



Charging framework for the Heathrow Spur

27 May 2016

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Introduction

Summary

Heathrow Airport Limited (HAL) owns and operates the Heathrow Spur¹, which is a stretch of railway infrastructure linking Heathrow Airport to the Great Western Main Line to Paddington. When Crossrail services begin in 2018, Crossrail trains will access the Heathrow Spur to take passengers to and from Heathrow Airport. HAL intends to charge the Crossrail train operator for that access.

This document sets out our decision in relation to HAL's ability to levy a charge to recover the historical costs of constructing the Heathrow Spur itself. This decision hinges on the interpretation of EU-derived law which says that charges for such construction costs can only be levied on train operators if the project could not have gone ahead without them. It is the interpretation of "*could not have gone ahead*" which is crucial in this case.

What makes this case unusual is that the provision is being applied to a project built before the relevant law came into force. We consulted on our proposed decision in February 2016 and noted that there were evidential issues in determining whether or not HAL could recover these costs, caused by the fact that we had not seen explicit evidence setting out the basis for the investment from the time when the investment decision was made. In response to our consultation, HAL has produced some additional contemporaneous evidence which it says shows that the investment decision taken by the board of BAA plc was based on BAA being able to recover the long-term costs of the construction project, plus a commercial rate of return, through levying charges on rail users.

In reaching this decision, we have considered all the available evidence (including the new evidence provided by HAL). We have also taken account of all the representations we have received. In our view, and for the reasons set out in this document, HAL has not provided sufficient evidence to show that it should be able to levy charges relating to the historical costs of constructing the Heathrow Spur. This does not, however, prevent HAL levying other charges provided they are set in accordance with the legislation.

We are establishing the charging framework, attached as the Annex to this decision document, with immediate effect. We expect HAL to update its network statement as soon as possible to ensure its charges are set in accordance with the charging framework.

¹ The Heathrow Spur encompasses the track, tunnels, running lines and associated equipment (such as signalling and electrification equipment) and the associated stations.

Background

1. The Office of Rail and Road (ORR) is establishing the charging framework for the 8.6km of railway infrastructure which Heathrow Airport Ltd (HAL) owns and operates and which links Heathrow Airport to the Great Western Main Line (the Heathrow Spur). ORR is required to establish the charging framework and specific charging rules in accordance with Regulation 12 of the Railways Infrastructure (Access and Management) Regulations 2005, as amended² (the Regulations).
2. HAL's approach to charging for the Heathrow Spur is set out in its network statement which was published for the first time in Autumn 2015³. Pursuant to a Deed of Undertaking in connection with the Crossrail project dated 30 May 2008 between, among others, HAL and the Secretary of State for Transport (the Deed of Undertaking)⁴, HAL committed to ensuring the Heathrow Spur would be in compliance with the Regulations by the start of Crossrail services in 2018.
3. When the Department for Transport (DfT) initially issued guidance on the scope of the Regulations in November 2005⁵, it indicated that the Heathrow Spur would be covered by the exemption from the specific charging, allocation of capacity and access to services provisions of the Regulations applicable to networks intended only for the operation of urban or suburban passenger services⁶. In November 2007, DfT revised the guidance to indicate that "*the Heathrow Express (i.e. the Heathrow Spur owned by the BAA Group) would attract this exemption. However, this would not... appear to be the case were the construction of Crossrail to enable passenger services to Heathrow from further afield than just Paddington station*"⁷.
4. In accordance with the Deed of Undertaking, HAL wrote to ORR on 27 November 2012 to seek confirmation that the Regulations applied to the Heathrow Spur. We confirmed on 10 January 2013 that the Regulations did apply to the Heathrow Spur⁸.

² In particular by the Railways Infrastructure (Access and Management) (Amendment) Regulations 2009.

³ http://www.heathrow.com/file_source/Company/Static/PDF/Companynewsandinformation/rail-network-statement-june15.pdf.

⁴ Deed of Undertaking, dated 30 May 2008 between the Secretary of State for Transport, BAA Limited, HAL and Heathrow Express Operating Company Limited.

⁵ DfT - Guidance on the scope of the First Rail Package Transposition Regulations.

⁶ Regulation 4(4)(b).

⁷ DfT - Guidance on the scope of the First Rail Package Transposition Regulations, footnote 2.

⁸ Letter from Brian Kogan, Deputy Director, Railway Markets and Economics, ORR to Allan Gregory, Surface Access Director, HAL, dated 10 January 2013.

Since then, HAL has been working towards compliance with the Regulations, including by publishing its network statement for the first time as set out above.

5. In proposing the charges set out in its network statement, HAL sought to rely on the exception to the charging principles contained in paragraph 3 of Schedule 3 to the Regulations in order to levy a charge to recover the historical capital costs of constructing, in particular, the tracks, tunnels and stations comprising the Heathrow Spur (the Historical Long-Term Costs). DfT and Transport for London (TfL), in their capacity as Crossrail sponsors (the Sponsors), disagree with HAL's approach to charging and do not believe HAL has satisfied the criteria to make use of that exception in respect of the Historical Long-Term Costs.
6. We have considered this question as part of our function of establishing a charging framework for the Heathrow Spur and consulted on our proposed decision on 11 February 2016. The consultation closed on 10 March 2016. In total, we received 14 responses, which can be found on our website⁹. Of those 14 responses, eight responses focused on HAL's particular circumstances and our interpretation of legislation and of those eight responses:
 - five responses (from DfT, TfL, MTR-Crossrail, London TravelWatch and Lord Berkeley (in his capacity as a member of the House of Lords)) supported our proposed decision;
 - two responses (from CAA and the London (Heathrow) Airline Consultative Committee) were concerned about the potential impact on airline charges; and
 - one response (from HAL) was strongly against our proposed decision.
7. This document sets out our decision and gives our reasons for that decision. We have considered the new evidence HAL has provided, as well as the other available evidence and taken into account all the representations we have received. For the reasons set out below, our view is that HAL has not provided sufficient evidence to enable it to levy a charge to recover the Historical Long-Term Costs from rail users.

