

# **OFFICE OF RAIL REGULATION'S PROPOSED DECISION ON THE KEY ASPECTS OF AN APPLICATION FOR A TRACK ACCESS OPTION FOR CROSSRAIL PASSENGER SERVICES ON NETWORK RAIL'S NETWORK**

## **Introduction**

1. This document sets out the decision we are minded to take (the "proposed decision") on the key aspects of an application made under the Railways Act 1993 (the Act) for a track access option (TAO) for Crossrail passenger services on Network Rail's network. We are seeking representations on this proposed decision before reaching a final decision on these matters. Having considered those representations, we aim to be able to make a final decision towards the end of March 2008 to enable the Government to take it into account during Parliament's consideration of the Crossrail Bill. We have taken account of all relevant representations and information that we have received. We would therefore expect representations to focus on material new information and/or factual inaccuracies.

## **The application**

2. In July 2007, ORR received an agreed application from Network Rail and DfT (on behalf of the Secretary of State) for approval, under section 18 of the Act, of a 50-year TAO to reserve access rights for the planned Crossrail services. The rights sought were for Network Rail's network only and excluded the new central tunnel section which, the parties told us, would be covered by an application for a complementary TAO or subsequent amendments to the Crossrail TAO.

## **The proposed decision**

3. We are minded to conclude that:

- we should approve a TAO;
- the parties' proposed TAO should be modified:
  - to contain rights to two fewer paths per hour in each direction at weekends and in periods other than the peak, shoulder peak and service start and end periods on weekdays;
  - so that the TAO has a term of thirty years from the start of services, including a buy-back mechanism;
  - to make the use of rights to run services conditional on the parties being able to demonstrate that they can satisfy objective capacity and performance tests;
  - so that the "use it or lose it" provision allows any loss of rights through non-use after the end of the stabilisation period to be made permanent in defined circumstances; and
  - so that the capacity allocated in this TAO, and the remaining capacity which has not been allocated are more clearly identified for the purposes of the Railways Systems Model and the change control mechanism, and so

that the operation of the change control mechanism is clearer and more predictable.

4. In this proposed decision we set out the key modifications that we have identified as needing to be made to the TAO. We have identified these key modifications having taken into account all the relevant representations and information which we have received. The proposed decision does not set out all aspects of the TAO which may need to be modified but focuses on what we consider to be the key issues.

5. The rest of this document describes the proposed decision in more detail, our reasons for reaching it, and the factors that we took into account in reaching this proposed decision. When we have taken into account any representations which we receive on the proposed decision and have engaged with the parties on the detail of these modifications we will produce a comprehensive reasons document setting out our reasons for all the modifications that we require to be made to the TAO.

### **Process to date**

6. In line with our published policies and processes, we undertook an extended eight-week consultation (which ended on 21 September 2007) and received 13 responses. Of these, only the one from TfL was fully supportive. Some others supported a TAO in principle, but raised issues in respect of particular terms of the TAO being sought. Seven of the responses were from freight operators and other freight bodies. These were all substantive objections, and raised the following common concerns:

- the TAO had significant implications for freight, particularly freight growth, and during the consultation period it was not possible for them to make fully informed comments on the application because the Timetable Reference Group (a group consisting of the parties and the affected operators with the role of overseeing Crossrail timetable development work) (TTRG) had not produced all the necessary outputs;
- we should not conclude on the TAO until we had concluded on our access options policy and, in any case, the proposed 50-year duration of the option was not justified on the basis of the evidence provided; and
- there was no contractual certainty that the proposed infrastructure work would deliver the necessary capability – freight operators and their customers were concerned that they would lose out if the required capacity for Crossrail services were not delivered.

7. Our initial review of the application, consultees' responses, and the applicants' comments on them, identified some critical information gaps. These related particularly to the completion of the timetabling analysis of capacity for future freight growth. Without this information we considered that we would face considerable difficulties in reaching a decision. The applicants published a Performance and Systems Modelling Report in December 2007 in response to our request.

