Consultation on a revised contractual regime at stations –

OFFICE OF RAIL REGULATION

Proposed changes to the Station Access Conditions and Independent Station Access Conditions: emerging conclusions

March 2012

Contents

1. Executive Summary

1.1 In this document we set out our emerging conclusions following our earlier consultation on proposed changes to the contractual arrangements at stations, in particular the arrangements governing the Station Change processes.

1.2 The National Station Access Conditions ("SACs") are the standard rules that govern the relationship between all contracting parties at a station and as such play an important role in managing the interface between different parties in the railway "system". They cover matters such as the process for agreeing physical changes to a station, charging for access and the remedies available when things go wrong. There are separate conditions for the stations managed by Network Rail called the Independent Station Access Conditions ("ISACs"). These broadly follow the same format as the SACs. Throughout this consultation document, unless otherwise stated, any reference to SACs will be a reference to both SACs and ISACs.

1.3 Station Access Agreements set out the terms for access to a station. SACs are incorporated into those agreements and in that way apply to all parties that have a regulated agreement for access to a station.

1.4 The contractual arrangements at stations are often complex. In particular, we have been told by the industry that the Station Change process in the SACs which governs the way in which changes are made either to the documentation relating to the station, or to the station itself, is unwieldy and overly-complicated. It is an important process because, among other things, it sets out the procedure that must be followed to initiate a change and ensures that other parties potentially affected by the proposed change are properly consulted. We are committed to introducing modifications to the SACs that will see this process for Station Change streamlined and simplified and that will give appropriate rights and responsibilities to those third parties wishing to invest at stations.

1.5 Our proposed changes aim to simplify the Station Change process by:

(a) streamlining the consultation process;

(b) clarifying the objections that can be validly made about a proposed Station Change;

(c) introducing a separate process for dealing with financial compensation issues, including allowing for a dispute process where the parties cannot agree; and

(d) formally introducing rights and responsibilities for third parties that wish to invest at stations, with the aim of encouraging more such investment.

Purpose

1.6 This document:

(a) sets out our emerging conclusions on the review of the contractual arrangements at stations, on which we consulted in March 2011;

(b) advises you about those changes that, based on your responses to the earlier consultation, we are satisfied should be implemented without the need for further consultation in this document;

(c) consults you again on issues where we would welcome your further views; and

(d) does not at this stage provide revised drafts of the SACs, which we will produce for circulation with our final conclusions, having first considered your further responses.

1.7 We ask a number of questions throughout the document and, for ease of reference, we have listed all of the questions in chapter 13.

Background

1.8 In March 2011 we issued a consultation on proposed changes to the contractual regime at stations. The consultation, which closed on 8 June 2011, proposed modifications to the SACs and to the ISACs. Details of the consultation and of the responses that we received can be found on our website at: http://www.rail-reg.gov.uk/server/show/ConWebDoc.10339

1.9 Since June 2011 we have been carefully considering the responses and this document sets out our emerging thoughts.

1.10 As set out in our earlier consultation, we remain of the view that the contractual arrangements at stations must support and encourage the drive for more efficient ways of working. They must not act as a barrier to investment by third parties. And they should make it easier for third parties wishing to invest at stations by providing certainty regarding their rights and responsibilities and by providing clarity regarding the process for dealing with objections and resolving financial compensation issues.

1.11 Based on your consultation responses we are decided in some areas on the changes that should be made and we will set those out. In other areas, particularly where there were a variety of views expressed in the consultation responses, we will seek your further views. Your responses will help us decide on the way forward.

Summary of key issues

1.12 In the following chapters we discuss in more detail a number of proposed modifications to the SACs. All of these changes are designed to improve the current regime and to help the Station Change process function in a more efficient way.

1.13 There are some changes that, based on responses to our earlier consultation, we have decided should be made. These changes relate to:

(a) removal of the requirement to hold Station Meetings in relation to proposed changes to the SACs;

(b) the introduction of a process for the registration and implementation of Station Changes; and

(c) a number of drafting amendments to update the SACs.

1.14 There are a number of other proposed changes where we would welcome your views to help us decide on the modifications that should be made. Those broad areas can be summarised as follows:

(a) categorisation of different types of Station Change;

(b) introduction of a Financial Impact Test;

(c) development of a list of valid objections to a Station Change;

(d) arrangements for the direct involvement of third-party developers;

(e) removing the distinction between private and public body investors;

(f) arrangements for dealing with disputes about financial compensation issues in a separate process; and

(g) deciding what to do when a developer fails to complete the agreed physical changes to a station.

1.15 We also deal with a number of miscellaneous issues that arose in the responses we received to our earlier consultation.

Industry reform

1.16 We are mindful of the fact that a number of changes to industry structures are already underway or are proposed. For stations, two of the most significant are the move to longer franchises and the transfer to train operators of the responsibility for the maintenance, repair and renewal of station assets under a fully repairing lease. We believe that the changes we are proposing to the Station Change process apply equally well when a train operator has full responsibility for its station under these new leasing arrangements.

Next steps

1.17 Once we have carefully considered the responses to this consultation, we will issue our final conclusions setting out the full range of changes that we will make to the SACs, giving our reasons for making those changes and will provide a revised draft of the SACs. We hope to do this by the autumn.

1.18 At that time we will begin the formal process to give effect to the necessary modifications to the Station Access Conditions and Independent Station Access Conditions.

1.19 Once ORR has issued a notice to modify the SACs, the modifications will not come into effect until a period of 180 days has elapsed. To avoid the SACs being modified in a piecemeal way, we do not intend to issue an approval notice for any modifications, including those we have already decided should be implemented without the need for further consultation (see chapter 12), until we have concluded this current consultation and can approve a package of all proposed modifications at the same time.

2. Introduction

Purpose

2.1 This document sets out ORR's emerging conclusions on our proposed reform of the contractual regime at stations, in particular the process governing Station Change, to ensure that it remains fit for purpose and meets the needs of today's rail industry.

2.2 Our emerging conclusions have been reached after a consultation with industry and wider stakeholders. We received 20 responses, primarily from the train operating and rail industry community, and we are grateful for these contributions. All responses have been posted on our website, and can be found here http://www.rail-reg.gov.uk/server/show/ConWebDoc.10339.

2.3 Respondents were generally supportive of the overall aim of reviewing the SACs to ensure that they remain fit for purpose. However, as explained later in this document, there was a wide divergence of views on many of the modifications to the SACs that we proposed. We have dealt with the detail of many of the responses in the remainder of this document, and have taken into consideration all of the responses received even if they are not referenced expressly in the text which follows.

Background

2.4 In March 2010 we tasked Network Rail to take the lead in working with the industry to take forward a reform of the contractual regime at stations. The particular areas we highlighted for change were:

(a) facilitating effective partnership working between Network Rail and train operators, with better alignment of incentives (building on the work of the local delivery groups established as part of the National Stations Improvement Programme);

(b) clarifying and simplifying the split of maintenance, repair and renewal responsibilities and creating flexibility to enable the most efficient ways to deliver improvement;

(c) simplifying and speeding up the process for station change; and

(d) facilitating third party involvement in stations.

2.5 We set a deadline of 8 October 2010 to receive the industry's proposals for reform.

2.6 In early October 2010 we received proposed revisions to the stations contractual regime from the working group of Network Rail and ATOC, which was convened in response to our requirement that the industry take forward a reform of the stations contractual regime. However, the draft provisions which the working group presented to us were not the joint industry proposal we had hoped for. Although there were points on which Network Rail and ATOC were agreed, there were also issues (including some points of principle) on which agreement was either not complete or lacking entirely, and ATOC usefully submitted a separate note setting out its position on those areas of disagreement.

2.7 In particular, the revisions did not contain proposals for clarifying and simplifying the split of maintenance, repair and renewal responsibilities. We undertook to look at this issue separately and, for the avoidance doubt, it is not included as part of this consultation.

2.8 In March 2011 we issued our consultation on proposed modifications to the SACs and ISACs, the text of which was based on the draft provisions received from the working group together with consideration of ATOC's separate note and our own review. Our consultation was conducted under the terms of Condition B6 of the SACs (Part 2, Condition 7 of ISACs). The most significant proposed changes were to the Station Change regime and to the involvement of third parties in station developments. We also proposed a number of other "consequential" changes to update the drafting of the SACs to reflect the current industry structure and to reflect the new access disputes processes. We asked consultees some specific questions, while inviting their comments more widely. The consultation closed on 8 June 2011.

Consultation responses

2.9 We received 20 responses, the majority of which were from the train operating/rail industry community. We received one response from a county council and two from developers. We also received detailed comments from a law firm.

2.10 There were a range of responses and disappointingly the majority of the proposed modifications did not receive overwhelming support, and indeed some received no support at all. Interestingly, a number of responses expressed support for elements of the proposed Stations Code as an alternative to the revised SACs that we consulted on (notwithstanding the previous lack of support within the industry to adopt the proposed Stations Code). This has caused us to re-consider, based on those responses, whether we should use specific parts of the proposed Stations Code in the revised contractual regime at stations.

2.11 Most resistance was expressed about using only a Financial Impact Test to assess the materiality of a Station Change proposal, about allowing third party developers to make proposals in their own right, about the arrangements for resolving compensation issues, about the proposed list of valid objections to a Station Change, and about the provision of alternative accommodation.

2.12 Support was expressed for the deletion of the requirement to hold a Station Meeting and for the retention of a voting process for Part B Station Changes, with a voting threshold of 80% for approval. The consequential modifications to update the drafting of the SACs and to bring it in line with the revised Access Dispute Resolution Rules (ADRR) also received support.

2.13 These issues are discussed in further detail later in this document.

Structure of document

2.14 This document represents our emerging conclusions. It does not provide revised drafting but rather sets out a series of principles that we have developed following the initial consultation and in relation to which we invite your further consideration and comments. The document is structured as follows:

(a) Chapters 3 to 10 summarise the issues identified in our earlier consultation, provide an overview of consultees' responses and set out our emerging conclusions;

(b) Chapter 11 deals with a number of miscellaneous issues;

(c) Chapter 12 identifies modifications that we have decided to make in due course, based on the responses we received to our earlier consultation;

(d) Chapter 13 sets out all of the questions raised in this emerging conclusions consultation;

(e) Chapter 14 contains our assessment of regulatory impact;

(f) Annex A lists the stakeholders who responded to our earlier consultation;

(g) Annex B lists those we are now consulting, which has been slightly updated since our earlier consultation; and

(h) Annex C contains a copy of the template Station Funder Participation Deeds from the proposed Stations Code.

Next steps

2.15 This is a 12 weeks consultation starting today. The list of those we are consulting can be found at Annex B.

2.16 Please send any representations to the Stations and Depots team as soon as possible and by no later than midday on 28 May 2012. You can send representations either by e-mail to stations.depots@orr.gsi.gov.uk or in hard copy to:

Stations and Depots Team
Office of Rail Regulation
One Kemble Street
London
WC2B 4AN

2.17 We shall publish all responses on our website and we may quote from them. If you wish all or part of your response to remain confidential, you should set out clearly why this is the case. Where you do make a response in confidence, please attach a summary excluding the confidential information, which we can use as outlined above. We will publish the names of respondents in future documents or on our website, unless you indicate that you wish your name to be withheld.

