

HS1 Freight Access Terms: Conclusions Document

June 2011



Contents

Executive Summary

1. Introduction

Background

Structure of this document

2. Conclusions - June 2009 Consultation

3. Conclusions on Freight Track Charges –June 2009 & February 2011 Consultations

4. ORR – June 2009 & February 2011 Consultation

Annex A: List of respondents to June 2009 consultation

Annex B: List of respondents to February 2011 consultation

Annex C: HS1 Freight Access Terms

Executive Summary

1. In June 2009 we (“**HS1 Ltd**”) consulted the industry and other interested parties on our proposed HS1 Freight Access Terms. A subsequent consultation was issued on 11 February 2011 in relation to the capacity reservation charge element of the track access charges. Having considered the responses, engaged with various freight operating companies and discussed the proposed HS1 Freight Access Terms in detail with the Office of Rail Regulation (ORR), on 14 April 2011 the ORR indicated that, without fettering its discretion in respect of any future applications it receives in respect of framework track access agreements for freight services, the ORR would be minded to approve a framework track access agreement for freight services if it incorporated the proposed HS1 Freight Access Terms.
2. This document sets out our final conclusions. In summary:
 - (a) there are good reasons for maintaining consistency with our Passenger Access Terms for the benefit of all train operators (both passenger and freight) using HS1;
 - (b) we recognise that given the nature of freight operations there is occasionally justification for departing from our consistency of approach; and
 - (c) following the representations from the industry and other interested parties received as part of the consultation, we believe that the final Freight Access Terms has addressed the key concerns of the industry and other interested parties raised in the consultation.
3. It is now our intention to work closely with potential track access applicants and the ORR to develop and agree the final Framework Freight Track Access Agreement.

1. Introduction

- 1.1 This document sets out:
- (a) our conclusions on the Freight Access Terms; and
 - (b) a summary of the key issues and concerns raised by responses to the June 2009 and February 2011 consultations.

Background

- 1.2 On 19 June 2009, we as infrastructure manager of HS1, commenced a consultation process with industry participants in relation to our proposed HS1 Passenger Access Terms and HS1 Freight Access Terms.
- 1.3 In our conclusion paper on the June 2009 Consultation (“Conclusion on consultation on HS1 Network Statement & Related Arrangements – September 2009”), we advised that we had decided to conclude the June 2009 Consultation except in relation to the HS1 Freight Access Terms, in relation to which we would continue to engage with the relevant consultees to finalise the HS1 Freight Access Terms and the Framework Freight Framework Track Access Agreement.
- 1.4 To this end, we held a series of meetings with certain freight operating companies in addition to receiving a number of written responses from the following industry parties and stakeholders:
- DB Schenker (UK) Limited
 - Europorte Channel and London Carex
 - Eurostar International Limited
 - London & South Eastern Railways Limited
 - Rail Freight Group
- 1.5 Following further dialogue with the ORR, we were requested to consult further on the freight track access charging, in particular in relation to the capacity reservation charge. We issued a further consultation to the freight operating companies and other industry participants in February 2011 and our conclusions are also set out in this document.
- 1.6 We have considered the responses from the freight operating companies and industry participants and the comments received from the ORR in relation to the proposed HS1 Freight Access Terms and the most appropriate manner of addressing the comments raised by the industry parties and stakeholders. It is worth noting this document addresses the points raised in relation to the HS1 Freight Access Terms. All other items outside the scope

of the HS1 Freight Access Terms detailed within the responses have been noted but not captured in this document.

Structure of this document

1.7 This document is structured as follows:

- **Chapter 2** summarises the key issues from the June 2009 consultation on the HS1 Freight Access Terms alongside how we have addressed the issues.
- **Chapter 3** summarises the key issues from the respondents in relation to the track charges in September 2008, June 2009 and February 2011 consultations on the HS1 Freight Access Terms alongside how we have considered the points raised.
- **Chapter 4** summarises the key concerns raised by the ORR following the June 2009 and February 2011 consultations and how we have considered the issues.
- **Annex A** provides the list of all respondents to the June 2009 consultation document.
- **Annex B** provides the list of all respondents to the February 2011 consultation document.
- **Annex C** contains the HS1 Freight Access Terms which the ORR indicated on 14 April 2011 that it would be minded to approve a Framework Track Access Agreement if such terms were incorporated into it.