⁹ <http://orr.gov.uk/consultations/closed-consultations/policy-consultations/charging-framework-consultation>

Legal framework

Functions in relation to charging frameworks

8. Regulation 12(1) of the Regulations requires ORR to “*establish the charging framework and the specific charging rules governing the determination of the fees*” which the infrastructure manager must charge.
9. Regulation 12(2) of the Regulations requires an infrastructure manager to “*determine the fees to be charged for use of the infrastructure in accordance with the charging framework, the specific charging rules, and the principles and exceptions set out in Schedule 3*”. It must then collect the fees from users of its infrastructure.
10. Accordingly, it is for the infrastructure manager to set fees for the use of its infrastructure that comply with both the framework and charging rules set by ORR and the principles and exceptions set out in Schedule 3 of the Regulations.
11. Regulation 28(2) of the Regulations provides that ORR is responsible for ensuring that the charges levied by the infrastructure manager comply with the requirements of Part 4 (Regulations 12 to 15) and Schedule 3 to the Regulations.
12. Therefore, an infrastructure manager is given discretion to determine the fees to be charged for the use of its infrastructure in the way it deems most appropriate to recover its costs. However, it must exercise that discretion in accordance with ORR’s charging framework and the specific charging rules, which must themselves comply with the Regulations’ charging principles and exceptions. It is for ORR to be satisfied that the charges levied comply with the requirements of the Regulations and to adjudicate on any appeals that may be brought by applicants in relation to such charges.

The test for recovery of long-term costs

13. The principles of access charging are set out in paragraph 1 of Schedule 3 to the Regulations. The starting point is that “*charges for the minimum access package and track access to service facilities... shall be set at the cost that is directly incurred as a result of operating the train service*”.
14. Where an infrastructure manager wants to levy charges to recover costs above those that are directly incurred, two exceptions apply:

- a) in order to obtain full recovery of the costs incurred, the infrastructure manager may levy mark-ups on the basis of efficient, transparent and non-discriminatory principles¹⁰; and
 - b) for specific investment projects, where three criteria are fulfilled, the infrastructure manager may set or continue to set higher charges on the basis of the long-term costs of the project¹¹.
15. The second exception has been the focus of disagreement between HAL and the Sponsors. It should be noted that Directive 2012/34/EU, which recasts the first railway package, is due to be transposed by the DfT soon (although the specific date is not known). The provisions of that Directive do not change the wording of the second exception.
16. The full wording of the exception is set out in Paragraph 3 of Schedule 3 to the Regulations as follows:
- “(1) Subject to sub-paragraph (2), for specific investment projects completed--*
- (a) since 15th March 1988; or*
 - (b) following the coming into force of these Regulations,*
- the infrastructure manager may set or continue to set higher charges on the basis of the long-term costs of the project.*
- (2) For sub-paragraph (1) to apply--*
- (a) the project must increase efficiency or cost-effectiveness¹²; and*
 - (b) the project could not otherwise have been undertaken without the prospect of such higher charges.*
- (3) A charging arrangement to which sub-paragraph (1) applies may incorporate agreements on the sharing of the risk associated with new investments.”*

¹⁰ See Paragraph 2 of Schedule 3 to the Regulations.

¹¹ See Paragraph 3 of Schedule 3 to the Regulations.

¹² The Railways Infrastructure (Access and Management) (Amendment) Regulations 2009 replaced the words “the effect of the higher charges must be to increase the efficiency or cost-effectiveness of the project” as shown in the Regulations as enacted, with the words “the project must increase efficiency or cost-effectiveness” as shown here.

17. The test for recovery of long-term costs in paragraph 3 of Schedule 3 to the Regulations (the Paragraph 3 Test) consists of three criteria. Where those three criteria are satisfied, the infrastructure manager has a discretion (“*may set or continue to set*”) to set charges that go beyond “*the cost that is directly incurred as a result of operating the train service*”, on the basis of “*the long-term costs of the project*”.
18. The first criterion of the Paragraph 3 Test requires that the project was completed since 15 March 1988 or following the coming into force of the Regulations. We consider this to be clearly satisfied in the case of the Heathrow Spur as we understand construction did not begin until 1993 and services did not start until 1998.
19. The second criterion of the Paragraph 3 Test requires that the project increases efficiency or cost effectiveness. We considered factors such as reductions in journey times (compared to driving or taking the Piccadilly Line) brought about by the project, potential for the relief of congestion on roads or other modes of transport and potential beneficial environmental effects were relevant in establishing that the criterion was met (see paragraph 44).
20. The third criterion of the Paragraph 3 Test requires that the project “*could not otherwise have been undertaken without the prospect of such higher charges*” (i.e. charges calculated on the basis of the long-term costs of the project) being levied. In this case, this has been the most contentious of the three criteria and has therefore been our main focus in deciding on the content of the proposed charging framework.
21. There is no case law, at either a domestic or European level, to assist in interpreting the requirements of the Paragraph 3 Test in relation to historical projects. Equally, neither the explanatory memorandum to the Regulations, nor the recitals to the Directives provide further assistance in interpreting this provision. As such, we have taken a view based on a plain English reading of the legislation and principles of EU law, together with our overall understanding of the purpose of the Regulations and European Directives.
22. Our consideration of the third criterion of the Paragraph 3 Test and how the Paragraph 3 Test as a whole may apply to HAL is set out below.

The third criterion of the Paragraph 3 Test

23. The third criterion of the Paragraph 3 Test raised several issues which we considered in determining whether or not the criterion was satisfied. These were: by whom should the higher charges be paid; what level of recovery of higher charges is required or permitted; and what is needed to evidence that the project *could not have*

been undertaken but for the prospect of such higher charges? Our analysis is set out below.

The recovery of higher charges

24. The Regulations do not expressly identify the person or persons by whom the ‘*higher charges*’ referred to in the third criterion of the Paragraph 3 Test should be paid, but we consider it is clear from the statutory context that it must be intended to confer a discretion on the infrastructure manager to increase its fees “*for use of the infrastructure*” in accordance with Regulation 12(2) of the Regulations. We therefore consider that the exception should be read as conferring a discretion to levy higher charges on rail users of that infrastructure (as against third parties who may obtain commercial benefits from such use), given that the exceptions to the charging principles relate to charges payable by railway undertakings for use of the railway infrastructure. We consider this to be consistent with our role under the Regulations in establishing the charging framework that the infrastructure manager will comply with when setting the fees for rail operators using the Heathrow Spur. As an alternative, we did consider whether it could be intended to permit higher charges to be recovered generally, through any mechanism. However, given the scope of the Regulations, we consider the former is the better interpretation. Indeed, we do not think the infrastructure manager is given any power under the Regulations to levy charges on third parties.

