of the start of the control period. We said that, once an operator has opted in or out, this decision will last for the entire control period, unless one of the exceptional circumstances listed in paragraph 1.14 occurs.

1.4 We recognised that the ability for some operators to opt out of Schedule 4 could reduce the financial incentives on Network Rail to plan possessions efficiently and minimise disruption to operators. To mitigate this risk we proposed enhancing the monitoring of Network Rail's possessions management. We set out a number of ways in which this could be done, including requiring Network Rail to collect information on the number and length of planned possessions, and reporting notification of possession changes at a more granular level. This could increase reputational incentives on Network Rail to manage possessions efficiently. We said we would consider whether this could be included within ORR's approach to holding Network Rail to account in CP7.

Responses to April 2022 consultation

1.5 In response, DfT, Transport Scotland and Transport for Wales (TfW) all supported the opt-out mechanism. Transport Scotland emphasised the importance of maintaining strong enough incentives on Network Rail to plan possessions efficiently given the reduction of financial incentives. TfW also highlighted the risk of reduced incentives, noting a concern about the potential risk to TfW services on routes shared with other operators. Transport for London supported the opt-out mechanism being available to operators that wish to use it.

1.6 Network Rail and the GBR Transition Team ('GBRTT', a forerunner organisation to GBR) submitted a joint consultation response, in which they supported the opt-out. They noted that operators on passenger service contracts ('PSCs', a new concession-style agreement expected to be used for GBR's future operators) will no longer face revenue risk. They also highlighted that they favoured compensation and possession management being incorporated within the contractual framework between GBR and its contracted operators.

1.7 Most train operating companies (TOCs) broadly supported the opt-out mechanism. Arriva and Greater Anglia, while supporting the opt-out mechanism, emphasised

the need to ensure other measures are put in place to ensure possessions are planned efficiently. And while generally supportive, South West Trains questioned the impact of removing financial incentives and whether reputational incentives will be strong enough in replacing financial incentives.

- 1.8 Heathrow Express did not support an opt-out mechanism, raising the concern that it would reduce Network Rail's incentive to plan possessions efficiently and that any opt-out facility should be postponed until the transition to GBR is complete. Northern Trains also disagreed with the proposal, expressing concern about the impact on operators on shared lines where opt-outs have occurred.
- 1.9 Freight operators generally did not support an opt-out mechanism. DB Cargo said it was not convinced an opt-out mechanism would encourage Network Rail to plan possessions efficiently and minimise disruption to passenger and freight operators. Rail Freight Group also expressed concerns about weakened incentives. Freightliner also raised this concern and said an opt-out should not be a priority for CP7. GB Railfreight said that Schedule 4 is essential to rail freight remaining viable.
- 1.10 On whether a full or partial opt-out should be on offer, of those that expressed an opinion most supported a full opt-out. However, GTR highlighted the potential benefits of being able to opt out of elements of Schedule 4 given the on-going uncertainty as to how GBR and its contracts are to be structured. Arriva emphasised the importance of allowing operators sufficient time to evaluate the estimated ACS before deciding whether to opt out.

Our conclusions

Schedule 4 opt-out mechanism

- 1.11 Having carefully considered stakeholders' responses we intend to go ahead with offering both passenger and freight operators the ability to opt out of Schedule 4. Alongside this document we are publishing an [impact assessment](#) of the change.
- 1.12 This proposal reflects the fact that many publicly-contracted operators have moved to concession-style contracts which do not carry revenue risk. They may therefore not require access to Schedule 4 compensation for the revenue impacts of planned disruption. Permitting operators to opt out reflects the change in contractual arrangements as well as allowing greater flexibility to accommodate further developments in rail reform.
- 1.13 We will limit the scope of the opt-out mechanism such that publicly-contracted operators that wish to opt out of Schedule 4 must do so completely, i.e. both from

the revenue and cost compensation components. This is in the interest of simplicity. In the future, GBR may seek to include its own cost compensation arrangements for planned disruption within its passenger service contracts.

- 1.14 The decision to opt out will need to be taken before the start of the control period. Any decision to do so will then last for the entire control period, except when one of the following events takes place mid-control period:
- (a) a re-tendering of an existing franchise or concession-style contract;
 - (b) a change of ownership of a franchise or concession-style contract mid-term that involves significant changes in service levels; or
 - (c) launch of a completely new franchise or concession.
- 1.15 The opt-out mechanism would be enacted by disapplying the Schedule 4 provisions within track access contracts for those operators that opted out.
- 1.16 Open access operators will have the option, as now, to opt in fully to Schedule 4 (paying an ACS) or to receive compensation for only the most disruptive possessions and sustained planned disruption (SPD), without an ACS.

Timing of the opt-out decision

- 1.17 In order for an operator to decide whether to opt in or out, it would need to have an understanding of the likely level of ACS it expects to pay over the control period. To inform their decision, Network Rail will supply estimates of the ACS payable by any operator wishing to opt in. We expect the indicative ACS to be available within two months of our draft determination.
- 1.18 All publicly-contracted passenger operators will need to decide whether to opt out of Schedule 4 within a set of number of weeks of being provided with an indicative ACS by Network Rail, well in advance of the start of CP7. We will confirm the timing of decision-points through further correspondence with the industry. We will treat any publicly-contracted TOCs that do not state an intention to opt out as opting to remain in the Schedule 4 regime.
- 1.19 Open access and freight operators will also need to decide whether to opt out to the same timescales. Open access operators that do not state an intention will remain in receipt of the baseline levels of Schedule 4 compensation currently applicable in open access operators' track access contracts. Freight operators that state no preference will also continue to receive Schedule 4 compensation as currently.

Mitigating potential loss of financial incentives

April 2022 consultation

- 1.20 We recognised in our April 2022 consultation that an opt-out mechanism might blunt the financial incentives on Network Rail to plan possessions efficiently and minimise disruption to train services. We considered that this risk could be mitigated through enhanced monitoring of Network Rail's possession planning and notification system.
- 1.21 We said we were minded to introduce an additional level of reporting, by monitoring Network Rail's possession notification and late changes and cancellations on a more granular basis.

Responses to April 2022 consultation

- 1.22 There was broad support for our proposal to increase the incentive on Network Rail to notify operators about possessions early (once the T-22 informed traveller timetable threshold¹ has been passed) by monitoring at a more granular level. Northern Trains said in addition that it would be useful to monitor the impact of changes to possession plans, e.g. how many trains are affected by any change. South Eastern said the additional scrutiny provided by increased monitoring would have a positive impact on passengers. Heathrow Express stated that it agreed with the proposal to increase incentives on Network Rail to notify possessions early once the T-22 threshold has been passed, by monitoring possessions notification on a more granular basis.
- 1.23 Network Rail also supported the additional monitoring; it said that it wanted to work with ORR to better understand the specific requirements before progressing further with proposals to increase monitoring.
- 1.24 Rail Freight Group and GB Railfreight supported this proposal, but wanted more information on, for example, key performance indicators and powers ORR would have to address any breaches.

Our conclusions

- 1.25 We are including our proposals for additional reporting and monitoring within ORR's PR23 Policy Framework, which explains how we intend to hold Network

¹ T-22 refers to the number of weeks of notice (i.e. 22), in advance of a possession taking place, which TOCs require in order to be able to take account of possessions when producing the 'informed traveller' timetable. The informed traveller timetable is typically the point at which TOCs make their timetables publicly available.

Rail to account for the outcomes it must deliver for the funding it receives in CP7. We published our [framework consultation](#) in July 2022.

- 1.26 To take this work forward, ORR has appointed consultants to engage with stakeholders, and provide expert advice, to help ORR to reach an evidence-based policy position on its new approach to monitoring network availability and possession management in CP7. This will help us build a robust proposal, informed by the views of operators, the infrastructure manager and other stakeholders impacted by the change in incentive regime and our monitoring approach. We expect to receive the consultants' proposal, informed by internal and external views, by the first quarter of 2023, and our approach will then be outlined in our PR23 draft determination.
- 1.27 This should provide appropriate reputational incentives to counterbalance the potential loss of financial incentives on the infrastructure manager to plan possessions efficiently in the event that operators opt out of Schedule 4².

Approach to changes to Schedule 4

- 1.28 In line with our April 2022 consultation, we are taking a proportionate approach to changes to the Schedule 4 regime. We have decided to take forward a limited set of our original proposals, the most significant of which is the introduction of an opt-out mechanism as discussed above.
- 1.29 This proportionate approach reflects the move to concession-style contracts, and in particular the removal of revenue risk for most operators. In addition, there is a need to focus resources on recalibration given the challenges of recalibrating Schedule 4 in the context of significant industry change.
- 1.30 Table 1.1 below summarises our conclusions. Annex A sets out our reasoning for each Schedule 4 proposal we have decided not to pursue.