1.8 Our final position is set out in the HS1 Freight Access Terms which the ORR indicated that, without fettering its discretion in respect of future applications, it would be minded to approve a Framework Freight Track Access Agreement if such Freight Access Terms were incorporated into it. We are now currently working with the ORR to finalise the template Framework Freight Track Access Agreement. We intend to consult in relation to any proposed Framework Freight Track Access Agreement in advance of entering into any such agreement.

2. Conclusions - June 2009 Consultation

Introduction

- 2.1 We have considered the responses and comments from industry participants and freight operating companies to our June 2009 consultation. Some of the comments received have been included in the final version of the HS1 Freight Access Terms, where we have considered such comments to be well founded. In general, we have attempted to maintain consistency between our HS1 Freight Access Terms and our Passenger Access Terms for the benefit of all train operators (both passenger and freight) using HS1. This provides greater certainty to all train operating companies by ensuring that our customers are protected on HS1 as well as enabling consistent regulation across HS1 which is in the interests of the industry as a whole. This is an approach which was endorsed by a consultee in its response to the consultation.

This section summarises the key concerns and issues raised by respondents alongside our view on how such issues have been addressed.

General Comments

- 2.2 We are keen to work with industry participants and the freight operating companies to develop a service which makes use of HS1 and provides the framework for sustainable freight services. Being a high speed railway network which provides high economic value to its customers, there are significant benefits to freight operating companies, in particular those who deliver time critical commodities for its customers. As such, HS1 provides a dynamic and innovative transport infrastructure which can lead to substantial commercial benefits to an organisation.

2.3 *Consultee Responses*

We were asked to consider the HS1 Freight Access Terms in the context of both conventional and high speed freight. One consultee indicated that the order of priority on HS1 should be revisited with a view to giving high speed freight trains first priority at night (with conventional speed freight trains taking second priority, ahead of any passenger services which may be operating).

HS1 Ltd's Consideration

HS1 is subject to a Declaration of Specialised Infrastructure which was introduced following industry consultation. The Declaration of Specialised Infrastructure sets out the priorities in the allocation of capacity on HS1 and gives as first priority to high speed international passenger train services. It is possible that there may be demand in future for high speed international passenger services at night and as HS1 was designed to be primarily a passenger train services corridor, such services should have priority in accordance with the

Declaration of Specialised Infrastructure. Therefore there have been no changes to reflect different priorities during the day and at night.

Section 1 – Definitions & Interpretation

2.4 *Consultee Responses*

One consultee asked if we can reproduce the definition of 'Change in Circumstances' in the Freight Access Terms unless the 'Concession Agreement' is going to be made available to freight operators.

HS1 Ltd's Consideration

The Concession Agreement is a public document and is available on our website (subject to certain redactions). We can provide a copy of the redacted Concession Agreement upon request.

Section 2 - Duration

2.5 *Consultee Responses*

One consultee suggested that the track access agreement should not automatically expire if a Failure to Use Notice results in the termination of all services.

HS1 Ltd's Consideration

We had originally included this in the HS1 Freight Access Terms for consistency with the HS1 Passenger Access Terms. However, we recognise that the nature of freight operations does mean that a freight operating company may need a track access agreement to allow it to spot bid into spare capacity on HS1 regardless of whether services are timetabled by virtue of the freight operating company having firm rights. Given the differences between passenger and freight operations, we have taken the view that the differences are justifiable and accordingly have deleted the references from the HS1 Freight Access Terms.

Section 3 – Operational Provisions

2.6 *Consultee Responses*

One consultee sought clarity on the period during the London Olympic Games where freight will not be permitted to use HS1.

HS1 Ltd's Consideration

We have provided additional clarification on the relevant period by introducing a definition of 'Period of Games' in the HS1 Freight Access Terms.

