

RAILTRACK

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Dear Tom

MODEL CLAUSES FOR TRACK ACCESS AGREEMENTS

I am writing to send the attached response of Railtrack PLC ("Railtrack") on the consultation paper "Model Clauses for Track Access Agreements" circulated with your letter of 7th January. Railtrack welcomes the proposed introduction of model clauses, which it agrees may assist accelerate and simplify the negotiation of new track access rights. They may also help to ensure equality of treatment of TOCs.

There are some important points of principle that I would like to emphasise.

1. Alignment of obligations.

In setting out the parties' obligations, it is important to remember that the parties cannot necessarily deliver them in isolation, and may be dependent on other parties fulfilling their own obligations. There is no point having a high standard specified in a contract between A and B if its delivery would be affected by a contract between A and C specifying a lower standard.

2. Financial neutrality.

Where changes to the current contractual matrix would result in an increase in a party's financial risks, those risks will require to be assessed and rewarded.

3. Availability of Capital

Care needs to be taken to ensure that changes are not made which increase the difficulty of raising capital to fund enhancements.

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May I also take this opportunity to introduce, in the context of the model clauses consultation, the product of some work Railtrack has been doing on Schedule S.

Railtrack believes that in the first round of franchising and track access agreements the industry simply did not have sufficient time or resource to develop consistent expressions of track access rights. You will recall that the Schedule Ss were "customised" largely by the relevant train operating units and Railtrack Zones. Inevitably this resulted in a greater variety of forms of expression being used than was absolutely necessary or was conducive to clarity.

I now believe that the use of a model template will help to ensure consistency of approach, although the provisions in each agreement will need to be carefully tailored. If common forms of expression can be adopted, it will also make clearer what capacity remains unsold. To this end we have begun to develop a template, for consideration for use in future contracts and expect to be able to send this to you by 4th February.

I think it would be helpful if Michael Beswick and Richard Wightman could meet to go through the points in the Railtrack response to your consultation document.

Richard Middleton

MODEL CLAUSES FOR TRACK ACCESS AGREEMENTS – DETAILED RESPONSE OF RAILTRACK PLC TO THE REGULATOR'S CONSULTATION DOCUMENT

I. CHAPTER I - AND GENERAL COMMENTS

- 1.1 Railtrack welcomes the consultation document and agrees that model clauses could be beneficial, if they strike a fair commercial balance.
- 1.2 Railtrack fully understands the benefit of agreeing the model clauses in time for them to be used in the track access agreements for franchise replacement and will commit resource to meet this target. However, the utility of the clauses will depend on their fitness for purpose which in turn will depend on the care with which they are negotiated. While you will be concerned to ensure that Railtrack will not exploit its dominant position to extract conditions that are unfavourable to the TOCs, Railtrack will also want to ensure that the conditions are fair to it. The timetable should not therefore be used to impose conditions that are not recognised by both sides as being even-handed, as that will simply mean the model clauses will not be used as intended.
- 1.3 Railtrack accepts that there are certain parts of the standard access contract that are not included in this consultation because they are subject to other review processes. However, obviously a contract cannot be judged commercially until all its provisions are known. There may well therefore be areas where it is difficult to agree model clauses until the results of those other reviews are known and the contracts can be judged in their entirety.
- 1.4 You mention stations and depots in your paragraph 1.5. Railtrack agrees that track access agreements should have priority, but feels that the scope for clarification of rights and obligations in the case of station and depots is substantially greater and that this should be undertaken as soon as possible. This is particularly true in relation to Station Change, where users have the potential to block enhancement developments, rather than simply to ensure they receive comprehensive compensation. As the industry moves towards considering the implementation of substantial enhancement it is important that this issue is addressed.
- 1.5 There are a number of comments in the consultation document generally, and in particular in chapter I where we might usefully seek further information because they imply that underlying problems exist and we would like to get to the bottom of them. The following are a few examples.
 - (a) In paragraph 1.21 you comment that too many access contracts are being submitted for regulatory approval without the parties having had appropriate regard to the Regulator's criteria for the approval of passenger and freight track access agreements. Railtrack is not aware of specific issues having been raised by ORR previously other than on charges. It is therefore surprised that this statement is being made now in the context of model clauses consultation, rather than previously and in the context of the detailed examples for resolution. It is important that we understand ORR's precise concerns so that we can address them, and we look forward to more detailed information.

