



OFFICE OF RAIL REGULATION

John Thomas
Director of Competition and Regulatory Economics
Telephone 020 7282 2025
Fax 020 7282 2044
E-mail john.thomas@orr.gsi.gov.uk

11 July 2008

Dear consultee

Periodic review 2008: Train operator compensation from possessions – consultation on changes to the compensation regime for freight operators, franchise passenger operators access charge supplements and part G of the network code

1. Train operators currently receive compensation for possessions through schedule 4 of their track access agreement and / or through part G of the network code.
2. We understand from discussions with Network Rail and train operators that the current compensation mechanisms for possessions are not working as effectively as they should. In response to our request the industry¹ has recently put forward proposals for changes to schedule 4 of freight train operators' track access agreements. This follows industry recommendations for changes to passenger train operators' schedule 4 and part G of the network code for all operators in February and March 2008.
3. Taking the industry's proposals, this letter consults on:
 - the changes that we intend to make to schedule 4 of freight train operators' track access agreements (including legal drafting);
 - some fairly minor changes to part G (for both passenger and freight operators) that we propose to make following consultation on the passenger compensation regime; and
 - revised proposals for franchise passenger track access charge supplements in schedule 4 following in particular the further work that we have done on network availability.
4. Details of our proposals are included in the annex to this letter.

¹ Freight operators and Network Rail

Consultation responses

5. We would welcome views on the issues raised in the annex, in particular on:

- (a) Our proposals for the level of liquidated damages sum compensation to be available for freight operators under the new regime;
- (b) Our proposals not to have a de-minimus monetary threshold for access to bespoke compensation for freight operators;
- (c) Our proposed changes to the legal drafting of schedule 4 for freight operators and part G for all operators; and
- (d) Our proposed access charge supplements for franchised passenger operators.

6. We also welcome responses more generally on the industry's proposals for changes to freight operators schedule 4.

7. Please can you send your views on the issues we have raised in electronic format (or if not possible, in hard-copy format) by **Friday 1 August 2008** to:

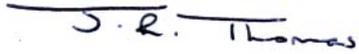
Ekta Sareen
Assistant Economist
Competition and Regulatory Economics
Office of Rail Regulation
1 Kemble Street
London WC2B 4AN
Tel: 020 7282 2164
Email: ekta.sareen@orr.gsi.gov.uk

8. We are also happy to discuss any of the issues raised in this letter. In the first instance please contact Tim Griffiths on 0207 282 2163 or email at: tim.griffiths@orr.gsi.gov.uk.

9. If you send a written response, you should indicate clearly if you wish all or part of your response to remain confidential to ORR. Otherwise we would expect to make it available in our library and on our website and potentially to quote from it. Where your response is made in confidence please can you provide a statement summarising it, excluding the confidential information that can be treated as a non-confidential response. We may also publish the names of respondents in future documents or on our website, unless you indicate that you wish your name to be withheld.

10. Copies of this letter can be found in the ORR library and on the ORR website (www.rail-reg.gov.uk).

Yours faithfully

A handwritten signature in black ink that reads "J.R. Thomas". The signature is written in a cursive style with a horizontal line above the letters.

John Thomas
Director, Competition and Regulatory Economics

Annex – Our proposals for changes to the compensation regime for freight operators, franchise passenger operators access charge supplements and part G of the network code

Structure of this annex

1. This annex sets out our proposals for changes to the possessions compensation regime for freight operators and part G of the network code. The annex is structured as follows:

- Brief summary of current possessions compensation arrangements and concerns raised by industry;
- Industry proposals for changes to possessions compensation;
- Our draft conclusions for changes to possessions compensation;
- Our proposals for implementing changes to part G of the network code; and
- Next steps.