Section 4 – Compensation for Restriction of Use

2.7 *Consultee Responses*

One consultee responded with a comment that the definition of 'Direct Costs' should be tailored to freight operations.

HS1 Ltd's Consideration

We met with the consultee and discussed the anticipated costs which would arise as a result of a Restriction of Use. After understanding the consultee's views, we agreed to amend the definition of 'Direct Costs' in the context of HS1 Freight Access Terms so that the Direct Costs more properly reflected those likely to be incurred by a freight operating company as a consequence of a Restriction of Use.

2.8 *Consultee Responses*

We were asked to provide comfort on the provisions relating to the negotiation of compensation with a Competent Authority which states that 'HS1 Ltd shall use all reasonable endeavours to negotiate with the relevant Competent Authority a level of compensation in respect of the Competent Authority Restriction of Use which is sufficient to ensure that the Train Operator receives compensation for all of its Relevant Costs'.

HS1 Ltd's Consideration

We can confirm that any recovery of cost from a Competent Authority would be distributed amongst all affected train operators in accordance with Paragraph 8 of Section 4 of the HS1 Freight Access Terms.

Section 5 – Liability

2.9 *Consultee Responses*

One consultee asked us to provide an explanation as to why the infrastructure manager's indemnity under paragraph 1.2(b) is not fully reciprocal with the Train Operator's indemnity under paragraph 1.1 (b).

HS1 Ltd's Consideration

The indemnity provisions are consistent with the HS1 Passenger Access Terms. Accordingly, we consider that no change should be made.

2.10 *Consultee Responses*

Consultees expressed views relating to the inclusion of paragraph 2.3 in the HS1 Freight Access Terms (Restrictions on claims by the Train Operator). The consultees expressed a view that there is already a restriction on the Train Operator from claiming Relevant Losses for delays and cancellations of trains and therefore this paragraph would mean that we are absolved from any liability in respect of restrictions of use other than in accordance with Sections 4 or 8 of the Freight Access Terms and Part G of the HS1 Network Code.

HS1 Ltd's Consideration

The rationale of paragraph 2.3 of the HS1 Freight Access Terms is to clarify that any compensation available to a freight operating company in respect of:

- (i) any Restriction of Use taken by HS1 is available only under section 4 of the Freight Access Terms or Part G of the HS1 Network Code; and
- (ii) any delays or cancellations suffered by such train operator is available only under section 8 of the HS1 Freight Access Terms.

This provision is not intended in any way to restrict or limit the indemnities otherwise available to the freight operating company under Section 5 of the HS1 Freight Access Terms. We do not consider that a change is required.

Section 7 – Track Charges

- 2.11 All issues relating to the freight track charges have been set out in Chapter 3 of this Conclusions Document. Chapter 3 captures the comments on track access charges raised in the September 2008 consultation on 'prospective levels and principles of track access charging', as part of the June 2009 consultation in relation to the Freight Access Terms and a specific consultation around proposed amendments to the Capacity Reservation Charge in February 2011.

Section 8 – Performance Regime

2.12 *Consultee Responses*

One consultee indicated that it thought that it was vital that freight operators sign up to the proposed performance regime in order to ensure that all train operators are protected by the same mechanism.

HS1 Ltd's Consideration

The purpose of the performance regime is to incentivise an efficient operational railway. This is captured in the Railways Infrastructure (Access and Management) Regulations 2005, which states that the infrastructure manager has to establish a performance scheme to encourage railway undertakings and the infrastructure manager to minimise disruption and improve the performance of the railway network. As such we acknowledge that it is important that all train operators are protected by the same mechanism as it gives equal encouragement to both HS1 Ltd and to all railway undertakings. Therefore there is good reason for ensuring that the performance regime for freight is the same as the performance regime under the HS1 Passenger Access Terms.

2.13 *Consultee Responses*

Consultees queried the structure of the Performance Cap, stating that in their view it lacks proportionality and is unreasonable, given the limited quantum of the combined IRC and OMRC payments likely to be made by freight operating companies during the initial period of freight operations on HS1. In addition, we were asked to review the application of other

elements in this section, such as the Performance Benchmarks and Performance Bonus Regime as they were based on historical levels of data which may not be fit for purpose.

