



CROSSRAIL INFORMATION PAPER

H4 – RAILWAY POWERS IN THE CROSSRAIL BILL

This paper deals with the “Railway Matters” in the Crossrail Bill contained in clauses 21 to 44. It explains why the powers are there, how they would (and would not) work, how they are intended to be mainly held in reserve and how they may be amended/cut back.

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. Introduction

1.1 This Information Paper deals with the “Railway Matters” in the Crossrail Bill contained in clauses 22 to 45. It explains why the powers are there, how they would (and would not) work, how they are intended to be mainly held in reserve and how they may be amended/cut back.

2. How hybrid bills work

2.1 With a hybrid bill, Parliament itself approves the essential features of a project. To do so Parliament recovers for its own decision things that it normally delegates to local planning authorities, the Office of Rail Regulation (ORR) etc.

2.2 Parliament grants outline approval and also approves the mechanisms by which details can be resolved later, though such mechanisms must not be capable of undermining Parliament’s outline approval. As for public bills generally, these mechanisms may include the Secretary of State having specified functions and duties which are then exercised in the public interest under administrative law.

2.3 The powers at introduction of a hybrid bill are broadly drawn to provide all outline approvals necessary. The intention is always, as a result of the petitioning and Select Committee process, to try to meet the concerns of those affected whilst still enabling the project to go ahead. If agreements can be reached during the passage of the Bill which achieve the project objectives, the powers can be cut back. But if they cannot be agreed in time the powers cannot be cut back otherwise Parliament would have no assurance that its decision on the project would not be undermined after Royal Assent.

3. Outline approval and project financing

3.1 Raising the finance for the project also depends on Parliament’s outline approval not being undermined later. In particular, before raising the necessary finance, there must be the security of track and station access rights sufficient to run the level and quality of service necessary to realise the benefits of the project. These rights may be obtained by means of a Crossrail Access Option granted during the passage of the Bill, or solely by use of the Bill powers. There is not a third option of applying to the ORR for access rights only once the project has been built and is ready to open because it would be impossible to finance the project on this basis.

4. Why did the Bill not rely simply on existing railways procedures and the Railways Act?

4.1 Since privatisation the rail industry has not had to accommodate something of the scale, complexity and novelty of Crossrail and so there is no precedent of relying entirely on Railways Act procedures at the outset of the approval process. To have tried to do so would have required a one to two year delay before introducing the Bill whilst the project was worked up in more detail and access rights sought.

- 4.2 Even this would not necessarily have been sufficient, because industry long term planning of capacity utilisation (Route Utilisation Strategies and Regional Planning Assessments) has taken no account of Crossrail and so there is no reason why decisions on applications for access rights for other operators would have taken any account of Crossrail. Therefore the need to amend existing access rights to make Crossrail workable cannot be ruled out and Bill powers are required to achieve this since there is no established industry mechanism for resolving this conflict in all cases.
- 4.3 To rely on the parties voluntarily surrendering access rights, without the backing of powers, would present unacceptable project risk in the same way as would relying on voluntary purchase, without the backing of compulsory purchase powers, to provide all of the necessary land for the project.
- 4.4 In short, Parliament must have the ability to approve a new project and grant whatever powers may be necessary to secure the implementation of the project, having taken account of the impacts on private rights.

5. Railways powers in the Bill

- 5.1 The railways powers in the Bill are designed mainly to ensure that the outline approval for the project is not undermined later. The particular aspects of outline approval relevant here are that Crossrail will have at least the minimum level of access rights necessary for the project, and that if necessary access rights for others may not be granted or may be modified to secure Crossrail construction or operation. The powers are lengthy not because extensive use is anticipated, but simply to cover every reasonable eventuality on construction and operation.
- 5.2 The powers are based on continued mixed use of the existing network. If the intention had been to take over two tracks each of the Great Western Main Line (GWML) and the Great Eastern Main Line (GEML), this could have been provided for much more simply in fewer clauses. The powers are also designed to be compliant with EC railway law. They use the existing regulatory system as integral to the delivery of the project.

6. The main provisions

- 6.1 As an overview, the rail clauses can be divided into four groups with the following purposes:

Clauses reflecting the strategic importance of Crossrail

- 6.2 Clauses 23 to 25 are intended to make sure that the systematic approach of the ORR is to seek to give effect to the project and the policy behind the project (as opposed to some other policy for using the relevant network).

Clauses assisting the Secretary of State to put in place a contractual framework for Crossrail

6.3 Clauses 28, 30, 31, 32 and 36 are there to ensure that the contractual rights can be put in place to deliver a Crossrail service.

