

# RAILWAYS ACT 1993

## 2018 PERIODIC REVIEW

### REVIEW NOTICE: FREIGHT CUSTOMER TRACK ACCESS AGREEMENTS

TO:

- (1) the persons whose names are set out in Annex 1 to this Review Notice (the “**Freight Customers**”);
  - (2) Network Rail Infrastructure Limited (“**Network Rail**”); and
  - (3) the Secretary of State for Transport, the Scottish Ministers and the Treasury,
- together the “**Addressees**”.

#### **1 General**

- 1.1 This review notice (the “**Review Notice**”) is given in accordance with paragraph 4 of Schedule 4A to the Railways Act 1993 (the “**Act**”).
- 1.2 The Office of Rail and Road (“**ORR**”) has undertaken a review of:
  - (a) the amounts payable by Network Rail and each of the Freight Customers to each other under each of the track access agreements listed in Annex 1 to this Review Notice (the “**Track Access Agreements**”); and
  - (b) the times at which, and the manner in which, those amounts are payable,(the “**Review**”).
- 1.3 ORR’s conclusions on the Review, and its reasons for those conclusions, are:

- (a) set out in a series of documents referenced in the document entitled “**2018 periodic review final determination: Overview of approach and decisions – October 2018**” and published by ORR on 31 October 2018, and in particular those documents referenced in Chapter 1 of that document<sup>1</sup> ; and
- (b) hereby incorporated into this Review Notice.

1.4 By publishing this Review Notice and serving it on each of the Addressees, ORR is initiating the implementation of the Review.

## **2 Proposed Relevant Changes**

- 2.1 For or in connection with giving effect to ORR’s conclusions on the Review, ORR proposes to direct the parties to each of the Track Access Agreements to amend their Track Access Agreement on the terms specified in Annex 2 to this Review Notice (the “**proposed relevant changes**”).
- 2.2 ORR proposes that, subject to paragraph 3, the proposed relevant changes will come into operation on and from 1 April 2019.

## **3 Regulated Amendments**

If, before the proposed relevant changes come into operation in relation to any Track Access Agreement, such Track Access Agreement is amended in a manner which is:

- (a) approved by ORR under section 22 of the Act; or
- (b) directed by ORR under section 22A or section 22C of the Act,

(each a “**regulated amendment**”), then:

- (i) the proposed relevant changes shall come into operation in relation to that Track Access Agreement subject to the regulated amendments; and

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<sup>1</sup> This further includes all documents referenced and/or linked to in the document entitled “2018 periodic review final determination: Supplementary document: Overview of charges and incentives decisions – October 2018”.

- (ii) if there is any conflict between the proposed relevant changes and the regulated amendments, the regulated amendments shall take precedence.

## **4 Objections**

4.1 Subject to paragraph 4.2, any person specified in paragraph 4(4)(a) or (b) of Schedule 4A to the Act may make objections with respect to:

- (a) any of the proposed relevant changes; or
- (b) the date on which it is proposed that any such proposed relevant changes shall come into operation.

4.2 Any objection made under paragraph 4.1 must be:

- (a) made in writing;
- (b) received by ORR on or before 7 February 2019; and
- (c) addressed to ORR as follows:

Carl Hetherington  
Office of Rail and Road  
One Kemble Street  
London  
WC2B 4AN

## **5 Definitions and Interpretation**

5.1 In this Review Notice, unless the context otherwise requires:

- (a) references to “**this Review Notice**” include the Annexes to this Review Notice;
- (b) references to the singular include the plural and *vice versa*;
- (c) words and phrases defined in:
  - (i) the Act;

(ii) the Network Code (formerly known as the Railtrack Track Access Conditions 1995 (as amended)); or

(iii) each Track Access Agreement,

shall have the same meanings in this Review Notice; and

(d) any general rules of interpretation contained in:

(i) Condition A1 of the Network Code; or

(ii) each Track Access Agreement,

shall also apply to this Review Notice.



**John Larkinson**  
**Chief Executive**  
**FOR AND ON BEHALF OF**  
**THE OFFICE OF RAIL AND ROAD**  
Dated 20 December 2018



## ANNEX 1

### FREIGHT CUSTOMERS AND TRACK ACCESS AGREEMENTS

<b>Freight Customer Name</b>	<b>Freight Customer Company Number</b>	<b>Original Date of Track Access Agreement</b>
Associated British Ports	ZC000195	11 April 2014
Legge Infrastructure Services Limited	10675751	14 May 2018
London Gateway Port Limited	04341592	27 November 2015
Tarmac Trading Limited	00453791	11 April 2017
Victoria Harbour Limited	04476519	1 May 2017

## ANNEX 2

### STANDARD AMENDMENTS

***Explanatory Note:***

*In order to give effect to the ORR's conclusions on the Review, this Annex 2 sets out the standard form proposed relevant changes to be made to Schedules 7 and 9 and the clauses of each Track Access Agreement (the "**standard amendments**").*

The following amendments shall be made to the Track Access Agreements:

**1 Consequential and other amendments to the clauses of each Track Access Agreement**

1.1 In clause 1.1 (Definitions), insert the following new definition in alphabetical order:

“**CPI**” and “**Consumer Prices Index**” means the Consumer Prices Index (all items) whose value is published each month by the Office for National Statistics in its statistical bulletin on consumer price inflation, or:

- (a) if the Consumer Prices Index for any month in any year shall not have been published on or before the last day of the third month after such month, such index for such month or months as ORR may (after consultation with the parties and such other persons as it considers appropriate) determine to be appropriate in the circumstances; or
- (b) if there is a material change in the basis of the Consumer Prices Index, such other index as ORR may (after consultation with the parties and such other persons as it considers appropriate) determine to be appropriate in the circumstances;”.

