

MODEL CLAUSES FOR TRACK ACCESS AGREEMENTS:
RESPONSE OF MERSEYTRAVEL

1. **Commercial Purpose**

Merseytravel supports the inclusion of commercial purpose provisions, in the interest of ensuring a clear expression of the intentions of the signatories to the Track Access Agreement. Standard formats are preferred, although there may need to be different formats for Track Access Agreements featuring an investment commitment by the parties. Consideration should be given to a commercial purpose provision relating to the Access Rights to the operators' obligations to deliver the Passenger Service Requirement or other contracted services with public sector funding.

2. **Standard of Performance of Obligations**

Both parties should be expressly required to meet appropriate standards of competence; a provision to this effect similar to that contained in clause 2.13 of the consultation document is supported by Merseytravel. This would give clear protection to both parties, but also to users and funders of the rail network.

3. **Basic Access Rights**

Access Rights may be expressed subject to application of the Rules of the Route and Rules of the Plan; the real issues are to ensure that operators are fully consulted in the development of both sets of Rules, to protect operators against unilateral changes to these Rules by Railtrack, and to ensure that the Rules themselves are impartial and applied impartially. The amendment procedure needs to give greater protection to operators, in particular by ensuring that changes which would have the effect of reducing network capacity or flexibility cannot be implemented unilaterally by Railtrack. It is also important to assure the interests of funders are protected, in particular the dual interest of revenue risk-bearing PTEs.

The introduction of new safety obligations which materially affect basic access rights should allow either party to request a review of those rights.

Merseytravel supports provisions aimed at preventing the abuse of a dominant position by an operator, in particular where services are protected from competition. Merseytravel has consistently taken the view that moderation of competition should involve an obligation on the protected operator to provide at least the level of service applying on each protected flow at the time of an application for such protection, or its approval (whichever is the greater) for the full duration of such protection, and that where it is requested to justify investment an appropriate increase in service levels on each protected flow should be provided by the operator in exchange for such protection. This is intended to protect passengers from an operator seeking protection from competition, and subsequently reducing services on protected flows. Similarly, protection is required against an operator accumulating access rights to prevent other operators increasing or amending their own services, especially on congested parts of the network. Where flows are protected from competition, it is important to ensure that passenger benefits accrue; operators benefiting from this protection should be expected to make use of the access rights they hold, or risk losing them.

Access right reviews should be built into longer-term contracts on a similar basis to that proposed by the SSRA for second-round franchise agreements (up to 20 years with reviews every 5-7 years). Reviews could be initiated at the request of one of the parties, perhaps once in a five year period, or by the Regulator if there were clear public interest grounds (e.g. to facilitate major investment) for doing so.

Changes to Access Rights should require consultation with affected parties, including funders, and subsequently either the agreement of both parties with Regulatory approval, or a direction from the Regulator following further consultation with the SSRA and relevant PTEs (as funders of the passenger services involved). It is likely that any change to Access Rights which was not agreed by the parties would be approved only if it was in the public interest, giving wider benefits to users of the network, and did not prejudice the delivery of passenger services contractually required under a franchise agreement or another public sector funding agreement.

Engineering allowances are provided for in the Rules of the Route and Rules of the Plan, and should already be incorporated in journey times to which an operator is entitled.

Pathing allowances are likely to be required in specific cases, and could be expressed as a maximum percentage of journey time across a set number of trains, or across trains within a set time period.

Provision should be made for differences between working timetable and publicly advertised timings to ensure that regular interval services can be advertised on a “clock face” pattern (e.g. trains depart every 15 minutes at 06, 21, 36 and 51 minutes past each hour). There should be no more than three minutes difference between working and public times at any location, and this should be related to Railtrack’s flexing rights (e.g. service patterns should be flexed around the clock before adjustments are made to individual trains, and flexing rights should then be from zero to +3 minutes away from the standard service pattern).

A robust timetable should not need performance allowances, however attractive they may be to the parties!