Prospect and level of recovery of higher charges

25. We considered whether the *prospect* of higher charges envisaged by the third criterion of the Paragraph 3 Test requires actual cost recovery from those higher charges to match any expectation of cost recovery forecast at the outset of the project.
26. The Regulations require that any higher charges that the infrastructure manager may decide to impose must be set on the basis of the long-term costs of the project. However, they do not oblige an infrastructure manager to make use of this exception at all. Equally, we do not see any reason to require that, if the infrastructure manager does decide to make use of the exception, it must then set charges at a level that recovers the full amount of the project costs. In other words, the “*long-term costs of the project*” imposes a maximum but not a minimum level at which any higher charges may be set.
27. We consider it follows that, for the purposes of the third criterion, the infrastructure manager must be able to demonstrate that the project could not have gone ahead without the prospect of levying charges on rail users that made at least some contribution to the “*long-term costs of the project*”. However, we do not consider that

the Regulations require an infrastructure manager to demonstrate that the project could not have gone ahead unless the higher charges imposed were sufficient to recover *all* the long-term costs of the project from rail users, if it is to be permitted to levy *any* higher charges under this exception. As such, partial recovery of the long-term costs is permitted, provided that an infrastructure manager is able to satisfy the elements of the Paragraph 3 Test. The total amount of long-term costs would, however, likely be relevant to the extent we needed to understand the higher charges to be paid, and in particular to the extent we needed to impose a limit on the discretion of the infrastructure manager in setting such charges.

28. This interpretation appears to us to reflect common sense and commercial reality. To take a simple example: if a Member State or a commercial third party offered to “match fund” the long-term costs of an infrastructure project, it might well be the case that the project could not go ahead unless higher charges could be levied to recover at least half of those long-term costs from rail users – we do not see anything in the wording or the legislative scheme that would prevent such an arrangement.
29. Further, the Regulations do not require the long-term costs of the project to be recovered in line with the initial forecast figures. Accordingly, and in light of the above, even if forecast traffic did not materialise over the early years of the project, this should not be fatal to long-term cost recovery under this exception. Instead, as costs are recovered over the long-term, charges may be levied over a longer period than initially forecast, in recognition of the fact that forecast traffic has not materialised. The operative requirement is, however, that the undertaking of the project was contingent on the prospect of higher charges being levied.
30. Our view is that it is appropriate for long-term costs to be assessed prospectively and over a specified duration. Therefore we consider an important factor in determining whether charges can be levied under the long-term costs exception is the basis on which the investment was made (i.e. expected returns / traffic forecasts rather than the actual amount recovered). As noted, the exception imposes a limit on the higher charges that can be recovered by reference to the “*long-term costs of the project*”: charges could not therefore be imposed that went beyond such cost recovery on a prospective basis; but we do not see any objection in principle to this maximum figure being subject to review over the relevant “*long-term*” period, which will vary from project to project.

Could not otherwise have been undertaken – standard of evidence and burden of proof

31. The Regulations do not provide any further assistance in determining what evidence is required in order to demonstrate that the project “*could not*” have been undertaken

but for the prospect of such higher charges being levied. Equally, the Regulations provide no further assistance regarding the standard of evidence required.

32. The ability to set higher charges to contribute to the long-term costs of infrastructure projects is an exception to the general principle that charges should be based on the cost that is directly incurred as a result of operating train services. As a result, the burden of proof is on the infrastructure manager to demonstrate that the project could not have been undertaken without the prospect of higher charges.
33. So far as what has to be proved and the standard of such proof, we do not think the wording “*could not*” can have been intended to set a standard of absolute impossibility. Given that major rail infrastructure projects frequently involve the actual or potential provision of public funds, the fact that a project could in principle have been funded by the relevant Member State on public policy grounds could otherwise preclude use of this exception. Applying the same logic in a private commercial context, we do not think a different or more demanding approach should be adopted in relation to a theoretical possibility that a project might be funded by a third party pursuing its own commercial interests. We think a realistic commercial standard should be applied to an issue of this kind. As a result, we considered the relevant question was whether HAL had showed that, when the decision was taken to approve the project, there was no realistic commercial possibility of the project going ahead without the prospect of levying charges on rail users that contributed to the Historical Long-Term Costs.
34. In its consultation response, TfL challenged the above approach on the basis it was a “*departure from the natural meaning of the words in the Regulations and...a lower barrier for HAL to reach.*”¹³ It considered there may be instances where the outcome of applying the natural meaning of the words in the Regulations would be different to the outcome of the test as we have interpreted it. We have considered TfL’s representations on this point but do not consider the “natural meaning” of the legislation could necessitate applying a standard of absolute impossibility. As such, we consider we have adopted a reasonable interpretation of the Paragraph 3 Test which requires a rigorous assessment of the evidence.
35. So far as the issue of evidence is concerned, we consider the best evidence would be explicit evidence from the time of the planning and financing of the project. In principle, the relevant evidential issues would focus on identifying (i) the decision to proceed with the project and (ii) the commercial basis on which that decision was made.

¹³ TfL consultation response ‘Charging framework for the Heathrow Spur’, 10 March 2016, footnote 8.

36. Such explicit evidence might include, for example, a board paper giving approval for the project that is contingent on the expectation of recovery of higher charges, or loan documents containing covenants requiring the project to recover a certain level of charges by reference to its long-term costs (for example, the long-term financing costs of any initial investment).
37. Although explicit, contemporaneous, evidence is likely to be the strongest evidence of the position at the time of investment, we consider it is appropriate to consider *all* the evidence, in the round, in deciding whether the test is met. In particular, for projects constructed before the Regulations existed, explicit, contemporaneous evidence may not be available. Therefore, in the present case we have considered, not only the contemporaneous evidence provided by HAL, but also what inferences should be drawn from all the available evidence when viewed in the round, in order to determine whether the project could not otherwise have gone ahead. We think it is appropriate to consider subsequent evidence if it casts light on the basis on which the original decision was taken. We do however consider such subsequent evidence is likely (but not certain) to be of less weight than the contemporary documentary record.
38. Where the evidence is such that it is possible to *infer* that the project could not have gone ahead without the prospect of higher charges, we consider this can be sufficient to satisfy the Paragraph 3 Test. In determining whether to draw such an inference, we have considered a range of evidence, including evidence of commercial conduct reflecting an expectation of cost recovery from rail users, such as actual recovery of ‘*higher charges*’ since the investment was made.
39. In its consultation response, TfL said that “*the test applied by the ORR departs from the natural meaning of the words in the Regulations... We consider that an inference should only be drawn where the strength of the evidence is compelling (i.e. the threshold must be set at a high level before an inference can be drawn). This is because making inferences draws upon what might have been rather than, in the case of contemporaneous evidence, what actually was.*”¹⁴. Whilst we have noted TfL’s views on this point, we are satisfied that, particularly for a project which was constructed before the Regulations existed, we have applied a reasonable interpretation of the legislation.