1.2 In clause 16 (Payments, interest and VAT) of each Track Access Agreement, delete clause 16.1.2 (Delivery of invoices) and replace it with the following:

“16.1.2 *Delivery of invoices*

All invoices or statements of amounts payable issued under any provision of this contract shall be delivered by hand at, or sent by prepaid first class post, or by facsimile transmission (with confirmation copy by prepaid first class post) or by email (where both parties agree) to the address for service for the recipient specified in Schedule 1 and shall be deemed to have been received by the addressee in accordance with Clause 18.4.3.”

1.3 In clause 18.4 (Notices) of each Track Access Agreement, delete sub-clause 18.4.1(b) and replace it with the following:

“(b) shall be duly given if signed by or on behalf of a person duly authorised to do so by the party giving the notice and delivered by hand at, or by sending it by prepaid first class post, recorded delivery, or by facsimile transmission (with confirmation copy by prepaid first class post) or by email (where the parties agree), to the relevant address or facsimile number or email address as set out in Schedule 1.”

1.4 In clause 18.4 (Notices) of each Track Access Agreement, delete sub-clauses 18.4.3(b) and (c), and replace them with the following:

“(b) if sent by prepaid first class post from and to any place within the United Kingdom, 3 Working Days after posting unless otherwise proven;

(c) if sent by facsimile (subject to confirmation of uninterrupted transmission by a transmission report) before 1700 hours on a Working Day, on the day of transmission and, in any other case, at 0900 hours on the next following Working Day; and

(d) if sent by email (subject to confirmation of receipt of delivery) before 1700 hours on a Working Day, on the day of transmission and, in any other case, at 0900 hours on the next Working Day.”

## **2 Schedule 7 to each Track Access Agreement**

2.1 In paragraph 1 (Definitions) of Schedule 7 to each Track Access Agreement, delete the definition of “access charges review” and replace it with the following definition:

“**“access charges review”** has the meaning ascribed to it in Schedule 4A to the Act;”

2.2 In paragraph 2.8 (Incremental Costs):

(a) delete paragraph 2.8.1(b) and replace it with the following:

“(b) the operation of the Service requested for would exceed the Operating Constraints applying as at 1 April 2019;”; and

(b) delete sub-paragraph 2.8.1(c) and replace it with the following:

“(c) the Freight Customer notifies Network Rail at the time of requesting the Service that it wishes Network Rail to modify the Operating Constraints



applying as at 1 April 2019 in a manner so as to permit the Operation of the Service requested for under this contract;”.

### 3 Schedule 9 to each Track Access Agreement

3.1 With the exception of the track access agreement between Network Rail and Legge Infrastructure Services Limited (the “**Legge TAA**”), in paragraph 1 (Definitions) of Schedule 9 to each Track Access Agreement, delete the definition of “Liability Cap” and replace it with the following definition (and replace the empty square brackets in sub-paragraphs (a) and (b)(ii) with the sum which is set out in the equivalent sub-paragraphs (a) and (b)(i) in the version of that Train Operator’s Track Access Agreement which was in place immediately prior to 1 April 2019):

““**Liability Cap**” means:

- (a) in relation to the first Contract Year, the sum of £ [ ]; and
- (b) in relation to any subsequent Contract Year, the sum calculated in accordance with the following formula:

$$C_n = C_{2017-18} \times \left[ \frac{CPI_n}{CPI_{2017-18}} \right]$$

where:

- (i)  $C_{2017-18} = C_1 \times \left[ \frac{RPI_{2017-18}}{RPI_1} \right]$
- (ii)  $C_1$  is the sum of £ [ ];
- (iii)  $C_n$  is the Liability Cap in the nth subsequent Contract Year;
- (iv)  $CPI_n$  is the Consumer Prices Index (defined as CPI in Clause 1.1) published or determined with respect to the first month of the subsequent Contract Year n; and
- (v)  $CPI_{2017-18}$  is the Consumer Prices Index (defined as CPI in Clause 1.1) published or determined with respect to that month in which a Contract Year

starts in the Relevant Year commencing on 1 April 2017 and ending on 31 March 2018;

(vi)  $RPI_{2017-18}$  is the Retail Prices Index (defined as RPI in Clause 1.1) published or determined with respect to that month in which a Contract Year starts in the Relevant Year commencing on 1 April 2017 and ending on 31 March 2018; and

(vii)  $RPI_1$  is the Retail Prices Index (defined as RPI in Clause 1.1) published or determined with respect to the month in which this contract became effective under Clause 3.1.”

3.2 In paragraph 1 (Definitions) of Schedule 9 to the **Legge TAA**, delete the definition of “Liability Cap” and replace it with the following definition (and replace the empty square brackets in sub-paragraphs (a) and (b)(i) with the sum which is set out in the equivalent sub-paragraphs (a) and (b)(i) in the version of that Train Operator’s Track Access Agreement which was in place immediately prior to 1 April 2019):

““**Liability Cap**” means:

- (a) in relation to the first Contract Year, the sum of £ [ ]; and
- (b) in relation to any subsequent Contract Year, the sum calculated in accordance with the following formula:

$$C_n = C_1 \times \left( \frac{CPI_n}{CPI_1} \right)$$

where:

- (i)  $C_1$  is the sum of £ [ ];
- (ii)  $C_n$  is the Liability Cap in the nth subsequent Contract Year;
- (iii)  $CPI_n$  is the Consumer Prices Index (as defined in Clause 1.1) published or determined with respect to the first month of the subsequent Contract Year n; and

- (iv)  $CPI_1$  is the Consumer Prices Index (as defined in Clause 1.1) published or determined with respect to the month in which this contract became effective under Clause 3.1.”