(b) In paragraph 1.29 you say that "train operators have often complained that their contracts with Railtrack give them insufficient rights to require the timely delivery of commitments, or that they fail properly to document the commitments which they believe Railtrack has made in exchange for the access charges they receive." Railtrack is also not aware that these frequent complaints have been made and would be grateful if you could let us have details so that we can follow them up.

1.6 We have undertaken some work on a possible template Schedule 5 and our thoughts in this respect will be submitted to you by 4 February 2000. In this work we have attempted to put in a standard format the vast majority of the normal rights and obligations. As you will see from our detailed views later on, we believe that the expression of Schedule 5 rights should be limited to quantum and perhaps frequency. We will supply a form of Schedule 5 that attempts to put most of the current Schedule 5 content in a format that could be used as a model clause, albeit that we believe that the standard form will always need to be tailored.

1.7 We note you are proposing to suggest drafting to address perceived shortcomings in some of the track access conditions. We assume that these will be brought forward under the due process, Part C, rather than through model clauses as such.

1.8 A fundamental principle of any changes to existing rights and obligations being proposed through the model clauses route is that the financial effects of those changes must be capable of being clearly assessed and reflected in the charges structure. The more complex the changes, the more difficult this will be to achieve.

2. **CHAPTER 2: WHAT THE OPERATOR IS BUYING, AND WHAT ARE HIS AND RAILTRACK'S OBLIGATIONS**

Commercial Purpose

Is it desirable that standard access contracts contain commercial purpose provisions?
Should they be in standard form?

Railtrack's belief is that whilst a commercial purpose clause of the type suggested may seem attractive as a means of clarifying the obligations of the parties, in practice there is a risk that it could have the opposite result

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To take a simple example, if X promises to provide a thing to Y, the important points for the contract to cover are:

- a proper definition of, or specification for, the thing;
- the time by which it is to be provided;
- the price; and
- the consequences of success or failure.

If all these points are clear then the contract will be fit for purpose.

Conversely if the points are not adequately defined it would be self deception to pretend that a "commercial purpose" clause would make things better. It would be a device for attempting to fix things without getting to the root causes of the lack of clarity, and therefore exactly the sort of provision that model clauses ought to avoid.

Railtrack believes therefore that the clarity of the contractual content ought to be such that it is unnecessary to have any "commercial purpose" clause. If "commercial clauses" have a purpose, it is to give evidence of the parties' intentions in situations of uncertainty when it is not possible to set out contractual relationships with precision. The industry has learned a great deal over the last few years and the need for any such clause ought to be less now than it was initially. To achieve the Regulator's stated objectives, undertakings should be kept clear and specific.

If, despite all this, there is felt to be a need for such a clause then it ought to be as precise as possible as to its consequences, rather than simply being aspirational, and those consequences need in turn to be clearly costed. To avoid creeping future increases in the expectations that arise from such a clause it is important that the clauses define expectations as those existing at the outset, and that no expectations can be allowed that are not explicitly funded at the outset of the contract.

The clarity of consequences needs to apply to both parties equally and not just to one party . This is a point of general application, rather than one specifically related to "commercial purpose" clauses.

In summary, it is important that the parties are clear at the outset what would need to be delivered in order to satisfy the contract in full, and any "commercial purpose" clauses should not detract from this clarity.

If so what should the standard provision contain?

It is difficult to see how there could ever be a standard provision because a commercial purpose clause would reflect the commercial aims, of Railtrack and the TOC which is agreeing the relevant deal, and would therefore inevitably be unique to that deal.

Are commercial purpose provisions appropriate only in contracts which provide for **carrying out** of major investment in the network or in rolling stock?