² We note also that GBR will have its own financial incentives to plan possessions efficiently given its direct exposure to farebox revenue, which will be adversely affected by poorly planned possessions.

Table 1.1 Summary of ORR’s initial Schedule 4 proposals and our decisions

Proposal	Decision
<p>Proposal A</p> <p>To introduce an opt-out mechanism to Schedule 4, whereby train operators could completely or partially opt out of Schedule 4</p>	<p>Will be taken forward</p> <p>We intend to introduce the option for all train operators to opt out of Schedule 4. We consider that an opt-out mechanism offers train operators the flexibility to respond to changes in the industry while maintaining the protection offered to third-party operators.</p>
<p>Proposal B</p> <p>To increase incentives on Network Rail to notify possessions early once the ‘informed traveller’ notification threshold (T-22) has been passed, either by:</p> <p>Option B1: introducing an additional notification threshold, or</p> <p>Option B2: monitoring possessions notification on a more granular basis</p>	<p>Will be taken forward</p> <p>We recognise operators opting out of Schedule 4 could reduce the financial incentive on Network Rail to plan possessions efficiently. To mitigate this risk, we intend to increase the monitoring and reporting of Network Rail’s possessions management.</p> <p>We intend to bring proposal B2 and D (below) together alongside other measures to be incorporated in the framework for how we hold Network Rail to account in CP7.</p>
<p>Proposal C</p> <p>To develop a method and/or process for settling compensation claims for lengthy possessions and periods of sustained planned disruption</p>	<p>Will not be taken forward</p> <p>We received a mixed response on both parts of this proposal, and there was an expectation that benefits would be low compared with the costs.</p> <p>We consider an industry-led solution preferable and will encourage the industry to work together on improving the negotiating framework.</p>
<p>Proposal D</p> <p>To monitor and report on late possession changes and cancellations on a more granular basis</p>	<p>Will be taken forward</p> <p>[See text for Proposal B above.]</p>
<p>Proposal E</p> <p>To develop a tool to estimate Schedule 4 formulaic compensation</p>	<p>Will not be taken forward</p> <p>The proposals received only limited support. Network Rail stated that it had made previous attempts at developing such a tool but found it problematic. Network Rail also expressed concerns about the cost. Given these concerns, we do not intend to take this forward as a regulatory requirement, but we encourage Network Rail to keep the idea of such a tool under review.</p>

Proposal	Decision
<p>Proposal F</p> <p>To review the methodology for calculating the ACS for open access operators</p>	<p>Will not be taken forward</p> <p>Overall, respondents thought changing the methodology would introduce undue complexity with few benefits. We will therefore not take forward this proposal.</p>
<p>Proposal G</p> <p>To review and, if appropriate, update freight compensation rates</p>	<p>Will not be taken forward</p> <p>Following discussions with freight operators through the Schedules 4 and 8 Recalibration Working Group it has been decided not to conduct an update of freight compensation payment rates as part of PR23. Rates will be adjusted for CPI inflation as in previous reviews (see paragraph 2.37).</p>

Recalibration of Schedule 4

- 1.31 We have established Schedules 4 and 8 Recalibration Working Groups to co-ordinate the work to recalibrate both regimes. The groups are made up of representatives of rail operators and Network Rail and the work is underway.
- 1.32 Network Rail will lead the recalibration work to establish passenger operators' ACSs, which fund Schedule 4 and which are payable by those operators that choose to opt in to the Schedule 4 regime. Network Rail does not intend to change its existing methodology for calculating the ACS.
- 1.33 In relation to bus mileage and train mileage cost payment rates, we intend to increase these in line with CPI inflation.
- 1.34 As part of the Schedule 8 recalibration, the passenger recalibration working group is also considering whether to adopt recommendations from the Passenger Demand Forecasting Council's recent disruption study (led by the consultants SYSTRA). The study has reviewed evidence on how passengers respond to delays to rail services and recommends revised elasticities to use when calculating how revenue is affected by service delays. If the study's recommendations are accepted for Schedule 8, this will impact the way in which Schedule 4 revenue loss is calculated. We will work with the passenger recalibration working group to develop the necessary adjustments to the revenue loss formula to account for this.

- 1.35 Network Rail is also considering moving to producing three timetables per year instead of the current bi-annual approach. This may impact for example on the revenue loss formula calculation, and we will work with Network Rail and the recalibration working group to make any necessary changes.

2. Schedule 8 conclusions and consultation on outstanding matters

Summary

We envisage that payments under the Schedule 8 performance regime will continue to apply between Network Rail/GBR and all operators. However, we are seeking to future-proof the regime to developments in rail reform by proposing to insert new sub-paragraphs into Schedule 8. If triggered by ORR, these clauses would result in only very limited payments taking place between GBR and its contracted operators under Schedule 8 for CP7. The clauses could be triggered if there is legislative change that removes the legal requirement for payments under a performance scheme.

We have considered arguments in favour of greater flexibility within the control period. While we are not proceeding with mechanistic annual updates of Schedule 8 parameters, we are proposing that there should be greater ability to recalibrate the regime mid-control period, if ORR decides this is appropriate. This will help respond to external shocks and mitigate risks associated with the PR23 recalibration.

We are inviting views on these proposals.

We are otherwise confirming our overall approach to retain the essential structure of Schedule 8 and make limited changes to the regime.

Scope of application of Schedule 8

April 2022 consultation and responses

2.1 In our April 2022 consultation, we noted a request from DfT and Network Rail to consider ways for DfT's operators, and potentially those of devolved bodies, to 'opt out' of Schedule 8 (April 2022 consultation, paragraph 1.31). DfT told us that this could help to simplify incentives given that its operators will already face financial performance incentives in their concession-style contracts. Transport Scotland also expressed interest in such an 'opt-out' for its operators.

2.2 In our consultation (paragraphs 1.7 to 1.8), we also set out the legal requirements for a performance scheme contained in the Railways (Access, Management and

Licensing of Railway Undertakings) Regulations 2016 ('the 2016 Regulations'). We said that the proposals we had received to date, which would have the effect of removing the Schedule 8 payments for GBR's contracted operators, were incompatible with these requirements. We therefore envisaged that, for CP7, payments under the Schedule 8 performance regime would continue to apply between Network Rail/GBR and all operators.

- 2.3 We also stated (paragraph 1.38) that we would consider new proposals presented to us in a timely way for alternative arrangements that meet the requirements of the 2016 Regulations. Any such proposals had to be practicable to implement, demonstrably consistent with the legal framework, and would need to be settled by autumn 2022 for them to be reflected in our PR23 conclusions. We have not received any requests to consider new proposals under the current legal framework. We therefore still envisage that, if there is no legislative change, payments under the Schedule 8 performance regime will continue to apply between Network Rail/GBR and all operators.
- 2.4 We further stated that, if legislation is passed that amends the 2016 Regulations, sufficiently relaxing the requirement for payments under a performance scheme, Schedule 8 payments may no longer need to be made between GBR and its contracted operators (April 2022 consultation, paragraph 1.39).
- 2.5 We note that DfT's [consultation on legislation to implement rail reform](#) (paragraphs 2.44 to 2.45 and question 7) is consulting on whether "immediate essential changes" are needed to the 2016 Regulations to enable GBR to deliver its 'guiding mind' function. Further, in its response to ORR's April 2022 consultation, DfT said that, "subject to results of [the UK Government's rail reform consultation] and usual clearance processes, we are considering if minor and technical changes are necessary to Regulation 16 and Schedule 3 [of the 2016 Regulations] to enable the guiding mind function and smooth transfer of responsibilities from DfT to Great British Railways. If so, these should be made in the forthcoming Transport Act". The Secretary of State indicated on 19 October 2022 that the earliest a Transport Bill would be introduced to the UK Parliament would be May 2023 (with GBR unlikely to be formed in time for the start of CP7). It is also possible that the [Retained EU Law \(Revocation and Reform\) Bill 2022](#) ('the REUL Bill') will change the 2016 Regulations.
- 2.6 In response to our consultation, Network Rail/GBRTT restated their views that it is important to explore alternatives to Schedule 8 payments for GBR's contracted operators. They noted that GBR will want to establish new performance incentives for its contracted operators through PSCs, and expressed concern that Schedule 8

would create a direct conflict with these new incentives, limiting GBR's design options and potentially impeding a regime that encourages deeper collaboration. DfT and GBRTT have told us that the removal of Schedule 8 payments between GBR and its contracted operators is necessary in order for GBR to function as a combined infrastructure manager and franchise body.