HS1 Ltd's Consideration

Regarding the Performance Caps, our intention is to protect our customers and therefore we require a performance regime which incentivises all parties to perform well. In particular, we also note a comment raised by a consultee that freight operating companies should sign up to the proposed performance regime to ensure that all train operators are protected by the same mechanism. In terms of the proposed Performance Benchmarks, the model currently used to set the present Performance Benchmarks has taken into account both passenger and freight operations. In relation to the Performance Bonus Regime, the Performance Bonus Regime for HS1 flows from the fact that the relationship between HS1 Ltd and the train operators is asymmetric. It is in the interest of all train operators (both passenger and freight) that both we and our customers are incentivised to perform in order to provide high standard services.

2.14 *Consultee Responses*

Consultees sought further clarity on the treatment of delays off HS1. It was felt that the proposed provision will give rise to significant risk for operators presenting trains onto HS1 from the national rail network, due to the fact that the performance regimes for networks (in particular Network Rail Infrastructure Limited's network) and HS1 are discrete. Compensation payments made by Network Rail Infrastructure Limited or by another train operator for incidents delaying the entry of a train onto HS1, will include no allowance for any subsequent delay occurring on HS1, or for payments made by a freight operating company to other HS1 users, to compensate for any consequential delays it causes. Consultees mentioned that in this situation, the freight operating companies will be exposed to potential losses under the HS1 Performance Regime for incidents caused by third parties off HS1, over which it has no control and in respect of which it is not indemnified.

HS1 Ltd's Consideration

We have fully considered the comments and concerns raised by consultees, however we note that the HS1 performance regime is designed to encourage railway undertakings and HS1 Ltd to minimise disruption and ultimately improve performance of HS1. Delays in a different network will be addressed in accordance with the performance regime for the relevant network, over which the infrastructure manager for that network has full control.

2.15 *Consultee Responses*

One consultee commented that paragraph 5.12 (b) of Part 1 of Section 8 of the HS1 Freight Access Terms (initial statement of allocation of responsibility) should also refer to incidents when no-one can be assigned responsibility.

HS1 Ltd's Consideration

We are happy to include information on the initial statement to show where no-one has been allocated responsibility for an incident and we have updated paragraph 5.1 (b) of Part 1 accordingly.

2.16 *Consultee Responses*

Consultees raised queries relating to the statement of allocated responsibility in paragraph 5.1(a) and 5.2 of Part 1 of Section 8 of the HS1 Freight Access Terms, with a view that the performance regime does not recognise and take account of incidents which may not be able to be allocated until many weeks or months after the occurrence of such incidents.

HS1 Ltd's Consideration

There are provisions for interim arrangements in the performance monitoring system to address delays in obtaining information on the allocation of responsibility for incidents, in the event that such incidents are under investigation. We are of the view therefore that such arrangements are sufficient to address consultee's concerns.

2.17 *Consultee Responses*

Consultees sought clarity on the time limit for adjusting previously issued performance statements and, consequently, performance sums for the purposes of paragraph 5.3 of Part 1.

HS1 Ltd's Consideration

We can confirm that any adjustment to the performance statements would be made promptly after the completion of any investigation under Condition B3.2 of the HS1 Network Code.

2.18 *Consultee Responses*

We were asked by a consultee to review whether the provision making reference to 'no earlier than 5 days' should refer to 'no later than 5 days' (paragraph 5.4(c) of Part 1 of Section 8 of the HS1 Freight Access Terms) to avoid the situation where the negotiations could last a very long time indeed and could be prevented from being resolved in a shorter period by means of the dispute processes.

HS1 Ltd's Consideration

We acknowledge the consultee's view, however the primary purpose of paragraph 5.4(c) of Part 1 of Section 8 of the HS1 Freight Access Terms is to provide a period of five working days for dialogue before the parties can submit the matter to dispute. This ensures that genuine attempts are made to discuss and resolve matters before the dispute resolution process is initiated.