2.18 Please note, when sending documents to us in electronic format that will be published on our website, we would prefer that you email us your correspondence in Microsoft Word format. This is so that we are able to apply web standards to content on our website. If you do email us a PDF document, where possible please:

(a) create it from the electronic Word file (preferably using Adobe Acrobat), as opposed to an image scan; and

(b) ensure that the PDF's security method is set to no security in the document properties.

2.19 Once we have considered all of the responses that we receive, we will issue our final conclusions setting out the changes we will make to the SACs and giving our reasons for making those changes. We will then take the necessary steps to formally modify the SACs. Please note that any modifications that we make to the SACs will not become effective until a period of 180 days has elapsed from the date that we approve the modifications.

2.20 If you have any questions regarding the consultation arrangements, or any other aspect of this document, please contact Gerry Leighton on 020 7282 2030.

3. Issues for further consultation and emerging conclusions

3.1 In chapter 12 we set out details of those modifications which we have decided, based on responses to our earlier consultation, should be implemented. However, in relation to a number of the proposals in that earlier consultation there was a wide range of views and a divergence in the level of support for the proposed modifications. In some instances, the proposed modifications would need only slight amendment to take account of respondents' views. In other areas, the range of views was such that the proposals need further consideration. In any event, we believe that it is appropriate to consult and seek your further views before reaching a final conclusion.

3.2 All of the proposed changes that we discuss are designed to achieve the objective of simplifying the Station Change process in the SACs by:

(a) streamlining the consultation process;

(b) clarifying the objections that can be validly made about a proposed Station Change;

(c) introducing a separate process for dealing with financial compensation issues, including allowing for a dispute process where the parties cannot agree; and

(d) formally introducing rights and responsibilities for third parties that wish to invest at stations, with the aim of encouraging more such investment.

3.3 In the following chapters 4 to 11 we will set out the following issues, which would benefit from some further consideration:

(a) categorisation of different types of Station Change;

(b) introduction of a Financial Impact Test;

(c) development of a list of valid objections to a Station Change;

(d) arrangements for the direct involvement of third-party developers;

(e) removal of the distinction between private and public body investors;

(f) introduction of a Co-operation Agreement, including arrangements for dealing with disputes about financial compensation issues in a separate process;

(g) deciding what to do when a developer fails to complete the agreed physical changes to a station; and

(h) the arrangements for granting wayleaves.

3.4 In each case we provide a brief summary of the views expressed by respondents to our earlier consultation and will also set out our emerging conclusions for a way forward and seek your further views.

4. Categorisation of Station Change and Financial Impact Test

Categorisation of types of Station Change

4.1 In our earlier consultation we proposed that there should be a differentiation between different types of Station Change based on the materiality of the impact on affected Users. One of the types of change proposed was that of “Exempt Activity”. This category was proposed to cover works of a routine nature that should be permitted to proceed without the need for consultation with, or the payment of compensation to, other station parties.

4.2 A number of respondents expressed concern that a Change categorised as an “Exempt Activity” could nonetheless result in affected parties experiencing financial losses, and yet such affected parties would have no right to be consulted on the proposed Change, to object to it and/or to claim compensation. Also, some respondents commented that having too many categories of change would result in an over-complication of the process, with more bureaucracy, and/or making it more difficult for train operators and smaller developers to understand the already complex Station Change process. Respondents felt that this could lead to increased costs for all parties. In addition, “Exempt Activity” includes works of a “routine nature”, which some respondents considered was too wide a definition and open to interpretation, with the possibility that significant works could be undertaken without the need to consult with, or pay compensation to, those affected. A number of respondents asked that a more detailed list of what activities will be “exempt” should be provided.

Emerging conclusions

4.3 Given the attempt to streamline the Station Change process, we believe that the aim of introducing the concept of “Exempt Activity” is sensible. However, the concerns raised by respondents about how this category of change would work in practice and particularly how parties might still be materially affected, lead us to the conclusion that the concept, as currently drafted, cannot easily be applied and may lead to confusion and an increase in disputes.

4.4 The concept of “Exempt Activity” was introduced in the proposed Stations Code and was a definition developed by the industry. We propose that the revised Station Change process should continue to use this concept of “Exempt Activity” and suggest that the definition developed for the proposed Stations Code should be adopted; this defines “Exempt Activity” in terms of an action the proposer is obliged to take under an agreement incorporating the SACs, the carrying out of which action is not expected to last for more 28 consecutive days or to result in a material diminution of the number of passengers or trains that are able to use the station on any day. It also includes works to prevent, remedy or mitigate the effects of an emergency or environmental condition. We favour this approach because, rather than try to compile a list of activities, it focuses on the effect and impact of the activity rather than a description of it.

Consultation question

4.5 Do you agree that we should introduce the concept of “Exempt Activity” and adopt the definition as developed for the proposed Stations Code?

Financial Impact Test

4.6 The proposed revised Station Change process introduced a Financial Impact Test as a means of assessing the materiality of the impact of a Change on other station parties and thereby determining whether they would be consulted on a proposed Change and/or be eligible to be compensated. There was a range of responses to this issue.

4.7 Most respondents could see the benefit in having a test to distinguish between material and non-material Change Proposals. Some thought the threshold of £5,000 was too low, some thought it too high, while others felt that a single threshold did not take account of possible variations between stations and the range of Changes that might be proposed. The majority of operators agreed with ATOC that having an impact test defined only in terms of financial impact (regardless of where that level might be set), and ignoring other effects on operators which are less capable of being quantified e.g. the impact on passenger perception of any disruption during the works, was not desirable.

4.8 In response to comments received from some respondents, we should clarify that it is possible under the proposed process that the impact of a Change Proposal on a relevant consultee might be Material at one station but not at another. It is the impact of the proposal on consultees at the particular station that governs the classification of the proposal, rather than anything inherent in the proposal itself. A proposal has consequences and we propose it is the extent of the consequences which should be the basis for deciding materiality, rather than the nature or contents of the proposal itself. This would not necessarily be the case where the proposal itself expressly affects more than one station. In those circumstances the overall proposal may be Material, even if it might not be in relation to each impact at each individual station.

4.9 ATOC made a proposal that, given the possible discrepancy between the effects experienced by a small operator and a large operator (or a small station and a large station), parties should be free to agree different financial impact thresholds for different stations. We presume that this means that operators could agree the materiality threshold in advance, and apply this threshold to any scheme which is subsequently proposed. We do not favour this approach because it seems to us to lead to uncertainty, especially for third party developers, and could lead to disputes over the level of threshold to be set.

4.10 One respondent raised the concern that it would be possible for a Station Change promoter to put forward a series of proposals for separate stations, each promoting the same Change at the stations, which when looked at individually would fail to reach the financial impact threshold and so would remain Notifiable Station Changes; whereas, if all those proposals were grouped together as a single scheme to cover all of the stations, a single proposal would meet the Material Change threshold. We agree that it would be desirable to avoid any deliberate “gaming” of this sort, but acknowledge that this is not straightforward as it will depend on consultees identifying and being able to establish that a series of individual Station Change proposals are in fact linked.

4.11 To some extent this risk exists even now under the current SACs, since a material change proposal might not be triggered in relation to one station, but if a few proposals follow one another at different stations, the consequences could be material. The proposed revised SACs do not therefore create a new problem. In many ways the setting of what some respondents consider to be a low threshold for the Financial Impact Test might help to mitigate the potential problem. However, we would be interested to hear your views on how to deal with this potential issue.

4.12 A further concern was raised that while the £5,000 threshold for the Financial Impact Test might not be reached in any single one of the first five years following the implementation of a Station Change, if spread over two or more of those years the costs incurred by the affected consultee might exceed the threshold. It was suggested that this should be taken into account when considering whether the proposal is in fact a Material Change. While we consider that this is a valid point, there is a degree of arbitrariness in setting an appropriate time limit, and if the period is too long there will come a point when the majority of proposals (save those where the costs are negligible) are likely to qualify as Material Changes. After careful consideration, and taking into consideration that a materiality threshold of £5,000 is actually quite low, we have decided that the "one year in five" timescale as set out in our earlier consultation is an appropriate timescale against which to assess materiality. This is an issue that we will keep under review.

Emerging conclusions

4.13 We consider that it is sensible to have a means by which parties can differentiate between different types of Change Proposal and their likely impact. We consider it appropriate to put in place a threshold above which a Proposal would be categorised as a "Material Change Proposal" and would go through a full consultation, but below which 'simpler' proposals can be progressed in a less costly and bureaucratic manner. We consider that the alternative would be for all proposals which are not otherwise categorised Exempt or Non-discretionary to go through the full consultation process; we believe such an alternative method will increase industry costs in terms of both bureaucracy and project costs, and accordingly we do not favour it.

4.14 We consider that there needs to be some type of impact test, and that it needs to be practical and provide a degree of certainty, hence our continued preference for there to be a financial quantification. While we acknowledge that factors such as the impact on passenger perceptions are important, we are concerned that such matters are not objective and could lead to further disputes. In an attempt to streamline and speed up an already complex process, we believe that any impact test must be simple to understand, objective and be capable of being applied consistently.

4.15 We have decided that a Financial Impact Test should be introduced and propose that the threshold be set at £5,000 initially. This is in line with our original proposal and so the principle has not altered. However, given some of the responses we received to our earlier consultation, we consider it would be helpful to clarify certain aspects of our proposed revised SACs in relation the Financial Impact Test, which we discuss below.

4.16 It is possible that a change proposal in relation to a station at which there are two (or more) operators may satisfy the Financial Impact Test for one operator but not for another, which in theory means the same proposal would be categorised as both a Material and Notifiable Change Proposal. We consider that there are two alternative approaches which may be taken in relation to such an occurrence. Either, if a change proposal has a material effect on one consultee then it is subject to the Material Change Proposal process for all affected consultees at that station (i.e. even operators at the station who are not affected to the cost of £5,000 will be subject to the Material Change Proposal process). Or, a dual Station Change process must take place, whereby an operator who passes the Financial Impact Test is subject to the Material Change Proposal process, while any affected operator who cannot demonstrate that the proposal will cost it £5,000 is subject to the Notifiable Change Proposal process; this would mean that the proposer has to conduct two concurrent change proposal processes.

4.17 Our view is that that the Financial Impact Test is about establishing the materiality of the proposed Station Change, and we consider that it is important to have a single process governing the proposal. Therefore we favour the first of the above approaches - if one consultee "triggers" the financial threshold of £5,000 then the Change proposal is categorised as a Material Change for all consultees (even those for

whom the impact of the proposed Change will not trigger the £5,000 limit). As such all affected parties would be eligible to be consulted as part of a single Material Change Proposal.

4.18 This in turn raises the possibility that an affected consultee who cannot demonstrate that it will experience £5,000 impact would nonetheless have all the rights which the Material Change procedure grants to a materially-affected consultee, including the right to compensation. We do not consider that this would be appropriate. For that reason, we now propose that an affected consultee who does not meet the Financial Impact Test would still take part in a single Material Change Proposal process but would not be granted the right to object or to receive compensation. This proposal, while allowing the affected consultee to take full part in the Material Change Proposal process, stipulates a minimum level of costs that must be reached before compensation becomes payable. We propose the level should be the same as the Financial Impact Test (£5,000). Under this arrangement, a consultee that meets the Financial Impact Test threshold to become a Material Change Consultee will automatically also be eligible for compensation. A consultee that did not meet the original Financial Impact Test threshold, will also not meet the minimum compensation threshold, but will at least take part in the single consultation process.