ORR's proposal

- 2.7 Given the possibility of changes to the 2016 Regulations, we have considered how to adapt to amendments to the requirement for payments under a performance scheme. This will depend on the content of any amendment, which is yet to be determined (and will not be certain until the point at which it comes into effect). Our working assumption is that any such amendment would change GBR's requirement for payments under a performance scheme so as to make it non-mandatory for GBR's contracted operators. Given uncertainty in legislative timelines, we need to be able to accommodate any such amendment taking effect in time for the start of CP7, or after CP7 begins. (The Secretary of State indicated on 19 October 2022 that GBR is unlikely to come into existence for the start of CP7, underlining the importance of being able to accommodate mid-control period change.)
- 2.8 We have considered how to achieve an outcome of being able to remove requirements for payments under Schedule 8 between GBR and its contracted operators, in such a way that future-proofs Schedule 8 in CP7. Our proposed approach is to insert new sub-paragraphs into paragraphs 12 and 18 of Schedule 8 of track access contracts for the operators that the UK Government intends will be contracted by GBR. These sub-paragraphs would remove the majority of requirements for payments for these operators (paragraph 2.9 explains which payments would be removed). Annex C sets out the proposed new sub-paragraphs together with the existing paragraphs; paragraph references are based on the existing passenger model contract. We note and will consider in due course any impacts that the REUL Bill may have on the proposed drafting of the revised paragraphs.
- 2.9 The proposed changes in Annex C would have the effect, for GBR's contracted operators, of stopping the main regular Schedule 8 payments, known as 'Performance Sums' (Schedule 8, paragraphs 9 and 10), as well as payments under Sustained Poor Performance provisions (Schedule 8, paragraph 18). It would leave intact some limited payments relating to adjustments to previous payments (Schedule 8, paragraph 6.3), the resolution of disputes (Schedule 8, paragraph 12.2) and the costs of assessing and implementing any amendments to

Schedule 8 Appendix 1 and the Performance Monitoring System (Schedule 8, paragraph 17.4).

- 2.10 We are assuming that any change to the 2016 Regulations would be limited in scope, to apply only to GBR's future contracted operators (i.e. those currently contracted by DfT). It is currently unclear whether the scope of any legislative change would be extended any further, for instance to operators contracted by devolved authorities, and if so on what timescales. We therefore propose that the new Schedule 8 sub-paragraphs proposed above will apply only to GBR's contracted operators. However, we are inviting consultation responses on whether the scope should be widened to other train services – this would need to be clearly justified.
- 2.11 The proposed drafting of the new sub-paragraphs is intentionally broad due to a lack of certainty at this stage about the scope of changes to the 2016 Regulations. The changes to Schedule 8 would enable ORR, in circumstances where the requirements for a performance scheme in the 2016 Regulations have been amended, to issue a notice confirming that specified changes to Schedule 8 will be made. The result of this notice would be that only limited Schedule 8 payments would take place between GBR and its contracted operators under Schedule 8 for CP7. This notice could only be issued at or after the start of CP7 but, by including the capacity to retrospectively adjust the payments, ORR could ensure that it could apply from the first day of CP7 (if necessary and in line with the legislative timetable). Should it be necessary to issue a retrospective notice, this would, at the earliest, only be backdated to the date from which the amended 2016 Regulations came into force. If there is such a change to the 2016 Regulations, we would engage with the industry in order to provide clarity about our intentions.
- 2.12 These steps to enable the removal of the requirement for the majority of payments under Schedule 8 between GBR and its contracted operators are consistent with our intention for the PR23 settlement to be robust to the outcomes of rail reform. DfT and GBRTT have told us that it is a necessary step for GBR to be formed and for existing concession-style contracts to be transferred to GBR as the franchising body.
- 2.13 The proposed new sub-paragraph 12.5 would enable Schedule 8 payments to be 'switched back on'. This could be required in the event of a further change to an operator's commercial contractual model, for example the re-adoption of revenue risk that may result in a requirement for Schedule 8 protections. Any notice issued in accordance with paragraph 12.5 would not apply retrospectively.

2.14 Before issuing a notice referred to under the new paragraph 12.3(b), ORR would:

- consider whether the 2016 Regulations had indeed been amended in such a way as to allow the removal in Schedule 8 of the requirement for the majority of financial payments between GBR and its contracted operators;
- need to be satisfied that developments in rail reform and changes in industry structure meant there was sufficient justification to remove the operators from exposure to the majority of Schedule 8 payments;
- need to be satisfied that there were reasonable incentive structures in place for GBR and its contracted operators (for example through financial performance incentives set by GBR for its operators) to minimise disruption for passengers and freight customers across the whole network³; and
- be satisfied that there was no reduction in the financial protection offered through Schedule 8 to non-GBR operators such as freight and open access ('third-party operators') that remained fully exposed to payments under Schedule 8.

2.15 Only once we were satisfied would we issue the notice.

2.16 We consider that the impacts of the notice would be limited to the parties directly concerned, i.e. GBR and its contracted operators. The absence of the majority of Schedule 8 payments between these parties would not affect the payments made between GBR and third-party operators such as freight and open access operators. This is because the Schedule 8 'star model', through which each operator's own payment rate is calculated at the start of the control period, will still include all operators in its calibration. This would ensure that all payment rates between GBR and third party operators still reflect the full financial impacts of delay, regardless of whether delay is caused by GBR (as infrastructure manager), GBR's contracted operators or third-party operators. Bilateral payments between GBR and its contracted operators would not take place, but this would not affect payments between GBR and third-party operators⁴. No changes to requirements to participate in delay attribution will arise from the new clauses.

³ We note the UK Government's intentions as stated in its consultation response to ORR: "The Government is strongly committed to ensuring that contracts between Great British Railways and operators include strong performance incentives."

⁴ In this way, GBR would effectively be taking on both the revenue risk and the Schedule 8 risk associated with the performance of its contracted operators.

- 2.17 We also consider it unlikely that there would be any adverse ‘indirect’ impacts on third-party operators that would come as a consequence of GBR and its contracted operators facing different Schedule 8 payments from those of third-party operators. GBR would still face the same Schedule 8 incentives to limit delay caused to third-party operators, whether caused by itself as infrastructure manager or by its contracted operators (for which we expect GBR to include financial performance incentives within their concession-style agreements, as mentioned in footnote 3).
- 2.18 We will continue to engage closely with the UK Government in respect of its rail reform programme, in particular regarding its plans for the creation of GBR as an entity combining infrastructure management and train services. This will inform our final decision on whether to include the proposed new paragraphs in contracts.

Network Rail/GBRTT’s proposal for removing financial payments through ‘zero payment rates’

- 2.19 In its consultation response, Network Rail/GBRTT suggested its own approach to removing financial payments between GBR and its contracted operators, which was to set these operators’ Network Rail Payment Rates and TOC Payment Rates to zero within Appendix 1 of Schedule 8⁵. We have assessed this option. We first note that there would be a knock-on effect on Schedule 4 because the Schedule 4 Network Rail payment rate links to payment rates in Schedule 8 Appendix 1. As such, amendments to Schedule 4 would be required in order to avoid the ‘zeroed’ Schedule 8 payment rates unintentionally flowing through to Schedule 4. In addition, Network Rail’s proposed approach would rely on the existing Schedule 8 contractual change provision, contained in Schedule 8 paragraph 17. This allows for mid-control period changes to Appendix 1, but it was not designed to respond to legislative change, and therefore may not be suitable as a way to implement zero payment rates after the start of the control period. Network Rail/GBRTT’s proposed approach would also not change provisions relating to Sustained Poor Performance. For these reasons, we consider that our proposed approach, set out in paragraphs 2.8 to 2.15, is a better way to achieve the intended outcome.

⁵ Network Rail/GBRTT proposed that the payment rates would be set to zero for GBR’s contracted operators after network-wide recalibration of Schedule 8. This would ensure that the zero rates would not impact on payment rates for third-party operators – a similar point to that explained in paragraph 2.16.

Consultation questions

Do you agree with ORR's proposal to insert new sub-paragraphs into Schedule 8 which would allow ORR to 'switch off' the majority of Schedule 8 payments for GBR-contracted operators if the required legislative change is implemented?

Do you agree that the proposed new Schedule 8 sub-paragraphs should apply only to GBR's contracted operators?

Do you have any comments on the proposed approach to this issue and the drafting of the proposed new sub-paragraphs under Schedule 8?

Approach to changes to Schedule 8

- 2.20 Our April 2022 consultation stated that we were minded to retain the essential structure of Schedule 8 rather than carry out more fundamental reforms (paragraphs 1.44 to 1.49). As such, we were minded to take a proportionate approach and pursue only a small number of incremental changes to the Schedule 8 regime.
- 2.21 In consultation responses, there was wide agreement from funders and train operators with this overall approach. Network Rail/GBRTT expressed disappointment with our minded-to positions not to proceed with many of the proposals set out in our initial June 2021 consultation.
- 2.22 We are now confirming our overall approach which – aside from the proposal above in relation to GBR's future operators – is to make limited changes to Schedule 8. Table 2.1 below summarises our decisions in respect of the proposals in our earlier consultations. Annex B sets out the reasoning for our decision in relation to each proposal we are minded not to pursue. Our consideration of Proposal B has resulted in a new proposal for adding limited flexibility to Schedule 8 in CP7 – see the sub-section on 'Adding flexibility to Schedule 8 in CP7' below.