8. Subsequently, we arranged an industry hearing, to address detailed issues regarding the demand for Crossrail services, capacity and performance, and the change control provisions in the draft TAO. We have published the relevant documents, including the application, consultees' responses and a transcript of the hearing on the ORR website at <http://www.rail-reg.gov.uk/server/show/nav.205>.

9. We have considered whether the case has been made for a TAO having taken into account:

- (a) **our statutory duties**, most of which are set out in section 4 of the Railways Act 1993. These duties are not in any order of priority, and, as for all applications, it is for us to decide how to balance them when reaching a decision. We believe that the following section 4 duties are of particular relevance in this case:
- (i) section 4(1)(a) - *otherwise to protect the interests of users of railway services;*
  - (ii) section 4(1)(b) - *to promote the use of the railway network for the carriage of passengers and goods, and the development of that railway network, to the greatest extent that [ORR] considers economically practicable;*
  - (iii) section 4(1)(g) - *to enable persons providing railway services to plan the future of their businesses with a reasonable degree of assurance;*
  - (iv) section 4(1)(zb) - *to promote improvements in railway service performance;*
  - (v) section 4(5)(c) – *to have regard to the funds available to the Secretary of State for the purposes of his functions in relation to railways and railways services; and*
  - (vi) section 4(5)(d) - *to have regard to the ability of the Mayor of London...and Transport for London to carry out the functions conferred or imposed by or under any enactment;*

We have considered all our duties in arriving at our proposed decision and are content that this decision represents the appropriate balance between all our Section 4 duties.

- (b) **relevant legislation**, in particular, the Railways Infrastructure (Access and Management) Regulations 2005 (the Regulations), which provide that various conditions need to be satisfied to justify framework agreements (which include TAOs) of longer than 5 years. The Regulations provide that agreements of:
- (i) between 5 and 10 years must be justified by the existence of commercial contracts, specialised investments or risks; and
  - (ii) more than 10 years may only be made in exceptional cases, in particular where there is large-scale and long-term investment, and particularly where such investment is covered by contractual commitments;

we explain our proposed decision in respect of the duration of the TAO below; and

- (c) **our published policies** - in this case, our track access options policy, which was published on 17 January 2008<sup>1</sup>, and was developed with careful regard to these Regulations, and our criteria and procedures for the approval of track

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<sup>1</sup> *Track Access Options Policy*, Office of Rail Regulation, London, January 2008, available at [www.rail-reg.gov.uk/upload/pdf/350.pdf](http://www.rail-reg.gov.uk/upload/pdf/350.pdf).

access contracts<sup>2</sup>. Although the track access option policy was published after the application was made, the applicants always understood that consideration of the application would be fully in line with it. This position was confirmed at the hearing.

## **The justification for the TAO**

10. Our policy on the approval and duration of TAOs is that we will only consider approving TAOs for a term longer than ten years in exceptional circumstances. Such cases would involve dedicated and focused long-term investment that could be facilitated by the certainty that a long-term contract can provide.

11. It is clear that both TfL and DfT will be providing significant funding. A TAO will help to provide certainty to DfT and TfL that their investment can be used for its intended purpose, helping to facilitate that investment. We therefore consider a TAO in excess of 10 years is justified in this case.

12. However, having established that view, we need to balance the benefits which that additional certainty provides to the funders with the reduced flexibility which arises from the long-term allocation of capacity. We have therefore considered:

- (a) what the duration of the TAO ought to be; and
- (b) the extent to which there is likely to be demand for the services covered by the access rights in the TAO, and the extent to which the operation of those services is critical to a decision to proceed with the project.

## **Duration of the TAO**

13. The applicants applied for a TAO of 50 years' duration. Apart from the size of the investment the parties' case for a 50-year option rested on:

- (a) the economic case for Crossrail - they said that it would take around 50 years to achieve an acceptable benefit cost ratio for the project;
- (b) the potential funding for Crossrail, with the potential to use long-term debt of at least 50 years' duration commensurate with the asset lives of the main Crossrail assets, which are in excess of 50 years; and
- (c) the balance between the benefits of the new Crossrail services against the benefits of retaining flexibility of use of the network.