4.19 We appreciate that this approach could lead to a slight increase in costs as a greater number of affected parties might be eligible to be consulted. However, we consider that the benefits of a simple approach will outweigh the bureaucracy associated with a Proposer having to consult under one process with some parties at a station who have reached the Financial Impact Test threshold, but under a different process with others who have not triggered the threshold.

4.20 We propose that each of the £5,000 impact thresholds should be kept under review to ensure that they are set at an appropriate level.

Consultation questions

4.21 Is £5,000 an appropriate level for assessing financial impact to determine the type of Change Proposal, subject to it being kept under review?

4.22 Do you have any views on the alternative proposals dealing with the circumstance when a single change proposal has a material impact on one station party, but not on another?

4.23 Do you agree that we should introduce a separate minimum compensation threshold (set at the same level as the Financial Impact Test of £5,000) to determine the point at which consultees are eligible to receive compensation for a Material Change Proposal? Under this arrangement, a consultee must incur costs of £5,000 or more in its own right before compensation becomes payable. Once the threshold has been met, all compensation becomes payable for the affected consultee. Parties whose costs do not meet the £5,000 threshold will receive no compensation. We consider that this would make financial compensation arrangements consistent with other parts of the Station Change regime.

4.24 We would be interested in your views on how to deal with the situation where a series of Change proposals are made at separate stations, which individually do not meet the Financial Impact Test threshold but when taken together do or could have a material impact on a consultee.

5. Objecting to a Station Change proposal

Proposed list of valid objections to a Station Change Proposal

5.1 In our earlier consultation we proposed a list of possible objections which might be made to a Station Change Proposal. A Change consultee's objection had to be included in the list to be valid. A number of respondents commented that the proposed list of objections was insufficient. There was significant support among operators for ATOC's proposal that the grounds of objection developed for the proposed Stations Code, together with an emphasis on essential operational protections, should be retained. ATOC stressed its view that the function of the station as a rail facility must retain priority, with an objection allowed if any proposed scheme has a material adverse effect on a consultee's operational ability.

5.2 ATOC did not argue that all of the proposed Stations Code objections should be incorporated into the proposed SACs, but identified specific ones: 19.1.3(c) (material adverse effect) and 19.1.3(f) (material disruption of other specified works). It also suggested that an objection should be valid if there is no overall net benefit of a scheme to the rail industry – this is not an objection set out in the proposed Stations Code, although 19.1.6(c) allows train operators to advance such a complaint in 'evidence' of other objections (but not as a ground for objecting in the first place).

5.3 ATOC expressed a concern in relation to the separation of financial compensation from other grounds of objection, but accepted that this concern would be allayed if all costs are met in a timely fashion (which we consider our proposed amendments and clarifications to the original proposition would achieve - in particular, providing that it is a consultee and not a developer that should have the final choice of whether it is compensated by means of a fixed cost payment or on an emerging cost basis – see paragraphs 8.16 to 8.20 below).

5.4 Please note that the issue of Alternative Accommodation is addressed separately in chapter 8 below.

Emerging conclusions

5.5 We consider defining a list of valid objections would be a sensible approach – it provides certainty at the outset for all parties and assists consistency. We welcome the suggestion that some of the objections listed in the proposed Stations Code should be adopted and Condition C4.7 of the proposed SACs sets out such a list (we agree with ATOC that those objections cannot be adopted without some amendment). We also propose that the list of valid objections be identical for all proposals, irrespective of whether the proposal comes from an industry party or a third party developer.

5.6 As suggested by ATOC, we propose to use the list of objections set out at Condition 19.1.3 of the proposed Stations Code as a starting point, adding these to the list of objections already contained in the proposed SACs at condition C4.7. However, we remain committed to the objective of separating financial compensation issues into a Co-operation Agreement (see Chapter 8 below). We have, therefore, carefully considered which objections are appropriate to ensure that we do not inadvertently retain a valid objection

within this list that is relevant to financial considerations and so would cut across our objective of keeping negotiations and agreements about compensation entirely separate.

5.7 We propose adding the following valid objections to those already contained in C4.7 (suitably amended in due course to take account of any drafting overlap or discrepancies):

(a) that implementation of the proposal will result, or is more likely to result, in a material adverse effect, whether permanent or temporary on

(i) the operation of the Station or the Network;

(ii) the use of the Station by any Relevant Operator's passengers; or

(iii) any station party or Material Consultee's ability to perform any obligations or exercise any discretions which it has in relation to railway services; and

(b) that, in a manner specified by the Material Consultee, the implementation of the proposal will, or will be more likely than not to, materially disrupt, interfere with, or otherwise be incompatible with the implementation of other specified works on or at the Station.

Consultation question

5.8 Do you have any comments on the proposed revised list of valid objections?[1]

[1] Please note that the revised list of proposed valid objections will be reviewed on the basis of consultation responses and will be updated accordingly for our final conclusions document.

6. Direct involvement of third party developers

6.1 Our proposed revised SACs included provisions for the direct involvement of third party developers, which would see them enjoy contractual rights and obligations, including the right to propose Changes in their own name.

6.2 We received a range of views on this proposal. There was general support for the principle of encouraging and facilitating third party investment in the railway. However, there was a range of concerns about the rights that third party developers would enjoy under the proposed regime. In particular there was concern that a third party will not have industry knowledge or will not have the interest of the railway industry at heart. As a result its proposals may not be satisfactory and are likely to be rejected and/or need a lot of additional input from rail industry consultees, with consequent cost implications. Respondents suggested that this could be avoided if a railway industry sponsor took the proposal forward. As an alternative, some respondents said that they would be happy for third parties to promote and sponsor Station Changes, but only having first agreed the scope of the scheme with the SFO.

6.3 Neither of these suggestions would address our concern that the current regime can prevent third-party development through giving the SFO or other consultees the power to withhold their consent for any reason and effectively delay a Station Change or prevent its progression altogether. We think it would be sensible for there to be prior engagement between a third party developer and the SFO/other Users before finalising any proposal, but not to the extent that the SFO/other Users can prevent a proposal being brought at the time and in the terms the developer wishes. In any event it seems probable to us that a practical third party developer will seek at least SFO input to a Change proposal at the development stages, in order to cut down on the possibility of successful objections. We have considered whether a developer should be obliged to conduct such a prior process and to reach agreement as to the terms of the proposal before it may be brought. Our view is that without the SFO being given control over a third party's proposal, such a provision would seem to be unrealistic and unworkable given that the parties cannot be forced to reach an agreement.

6.4 There was also concern that as a developer would not be a party to an Access Agreement, there could be no guarantee that it would act as it had initially agreed, and there would be no means of enforcing that agreement. Linked was the point that as a developer would not be an industry party, it would be unable to avail itself of the dispute resolution procedures (a fundamental premise of the proposal).

6.5 The Access Disputes Committee (ADC) provided a helpful response to our earlier consultation and pointed out that by entering into a Co-operation Agreement, a third party developer (whether classed as a Specific or Strategic Contributor) would become liable to contribute to the ADC's funding under J45 of the Access Dispute Resolution Rules. As there is currently no end date anticipated for a Strategic Contributor's

interest in a scheme, ADC would expect to raise an annual levy on them until informed that their interest had ended.

Emerging conclusions

6.6 Despite the concerns that have been raised, we consider that facilitating third party investment in the railway is the appropriate thing to do; it has been one of the objectives of our review of the stations contractual regime and remains so. If third parties are going to invest money, they will require certainty regarding their rights and obligations and the stations contractual regime is an obvious place to achieve that. The generally negative response to this aspect of our earlier consultation ignores the clear statement in ORR's March 2010 letter[2] that the right of third party developers to propose changes in their own name is "an important feature and one that should be adopted in any reform of the access conditions".

6.7 We consider that there are several points relevant to the proposed direct involvement of third party developers:

(a) whether third parties are going to have rights to make their own proposals;

(b) establishing what those rights and the level of involvement should be;

(c) the need to be sure that any legal rights and duties in relation to third parties are robust;

(d) the level of financial investment required from third parties in order to be given rights to propose Changes in their own name (see chapter 7 below); and

(e) the duration for which third parties should retain their interests as a future Change consultee after the development project is complete (see chapter 7 below).

6.8 In response to the concern raised by several respondents that the proposed drafting did not properly provide for third party developers to be bound by the commitments and obligations expected of a proposing party as set out in Part C of the SACs, we will insert a provision that a third party developer must complete an undertaking (by way of a deed) when it puts forward its proposal. In doing so, the developer will commit to being bound by the obligations in Part C of the SACs for as long it retains an interest or until the development is implemented.

6.9 The proposed Stations Code drafting already contains template Station Funder Participation Deeds for England & Wales, and for Scotland which, when entered into, would require the third party to comply with and be liable under the contractual Station Change provisions. It also contractualises the means of resolving disputes. For ease of reference, the proposed Stations Code template Station Funder Participation Deeds are annexed to this document (Annex C).

6.10 We propose developing a "participation deed" in terms similar to the ones in the proposed Stations Code, which third party developers are obliged to sign if proposing and sponsoring a Station Change in their own right. In doing so they accept obligations and liabilities to other station Users (at the same time as they acquire commensurate "rights" via the SACs), and those Users have a deed which they can enforce against the third party.

6.11 None of the above is intended to prevent a third-party developer working closely with the SFO in developing a Change Proposal and/or asking the SFO to sponsor the Change on his behalf. We will look to make this clearer on the face of the SACs.

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[2] http://www.rail-reg.gov.uk/upload/pdf/stations_code_conclusions_120310.pdf

Consultation question

6.12 Do you have any suggestions on the terms of the “participation deed” that third party developers should be required to sign?

7. Distinction between different types of third party investor at stations

7.1 Our earlier consultation set out a proposed distinction between different types of third party investors – "Specific Contributors" and "Strategic Contributors". In broad terms, the former was likely to be a private company wishing to make a one-off investment at a station, while the latter was expected to be a public body (e.g. a local authority) with a longer-term interest in local transport matters.

7.2 The proposed SACs sought to distinguish between the different types of Contributor both in terms of the level of their financial investment and in the duration for which they retained an "interest" at the station(s).

Level of contribution

7.3 The proposed SACs provide that third parties might make their own Station Change Proposals as either a Strategic or a Specific Contributor. The latter role requires a smaller financial contribution (£50,000), at a single station, and gives the proposer a time-limited interest as a consultee in the affected station. The former role requires a larger contribution (£250,000), but can be spread over a number of stations, and gives an everlasting interest in the affected station(s).

7.4 Several respondents were concerned that the contribution thresholds were not sufficiently high given the costs of works on the railway, with the result that such third party developments would not be restricted to big projects only. In particular, it was suggested that the £50,000 investment required of Specific Contributors is too low, and equates to expected spend by a retail tenant at a station, as opposed to a substantial investment justifying future consultation rights and involvement. Alternative minimum figures of £150,000 or £200,000 for qualification as a Specific Contributor were proposed, while in relation to Strategic Contributors we received representations that the qualifying threshold should be set higher than £250,000 (although no respondent proposed an alternative minimum).

