



CROSSRAIL INFORMATION PAPER

H2 – RAILWAY COMPENSATION

This paper explains how the Promoter intends that Network Rail and passenger and freight operators will be compensated for the loss of, or disruption to, services during the construction and operation of Crossrail.

It will be of particular relevance to those interested in the operational aspects of Crossrail.

This is not intended to replace or alter the text of the paper itself and it is important that you read the paper in order to have a full understanding of the subject. If you have any queries about this paper, please contact either your regular Petition Negotiator at CLRL or the Crossrail helpdesk, who will be able to direct your query to the relevant person at CLRL. The helpdesk can be reached at:

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1. Purpose of Paper

- 1.1 This Information Paper explains how the Promoter intends that Network Rail and passenger and freight operators will be compensated for the loss of, or disruption to, services during the construction and operation of Crossrail.
- 1.2 Compensation arises from the loss of, or interference with, contractual rights. EC railways law forbids what are sometimes called grandfather rights (ie an informal right to indefinite access, or a right to renew contractual rights) and so compensation in connection with this is not an issue.
- 1.3 Since, in accordance with EC law, access rights are generally granted for periods of up to 10 years (major investments are an exception), and given the duration of Crossrail development and construction, there is likely to be limited impact on contractual rights from the operation of Crossrail. The Heathrow Express track access contract with Network Rail is currently the only one known to extend significantly into the operational period of Crossrail. Therefore the issue of compensation arises mainly in connection with the construction of Crossrail.
- 1.4 This paper explains the current industry practices for the payment of compensation in accordance with standard access contract and franchising provisions and the Network Code. It also sets out the Secretary of State's policy on the payment of compensation. This policy will apply should the proposed Access Option for Crossrail services be agreed with Network Rail and is subsequently approved by the Office of Rail Regulation (ORR) (see the Information Paper on the Crossrail Access Option (H3)), or the railways powers in the Crossrail Bill are used instead (see also the Information Paper on the Railways Powers in the Crossrail Bill (H4)). It does not fetter the discretion of the ORR on any compensation or access charge review matter in connection with Crossrail that falls to it to decide.
- 1.5 A separate Information Paper explains the arrangements for compensating owners of land acquired for Crossrail, which will apply to railway land acquired for the project.

2. Standard Industry Practices – Executive Summary

- 2.1 There are standard industry arrangements in place to provide for payments to be made to and from each of Network Rail, passenger operators and freight operators in circumstances when operators' services suffer from delay, disruption or cancellation arising from other parties. The passenger and freight track access agreements, which operators have with Network Rail, include provisions for compensating for planned disruption to the network and where the punctuality and reliability of services are affected by unplanned disruption. Where there are planned changes to the network (involving significant modifications or enhancements), the Network Code provides for compensation to be made to

affected parties in addition to any compensation resulting from the track access agreements. For planned changes to Stations and Depots, the Station Code and the Depot Code contain provisions relating to compensation due in respect of the implementation of changes.

2.2 Franchise Agreements between passenger operators and the Secretary of State also include arrangements for compensation in the case of certain events, such as particular train services ceasing to operate or being transferred to another operator, at the instruction of the Secretary of State.

2.3 The standard industry arrangements for compensation are described in more detail in the Appendix to this Information Paper.

3. Compensation arising from the development of Crossrail

3.1 The Secretary of State believes that the standard industry arrangements should be appropriate for compensating the railway industry for the loss of, or disruption to, services during the construction and operational phase of Crossrail, apart from the specific instances set out in sections 4 and 5 below. He would expect the arrangements set out in the attached appendix to apply in all other cases, modified only by agreement with the affected railway operator. In the circumstances described below, where standard arrangements do not provide an appropriate remedy, specific non-standard arrangements will need to be developed for the payment of compensation.

3.2 In all cases, the Secretary of State expects that compensation arising from Crossrail should be consistent with the principle that operators receive no net benefit or loss (i.e. that they are held neutral) and that this should be done on an open book emerging cost basis. Operators requesting compensation will therefore need to make available the relevant information to demonstrate their case for compensation.

4. Existing Conflicting Track Access Rights

4.1 In the particular case of existing track access rights that may conflict with the rights reserved under the Crossrail Access Option, the standard industry arrangements would not provide an appropriate mechanism for such conflicting track access rights to be altered or extinguished.

4.2 In the case of freight, the ORR has already granted track access rights that potentially conflict with the track access rights sought by Crossrail but with a re-opening mechanism in the case that Crossrail proceeds. The Department further understands that the ORR intends to adopt a similar approach in respect of any application for track access rights in advance of the Crossrail Access Option being approved that could conflict with the rights to be reserved under the Crossrail Access Option.