Applicability of Section 4 duties

40. Regulation 28(1) of the Regulation applies section 4 of the Railways Act (section 4) to ORR’s functions under the Regulations, to the extent relevant and consistent with the European legislation. As section 4 applies to exercise of ORR’s functions under

¹⁴ TfL consultation response ‘Charging framework for the Heathrow Spur’, 10 March 2016, paragraph 16.

the Regulations, it will therefore have effect, to the extent that it is relevant, in our determination of the charging framework for the Heathrow Spur.

41. Notwithstanding the above, we do not consider the section 4 duties are applicable to the decision of whether the Paragraph 3 Test is met, which turns on the application of the evidence to the three criteria set out above. The language of the Paragraph 3 Test must be considered in the context of the Regulations as a whole (i.e. taking a purposive interpretation as to its meaning). The application of the Paragraph 3 Test is essentially one of factual appreciation by reference to the evidence.
42. In its consultation response, TfL did not agree that we should have no regard to our section 4 duties in reaching our decision on the Paragraph 3 Test, on the basis that the application of our section 4 duties is both relevant to the issue in question and consistent with the Council Directives. DfT reserved its position in relation to the same points. Having considered these points, we remain of the view that the Paragraph 3 Test is not a provision to which our section 4 duties should be applied for the reasons we have set out in paragraph 41. Indeed, we consider it would not be lawful to have had regard to our section 4 duties in a way that would enable us to reach a different decision from the result that we would reach by applying the Paragraph 3 Test to the available evidence.
43. In light of the above, we have not had regard to our section 4 duties in deciding that the Paragraph 3 Test has not been met.

Application of the legal framework to the Heathrow Spur

44. We consider that the construction of the Heathrow Spur satisfies the requirements of the first criterion of the Paragraph 3 Test as a matter of fact. The second criterion is set out in paragraph 19 above. We set out in our proposed decision that we considered this criterion was met in the case of the Heathrow Spur. In their consultation responses, both TfL and DfT said that they did not consider that HAL had met the second criterion of the Paragraph 3 Test. DfT submitted that Heathrow Express “*has long-term preferential access rights over the Heathrow Spur and...[t]he consequence of this is that third party train operators do not have the ability to benefit from the most efficient use of the Heathrow Spur rail infrastructure.*”¹⁵ TfL said “*the construction of the Heathrow Spur and operation of the HEX services is not an efficient use of overall capacity on the Great Western mainline.*”¹⁶ We consider that in determining whether the *project* itself increases efficiency and cost-effectiveness, we must consider factors wider than simply whether a particular train service makes efficient use of the infrastructure. Having regard to the factors set out in paragraph 19, we remain of the view that the second criterion is met.
45. In considering the third criterion of the Paragraph 3 Test on whether the Heathrow Spur project “*could not*” have gone ahead without the prospect of higher charges being levied, we have had to carefully assess an incomplete documentary record. In its consultation response, HAL provided a number of contemporaneous documents relating to its decision to invest in the Heathrow Spur, including board papers and minutes. These documents have clarified several points which were unclear at the time we consulted on our proposed decision and our analysis of these documents, together with a summary of the key evidence which we have taken into account in reaching our decision, is set out below. In particular, the most recent documents provided by HAL show that the decision to invest in the Heathrow Spur was made in 1993.
46. The Paragraph 3 Test is an exception to the charging principles and the onus is on HAL to show that it has satisfied the test. None of the evidence we have seen explicitly answers the question of whether the project could have been undertaken without the prospect of higher charges to recover the Historical Long-Term Costs. We have taken into account that the Paragraph 3 Test did not exist at the time of

¹⁵ DfT consultation response, 9 March 2016, paragraph 8.

¹⁶ TfL consultation response, 10 March 2016, paragraph 18.

construction of the Heathrow Spur. In light of this, we have viewed the available evidence in the round, to see whether we should reasonably infer that the Heathrow Spur project could not have been undertaken without the prospect of higher charges being levied. We do not consider the available evidence to be sufficient to demonstrate that HAL has satisfied the Paragraph 3 Test in respect of the Historical Long-Term Costs and as such, HAL cannot be considered to have discharged its burden of proof.

47. In this document, we have largely followed the structure we adopted in our proposed decision, and which we consulted on, because the representations we received were based on that structure. We have summarised the reasons for our decision, based on our consideration of the evidence, below.

Newco arrangements

48. The arrangements for the construction of the Heathrow Spur are set out first in a Memorandum of Understanding¹⁷ and then in an agreement between BAA plc (BAA), HAL and British Railways Board (BRB) dated 16 August 1993 (the Joint Operating Agreement). Those arrangements were structured as a joint venture between the private sector (HAL and its then parent company BAA) and the public sector (BRB), pursuant to which HAL provided funding for the project in return for the right to receive revenues from the operation of train services on the new infrastructure. In both of these documents the arrangements provide for the transfer of the project to a legally distinct special purpose vehicle referred to as Newco.
49. Clause 12 of the Joint Operating Agreement sets out a clear intention that HAL and BRB would transfer the assets and liabilities of the Heathrow Spur project to Newco. The Joint Operating Agreement states further that: *“it is agreed that the objective of the Parties is to finance the discharge by Newco of the HAL Indebtedness [incurred by HAL to fund the Heathrow Spur project]... by way of secured loans undertaken on reasonable commercial terms on the basis that the lenders to Newco have no recourse to BRB, HAL or BAA”*¹⁸. As HAL submitted further, if Newco failed to do this, it would have been required to issue a loan note in HAL’s favour for the outstanding balance of the HAL indebtedness, which would bear interest equivalent to HAL’s funding costs¹⁹. The Joint Operating Agreement goes as far as to attach both a form of a “hiving-down agreement” setting out the mechanics of the transfer to

¹⁷ The version provided to ORR was unsigned, however we have no reason to suspect it was not signed by the parties.

¹⁸ Joint Operating Agreement, clause 12, paragraph D.

¹⁹ Initial submission of HAL to the ORR regarding HAL’s charges for track access to the Heathrow Spur, 1 September 2015, paragraph 29.