7.5 On the other hand, the public authorities and bodies who responded identified that public authorities might find it difficult to reach the £250,000 investment threshold required of a Strategic Contributor, but felt they would nevertheless have equivalent interests and wanted such bodies to have an involvement in the change process. A question was raised as to whether a public authority would qualify for Strategic Contributor status if it engaged in a joint project, jointly funding it with a private developer.

7.6 It was also queried whether the £250,000 required to qualify as a Strategic Contributor had to be spent at one station, or could be spread over a portfolio of stations.

Duration of interest

7.7 Some respondents commented that the length of the period during which a Contributor held an interest in the station should be limited, and disagreed with the proposal that a Strategic Contributor should have an unlimited interest in the station(s) which was the subject of its proposal, with subsequent consultation rights in relation to any future changes proposed at the station. A period of interest of five years was cited as an appropriate limit which would bring it into line with that proposed in the Stations Code (although under the proposed Stations Code longer periods could be agreed between parties). Respondents also sought assurance that an investor would only be entitled to be consulted on changes affecting its investment, rather than in relation to all changes affecting the station.

7.8 Part of the purpose of identifying a category of strategic public body investor was to ensure that this particular type of interested public contributor did not have to keep re-investing year after year; a significantly higher financial threshold was imposed to guard against this right being abused. The proposed drafting meant that a private developer would never acquire unlimited interest even if its investment reached the £250,000 threshold. And it follows that there was no intention that a public developer would get any rights if it invested under £250,000 even if it still amounted to over £50,000, and even if it had a statutory interest in public transport provision. One respondent considered that such a differentiation might amount to discrimination between like-for-like investors.

Emerging conclusions

7.9 We can see value in the proposition to distinguish between different types of Contributor and can also see that a financial threshold is a sensible and objective way of making that distinction. Further, we also understand the logic that the duration for which a Contributor has an interest in a station or stations could be linked to the level of their financial investment.

7.10 However, we have carefully considered this issue again, taking into account the views expressed by respondents. We consider that any investment in the railway is to be welcomed and are concerned that the current proposal would limit the involvement of third party developers to large-scale projects only.

7.11 We have reached the view that the proposed distinction between Specific and Strategic Contributors and their associated duration of interest following investment at a station is not a straightforward proposition. We consider that it runs the risk of adding, rather than reducing, complexity into the Station Change process.

7.12 For example, a Specific Contributor cannot get rights in relation to more than one station – the drafting refers to investment at a “single station”- even if it proposes to spend at least £50,000 at each of the stations. Instead, two separate Change proposals, with the associated consultation at each, would need to be progressed in order to have “rights” at both stations. On the other hand, a Strategic Contributor which invests £250,000 across a number of stations would obtain (non-time limited) rights at each of those stations, even if the investment at each (or even at one) did not reach £50,000.

7.13 Under the proposed drafting we are treating private and public developers significantly differently – a private investor cannot get rights at more than one station as part of a single Change proposal and its interest at the station is limited to five years, even if it invests £250,000 or more. Conversely, a public developer cannot bring forward a proposal for less than £250,000, but this could consist of investment at several stations of less than £50,000 at each.

7.14 Although by no means exhaustive, this illustrates the potential difficulty in the proposed distinction between private (Specific) and public (Strategic) developers and the duration of their interest. We are

concerned that this potential lack of clarity could lead to protracted negotiations and to additional disputes, and could act as a barrier to investment at stations.

7.15 We wish to propose some changes to simplify the process:

(a) remove any distinction between private and public Contributor. Instead any developer must invest at least £50,000 at a station in order to enjoy rights at that station;

(b) in order to include two or more stations in one Station Change proposal, then at least £50,000 must be invested at each station (for clarification, if the proposal aims to invest less than £50,000 at an individual station, then that element of the proposal may not be brought in the third party developer's own name, and the current arrangements would continue to apply i.e. the proposal will need to be brought by a sponsoring industry party);

(c) remove the concept of "unlimited rights" at a station; and

(d) any Contributor (private or public) that invests £50,000 or more at a single station will enjoy "rights" at that station for 5 years.

7.16 While we acknowledge that this proposed change may appear less advantageous to public body developers than was first proposed, we believe that it is still an improvement on the current SACs, it is in line with what was anticipated in the proposed Stations Code and it simplifies the process. It also removes the concern that was raised by some respondents about how joint ventures between public and private developers would be treated.

7.17 Having set out emerging conclusions, we are keen to invite your input into considering the appropriateness of the financial thresholds and to the time limits attached to Contributors' interests.

Consultation questions

7.18 Should there be a distinction between public and private investors at all or should they be treated in the same way? Please explain the reasons for your view.

7.19 If public and private investors are to be treated in the same way:

(a) should we have one qualifying financial threshold and duration of interest and at what level should those be set?; or

(b) should we retain two financial thresholds and two different duration of interest time limits (to distinguish between the scale of different levels of investment) both of which can apply to a private or public investor?

7.20 If we retain the concept of Strategic Contributor with spending at a strategic spread of stations, should that entitle it to an interest just at those stations it has invested in or to all stations on that particular network?

7.21 Are there other ways that a third party's "interest" in a station could be determined e.g. the length of interest to be determined by the life of the asset(s) that its investment has funded?

8. Co-operation Agreement

8.1 The revised SACs proposed the establishment of a Co-operation Agreement to be entered into by parties involved in a Station Change. There are two template agreements; one for use where the proposer of the Change is an industry party, and one for use where the proposer is a third party developer.

8.2 As the name suggests, the primary purpose of the agreement is to set out in clear terms how the parties to a Station Change proposal will co-operate with each other, in particular in relation to agreeing compensation sums and accommodation issues. Among other things, it sets out the ways in which compensation payments will be dealt with in order that compensation disputes need not delay implementation of an otherwise accepted proposal (assuming that the proposer wishes to proceed to implementation while such a dispute is pending).

8.3 We will deal with main issues raised in the following paragraphs.

Separation of financial compensation issues

8.4 One of the significant differences that the Co-operation Agreement introduces is the separation of financial compensation issues from the list of valid objections to a Station Change proposal. Essentially this means that where the parties cannot agree the terms of financial compensation, the matter is taken to dispute resolution, but in the meantime while the dispute is determined, works on the scheme can commence (if the proposer so wishes). This proposition also received a mixed response.

8.5 One developer respondent considered that the proposed separation of compensation from other objections had merit but did not think it would necessarily prove helpful - it considered that the flexibility a developer has of making financial settlement with affected operators is the most effective way to address complaints and objections i.e. pay the operator more. It did not want to lose the ability to resolve objections by offering financial payments, and it was concerned that treating compensation separately will lead to such a loss. We do not consider that any changes are needed to the proposed text to accommodate this, and that a proposer is not precluded from paying additional compensation if it wishes to do so as part of an agreement to resolve objections. However, we remain committed to put in place a system whereby the proposer is not obliged to do so, but can instead rely on a dispute process if required.

8.6 A small number of respondents questioned whether private developers would wish to start implementation before financial compensation is fully resolved. Likewise, public authority developers (with only fixed or capped grants to invest) may not be able to start implementation until they know with more certainty how much compensation they will likely need to pay. We recognise that not all developers will wish to start implementation while the question of financial compensation is unresolved. However, the current draft of the proposed revised SACs does not oblige any developer to start implementation if it does not want to, and accordingly we do not propose to amend the current draft.

8.7 One respondent expressed a concern that requiring separate Co-operation Agreements would require more time and effort, with additional workload for both developers and consultees. We acknowledge that the Co-operation Agreement introduces an additional process. However, it is based on a template and the separation is intended to speed up the overall process by allowing Station Changes to proceed in the face of unresolved compensation issues. We consider that it addresses a fundamental blockage in the current process, which the industry has told us is an issue.

Emerging conclusions

8.8 The industry has told us that financial compensation issues are the likeliest cause of Station Change Proposals becoming delayed as protracted negotiations between the parties take place. Some respondents described this as the Change proposer being held to "ransom". Ultimately this can lead to schemes not progressing for financial reasons unrelated to the merits of the proposals. While it is understandable that parties seek to protect their interests, we do not believe that it is in the best interests of the railway industry for Station Changes that in every other way are acceptable to the parties, to be delayed and/or halted on the grounds of financial compensation alone.

8.9 If a proposed Station Change is considered by the parties to be 'technically' acceptable and to be the right thing to do for the station, we consider it must be allowed to proceed even in the face of unresolved financial compensation issues between some or all of the parties. We suggest that unless the parties reach agreement otherwise, Station Change works should be able to commence while financial compensation issues are resolved via the disputes process as provided for in the Co-operation Agreement.

Consultation question

8.10 We asked in our earlier consultation whether respondents agreed that:

(a) unless the parties agree otherwise, unresolved financial compensation issues should be dealt with via the dispute resolution process?; and

(b) an otherwise agreed Station Change should be allowed to proceed while the financial compensation issues are resolved?

We have set out above why we consider this approach is to be preferred, but if you do not agree,

(i) please explain your reasons why; and

(ii) please provide your suggestions for dealing with this situation.

Costs issues in the Co-operation Agreement

8.11 A number of concerns were raised regarding the costs issues associated with the Co-operation Agreement.

Drafting issues

8.12 Some respondents were concerned that the definition of "Material Change Consultee's Costs" (MCC Costs) is too narrow, is poorly drafted and is confusing. As currently drafted, the payment of compensation could be read as being dependent on the scheme being implemented. On review, we accept that the current drafting is open to interpretation.

8.13 It was not our intention to link the payment of compensation to scheme implementation. Our proposal is that all costs and losses incurred as a result of a Material Station Change Proposal should be capable of being claimed. This should be the case even if a proposed scheme does not obtain the approval of other

operators and so does not progress beyond the consultation/evaluation stage. We will review and amend the current drafting to ensure it reflects our intended objective.

8.14 In addition a number of other helpful drafting points were made by respondents, which we will take into account in our final conclusions and in our re-drafting of the revised SACs. We do not propose to set these out in this document.

8.15 However, we do consider that one point in particular requires clarification of our intention. One respondent considered that there is an implication in (B) of the definition of “MCC Costs” and “Consultee Costs” that the affected operator should or may be required to raise fares to set against the costs of the scheme, and argued that this is not acceptable. This wording, however, substantially mirrors the proposed wording in the proposed Stations Code, and the wording in Part F of the Network Code (condition F3.3, Vehicle Change). We consider that such a compensation arrangement, already used elsewhere by the industry, is equally appropriate in relation to Station Change as well.

Payments and interest

8.16 The proposed drafting on which we consulted provides that the default method for paying compensation to affected consultees is by payment of their costs once those are agreed or determined after the proposed change had been delivered. However, a consultee has the right to request payments by instalment on a without prejudice basis and, if the proposer does not agree the amount of such instalments, the matter can be taken to dispute (it is the amount of any instalment which can be disputed, not the principle that an instalment should be paid).

8.17 The alternative method in the proposed revised SACs for paying compensation is for the consultee to *offer* to accept payment of a fixed sum in full and final settlement of all its costs (i.e. agree a sum upfront). However the developer is not obliged to take up such an offer to make payment by way of a fixed sum and, if it does, is entitled to elect to pay in instalments, even if the consultee asked for upfront payment by way of a single sum.