- 4.3 The re-opening mechanism developed by the ORR provides that any adjustment to a track access agreement, in the event that conflicting rights materialise, would attract compensation as if it were a Network Change under Part G of the Network Code, where appropriate. The Department proposes to work with the ORR to develop more detailed arrangements for the payment of compensation to affected operators.
- 4.4 In the case of passenger franchises, the Secretary of State will also consider the option of exercising his rights to alter the scope of franchises under the Franchise Agreements, again as set out in the Appendix.
- 4.5 In these circumstances, where the Department cannot reach agreement with operators, Network Rail and ORR to include re-opening mechanisms in any relevant track access agreement, the Secretary of State would reserve the right to use Bill powers to prevent the operation of Crossrail being frustrated by conflicting track access rights. Arrangements will need to be in place for the payment of compensation to the affected operators were Bill powers to be used to alter or extinguish conflicting track access rights.

5. Blocking Rights under Part G of the Network Code

- 5.1 In certain circumstances, in accordance with the terms of Part G of the Network Code, operators may be able to block a Network Change which is required in order to undertake the Crossrail works.
- 5.2 During consideration of the Crossrail Bill by Parliament, interested parties will have had the opportunity to raise their concerns about the project. Once Royal Assent is given to the Bill, the Department does not believe that operators should be able to exercise veto rights to block a Crossrail related Network Change. In such circumstances, if relevant amendments to Part G of the Network Code cannot be agreed with the ORR, the Secretary of State would reserve the right to use Bill powers to prevent operators blocking a Crossrail related Network Change.
- 5.3 Arrangements will need to be in place for the payment of compensation, where necessary, to the affected operators in this case. The Department for Transport proposes to work with the ORR to develop arrangements for the payment of compensation to affected operators.
- 5.4 It should be noted that, whilst operators will not be able to block a Crossrail related Network Change, the Department proposes that the standard industry arrangements for information exchange and consultation, provided for in Part G of the Network Code, should apply in respect of a Crossrail related Network Change.

6. Conclusion

6.1 The Secretary of State's principles for the payment of compensation to train operators arising from the construction and operation of Crossrail are as follows:

- (i) The standard industry arrangements are generally appropriate for the compensation of Network Rail and train operators.
- (ii) Where the standard industry arrangements are demonstrably inadequate (i.e. in the circumstances set out above in sections 4 and 5) particular arrangements will need to be developed and applied. New track access contracts granted before the Crossrail track access option is in place which include track access rights which conflict with Crossrail will need to include provisions for their adjustment with compensation where appropriate.

6.2 In all cases, the Secretary of State expects that compensation arising from Crossrail should be consistent with the principle that operators receive no net benefit or loss (i.e. that they are held neutral) and that this should be done on an open book emerging cost basis. Operators requesting compensation will therefore need to make available the relevant information to demonstrate their case for compensation.

6.3 Finally, during the House of Commons Select Committee stage of the Crossrail Bill, Counsel for the Secretary of State gave the following assurance (see second and third sentences of paragraph 13928 of the transcript for Day 48 (4 July 2006):

"Just to clarify matters on [railway] compensation, we undertake to apply the following principles on compensation:

- The industry mechanisms will apply whether the access option or the Bill powers are used;
- Secondly, where an industry mechanism for compensation exists, it will be used; and
- Thirdly, where an industry mechanism does not exist and one has to be drawn up, the principle of no net benefit and no net loss will be applied."

Addendum January 2008

The railway industry is currently discussing applying suitable compensation arrangements to "competent authority change" under the Network Code. Competent authority change, with compensation attached to it, is a potential means by which works approved in the Crossrail Bill could be undertaken. This may prove preferable to amending Part G as described in this paper. The Promoter will be considering this further in line with the assurance detailed above in paragraph 6.3 to use industry compensation mechanisms - in this case an emerging mechanism - where possible.

Appendix - Standard Industry Compensation Arrangements

1. Introduction

1.1 The standard rail industry arrangements for the payment of compensation are set out within the individual regulated track access agreements between operators and Network Rail. These agreements are based on model formats produced and periodically reviewed by the Office of Rail Regulation (ORR). Track access is available to operators within Network Rail's Rules of the Route which set out the periods for the conduct of engineering works and non-running of trains. The common set of rules applying to the track access agreements are contained within the Network Code which is issued by Network Rail and includes provisions for compensation in certain circumstances not covered in the track access agreements.

1.2 There are three main mechanisms for the payment of compensation:

- i) *Schedule 8* of the track access contracts which sets out a performance regime whereby compensation is paid when trains are delayed with respect to the agreed timetable for each day. This deals with the effects of unplanned disruption.
- ii) *Schedule 4* of the track access contracts, which sets out a regime for passenger and freight operators to be compensated for the effect of planned unavailability of rail infrastructure e.g. scheduled engineering work. (As operators know about the disruption in advance, the compensation rate per minute is less than for unplanned disruption – in fact such payments are, in effect, a discounted form of the aforementioned Schedule 8).
- iii) *Network Change (Part G of the Network Code)* where compensation can arise from a change to rail infrastructure functionality, such as enhancements being made to the network.