Newco²⁰ and a form of a shareholders' agreement to be entered into between the parties and Newco²¹. We infer from this that while the transfer to Newco was expressed as being merely an option, it was in fact the primary option for the parties.

50. We have seen no evidence that Newco, as a standalone special purpose vehicle, would have had any realistic commercial source of income to contribute to Historical Long-Term Costs other than revenue from rail users. Accordingly, we are persuaded that, had the Newco structure proceeded, the third criterion of the Paragraph 3 Test would very likely have been satisfied.
51. In its consultation response, HAL told us that the Newco structure did proceed. HAL has stated that the "Newco" (Heathrow Express Operating Company Limited, HEOC) was established on 11 January 1996 and its service agreement commenced on 1 April 1996²². HAL has argued that *"...it was on the basis of that proposed structure that – three years earlier in 1993 – BAA invested in building the railway. BAA later decided to buy out the interest of its commercial partner, British Railways Board, and the buyout removed the need for a joint venture structure because the project was then 100% owned by members of the same group, namely BAA plc and Heathrow Airport Limited."*²³.
52. We accept that HEOC was established as a new company in 1996, and that it agreed to operate train services pursuant to the service agreement. However, we consider that this falls short of evidencing that the Newco structure (as set out in the earlier documents) proceeded. In particular, there was no transfer of the assets and liabilities of the Heathrow Spur project to Newco and there was no borrowing of any non-recourse commercial secured loans. As such, we are not persuaded that HEOC actually embodies the Newco arrangements in the same form as set out in the Memorandum of Understanding and the Joint Operating Agreement, particularly in the absence of it holding any assets or liabilities in relation to the Heathrow Spur.
53. In its consultation response, HAL has also argued that hundreds of millions of pounds were borrowed at commercial rates to build the Heathrow Spur. The evidence that HAL has provided to support this is a European Investment Bank (EIB) press release from 1997 in relation to a £125m loan from EIB to BAA relating to the Heathrow Express project, and a news article from 1999 by Paul Le Blond (former Rail Strategy Manager with BAA) which, among other things, states that the project was financed from BAA's own cash flow and loans from the EIB and the Export-Import Bank of Japan.

²⁰ Joint Operating Agreement, Schedule 5.

²¹ Joint Operating Agreement, Schedule 8.

²² Consultation response by HAL regarding the charging framework for the Heathrow Spur, paragraph 19

²³ Consultation response by HAL regarding the charging framework for the Heathrow Spur, paragraph 20

54. Both the press release and article post-date the decision to proceed with the project and our understanding is that most of the construction would have been undertaken by 1997. Therefore we are not persuaded that these documents take us much further in determining the basis upon which BAA decided to go ahead with the Heathrow Spur project in 1993, particularly in light of our view that the Newco structure, as set out in the earlier documents, did not proceed.

RAB addition and the single till

55. Our initial understanding, as set out in our proposed decision, was that the Heathrow Spur was included in the airport RAB as an alternative to pursuing the Newco option, although, as we noted, we had not seen any explicit evidence setting out the basis on which that RAB addition occurred. We said in our proposed decision that we did not consider that inclusion of the Heathrow Spur on the RAB necessarily precluded the application of the third criterion of the Paragraph 3 Test. However, in most regulated sectors, a rate of return on the RAB is included in the calculation of the charges a regulated entity is permitted to make to its customers and, as such, we considered that this could provide an alternative source of funding for a project enabling it to go ahead even without a contribution to capital costs from users of the project infrastructure. In the case of the Heathrow Spur, the addition of the project to the airport RAB could, at least in principle, be viewed as having created a realistic commercial possibility of funding the project through airline charges (or other single till income) even if there were no prospect of higher charges to rail users contributing to Historical Long-Term Costs. We therefore considered the addition of the project to the airport RAB to be important when considering the basis on which the investment was made.

56. In its consultation response, HAL said that we “*wrongly placed weight on events post-dating the relevant investment decision, in particular the subsequent decision by the CAA to include the Heathrow Spur within the airport’s regulatory asset base (a concept that did not exist at the time of the investment decision and therefore could not have formed any part of the reasoning behind the investment decision).*”²⁴

57. However, in CAA’s consultation response, it told us that “*the Heathrow Spur was added to the HAL Regulatory Asset Base (RAB) in 1991 by the then Monopolies and Mergers Commission*”²⁵. It appears that the RAB was not formally called a regulatory asset base until 1997, although a previous construct, the airport regulatory till, was in place before that time. The 1991 MMC report on the economic regulation of the

²⁴ HAL consultation response, paragraph 18(b).

²⁵ CAA consultation response, 14 March 2016.

South-East airports companies (HAL, Gatwick Airport Ltd and Stansted Airport Ltd) supports this²⁶.

58. Although HAL has sought to distinguish the regulatory till from the RAB, it appears the regulatory till is an analogous construct to the RAB. Our understanding is that the two mechanisms offered the same recourse to alternative funding through airport charges and that the regulatory till did not operate in a materially different way to the present day RAB.
59. At a meeting between ORR and HAL on 22 March 2016, HAL further argued that the 1991 MMC report only refers to seed funding for the Heathrow Spur. The 1991 MMC report does however state that: “[m]ajor projects (and expenditure at 1990/91 prices) include at Heathrow... the Heathrow Express project, £215 million expenditure in 1992/93 to 1996/97 (following expenditure of about £25 million in the current quinquennium)”²⁷. This total of £235m is close to the construction costs of £260m at January 1992 prices that were approved by the BAA board in 1993. As a result, we are not persuaded that the MMC report merely refers to “seed” funding.
60. In light of the above, we consider that the RAB (although not known by that name) existed before the project was approved, and operated in a way that created a realistic commercial possibility of funding the project through airline charges (or other single till income) even if there were no prospect of higher charges to rail users contributing to Historical Long-Term Costs.
61. In our proposed decision, we went on to consider all the available evidence to establish whether the addition of the Heathrow Spur to the airport RAB (or its predecessor) was or was not consistent with the Paragraph 3 Test being satisfied. HAL told us that the CAA was unlikely to have agreed to the Heathrow Spur project (and funding through the RAB) if there was not a prospect of the charges being recovered over time through revenues from use of the new infrastructure²⁸. We looked to see whether there was any evidence from which we could infer that the investment in this case was treated in a way which distinguished it from other assets. Such treatment could, for example, include allocation of specific income to fund specific costs or some form of ring-fencing of that investment. However, we did not see, nor have we seen in response to our consultation, any evidence of distinct treatment of the project on the airport RAB or the regulatory till.