For the reasons outlined above we do not believe that model commercial purpose clauses are appropriate. Nevertheless, in the event that they were to be adopted we believe that there might be more of a case for taking the view that agreements involving major investment are less, not more, appropriate for the use of "commercial purpose" clauses, because the infrastructure developments would presumably be specified in the contract. Where major investment is involved the contract should contain a clear specification of the parties' rights and obligations, whereas for ongoing relationship contracts this might be more difficult to achieve. In general, we still believe that commercial purpose provisions should be avoided in order to maximise contractual clarity.

Standard of performance of obligations

Is it appropriate that, in carrying out the obligations under the contract, one or both of the parties should be expressly required to meet certain minimum standards of competence?

This is a question which cannot satisfactorily be addressed in isolation from the track access agreement as a whole. In a number of cases, such as safety obligations for example, detailed requirements already exist and are covered elsewhere. As regards performance-related matters, it will be recalled that the philosophy at the time the original round of track access agreements was concluded was that performance should be governed by the performance regimes solely, and for that reason there was no catalogue of separate substantive obligations about standards of maintenance and similar matters. If that philosophy is now to be changed then in Railtrack's view this can only satisfactorily be achieved as a follow on to whatever conclusions the Regulator is moving towards in his review of charges generally, and of Schedules 4 and 8 in particular, and any changes in rights and obligations should be clearly costed and reflected in that review. We do not see how this issue can reasonably be settled separately and prior to the above parts of the Periodic Review settlement.

It may be that different considerations apply in relation to that part of any contract where one of the parties is promising to do something specific other than general maintenance and renewal, but in those circumstances, at least in the case of Railtrack, presumably the statutory implied term of reasonable care and skill would apply.

Are the standards implied by the Supply of Goods & Services Act 1982 sufficient, or is more needed?

We see no reason for any higher standard than the statutory requirement.

Should the standards be the same? If not what should be the standards for (a) Railtrack and (b) the train operator?

We see no reason for different standards to be applied to different industry parties. Indeed, as the activities of one industry party on the Network impact the activities of others, it is difficult to see how Railtrack can deliver higher standards than those required of any other industry party operating on the Network. It ought to be a basic principle that all obligations should be reciprocal as far as appropriate, and certainly in relation to standards of work, so that if a higher standard is to be required of one party the same standard should be demanded of all other industry parties.

TOCs should be subject to obligations in respect of co-operation and disclosure. For example, there are currently no levers that Railtrack can pull to persuade TOCs to provide demand data to ensure that Railtrack can plan station developments to ensure that they are able to accommodate anticipated passenger flows. Similarly, TOCs should be required to maintain drivers' route knowledge for diversionary routes in order to ensure better services are delivered to passengers during perturbation.

Basic access rights

Are there circumstances in which the access rights should be absolute and not expressed to be subject to the Rules of the Route and the Rules of the Plan?

We do not believe there are any circumstances in which access rights should not be expressed to be subject to the Rules of the Route and the Rules of the Plan. This must be a fundamental principle as any alternative approach could undermine the ability to maintain and renew the Network, without which access rights will have declining value.

Twenty year contracts are now being contemplated, and to set in absolute terms the maintenance and renewal arrangements has to be unwise, because it could circumscribe the ability to introduce new more efficient maintenance and renewal arrangements that require different approaches to the Rules of the Route and Plan. Railtrack needs to be able to flex paths and to add pathing time in order to maximise the use of the available capacity.

The aim in this context ought to be to ensure that the process and consequences of introducing Rules of the Route and Rules of the Plan which impinge on train operators' rights are sufficiently clearly expressed, with appropriate appeals.

If access rights are to continue to be subject to these rules; is there a need for additional protections for train operators against their amendment without the agreement of the affected parties?

Railtrack is not sure what additional protection might be contemplated. Train operators already have the protection of the decision criteria and the challenge process in Part D. Any further protection would have to be implemented in the context of Part D, and all such protection contains appeal mechanisms. Any adjustment to the processes must not slow down the ability to implement changes speedily, and any obligations to reach agreement in advance (as opposed to proposition, consultation, decision and appeal as now) has to be to the detriment of the industry's efficiency and speed of achieving enhancement implementation.

Are there specific circumstances (for example new safety obligations or abuse of a dominant position by an operator) in which elements of access rights should be subject to review or 'use it or lose it' provisions?

