



OFFICE *of the*
RAIL REGULATOR

**CONSULTATION ON PROPOSED
MODIFICATIONS TO RAILTRACK'S
NETWORK LICENCE**

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Regulator's foreword

1. This consultation document sets out my proposals to modify Railtrack's network licence in two respects. The first concerns an asset register. The second is about a code of practice on the company's dealings with third parties.
2. Since taking over as Regulator, I have made it clear that I regard Railtrack's network licence as deficient in several respects. At its vesting and subsequent privatisation, the company was given a regulatory regime which was not adequate to protect and promote the public interest properly. The financial framework did not encourage strong and proactive investment, the company's contracts with train operators were weak and its network licence was not fit for a monopoly infrastructure operator in the private sector.
3. In relation to an asset register, it is vital, both for Railtrack and its customers - including passengers, freight users, train operators, suppliers and funders - that Railtrack has a sound knowledge of the condition, capacity and capability of its assets. Without it, it cannot be an efficient, economic and effective operator. Train operators, rolling stock manufacturers and others making or contemplating investment in railway assets, or who need to know how the network is working and changing, have pressed for reliable and comprehensive information about Railtrack's network.
4. Railtrack has accepted that its asset knowledge and the way in which it is presently organised are, in some important respects, unsatisfactory. In the last two years the company has started and abandoned two projects to tackle these problems. Its third attempt is underway, and it is making progress.
5. However, I am not satisfied that the establishment and maintenance of an appropriate register of assets and asset condition can be left to the discretion of Railtrack. There is significant industry concern in this respect and it is my view that the company's network licence needs to be strengthened to provide a clear and continuing obligation to have a comprehensive asset register.
6. I invite industry and other interested persons to state their needs in this area and how best they may be met.
7. The second draft licence condition concerns Railtrack's dealings with third parties. A large number of persons must deal with Railtrack in connection with the operation and development of passenger and freight services and related matters. These include train operators, rolling stock manufacturers, funders and freight facility developers. I believe it is necessary for Railtrack to deal with the needs of its customers and others in a timely, efficient, competent and co-ordinated way. The experience of Railtrack's

dependent customers in the recent past has not met that standard to a sufficient extent, and I believe that reform is needed.

8. The licence condition on which I am consulting would require Railtrack to develop and honour a code of practice on its dealings with dependent persons. This consultation asks the industry and interested persons of the case for such a code, what it should cover and how it should work. Its objectives are higher standards, consistently met and a better relationship within the industry in its common efforts to improve the services to passengers and freight users.
9. I believe that these proposed licence conditions are an important step in making Railtrack's network licence better fitted for its purpose. They would improve the company's accountability and the standards to which it adheres. I encourage the industry and others to respond fully and constructively to this consultation.

TOM WINSOR
Rail Regulator
September 2000

1. Introduction

Purpose

- 1.1 This document explains two licence modifications that the Regulator proposes to make and invites comments from interested parties on them. The modifications would require Railtrack:
- (a) to establish and maintain a register of the condition, capacity and capability of its assets (see Chapter 2, and the draft licence condition at Annex A); and
 - (b) to develop and comply with a code of practice on its dealings with dependent persons (see Chapter 3, and the draft licence condition at Annex B).

Background

- 1.2 Railtrack's network licence was devised between 1993 and early 1994 and granted on 31 March 1994 at a time when it was expected that Railtrack would remain a publicly-owned corporation. At that time the then Regulator pressed for Railtrack's network licence to include certain conditions which would have brought it into line with the network licences held by infrastructure operators in other privatised industries. The then Government decided that there was no need for such conditions because Railtrack was expected to remain in the public sector. It told the Regulator that if a decision were made to privatise Railtrack, the licence would be reviewed and conditions suitable for a private sector Railtrack would be retrofitted before privatisation. In November 1994 the Government announced its intention to privatise Railtrack. However, although the then Regulator pressed for additional licence conditions, no appreciable change was made to Railtrack's licence. The company was privatised in June 1996 with substantially the same network licence.
- 1.3 Railtrack's network licence has been modified three times:
- (a) on 3 April 1996, to require production of, and compliance with, a systems code (Condition 19);

- (b) on 25 September 1997, concerning Railtrack's obligations to its customers and funders in maintaining, renewing and developing the network (Condition 7); and
- (c) on 18 May 1999, to oblige Railtrack (and train operators) to make known changes to timetables not less than 12 weeks in advance of implementation (Condition 8).