²⁶ BAA plc: A report on the economic regulation of the South-East airports companies (Heathrow Airport Ltd, Gatwick Airport Ltd and Stansted Airport Ltd), chapter 7.

²⁷ Paragraph 7.6.

²⁸ Initial submission of HAL to ORR regarding HAL’s charges for track access to the Heathrow Spur, 1 September 2015, paragraph 39.

62. In our proposed decision, we went on to consider how the single till operates in practice²⁹. We noted that instead of HAL levying access charges (in the form set out in the Regulations) on either the Heathrow Express (HEX) operating company or the Heathrow Connect services, HEX and some Heathrow Connect revenues have contributed to the airport's "single till"³⁰.
63. In explaining how the single-till mechanism works in the context of the airport, HAL submitted that "CAA...takes the current value of the Airport RAB (which includes rail assets), total airport forecast opex, and commercial income in order to calculate airport charges evolution"³¹. HAL has also separately submitted that "although train service revenues are not formally matched to costs associated with the Heathrow Spur, the effect is that such costs are reflected in airline landing charges only to the extent that the train service revenues are insufficient to cover them"³². We considered that both of these positions were consistent with a view that the Heathrow Spur project, once added to the RAB or regulatory till, would be treated in the same way as any other addition. That is, airline charges would fund a rate of return on that project without any specific correlation to any contribution from rail users to Historical Long-Term Costs.
64. In its consultation response, CAA said it would "encourage a degree of caution about adopting an assumption that just because a rail project is within the airport RAB, this axiomatically indicates that the project would have gone ahead without recovering historic costs through rail charges. This is because under our single till approach the airport operator will factor in that income from the project will be netted off from

²⁹ In our proposed decision, we considered that, in 2001, in arguing against moving from a "single till" to a "dual till structure", BAA submitted to the Competition Commission that the Heathrow Spur was not a standalone commercial investment. We understood that the "dual till" structure under consideration would have separated airport activities into two pots (aeronautical and commercial) where prices would be set independently of each other. In our view, these submissions were consistent with our analysis regarding the significance of the addition of the Heathrow Spur to the airport RAB and the inference that this provided a realistic commercial possibility of alternative funding for the project. We accepted BAA and HAL did intend to recover Historical Long-Term Costs from rail users of the HEX services. However, we considered that BAA's submissions regarding the project, when viewed alongside its addition to the airport RAB, indicated that the project could have gone ahead without the prospect of recovering the Historical Long-Term Costs from rail users. In its consultation response, CAA told us that although the Competition Commission considered it sensible to include surface access costs and income in the single till, it did not address the issue of sharing the recovery of surface access costs between the different users. Notwithstanding that the focus of the debate was on the wider single / dual till issue, it remains our view that BAA's 2001 representations are consistent with a conclusion that the project could have gone ahead without the prospect of higher charges from rail charges.

³⁰ In the context of Heathrow Airport, we understand that the single till is defined as taking account of revenue, costs and assets from non-aeronautical activities when calculating the price of aeronautical activities, i.e. airport charges.

³¹ Detailed Answers to ORR emailed questions of 20 November 2015, provided 24 November 2015.

³² Initial submission of HAL to ORR regarding HAL's charges for track access to the Heathrow Spur, 1 September 2015, paragraph 50.

airport charges and that we would expect an operator to maximise the recovery of the costs from this income."³³ We accept that HAL has sought to maximise recovery of income from the Heathrow Spur project (and consider the reasons for this later); however, we have not seen any evidence that challenges our view that once the Heathrow Spur project was added to the RAB (or regulatory till), airline charges would fund a rate of return on that project without any specific correlation to any contribution from rail users to Historical Long-Term Costs.

65. In our proposed decision, we then considered CAA's surface access policy. HAL told us that the full recovery of the Historical Long-Term Costs from rail users was, in effect, a requirement of the CAA at the time of investment and that HAL's understanding of CAA policy was that surface access investment costs should be recovered by way of revenues from use of the relevant infrastructure, and should not, over the long term, be recovered by way of airport charges. The 1991 MMC report, which added the Heathrow Spur to the regulatory till, is silent on any requirement of this kind. Furthermore, no one has provided a copy of any relevant surface access policy from the time, which might support HAL's submissions. The only document containing a surface access policy that any party could locate was CAA's consultation paper entitled "Airports review – policy issues" published in December 2005³⁴. The consultation paper only required airport operators to seek to offset the costs of surface access projects "*as far as practicable against revenues from those directly using the new surface access infrastructure/services. As a result, airport charges would only fund the residual costs not covered by rail fares or road tolls or charges*"³⁵. Our proposed decision noted that the policy did not however go so far as to preclude investment where this was not the case. As a result, we did not feel the evidence provided to us on this issue was sufficient to demonstrate that the addition of the project to the airport RAB was only permitted on the basis that the Historical Long-Term costs would be recovered, over time, through rail charges.
66. In its consultation response, CAA clarified some of the context surrounding its surface access policy documents. Although unable to source a policy statement on surface access predating 2005, it told us it has "*no reason to doubt that a similar 'user pays' type approach would have been taken into account during earlier price*

³³ CAA consultation response, 14 March 2016.

³⁴ UK Civil Aviation Authority Airports Review Policy Issues:
http://webarchive.nationalarchives.gov.uk/20140713054907/http://www.caa.co.uk/docs/5/ergdocs/erg_ercp_airportsreview_dec05.pdf.

³⁵ UK Civil Aviation Authority Airports Review Policy Issues, paragraph D.23:
http://webarchive.nationalarchives.gov.uk/20140713054907/http://www.caa.co.uk/docs/5/ergdocs/erg_ercp_airportsreview_dec05.pdf.

*control reviews*³⁶. It also confirmed that airport charges would only make up a shortfall for the costs that are not otherwise recovered by charging users of the surface access infrastructure. In light of this confirmation that airport charges are available to make up any shortfall in revenue from users of surface access infrastructure, our view remains that HAL has not provided sufficient evidence to support a conclusion that the addition of the project to the airport RAB, or its predecessor, was *only* permitted on the basis that the Historical Long-Term costs would be recovered through rail charges.