Ideally, Railtrack should not sell rights which would constrain the ability of another operator to deliver PSR services, or other contracted services with public sector funding. However, Railtrack are not direct parties to franchise agreements and may not be parties to other contracts. While a competent infrastructure owner should not oversell capacity, it is necessary to ensure that these contracts can be honoured; co-operation between the SSRA, PTEs, other funding bodies and the Regulator is required.

4. **Network Operation, Maintenance and Development**

The key obligation here for Railtrack is Licence Condition 7, which underlies each Track Access Agreement; the Regulator should consider making a direct reference to this within the model clauses. The five year plans provided for in Clause 6 should be retained, but should be updated additionally in advance of the winter Passenger Change Date in each year. They should include Railtrack’s proposals to meet all the obligations covered by Licence Condition 7.

Operators should have a strengthened obligation to maintain and operate Specified Equipment and ensure their personnel are suitably trained and qualified, to ensure that they do not hinder Railtrack’s delivery of its obligations under Condition 7.

Part G of the Track Access Conditions is generally satisfactory, although Merseytravel has concerns that it is not always consulted about relevant Network Change proposals. It is suggested that each Railtrack zone should circulate, on a regular basis (monthly?), a list of all Network Change proposals under consideration within that zone to all train operators and other stakeholders, with deadlines for comments, and contact points for those parties requiring full details of any proposal.

5. **Local Output Arrangements**

These are likely to be of most importance in congested sections of the network, where improvements or changes affect numerous operators. Ideally, they should build on Condition 7, and be designed to ensure delivery of the reasonable requirements of operators and funders. They should be voluntary, although it would be open to the Regulator or one party to an individual access agreement to propose a review of access rights in line with the local output arrangements where a party to the access agreement was reluctant to co-operate with a local output arrangement.

6. **Information**

Merseytravel anticipates that the types of information outlined in clause 2.29 of the Consultation Document should be covered within the basic access agreement and charges. Equally, information required by operators to facilitate investment, for example structure gauges affecting design and operability of new rolling stock, should be held by Railtrack and made available on request at no charge.

The revised timetable bidding process is designed to encourage the sharing of information between operators and Railtrack, allowing all to make optimal use of the network, and is welcomed by Merseytravel.

7. **Capacity**

Track access contracts should contain assurances that the capacity contracted for will be available to the operator, subject to the application of the Rules of the Route, Rules of the Plan, and the criteria covering major works outwith the Rules of the Route.

Remedies if the contracts are not honoured could include a requirement for Railtrack to provide additional capacity, at its own expense, to enable all the capacity contracted to operators to be used.

8. **Liability**

For Schedule 8 to work as intended, the base timetable must be robust. If this is not the case, for example through overselling of capacity or mis-allocation of paths by Railtrack, then the issue becomes one of competence rather than operational performance. In this case other remedies, for example a requirement to provide the contracted capacity, should be available.

Access contracts need to take into account a much wider range of interests than those of Railtrack and the relevant operator; the interests of other operators, the end users of the network – passengers and freight customers – and funders of the network – SSRA, PTEs, local authorities and private sector contributors – must be incorporated. The dual interest of revenue risk-bearing PTEs needs specific protection. Liabilities within access contracts should, therefore, be proportionate to the impact of failures to comply with, or breaches of, the terms of the contract, taking into account the wider effects on third parties, with remedies delivering benefits to end users as well as the party; monetary compensation should not be the only remedy available.

Unlimited liability could be considered for wilful misconduct, provided this can be clearly defined in legal terms; possible instances could be unfair discrimination in path allocation by Railtrack, knowingly overselling capacity, unduly favouring partners in revenue-sharing agreements, or operators knowingly using defective, unsuitable or unapproved equipment or unqualified personnel.

An operator should be entitled to withhold payment of access charges in the event of a breach of the agreement by Railtrack, although withholding must take into account the seriousness of the breach. An early warning mechanism should alert Railtrack to the threat of withholding.