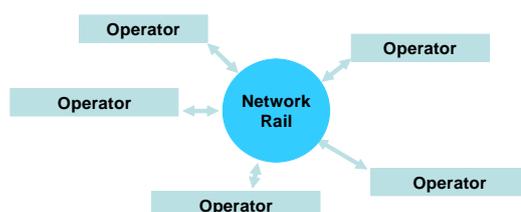
1.3 In addition, compensation payments can result from Station and Depot Change, and as a result of change to a passenger Franchise Agreement by the Secretary of State

2. The Payment Mechanism for Compensation

2.1 The regulatory arrangements for compensation arising from individual track access contracts and the application of the Network Code provide for all compensation payments to be made to or from Network Rail. The compensation liability therefore remains with Network Rail.

3. Schedule 8 (Passenger and Freight Services) – Star Model

- 3.1 Schedule 8 of the ORR’s model Track Access Contract for both passenger and freight services sets out the performance regime. This deals with the effects of poor performance on an operator’s revenue and provides incentives on both Network Rail and the operators to encourage punctuality and reliability of train services.
- 3.2 The primary measure of performance in Schedule 8 is lateness and the performance regime for each track access contract attributes responsibility for lateness between Network Rail and the train operator. The performance of trains is monitored against the timetable of services, and at monitoring points along the route.
- 3.3 In the event that Network Rail causes a delay, it makes a payment directly to the affected train operators. If an operator itself causes delay, it pays Network Rail. Consequently, if one operator is responsible for a particular delay and the services of other operators are subsequently delayed, a single payment by the responsible operator will be made to Network Rail, which will in turn compensate the other operators directly.
- 3.4 This is known as the star model (see diagram below). The star model aims to ensure that all parties (i.e. Network Rail, passenger and freight operators) remain cash neutral to each other over a Railway Period¹ as long as they achieve a defined level of train performance.



- 3.5 Network Rail is responsible for lateness where trains are delayed to a greater extent than that permitted within any Rules of the Route or Rules of the Plan timetabled allowances as a consequence of the performance of the rail infrastructure, for example through signal failures or points failures (or overruns of planned engineering work, see next section on Schedule 4). The train operator is responsible for lateness where a train service runs late as a

¹ There are 13 four week Railway Periods in a year.

consequence of train operations, possibly due to defective rolling stock or lateness of departure due to non-availability of staff.

- 3.6 The Schedule 8 performance regime allows for an allocation of responsibility between Network Rail and the train operator under each track access contract. There are provisions, in certain circumstances, for the joint responsibility of incidents between Network Rail and the train operator.
- 3.7 The Schedule 8 payment rates are priced per average minute of lateness and are calculated using an industry agreed methodology to reflect the impact of performance on an operator's long term revenue.

4. Schedule 4 (Passenger services)

- 4.1 Schedule 4 of the ORR's model Track Access Contract for passenger services describes the compensation which is payable from Network Rail to operators as a result of a Restriction of Use ("ROU"). An ROU is a restriction of use of all or any part of the routes covered by the relevant track access agreement where a train operator is not able to operate the planned train service as shown in the published timetable.
- 4.2 These generally occur when Network Rail imposes restrictions on a train operator's use of the network in order for Network Rail to maintain and renew the network so that it can continue to manage the timetable. This would include all booked possessions, blockades (where access to part of the network is not available in order to allow works to be carried out) and booked temporary speed restrictions.
- 4.3 The basic principle is similar to Schedule 8 in that operators are compensated for the delays and cancellations which they suffer. The same payment rates apply as in Schedule 8, although there is a sliding scale of discounts depending on how far in advance Network Rail notifies the operator of the disruption. This provides an incentive for Network Rail to plan its work effectively.
- 4.4 Operators are compensated for their lost revenue, which broadly reflects the impact which a particular ROU would have on their train services, measured by identifying the amendments made to the timetable for the day on which the ROU is taken. In this way, compensation will vary depending upon the location and duration of the ROU. Like Schedule 8, this compensation is calculated using a formula.