Contemporaneous documents

67. HAL has provided board papers showing the importance of the Heathrow Express project to the overall development of the airport. It is evident from these documents that BAA treated the Heathrow Spur as a key piece of infrastructure which was vital to enable the airport to maintain its market lead and grow its business in competition with other major European hubs. A 1993 board paper states *“In the context of Heathrow’s development prior to the opening of T5...Heathrow Express is considered an essential part of the plan to accommodate growth in traffic.”*³⁷
68. This supports our preliminary view that the project was integral to the airport as a whole rather than a standalone project. The BAA board papers show that as a project that would eventually be “sold down”, the discounted cash flow of the project showed an IRR of 14.2%. Equally, as a standalone project showing BAA’s financial interest (and excluding that of BRB), the IRR was 12.5%. It is only when treated as part of the overall development of Heathrow and viewed as a way to unlock additional capacity at the airport that the Heathrow Spur project gave a return in excess of BAA’s then hurdle rate of 15%³⁸.
69. As a standalone project, the board papers show that BAA group finance considered that the marginal returns and the extent of the downside made the project an unattractive investment. However, in the context of Heathrow’s development prior to the opening of T5, the project was considered an essential part of the plan to accommodate growth in traffic and the forecast returns for the overall development programme were attractive.
70. The board papers demonstrate that it is the wider benefits to the airport which made the difference between an acceptable and unacceptable IRR for the Heathrow Spur

³⁶ CAA consultation response, 14 March 2016.

³⁷ BAA board paper 19/93 ‘Heathrow Express – approval of joint venture with British Rail Board’, March 1993, paragraph 20.

³⁸ BAA board paper 19/93 ‘Heathrow Express – approval of joint venture with British Rail Board’, March 1993, paragraphs 18-19.

project and provide evidence that the board approached the project from the perspective of the airport as a whole, rather than as a standalone venture.

71. In its consultation response, HAL told us that the BAA board required a review of the revenue forecasts before it would take a final decision to proceed with the project and that passenger forecasts were a key element relevant to the profitability of the project³⁹. We accept, and indeed it is clear from the documents HAL has provided, that BAA took a commercial approach towards assessing the viability of the project. The BAA board papers show that the cost and revenue forecasts were subject to rigorous analysis and testing by the BAA board ahead of approving the project.
72. Equally, the recent documents provided by HAL indicate the importance to the project of exemption from the Railways Act access and licensing system. BAA treated obtaining an exemption from the access and licensing regime set out in the Railways Act as a crucial precondition to proceeding with the project. A 1993 board paper states “[i]t is extremely important to maintain the exemption from the rules that will apply to services under privatisation and, in particular, from the Regulator. This exemption will enable us to charge a track fee to other users of the line crossing Heathrow Airport, a fee that will compensate the Heathrow Express project for any loss of income generated by the introduction of other services on the line, including CrossRail.”⁴⁰ It is clear that BAA’s concern was to protect against “loss of income”. However, loss of income might have been important to the project’s viability because it was crucial to ensure that rail users contributed to repaying the Historic Long-Term Costs (i.e. demonstrating the required link to the Paragraph 3 Test) or for some other reason. The documents are not explicit about *why* the exemption was such a critical precondition of the project and BAA’s reasons for placing such a reliance on obtaining it. We have analysed the new evidence provided by HAL to see what it tells us in the context of the Paragraph 3 Test.
73. HAL’s explanation of why the exemption was essential for the financial viability of the project is that not obtaining such an exemption could preclude HAL from fully recovering its capital expenditure⁴¹. HAL told us that the exemption would enable BAA to charge other operators using the Heathrow Spur for access so as to compensate for the loss of income to the Heathrow Express and would allow HAL to maintain its projected incomes from the Heathrow Spur in the event of use by other operators. HAL’s view is that “*the BAA plc Board would not have proceeded with full investment in the Heathrow Spur – and, therefore, the Spur would not have been constructed – unless it was confident that it could (pursuant to the said exemption)*”

³⁹ Consultation response by HAL, paragraph 37.

⁴⁰ BAA board paper 19/93 ‘Heathrow Express – approval of joint venture with British Rail Board’, March 1993, paragraph 3.

⁴¹ HAL consultation response, paragraph 32.

levy charges on access operators enabling BAA plc (later HAL) to recover its capital investment in construction, plus a commercial rate of return.”⁴².

74. From the board papers it appears that the reduction or increase in fare revenues was forecast to have the biggest effect on IRR and, therefore, the profitability of the project. The track fee that BAA contemplated charging other users of the Heathrow Spur including CrossRail appears to have been to compensate the project for any loss of this income from HEX fare revenues. Further, it is clear from the documents that BAA sought to reduce the amount that its train operating company paid to BRB for the use of the Great Western Main Line, thereby reducing the outgoings of its train operating company and improving the company’s profitability⁴³. As such, it is evident that BAA sought to maximise the fare revenue from, and profitability of, its train operating company (i.e. the Heathrow Express service).
75. HAL has essentially sought to link the focus on recovering income in the form of fares through the operating company to a need for HAL to receive income through track access charges which would recover the Historical Long-Term Costs. Having considered the new evidence provided by HAL and its representations on this point, we are not persuaded that the documents demonstrate the existence of a link between fares revenue and income through track access charges to recover the Historical Long-Term Costs.
76. We consider that there are three potential reasons why an exemption from the access and licensing regime may have been so important to the project’s viability:
- i. It allowed BAA to protect its monopoly profits generated through fare revenue (albeit that this ability would be limited by competition law and the price control mechanism);
 - ii. It allowed BAA to maximise fare revenue to ensure that the contribution to the single till was maximised and helped lower airport charges; and
 - iii. It allowed BAA to ensure that the users of the project infrastructure contributed to repaying the Historical Long-Term Costs of the project.
77. We consider that all three reasons are plausible explanations for the significance of the exemption from the Railways Act. However, even keeping in mind the fact that the Paragraph 3 Test did not exist at the time when the documents were drafted, we believe the language of those documents appears to be more consistent with the first two reasons than the third. If the third reason were the most likely explanation, we

⁴² HAL consultation response, paragraph 46(f).

⁴³ BAA board paper 19/93 ‘Heathrow Express – approval of joint venture with British Rail Board’, March 1993, paragraph 13.5 and Appendix 1.

consider there would be *some* mention of the importance of recovering the Historical Long-Term Costs (or at least some language implying it) in the board papers. Therefore, we are not convinced that the importance of the exemption was that it allowed BAA to ensure that the fare revenue contributed to repaying the Historical Long-Term Costs, rather than simply enabling it to protect its monopoly profits and / or maximise contributions to the single till, thereby reducing airport charges. As such, although we accept gaining an exemption from the Railways Act access and licensing system was critical, we consider that the decisive factor in proceeding with the project was the wider benefits that the project would bring to the development of the airport as a whole.

