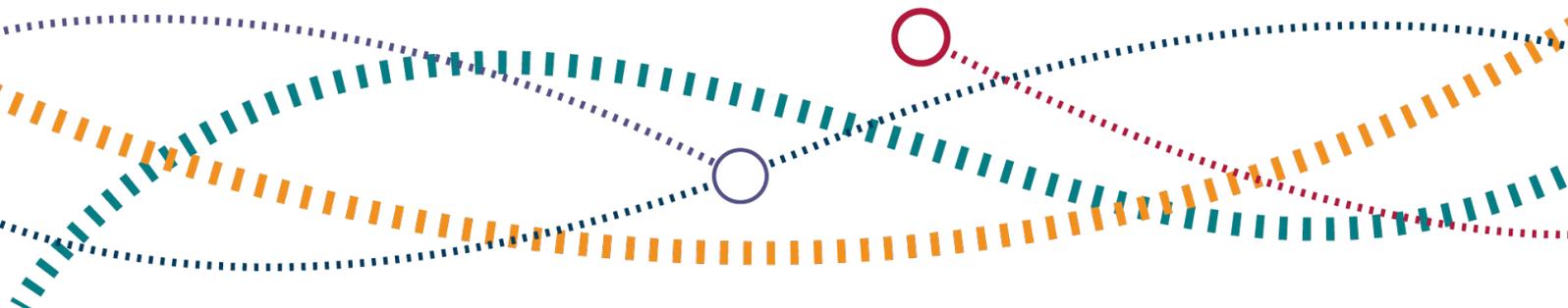




Liability Framework

01 April 2024



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Introduction & overview

Introduction

1. This module explains our policy on the liability framework for access contracts. Access contracts should contain incentives that will promote efficient and effective performance; include provision for cost recovery and payment of appropriate compensation; secure efficient use of network capacity; to facilitate better services for rail customers.

2. In the 2023 periodic review (PR23) we set the regulatory framework for control period 7 (CP7), which runs from 1 April 2024 to 31 March 2029. Our conclusions are set out in our [final determination](#). This document reflects the regulatory framework implemented through the track access contract as part of PR23.

The model liability framework

3. The model passenger and freight contracts contain our model liability framework. The contractual arrangements for freight customers also contain the model liability framework but the model framework has been structured to reflect the different contractual arrangements. We consider it important that parties to an access contract are clear about their obligations and the liabilities for failure to comply with them. The other key principle underpinning the model liability provisions is that they should achieve the most efficient allocation of risk, such that risk is borne by the party best able to manage it. Thus, our view is that the model regime should incentivise efficient behaviour, foster a culture of contractual compliance and minimise total industry costs.

4. The liability framework distinguishes between operational failures that are contemplated by the contract and breaches of the contract. Liability for operational failures, such as delays or cancellations of trains and planned restrictions on the use of the network, are compensated under Schedule 4 (possessions) and Schedule 8 (performance). Payment under these provisions is not necessarily capped and neither party may claim force majeure relief.

5. For other breaches of the contract, the access beneficiary or Network Rail would be able to apply for a performance order but, whether or not it did so, the party in breach would still be liable to pay compensation for proven losses from the point the initial breach occurred. Compensation for breach of contract is also subject to the annual cap (with certain exceptions) and to relief from the obligation to pay compensation where the breach results from a force majeure event.

6. Our model access contracts provide options for the parties to have disputes determined by the relevant Access Dispute Resolution Rules (ADRR) panel or the High Court. These options sit alongside the options of expert determination and mediation provided for in the Network Code and the specific dispute resolution mechanisms contained in individual parts of the Network Code and the model contract (for example, those in Schedules 4 and 8 of the model contracts for determining sums payable in respect of delays, cancellations and restrictions of use).

7. We believe that the default liability arrangements in the model track access contracts represent the most appropriate position in terms of optimal risk allocation and are part of the overall package which Network Rail offers its customers. We therefore consider it appropriate that the costs of the regime form an integral part of the overall access charge, which is subject to periodic review. However, if for commercial reasons an access beneficiary wishes to negotiate bespoke liability arrangements with Network Rail, such as asymmetrical caps on liability, we will consider them, including against the following criteria of whether the proposed regime:

- a) properly reflects the financial position of and allocation of risk between the parties;
- b) provides appropriate incentives and remedies for the parties; and
- c) is appropriate, taking account of the allocation of risk to the train operator under any franchise agreement.

8. In such cases we will expect Network Rail and the operator to agree an appropriate access charge supplement or access charge rebate, the levels of which will be dependent on the degree to which risk has been transferred from one party to the other.

Liability caps

Model passenger contracts

For passenger contracts, our policy is that the annual liability cap in Schedule 9 should be set for both parties at three times the level of the train operator's annual variable charge, excluding traction electricity charge (EC4T), subject to a minimum cap of £13 million (2019-20 prices). EC4T is not included in the calculation so as to ensure consistency between operators using diesel and electric traction.

9. We are willing to consider bespoke arrangements for liability caps for other operators – for example, small-scale open access railway operators where a smaller cap of, say, around half the normal minimum cap, at £8.3 million in (2023-24 prices), could be more appropriate.

10. Where a new track access contract is sought to replace an existing contract, the liability cap will need to be reconsidered. It would not be appropriate merely to copy across the old liability cap to the new contract, not least because it would not be in the right price base.

Model freight and freight customer contracts

11. The level of caps applicable to each freight operator is dependent on the level of turnover. The default level of the annual cap is £8.3 million (2023-24 prices), indexed as necessary. However, a larger operator might be offered a higher cap recognising the larger scale of relevant losses that would result from breaches of contract.

12. The model freight customer contract contains similar liability arrangements to the model freight access contract. However, it does not contain those parts of the model freight access contract liability arrangements that relate to the operation of trains and there are exclusions in the freight operating company customer access contract (into which the freight customer draws down its access rights) to prevent a freight operator or Network Rail from being liable for a single incident across a number of contracts. These arrangements also apply to the indemnity incident cap.

13. As part of PR23 we have amended the indexation formula within the definition of 'Liability Cap' in Schedule 9 of the freight operator, freight operating company customer, freight customer and charter model track access contracts as well as those operators' contracts where the cap had not been negotiated. This amendment ensures that default caps are consistent regardless of when a contract was entered into.

14. If a replacement track access contract is being sought, the liability cap will need to be reviewed as part of this (see the point in paragraph 11 above relating to passenger contracts).



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