1.4 The present Regulator has made clear that, in a number of respects, he considers that Railtrack's network licence is still not fit for purpose given its private ownership. In November 1999, he announced that he proposed to strengthen Railtrack's accountability by amending its network licence in a number of ways, including the incorporation of requirements to establish and maintain an asset register, and to develop and comply with an enforceable code concerning the manner in which Railtrack deals with dependent customers¹. The Regulator is now seeking comments on draft licence modifications which are designed to achieve these objectives. He has separately sought comments on other proposed licence modifications².

1.5 Consultees are invited to comment on the proposed licence modifications and the specific questions raised in this document. Consultation responses should be sent to:

Rebecca Phillipson
Executive, Network Regulation Policy
Office of the Rail Regulator
1 Waterhouse Square
138-142 Holborn
London
EC1N 2TQ

by 12 October 2000.

1.6 Respondents should indicate clearly if they wish all or part of their responses to remain confidential to ORR. Otherwise it is expected that they will be published in the

¹ *Railtrack's Stewardship of the Network*, Office of the Rail Regulator, London, November 1999.

² See *Periodic Review of Railtrack's Access Charges: Provisional Conclusions on the Incentive Framework*, Office of the Rail Regulator, London, April 2000 and *Periodic Review of Railtrack's Access Charges: Draft Conclusions*, Office of the Rail Regulator, London, July 2000.

ORR library and on its website and they may be quoted from by the Regulator. Where a response is made in confidence, it should be accompanied by a statement which can be published as described above, summarising the submission but excluding the confidential parts. The Regulator may also publish the names of respondents in future documents or on the ORR website, unless a consultee indicates that he wishes his name to be withheld.

Next steps

- 1.7 The Regulator will consider comments received by the due date, and in the light of those comments will consider whether modifications to Railtrack's network licence are justified, and, if so, whether the proposed modifications are appropriate or whether they should be changed. If the Regulator concludes that modifications are necessary, he will seek Railtrack's consent to the modifications in accordance with section 12 of the Railways Act 1993. If Railtrack declines to consent, the Regulator would expect to refer the modifications to the Competition Commission in accordance with section 13 of the Act so that the Commission can determine whether or not the modifications are required to remedy or prevent effects adverse to the public interest.
- 1.8 Copies of this and other ORR documents referred to in this document can be seen on ORR's website (<http://www.rail-reg.gov.uk>) and in the ORR library.

2. *Asset register*

Background

- 2.1 In 1994 Railtrack inherited a diverse array of computerised and physical databases of the condition and capability of its assets, some maintained centrally, others decentralised in zones³. In some cases, data had not been gathered on a systematic basis or in a common format across zones. Railtrack has acknowledged both that the information it has on asset condition, and the way in which it is organised, require improvement.
- 2.2 These inadequacies have given rise to a number of concerns. The Regulator is concerned that, unless Railtrack significantly improves the means by which it records and measures the condition, capacity and capability of its assets, it will be difficult for him and others to measure the extent to which Railtrack's investment in the maintenance, renewal and enhancement of its assets is reflected in appropriate changes in their condition, capacity and capability, having regard to the funding provided to enable Railtrack to meet its stewardship responsibilities. This information will play an important part in future periodic reviews of Railtrack's access charges.
- 2.3 A number of bodies needing information about Railtrack's assets have found that the information available from Railtrack has sometimes been inadequate as to scope or quality, or takes too long to obtain. For example:
- (a) train operators have experienced difficulty in obtaining timely advice on whether they can run existing rolling stock over new routes;
 - (b) rolling stock manufacturers have had difficulty in ascertaining the design parameters of new rolling stock;
 - (c) both train operators and Passenger Transport Executives (PTEs) have had difficulty in obtaining information about the capability and capacity of the network needed to plan future services; and

³ See footnote 1.

- (d) train operators have experienced problems in identifying areas where investment could be targeted to improve performance, because of the lack or inadequacy of information about the existing capability of assets.