We agree that there may be more scope for 'use it or lose it' provisions.

Are there elements of access rights which should be subject to more general review over the life of the contract and, if so, how often and in what circumstances?

Railtrack is prepared to be flexible where there is a commercial justification, but we are not clear exactly how a review of the type being suggested would operate, without undermining train operators' confidence in the stability of those rights and reducing situation

their ability to raise finance. At the very least the results of such a review would have to be financially neutral and Railtrack is not certain how this could be achieved in practice: Nevertheless Railtrack sees there may be merit in this proposal, in a situation where, for example, the Regulator believed existing rights were capable of being used to block the introduction of new rights and that this would act against the public interest. In such circumstances the Regulator should have the ability to extinguish the blocking rights.

If access rights are to be reviewed, what should be the nature of the review? For example, should change only be in cases where the parties have agreed on it (with the approval of the Regulator)? Or should there be cases where a change is possible without all concerned being in agreement and, if so, what are then?

As a general principle the concept of signed, negotiated agreements being amended without the parties having given their consent seems contrary to commercial practice, save only in the public interest type of situation referred to above.

Should the journey times to which a train operator is entitled be subject to any entitlement of Railtrack to add pathing time or other allowances?

In principle Railtrack must be entitled to add pathing time if necessary to allow timetables to be co-ordinated. The crucial point is that it is not in Railtrack's gift to set a timetable which guarantees that pathing time will not be required. It is entirely dependent upon the interaction between the bids of all the parties; and would in any case be subject to an appeal. It is this right of appeal that should ensure that Railtrack never unreasonably inserts pathing time. Any protection provided within the contractual agreements which sought to override the timetabling process and its rights of appeal would, by its very nature, cause the sub-optimisation of the network in any circumstances where it applied. Performance time that already exists within the timetable should also be retained as this reflects the existing basis on which Schedule 8 is calibrated, and any ability to adjust this without the parties' agreement would undermine the balance of obligation and expectation of the parties.

As far as engineering time is concerned, it is essential that there is a mechanism to ensure that maintenance, renewal and enhancement works can be undertaken, and that more innovative solutions (such as weekday overnight possessions with TSRs in place of weekend blockades) are capable of introduction during the currency of a contract. It might appear reasonable to sign up to such a contractual restriction simply because a more innovative approach has not yet been developed, but it would not be in the long term interests of the industry. Again, the protection is the right of appeal under Part D.

Is it appropriate for Schedule 5 to provide rights over and above quantum and frequency which would constrain what other operators can do on the network, or should train operators rely on Access Condition D and the associated rights of appeal for their protection?

Railtrack's view is that Schedule 5 Firm Contractual Rights should be limited to key elements such as quantum, frequency and the specified equipment to be used defined by route. All other aspects of the service specification, and in particular journey times, should be left to be determined in accordance with the decision criteria laid down in Part D. This is the only mechanism to ensure that the development of the Network and service developments in the public interest are not constrained by pre-existing rights. Again, the key to ensuring fairness between operators is the right of appeal.

However it is recognised that in the long-term this approach would only work if it were to be adopted in all train operators' contracts (passenger and freight) so that there is a level playing field between train operators.

In his "Criteria for the Approval of Passenger Track Access Agreements" the Regulator has expressed his preference against excessive "hard wiring" of rights. A greater degree of flexibility in the development of the timetable should enable Railtrack to make better use of capacity, although there are circumstances where hard wired ("first on the graph") rights can assist by providing a starting point around which a timetable is constructed. On balance, however, Railtrack believes that flexibility should almost invariably prevail over hard wiring.

One aspect of access rights which requires careful consideration in this context is flexibility in calling patterns. Variations in the calling pattern of any one service may affect the amount of capacity which that service takes up on the network. Many track access agreements give train operators fairly wide rights to call at a range of stations. Should those train operators decide to vary the calling pattern of the service they operate in accordance with their rights under Schedule 5, this could have the effect of limiting flexibility and consuming additional capacity. Railtrack believes therefore that calling patterns are best dealt with through part D and the associated rights of appeal, rather than through "hard wiring".