8.18 A number of respondents considered it inappropriate that they should have to put forward reasons why they would prefer payment of costs on an emerging basis, or for this to ultimately be a decision for the proposer. This seems to us to be a valid concern, although as drafted the Co-operation Agreement already provides for this to be the default method if the consultee so requests.

8.19 Some respondents considered that the decision regarding payment of emerging costs should not fall solely to the proposer but should be something that the Change Consultees can request and negotiate with the proposer. We agree with this view, and propose to make the drafting clearer that payment of costs actually incurred (as agreed or determined) is the default method, and that a proposer cannot refuse to pay these by instalment so that the consultee is not obliged to wait until the project is complete.

8.20 The alternative method of compensation, through the agreement of a fixed cost payment, remains: this will either be paid as a lump-sum at the outset or via part-payments on an agreed timetable. As currently proposed, the decision to make compensation by way of fixed-sum payment(s) needs to be agreed by both proposer and consultee. It is not something either party can insist on instead of the default emerging costs mechanism. We do not intend to alter that. Likewise, we do not consider that a consultee should be able to insist that such fixed sum be paid in a lump-sum at the outset. Again, the agreement to pay compensation by way of a lump sum should deal with how it is to be paid. One respondent suggested that if a consultee is going to seek a fixed-sum payment it should do so within a defined time period, rather than at any time during the project. We shall consider this further when making our final conclusions.

8.21 One respondent highlighted that, as currently drafted, the Co-operation Agreement envisages operators only receiving reimbursement of costs until the end of their franchises. While this approach is workable with franchised operators, it does not take account of those operators that are non-franchised or those whose interests are not limited to a franchise period e.g. Transport for London. We agree that this is a valid point and invite your views on an appropriate period of reimbursement e.g. a control period.

Cost saving suggestions

8.22 Our original proposal provided that a developer was entitled to put forward cost saving suggestions to affected consultees, in a bid to reduce the costs of implementation. Most respondents accepted this principle, but did not accept that a consultee should thereafter be obliged to implement those suggestions.

8.23 In fact, the proposed Co-operation Agreement allows a developer to make a "Savings Suggestion", but does not expressly oblige a consultee to follow it. However, if the consultee does not do so, the developer can refer the matter to dispute. This is stronger than an obligation to mitigate in a normal contractual scenario, since it enables the developer to be more proactive and to challenge the consultee's mitigation of losses if it does not adopt a specific course of action proposed by the developer.

8.24 Also, the consultee must provide any information the proposer requests in order to make its Savings Suggestion. One respondent was concerned this could include confidential information. Taking this concern into account, and considering the obligation already in place for the consultee to act reasonably to reduce the extent of its costs, we are inclined to delete the obligation for the consultee to provide information to the proposer in relation to a Savings Suggestion request from a developer. But we are not inclined to remove the right of a developer to make such a Savings Suggestion and to take it to dispute if necessary. However, we would welcome your further comments on this point.

Schemes halted before completion

8.25 Where a scheme is halted before completion the proposed Co-operation Agreement provides for a Change Consultee to re-pay to the proposer the relevant proportion of any fixed-sum compensation that has already been paid (where compensation is being paid on an emerging costs basis, no re-payment would arise). The current drafting requires the consultee to pay interest on the amount of money owed.

8.26 This proposition received a mixed response. Some respondents believe that no interest should be payable and that the proposer should absorb this risk as part of agreeing to pay costs by way of a fixed-sum. Others believe that the knowledge that interest is accruing on the amount owed will encourage consultees to repay the relevant part of the fixed sum quickly.

Shared value payments

8.27 One respondent commented that shared value payments demanded by Network Rail should not be permitted. In fact, ORR has previously concluded on this issue (chapter 9.2 of our document "Investment framework consolidated policy and guidelines", published October 2010). We do not intend to review the principle again in the context of this consultation.

Sharing the costs of implementation

8.28 One respondent asked that it should remain possible for a developer to propose that costs of implementing the proposed change should be shared between the developer and one or more of the affected consultees. The current SACs (C8.3) provide that a proposal's costs will be apportioned according to the terms of the proposal (save that Network Rail cannot propose any such apportionment in respect of a "Railtrack Change Proposal"). The proposed Stations Code (clause 18.4.1(d)) allowed for a proposal to state how costs might be apportioned amongst stakeholders. It was not our intention in proposing the new revised SACs to remove the ability of a developer to propose such an apportionment, but we do not

consider that a consultee should be obliged to accept. Accordingly, we propose that it should be a valid ground of objection for a consultee if the proposal requires the consultee to bear (part of) the cost of a development, and we will consider to what extent the proposed Stations Code's wording in paragraph 19.1.3(e)(i) would be appropriate ("that the additional revenue which the Material Consultee expects to gain as a result of implementation of the proposal will be, or is more likely than not to be, less than it will cost the Material Consultee to pay for, or contribute to, such implementation").

Capping costs

8.29 One respondent commented that the uncapped nature of a developer's liability in the proposed revised SACs might deter developers from bringing forward proposals. On the other hand, a station is integral to the business of the station operator and other Users, and yet it/they could face uncompensated costs if a large development fails to be completed by a developer. We are keen to hear your further views on this point.

Netting off benefits

8.30 One of the respondents representing third party developers suggested that the amount of compensation payable to affected operators should have regard to the long term gain to the rail industry yielded by the proposed scheme. We understand this to be a suggestion that the incumbent operators who experience the direct costs and losses at the time of the implementation should not receive full compensation if they will reap the benefit of operating at a 'better' station. Those developers that responded and one of the train operators raised the same point. As drafted in the proposed revised SACs/Co-operation Agreement, we consider that the definition of "MCC Costs" already takes into account the netting off of benefits, although we will review the drafting to make the point clearer. We will also consider whether guidance on the calculation of netting off benefits (as proposed by Network Rail in its letter of 26 November 2010) ought to be produced.

8.31 However, it is also possible to net off the likely ability to recoup money from passengers, which one respondent has objected to. The netting off of the likely ability to recoup financially from passengers was to be permitted under the proposed Stations Code. It is likewise to be found in the existing "Vehicle Change" provisions of the Network Code (F3.3). Given that this concept already exists in industry rules we would question why such an approach is undesirable when applied to stations. However, we seek your further views on this point.

Emerging conclusions

8.32 We are in favour of the proposed Co-operation Agreement and strongly support its introduction. We believe that it serves a number of useful purposes. Most notably it allows the parties to a Station Change to set out in unambiguous terms the arrangements for dealing with any compensation. It also separates financial issues from the rest of the Station Change process and prevents a Change being held up while financial issues alone are resolved – we believe that this is a positive step forward for streamlining and speeding up the Station Change process.

8.33 On the particular points raised by respondents and highlighted in paragraphs 8.12 to 8.31 above we propose the following:

(a) that the definition of "MCC Costs" in the Co-operation Agreement should be amended to make it clear that compensation payments are not dependent on the implementation of a Station Change. We also consider that the definition should be extended to include the loss of revenue, although we invite your comments on this;

(b) to change the Co-operation Agreement to make it clear that payment of compensation on an emerging costs basis may be requested by the affected party as of right; if a consultee wants to receive payment of its costs on an emerging basis (as opposed to a fixed payment agreed up-front) then it should be able to insist on the same. There would remain scope to dispute the amount or frequency of such payments, but not for the proposer to dispute the right of the consultee to elect to receive payments on an emerging costs basis; and

(c) that the payback of any overpaid compensation be free of any interest as long as it is repaid within a set period of time from the date of the request (we suggest 28 days). If the repayment is not made within that period then interest becomes payable, back-dated to the date of the request.

Consultation questions

8.34 Should loss of revenue (in addition to loss of profit) be capable of being included as part of any compensation claim?

8.35 Do you have any comments on the proposal that no party can insist on compensation being payable by way of fixed-sum payment(s)? Rather this should be an issue for the parties to negotiate and agree, but ultimately it is for the proposer to decide if it wants to pay a fixed-sum compensation amount (whether by a single upfront payment or by instalments).

8.36 If a consultee wishes to request payment by way of fixed-sum payment(s), do you agree:

(a) that the request should be made within a defined period, and not at any time during the project? and

(b) if you do agree, what should the time limit be?

8.37 As currently drafted, the Co-operation Agreement envisages reimbursement of costs to the end of an operator's franchise. As highlighted in paragraph 8.21 above this may not be appropriate for all consultees. What period of reimbursement do you consider would be appropriate?

8.38 Do you agree that we should retain the provision for a developer to propose "Savings Suggestions" that can be taken to dispute if the parties cannot reach agreement on their terms? Do you agree with our preference to remove the proposer's entitlement to seek *any* information it requires?

8.39 We are keen to hear your views, and the reasons for your views, on:

(a) whether a developer's liability should be uncapped;

(b) whether the introduction of a liability cap would be appropriate; and

(c) the level at which any liability cap should be set.

8.40 Should operators be able to recoup money from passengers e.g. by way of increased fares that are justified on the basis of an improvement resulting from a Station Change, in the same way that Vehicle Change is drafted?

8.41 In assessing the amount of compensation payable, is there any reason why it is not acceptable to net off the likely ability of an operator to recoup money from its passengers or other sources of revenue?

8.42 We propose that the payback of overpaid compensation should be free of interest as long as it is paid back within a defined period of time, otherwise interest becomes payable, backdated to the date of the payment request:

(a) Do you agree with this approach?

(b) Is 28 days an appropriate period for payback?

(c) If you do not agree either with the approach or with the payback period, please provide your alternative suggestions.

Provision of alternative accommodation in the proposed Co-operation Agreement

8.43 Our earlier consultation set out the proposed arrangements for the provision of alternative accommodation connected to a Station Change. Those arrangements would be contained in the proposed new Co-operation Agreement.

8.44 The majority of respondents were concerned that the provision of alternative accommodation was proposed to be limited to Core Facilities only, as defined in paragraph 8 of Annex 1 to the current SACs and unchanged in the proposed new SACs. Core Facilities are defined as:

(a) those spaces for the parking of motor vehicles by employees of a User which are necessary in order to facilitate the safe and/or efficient operation of trains to and from the Station by the relevant User;

(b) those offices and storage spaces which are necessary for use by a User in order to facilitate the safe and/or efficient operation of trains to and from the Station by the relevant User;

(c) those ticket sales and passenger information facilities which are necessary to obtain tickets for and information about the train services provided to or from the Station by a User; and

(d) the mess rooms, cloakrooms and staff toilets used by employees of a User.

8.45 One respondent suggested that any facilities that do not form part of the Core Facilities at a station will be covered by the lease and so will be eligible for compensation through another means. While that may be the case, this would only assist the Station Facility Owner (SFO) who will have a lease with Network Rail. It would not provide the same protections to other beneficiaries.

8.46 Another respondent also suggested that an operator should have the right of valid objection if it considers that the alternative accommodation proposed by a developer is inadequate or unsuitable.

8.47 The current SACs provide that in the case of a “Railtrack Change Proposal”, Network Rail must provide details of proposed alternative Station Facilities for the SFO and proposed alternative accommodation and facilities for other operators (C3.3). “Station Facilities” are set out in paragraph 10 of Annex 1 to the SACs.

