



Liability framework

April 2019

Introduction

1. This module explains our policy on the liability framework for access contracts. Access contracts should contain incentives that will promote efficient and effective performance; include provision for cost recovery and payment of appropriate compensation; secure efficient use of network capacity; in order to facilitate better services for rail customers.

2. In the 2018 periodic review (PR18) we set the regulatory framework for control period 6 (CP6), which runs from 1 April 2019 to 31 March 2024. Our conclusions are set out in our final determination¹.

This document reflects the regulatory framework implemented through the track access contract as part of PR18, which included the possessions regime (Schedule 4) and the performance regime (Schedule 8).

The model liability framework

3. Both the model passenger and freight contracts contain our model liability framework. The contractual arrangements for freight customers also contain the model liability framework but the model framework has been structured to reflect the different contractual arrangements. We consider it important that parties to an access contract are clear about their obligations and the liabilities for failure to comply with them. The other key principle underpinning the model liability provisions is that they should achieve the most efficient allocation of risk, such that risk is borne by the party best able to manage it. Thus, our view is that the model regime should incentivise efficient behaviour, foster a culture of contractual compliance and minimise total industry costs. The full rationale for our conclusions was set out in our final conclusions on the model passenger contract².

4. The liability framework distinguishes between operational failures that are contemplated by the contract and breaches of the contract. Liability for operational failures, such as delays or cancellations of trains and

¹ The final determination documentation is available [here](#). However, for an overview, please see chapter 9 of '2018 Periodic review final determination – Overview of approach and decisions', ORR, October 2018, available [here](#).

² See *Model clauses: the template passenger track access contract – Regulator's final conclusions*, Office of the Rail Regulator, June 2003, available at <http://webarchive.nationalarchives.gov.uk/20131001175041/http://www.rail-reg.gov.uk/upload/pdf/171.pdf>.

planned restrictions on the use of the network, are compensated under Schedule 8 or Schedule 4. Payment under these provisions is not necessarily capped and neither party may claim *force majeure* relief.

5. Performance Strategies add a further liability for particularly poor performance and are discussed in more detail later in this module.

6. For other breaches of the contract, the access beneficiary or Network Rail would be able to apply for a performance order but, whether or not it did so, the party in breach would still be liable to pay compensation for proven losses from the point the initial breach occurred. Compensation for breach of contract is also subject to the annual cap (with certain exceptions) and to relief from the obligation to pay compensation where the breach results from a *force majeure* event.

7. Our model access contracts provide options for the parties to have disputes determined by the relevant Access Dispute Resolution Rules (ADRR) panel or the High Court. These options sit alongside the options of expert determination and mediation provided for in the network code and the specific dispute resolution mechanisms contained in individual parts of the network code and the model contract (for example, those in Schedules 4 and 8 of the model contracts for determining sums payable in respect of delays, cancellations and restrictions of use).

8. We believe that the default liability arrangements in the model track access contracts represent the most appropriate position in terms of optimal risk allocation and are part of the overall package which Network Rail offers to its customers. We therefore consider it appropriate that the costs of the regime form an integral part of the overall access charge, which is subject to periodic review. However, if for commercial reasons an access beneficiary wishes to negotiate bespoke liability arrangements with Network Rail, such as asymmetrical caps on liability, we will consider them, including against the following criteria of whether the proposed regime:

- (a) properly reflects the financial position of and allocation of risk between the parties;
- (b) provides appropriate incentives and remedies for the parties; and
- (c) is appropriate, taking account of the allocation of risk to the train operator under any franchise agreement.

9. In such cases we will expect Network Rail and the operator to agree an appropriate access charge supplement or access charge rebate, the levels of which will be dependent on the degree to which risk has been transferred from one party to the other.

Liability cap – model freight customer contracts

10. The model freight customer contract contains similar liability arrangements to the model freight access contract. However it does not contain those parts of the model freight access contract liability arrangements that relate to the operation of trains and there are exclusions in the freight operating company customer access contract (into which the freight customer draws down its access rights) to

prevent a freight operator or Network Rail from being liable for a single incident across a number of contracts. These arrangements also apply to the indemnity incident cap.

Liability cap – passenger contracts

11. For passenger contracts, our policy is that the annual liability cap in Schedule 9 should be set for both parties at three times the level of the train operator's annual variable charge, excluding traction electricity charge (EC4T), subject to a minimum cap of £13 million (2019-20 prices). EC4T is not included in the calculation so as to ensure consistency between operators using diesel and electric traction.

12. We are willing to consider bespoke arrangements for liability caps for other operators – for example, small-scale open access railway operators where a smaller cap of, say, around half the normal minimum cap (so, £6.5 million in 2019-20 prices), may be more appropriate.

13. Where a new track access contract is sought to replace an existing contract, the liability cap will need to be reconsidered. It would not be appropriate merely to copy across the old liability cap to the new contract, not least because it would not be in the right price base.

Level of the liability cap – freight and freight customer contracts

14. The level of caps applicable to each freight operator is dependent on the level of turnover. ORR's policy in relation to the level of caps limiting liability under Schedule 9 was established during the retrofitting of the model freight contract into the then current freight operators' contracts in February 2005.

15. The default level of the annual cap is £6.5 million (2019-20 prices), indexed as necessary. However, a larger operator might be offered a higher cap recognising the larger scale of relevant losses that would result from breaches of contract.

16. If a replacement track access contract is being sought, the liability cap will need to be reviewed as part of this (as per the point in paragraph 13 above relating to passenger contracts).

Performance Strategies

17. Performance Strategies, formally known as Joint Performance Improvement Plans (JPIPs), provide a framework within which Network Rail and train operators work together to improve performance, with bilateral Performance Strategies and monitoring/challenge arrangements between Network Rail and each franchised train operator, and regular monitoring of performance against plans. If Network Rail's performance is consistently below the agreed threshold, we can take enforcement action under its network licence. We have issued a policy statement³ on the circumstances in which we would consider taking enforcement action.

³ ORR's economic enforcement policy and penalties statement - Great Britain, ORR, November 2017, available at: https://orr.gov.uk/data/assets/pdf_file/0018/4716/economic-enforcement-statement.pdf.

18. Condition LA, providing for the agreement of Performance Strategies between train operators and Network Rail, was incorporated into Part L of the Network Code on 27 March 2006.