- 4.5 If an ROU is particularly long in duration or is associated with a Possession Strategy Notice², then Network Rail also compensates operators for the additional costs which they have incurred (e.g. costs associated with bus and taxi hire, publicity, train planning, direct management and organisational costs as adjusted by increases or decreases in train mileage). To qualify for this compensation, operators must have also needed to cancel or divert their services, so a temporary speed restriction on a given route would not fall into this category. Schedule 4 provides for a dispute resolution procedure if Network Rail and the operator cannot agree what this compensation should be.
- 4.6 In some cases, an operator itself may request a restriction of use, either because of a Network Change which it proposed (see section 6), or because of damage to the network caused by the train operator. Network Rail does not pay compensation to the relevant train operator in respect of these ROUs.
- 4.7 Where restrictions of use overrun their booked time, then operators are compensated for any further disruption under Schedule 8.

5. Schedule 4 (Freight services)

- 5.1 Schedule 4 of the ORR's model Track Access Contract for freight services sets out the process whereby a freight operator is compensated for variations to its services by Network Rail. A service variation is where a planned service is varied in accordance with Schedule 4, usually with relatively little notice, for a reason attributable to Network Rail and where the variation meets one or more of a list of criteria. These criteria are set out in Schedule 4 and are intended to cover circumstances, such as the use of a longer diversionary route or a delayed departure time, which are likely to cause the operator significant additional costs. Where possible, Network Rail should attempt to find an alternative train slot for a freight operator as a result of a service variation.
- 5.2 Where there is a service variation and Network Rail cannot find an alternative train slot, or Network Rail and the affected freight operator cannot agree an alternative train slot, then the service is treated as a cancellation and compensated under Schedule 8.
- 5.3 Network Rail is not liable for any service variation sums where restrictions of use are accepted under the annual Rules of the Route process, nor is it liable where the freight operator is seeking to vary its services.

² A mechanism to allow Network Rail to coordinate Restrictions of Use over a period of more than a year or for a fixed period of time containing two or more Passenger Timetable Change dates.

6. Network Change

6.1 Part G of the Network Code sets out the process whereby Network Rail or train operators may propose changes which have a material effect on the operation of the network or of trains operated on the network. Network Changes can be either physical, such as a change to the track or signalling configuration, or operational, such as the introduction of a speed restriction on a section of track. Where rail infrastructure is to be altered, modified or enhanced a detailed consultation process has to be entered into with affected parties; a dispute resolution procedure is available if required.

6.2 Compensation is payable as a result of Network Change as follows:

Network Change proposed by:	Compensation
Network Rail	<p>Train operators will be entitled to compensation where the Network Change would result in a material effect on its operations. The amount of compensation would include the amount of the costs, direct losses and expenses (including loss of revenue) incurred by the operator as a consequence of the implementation of the proposed change. The amount of compensation will take account of the benefit (if any) to be obtained by the operator as a result of the proposed change and the ability of the train operator to recoup any costs, losses or expenses from third parties.</p>
Train Operator	<p>Network Rail will be entitled to compensation where the Network Change would have a material adverse effect on operation of the network. The amount of compensation would include the amount of the costs, direct losses and expenses (including loss of revenue) incurred by Network Rail as a consequence of the implementation of the proposed change. This will not include any such costs, losses or expenses which are attributable to the operator sponsoring the change improving its ability to compete with other operators of railway assets.</p> <p>Other train operators will be entitled to compensation where the proposed change would have a material effect on operations. The amount of compensation would include the amount of the costs, direct losses and expenses (including loss of revenue) incurred by the operator as a consequence</p>

	of the implementation of the proposed change. This will not include any such costs, losses or expenses which are attributable to the operator sponsoring the change improving its ability to compete with other operators of railway assets.
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- 6.3 Proposals for amendment to Part G of the Network Code are currently being developed by a cross industry working group to which DfT and ORR are observers. The working group is considering introducing a specific process to facilitate large and complex projects, although compensation principles will be retained.
- 6.4 In addition to provisions relating to Network Change, the Station Code and the Depot Code contain provisions relating to compensation due in respect of the implementation of Station Changes and Depot Changes respectively.
- 6.5 The Station Code states that if a Station Change requires the carrying out of any works on or to a station, the relevant station party must be indemnified for any damages, losses, liabilities, costs, expenses or any material adverse effect resulting from such implementation and must be either indemnified or insured in relation to any damages, losses, liabilities, costs, expenses or any material adverse effect resulting from failure to implement the change.
- 6.6 The ORR's Draft National Depot Access Conditions state that, in relation to a Depot Change, the relevant operator must be fairly and reasonably compensated for any material adverse effect that the change has on its existing and future business.

7. Franchise Agreements

- 7.1 Franchise Agreements between passenger operators and the Secretary of State include provisions for operators to be compensated where changes to the scope of their franchise are required by the Secretary of State.
- 7.2 So, for example, the Secretary of State may change at any time the provision of train services a particular Franchise may provide subject to the payment of proper compensation. The basis for compensation under this schedule is that, as a result of the template franchise agreement financial model change mechanism, the train operator will be held broadly neutral.