Current arrangements for possessions compensation

2. Train operators receive compensation for possessions and amended timetables through the following components.

- Under schedule 4, in return for the payment of an access charge supplement, franchised passenger operators receive formula based compensation for revenue losses from planned possessions and, for significant disruption (generally longer than a weekend) or for possessions related to a major project (and in each case not related to network change), compensation for certain categories of costs (but not any additional revenue loss). Schedule 8 provides formula based revenue compensation for unplanned possessions (including possession overruns).
- Some open access passenger operators have signed up to different parts of the schedule 4 provisions set out above, whilst others have no schedule 4 provisions at all.
- For freight operators, schedules 4 and 8 provide compensation for service variations and cancellations in respect of short notice/unplanned/overrunning possessions notified after T-12.
- Under part G, for possessions associated with network change most passenger and freight operators can claim for full revenue losses (over and above that

receivable under the schedule 4 formula) and for costs, direct losses and expenses (including loss of revenue), net of any benefits.

Concerns with the current regime

3. We understand from Network Rail and train operators that although the current regime has strengths it also has a number of weaknesses, namely:

- issues around the boundaries between schedule 4 and part G;
- an inconsistent approach to compensating train operators for the effects of possessions;
- concerns over the accuracy of compensation arrangements and the resulting economic signals;
- a lack of transparency in the part G and schedule 4 process; and
- unnecessarily high transaction costs.

4. Partly in response to these concerns, we asked the industry to undertake a review of possessions compensation. One of the key outputs that we sought from this review was the incorporation of all possessions compensation in schedule 4².

The industry recommendations on changes to the freight possessions compensation

5. The industry has provided recommendations for changes to possessions compensation on 31 January 2008³, 14 March 2008⁴ and 1 July 2008⁵. The first two sets of recommendations were primarily concerned with changes to the passenger regime and part G of the network code. We subsequently consulted on these in April 2008⁶ and set out

² Our letter and remit for the industry is given in *Train operator compensation for possessions*, Office of Rail Regulation, January 2007. This document can be accessed at: http://www.rail-reg.gov.uk/upload/pdf/pr08-toc_comp.pdf

³ Periodic review 2008: Recommendation to ORR on changes to the regime for disruptive possessions, Schedule 4 Policy Group, January 2008. This document can be accessed at: http://www.rail-reg.gov.uk/upload/pdf/pr08-poss-recs_comp_regime_310108.pdf

⁴ Periodic review 2008: Recommendation to ORR on changes to the regime for disruptive possessions, Schedule 4 Policy Group, March 2008. This document can be accessed at: http://www.rail-reg.gov.uk/upload/pdf/pr08-rcmd_flwup_290208.pdf

⁵ Periodic review 2008: Recommendation to ORR on changes to the regime for compensating disruptive possessions – freight, July 2008. This document can be accessed at: http://www.rail-reg.gov.uk/upload/pdf/pr08-ISG_recalls_ftg_comp_010708.pdf

⁶ Periodic review 2008: Train operator compensation from possessions – consultation on changes to the compensation regime for passenger operators and part G of the network code for all

our draft determinations in June 2008⁷. The July industry recommendations are concerned with the changes to the freight regime and form the main part of this consultation.

6. The industry recommends that freight schedule 4 should maintain the existing provisions for compensation for late notice (after T-12) service variations and cancellations (SV&C provisions). These provide compensation of around £400 for service variations and £900 for cancellations (in 2006/7 prices).

7. The industry recommends that new tiers of compensation are introduced for extreme planned disruption (notified before T-12). In return for the enhanced provisions, freight operators would no longer be able to claim compensation for possessions under part G. The total compensation under the proposed regime would be of a similar scale to that currently available under part G. The proposed criteria and categories of compensation for extreme planned disruption are set out in table 1.

8. The industry was unable to agree on the proposed levels of flat rate compensation available for category 1 or 2 disruption aside that compensation for category 2 disruption should be around 10 times category 1. The industry was also unable to agree on a de minimus threshold for access to possible top-up compensation under category 3. We make recommendations on these two elements below. Further details of the industry's recommendations are given in *Periodic review 2008: recommendation to ORR on changes to the regime for compensating disruptive possessions - freight*, July 2008⁸.

operators, Office of Rail Regulation, April 2008. This document can be accessed at: http://www.rail-reg.gov.uk/upload/pdf/pr08-poss_comp_pass_090408.pdf

⁷ Periodic review 2008: Draft determinations, Office of Rail Regulation, June 2008. This document can be accessed at: <http://www.rail-reg.gov.uk/upload/pdf/368.pdf>