2.19 *Consultee Responses*

One consultee sought to understand why we were not intending to provide information on our own responsible incidents, such consultee believing that such information would be helpful in discussions between the parties about understanding and addressing the underlying causes of poor performance.

HS1 Ltd's Consideration

We are happy to provide such information to the freight operating companies if it could be helpful to seek to improve the performance of such freight operating companies and our own performance.

2.20 *Consultee Responses*

One consultee commented that for the purposes of paragraphs 3 and 4 of Part 2 of Section 8 of the HS1 Freight Access Terms (Train Operator Performance Sums and Train Operator Performance Receipt), there was no visibility of the payments payable pursuant to such provisions to be able to satisfy itself that this was being undertaken correctly.

HS1 Ltd's Consideration

We are happy to provide the train operators with evidence to support the calculations carried out pursuant to paragraph 3 of Part 2 of Section 8 of the HS1 Freight Access Terms. We have included an additional paragraph 3.4 into the HS1 Freight Access Terms to reflect this.

3. Conclusions on Freight Track Charges –June 2009 & February 2011 Consultations

Context & Overview

3.1 This section summarises the various consultations and elements of consultations relating to the freight track access charges. Our consultation documents have included: (i) the ‘Second Consultation on prospective levels and principles of track access charging’ in September 2008, (ii) the June 2009 consultation on the HS1 Freight Access Terms; and (iii) the consultation in February 2011 specifically concerning proposed changes to the Capacity Reservation Charge. To maintain consistency with the rest of the document and to give a clearer picture of consultee responses and how we have addressed them, we organise this section by issue rather than by consultation.

Introduction

3.2 We have established a number of principles in relation to freight charges. As set out in paragraph 21 of our second consultation on charging:

“The proposed charges have also been set so that they should encourage, as far as possible, the maximum use of HS1 subject to the need to recover investment costs and:

- encourage the use of HS1 as a high speed railway for which it was conceived, designed and financed;
- not discourage the use of intermediate stations on HS1; and
- recover investment fairly between different types of user.”

Specifically for freight, paragraph 67 of the consultation document sets out the following:

“HS1 Limited’s main objectives with respect to the freight charging framework are to:

attract freight traffic which can bear the additional costs incurred by HS1 Limited as a result of freight services running on HS1; and

create a flexible charging framework which allows for future adaptation to enable freight services to make a contribution to common costs where possible.”

Further, in paragraph 70:

“The HS1 Line was built primarily for high speed passenger trains with freight as a potential future additional service. Thus freight access charges should reflect the marginal costs to HS1 Limited of providing for freight services. In the context of freight, directly incurred costs can therefore be defined as the long run incremental costs of freight (i.e. the costs that would be avoided in the long run if freight did not operate on the line).”

This means that the historic long-term construction costs are being recovered from passenger services, so any charges to freight in excess of the directly incurred costs will be recovered via mark-up. This is consistent with paragraph 80 of the consultation document:

“...HS1 Limited wishes to encourage the development of new freight markets and does not preclude the possibility that the profitability of services in such markets would enable them to make a contribution to common costs. In such circumstances, HS1 Limited reserves the right to introduce additional charges for such markets on a non-discriminatory basis in the form of a contribution to common costs.”

We do propose mark-ups for high speed freight (to provide a contribution to common costs); however we do not currently propose mark-ups for any other freight sector– the HS1 Network Statement in fact includes a discount. Any mark-ups would be introduced following a consultation around the principles to be applied and such principles will be included in the HS1 Network Statement. Any mark-ups would of course be consistent with the Railway Infrastructure (Access and Management) Regulations 2005), and will be subject to the approval of the ORR (see paragraph 11 of Part 2 of the HS1 Freight Access Terms). We would also expect to consider this matter further as part of the Periodic Review process for Control Period 2.

General - Freight Charges

3.3 *Consultee Responses*

Respondents largely supported the marginal cost approach for freight charges, citing the need to maintain competition with road transport and the nature of freight services (*vis-à-vis* passenger services). Consultees however suggested that the *level* of the charges was too high.