78. In our proposed decision we also discussed that Schedule 11 of the Joint Operating Agreement contained a financial model demonstrating how the HEX service would provide a return on HAL's investment in the Heathrow Spur. This model showed that the fare revenue to be received between 1993 and 2016 was forecast to be sufficient to cover all BAA's initial investment in building the Heathrow Spur as well as covering operating costs for those years. HAL had shown us figures which it argued shows the Heathrow Spur has generated revenues equivalent to approximately 80% of the full operating and Historical Long-Term Costs in each year, on average, over the last 10 years. HAL also argued that *"given that the contribution would increase in the coming years (so that, in the years after 2018, the revenue figure would exceed the cost figure, and would do so to an increasing extent), it is reasonable to project that, absent the commencement of Crossrail services, 100% of the long term costs of the Spur would be recovered from Heathrow Express revenues"*⁴⁴. HAL considered that this level of cost recovery, when taken together with its initial recovery assumptions⁴⁵, indicated HAL had met the Paragraph 3 Test.
79. We set out our understanding, in our proposed decision, that any shortfall in Historical Long-Term Cost recovery from rail users had been recovered through airline charges calculated on the basis of the RAB. While we considered the recovery of costs from rail users to be rational commercial behaviour, given that the Heathrow Spur was financed through the airport RAB and had been (at least partially) funded through airport charges since its inception, we did not consider the expectation of recovery (even when coupled with actual recovery), to be determinative of whether HAL had met the requirements of the Paragraph 3 Test. As such, whilst we recognised HAL took steps to recover revenues from users of the Heathrow Spur, we did not consider it to be sufficient to establish that the project could not have gone ahead without the prospect of such cost recovery. We remain of this view.

⁴⁴ Response from HAL to queries from ORR, dated 11 September 2015, received 5 October 2015.

⁴⁵ Contained within the Joint Operating Agreement.

80. In our proposed decision, we also considered contemporaneous documents⁴⁶ which showed that Crossrail in the form originally conceived⁴⁷ expected early on to compensate BAA for the capital costs of modifying Airport Junction⁴⁸, the turnaround facility at Heathrow Airport, and for any reduction in revenue to the HEX operator resulting from passengers transferring onto a Crossrail service. These documents showed that, whilst the costs of modifications to the Heathrow Spur to enable Crossrail services to run were explicitly contemplated at an early stage, the much larger elements of Historical Long-Term Costs were not explicitly referred to in the documents. We noted that the documents referred to compensation payable for loss of HEX revenue, however that loss of revenue was not explicitly calculated by way of reference to those Historical Long-Term Costs. We consider this to support our view, set out in paragraph 77 above.

Conclusions

81. In light of the above, we are not satisfied that HAL has provided sufficient evidence to demonstrate that the Heathrow Spur project could not have gone ahead without the prospect of higher charges to rail users. We have taken into account that the Paragraph 3 Test did not exist at the time the decision to construct the Heathrow Spur was taken. However, in considering all the evidence in the round, we are not satisfied that HAL has met the test.

82. In reaching this conclusion, we consider that the addition of the Heathrow Spur project to the RAB, or the regulatory till, was a significant factor, as this provided a realistic alternative source of funding for the project which could have allowed it to go ahead even if there were no prospect of higher charges to rail users contributing to the Historical Long-Term Costs. Evidence showing the significance of the project to the development of the airport as a whole supports this conclusion. Equally, we accept that there was an expectation of cost recovery from rail users from the outset of the project (and protection of fare revenue sought in the form of an exemption from the access and licensing system), and that HAL has demonstrated it has recovered revenue from rail users. We consider taking steps to recover revenue from users of the Heathrow Spur to be rational commercial behaviour by HAL to protect (and maximise) monopoly profits and / or the contribution to the airport single till, and, as such, is not determinative of the Paragraph 3 Test.

⁴⁶ Letter from Network Southeast to Chris Stokes, dated 13 August 1992; Transportation Issues – CrossRail Services to Heathrow Airport, dated 30 September 1992; Memo re: Financial Effect of Running CrossRail services to Heathrow, dated 1 February 1994.

⁴⁷ The Crossrail project referred to in the contemporaneous documents is not exactly the same project as it is now. That proposal was intended to be wholly privately financed (and recovered from rail users), but the Bill that would have given the go-ahead to the scheme was rejected by Parliament in 1994.

⁴⁸ The railway infrastructure where the Heathrow Spur meets the Great Western Main Line.

Annex – Heathrow Spur Charging Framework

1. Definitions

In this Charging Framework, unless the context otherwise requires:

“**HAL**” means Heathrow Airport Limited;

“**Heathrow Spur**” means the 8.6km of railway infrastructure that is owned by HAL which links Heathrow Airport to the Great Western Main Line. For the avoidance of doubt, the Heathrow Spur comprises the railway infrastructure from the tunnel portal to the tunnel end wall at Heathrow Airport terminal 4 and Heathrow Airport terminal 5 stations;

“**Historical Long-Term Costs**” means all costs relating to the construction of the Heathrow Spur incurred prior to the coming into force of this Charging Framework; and

“**Regulations**” means (i) the Railways Infrastructure (Access and Management) Regulations 2005, as amended; or (ii) any instrument made for the purpose of implementing Directive 2012/34/EU of the European Parliament and of the Council of 21st November 2012 establishing a single European railway area (recast) which revokes the Railways Infrastructure (Access and Management) Regulations 2005.

2. Introduction

2.1. Any charges levied by HAL on train operators for track access to the Heathrow Spur and for such other services as are referred to in Schedule 2 of the Regulations, including station access, shall be determined by HAL pursuant to this Charging Framework and the Regulations.

2.2. HAL shall ensure that any track access or station access agreement entered into with a train operator relating to access to the Heathrow Spur contains provisions to give effect to the principles set out in the Regulations to which each of HAL and the other parties to such agreements shall be contractually bound.

3. Access charges

3.1. Subject to paragraph 3.2, access charges may include any charge permitted by the Regulations.

3.2. Access charges may not include any charge purporting to comply with the exception set out in paragraph 3 of Schedule 3 to the Regulations in respect of the Historical Long-Term Costs.



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