2.4 Two previous attempts by Railtrack to construct asset databases have been aborted, and the latest endeavour had to be delayed while Railtrack's IT resources were diverted to prevent Y2K problems arising in its existing software. A study undertaken for the Regulator by Booz Allen & Hamilton concluded that Railtrack had failed to match the achievements of other privatised utilities in developing better asset information and management systems⁴.

The Regulator's initial proposals

2.5 In November 1999, the Regulator set out reasons for his proposals that Railtrack's network licence should be modified to require it to develop and maintain:

- (a) a register of the nature and condition of key asset categories; and
- (b) a database of network capability⁵.

2.6 In brief, the reasons he gave for modifying Railtrack's licence to require it to establish these databases were:

- (a) to ensure that Railtrack possesses and uses the information it needs to maintain and renew the network in accordance with best practice, and in a timely, economic and efficient manner;
- (b) to ensure that the Regulator has the information he needs to monitor Railtrack's compliance with its network licence obligations;
- (c) to assist the Regulator in keeping Railtrack's expenditure requirements under review;

⁴ *Railtrack's Performance in the Control Period 1995-2001: Final Report*, Booz Allen & Hamilton Limited, London, March 1999. This can be seen on ORR's website (<http://www.rail-reg.gov.uk>) and in the ORR library.

⁵ See footnote 1.

- (d) to enable Railtrack to provide timely advice to train operators, rolling stock manufacturers and others on the implications of network capability for new rolling stock, freight terminals, the cost of network enhancements and other requirements;
- (e) to inform Railtrack's own plans for the development of the network; and
- (f) in the light of what the Regulator considered to be unsatisfactory progress hitherto, to ensure that Railtrack did complete an adequate asset register.

Views expressed by other parties

2.7 There was widespread support for these proposals. In January 2000, in its response to consultation by the Regulator about the information needs of train operators⁶, the Association of Train Operating Companies (ATOC) identified the principal categories of information which train operators need from Railtrack in order to make the best use of the network. These categories are:

- “(a) *information about the physical characteristics and capabilities of the network.* This includes basic technical information which train operators need in order to operate trains on the network, order new trains for use on the network or make alterations to existing rolling stock. It includes very detailed route-specific information about (1) the precise physical dimensions of the infrastructure using an absolute gauging methodology (2) the types of rolling stock which are already route cleared for operation on particular parts of the network (3) the EMC [electro-mechanical compatibility] (and related) characteristics of the route, including all aspects of the signalling system etc. (4) the loading characteristics of the route, including maximum axle loads permitted for a range of line speeds and (5) the precise track geometry of the route, including curve and cant;
- (b) *information about the capacity of the network.* This includes (1) details of how much spare capacity exists at present (2) when capacity which is presently sold will come free and (3) to the extent that confidentiality permits, how the aspirations of other users will affect the amount of spare capacity;

⁶ *Model Clauses for Track Access Agreements: A Consultation Document*, Office of the Rail Regulator, London, January 2000.

- (c) *information about the railway timetable.* This includes how the available capacity translates into timetables – in effect, the capacity information identified above needs to be translated into information about practical, usable capacity which the TOCs [train operating companies] can use to assess the value to them of purchasing that capacity; and
- (d) *information about changes over time to any of the above information.* This includes (1) changes to the physical network which are proposed (both firm proposals, where projects are well developed, and less firm proposals, where the project is still in the design phase) (2) proposals for changes to the timetable, as a result of its redesign for efficiency purposes or the implementation of other access deals with other operators and (3) forward planning of possessions;
- (e) *information about the maintenance and operation of the network.* For example, relating to the maintenance policies adopted. This is needed to assess how policies and policy changes may affect the TOCs' own operations and train maintenance;
- (f) *information about Railway Group Standards and changes to Railway Group Standards in advance of formal proposals for change.* This is needed in order to assess what the likely effect of future changes being considered might be, in particular when considering significant investment in new rolling stock or services;
- (g) *information about the cost and timetable for implementing particular upgrades and other schemes.* An essential part of developing new services and new rolling stock is the determination of what changes to the network and its operations will need to be made, how long these changes will take and how much they will cost to implement; and
- (h) *advance information about possible changes to the Rules of the Plan.*⁷

⁷ Rail Regulator's consultation on Model Clauses for Track Access Agreements: ATOC Response, Association of Train Operating Companies, London, January 2000. This can be seen on ORR's website (<http://www.rail-reg.gov.uk>) and in the ORR library.