Table 2.1 Summary of ORR's initial Schedule 8 proposals and our decisions

Proposal	Decision
<p>Proposal A</p> <p>Change the way Network Rail's benchmarks are set, basing them only on historical data</p>	<p>Will not be taken forward</p> <p>We will not proceed with this proposal, and instead intend that Network Rail's benchmarks will remain forward-looking and consistent with its funding settlement.</p>
<p>Proposal B</p> <p>Update benchmarks annually to make them more flexible during control periods</p>	<p>Will not be taken forward</p> <p>We will not proceed with annual updates, due to adverse incentive properties and administration costs, but our proposal on flexibility within CP7 provides some of Proposal B's envisaged benefits.</p>
<p>Proposal C</p> <p>Share allocation of some types of delay within Schedule 8</p>	<p>Will not be taken forward</p> <p>This proposal is best taken forward through an industry-led review of delay attribution (see paragraphs 2.34 to 2.35).</p>
<p>Proposal D</p> <p>Change how TOC-on-TOC delay is handled within Schedule 8</p>	<p>Will not be taken forward</p> <p>While we will not proceed with the proposal, our proposal on flexibility within CP7 could update the 'TOC responsibility matrix' as envisaged in one option for the original proposal.</p>
<p>Proposal E</p> <p>Change the allocation of delay within Schedule 8 for unidentified incidents to make the split more accurate</p>	<p>Will not be taken forward</p> <p>The issue is linked to matters which we expect to be considered in an industry-led review of delay attribution, so is best dealt with through that review.</p>
<p>Proposal F</p> <p>Change Schedule 8 compensation to more fully reflect the financial impacts of delay (to include cost compensation)</p>	<p>Will not be taken forward</p> <p>Maintaining the current approach is proportionate given the limited benefits of a change.</p>
<p>Proposal G</p> <p>Update the evidence base underpinning the calibration of the Network Rail freight payment rate</p>	<p>Will not be taken forward in PR23</p> <p>The freight sector concluded that there was insufficient time in PR23 to update the evidence base for Network Rail's freight payment rate, but intends to carry out work in readiness for PR28.</p>

Proposal	Decision
<p>Proposal H</p> <p>Revisit calibration of caps in freight regime</p>	<p>Will not be taken forward</p> <p>We will not take forward a structural change to freight caps in PR23. The caps continue to have a useful role, and calibration at an industry (rather than operator) level is simpler and more consistent with the rest of the freight regime.</p>

Adding flexibility to Schedule 8 in CP7

- 2.23 Our June 2021 and April 2022 consultations highlighted potential issues with fixing Schedule 8 parameters for the duration of a control period. This can mean, for example, that benchmarks do not respond during the control period to external shocks such as changes to traffic volumes. This potentially means that the regime is not accurately calibrated if circumstances change during the control period, which could result in large and volatile payment flows between parties.
- 2.24 As noted in Table 2.1, we considered an option to annually update benchmarks during CP7 (Proposal B). This would have applied to train operators' benchmarks, and potentially to Network Rail if we adopted Proposal A to base its benchmarks on historical data rather than forward-looking trajectories⁶. Our April 2022 consultation said that we were not intending to proceed with the proposals. However, we said that it may be appropriate to consider a mid-control period recalibration during CP7 if uncertainties about recovery from the pandemic mean that parameters turn out to have been inaccurately determined (paragraphs 1.53 to 1.54). We noted that the Schedules 4 & 8 Recalibration Working Groups were discussing options for flexibility in Schedule 8 in CP7, and that we would take into account the discussions in these working groups when we made final decisions.
- 2.25 We are not proceeding with the initial Proposals A or B, as explained in Annex B. However, we recognise that there might be circumstances under which an update to Schedule 8 parameters during the control period could bring significant benefits, by adjusting parameters to better reflect industry conditions, reducing the scope for volatile payment flows. Discussions in the recalibration working groups have continued to highlight potential benefits of being able to 'correct' parameters to better reflect industry conditions at least once during the control period.

⁶ In addition, Proposal D, implemented through Option D2, would have involved an annual update to the 'TOC Responsibility Matrix', through which TOC payment rates are calculated.

- 2.26 Currently, there is only limited scope to update Schedule 8 parameters during the control period, provided for in the passenger regime by Schedule 8, paragraph 17 (this provision is not present in the freight and charter regimes). Through this provision, train operators and Network Rail can request updates to their parameters in Appendix 1, and ORR has provided [guidance](#) (paragraphs 28 to 46) on the circumstances when we would expect to approve such requests. However, due to its bilateral nature, this provision is not well-suited to recalibrating in a co-ordinated way across multiple operators, and does not permit ORR to initiate a recalibration.
- 2.27 We are therefore proposing to include provision within Schedule 8 to allow ORR to initiate an update to Schedule 8 parameters. The provision would only be used if there were clear benefits to the industry from recalibrating, and if it was clearly justified by a material change in circumstances such as a significant change in traffic volumes that diverged from the assumptions made in the PR23 recalibration. We would seek to avoid recalibrating in response to a shock that was likely to be short-lived or had limited effects. We would not recalibrate as a result of poor performance that was under the control of industry parties. In addition, we would only initiate a recalibration if we considered that there was a sufficiently high-quality evidence base on which to base the calculations.
- 2.28 The existing Schedule 8 paragraph 17 provision, which allows Network Rail and each passenger operator to request changes to the operator's parameters, will remain in place, and we would expect to consider requests in line with ORR's existing guidance (see paragraph 2.26). ORR would only initiate a recalibration under the proposed new power in circumstances where the existing paragraph 17 provision is unlikely to suffice – for example if national data suggest that a system-wide recalibration is appropriate.
- 2.29 We would expect the Schedule 8 parameters with the greatest impact on payment flows to be most likely to be within scope of any mid-control period recalibration, i.e. Network Rail and operator benchmarks and payment rates. If we exercise the provision, this would be considered and confirmed at that time. In relation to Network Rail's benchmarks, unless there are circumstances which justify an alternative approach, we would expect the benchmarks to remain consistent with trajectories in ORR's final determination. Network Rail's benchmarks could be based on newer trajectories in circumstances where ORR had agreed for Network Rail's performance trajectories to be adjusted (this possibility is provided for, through a clear change control process, in [ORR's PR23 Policy Framework consultation](#), paragraphs 6.23 to 6.27). This would help to retain consistency between benchmarks and our regulatory expectations of Network Rail.

- 2.30 Any update would be limited to an update to parameters in Schedule 8 Appendix 1, rather than an opportunity to change the wider contractual terms of Schedule 8. The update would be based on the policy framework determined through PR23.
- 2.31 We consider that this proposal has potential benefits in allowing parameters to adjust during the control period to better reflect industry conditions. This would reduce the extent of any ‘windfall’ payments that are the result of exogenous factors. It may though reduce Schedule 8’s incentive properties – for instance, it could reduce operators’ incentives to undertake investment to improve performance as this might lead to more challenging benchmarks in future years⁷. An alternative option is to fix parameters for five years and to rely instead on the current paragraph 17 provision – though as noted, this does not appear well-suited to a co-ordinated recalibration involving multiple operators.
- 2.32 We propose that the ability for ORR to initiate a mid-control period recalibration could be included in the passenger, freight and charter regimes. (The freight and charter regimes are calibrated at the industry level, so a change to benchmarks or payment rates would necessarily affect all operators.) We consider that the case is strongest for the passenger regime, which has the greatest uncertainty about the path of future demand (we note that freight volumes were relatively stable during and after the pandemic). However, external shocks do also impact the freight and charter markets, including through the knock-on effects of changes in passenger traffic volumes. We note that the freight and charter recalibration working group has discussed reinstating automatic annual adjustments to benchmarks through use of a traffic growth multiplier, which was in use in CP5⁸. However, the reintroduction of this automatic mechanism would appear not to be needed if ORR is able to initiate an update to parameters if there is a material change in circumstances.
- 2.33 If we proceed with this proposal, we would provide policy guidance on the circumstances under which we would expect this power to be used – this will be shared as part of the PR23 draft determination. We would consider consultation responses in preparing this guidance, as well as input from the recalibration working groups.

⁷ This issue exists in the current system, but only at the point of the periodic review recalibration every five years.

⁸ The mechanism used the change in traffic volumes and a ‘congestion factor’, to automatically update benchmarks if there was a change in network traffic above a materiality threshold.

Consultation questions

Do you agree with our proposal to allow ORR to initiate a mid-control period recalibration of Schedule 8 in the event of a material change in circumstances?

Do you think that this should be a feature of each of the passenger, freight and charter regimes?

Do you have views on the circumstances under which such a power should be used?