HS1 Ltd's Consideration

Subject to the need to recover any future freight-specific investment (see next section in relation to the investment recovery charge), we are committed to the principle of freight as a marginal user of the infrastructure. Charges have been set on the basis of efficient freight direct costs (avoidable and variable) and we are currently offering a substantial discount for freight operating at night. We will shortly be issuing a consultation about the efficient levels of freight 'avoidable costs' which will give stakeholders an opportunity to consider our calculations, with the outcome of the study needing to be approved by the ORR for implementation in future Framework Freight Track Access Agreements.

Investment Recovery Charge

3.4 *Consultee Responses*

Consultees expressed a request for clarity on our proposals to levy an investment recovery charge on freight operating companies, with one consultee being 'strongly opposed' to such an introduction, in part due to the affordability for the rail freight industry.

HS1 Ltd's Consideration

We have carefully considered consultees' responses on this point. We do not intend to levy an investment recovery charge on freight operating companies unless in future we undertake freight specific upgrades or enhancement, at which time we will seek to recover the cost of such upgrades or enhancements from the freight operating companies at such level as is approved by the ORR. This is consistent with the charging principle that freight is a marginal user of HS1.

We have amended the HS1 Freight Access Terms to reflect the above approach and as such the initial further investment recovery charge will be set at zero.

Congestion Tariff

3.5 *Consultee Responses*

Consultees requested further clarity and questioned the applicability of the congestion tariff.

HS1 Ltd's Consideration

We note that in the HS1 Network Statement, we will only consider the possibility of levying a congestion charge if HS1 is declared congested in accordance with the Railways Infrastructure (Access and Management) Regulations 2005. This has been included in the Freight Access Terms to provide the mechanism for levying such a charge if HS1 is deemed to be congested, subject to the approval of the ORR. Until such time, the charge will be set at zero.

Capacity Reservation Charge

3.6 *Consultee Responses*

Consultees expressed concerns that we are levying a Capacity Reservation Charge and the logic, principles and ultimately the intention of the Capacity Reservation Charge.

HS1 Ltd's Consideration

We have considered the Capacity Reservation Charge continuously across all of our consultations. Regulation 15(1) of the Railways Infrastructure (Access and Management) Regulations 2005 provides for a capacity reservation charge:

15.—(1) The infrastructure manager may levy an appropriate charge for capacity that is requested but not used, and the imposition of this charge must provide incentives for efficient use of capacity.

We set out our proposal for a Capacity Reservation Charge in our Second Charging Consultation (September 2008) based on a charge of 75% of freight OMRC plus a management fee of 7.5% of the freight OMRC charge. In the HS1 2009 Network Statement (Edition Date: August 2009) we envisaged this applying only to day-time freight.

However, as we have learned more about capacity constraints on HS1 relating to freight – particularly the exchange sidings at Ripple Lane – we consider it appropriate to levy a Capacity Reservation Charge on all freight operations. Otherwise, there is a risk that freight operators could block-book capacity and preclude other freight operators from using HS1,

without facing any incentive to run services for all paths booked. The Capacity Reservation Charge will work in tandem with the Use it or Lose It provisions to incentivise the efficient use of the available freight capacity.

We issued a consultation document addressing our proposed revised approach to the Capacity Reservation Charge on 11 February 2011. The consultation highlighted two changes to what was set out in the HS1 Network Statement (Edition Date: August 2009):

- application to night-time as well as day-time freight; and
- reduction in the capacity reservation charge to 25% of the freight OMRC that the freight operator would have paid had it run the service, plus a management fee of 7.5% of the freight OMRC that the freight operator would have paid had it run the service.