8.48 The proposed modified SACs would provide that any proposal must give details of alternative Core Facilities. In reality, referring to “Core” rather than “Station” facilities would mean that fewer alternative facilities need to be provided but Network Rail nonetheless considers that this proposed obligation is more onerous than the current arrangements because under the revised SACs the proposer must provide alternative Core Facilities, while under the current SACs it must merely propose alternative Station Facilities.

8.49 The proposed Stations Code does not use either definition. Instead it provides that "any amenities or facilities" need to be the subject of alternative provision (Condition 19.3.2(d)), which would seem wider than the existing SACs.

Emerging conclusions

8.50 We have carefully considered respondents' responses. It has not been suggested that the arrangements in force in the current SACs are creating a particular problem. We do not consider the proposed revision of the SACs should be used as an opportunity to reduce the amount and/or type of alternative accommodation to be provided.

8.51 We do not consider that the provision of Alternative Accommodation should be included in the list of valid objections. Rather it should be dealt with as part of the Co-operation Agreement, to be resolved by the parties or, where agreement is not reached, referred to dispute resolution.

8.52 We propose that the provision of alternative accommodation should be extended beyond the Core Facilities that are set out in paragraph 8 of Annex 1 to the proposed revised SACs, and we will seek your views on what facilities should be included.

Consultation question

8.53 Paragraph 8 of Annex 1 to the revised SACs sets out a list of Core Facilities at stations. We propose that the provision of alternative accommodation in the revised SACs should extend beyond those "Core Facilities" and seek your views on what those additional facilities should include (e.g. the "Station Facilities" as set out in paragraph 10 of Annex 1 to the current SACs, or something wider).

9. Re-instatement of the original position

Re-instatement of the original position

9.1 In our earlier consultation we asked a specific question about whether, in the event of a Station Change being left incomplete, there should be provisions for reinstating the station to its original state. Again there was a mixed response on this point. Some respondents felt that the original position should be reinstated. Others suggested that each scheme must be looked at on a case-by-case basis as it would not always make sense to undo partially completed works, which although incomplete, are still an improvement on the original position, or where a small amount of further investment would see the scheme completed.

9.2 Currently the proposed Co-operation Agreement only deals with this issue to the extent of stipulating that, if a Change is not fully implemented, a station party should pay back the relevant part of any costs it had already received in advance. There is no provision setting out who should step in to either reinstate the original position or to complete the proposed works if the actual developer fails to complete.

9.3 The current SACs (C8) provide that Network Rail must retain responsibility for a Railtrack Change Proposal once it has started to implement it. As such, non-completion of a Station Change is not a possibility. In all other Proposals for Change under the current SACs, the SFO is obliged to carry out the proposal. Again, there is no scope for a proposal not to be completed, unless the SFO itself is prepared to default. This process can work because in reality third parties require a rail industry sponsor in order to have their proposal put forward, and therefore (we assume) the financial considerations of third parties failing to complete the project will have been worked through by the sponsor at the outset.

9.4 The proposed Stations Code does not include the concept of the sponsor or Network Rail finishing off the implementation, because that would be inappropriate where a third party has proposed a scheme in its own name. Instead, the proposed Stations Code would have required the proposer to put forward an appropriate Relevant Undertaking to compensate station parties for costs/losses which they might suffer if the development is not implemented in accordance with the terms of the proposal. Further, the parties would have had a right of objection to the proposal if they do not consider the Relevant Undertaking is sufficient (19.1.3(d)).

Emerging conclusions

9.5 We believe that reinstatement to the original position when a scheme is left incomplete must be considered on a case by case basis. We have reached this view for reasons similar to those given by respondents to our earlier consultation – in some instances re-instatement of the original position will be the optimum outcome, while in others it will be better to complete a scheme either to the terms of the original Change Proposal or to an alternative scope.

9.6 To protect the interests of other Users in the event that a scheme is left incomplete, we propose the introduction of a Relevant Undertaking (similar to that in the proposed Stations Code), in which the proposer must undertake to compensate station parties for costs/losses that they might incur if the

development is not implemented in accordance with the terms of the original Station Change proposal. We also propose that affected parties should be able to object to the terms of the Relevant Undertaking as part of the possible valid objection to a change proposal.

9.7 In addition, we believe that whatever the proposed solution for dealing with an incomplete scheme, it should be subject to a new Station Change proposal. In this way the optimum solution can be negotiated among the parties through the Station Change process.

Consultation questions

9.8 Do you agree that re-instatement of the original position should be considered on a case by case basis?

9.9 Do you agree:

(a) with the introduction of a Relevant Undertaking in which a proposer must undertake to compensate station parties for costs/losses that they might incur if the development is not implemented in accordance with the terms of the original Station Change proposal; and

(b) that affected parties should be able to object to the terms of the relevant undertaking?

9.10 Do you agree that an incomplete scheme should be subject to a new Station Change proposal so that the optimum outcome can be negotiated between the parties?

10. Wayleaves

Deletion of Condition G6 of the SACs (Condition 47 in ISACs) – wayleaves

10.1 Condition G6 of the current SACs (Condition 47 of the ISACs) deals with the granting of wayleaves and easements. Our earlier consultation suggested the deletion of Conditions G6 and 47 because it was proposed that these matters would fall to be dealt with as part of the "Notifiable Change" procedure and their deletion would therefore avoid possible duplication and potential confusion over the grant of wayleaves and easements.

10.2 Condition G6 in the current SACs provides that Network Rail can grant easements and wayleaves except if such easements or wayleaves impose Relevant Restrictions (essentially impairment of a User's quiet use and enjoyment of the station). Otherwise Network Rail must consult and have due regard for operators' interests. There is no entitlement to compensation.

10.3 However, some respondents raised concerns that the deletion of Condition G6 removes protections that are not then replicated in the proposed "Notifiable Change" process. Concern was also expressed that the grant of a wayleave or easement could result in additional costs being incurred by an affected party, who would be unable either to object to it (only representations can be made) or to claim compensation for the costs it incurred.

Emerging conclusions

10.4 We are grateful to respondents for highlighting these issues and agree that it is important not to remove the protections that are contained in Condition G6 from the SACs.

10.5 Including the granting of wayleaves and easements within the proposed Notifiable Change process removes the currently existing right of consultation, while including it within the proposed Material Change process would give consultees an entitlement to compensation which they do not currently have, and which we do not see any justification to grant.

10.6 We have identified two ways to proceed and invite your comments:

(a) we can retain the proposal to include easement and wayleave provisions within the Notifiable Change process, but as a sub-set of that process grant consultation rights (thus reflecting more closely the existing G6 arrangements, but leading to more detail in the change process); or

(b) we retain the current G6 easement and wayleave provisions and they therefore remain separate from the proposed revised Station Change mechanisms.

10.7 In any event we would expect the proposer of a Station Change to address any need for wayleaves or easements in its original proposal and not rely on Network Rail to undertake a separate consultation. We shall look to make this clear in the final drafting of the amended SACs.

Consultation questions

10.8 Do you think that that the protections contained in Part G:

(a) should be incorporated into the proposed new “Notifiable Change” process? or

(b) should remain in Part G of the revised SACs, separate from the Station Change provisions?

11. Miscellaneous issues

11.1 This chapter deals with a number of additional issues that result from the responses we received to our earlier consultation. We have set out the issues below. While we have no specific questions on these matters, we would welcome any comments that you wish to make.

Status of other funders e.g. Welsh Assembly Government and Transport for London

11.2 We received comments that Welsh Assembly Government (WAG) and Transport for London (TfL) should be included as "funders" alongside DfT and Transport Scotland. And it is the case that others e.g. PTEs also provide funding. We will consider this further, including what the legislation may say on the matter, and will set out our position in our final conclusions.

Asset Protection Agreements and Property Agreements

11.3 One respondent commented that ORR should not be endorsing the requirement for developers to have to settle Asset Protection Agreements (APA) or Property Agreements with Network Rail after a change proposal has otherwise been approved. Rather, all these consents should be granted automatically as part of the station change approval process. It is not clear to us how this could work in practice – the APA and Property Agreement contain terms that need negotiation between the developer and Network Rail, and as such cannot be considered suitable to form part of the overall proposal for change.

TOC to TOC indemnities

11.4 Some respondents questioned why a TOC proposer of a Station Change should be required to offer "indemnities" to other train operators. They argued that indemnities are unnecessary because all station Users pay their relevant proportions of Long Term Charge ("LTC") and Qualifying Expenditure ("Qx") and these payments will be adjusted as part of the Station Change process to reflect the new allocation of costs.

11.5 We are not convinced by this point. While this may be the case where the Station Change involves other industry parties only, the same does not apply where a third-party developer is involved. We do not consider that the argument would hold where the SFO has a full repairing lease. In any event, we consider that indemnities are designed, among other things, to provide consultees with compensation for disruption and reimbursement of costs in relation to a Station Change. Station LTC and Qx deal with "steady state" allocation of costs once the Station Change has been implemented.

11.6 Also, on the financial threshold for materiality one respondent suggested that a single threshold is inappropriate and, instead, materiality should be decided by assessing whether the cost consequences to an affected consultee reach a certain percentage of the station's annual QX-able charges. For similar

reasons to those set out in paragraph 11.5 above, we are not convinced that Qx is an adequate proxy for assessing materiality.

Network Rail – requirement to act reasonably

11.7 A concern was raised about the requirement on Network Rail that it is to act "reasonably" in its negotiations with a third party developer. Such a developer does not have recourse to complaining that any unreasonable behaviour on the part of Network Rail constitutes a licence breach (a third party property developer is not a stakeholder for the purposes of condition 8 of Network Rail's licence).

11.8 This is a valid point, and our existing proposal already includes the obligation for both parties (so including Network Rail) to act reasonably in settling the terms of any asset protection or property agreements which may be required to allow implementation of a Material Change Proposal. We consider that the stipulated disputes process (ADRR, via Condition H5) is capable of hearing a dispute and determining what parties are allowed to take into account or ignore if acting reasonably.

Timescales for responding to Change proposals

11.9 Amongst those operators who commented on the timescales being proposed for responding to a Station Change proposal, there was a divergence of opinion: one supported shorter consultation periods for simpler proposals; the other considered that timescales for responding to different types of proposals should all be standardised, to cut down on the possibility of bureaucratic mistakes. We favour having as simple a process as possible, which we consider is consistent with having similar timescales for representations and consultations, so that no party misses out on making a response on the technicality of being confused as to how long it had to do so.

Deemed approval

11.10 We were asked to ensure that the 'deemed approval' provisions are made express – i.e. if the consultee refuses to sign the Co-operation Agreement, but also refuses to engage in any dispute about its terms, then deemed approval of the template terms occurs. This is to avoid any possibility of consultees delaying or derailing the process by refusing to engage. We consider it should also be open to the proposing developer to raise a dispute in order to make changes to the template terms if the consultee is refusing to engage, in case it is the template terms that are not appropriate. In this eventuality, we consider that the consultee ought to be deemed to accept the resulting dispute decision.

11.11 We do not consider an issue occurs the other way round, because the third party developer's proposal is conditional on signing a deed of undertaking.

11.12 We plan to review the drafting to make this deemed approval clear, and will publish the outcome in our final conclusions document.

ORR registration and approval

11.13 The existing approval condition C6 was left unchanged in the proposed new SACs (albeit now numbered C7). In part, this condition provides that if the implementation of a change proposal would require consequential amendments to a station access agreement, then ORR's approval of those consequential amendments must be obtained before implementation (and before registration as well, in the proposed new SACs).