14. The term of the TAO was a particular concern raised by consultees, and we have conducted our own assessment. In summary, we do not consider that the parties have made the case for a TAO of 50 years. We have concluded that a shorter duration option is more appropriate, because:

- (a) we do not consider that a 50-year option is required to satisfy DfT value for money criteria. For example, economic benefits from Crossrail would not cease at the end of a TAO, although there would be an increase in the risk associated with the projections in the very long-term; and

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<sup>2</sup> *Criteria and Procedures for the approval of passenger track access contracts: 4<sup>th</sup> Edition*, Office of Rail Regulation, London, May 2006, available at [www.rail-reg.gov.uk/upload/pdf/288-pass\\_candp4ed.pdf](http://www.rail-reg.gov.uk/upload/pdf/288-pass_candp4ed.pdf).

(b) we do not consider that a 50-year option is required to underpin the likely duration of the funding proposed by DfT and TfL. Our assessment has considered the source, structure and likely duration of funding and the impact that a shorter duration option might have.

15. From our analysis we consider that the duration that would be appropriate in this case is 30 years. That duration would be consistent with our policy, in particular because:

(a) it would provide sufficient certainty for DfT to achieve a benefit cost ratio of greater than 1:1, while noting that benefits would not necessarily cease at the end of the TAO; and

(b) it should provide sufficient certainty for funding to proceed.

### **Scope of access rights**

16. The TAO seeks rights to use Network Rail's network (on the Great Eastern and Great Western lines) as part of a Crossrail service running 24 trains per hour (tph) in the morning (am) and evening (pm) peaks each way through the core tunnel section, reducing to 20 tph in the shoulder peak<sup>3</sup> and 16 tph in the off-peak and at weekends and to provide for an all stations service. The service sought by the TAO would comprise:

- in the peaks, 10 tph on the Great Western (4 tph to Maidenhead, 2 tph to West Drayton and 4 tph to Heathrow), intended to replace and/or supplement existing services (this reduces to 8 tph in the off-peak and at weekends, and 6 tph at the beginning and end of the day);
- in the peaks, 12 tph on the Great Eastern to Shenfield, intended to replace and supplement the current "all stations" services (this reduces to 10 tph in the shoulder peaks, 8 tph in the off-peak and at weekends, and 6 tph at the beginning and end of the day); and
- in the peaks, 12 tph largely on a new tunnel section to Abbey Wood which is entirely separate from the existing running lines (this reduces to 10 tph in the shoulder peaks, 8 tph in the off-peak and at weekends, and 6 tph at the beginning and end of the day).

Of the total of 24 trains entering the tunnel from the east in a peak hour, 14 would terminate at Paddington.

17. We were concerned that there might not be the demand for this level of service and we have reviewed the likely level of demand for the services in the peak, off-peak and other periods. We consider that DfT has made the case (based on current load factors, growth forecasts and other modelling) that there is the demand for the level of service it is seeking in the peak and shoulder peak on both the Great Eastern and Great Western routes and that the revenue from this, and therefore the rights in the TAO, are critical to its business case.

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<sup>3</sup> Peak is defined as arriving at or departing from Tottenham Court Road between 07:45 – 09:14 and 16:45 – 18:14 with the balance of the periods 07:00 – 09:59 and 16:00 – 19:00 being the shoulder peak. The remaining periods of the day are classed as off-peak, which includes a service start period before 06.59 and a service end period after 21.00.

18. However, based on the evidence that has been presented to us, we do not believe that the case has been made for the proposed level of off-peak services. In particular, it has not been demonstrated that the rights to such a level of service are critical for the business case. We have given the applicants every opportunity to provide us with the necessary justification, including asking very focused questions at the February rail industry hearing. At that hearing, it became clear that these service levels have been determined out of policy considerations, to meet the Mayor's and TfL's transport strategy, and to provide something closer to a London Underground metro standard of service through the central tunnel section.