We will submit separately our thoughts on a template Schedule 5.

Network operation, maintenance and development

Does Clause 6 provide the train operator with sufficient specification- of the obligations of Railtrack in relation to the operation, maintenance and development of the network insofar as the train operator is affected?

This raises the question of whether network performance should continue to be governed contractually solely by the performance regime. If not, then careful thought needs to be given to the relationship between any express new or separate obligations and the performance regimes in their revised form following the Regulator's review of charges. In any event Railtrack believes that any attempt to address these topics in specific contractual terms as well as through licence condition 7 or its equivalent would lead to potential double jeopardy and would confuse rather than lead to greater clarity.

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If not, in what respects should Clause 6 be improved? For example should it include explicit track and ride quality parameters?

This is a complicated area and past attempts at specifying explicit track or ride quality parameters had limited success - ride quality being particularly problematic. Railtrack believes that it is difficult to avoid the conclusion that it is better to rely on the general performance regimes.

Even if explicit track or ride quality parameters were to be considered, Railtrack's obligations should be limited to that which it can control, namely track quality and not ride quality, which is a function of both track quality and vehicle suspension. It also has to be recognised that wheel flats cause track damage and adversely impact track quality, and TOCs would have to be targeted with specific wheel impact limits on the infrastructure as measured by Wheelchex or similar devices. This is a further example where any obligations should be mutual as Railtrack could not deliver its obligations without the TOCs delivering theirs.

If more clearly defined specifications are to be established should they be universal or route-specific?

It is difficult to envisage universal specifications, given the diversity of views between TOCs. If there are to be any at all they would have to be route-specific and they would have to be clearly funded by the TOC in question to the extent that they are more onerous than Railtrack's national obligations.

Are train operators satisfied with the annual five-year network plans provided for in Clause 6? Do they meet the contractual standard laid down for them? Does Railtrack believe that the five-year plans provide sufficient information to train operators?

The first is a matter for train operators but no doubt the Regulator will want to consider the relationship between the five-year plans and the Network Management Statement. In any event Railtrack does not believe that the contractual standard is at all clear.

If not, in what ways could and should they be improved?

A more sensible process would be for TOCs to specify what they want, and to place on Railtrack the obligation to consult TOCs where Railtrack cannot meet this wish from its core maintenance and renewal monies. Thus TOCs would have the opportunity to fund the enhancement incremental cost before decisions are reached, and as much as possible of the expenditure would be addressed through the core maintenance and renewal monies.

Is Part G of the Track Access Conditions a sufficiently detailed and effective process for ensuring network change operates in the interests of all users of the railway Does it enable a proper balance to be struck between strategic considerations and those relevant to a specific case? If not, how could it be improved?

There are undoubtedly areas in respect of which the clarity of Part G could be improved. It could define more clearly what constitutes a change to the operation of the network. The "six month rule" in relation to TSRs needs clarification as to its operation, particularly where remedial work is planned but takes more than 6 months to implement. Part G could attempt to define materiality; and also restrict the extent to which changes to a Network Change oblige the process to be started all over again completely rather than partially.

In passing Railtrack notes that comment is made on the fact that there have been no appeals to the Regulator from decisions of the Network and Vehicle Change Committee (to which there have been a number of references). This ought not to be seen as a measure of the lack of success of the provisions, but rather as an indication that the parties successfully resolve disputes by agreement, facilitated where necessary by a reference to the Committee, rather than by pressing on to more formalised dispute resolution mechanisms.

Does Part G provide adequate protections for Railtrack, affected train operators and other stakeholders when proposals to change the network are made and pursued? Are the rights to object to and block a proposal for change correctly structured or are they too strict or too weak? Do they promote or inhibit improvements and the use and development of the network? Are the rights to financial compensation (both in terms of the costs of feasibility studies and compensation for the changes themselves) appropriate and adequate?

The mechanism of Part G is undoubtedly cumbersome but at least provides a reasonably effective mechanism for resolving disputes, which does not simply rely on consensus of all the parties who claim an interest. The complexity may be inevitable given the nature of the industry and the number of different parties involved. If enhancement to the Network is to be achieved speedily there is a need for less bureaucracy before change can be put in place, not more. Indeed, the current mechanism was not designed for, and is not well suited to deliver major Network enhancement. In Railtrack's view it would be a retrograde step to require unanimity between the parties (as is required under the station agreements) as that would significantly slow down the implementation of enhancements.