We received two responses to the consultation:

- One consultee expressed concern at the introduction of any new charge, particularly since it was not aware of any capacity issues ahead of freight beginning operations on HS1. The respondent also highlighted the need for charges to be efficient, noting the parallel workstream looking at 'freight avoidable costs'. The response suggested that if a charge were to be introduced, then it would support the charge being set at 25% (rather than 75%) of the freight OMRC charge.
- The other consultee noted that it would clearly prefer any charges to be lower rather than higher (and hence supported the proposed reduction in the Capacity Reservation Charge to 25% of the freight OMRC). However, it also noted that any additional charges might deter or delay the introduction of new international freight services, and questioned the basis of the 7.5% management fee. The response also raised a number of unrelated technical issues which we intend to separately discuss with the consultee.

We have made two further changes following the consultation:

- the Capacity Reservation Charge will be 25% of the OMRC A2 (avoidable directly incurred cost) charge which reflects the avoidable directly incurred costs; and
- the 7.5% management fee will not be charged as we acknowledge that the avoidable cost calculation includes a fee to cover our administrative costs in relation to freight services.

We consider that the proposed Capacity Reservation Charge meets the requirements of the Railways Infrastructure (Access and Management) Regulations 2005:

- Charge is for capacity requested not used – this requirement is satisfied as the Capacity Reservation Charge is set at zero unless a Reserved Capacity Right is not utilised.
- Charge must provide incentives for efficient use of capacity – as set out above we believe that the Capacity Reservation Charge will be important (along with Use It Or Lose It and other provisions) in securing efficient booking and use of train paths, particularly in light of possible capacity issues around Ripple Lane.

Freight Wash - Up

3.7 Consultee Responses

Responses to the consultation indicated that consultees are against the concept of a 'wash-up' for freight operating companies in respect of the various charges as set out in paragraph

9 of the HS1 Freight Access Terms, on the basis that such a mechanism will create instability and uncertainty therefore discourage freight traffic from using HS1.

HS1 Ltd's Consideration

The HS1 Freight Access Terms have been revised following discussions with consultees so that charges will be levied in arrears by HS1 Ltd and not in advance. We acknowledge that as charges under the HS1 Freight Access Terms are levied in arrears, the scope for additional payments being required from the freight operating companies will be reduced. However, the wash - up is also a means of reimbursing sums to the freight operating company in the event that services are not operated, for example, due to a HS1 Restriction of Use or a Competent Authority Restriction of Use. It can therefore be beneficial to the freight operating company to have a wash - up mechanism. As such, no changes are proposed to the HS1 Freight Access Terms. It is worth noting that one consultee indicated its support for having the wash - up process in arrears.

4. ORR – June 2009 & February 2011 Consultation

Introduction

4.1 On 7 September 2010, we asked the ORR to advise whether it would be minded to approve a Framework Freight Track Access Agreement for freight services if it incorporated the proposed HS1 Freight Access Terms. During the ORR's review and subsequent discussions, the ORR identified specific concerns. This section summarises the ORR's key concerns alongside how such issues have been addressed.

4.2 *ORR's Comment*

The ORR raised concerns about the inclusion of a 6 day maintenance period within the definition of "Period of Games" and the negative effect that this could have on potential freight operators who are not entitled to use HS1 during the "Period of the Games".

HS1 Ltd's Consideration

Following consideration, to satisfy the ORR's concern we agreed to remove any incorporation of an additional maintenance period from the definition of 'Period of the Games' in the HS1 Freight Access Terms.

4.3 *ORR's Comment*

The ORR suggested amended wording to the definition of Ripple Lane to include the stabling of trains, mindful of the operational layout around the Ripple Lane area. In addition, the ORR highlighted that paragraph 1.4 of Section 3 of the HS1 Freight Access Terms originally referred to stabling rights and provided that HS1 Ltd would distribute these in a manner which is fair and non-discriminatory and which makes best use of stabling capacity.

HS1 Ltd's Consideration

In subsequent discussions with the ORR, we explained the operational layout and capacity constraints at Ripple Lane. Following the discussions the ORR acknowledged our position and agreed that the wording which we originally proposed should apply and also apply in the context of the HS1 Passenger Access Terms. Any change to the HS1 Passenger Access Terms will be considered separately subject to the ORR's approval.