19. In this context, we had particular regard to the ability of the Mayor and TfL to carry out their statutory functions. We do not, as we explain in more detail below, consider that our approval of fewer access rights than requested would affect the ability of the Mayor and TfL to carry out their statutory functions, including the promotion of the economic and social development of London, and no evidence has been presented to us in this regard. Quite apart from the fact that it has not been demonstrated that the marginal effect of these services is critical, their exclusion from the TAO would not mean that the services could not run in the future. It would simply mean that we are not prepared to allocate capacity for them now.

20. In considering the capacity that should be allocated for Crossrail services, we have taken into account demand for other services on the relevant route, that is, the Great Western or the Great Eastern. Stakeholders have estimated the level of freight demand in 2015, and DfT stated at the hearing that it regarded the forecasts as reasonable. It also expressed the view that the railway should accommodate reasonable freight growth, although it did not indicate over what timescale. The modelling report showed that the estimated level of freight growth could not be accommodated even without Crossrail. It indicated that the number of freight trains which could run with the Crossrail services was slightly lower than, but broadly similar to the number which could otherwise run.

21. The situation is most critical on the Great Eastern. The Greater Anglia Route Utilisation Strategy (RUS), which was established on 18 February 2008, states that the Great Eastern will be a constraint to freight growth well before 2015, and foresees an urgent need to provide additional capacity, which will almost certainly be in the form of alternative routes enhanced for freight. Since the TAO was submitted, DfT has announced committed funding for the upgrade of the Gospel Oak to Barking route, in association with the expansion of the Thames Gateway port (Thameshaven). Planning permission has also been granted for the expansion of the ports of Felixstowe and Harwich, supported by a requirement that the developer will contribute to funding the enhancement of the "cross-country" route from Felixstowe to Yorkshire. However, this is not yet a committed project and, until it is, there is a risk that freight growth will be suppressed. As we mention above, this is an issue irrespective of Crossrail.

22. Given the high degree of uncertainty surrounding the demand for capacity for different purposes, we consider it is appropriate, in line with our statutory functions and duties, only to approve access rights in the TAO for which we can see a clear case, which outweighs the benefits of retaining flexibility to meet other likely demands. It is worth emphasising that this approach does not mean that the Optionholder would necessarily be prevented from running more services – it could always ask us to approve more access rights when the level of demand became

clearer and providing the required capacity existed at that time. Equally, it does not mean that we would necessarily approve the capacity currently regarded as being required for freight growth for use only by freight operators. At this stage, we do not know what the most appropriate use of that capacity will be, and we believe it is in the public interest to leave that to be decided, as appropriate, nearer the time it is needed.

23. Subject to our further comments on the capacity and performance implications of the TAO, addressed below, we have therefore decided to approve the requested quantum of access rights in the peak and shoulder peak periods. In the off-peak and at weekends (excluding the service start and end periods), we will direct the approval of two fewer rights per hour in each direction than requested in the application, between Tottenham Court Road and Shenfield, and Tottenham Court Road and Heathrow or Maidenhead.

### **The capacity and performance implications of the TAO**

24. Having established the position in terms of demand, we looked at whether there would be the capacity to meet the rights in the TAO – and the impact on performance. The modelling report stated that peak capacity usage on the Great Eastern could be as high as 128% with very poor performance levels. The parties said that, as they refined the project, they were confident that they would be able to improve this significantly, so as to achieve a minimum performance level of 92% PPM. At the hearing, DfT made it clear that performance below that level would be unacceptable.

25. Off-peak, as we explained above, we believe that the service specification is less critical to the business case. During these times, the applicants have modelled a timetable which can accommodate four freight paths per hour per direction on the Great Western (double that which operate today), and two freight paths per hour per direction on the Great Eastern (the same as today), but with additional infrastructure to improve capacity and performance. However, although this infrastructure is contained within the Crossrail Bill, there is no certainty that the Bill will receive Royal Assent as published. Even if it does, it grants powers, not obligations, to the promoters and there is no certainty that Crossrail will construct all the enhancements for which it gains powers. No enhancement is yet funded until the Bill is enacted.

26. We considered whether we should link the ability to exercise the rights to the completion of specified infrastructure enhancements. We have decided not to take this approach because of the general lack of knowledge of the likely final technical specifications for the project. We have therefore chosen to concentrate on the outputs from the project (in terms of capacity and performance) rather than the inputs.