⁸ *Periodic review 2008: Recommendation to ORR on changes to the regime for compensating disruptive possessions - freight*, Schedule 4 Policy Group, July 2008. This document can be accessed at: http://www.rail-reg.gov.uk/upload/pdf/pr08-LSG_recs_fgt_comp_010708.pdf

Table 1: Proposed triggers for different levels of compensation treatment for planned disruption

	Disruption	Threshold (Where due to a possession advised in all material aspects before T-12)	Compensation treatment
"claimable events"	Category 1 disruption	<ul style="list-style-type: none"> • The end to end journey of the service is affected by more than 10 miles; or • The planned departure time of the service differs by more than 60 minutes; or • The planned arrival time of the service at destination differs by more than 60 minutes; or • More demanding length or weight restrictions for the affected service are imposed. 	Flat rate sum of [£a] per service affected (payable only once per service)
	Category 2 disruption	<ul style="list-style-type: none"> • The affected service is cancelled (subject to the 28-day test as currently applied within SV&C provisions⁹); or • More demanding gauge restrictions for the affected service are imposed; or • The use of at least one additional locomotive on the affected service is required; or • The use of a diesel locomotive as a substitute for an electric locomotive is required. 	Flat rate sum of [£b] ¹⁰ per service affected (payable only once per service)
"yellow flag events"	Category 3 disruption	<ul style="list-style-type: none"> • The access from Origin or to Destination is blocked (included where a suitable alternative gauge cleared route is not available for longer than 60 hours)¹¹; or • Any of the freight conveyed on the service has to be transported by other means; or • The use of at least one additional locomotive on the affected service is required¹²; or • The use of a diesel locomotive as a substitute for an electric locomotive is required¹². 	Flat rate sums apply as set out above Possibility of top-up compensation based on actual costs/losses (net of benefits) – only where the total liquidated damages sums compensation under compensates by more than [£X per service or per possession (subject to further discussion)
No compensation for other forms of planned disruption			

Note: Existing provisions for compensating late notice service variations and cancellations would be retained

⁹ This need not necessarily be included in the contractual drafting but could for example be addressed in Criteria and Procedures documentation

¹⁰ Where "b" equals approximately 10 X "a" (to reflect the more significant impact of the events listed under Category 2 disruption)

¹¹ "Origin" and "Destination" as per the definitions in Clause 1 of the freight track access contract

¹² EWS and Network Rail proposed that this provision should apply only where there is a need for the additional locomotive to be procured from a third party, however this is still subject to review in the legal drafting conclusions.

Our draft determinations on changes to freight possessions compensation

9. We welcome the recommendations made by the industry for changes to freight operator compensation for planned disruption. The recommendations seem well-founded and have broad industry support. We therefore do not intend to make large-scale changes to the recommendations. We only intend to recommend changes in four areas:

- the level of flat rate compensation, where the industry could not reach agreement;
- the level of a de minimus threshold, where the industry could also not reach agreement;
- triggers for category 3 disruption; and
- compensation rates for late notice disruption, where we consider the current arrangements could result in Network Rail adopting a differentiated approach between operators.

Flat rate compensation for late notice disruption

10. Under current schedule 4 provisions freight operators receive compensation where a planned service is varied, usually with relatively little notice, for a reason attributable to Network Rail and where the variation meets one or more of a list of criteria. These criteria are set out in Schedule 4 and are intended to cover circumstances, such as the use of a longer diversionary route or a delayed departure time, which are likely to cause the operator significant additional costs. Although we do not currently specify the precise values of the service variation sum we would expect them to be approximately £400 and £900 respectively (in 2006/7 prices). Freight operators are able to obtain higher compensation in return for the payment of an access charge supplement.

11. As part of our review of schedule 4 we have become aware that even in the absence of an access charge supplement not all freight operators have the same service variation or cancellation sums. We do not consider that this is equitable and could lead to Network Rail treating operators differently. We therefore propose to harmonise the compensation available and propose the following rates at the highest of the rates currently paid by Network Rail (all rates are in 2006/7 prices):

- Service variation - £493
- Cancellation - £942

12. Rates for freight operators with bespoke regimes would be uplifted in line with these increases.

13. We welcome views on whether the proposed rates are reasonable and additional evidence on the current level of part G compensation.