4.4 *ORR's Comment*

The ORR referred to paragraph 2.2 (a) of Section 5 of the HS1 Freight Access Terms which provides that any claim that HS1 Ltd makes against a freight operator for an indemnity for relevant losses excludes those losses resulting from a cancellation or delay in the commencement of a Restriction of Use (unless the delay is attributable to the operator).

HS1 Ltd's Consideration

We agreed that paragraph 2.2 (a) of Section 5 of the HS1 Freight Access Terms would also be incorporated into the HS1 Passenger Access Terms. As a general note, we are committed to review the HS1 Passenger Access Terms in its entirety and make the necessary amendments as a result of the provisions contained in the HS1 Freight Access Terms. Any changes to the HS1 Passenger Access Terms will be subject to the ORR's approval.

4.5 *ORR's Comment*

The ORR queried the definition of Review Event in Section 7 of the HS1 Freight Access Terms which provided that a review event would take place on a Principal Change Date where any anticipated timetabled train movements on HS1 in the current timetable year was at least 4% more or less than the actual number of timetabled train movement on HS1 during the preceding timetable year. The ORR was concerned, given the potentially low level of freight services, that a review could be triggered with a comparatively small change in the number of freight services. This could potentially lead to repeated reviews of the track charges as services materially change during the normal course of business.

HS1 Ltd's Consideration

We advised that the figure was a percentage of the total timetabled passenger and freight movements on HS1 and so would only be triggered when there was a significant change in the number of services. As such, we clarified this in the HS1 Freight Access Terms and we also intend to review the wording in the HS1 Passenger Access Terms. Any changes to the HS1 Passenger Access Terms will be subject to the ORR's approval.

4.6 *ORR's Comment*

The ORR raised concerns with the original proposal for a Capacity Reservation Charge.

HS1 Ltd's Consideration

We considered the ORR's point in some detail and explained to the ORR that a Capacity Reservation Charge is required to prevent a situation where a freight operator could "block" paths, that freight capacity on HS1 was severely constrained and so it was appropriate to levy a Capacity Reservation Charge even if a small number of paths were blocked. In addition, we provided reassurance to the ORR that the intention was that we would not financially benefit from the Capacity Reservation Charge.

At the request of the ORR, HS1 Ltd produced a paper setting out how the proposed Capacity Reservation Charge was consistent with the Railways Infrastructure (Access and Management) Regulations 2005 as detailed in Chapter 3 of this Conclusions Document.

We will charge a Capacity Reservation Charge only in the event that a reserved right is not utilised by a freight operator, with provisions for rebate to that freight operator in the event that the access right is utilised by another freight operator.

4.7 *ORR's Comment*

The ORR considered that the HS1 Freight Access Terms should include a review of the Capacity Reservation Charge as well as the figures contained in Schedule 4 of individual Framework Freight Track Access Agreements which would change as a consequence of an access charges review.

HS1 Ltd's Consideration

Having considered the ORR's views we agreed to include the Capacity Reservation Charge in the definition of 'Review Provisions' in Part 3 of Section 7 of the HS1 Freight Access Terms and also to reflect the consequential changes in Schedule 4 of the individual Framework Freight Track Access Agreements. In addition, we further confirmed that the wording would also be reflected in the HS1 Passenger Access Terms in due course. Any changes to the HS1 Passenger Access Terms will be subject to the ORR's approval.

Annex A – List of respondents to June 2009 Consultation

The following organisations responded to the June 2009 consultation:

DB Schenker (UK) Limited letters dated 28 November 2008 and 31 July 2009

Eurotunnel letters dated 21 December 2009, 9 March 2010, 18 June 2010, 27 July 2010 and 5 August 2010.

Eurostar International Limited response dated June 2009

London & South Eastern Railway Limited letter dated 16 July 2009

Rail Freight Group response dated July 2009

Annex B – List of respondents to February 2011 Consultation

The following organisations responded to the February 2011 consultation:

Rail Freight Group dated 23 February 2011

Europorte Channel and London Carex dated 24 March 2011

Annex C: HS1 Freight Access Terms

A copy of the Freight Access Terms is available to download from www.highspeed1.com