



Conclusions to our January 2018 consultation on improvements to the drafting of Schedules 4, 7 and 8

July 2018

Summary

In January 2018 we invited suggestions for improvements to the drafting of Schedules 4, 7 and 8 of the model freight and passenger operator track access contracts¹. The scope of this consultation was limited to comments on the clarity, consistency and simplicity of the contractual drafting of these schedules. We received four responses² which we have published on our website. We have considered the suggestions made by respondents carefully and this document summarises the suggestions we received, the actions we have taken in response to them, and our rationale for doing so.

Where appropriate, we have reflected the suggestions made in the proposed CP6 model versions of Schedules 4, 7 and 8 that we are publishing as part of our consultation on implementing PR18.

A number of the suggestions made went beyond improvements to the clarity, consistency or simplicity of the drafting of the model contracts and would require amendments to policy. These were outside the scope of our January 2018 consultation. A separate consultation and engagement process was followed (which has now concluded) for making amendments to charges and incentives policy.

¹ The consultation and responses received are available [here](#).

² We received responses from the Department for Transport, Freightliner, Network Rail and the Stagecoach Rail and Virgin Rail Group. These are available [here](#).

Model contract	Proposal/suggestion made in the January 2018 consultation	Our response
Schedule 4 proposals		
Freight	A suggested change in wording regarding round trips to reflect current practice between parties.	We have proposed amendments to the contractual wording in part 2, paragraph 3.5 of the freight contract.
Franchised passenger	Missing punctuation in paragraph 1.1.	Proposed change included in the definition of Restriction of Use in part 3, paragraph 1.1 of Schedule 4.
Franchised passenger	The contract contains references to a now obsolete train service database.	Proposed changes included in part 3, Paragraphs 1.1, 9.1(b)(iii) and 9.2(b)(i).
Freight	The amounts and conditions that apply to each category of disruption sums should be tabulated in an appendix to each of Schedule 4 and 8.	We have proposed a new appendix 1 in Schedule 4 which sets out the two Enhanced Disruption Sums and to which the definitions now cross-refer. Schedule 8 appendices already set out sums referred to in that schedule. We do not consider it appropriate, however, for the Schedule 8 appendices to duplicate the sums now set out in the new Schedule 4 appendix (and vice versa).
Freight	Schedule 8 rates should be payable for long unplanned incidents rather than Schedule 4 rates.	This is a proposal to change the policy for how long periods of unplanned disruption should be compensated rather than a suggestion to improve the consistency or simplicity of the current drafting. This suggested change is therefore out of scope.
Freight	The current contract wording is confusing that it cross refers between Schedule 4 and 8 and back again.	We have considered this suggestion but are of the view that to remove all the relevant cross-referring would require considerable re-drafting and duplication within the two schedules, and such duplication is not appropriate. Alternatively, moving the references from Schedule 8 into Schedule 4 (which was also part of the

Model contract	Proposal/suggestion made in the January 2018 consultation	Our response
		<p>suggestion) would require cross-references in Schedule 8, for no benefit.</p> <p>Therefore, we propose not to adopt this suggestion.</p>
Freight	There is no clear definition of how a cancellation caused by planned disruption is counted.	We consider that this is an issue that should, if appropriate, be taken forward through the network code rather than through revisions to contractual drafting.
Freight	The circumstances in which Network Rail can declare a restriction of use are unclear.	We consider that this is an issue that would require further policy consideration rather than something that can be taken forward as part of the contractual wording process.
Freight	A suggested change to the category 3 payment terms.	We consider that this is an issue that should, if appropriate, be taken forward through the network code rather than through revisions to contractual drafting.
Franchised passenger	Definition of Train-Bus-Train is unnecessarily cumbersome.	In our view, the language is already clear and no further adjustment is needed.
Franchised passenger	The contract does not specify the length of advance notice that a TOC requires to reinstate train services in the case of a cancelled possession.	We consider that this is an issue that would require further policy consideration rather than something that can be taken forward as part of the contractual wording process.
Franchised passenger	A suggestion that the Restrictions of Use (RoU) trigger date should be defined more clearly with reference to whether the dispute relates to the Day 42 statement or the possession itself.	In our view, the language is already clear and no further adjustment is needed.