Delay attribution

2.34 Delay attribution is the system through which delay incidents are attributed to primary cause, including allocating responsibility to an industry party. Delay attribution has a wider purpose in understanding and helping to improve operational performance, as well as providing information that is a key input to Schedule 8 calculations.

2.35 Our April 2022 consultation noted that Network Rail is in the early planning stages of a programme to update and improve the performance and delay systems and processes underpinning delay attribution. (This review is independent from the PR23 programme.) ORR will continue to liaise with Network Rail regarding this project.

2.36 We note again that no changes to participation in delay attribution will arise from the new clauses we propose in relation to GBR's future contracted operators (paragraphs 2.8 to 2.15).

Indexation of payment rates

2.37 Schedule 4 and 8 payment rates are indexed within the control period to the Consumer Price Index (CPI) measure of general price inflation. Our [April 2022 access charges consultation](#) stated that we were minded to retain CPI as the general inflation index for indexing charges and payment rates in other mechanisms (which include Schedules 4 and 8). In the parallel [PR23 conclusions on Network Rail's access charges](#), Chapter 4 confirms our decision to continue to index payment rates to CPI in CP7.

Recalibration of Schedule 8

- 2.38 Recalibration of Schedule 8 involves calculating parameters that will apply for each operator in CP7. In PR23, the passenger Schedule 8 recalibration is being led by ORR, and we have recently appointed consultants to undertake the calculations⁹. The freight and charter Schedule 8 recalibration calculations are being led by Network Rail, and ORR will make final decisions in respect of the regime parameters. As noted in Chapter 1, ORR has convened two working groups, one for the passenger sector and the other for the freight and charter sectors, to discuss and help to resolve issues arising in the recalibration. ORR chairs these groups, and there remains an open invitation to all operators to be represented on these groups.
- 2.39 The recalibrations of the passenger, freight and charter regimes are proceeding now, and we intend that they will be completed by November 2023. ORR's PR23 draft determination and final determination documents will provide progress updates ahead of completion. We will also notify the industry at key milestones, including at ORR's approval of final sets of parameters.
- 2.40 The recalibration working groups have been discussing some of the key assumptions that will underpin the recalibrations. These include: the choice of recalibration period in light of the impact of the pandemic on recent reference data; the treatment of atypical days (such as strike days) within that recalibration period; and the evidence base underpinning the calculation of Network Rail's passenger operator payment rates, including whether to adopt a recent study by the Passenger Demand Forecasting Council and SYSTRA into passenger responses to disruption. As the passenger Schedule 8 recalibration consultants commence their work, we will finalise methodologies and confirm these to the recalibration working groups.
- 2.41 In the passenger recalibration, the scope of the recalibration consultants' work is to calculate benchmarks (contractually known as 'performance points'), payment rates and sustained poor performance thresholds. The consultants will not update monitoring points, monitoring point weightings and cancellation minutes, given the limited time available for recalibration and the comprehensive updates to these parameters in PR18¹⁰. These parameters are used in Schedule 8's payment

⁹ A bespoke recalibration for MTR Elizabeth Line, which will be bilaterally agreed between MTR and Network Rail, is outside the scope of the national recalibration.

¹⁰ Monitoring points are points on the network at which the lateness of trains is measured; each service group has multiple monitoring points, reflecting key alighting locations. Monitoring point weightings are calculated for each monitoring point, to reflect the proportion of a service group's passengers alighting and

formula, as well as being necessary inputs to the calibration of other Schedule 8 parameters. Ahead of the consultants' work, we contacted Network Rail and passenger operators to set out a process through which operators and Network Rail can propose changes to monitoring points, monitoring point weightings and cancellation minutes. We have now received requests to change or retain parameters, which we will consider before confirming the parameters for CP7.

interchanging at that monitoring point. Cancellation minutes are the number of minutes of lateness that are applied to a cancellation within Schedule 8, reflecting the estimated impact of a cancelled service on passengers.

Annex A: Schedule 4 proposals not being taken forward

Proposal B1: To introduce an additional notification threshold

April 2022 consultation

- A.1 Network Rail receives a discount on the amount of compensation it pays to passenger operators for possessions-related disruption, depending on how early it notifies operators about possessions. The discount reflects the fact that the sooner operators know about a possession, the sooner they can inform passengers, thereby causing less inconvenience to passengers as a result of late service changes. In the current regime, there is no Schedule 4 incentive on Network Rail to give notification to operators as early as possible once the ‘informed traveller’ threshold at T-22 has been passed.
- A.2 In our initial September 2021 consultation, as Proposal B1 we suggested adding an additional notification threshold between the informed traveller threshold and the late threshold, which would be for use once the informed traveller threshold had been passed. In our April 2022 consultation, we said we were minded not to take forward Proposal B1, due to a lack of industry support (including lack of consensus around where to set the appropriate threshold), and concerns around the impact on the timetabling process.

Responses to April 2022 consultation

- A.3 Only Heathrow Express commented on this option, saying that, while it agrees with the proposal to increase incentives on Network Rail to notify possessions early, it did not support the introduction of an additional threshold.

Our decision

- A.4 We have decided not to take this proposal forward as part of PR23. The option to include an additional notification threshold at T-14 was considered in PR18, but we decided not to take it forward due to a lack of consensus around the appropriate threshold to add and concerns around the impact on the timetabling process. In light of there being limited benefits, and there being little support from respondents as part of PR23, we do not intend to take this proposal forward for CP7.

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

April 2022 consultation

A.5 In our April 2022 consultation, we proposed not taking forward our initial proposal to develop a method/process for settling compensation claims for lengthy possessions and periods of sustained planned disruption (SPD). We had originally proposed two options:

- **Option C1** – Develop a method for calculating cost and revenue loss compensation.
- **Option C2** – Specify in track access contracts a process for negotiating compensation claims for type 2 and type 3 possessions and SPD.

Responses to April 2022 consultation

A.6 Of those that commented, Greater Anglia expressed disappointment that ORR does not intend to develop either option C1 or C2 further, saying that settlement of claims remains a significant area of contention between parties and a barrier to closer working. It also highlighted that Network Rail has made initial proposals to operators in this area through Rail Partners and hoped that ORR will consider how this could be taken forward as part of PR23.

A.7 GTR noted proposals, which followed industry discussions involving TOCs and Network Rail, to set out a clear contractual timetable for each stage of a claim, with the aim of reducing instances where claims are on-going without resolution. This, GTR said, should hold both TOCs and Network Rail accountable for their respective sides of the claim process.

Our decision

A.8 We have decided not to take either initial option forward as an ORR-led policy, taking account of the factors we raised in our April 2022 consultation and given the lack of support for the proposal from respondents. We note the work that Network Rail has proposed through Rail Partners to develop a framework to improve the negotiation process – we encourage parties to continue to work together on initiatives to improve the process.

Proposal E: Develop a tool to estimate Schedule 4 formulaic compensation

April 2022 consultation

A.9 In our April 2022 consultation, we were minded not to take forward our proposal to require Network Rail to develop a tool for estimating formulaic compensation. Network Rail had told us that such a tool would require a large amount of work and would be costly, with potentially limited benefit if it is only relevant to a small number of operators. In addition, there was only limited support for the tool from respondents.

Responses to April 2022 consultation

A.10 Only Northern Trains commented further on this proposal, expressing disappointment that it was not being taken forward. Northern Trains said that such a tool would be beneficial in evaluating the impact of large infrastructure projects as part of the annual business planning process. It said that, even if the model provided only high-level estimates, this would be beneficial to parties in agreeing projects.

Our decision

A.11 We have decided not to take this proposal forward. In its September 2021 response, Network Rail expressed concerns about the cost of developing the tool, which it estimates at around £2m. Given concerns that the cost of developing the tool would likely outweigh any benefits, we do not intend to take this forward as a regulatory requirement, but we encourage Network Rail to keep the idea for such a tool under review.

Proposal F: To review the methodology for calculating the access charge supplement for open access operators

April 2022 consultation

A.12 Currently open access operators can elect to pay an ACS in return for receiving full Schedule 4 compensation. However, to date no open access operator has chosen to do so.

A.13 The issue that no open access operator has ever chosen to pay an ACS could indicate that the ACS is not well calibrated, which could act as a barrier to these operators receiving higher levels of compensation. One potential reason why

operators have chosen not to sign up to enhanced levels of compensation could be that they expect their up-front ACS payment to exceed the additional compensation that they are likely to receive.

A.14 We therefore proposed in our initial September 2021 consultation to review the methodology for calculating the ACS for open access operators. This would have involved calibrating the ACS for open access operators so that it covers only the additional expected compensation that would be provided (i.e. compensation for type 1 and type 2 possessions, including formulaic compensation).

A.15 However, in our April 2022 consultation, we said we were minded not to take forward a review of the methodology for calculating the ACS for open access operators, as most respondents said this could introduce undue complexity with few benefits.