There is scope for much greater clarity about exactly what is recoverable by way of compensation. Railtrack believes there also needs to be greater clarity between the compensation principles of Part G and those of Schedule 4. At present some train operators spend considerable energy in persuading Railtrack that possessions are Part G possessions because they believe that the compensation payment under Part G will of necessity be higher than the liquidated sums regime under Schedule 4. By the same token this may inhibit Railtrack from making best use of possessions, in case the combining of different types of work increase the amount of compensation payable for the whole of the possession. Ideally the contract ought to make it clear that if a possession relates less than fifty per cent to enhancement it should be treated as a maintenance renewal possession and not a Network Change possession.

Railtrack believes that there is a case to be made for aligning the compensation provisions of Schedule 4 and Part G, with the latter moving to a liquidated sums regime for Part G possessions as well.

If this were to result in a standardised liquidated sums regime this would have the added benefit of providing a "standard" compensation rate which could then also be used by analogy in "competent authority" cases where at present the lack of any standardised compensation regime creates difficulties, where recovery of costs from a third party is being sought.

There is also scope for more clarity above the relationship between Part G compensation and Schedule 8 payments to avoid double counting.

Is Part G being operated well by train operators and Railtrack? If not, in what respects?

In general Railtrack believes the processes are being operated reasonably well, although there are undoubtedly some cases where greater rigour would be appropriate. For example some changes have been promoted by Railtrack which should more properly have been promoted by a train operator because they arise in consequence of a vehicle change under Part F. Equally, TOCs are perhaps deterred from taking the lead role when it would have been appropriate, possibly because they find the detail in Part G a little daunting. Easing the administrative burden on the proposer of the change would therefore produce a more desirable result. Conversely, increasing it would make Railtrack become more reluctant to propose Network Changes on behalf of TOCs in those cases where the TOC would prefer Railtrack to do so.

Local output arrangements

Is it desirable that contractual 'local output statements' reflecting the points discussed above are established?

Railtrack believes that the Network Licence is the appropriate location for any general obligations concerning outputs. Any more local arrangements would not in any event fit very easily into a model clauses framework.

If what is being suggested is simply that specific parts of the network should be subject to expressions of train operators' rights to use that section of network which are not mutually incompatible, then that is surely what Schedule S is seeking to achieve. It is also something which Railtrack has to seek to ensure is achieved in a balanced way.

Railtrack would certainly not want to reject the possibility of streamlining the process whereby a number of different train operators all agree to the same thing, but it is not clear what role model clauses could play in such a mutually agreed solution. If a role can be devised then Railtrack supports the aim of facilitating the harmonisation of different train operators' rights.

What should be the balance between enforcement of contracts and via Railtrack's network licence?

Railtrack believes that arrangements between different train operators and Railtrack, should be enforceable by the parties through their contracts. On the other hand "public good" types of arrangements, including general network development obligations, are probably better enforced through the licence.

What should be the nature of any such arrangements, and how should they be enforced? What remedies should there be if they are not complied with?

Railtrack finds it difficult to comment on the nature of any such arrangements other than to say that if any such arrangements are contractual in nature they should be negotiated, and the remedies should be negotiated as well. There may be a case for liquidated damages rather than the parties simply relying on general damages, but again this is probably best approached on a case by case basis.

If such arrangements are to be put in place, are the provisions of Part G of the Track Access Conditions sufficient to deal with the failure of Railtrack and an affected train operator to agree? If not, how should they be improved?

Railtrack is not aware of any specific inadequacies in this respect in the Part G processes as such, although it would welcome anything which makes them less bureaucratic.

Information

What categories of information does a train operator need from Railtrack in order to make the best use of the network?