Model contract	Proposal/suggestion made in the January 2018 consultation	Our response
Franchised passenger	A suggestion that TOCs should be compensated for 'all Relevant Losses' in a Network Rail strike scenario and the mechanism for compensation should be simple rather than complex, perhaps by using a 'liquidated sums' approach for revenue loss.	We consider that this is an issue that would require further policy consideration rather than something that can be taken forward as part of the contractual wording process.
Franchised passenger	Suggestion of change to definition of RoU Direct Cost definition to address inconsistent claim behaviour by Network Rail.	We consider it is for the TOC to make the case for why its costs fall within the intent of the definition. It is for Network Rail to pay for reasonably incurred costs that the TOC can demonstrate are related to the possession.
Franchised passenger	The geographical limits to which Annex B applies should be defined. The passenger model contract sets out the calculations that are used to make payments in relation to cost compensation for rail replacement services and references Annex B but currently does not define the geographical limits to which Annex B should be used.	The respondent is correct in saying that the contract does not specify the geographical limit. However, it is clear from the contract that pairings which fall within the RoU footprint should be calculated. Any claims that go beyond that (e.g. extended bus services) would need to be justified by the TOC (i.e. be shown to be more efficient). We do not consider that it is appropriate to change the contract at this time.
Franchised passenger	Paragraph 2.8(a) is unclear for instances of more than one period.	In our view the language is already clear and no further adjustment is needed. The contract states that notice relates to the Period in which that Restriction of Use commences - one Restriction of Use can only commence once.
Franchised passenger	Suggestion that TOCs should get higher a Schedule 4 payment when Network Rail makes changes to lessen the effect of a possession at later notice.	We consider that this is an issue that would require further policy consideration rather than something that can be taken forward as part of the contractual wording process.

Model contract	Proposal/suggestion made in the January 2018 consultation	Our response
Schedule 7		
Freight and franchised passenger	Introduce a rounding rule for indexation of charges to avoid issues of formulas resulting in values with an infinite number of decimal places.	Proposed change included in the definition of the Initial Indexation Factor in part 1, paragraph 1 (for all track access contracts). Also in the definition of the Phased in Charges Indexation Adjustment in paragraph 2.7.3 of part 1 of Schedule 7 of the freight contract.
Charter and franchised passenger	Extend the timescale for financial adjustments in respect of amended train consist data and require operators to submit such data in a set format.	Proposed change included in part 2, paragraph 10.3(e).
Freight, charter and franchised passenger	Allow operators to opt-in to receiving invoices from Network Rail electronically.	Proposed change included in part 16, paragraph 16.1.2 (for all track access contracts; the change would be made to the main body of the contract, not Schedule 7).
Freight	Remove the provision stating that operators are not required to pay charges if a train does not reach its destination for a reason attributable to Network Rail.	We consider that this is an issue that would require further policy consideration rather than something that can be taken forward as part of the contractual wording process.
Freight, charter and franchised passenger	Use either “as a result of” or “as a consequence of” consistently throughout the contracts.	These terms have different meanings in context and so changing the term used risks changing the effect of the contracts. We do not consider that the existing wording is problematic or unclear.
Freight and franchised passenger	Remove all references to the route-level efficiency benefit sharing mechanism (REBS).	We have made a separate policy decision to remove REBS for CP6. Accordingly, we have removed most references to REBS, except those required for transitional purposes.

Model contract	Proposal/suggestion made in the January 2018 consultation	Our response
Schedule 8		
Franchised passenger	Amend the wording in paragraph 18.2 to reflect our letter to industry in November 2014 ³ , which clarified the 'relevant losses' that the sustained poor performance (SPP) mechanism is intended to compensate operators for.	Proposed change included in paragraph 18.2 of our consultation.
Franchised passenger	Clarify that the "passenger timetable" means the "applicable timetable" that is advertised to the public.	Proposed change included in definition of passenger timetable in paragraph 1.1.
Franchised passenger	Make it clearer in paragraph 17.5 that any changes to Appendix 1 in Schedule 8 could require consequential changes to Appendix 3.	Proposed change included in paragraph 17.5.
Franchised passenger	Make it more explicit in paragraph 17.1 when Schedule 8 can be re-opened within a control period.	We are discussing with the Passenger Schedule 4 & 8 Re-calibration Working Group how best to deliver this.
Freight	Include a table in an appendix to Schedule 8 setting out the amounts and conditions that apply to each category of cancellation.	We have proposed a new appendix 1 in Schedule 4 which sets out the two Enhanced Disruption Sums and to which the definitions now cross-refer. Schedule 8 appendices already set out sums referred to in that schedule. We do not consider it appropriate, however, for the Schedule 8 appendices to duplicate the sums now set out in the new Schedule 4 appendix (and vice versa).
Freight	The current contract wording is confusing that it cross refers between Schedule 4 and 8 and back again.	We have considered this suggestion, but are of the view that to remove all the relevant cross-referring would require considerable

³ Letter from John Larkinson (ORR) to Charles Robarts (Network Rail) regarding SPP on 14 November 2014. This may be accessed [here](#).

Model contract	Proposal/suggestion made in the January 2018 consultation	Our response
		<p>re-drafting and duplication within the two schedules, and such duplication is not appropriate. Alternatively, moving the references from Schedule 8 into Schedule 4 (which was also part of the suggestion) would require cross-references in Schedule 8, for no benefit.</p> <p>Therefore, we propose not to adopt this suggestion.</p>



© Crown copyright 2018

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