Responses to April 2022 consultation

A.16 Of those that responded on this issue, Network Rail said that it agreed with our position not to review the methodology. However, Rail Partners said there was merit in pursuing a change in the methodology to make it less complicated and more transparent.

Our decision

A.17 We have decided not to take this proposal forward. There was little overall support in response to our September 2021 and April 2022 consultation. The proposal also risked introducing undue complexity with little benefit. However, we note the call for greater clarity and transparency in how the ACS is calculated, which can be taken forward through work in the Schedules 4 & 8 Passenger Recalibration Working Group.

Proposal G: Update the evidence base underpinning the calibration of freight Schedule 4 compensation payment rates

April 2022 consultation

A.18 In our April 2022 consultation, we said we would take forward, if appropriate, a review to update freight Schedule 4 compensation payment rates. We noted that, as part of any work to recalibrate freight payment rates, we would need to consider the funding implications of any changes in payment rates, and that any rise in compensation levels may be conditional on the payment of an ACS by freight operators to fund the additional Schedule 4 costs.

Responses to April 2022 consultation

- A.19 Freightliner supported the review but said that, if the increase is funded through the introduction of an ACS, it would be unlikely to lead to a change in behaviours or increased incentives. Rail Freight Group supported the review, arguing it could increase the incentive on Network Rail to divert rather than cancel freight services. Rail Partners also supported an increase in compensation rates, but said the increase should be financed by railway funders.

Our decision

- A.20 Following the April 2022 consultation, the industry, including ORR, agreed with the position to update the calibration of Network Rail's freight compensation rates. ORR gave guidance to freight operators on the evidence they would need to produce to calculate a new rate. However, the freight industry noted that there was a shortage of time to produce this evidence before the conclusion of PR23. Therefore, they opted not to proceed with the exercise in PR23, but noted that they want to proceed with this exercise in anticipation of PR28.

Annex B: Schedule 8 proposals not being taken forward

Proposal A: Change the way Network Rail's benchmarks are set, basing them only on historical data

April 2022 consultation

- B.1 In our initial June 2021 consultation, we proposed changing the way Network Rail's benchmarks are set. We proposed to base Network Rail's benchmarks only on past performance, in place of the current approach of incorporating forward-looking regulatory performance trajectories.
- B.2 We considered Proposal A to have several benefits, including simplifying the process for setting Network Rail's benchmarks and aligning the approach to setting benchmarks for Network Rail and train operators. However, we noted that Proposal A, which would set benchmarks based on past performance, would create an inconsistency with ORR's wider PR23 settlement in the form of regulatory performance trajectories (which are ORR's forward-looking expectations based on Network Rail's funding). The benchmarks would also not be able to take into account expected changes in circumstances such as a post-pandemic recovery in traffic.
- B.3 In our April 2022 consultation, our minded-to position was not to take forward Proposal A, and instead to maintain the status quo in which benchmarks are based on a forward-looking performance trajectory that is consistent with Network Rail's funding settlement. We noted that removing any forward-looking element from the benchmark-setting process would weaken the incentive for Network Rail to improve its performance relative to the status quo, because improved performance would lead to tougher benchmarks in the future.
- B.4 While our minded-to position was not to proceed with Proposal A, we noted that there were on-going discussions in the recalibration working groups on how benchmarks are set, including regarding mid-control period updates to Schedule 8 parameters. We said we would take these discussions into account when making a decision.

Responses to April 2022 consultation

- B.5 Network Rail is in favour of basing benchmarks only on historical data. Network Rail said that there is risk associated with forward-looking performance trajectories given the impact that the pandemic had on performance in CP6 and the uncertain recovery of traffic on the network. It said that a historical approach could reduce large variations in Schedule 8 payments through more accurate benchmarks that reflect actual performance. Further, it said that any performance trajectory will need to adapt to changing circumstances as the industry reaches a 'new normal'.
- B.6 Our April 2022 consultation did not ask for direct feedback on each of Proposals A to H, but operators generally agreed with the position not to pursue most of the original proposals. In response to our earlier June 2021 consultation, most operators expressed concerns about Proposal A's impact on Network Rail's incentives and the loss of consistency between performance benchmarks and Network Rail's funding settlement.

Our decision

- B.7 In summary, we do not intend to proceed with Proposal A.
- B.8 As part of our evaluation of proposals, we commissioned Europe Economics to provide advice on options that would provide flexibility for Schedule 8 to adjust to changed circumstances during CP7, and our decision on Proposal A takes into account this advice. We will shortly be publishing the Europe Economics report on [ORR's website](#).
- B.9 We consider that the main justification for Proposal A is that basing Network Rail's benchmarks on historical performance could be less administratively burdensome given the work needed to convert regulatory trajectories to benchmarks. There would also no longer be an incentive for parties to attempt to influence the setting of trajectories for the purpose of achieving more favourable Schedule 8 benchmarks.
- B.10 However, setting Network Rail's benchmarks on historical performance alone comes with its own challenges given the impact of the pandemic on performance (challenges that are having to be addressed in relation to TOC benchmarks). Network Rail's benchmarks would not be aligned with its funding settlement, so would not reflect the performance that Network Rail is expected to achieve based on the funding it receives. Network Rail's benchmarks would be driven only by its own past performance, somewhat reducing its incentives to improve performance (as improved performance would lead to tougher benchmarks in the future).

- B.11 On balance, while Proposal A could somewhat simplify the setting of Network Rail's benchmarks, this is not clear-cut, and it is a limited benefit compared with the downsides.
- B.12 In this consultation we are proposing to add flexibility to Schedule 8 in CP7 by allowing for a mid-control period update, if we consider it appropriate (see paragraphs 2.23 to 2.33). In relation to Network Rail's benchmarks, unless there are circumstances which justify an alternative approach, we would expect Network Rail's benchmarks to remain consistent with trajectories in ORR's final determination. The exception is that, in circumstances where ORR had agreed for Network Rail's regulatory performance trajectories to be updated, Network Rail's benchmarks could be based on these newer trajectories (see paragraph 2.29).

Proposal B: Update benchmarks annually to make them more flexible during control periods

April 2022 consultation

- B.13 In our initial June 2021 consultation, we proposed to introduce annual updates of benchmarks during the control period. This would allow benchmarks to respond to exogenous shocks, with the aim of reducing the scope for volatile payment flows that result from benchmarks not responding to changing circumstances. We proposed two alternative methodologies for annually updating benchmarks:
- **Option B1:** a rolling average of each service group's historical performance.
 - **Option B2:** a modelled approach based on network traffic levels during the past year.
- B.14 In our April 2022 consultation, our minded-to position was not to take forward Proposal B. We stated that keeping the current approach ensures that there are effective incentives to improve performance. However, we noted that flexibility in the setting of Schedule 8 parameters (including more frequent updates to parameters) was under discussion in the recalibration working groups, and we would take these discussions into account when we made final decisions.

Responses to April 2022 consultation

- B.15 In its response, Network Rail said that setting benchmarks for the whole period would be inaccurate and could result in large perverse payments. It said that a more flexible approach to setting benchmarks should be an essential feature of Schedule 8 for CP7, and that any attempt to set benchmarks for the whole control period will lead to inaccurate results and therefore perverse payments. Network

Rail said that Proposal B would help to reduce the importance of selecting an appropriate recalibration period, as the results from that recalibration period would only be in place for the first year of CP7 before being changed. It therefore favours an “annual, mechanistic change” to benchmarks in CP7 that would factor in progressive recovery from the pandemic. Network Rail also proposed that, as an alternative to setting benchmarks for the whole of the control period, its benchmarks could be set annually using annual performance targets that Network Rail and operators already work together to set.

- B.16 Our April 2022 consultation did not ask for direct feedback on each of Proposals A to H, but operators generally agreed with the position not to pursue most of the original proposals. In response to the June 2021 consultation, most passenger and freight operators had opposed Proposal B – others offered qualified support but did not feel it was a priority for PR23. In response to the April 2022 consultation, two operators did express concern about fixing parameters for the five-year control period. Southeastern favoured mid-control period recalibrations in the event of volatility and forecast uncertainty, but also noted that the administrative cost of annual updates could be burdensome. Transport for London made a similar point, saying that ORR should use existing mechanisms/reopeners to adjust Schedule 8 numbers for emerging discrepancies.
- B.17 Funders agreed with our minded-to position of taking a proportionate approach to changes to the regime. DfT has previously commented that an annual update to benchmarks should not be a priority for PR23, as it may be challenging to achieve and require significant resources and new processes.