De minimus threshold

14. There have been a number of discussions on whether there should be a de minimus level set for category 3 disruption before compensation could be claimed and if so what that level should be and whether it should be based on each possession or each train affected. The industry has been unable to reach a consensus on this.

15. The modelling work which has informed the proposed level of the category 1 and category 2 disruption amounts, has been undertaken excluding a de minimus level. In discussion it has been suggested that therefore to include a de minimus level would require a rerun of the model to calibrate the regime.

16. If a de minimus level was to be introduced the level at which it has been suggested it should be set has ranged from zero to £10,000 for each possession (similar to that for the passenger possession compensation regime). A key issue differentiating the freight regime from the passenger regime is that in the freight regime, the impact of each individual train will trigger compensation, whereas in the passenger regime compensation is triggered based on the duration of the possession. It is therefore difficult to set a freight de minimus level at £10,000 based on each possession, as actual cost compensation is only paid for, and a de minimus level proposed for, trains affected by category 3 disruption.

17. On the basis that:

- (a) each category 3 event can only be triggered in an explicit way (as defined);
- (b) category 3 disruptions only account for around 4.5% of baseline disruption; and
- (c) compensation would only be provided if a claim is submitted by a train operator; and
- (d) there is no de minimus level currently for part G compensation.

18. We consider that it should be left to the discretion of the train operator as to whether or not to apply for actual cost compensation - which in any event would need to be greater than any compensation already received under category 2. The train operator would need to support any application by providing clear justification for any additional compensation claimed.

Triggers for category 3 compensation

19. There is also one point in the recommendations that the industry highlighted as only being proposed by Network Rail and EWS. This is in relation to the trigger for category 3 disruption occurring where either at least one additional locomotive or a diesel locomotive, instead of an electric one, is required to be used. Network Rail and EWS propose that, in order for the trigger to be operated, the additional or diesel locomotive has to be procured from a third party which is not an affiliate of the train operator. We understand that EWS considers that if it can accommodate the use of the additional locomotive or diesel

locomotive from its own fleet then it would be adequately compensated for such a change through any liquidated compensation paid.

20. We have considered this further and while we understand the need to concentrate category 3 compensation where additional costs are the most significant, we are concerned that the proposals could create perverse incentives, for example, as actual cost compensation is available operators may be incentivised to hire in additional locomotives rather than source them from their own fleet. It may also be difficult to validate operators' claims that they did not have spare locomotives available to provide the service. We have therefore amended the proposed legal drafting so that category 3 compensation is available wherever an additional or diesel substitute locomotive is required.

Flat rate compensation for planned disruption

21. The industry has been unable to recommend the level of flat rate liquidated sums compensation available for planned possessions. The industry has agreed that the new elements of schedule 4 should capture a similar scale of compensation to that currently available for possessions under part G, however the industry has been unable to agree the level of part G compensation currently paid. Part of the difference arises from the lag between possessions being taken and compensation being claimed and agreed. Network Rail has identified £2.7m of current freight operator part G claims for 2007/08. Based on this Network Rail estimate total potential part G compensation and commercial payments related to possessions of £6-7m for 2007/8. Individual freight operators have made representations that the figure should be significantly higher.

22. We have reviewed Network Rail's and freight operators' submissions. We consider that given the concerns raised by freight operators there is considerable uncertainty over the current level of part G compensation. Given these concerns we consider that it would be appropriate to calibrate the new elements of the regime on the basis of £9m per year compensation, rather than the £6-7m proposed by Network Rail.

23. To allow the calibration of the regime consultants Faber Maunsell have carried out a period of shadow running of the regime (over periods 12 and 13 of 2007/08). This has identified the following for the two shadow running periods:

- category 3 compensation would be around £0.4m;
- 734 category 2 events and 1246 category 1 events; and
- the two periods reflect around 13% of total possession hours for the year, implying a multiplier factor of 7.7 to obtain a full year estimate.