11.14 This means that the contractual amendment will be made before implementation takes place, with the result that the contract may not reflect the position on the ground for some time (possibly some years), and that if implementation results in some minor changes to the proposal a further consequential amendment might be needed (if there were material changes to the proposal, a fresh change proposal would of course need to be made).

11.15 We will consider whether it is appropriate that, following agreement of a Station Change by the parties, ORR approval to any consequential amendment might be obtained 'in principle', to allow registration and implementation to proceed before formal section 22 approval of an amendment to an access agreement is given. We invite comments on this suggestion.

11.16 We reiterate that ORR does not have a role in approving the merits (technical, financial or otherwise) of a Station Change Proposal, only the contractual consequences for a party's access agreement. The existing C6 also requires ORR's prior approval if implementation will result in a material diminishing of the number of passengers or trains able to use the station for a period of over 28 days. We have no intention of reducing or removing this requirement.

12. Modifications we propose to implement

Proposed modifications

12.1 Based on the responses that we received to our earlier consultation, there is sufficient support for the proposed changes to Part B of the current SACs to allow us already to conclude that we will modify the SACs as part of any re-drafting after the consultation as a whole is concluded. The proposed changes are:

(a) deletion of the requirement to hold a Station Meeting;

(b) retention of a voting process for Part B Change Proposals.

12.2 There are two further areas where consultation responses supported the proposed changes. These are:

(a) the process for registration and implementation of proposed Station Changes; and

(b) the additional consequential modifications to update the SACs.

12.3 We explain each of these modifications in more detail below, together with our reasons for making the change.

Modifications in more detail and reasons for making the modification

Deletion of the requirement to hold a Station Meeting

12.4 Currently the SACs contain a requirement for the Station Facility Owner to convene a Station Meeting either at the request of any station User or, automatically following the making of any Conditions Change Proposal. However, we are told that these meetings rarely take place (even when a Conditions Change Proposal is made) and so the requirement in the SACs is superfluous.

12.5 Your responses to the earlier consultation support this view. We do not believe it adds any value to retain a requirement in the SACs for meetings that industry parties rarely, if ever, hold and so we have concluded that we will remove the requirement. However, the modification will be drafted in such a way as to allow a meeting to take place if either the SFO or a station User chooses to convene one.

Retention of a voting process for Part B Conditions Change Proposals

12.6 In our earlier consultation we proposed that Part B of the SACs will only apply to changes to the national template SACs (as opposed to physical changes to the station). We have now concluded that the obligation to hold Station Meetings should be deleted. We previously proposed that we should retain the concept that a Part B Conditions Change proposal must receive approval from a majority of relevant operators. We proposed that a Conditions Change must be approved by no less than 80% of all relevant

operators (which retains the existing SACs definition of being the SFO and any beneficiary in respect of a Station Access Agreement). under our proposed amendments there would be a consultation period, followed by a decision period, to allow relevant operators to consider consultation responses before voting.

12.7 Respondents were broadly supportive of this proposal. Given that a Conditions Change Proposal, if approved, alters the template SACs, we believe that it is important to retain a voting mechanism to allow Users to express a view and influence the outcome. We have therefore concluded that the revised SACs will retain a voting process for Conditions Change Proposals, with an approval threshold of 80% of all operators being required to approve the Change.

Should votes be weighted?

12.8 A number of respondents suggested that instead of the current one vote per operator, Users' votes should be weighted to reflect their usage of the station.

12.9 The current system is simple to administer. Introducing a weighted vote is potentially more complicated and will require the development of, and agreement on, a formula for deciding on appropriate weightings. And it could result in an individual operator having a different weighting of votes for each station they call at, with attendant bureaucratic costs.

12.10 For the reasons set out above we have concluded that votes should not be weighted.

Registration and implementation of proposed Station Changes

12.11 We sought your view on the proposed modification to the SACs to:

(a) provide that a Station Change proposal under Part C (physical change to the station) that has been agreed by the Change consultees must be registered with ORR in order to be effective and before it can be implemented; and

(b) introduce a limit on how long a registered proposal can remain effective without being implemented, before it lapses.

12.12 There was a mixed response to this proposal. Some respondents did not favour having ORR keep a register, and instead contended that the current arrangements work well and do not need changing. This directly contradicts the reason originally put forward by Network Rail for suggesting an ORR register; that the current arrangements are not consistently adhered to by all parties, and consequently Network Rail has a considerable number of low-level disputes about changes which may or may not have been made to station property. Other respondents favoured a central register being kept by ORR, subject to the proviso that no-one wants unnecessary bureaucracy.

12.13 Almost all respondents were in favour of imposing an implementation time limit, with many favouring the three year period which we proposed, after which the proposal lapses if implementation has not been started.

12.14 There were some comments that it was not sufficiently clear when the time limit should start to run. If it only runs from the date the proposal is registered with ORR, then there is a risk that a Change sponsor will delay that registration, thus prolonging the implementation period.

12.15 Clarity and accuracy of the contractual arrangements at stations are important for current and prospective Users. This includes keeping information on Station Change up to date, including information on whether a Station Change is implemented. We have concluded, therefore, that we will adopt the proposal set out in our earlier consultation to require that Station Change proposals are registered with

ORR. We will also introduce a time limit within which Change Proposals must be implemented otherwise they will lapse. The implementation period will be three years, in keeping with other property consent timescales. The time limit begins from the date that the Station Change has been registered with ORR.

12.16 To avoid the possibility of any delay on the part of the proposer in submitting agreed Station Changes to ORR either for registration or for approval, any party to the Station Change can send it to us. We will also introduce a time limit (we propose 28 days) within which agreed Station Changes must be submitted to ORR otherwise they will lapse.

Additional consequential amendments

12.17 In our earlier consultation we proposed a number of additional modifications to the SACs. The purpose of these modifications is to update the SACs to make them reflective of current industry structures and to take account of the new dispute resolution process that came into effect on 1 August 2010. The proposed changes are contained in Annex H of our earlier consultation and can be found on our website at http://www.rail-reg.gov.uk/server/show/ConWebDoc.10339 .

12.18 The proposed additional modifications received support and we will modify the SACs accordingly.

Next steps in relation to these modifications

12.19 Once ORR has decided to issue a notice to modify the SACs, the modifications will not come into effect until a period of 180 days has elapsed. To avoid the SACs being modified in a piecemeal way, we do not intend to issue an approval notice for the modifications discussed in this chapter 12 until we have concluded our current, further consultation and can approve a package of all of the proposed modifications at the same time.

13. Consultation questions

	Paragraph	Question
1	4.5	Do you agree that we should introduce the concept of “Exempt Activity” and adopt the definition as developed for the proposed Stations Code?
2	4.21	Is £5,000 an appropriate level for assessing financial impact to determine the type of Change Proposal, subject to it being kept under review?
3	4.22	Do you have any views on the alternative proposals dealing with the circumstance when a single change proposal has a material impact on one station party, but not on another?
4	4.23	Do you agree that we should introduce a separate minimum compensation threshold (set at the same level as the Financial Impact Test of £5,000) to determine the point at which consultees are eligible to receive compensation for a Material Change Proposal? Under this arrangement, a consultee must incur costs of £5,000 or more in its own right before compensation becomes payable. Once the threshold has been met, all compensation becomes payable for the affected consultee. Parties whose costs do not meet the £5,000 threshold will receive no compensation. We consider that this would make financial compensation arrangements consistent with other parts of the Station Change regime.
5	4.24	We would be interested in your views on how to deal with the situation where a series of Change proposals are made at separate stations, which individually do not meet the Financial Impact Test threshold but when taken together do and could have a material impact on a consultee.
6	5.8	Do you have any comments on the proposed revised list of valid objections?
7	6.12	Do you have any suggestions on the terms of the “participation deed” that third party developers should be required to sign?
8	7.18	Should there be a distinction between public and private investors at all or should they be treated in the same way? Please explain the reasons for your view.

9	7.19	If public and private investors are to be treated in the same way: (a) should we have one qualifying financial threshold and duration of interest and at what level should those be set?; or (b) should we retain two financial thresholds and two different duration of interest time limits (to distinguish between the scale of different levels of investment) both of which can apply to a private or public investor?
10	7.20	If we retain the concept of Strategic Contributor with spending at a strategic spread of stations, should that entitle it to an interest just at those stations it has invested in or to all stations on that particular network?
11	7.21	Are there other ways that a third party's "interest" in a station could be determined e.g. the length of interest to be determined by the life of the asset(s) that their investment has funded?
12	8.10	We asked in our earlier consultation whether respondents agreed that: (a) unless the parties agree otherwise, unresolved financial compensation issues should be dealt with via the dispute resolution process?; and (b) an otherwise agreed Station Change should be allowed to proceed while the financial compensation issues are resolved? We have set out above why we consider this approach is to be preferred, but if you do not agree, (a) please explain your reasons why; and (b) please provide your suggestions for dealing with this situation.
13	8.34	Should loss of revenue (in addition to loss of profit) be capable of being included as part of any compensation claim?
14	8.35	Do you have any comments on the proposal that no party can insist on compensation being payable by way of fixed-sum payment(s)? Rather this should be an issue for the parties to negotiate and agree, but ultimately it is for the proposer to decide if it wants to pay a fixed-sum compensation amount (whether by a single upfront payment or by instalments).
15	8.36	13.1 If a consultee wishes to request payment by way of fixed-sum payment(s), do you agree: (a) that the request should be made within a defined period, and not at any time during the project? and (b) if you do agree, what should the time limit be?
16	8.37	As currently drafted, the Co-operation Agreement envisages reimbursement of costs to the end of an operator's franchise. As highlighted in paragraph 8.21 above this may not be appropriate for all consultees. What period of reimbursement do you consider would be appropriate?

17	8.38	Do you agree that we should retain the provision for a developer to propose "Savings Suggestions" that can be taken to dispute if the parties cannot reach agreement on their terms? Do you agree with our preference to remove the proposer's entitlement to seek any information it requires?
18	8.39	We are keen to hear your views, and the reasons for your views, on: (a) whether a developer's liability should be uncapped; (b) whether the introduction of a liability cap would be appropriate; and (c) the level at which any liability cap should be set.
19	8.40	Should operators be able to recoup money from passengers e.g. by way of increased fares that are justified on the basis of an improvement resulting from a Station Change, in the same way that Network Change is drafted?
20	8.41	In assessing the amount of compensation payable, is there any reason why it is not acceptable to net off the likely ability of an operator to recoup money from its passengers or other sources of revenue?
21	8.42	We propose that the payback of overpaid compensation should be free of interest as long as it is paid back within a defined period of time, otherwise interest becomes payable, backdated to the date of the payment request: (a) Do you agree with this approach? (b) Is 28 days an appropriate period for payback? (c) If you do not agree either with the approach or with the payback period, please provide your alternative suggestions.
22	8.53	Paragraph 8 of Annex 1 to the revised SACs sets out a list of Core Facilities at stations. We propose that the provision of alternative accommodation in the revised SACs should extend beyond those "Core Facilities" and seek your views on what those additional facilities should include (e.g. the "Station Facilities" as set out in paragraph 10 of Annex 1 to the current SACs, or something wider).
23	9.8	Do you agree that re-instatement of the original position should be considered on a case by case basis?
24	9.9	Do you agree: (a) with the introduction of a Relevant Undertaking in which a proposer must undertake to compensate station parties for costs/losses that they might incur if the development is not implemented in accordance with the terms of the original Station Change proposal; and (b) that affected parties should be able to object to the terms of the relevant undertaking?
25	9.10	Do you agree that an incomplete scheme should be subject to a new Station Change proposal so that the optimum outcome can be negotiated between the parties?