27. We understand why there is so much uncertainty around capacity and performance at this early stage of the project. There may well be instances where a TAO designed to facilitate investment will be submitted for approval before the detail of the project is finalised. However, that uncertainty regarding the effect on other operators means that we have needed to consider how those legitimate third party interests can be protected. When we approve access rights for existing infrastructure, we do so with a clear understanding of the amount of capacity we are approving, and the amount left for other uses.

28. For that reason, we have decided that the use of the access rights in the TAO will be made conditional on an objective test. This will require the parties to demonstrate through the Railway Systems Model, as part of the initial capability testing envisaged in the TAO, that they are able to run the proposed Crossrail services, together with certain other passenger and freight services at a performance level for all passenger operations on relevant routes no lower than 92% PPM. The passenger and freight services which the parties will be required to include in the model for this purpose include:

- (a) the existing rights of other passenger operators (save for those services which will be replaced by Crossrail);
- (b) the existing rights of freight operators; and
- (c) certain paths identified in respect of freight growth, as explained below. All of these paths should therefore form part of the model assumptions. We envisage that these and any other model assumptions should be capable of review from time to time, as we explain below.

29. The parties have carried out work to assess the extent to which freight growth can be accommodated alongside Crossrail, and have worked with the freight industry to identify a number of paths which represent anticipated freight growth to 2015. Work done by Network Rail and DfT demonstrates that some of those paths can be accommodated alongside Crossrail. We consider that those additional paths should be included in the model for the purposes of the objective capacity test described above. This approach will not reserve or allocate those paths for freight services - any operator wishing to take up the paths in the future will have to follow standard industry processes. However, we consider that this approach ensures an appropriate balance between reserving capacity for Crossrail and ensuring that sufficient capacity is available for other services.

30. We will also impose a requirement that Crossrail services should run at a 92% PPM performance standard for a period after an initial services commencement phase. We will include provisions the effect of which is that Crossrail rights could be lost if this standard is not met.

## **Change control**

31. The TAO contains a bespoke **change control mechanism** (CCM). The CCM operates in conjunction with the Railway Systems Model, referred to above, which allows other operators' access rights to be modelled to decide whether they "conflict" with the Crossrail rights. The key function of the CCM is to establish the consequence of any conflict between Crossrail rights and other rights.

32. We consider that the concept of using such a model to identify conflicts and issues is a step forward compared to other major projects, although we have concerns with the operation of the mechanism as currently drafted. Indeed, given the considerable level of uncertainty surrounding the project, it seems very likely that the CCM will be needed.

33. The CCM addresses the consequences of conflicts. In doing so, it describes particular scenarios and, for each case, allocates risk between Network Rail and DfT. The parties have broadly adopted the liability framework from the model clauses for track access contracts, and we are not suggesting any change to the risk allocation,

unless the parties consider that this is required as a consequence of the changes we propose to the CCM.

34. The main issues we have identified in our review of the CCM, raised also in response to the consultation and at the hearing, are that:

- it would not necessarily work transparently and predictably. In particular, there is a lack of clarity as to what constitutes a conflict and what are the consequences of certain conflicts;
- it could enable Crossrail to use up capacity which we understand, from statements made at the hearing, the parties have assumed would be available for other operators. This effect could have a particular impact on Network Rail's ability to agree to the rollover of existing access rights; and
- the parties would have an ability to change the model without any requirement to refer to us or other operators.

35. These concerns lead to our decision that we should change the CCM to give effect to the following key principles:

- there should be as much clarity as possible about what would constitute a conflict. In particular, a conflict will arise if the model is run on the basis of the required assumptions and the services do not meet a performance standard of 92% PPM;
- the TAO should set out the consequences of a conflict for Crossrail and third party rights in all of the different circumstances which are envisaged, subject only to the inclusion of a power in the TAO to allow ORR to review or direct to the contrary as necessary;
- the effect of a conflict between a Crossrail right and the rights which we require to be included in the model will be that the Crossrail right is lost permanently (not only for the duration of the conflict as it is at present);
- similarly, the effect of a conflict arising because of an error in the model or in the model assumptions, or because of a de-scoping of the project, will be that the Crossrail right is lost permanently;
- conversely, if an application is made for a new access right which is not within the scope of the rights which we require to be included in the model as assumptions, and that right conflicts with an approved Crossrail right, the approved Crossrail right will prevail; and
- the model should be capable of change through agreement with other affected operators, but if such agreement is not achieved, the TAO should allow ORR to review the CCM model and require changes to it and its assumptions, if that is necessary to ensure that it reflects current reality.