24. To obtain compensation of around £9m we therefore recommend the following liquidated damages sums:

- category 1 - £100 per train (in 2007/8 prices or £97 per train in 2006/7 prices); and

- category 2 - £900 per train (in 2007/8 prices or £872 per train in 2006/7 prices)

25. The proposed sums appear to provide a reasonable level of compensation, although they are not intended to provide full compensation. They generally provide for lower compensation for planned disruption than will be available for late notice disruption under schedule 4 (where we propose rates of £493 per service variation and £942 per cancellation) and for on the day disruption under schedule 8 (where we will propose rates later this month). This will help incentivise Network Rail to notify possessions early. The compensation should also be relatively cost reflective as we would expect train operators costs to be lower with planned rather than late notice or on the day changes, for example as they may be able to make alternative arrangements such as running additional trains on other days to avoid possessions. We therefore consider that the proposed sums are reasonable. In common with the existing Schedule 4 regime operators would be able to pay an access charge supplement in return for higher liquidated damages compensation.

26. We welcome any comments consultees have on the proposed liquidated compensation levels and the overall level of compensation to be generated from the new provisions.

Legal drafting

27. We attach at appendix 1 the freight schedule 4 legal drafting submitted to ORR by the industry on 4 July 2008 incorporating the changes that we propose to make. The changes are in two areas: the trigger for category 3 compensation which has been amended to reflect above recommendation that it should apply wherever additional or diesel substitute locomotives are required; and second to separate the cancellations sums paid under schedule 4 and schedule 8 as described below.

28. The industry's proposed drafting continues to reference the value of cancellation sums in Schedule 8. The industry's recommendations were that the current provisions for compensation for disruption caused through possessions which have not been notified in all material respects by T-12 (service variations & cancellations – "SV&C") should remain in place and be unaffected by the review. As part of the review of Schedule 8, we are proposing to increase the value of the cancellation sum which is defined in Schedule 8. This value is also used in schedule 4. Under the current drafting this would therefore increase the compensation available in schedule 4 under SV&C. We do not consider that such an increase would be appropriate, as, in the absence of an access charge supplement, it would increase the financial burden on Network Rail. We have therefore proposed changes to the legal drafting of schedule 4 to allow the current cancellation for late notice possessions to continue. Consequent changes to schedule 8 will be issued for consultation together with the other legal drafting changes associated with the draft determinations next week.

29. EWS has suggested that the definition of services under the contract in paragraph 4.1 of schedule 5 should be amended to include the term revised base service. This would ensure that services amended before the possession notice date would be included in the

definition of services. We are minded to include this amendment but would welcome views from consultees.

30. We welcome any comments consultees may have on our proposed changes and more generally on the legal drafting.

Legal drafting changes to part G of the network code

31. We consulted on the proposed changes to part G of the network code on 8 April 2008 along with the proposed changes to the franchised and open access passenger schedule 4. At paragraphs 26.32 – 26.34 of our draft determinations we responded to the consultation responses which suggested substantive changes to the proposed amendments to part G. We also received various minor proposed amendments to the drafting that we have taken account of.

32. We attach at appendix 2 a copy of part G which highlights the changes which we propose to implement via condition 8 of the network code. The minor drafting changes, which we accepted following our consultation in April 2008, will show up in a different colour electronically to the drafting that we consulted on in April 2008.

33. The consultation on the changes that we propose to make to part G which we are undertaking now and which we undertook in April 2008 will constitute the consultation required under condition C8.4 of the network code. Following this consultation, if we still consider that implementing the changes to part G is appropriate, we will issue the notice required under condition 8.1. We welcome any comments from consultees on the changes that we are proposing to implement by this method.

Contingency Planning

34. As the proposed changes to part G of the network code and schedule 4 are inter-related we are aware of the need to ensure that both sets of changes are implemented simultaneously. In this regard we have been considering contingency options in the event that there is a reference to the Competition Commission and the changes to the schedule 4 freight and open access contracts are not implemented on 1 April 2009. In respect of the franchised passenger operators, an amendment to their track access agreements via section 22 Railways Act is being progressed which will have the effect that, in the event of a reference, the proposed changes in the periodic review will take effect from 1 April 2009 anyway, with an adjustment mechanism to deal with any changes to the charges following the reference. We would support a similar amendment being agreed by freight and open access operators and welcome any views consultees may have in this regard.