26	10.8	Do you think that that the protections contained in Part G: (a) should be incorporated into the proposed new “Notifiable Change” process?; or (b) should remain in Part G of the revised SACs, separate from the Station Change provisions?
27	11.15	We will consider whether it is appropriate that, following agreement of a Station Change by the parties, ORR approval to any consequential amendment (to a Station Access Agreement) might be obtained ‘in principle’, to allow registration and implementation to proceed before formal section 22 approval of an amendment to an access agreement is given. We invite comments on this suggestion.
28	14.5	We wish to hear from respondents on what (regulatory) impact – positive or negative - you believe that the proposed changes will have on you.
29	14.5	While we have raised specific questions, summarised in chapter 13, we equally welcome respondents’ views on any aspect of the proposed modifications, including if respondents consider we could go further in stream-lining the process.

14. Regulatory impact

14.1 As we stated in our earlier consutation, these proposed modifications to the SACs are designed to clarify, simplify and speed up what the industry has told us is a complex and unwieldy Station Change regime. It is our clear expectation that the reforms proposed should create a more efficient and speedy Station Change process. The new process should give change proposers more certainty in progressing schemes by classifying certain types of change exempt from the formal change processes and by separating issues relating to compensation (where they exist) into a parallel, but separate process that will not hold up implementation of a change. The new Station Change procedures also include more clearly defined rights for third parties involved in Station Change, with the aim of encouraging more third party-led development.

14.2 We have also proposed additional modifications to update the SACs to make them more reflective of current industry structures and processes. We do not envisage that those modifications should have an adverse impact on respondents.

14.3 We have also carefully considered what respondents to the earlier consultation told us and have tried, where possible and practical, to further simplify those aspects of the proposed changes that appeared to complicate rather than simplify the Station Change mechanisms.

14.4 Further, we consider that these proposed changes complement the introduction in 2010 of a wide-ranging General Approval for the approval of station access agreements and amendments to them. The General Approval has reduced regulatory burden on the industry and we hope that the proposed changes to the SACs will reduce that burden further.

14.5 However, we wish to hear from respondents on what impact – positive or negative - you believe that the proposed changes will have on you. Accordingly, while we have raised specific questions, summarised in chapter 13, we equally welcome respondents' views on any aspect of the proposed modifications, including if respondents consider we could go further in stream-lining the process.

Annex A: Respondents to previous consultation

Abellio Group

Access Disputes Committee

Arriva Trains Wales / Trenau Arriva Cymru Limited

ATOC

East Coast Mainline Company Limited

First Group

Hertfordshire County Council

London & South Eastern Railway Limited

London Midland

Neptune Developments Limited

Network Rail Infrastructure Limited

Northern Rail Limited

Northgrove Land Limited

Passenger Focus

Passenger Transport Executive Group (PTEG)

Southern Railway Limited

Stagecoach South Western Trains Limited

Transport for London

Transport Scotland

White & Case LLP

Annex B: list of current consultees

Abellio Greater Anglia Limited
Access Disputes Committee
Arriva Trains Wales / Trenau Arriva Cymru Limited
Association of Train Operating Companies
Bombardier Transportation UK Limited
c2c Rail Limited
DB Reggio Tyne & Wear Limited
DB Schenker Rail (UK) Limited
Department for Transport
Direct Rail Services Limited
East Coast Mainline Company Limited
East Midlands Trains Limited
Eurostar International Limited
First Capital Connect Limited
First Greater Western Limited
First ScotRail Limited
First/Keolis Transpennine Limited
Freightliner Heavy Haul Limited
Freightliner Limited
GB Railfreight Limited
Glasgow Prestwick International Airport Limited
Grand Central Railway Company Limited
Heathrow Express Operating Company Limited
Hitachi Europe Limited
HS1 Limited
Hull Trains Company Limited
London & Birmingham Railway Company Limited
London & Continental Railways Limited
London & North Western Railway Company Limited
London & South Eastern Railway Limited
London Overground Rail Operations Ltd
London Underground Limited
Merseyrail Electrics 2002 Limited
Network Rail Infrastructure Limited
North Yorkshire Moors Railway Enterprises plc
Northern Rail Limited
Rail Express Systems Limited
Rail Freight Group
Southern Railway Limited
Stagecoach South Western Trains Ltd

Stobart Rail Limited
The Chiltern Railway Company Limited
Transport for London
Transport Scotland
Venice Simplon-Orient-Express Limited
Welsh Assembly Government
West Coast Railway Company Limited
West Coast Trains Limited
XC Trains Limited
Advantage West Midlands
Ashwell Property Group plc
Ask Developments
Ballymore Group
Bridgend County Borough Council
British Land Company plc
Centro
Chelsfield plc
Cibitas Investments Limited
County Councils Network
Cross London Rail Links Limited
Delancey
Derbyshire County Council
East Sussex County Council
Eversholt Rail
Gloucestershire First
Grainger plc
Hammerson plc
Hertfordshire County Council
Hines
Home Builders Federation
John Laing plc
JPM Parry & Associates
Kenmore
Kier Property
Local Government Association
London TravelWatch
Merseytravel
Metro
MTR Corporation Ltd
Muse Developments
NedRailways (UK)
Neptune Developments Limited
Nexus
Northgrove Land Limited
Nottinghamshire County Council
Passenger Focus
Passenger Transport Executive Group
Peel Holdings Limited
PMG
Pre Metro Operations Limited

Railway Forum
Railway Industry Association
Sellar Property Group
South Yorkshire Passenger Transport Executive
St Mowden Properties plc
Stanhope plc
Strathclyde Partnership for Transport
Targetfollow
Taylor Wimpey plc
Terramond
Transport for Greater Manchester
Westfield UK
White & Case LLP

Annex C: copy of Stations Code template Station Funder Participation Deeds

Template Station Funder Participation Deeds

Part 1: Template Station Funder Participation Deed (England & Wales)

This DEED is dated _____ and is made by

(1) **[STATION FUNDER]** (the **"Station Funder"**) in favour of

(2) each other person having rights or obligations in relation to the making of Station Changes under the Code Station Agreement relating to **[insert details of Station]** (the **"Consultees"**).

WHEREAS:

(A) The Station Funder has made a Station Change Proposal in respect of the Station dated _____, to which this Deed is attached (the **"Specified Proposal"**);

(B) The Station Parties wish the Station Funder to be bound by the provisions of Part 5 of the Code in respect of the Specified Proposal.

NOW THIS DEED WITNESSES:

1 DEFINITIONS

Unless the context requires otherwise, words and phrases defined in Condition 1 of the Code shall have the same meanings in this Deed.

2 PARTICIPATION

In all matters relating to or arising from the Specified Proposal, the Station Funder shall comply with, and be liable under, the provisions of Part 5 of the Code as if it was a Station Party.

3 LIMITATION

The Station Funder shall not acquire under this Deed:

(a) any liability in connection with any other Station Change Proposal; or

(b) except as provided in Clause 4.2, any other liability to any Stakeholder in connection with the Specified Proposal.

4 GOVERNING LAW AND DISPUTE RESOLUTION

4.1 Governing law

This Deed shall be governed by and construed in accordance with the laws of England and Wales.

4.2 Dispute resolution

Any dispute which may arise out of, or in connection with, this Deed shall be treated as a Relevant Dispute, and for these purposes, the Station Funder shall have the rights and obligations of a Station Party under Condition 28 (Disputes) of the Code.

5 CONTRACTS (RIGHTS OF THIRD PARTIES) ACT 1999

5.1 General

Subject to Clause 5.2, no term of this Deed is enforceable under the Contracts (Rights of Third Parties) Act 1999 by a person who is not a party to this Deed.

5.2 Other Station Funders

ORR shall have the right under the Contracts (Rights of Third Parties) Act 1999 to enforce directly such rights as have been granted to it under Part 5 or Condition 28 of the Code.

EXECUTED as a DEED by)

[FUNDER])

in the presence of:)

Part 2: Template Station Funder Participation Deed (Scotland)

DEED by

(1) **[STATION FUNDER]** (the **"Station Funder"**) in favour of

(2) each other person having rights or obligations in relation to the making of Station Changes under the Code Station Agreement referred to in the Schedule annexed to this Deed (the **"Consultees"**).

WHEREAS:

(A) The Station Funder has made a Station Change Proposal in respect of the Station dated _____, a copy of which Station Change Proposal is annexed to this Deed (the **"Specified Proposal"**);

(B) The Station Parties wish the Station Funder to be bound by the provisions of Part 5 of the Code in respect of the Specified Proposal.

IT IS HEREBY DECLARED AND AGREED:

1 DEFINITIONS

Unless the context requires otherwise, words and phrases defined in Condition 1 of the Code shall have the same meanings in this Deed (references herein to the "Code" shall mean the set of model clauses entitled "Stations Code" and established by ORR under section 21 of the Railways Act 1993, as such set of model clauses is amended from time to time).

PARTICIPATION

In all matters relating to or arising from the Specified Proposal, the Station Funder shall comply with, and be liable under, the provisions of Part 5 of the Code as if it was a Station Party.

LIMITATION

The Station Funder shall not acquire under this Deed:

any liability in connection with any other Station Change Proposal; or

(a) except as provided in Clause 4.2, any other liability to any Stakeholder in connection with the Specified Proposal.

2 GOVERNING LAW AND DISPUTE RESOLUTION

2.1 Governing law

This Deed shall be governed by and construed in accordance with the laws of Scotland.

2.2 Dispute resolution

Any dispute which may arise out of, or in connection with, this Deed shall be treated as a Relevant Dispute, and for these purposes, the Station Funder shall have the rights and obligations of a Station Party under Condition 28 (Disputes) of the Code.

3 THIRD PARTY RIGHTS

3.1 General

Subject to Clause 5.2, no term of this Deed is enforceable by a person who is not one of the Consultees.

3.2 ORR

ORR shall have the right to enforce directly such rights as have been expressed to be granted to it under Part 5 or Condition 28 of the Code. Without prejudice to other methods of constitution, registration of this Deed in the Books of Council and Session is intended to constitute such right in favour of ORR.

4 REGISTRATION

The parties consent to the registration of this Deed for presentation: IN WITNESS WHEREOF

Note: appropriate signing docquet to be added

Note: Specified Proposal to be annexed

Note: this deed and the annexation require to be signed in self-proving form in accordance with the Requirements of Writing (Scotland) Act 1995

This is the Schedule referred to in the foregoing Deed by [insert name] in favour of the Consultees therein referred to.

SCHEDULE: CODE STATION AGREEMENT

STATION	ORR REFERENCE NUMBER
[insert station name] Note – The Code Station Agreement was constituted and took effect [in accordance with a Deed of Accession between [insert party details] dated [insert date(s)] and registered in the Books of Council and Session [insert date]]. [adjust as required]	