36. Implicit in these principles is our acknowledgement that the proposed modelling assumptions for other operators on the network are based on current levels of understanding. It is very likely, if not certain, that they will need to be changed in the future in order better to reflect reality. We have therefore decided that the TAO should be modified to require the use of the modelling assumptions described above unless the parties have agreed changes with affected operators or we have directed or approved changes in the light of the position prevailing at the time. In this way, we anticipate that the modelling assumptions can be kept up to date with a minimum of intervention from us.

37. Because this approach assumes that other operators and ORR will have a full understanding of the model and assumptions used, it assumes that the parties will make that information freely available to them. If that were not to happen, we would expect the issue to be submitted to us for resolution, at which point we would ensure that the relevant information was made available as appropriate.

### **Use it or lose it (UIOLI)**

38. Whilst the UIOLI provisions of Part J of the Network Code will be incorporated into each individual Crossrail TAA drawn down under the TAO, the TAO itself contains provisions which effectively override and in part replace Part J. The overall effect of these provisions is to give extensive protection for Crossrail services against the operation of the UIOLI provisions of Part J which would normally apply.

39. Specifically, for a “Stabilisation Period”, which is the shorter of 5 years or length of the first Crossrail Track Access Agreement, if rights are lost under a particular Crossrail TAA through Part J, then the Option Holder will be entitled to obtain equivalent access rights in the next timetable period.

40. During the Stabilisation Period NR can serve a Surrender Notice proposing surrender of an access right which has not been drawn down by the TAA for the remaining duration of the relevant Crossrail TAA, but not for longer. There is provision for ORR determination if the parties cannot agree.

41. Eventually, NR can serve an Extended Surrender Notice requiring surrender of undrawn access rights for the entire remaining period of the TAO. However, this right only arises if the access option right to which the Extended Surrender Notice relates was either Extinguished or not obtained in two successive Crossrail TAAs. Again, there is provision for ORR determination if the parties cannot agree. However, given that the length of the first two Crossrail TAAs could be 20 years or even longer, the effect of these provisions will be to give very considerable protection to Crossrail services against the operation of the Part J UIOLI provision for an extended period.

42. We believe it is reasonable that there should be some protection from the normal operation of Part J during a Stabilisation Period, reflecting the need to build up the services and the initial period of revenue earning service and we consider that 5 years is a reasonable period in this context. However, beyond that period we believe that the service pattern should largely have stabilised and we see a limited case for preserving the protections contained in the draft TAO beyond this point. We have therefore decided to modify the UIOLI provision to remove the provisions giving the Optionholder extended and special protection.

### **Application of buy back**

43. Our track access option policy states that we will include a buy back mechanism for TAOs lasting longer than 15 years. The level of buy back compensation principally depends on the level of investment, the number and weighting of the paths in the option, the duration of the option and the timing of the buy back.

44. Of critical importance in defining the level of buy back compensation required is whether expenditure in non-Network Rail assets should be included in the compensation calculations. Our policy states that the size of the investment will be

considered on a case-by-case basis taking into account the degree to which it is required to secure the benefits of the investment. DfT has stated that, if services did not operate on the Network Rail network (e.g. operated only between Paddington and Abbey Wood) then the scheme would have an indicative benefit cost ratio of 0.4:1. It is therefore unlikely that the off-network investment would take place in the absence of the ability to operate on the Network Rail network. The total Crossrail investment will therefore, consistent with our TAO policy, need to be taken into account in the buy back calculations.