6.4 Clauses 27, 28, and 31 are there to ensure that there is physical capacity on the network for the introduction of a Crossrail service.

6.5 Clauses 26 and 29 are there to ensure that the network and its operators can absorb the (to a degree) inevitable disruption caused by Crossrail.

Consequential, ancillary, technical and supporting provisions

6.6 Clauses 34 and 37 are consequential to deal with the operational changes which may arise as a consequence of Crossrail.

6.7 Clauses 40 to 42 create and describe a mechanism for facilitating construction, maintenance and operation.

6.8 Other technical clauses are explained below

6.9 The effect and purpose of particular clauses is explained in **more detail** as follows: ¹

Clauses reflecting the strategic importance of Crossrail

6.10 **Clause 23** ensures that the ORR will exercise its functions so as to help delivery of the core train operations on which support for the project is predicated. It does this by giving the ORR an overriding duty to facilitate Crossrail's core services which would go to produce a minimum level of operation (i.e. its "principal Crossrail passenger services"). This minimum level of operation can be specified by the Secretary of State (**under Clause 24**), and would be likely to be specified at the level at which the project becomes justifiable in economic and policy terms. Decisions of the ORR in respect of the capacity which is not required to deliver such benchmark operating levels would be taken by the ORR in accordance with its normal duties only (i.e. it would look to balance other competing rail priorities).

6.11 The functions of the ORR which are affected by this duty are exhaustively defined. They are functions relating to the existence and form of access contracts over rail assets, but do not concern the economic terms of those access contracts. These functions include functions conferred on the ORR by clauses 26, 28, 29 and 33 of the Bill. The overriding duty is explicitly subject to the ORR's broader railway safety duties.

6.12 **Clause 25**, which is modelled on a provision in the Channel Tunnel Rail Link Act 1996, places an overriding duty on the ORR to exercise its functions so as not to

¹ Note that these comments are not intended to be a definitive or complete legal analysis. To understand the clauses fully a knowledge of both the highly complex rail industry and the existing rail legislation is required in addition to detailed consideration of the exact terms of the clauses. Readers will also want to refer to the Explanatory Notes of the Bill.

impede a Crossrail development agreement. The corresponding development agreement reached for the purposes of the Channel Tunnel Rail Link (CTRL) was an agreement by which London and Continental Railways undertook the development of the CTRL project.

Clauses assisting the Secretary of State to put in place a contractual framework for Crossrail

- 6.13 The exact date for the commencement of Crossrail services is currently unknown. When Crossrail services are ready to begin, there will need to be changes in contractual rights and consequential operations which allow such services to run on the current network. The intention is that the transition from the pre-Crossrail service pattern will be predictable, and will be brought about under a Crossrail Access Option being negotiated with Network Rail (see the Information Paper H3, Crossrail Access Option). However, a reserve power is needed to ensure that should negotiations not enable the introduction of an appropriate Crossrail service then the Secretary of State will be able to ensure such a service.
- 6.14 Government policy is that contractual rights over the relevant network should be negotiated from now until the opening of Crossrail such that:
- (i) there is the capacity on Network Rail track to run Crossrail services; and
 - (ii) there are the necessary running rights for the operator of a Crossrail service; without any unilateral or unexpected terminations or variations of others' running rights.
- 6.15 It is not possible to guarantee that, by negotiations alone, appropriate capacity will be available on the right parts of the network for an appropriate duration and beginning at the right time. Nor is it currently possible for the Secretary of State to guarantee that (assuming the capacity exists) the appropriate service (i.e. a service consistent with the project as described to Parliament) will be secured in contracts with infrastructure owners. Clauses 26 to 32, and clause 36 seek to change these circumstances.
- 6.16 **Clause 26** relates to “existing” access contracts (or at least those contracts in force when the ultimate Crossrail Act comes into force). It gives a power to the ORR to direct that access contracts be changed to contain appropriate provision for disruption caused by Crossrail. All access contracts contain rights and obligations when there is disruption to rail facilities (whether by planned works or unforeseen problems). As Crossrail works will be a long-term and (inevitably) disruption to existing facilities, the ORR *may* identify a need for bespoke contractual arrangements about the consequences of these disruptions.
- 6.17 **Clause 29** corresponds to Clause 26 but relates to access contracts entered into after enactment of the Crossrail Bill (i.e. the clause confers a duty on the ORR to ensure that future access contract contain appropriate provision for the consequences of disruption caused by Crossrail).