Our decision

- B.18 In summary, we do not intend to proceed with Proposal B.
- B.19 As part of our evaluation of proposals, we commissioned Europe Economics to provide advice on options that would provide flexibility for Schedule 8 to adjust to changed circumstances during CP7. Our decision on Proposal B takes into account this advice.
- B.20 We do not favour mechanistic annual updates as envisaged by Proposal B. While annual updates would allow benchmarks to adjust to reflect relatively recent conditions on the network, there are notable downsides. Firstly, there would be considerable cost in carrying out annual updates. Additionally, Option B1 would have adverse incentive effects, as improving performance in one year would lead to more challenging benchmarks in future years. Option B2 would not suffer from this downside, but there would be a significant complexity to a modelled approach,

particularly as it would need to be capable of updating benchmarks at the service group level. Under Proposal B, there would be a risk that benchmarks adjust to reflect temporary shocks in previous years that no longer affect performance in the year to which the benchmark applies. There would be reduced certainty as to what benchmarks will be over the course of CP7, reducing incentives for long-term investment as it will be harder to factor Schedule 8 financial flows into business cases.

- B.21 Network Rail suggested that, as a way of implementing Proposal B, Network Rail's benchmarks could be set annually using annual performance targets, arguing that this option would provide scope for flexibility and align benchmarks with locally-agreed annual targets. However, we consider that benchmarks would not necessarily be aligned with Network Rail's funding settlement, would lack certainty and clear governance, and the approach would add cost given the annual cost of converting targets to benchmarks.
- B.22 As noted under Proposal A, we are proposing in this consultation an approach to add flexibility to Schedule 8 in CP7 by allowing for a mid-control period update, if we consider it appropriate (see paragraphs 2.23 to 2.33). We consider that this proposal provides most of the potential benefits of Proposal B, by allowing benchmarks (and other key parameters) to adjust to changing circumstances. An update would only be carried out when we consider it appropriate, which would be a proportionate approach with lower administration costs relative to the option of annual updates. It would mean that parameters should not be updated in response to shocks that are likely to be transitory, limiting the risk that parameters would be changed without justification. It would also provide greater certainty and keep intact the incentive properties of Schedule 8, by fixing benchmarks for the control period and only changing them if there is a material change in circumstances.

Proposal C: Share allocation of some types of delay within Schedule 8, to help to reduce a possible barrier to industry collaboration

April 2022 consultation

- B.23 In our initial June 2021 consultation, we proposed that Schedule 8 should treat certain classes of delay as joint or shared for the purpose of allocating delay minutes in the calculations that determine financial flows. We suggested that a move to sharing allocation of some types of delay within Schedule 8 could help to reduce a possible barrier to industry collaboration, incentivising all parties to mitigate risks and aid service recovery. However, we also expressed concern that

joint or shared allocation could add complexity to the terms and calibration of Schedule 8.

- B.24 In our April 2022 consultation, we stated that our minded-to position was not to take forward Proposal C. While we considered that the proposal conceptually had some merit, we favoured the proposal being considered in an industry-led review of delay attribution.

Responses to April 2022 consultation

- B.25 Network Rail said that increased sharing of delays through Schedule 8 would lead to more joined-up incentives between operators and Network Rail as the sharing mechanism would recognise that both parties have a role in minimising delays. It further argued that, by increasing whole-industry incentives, this proposal would help to achieve the aims of the rail reform programme. Therefore, Network Rail disagreed with ORR's position not to pursue Proposal C further.
- B.26 Our April 2022 consultation did not ask for direct feedback on each of Proposals A to H, but operators generally agreed with the position not to pursue most of the original proposals. There were limited specific comments from operators on our minded-to position not to pursue the original Proposal C.

Our decision

- B.27 We will not proceed with Proposal C. We remain of the view expressed in our April 2022 consultation that any proposal around the sharing of delay should be taken forward in an industry-led review of delay attribution. We have not seen new arguments or evidence to change this position.

Proposal D: Change how TOC-on-TOC delay is handled within Schedule 8 to address a gap in TOCs' incentives

April 2022 consultation

- B.28 In our initial June 2021 consultation, we proposed changing how TOC-on-TOC delay is handled within Schedule 8, which could address a gap in TOCs' incentives in considering delay caused to other operators. We proposed two options to implement Proposal D:
- **Option D1:** moving to a full TOC-on-TOC approach (as currently used for freight operators); or

- **Option D2:** annually updating payment rates using an updated TOC responsibility matrix.

- B.29 We expressed an initial preference for Option D2, as this could improve the accuracy of TOCs' incentives while maintaining Network Rail's incentives to manage reactionary delay, and would be more straightforward to implement using existing systems.
- B.30 However, in our April 2022 consultation, our minded-to position was not to take forward Proposal D. We noted that Option D1 is not feasible due to limitations in Network Rail's current systems. The expected benefit of Option D2, namely to slightly improve the accuracy of calibration, did not appear sufficient to take the proposal forward in isolation. However, we noted that the recalibration working groups are considering the merits of mid-control period updates to Schedule 8 parameters, and stated we would take these discussions into account when making a decision.

Responses to April 2022 consultation

- B.31 Network Rail agreed that current system capability means that moving to a full TOC-on-TOC regime (Option D1) is not feasible. However, Network Rail expressed disappointment about ORR's minded-to position. Network Rail is in favour of Option D2, which it considers could incentivise reductions in TOC-on-TOC delays.
- B.32 Our April 2022 consultation did not ask for direct feedback on each of Proposals A to H, but operators generally agreed with the position not to pursue most of the original proposals. In responses to our initial June 2021 consultation, most operators had said that there was no gap in operators' incentives and therefore no clear problem to be solved. Of the two options, operators favoured D2 over D1, but they noted the resource costs associated with annual updates.

Our decision

- B.33 We do not intend to proceed with Proposal D. As noted in our April 2022 consultation, Option D1 is not feasible due to limitations in Network Rail's current system capability. We have decided not to proceed with Option D2, as it has only limited incentive benefits, and we have not seen new arguments or evidence to change our position. However, updates to the TOC responsibility matrix may be a feature of mid-control period updates as put forward in this consultation (see paragraphs 2.23 to 2.33), albeit that these updates would not be automatic or mechanistic as envisaged by Option D2.

Proposal E: Change the allocation of delay within Schedule 8 for unidentified incidents to make the split more accurate

April 2022 consultation

- B.34 In our initial June 2021 consultation, we proposed changing the allocation of delay within Schedule 8 for unidentified incidents to make the split more accurate. Unidentified incidents are those where there is insufficient information to determine a primary cause. Schedule 8 currently allocates delay minutes from unidentified incidents according to a set formula. Network Rail suggested that it is allocated an excessive amount of delay under this formula, and it requested that new analysis be conducted to better understand the causes of unexplained delays and which party is best placed to mitigate them. Network Rail proposed that this could lead to a changed methodology for allocating unidentified delays within Schedule 8.
- B.35 In our April 2022 consultation, our minded-to position was not to proceed with Proposal E. We noted that this issue is closely linked to underlying delay attribution, in particular the allocation of sub-threshold delays, and that industry-led efforts to reform delay attribution may interact with this issue. ORR considered that it would be better to first consider how sub-threshold delay is handled within delay attribution, and that Proposal E should not be a priority for PR23.

Responses to April 2022 consultation

- B.36 Network Rail said that there is merit in Proposal E, and that there is evidence to support shared allocation of unexplained delay. However, Network Rail recognised that ORR should focus on other Schedule 8 reforms such as enabling Schedule 8 'opt-outs' and optimising the recalibration of Schedule 8. It said that it may be appropriate to revisit this reform at a later date.
- B.37 Our April 2022 consultation did not ask for direct feedback on each of Proposals A to H, but train operators generally agreed with the position not to pursue most of the original proposals. There was limited specific comment from operators on our minded-to position not to pursue Proposal E.

Our decision

- B.38 We will not proceed with Proposal E. We remain of the view expressed in our April 2022 consultation that it is not a priority in PR23 to change the allocation of delay within Schedule 8 for unidentified incidents. We support industry-led efforts to

consider reforms to delay attribution. We have not seen new arguments or evidence to change this position.

Proposal F: Change Schedule 8 compensation to more fully reflect the financial impacts of delay (to include cost compensation)

April 2022 consultation

- B.39 In our initial June 2021 consultation, we sought views on whether we should change Schedule 8 compensation to more fully reflect the financial impacts of delay. This would factor in costs such as the 'Delay Repay' scheme through which passengers are compensated for service delays. This could make compensation more accurate and incentivise parties to take account of the full impacts of delays they cause.
- B.40 We proposed two alternative methodologies aimed at better reflecting the wider financial impacts of delay in Schedule 8:
- **Option F1 – Formulaic recovery.** Under this approach, payment rates would be calibrated to reflect a pre-determined proportion of the cost impacts expected to result from delay.
 - **Option F2 – Actual sums recovery.** Under this approach, passenger operators would, on a case-by-case basis, recover from Network Rail the costs they actually incur as a result of delays caused by Network Rail.
- B.41 In our April 2022 consultation, our minded-to position was not to proceed with Proposal F. We considered that the proposal had some merit in making Schedule 8 payments more fully reflect the financial impacts of delay. However, there would be a greater element of complexity, particularly if costs beyond Delay Repay were factored into compensation. In addition, this proposal is only relevant to the passenger regime, and the reduced exposure of passenger operators to Schedule 8 that has occurred through concession-style contracts means that a change would have limited benefits to operators. Therefore, we suggested that it was not proportionate to take forward this proposal.
- B.42 Network Rail had said that making payment rates more reflective of the wider financial impact of delay would mean that the sustained poor performance (SPP) mechanism was no longer needed and could be removed. However, we considered that the SPP mechanism has an on-going role in providing financial

protection for operators in the case of prolonged disruption, and therefore remained an important protection for operators.