This is really a matter for train operators but Railtrack assumes they will need to know the network capability and capacity and Railtrack's plans for enhancing, renewing and maintaining the network. Railtrack's view would be that requests need to be clear as to:

- the precise description of the information or type of information required;
- the purpose for which it is to be used;
- the form in which the information is required (accepting that it must be compatible with the current state of Railtrack's IT systems)
- who will pay for any incremental costs, accepting that if they are incurred as a response to a TOC's request they should be borne by the TOC unless explicitly allowed for in the charges review settlement.

There is always a risk of confidentiality issues arising in relation to other TOCs where performance type information is requested, so this could usefully be addressed as well.

How should this information be supplied? What standards should it meet? Should there be different standards for different categories of information?

As indicated above it is for the TOCs to specify and agree with Railtrack.

Are there circumstances in which it is reasonable for a train operator to make additional payments to Railtrack for certain information? If so, what categories of information and what criteria should be used to assess the charges?

Railtrack should be allowed to commercialise the provision of information relating to trains operating over its infrastructure. There are many parallels in other industries, and there is no reason why rail should be an exception.

There will certainly be cases where additional payment may be appropriate, but it is difficult to be more specific than this in isolation from consideration of the specific category of information and the purpose for which it is required.

What information should a train operator provide to Railtrack, in particular having regard to the interests of other operators?

TOCs need to be bound into longer planning cycles with Railtrack, for example in relation to infrastructure development plans and demand forecasts. TOCs should be required to provide demand data to ensure that stations are able to accommodate anticipated passenger flows, and early advice as to special offers and marketing initiatives to enable Railtrack to ensure that possessions and resource planning are adjusted appropriately.

There is also a particular need to provide accurate train consist data, and information on train numbers and characteristics of trains (speed, length, weight, gauge, consist, traction power), and origins, destinations and routing of each train.

If information is already provided through the performance regimes or the compensation provisions under Part G Railtrack would not want the obligation to be duplicated.

Capacity

Is it appropriate that track access contracts continue to contain no egress assurances from Railtrack in relation to the capacity which has been sold under the contract?

Where Railtrack does not timetable a relevant train path because it has insufficient capacity the addition of some form of warranty as to capacity would not give a train operator any greater remedy than it already has for damages for breach of contract.

If we put to one side the issue of whether or not a train operator's rights are expressed in clear enough terms, then it is not clear to Railtrack what further issue arises here. If a TOC's rights are clearly enough expressed and Railtrack does not satisfy them either because it has sold the capacity to another train operator or for some other reason, then the TOC will be entitled to damages. Railtrack does not believe those damages will be based on Schedule 8, which addresses a different issue, namely where Railtrack continues to allow all the trains to be put into the timetable but performance is inadequate because of congestion. The whole question of congestion and trigger points is a complex one and is bound up with the issues of charging which the Regulator is presumably considering elsewhere. In principle though it is not clear why poor performance in congestion cases ought to be penalised differently from other forms of poor performance.

If not, what should be the nature of the assurances, and what remedies should be available if they are not honoured?

See above.

3. **CHAPTER 3: WHAT HAPPENS IF THINGS GO WRONG?**

Liability - operational performance

Should Schedule 8 be the only remedy for the cancellation or delay of services?

This is a complex question bound up with the whole charges review issue. The whole rights and remedies arrangements at present is predicated on the basis that Schedule 8 is the only remedy for poor performance. The only justification for having such a complicated and costly mechanism for rewarding and penalising good and bad performance as the current performance regimes, is that despite their costs and complexity they do at least provide one focus for all performance related questions. If that principle were to be watered down and a separate raft of rights and obligations created, then this should not be attempted in isolation from consideration of the charges review as a whole, and would require explicit clarity as to the interrelationship between these rights and obligations.

Are there circumstances in which Schedule 8 should be suspended and other remedies take over? If so, what are they and what are the appropriate remedies?

There may be a case for greater clarity of the relationship between Schedule 8 and the suspension or termination rights in clause 9. Beyond this it is not clear to Railtrack exactly where this suggestion would be leading. If there is to be a performance regime at all it ought to be comprehensive, although this does not preclude the setting of different levels of reward or penalty for different levels of performance (provided the dividing points can be clearly identified).