6.18 **Clause 27** is to ensure that existing access contracts (strictly, contracts in existence on the coming into force of the Crossrail Act) do not prejudice the core Crossrail services. Clause 27 obliges the ORR to identify any such prejudice and to bring this prejudice to the attention of the Secretary of State. If the Secretary of State objects to this prejudice – i.e. in practice he sees a real problem that needs dealing with – then the ORR must decide whether or not the prejudicial contract should be amended or declared void. The second alternative, in particular, is believed to be very unlikely. Should a contract be varied or declared void then the ORR may require compensation to be paid. The clause allows the Secretary of State to make regulations about how the ORR would approach disturbing a contract or requiring compensation and such regulations would be likely to include provision about notification, representations, the involvement of interested parties and decision-making.

6.19 This clause would only have practical effect if and when minimum operating levels for Crossrail passenger services are specified.

6.20 **Clause 28** has two functions where someone is applying for an access contract in respect of the network linked to the tunnel. Firstly, subsections (2) to (5) enable the ORR to direct that an access contract which is being sought by a party should be amended (assuming that the ORR is minded to approve the contract). The amendments would be required in order to facilitate Crossrail passenger services.

6.21 The second function enables the Secretary of State to control some key non financial terms of an access contract which might be sought by someone wanting to operate the core Crossrail service. The Secretary of State's intervention under subsection (6) would most likely be in order to:

- (i) establish the appropriate duration of an access contract for the Crossrail services describe to Parliament (e.g. to ensure that the access contract is of an appropriate length justified by reference to the investment in the tunnel by securing revenues over a significantly longer than standard time); or
- (ii) establish the operational characteristics necessary to deliver a core Crossrail passenger service.

6.22 This second function is complemented by Clauses 30, 31 and 32. The table below explains how each clause might be used or have effect so as to guarantee delivery of the expected core Crossrail service (note that this is a non-technical oversimplification):

	<i>Running rights for tunnel</i>	<i>Running rights outside tunnel</i>
<i>Rights successfully negotiated with facility owner</i>	Secretary of State could act under clause 30 to disapply requirement for ORR approval	Secretary of State could act under clause 31 to direct ORR to approve certain non-financial terms
<i>Rights not successfully negotiated with facility owner</i>	Secretary of State (or TfL) “controls” the tunnel and hence not a potential scenario	Application made to ORR and the Secretary of State might intervene under clause 28 as regards certain non-financial terms; <i>or</i> Direct involvement by the Secretary of State, securing key non-financial terms, under clause 32

6.23 **Clause 30** is a power for the Secretary of State to disapply the usual requirement that the ORR approves access contracts which have been agreed between parties. This power’s relevance is in respect of access contracts for rights over or relating to the tunnel, as opposed to the network away from the tunnel. This power can only be exercised by the making of a statutory instrument which Parliament has the right to negative.

6.24 **Clause 31** relates to the network outside the tunnel to be used for Crossrail services. Where an agreement has been reached with a facility owner (e.g. an agreement with Network Rail about running rights over its tracks) it is required to be presented to the ORR for approval. Clause 31 allows the Secretary of State to direct the ORR to approve certain key, non-financial terms. Those key terms would most likely be ones that:

- (i) establish the appropriate duration of an access contract for the Crossrail services describe to Parliament (e.g. to ensure that the access contract is of an appropriate length justified by reference to the investment in the tunnel by securing revenues over a significantly longer than standard time); or
- (ii) establish the operational characteristics necessary to deliver a core Crossrail passenger service. I.e. they are likely to be the same type of terms under which the Secretary of State might intervene under Clause 28.

- 6.25 Whereas Clause 28 is relevant where an unspecified party applies for access rights away from the tunnel, **Clause 32** enables the Secretary of State to initiate the acquisition of an access contract and to control the key, non-financial terms (the same type of terms discussed in respect of both clauses 28 and 31).
- 6.26 **Clause 33** deals with conflicts between rights required for Crossrail services and existing rights (as are paragraphs (2) to (5) of Clause 28). Where the Secretary of State has directed a third party to enter into an access contract, the ORR has the function of looking at others' access contracts to see if they hamper the core Crossrail service. The ORR may require a remedying amendment and shall consider whether a consequential and standard review of charges is needed.
- 6.27 Clauses which modify the role or involvement of the ORR in respect of train running rights presuppose that the ORR has regulatory oversight of the infrastructure in question. Some infrastructure over which the Secretary of State will want a Crossrail operator to have rights (notably BAA's infrastructure linking Heathrow to the main network, and London Underground's central stations) are not regulated by the ORR. **Clause 36** makes it possible for the ORR to have regulatory oversight of such infrastructure, in which case normal industry processes (subject to modification under the Bill) would apply. Also, Clause 36 could be used to remove a bar to the franchising of passenger services to Heathrow.
- 6.28 The powers in Clause 36 could only be used if justified, at least in part, by reference to Crossrail services. The exercise of any such powers would be by statutory instrument which Parliament could negative.