Responses to April 2022 consultation

- B.43 Network Rail said that there was merit in a ‘full and final’ approach to compensating operators. This in turn could remove the need for the SPP mechanism and encourage greater signposting and uptake of delay compensation by passengers. Network Rail agreed that ORR should focus on other Schedule 8 reforms, but said that it may be appropriate to revisit this reform proposal at a later date.
- B.44 Our April 2022 consultation did not ask for direct feedback on each of Proposals A to H, but operators generally agreed with the position not to pursue most of the original proposals. There was limited specific comment from operators on our minded-to position not to pursue Proposal F.

Our decision

- B.45 We will not proceed with Proposal F. We remain of the view expressed in our April 2022 consultation that the proposal would add complexity with only limited benefits. We have not seen new arguments or evidence to change this position.
- B.46 We note Network Rail’s arguments regarding the potential for removal of the SPP mechanism if compensation rates are ‘full and final’. However, in line with our position and reasoning in the April 2022 consultation, we consider that the SPP mechanism has an on-going role in providing a financial safeguard in the case of prolonged disruption. Recalibration of SPP thresholds will be taken forward by the Schedule 8 passenger recalibration consultants, in communication with the recalibration working group.

Proposal G: Update the evidence base underpinning the calibration of the Network Rail freight payment rate

April 2022 consultation

- B.47 In our initial June 2021 consultation, Proposal G was to update Network Rail’s freight payment rate, which is designed to reflect the average financial impact of delay on freight operators. The evidence base supporting the payment rate was generated in the 2008 periodic review (PR08), and the payment rate has subsequently only been adjusted to reflect price inflation (RPI and subsequently CPI inflation). It therefore may not accurately reflect the current financial impacts

that freight operators experience when one of their services is delayed or cancelled.

- B.48 In our April 2022 consultation, our minded-to position was to begin the process of updating the evidence base underpinning Network Rail's freight payment rate. ORR also stated that a preliminary step in this exercise would be to clarify and agree the financial impacts for which Network Rail's freight payment rate should compensate, as this was unclear from the PR08 exercise.

Responses to April 2022 consultation

- B.49 There was broad consensus among Network Rail and freight operators that there is value in revisiting the evidence base underpinning Network Rail's freight payment rate. In response to the April 2022 consultation, freight operators raised concerns that the Network Rail payment rate has become outdated since its calibration in PR08 and does not accurately reflect the financial impacts of disruption. The payment rate may not account for changes since 2008, such as changes to the mix of commodities carried by rail.

Our decision

- B.50 We have agreed with the freight industry not to proceed with Proposal G in PR23 due to timing constraints. Following the April 2022 consultation, the industry and ORR initially agreed that the Network Rail freight payment rate should be recalculated based on fresh evidence. ORR provided guidance to freight operators on the evidence they would need to produce to calculate a new payment rate. While generally accepting the guidance, the freight industry noted that there was a shortage of time to produce this evidence before the conclusion of PR23. Therefore, the freight industry opted not to proceed with the exercise in PR23, but noted that they want to proceed with this exercise in anticipation of PR28. Network Rail's freight payment rate will therefore be uplifted for CPI inflation, as it was in PR18.
- B.51 Through the freight & charter recalibration working group we also informally consulted charter operators on whether there should be a full recalibration of Network Rail's charter payment rate. Those operators that responded favoured uplifting the current rate for inflation rather than calculate a new rate based on fresh evidence. We agree with this pragmatic approach, so Network Rail's charter payment rate will, like the freight payment rate, be uplifted for CPI inflation for CP7.

Proposal H: Revisit calibration of caps in freight regime

April 2022 consultation

- B.52 In the freight Schedule 8 regime, Network Rail and freight operators have reciprocal annual caps which limit the net annual liability they face. Additionally, operators can choose to purchase an incident cap, which acts as a form of insurance, limiting the amount they must pay under Schedule 8 for any single delay incident for which they are responsible. For this insurance, freight operating companies (FOCs) pay incident cap access charge supplements (ICACS).
- B.53 Network Rail had suggested that caps can limit FOCs' incentives to reduce the delay they cause to other parties. Network Rail considered that incident caps are hit too frequently at present, weakening FOCs' incentives to limit delay. In our initial June 2021 consultation, we set out our view that incident and annual caps play an important role in limiting FOCs' financial risks, and therefore they should be retained in their current form.
- B.54 In our April 2022 consultation, our minded-to position was not to proceed with Proposal H. We stated that we remained of the view that incident and annual caps are an important part of the Schedule 8 regime for FOCs. While these caps can have adverse incentive effects on FOCs as their incident or annual cap level is reached, we considered that they provide a useful insurance mechanism. Fixing the level of the caps for CP7, rather than annually updating the caps for new delay evidence (as Network Rail had proposed), gives FOCs a greater degree of financial stability, providing them with confidence to invest in the industry. We stated that ICACS should be recalculated in PR23, as part of the Network Rail-led recalibration of the freight regime, to ensure they are set at the appropriate level.

Responses to April 2022 consultation

- B.55 In response to the April 2022 consultation, Network Rail said that incident caps may not be appropriate for some larger operators, and that a bespoke operator-by-operator approach may be more appropriate. Network Rail suggested that this could achieve incident caps that are set sufficiently high to only be hit in exceptional circumstances, while being low enough to give freight operators necessary protection from extreme performance scenarios. Network Rail holds the view that a review of these caps could improve the regime for freight operators. However, it recognised that ORR should focus on other Schedule 8 reforms. Network Rail suggested that it may be appropriate to revisit this reform at a later date.

B.56 Our April 2022 consultation did not ask for direct feedback on each of Proposals A to H, but operators generally agreed with the position not to pursue most of the original proposals. There was limited specific comment from operators on our minded-to position not to pursue Proposal H.

Our decision

B.57 We will not proceed with Proposal H. We remain of the view that incident and annual caps are an important part of the Schedule 8 regime for freight operators. For the reasons given in our April 2022 consultation, outlined above, we will not proceed with operator-specific ICACS rates or with annual updates to ICACS rates. We have not seen new arguments or evidence to change this position. Our intention is that freight caps will be recalibrated as normal as part of PR23.

Annex C: Schedule 8 initial legal drafting proposals

C.1 This annex sets out the proposed new Schedule 8 sub-paragraphs, as introduced from paragraph 2.8 of this document, together with the relevant existing paragraphs. Paragraph references are based on the existing [passenger model contract](#).

C.2 In the following Schedule 8 paragraph 12, sub-paragraphs 12.1 and 12.2 are existing clauses, and sub-paragraphs 12.3 to 12.5 are proposed new clauses.

12. Payment procedures

12.1 Payments and set-off

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

12.2 Payments in the event of dispute

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

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

the subject of a Joint Inquiry, in which case interest shall be payable at the prevailing base rate of Barclays Bank plc.

12.3 *Application of paragraph 12.4*

Paragraph 12.4 shall apply if:

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

12.4 *Restriction on payments*

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

12.5 *Reinstatement of payments*

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

- C.3 In the following Schedule 8 paragraph 18, sub-paragraphs 18.1 and 18.4(b) are existing clauses, and sub-paragraphs 18.4(c) is a proposed new clause.

18. Compensation for sustained poor performance

18.1 Definitions

In this paragraph 18, unless the context otherwise requires:

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

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

“Periodic Liability Date” means the first day of the first, fourth, seventh and eleventh Periods in each Relevant Year ignoring for these purposes

any Period that commenced before the Transition Date as referred to in Clause 19; and

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

18.2 Indemnity

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

18.3 Determination of Relevant Losses

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

$$SPPL = RL - PS$$

where:

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

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

18.4 Restrictions on claims by Train Operator

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

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



© Crown copyright 2022

This publication is licensed under the terms of the Open Government Licence v3.0 except where otherwise stated. To view this licence, visit nationalarchives.gov.uk/doc/open-government-licence/version/3

Where we have identified any third party copyright information you will need to obtain permission from the copyright holders concerned.

This publication is available at orr.gov.uk

Any enquiries regarding this publication should be sent to us at orr.gov.uk/contact-us