45. The application did not contain a buy back mechanism, although the parties acknowledged that they would accept one which reflected our published policy. We are currently drafting the provision to give effect to these principles and will modify the TAO to ensure its inclusion

### **Rights to calling patterns**

46. The TAO contains rights for Crossrail services to call at all stations, and for any destination in the west to be linked to any in the east. The timetable as modelled omitted some station stops on the Great Western, and linked certain destinations in the west to certain others in the east.

47. Whilst this was one possible timetable solution, it was not the only one. Depending on the approach chosen by the Optionholder, the exercise of TAO rights could therefore consume more or less capacity than has been modelled. When questioned, the parties were unable to say how this might affect other operators. However, by scrutiny of the proposed timetable, we have ascertained that the exercise of rights to stop at all stations on the Great Western could compromise some paths for the residual passenger and/or freight services. At the hearing, DfT stated that the universal rights requested in the TAO were not critical to its business case. We therefore intend to modify the TAO to ensure that the stopping and service patterns do not affect other operators unduly.

### **Other Legal Issues**

48. Certain stakeholders argued that the grant of an option would infringe European rail legislation. Issues raised by stakeholders included the complaint that the option would give Crossrail undue priority over other users, and would introduce discriminatory terms of access to the network, so infringing both European rail legislation and competition law.

49. In coming to the proposed decision, we have satisfied ourselves that an option can be granted consistently with European law. We will therefore work to ensure that the terms of the option comply with all relevant legislation.

### **Contractual arrangements**

50. We do not currently have model clauses for TAOs and the parties have developed a contract which draws on relevant aspects of the model clauses that are used for passenger track access contracts. The TAO contains a number of other novel provisions and has adapted certain model clause provisions. We intend now to work with the parties to ensure that the TAO reflects accurately the decision outlined above, and that customised provisions do not make it difficult for the contract to apply in the wider context of the industry's contractual framework.

## **Modification provisions in other operators' track access contracts**

51. Since we have known of the parties' intention to submit a TAO for approval, we have been asked by other operators to direct long-term track access contracts which could have impinged on the rights in the proposed Crossrail TAO. When we approved those contracts, we did not know whether there was a conflict with the Crossrail services, and so were unable to decide how any possible conflict might be resolved. So that approval of the other operators' rights would not be unduly delayed, we included provisions in those contracts which would enable us subsequently to modify conflicting rights, if appropriate, with compensation.

52. Whilst this approach addressed the short-term issue, we do not believe that it would be a satisfactory situation for the longer term, since it introduces uncertainty for the operators concerned. A benefit of the approval of the TAO for Crossrail is the certainty it provides to the parties – and also to ORR and other operators – regarding the amount of capacity that has been allocated. For that reason, and also because all existing contracts containing modification provisions expire on or before December 2016, we are now able to confirm that there is no conflict between the existing contracts and the capacity we propose to approve in the TAO. We can also confirm that we would not approve capacity for other operators in the future if we knew that it would necessarily conflict with capacity approved in the TAO.

53. Accordingly, we are prepared to approve amendments which remove Crossrail modification provisions from existing access contracts, and we will not require parties in future to include them in new access contracts.

## **Next Steps**

54. We aim to be able to make a final decision before the end of March 2008 to enable the Government to take it into account during Parliament's consideration of the Crossrail Bill. Accordingly, we are seeking representations by midday on 17 March 2008. These should be sent in electronic format to David Robertson at these offices ([david.robertson@orr.gsi.gov.uk](mailto:david.robertson@orr.gsi.gov.uk)).

55. We will publish responses on our website and may quote from them. You should indicate clearly if you wish all, or part, of your response to remain confidential to ORR. If you make a response in confidence, you should also send a statement, excluding the confidential information, which we can publish. We may also publish the names of respondents in future documents or on our website, unless you tell us that you want your name to be withheld.

56. The actual directions to enter into the track access option contract will be issued as soon as possible after the publication of our final decision. We anticipate that this will be within three months, once we are satisfied that all the required modifications and other outstanding contractual issues referred to above have been resolved.

**Office of Rail Regulation  
3 March 2008**