Consequential, ancillary, technical and supporting provisions

- 6.29 In the event that the Secretary of State needs to use Bill powers which have a consequence of varying third parties' rights, then there is a need to consider any knock-on effect to franchises. The Department for Transport's franchising strategy is already anticipating the advent of Crossrail, but to cover currently unanticipated situations **Clause 34** puts a duty on the parties to a franchise agreement to try to agree any necessary and consequential amendments. In the unlikely scenario of the termination of a franchise, the ORR has the power to direct the payment of compensation.
- 6.30 **Clause 35** disapplies the statutory prohibition on public sector operators being a franchisee in respect of passenger services. It therefore allows a public sector operator to be a franchisee under a franchise agreement for Crossrail services.
- 6.31 **Clause 37** allows for the disapplication of the statutory mechanisms for closing stations or withdrawing services. These complex mechanisms are operated by reference to Government guidance and closure procedures are reviewed by the ORR. Rather than being guided by Government policy, this clause allows a decision to be taken directly by the Secretary of State to enable the discontinuation of services or facilities.

6.32 **Clauses 40 to 42** provide a mechanism for securing agreement about matters which concern Crossrail and third parties' infrastructure or train services. Clause 40 mirrors a provision in the Channel Tunnel Rail Link Act, providing for the parties concerned to reach agreement or in default to go to arbitration. Clause 41 allows the Secretary of State to secure the substantive result (to the extent which this is reasonably practicable) of the arbitration or the principle on which it is to be determined (e.g. a result which avoids delay, albeit perhaps at additional project costs) but not the terms of the agreement delivering that result (e.g. as to the additional costs). Clause 42 sets out the arrangements to apply in the case of multiple arbitrations, thus allowing proceedings to be consolidated or held concurrently.

7. Exercise of the powers

7.1 A number of powers fall to the Secretary of State. In exercising them he would take account of all relevant aspects of the public interest, not narrowly the interests of Crossrail. These interests include franchising of regional as well as suburban passenger services, provision of rail freight and provision of surface access to airports.

7.2 Although the powers are broad, the Secretary of State would not exercise them to the theoretical maximum. Each use of the powers would need to comply with the Human Rights Act as well as be exercised reasonably. Additionally his intention is to use the powers to facilitate the project that has been defined as part of the Bill process. This is in particular the Crossrail service level that has been developed taking account of the interests of other users and which has been tested by the Timetable Working Group.

7.3 Also use of the powers would be accompanied by appropriate compensation where there are unavoidable impacts on contractual rights.

7.4 The Secretary of State's powers cannot be delegated under the Bill: they would remain with the Secretary of State even if the Crossrail project is devolved (see Clause 60).

8. Common concerns about the powers

8.1 Concerns have been raised by petitioners and others about the railways powers in the Bill. Those most frequently mentioned are listed in italics below, with comments in plain text on each:

8.2 *Objection to the Secretary of State having any role under the railways powers.* The Secretary of State would apply public interest considerations in the use of such powers.

8.3 *Objection to any overriding duty on the ORR.* Specification of a service, or completion of a development agreement, so as to engage the overriding duties

would happen only once the appropriate balance between Crossrail and other users has been struck in the public interest.

8.4 *Objection to setting aside railway processes such as the Network Code.* It is intended to use railway processes wherever possible.

8.5 *Fear that the powers could be used to take over the whole or part of the GWML and GEML.* The Secretary of State made clear at Second Reading that the intention is for there to continue to be a mixed use railway.

8.6 *Fear that the powers could be used to further extend the planned Crossrail service.* This is not the intention and would be for consideration (see below) as part of any future review of the use of the Bill powers.

8.7 *Objection to the appropriation of access rights.* This may be unavoidable in very case, though many existing access rights will expire before Crossrail pens. Where the power is used compensation would be available where appropriate.

8.8 *Objection to the limited nature of ORR's role in approving – potentially long duration - Crossrail access agreements.* Given that obtaining access rights for Crossrail services is essential to the project, ORR's decision in relation to these must not be such that Parliament's outline approval could be second guessed. EC law has defined limits on the duration of access agreements ("framework agreements") and the provision for Crossrail services will comply with this.

9. Cutting back Bill powers

9.1 As explained in Information Paper H3, Crossrail Access Option, the intention is if an Access Option can be approved in time that the Promoter will seek to reduce the railway clauses or to give undertakings on their use, or a combination of these. It is unlikely to be possible to do this before the Bill reaches the House of Lords.