Liability - breaches which do not lead to train delays or cancellations

What liability should there be if a party fails to comply with its obligations under, for example, the Track Access Conditions or the dispute resolution arrangements?

What liability should there be for breach of maintenance and network enhancement obligations, environmental obligations, obligations concerning the provision of information or its confidentiality? What should the contract say about other types of breach of the contract?

Railtrack believes that generally normal contractual principles should apply. There may be more instances where liquidated damages rather than damages at large could suitably be introduced, but the only obvious example is the Part G example referred to above, which by extension should apply to Part F as well.

Should the parties be exposed to unlimited liability in any circumstances?

Railtrack sees no reason why the parties should not be exposed to unlimited liability, subject always to the provisions of CAHA. Any proposal to alter or cap liabilities would involve detailed consideration of the provisions of CAHA as well.

If not, what should the liabilities of the parties be?

See above.

Should there be different limits on liability depending on the nature, time and severity of the breach in question?

If damages at large are payable then to an extent the quantum of damages will reflect the significance of the breach to the injured party. If liquidated damages provisions are being devised then they will need to pre-estimate losses taking into account all the circumstances.

Should wilful misconduct be an exception to any general rule? If so, what should be the definition of wilful misconduct and what liability should attach in such a case?

Railtrack believes that it is always likely to prove difficult to define wilful misconduct adequately or to measure against the definition whether or not such misconduct has taken place.

Non-money remedies

Are there circumstances in which parties to access contracts should be able to apply for remedies other than the payment of money?

There might be circumstances in which some form of specific performance type remedy designed in relation to the particular circumstances of the contract in question, could possibly be helpful but they would be very rare and probably need to be bespoke rather than templated. In most cases it is difficult to see what right such a regime could confer on the injured party other than the same right to damages that it would have in any event.

If so, what are they, and what remedies should be available? -Are there any circumstances in which a train operator should be entitled to 'self-help' remedies (similar to self-help remedies in station and depot access contracts?)

Railtrack does not believe that self-help remedies are likely to be appropriate in relation to track or related apparatus which the person in question does not himself operate. By the same token it would not be appropriate for Railtrack to have selfhelp remedies enabling it to make physical changes to rolling stock.

Would specific performance of an access contract be an appropriate available remedy? Or should specific performance be restricted to certain types of breach, leaving money compensation the only remedy in others?

Railtrack is not convinced that generally there is any merit in seeking to modify the standard provisions of the law in relation to specific performance. Such attempts tend to turn out creating as many problems as they solve.

Events of default and remedies

Are the events of default specified in the standard track access contract appropriate? Are there any missing? Are any of them inadequately defined?

Railtrack believes there is a good case for revisiting the events of default specified in the standard track access agreement. They do appear to need updating and in some cases they seem to be biased in Railtrack's favour, in particular the provision about non use of train slots. As regards the question of definitions, it is probably better not to attempt a more precise definition of "material breach", as such attempts are notoriously difficult.

What should be the rights of the parties in the case of an event of default on the part of the other party? Should they be the same for Railtrack and the train operator or do the different circumstances of these parties warrant different remedies?

There is probably a case for greater clarity as to the circumstances in which events of default give rise to an option either to suspend or to terminate. Equally the train operator might prefer to have the option of seeking suspension/termination or specific performance. Presumably it has this right anyway, but it might be better to express it rather than leave it implied.

Should the remedies available to the party not in breach vary according to the nature of the breach which he faces? If so, in what ways? Should there be the possibility of a response which is more graduated than the existing position?

Again difficulties of specifying different levels of materiality or wilfulness are probably better avoided.

Are there any circumstances in which the train operator should be entitled to withhold payment of access charges? If so, what are they and what conditions should apply?

Railtrack does not believe that train operators should have any greater right than at present to withhold payment of access charges. Any such right would have a seriously damaging effect on Railtrack's credit rating and on its ability to securitise revenues, and hence its ability to finance its activities. Railtrack believes that such a change would not be in the long term interests of the industry. If the Regulator were to pursue this possibility it would need to be tailored into the charges review. This would involve a substantial and complex re-evaluation of the whole financial position and of the levels of risk being carried by Railtrack.