35. However, in order to protect against the eventuality that such an amendment might not be agreed by all the freight and open access operators we also propose to include conditionality wording in the notice under condition 8.1 of the network code which ORR will issue in August 2008 to implement the changes to part G. This would have the effect that, in the event of a section 22 amendment, as described above, not being entered into by a freight or an open access operator, the part G changes in respect of that operator would

only come effect when the schedule 4 changes become effective. This may result in two different versions of part G being operative during a transitional period. We welcome any views consultees may have on this proposal.

Access charge supplements for franchise passenger operators

36. The schedule 4 compensation regime for franchise passenger operators is funded by access charge supplements. We stated in our draft determinations that we would review Network Rail's proposals for access charge supplements following the further work we were undertaking on network availability. We have since undertaken this further work, publishing a consultation document on 4 July 2008¹³. We have also reviewed the assumptions underpinning Network Rail's calculations of access charge supplements. On the basis of this review we have calculated new access charge supplements by:

- revising network availability forecasts;
- removing the uplift applied to MRE rates as the schedule 8 recalibration is not intending to increase rates above RPI;
- replacing the Network Rail's forecast of expenditure for CP4 with our assessment given in the draft determinations; and
- reducing the uplift for emergency timetable possessions from £8.5m to £5m as we consider the Network Rail's estimate over represents the impact of extreme events.

37. The resulting access charge supplements are shown in table 1. Together these changes reduce access charge supplements due in the final year of CP4 by 29%.

¹³ PR08: consultation on network availability and the seven day railway, Office of Rail Regulation, July 2008. This document can be accessed at: http://www.rail-reg.gov.uk/upload/pdf/cons-netwrk_avail_KPI.pdf

Table 1: Proposed access charge supplements for franchised passenger operators.

	2009/10	2010/11	2011/12	2012/13	2013/14
Arriva Trains Wales	1.1	1.0	1.0	0.8	0.8
Arriva Cross Country	11.4	10.0	10.2	8.1	7.6
c2c	2.0	1.7	1.8	1.4	1.3
Chiltern	2.2	2.0	2.0	1.6	1.5
East Midlands	6.2	5.5	5.5	4.4	4.1
First Capital Connect	6.2	5.5	5.6	4.4	4.1
First Great Western	32.3	28.5	28.9	23.1	21.6
First ScotRail	5.1	4.5	4.6	3.7	3.4
First Trans Pennine Express	1.8	1.6	1.6	1.3	1.2
Gatwick Express*	2.5	2.2	2.3	1.8	1.7
Heathrow Connect	0.1	0.1	0.1	0.1	0.1
London Midland	1.9	1.7	1.7	1.3	1.3
London Overground	0.4	0.4	0.4	0.3	0.3
South Eastern	3.1	2.7	2.8	2.2	2.1
Merseyrail	2.2	2.0	2.0	1.6	1.5
Northern	2.0	1.8	1.8	1.4	1.3
National Express East Coast	30.6	27.0	27.4	21.9	20.4
National Express East Anglia	7.0	6.2	6.3	5.0	4.7
Southern	6.7	6.0	6.0	4.8	4.5
South West Trains	14.8	13.1	13.2	10.6	9.9
Virgin West Coast	29.4	26.0	26.3	21.0	19.6
Total	169.1	149.5	151.3	121.0	112.9

Note: Gatwick Express is now part of the Southern franchise.

Next steps of implementation

38. Our proposed next steps on reviewing possessions compensation are set out below.

Date	Action
11 July 2008	Issue letter to industry consulting on changes to possessions compensation for freight operators, franchise passenger operators access charge supplements and changes to part G.
1 August 2008	Closing date for industry responses on changes to freight operator possession compensation, franchise passenger operators access charge supplements and for changes to part G.
W/c 11 August 2008	Conclusions on possessions compensation for freight and passenger operators and changes to part G, to come into effect from 1 April 2009. Publish revised schedule 4's for passenger and freight Issue of C8 notice and publish revised part G.