- 2.8 ATOC added that “the information referred to in the [preceding] paragraph should be supplied:
- (a) in the case of items (a) to (c), (e) and (f), on ‘demand’ and should be kept up to date from day to day; and
 - (b) in the case of the remaining items, according to a predetermined timetable between Railtrack and the TOCs [train operating companies], against which a general obligation to act in an efficient, economic and timely manner should apply”.
- 2.9 ATOC went on to say that “financial remedies and remedies to secure performance should be available for failure to comply with these obligations”.
- 2.10 The shadow Strategic Rail Authority (sSRA), responding to the same consultation⁸, said it that wanted Railtrack to supply comprehensive information to train operators within defined timescales, including information on gauging, weight and speed restrictions, traction supply, signal immunization, route capability, proposed projects and possessions, Rules of the Route and Rules of the Plan⁹.
- 2.11 In February 2000, the Health and Safety Executive said that it very much welcomed the proposal for a licence condition, and believed that Railtrack needed to “sharpen up” its asset monitoring system. It noted that any system which delivered outputs which the Regulator would expect for reasons of good management and service delivery reasons should automatically maintain or improve a good safety margin as well. It said that moves to ensure that Railtrack delivered on its proposals for an asset register “would not go amiss”, given that previous commitments to addressing these weaknesses had not been delivered.
- 2.12 In their responses to the Regulator’s consultation on Railtrack’s 2000 Network Management Statement¹⁰ published in March 2000, train operators called for better information about:

⁸ See footnote 7.

⁹ Letter to Rail Regulator from shadow Strategic Rail Authority dated 1 March 2000. This can be seen on ORR’s website (<http://www.rail-reg.gov.uk>) and in the ORR library.

¹⁰ *2000 Network Management Statement*, Railtrack PLC, London, March 2000.

- (a) the capability of the network (including capacity utilisation and spare capacity); and
- (b) the age, condition, and expected life and planned renewal date of assets.

2.13 In April 2000, the National Audit Office (NAO) gave its support to the steps being taken by the Regulator to secure a better picture of the network's assets¹¹. It noted that passengers, freight users and taxpayers were paying substantial amounts of money for Railtrack to maintain and renew the network, and it was important for the Regulator to be able to assess what was being achieved with this money. In a report published in August 2000, following its consideration of the NAO report, the Public Accounts Committee endorsed the Regulator's proposal for a licence modification in relation to the establishment of an asset register¹².

2.14 In July 2000, the Regulator had discussions with Railtrack about the proposal for a licence condition combining the requirements for a register of asset condition with a database of the capability of assets, and has taken account of Railtrack's views in formulating his proposals. Railtrack said that it supported the principle of a licence condition relating to the maintenance of an asset register for Railtrack's overall stewardship of the network. In particular, it was willing to support a condition requiring it to develop and maintain an asset register. It said that it was developing a register that would contain information enabling each asset to be identified and located, as well as information about the condition of assets except where that was 'inappropriate' and about the inspection regime where that was 'relevant', as well as other asset-specific information.

2.15 Railtrack also agreed that there is a legitimate requirement for train manufacturers and other third parties to have information concerning the capability of the network. However, it suggested that a licence condition is not the best way of meeting this need and that alternative means should be examined. For the reasons set out in paragraphs 2.25 to 2.26 below, the Regulator accepts that there may be better alternatives to a licence modification to secure access by third parties to the information they need; he would welcome the views of consultees on the merits of the options. In the meantime,

¹¹ *Ensuring that Railtrack maintain and renew the railway network*, Comptroller and Auditor General, London, 12 April 2000.

¹² *The Office of the Rail Regulator: Ensuring that Railtrack maintain and renew the railway network*, 35th Report of the House of Commons Committee of Public Accounts, The Stationery Office Limited, London, 23 August 2000.

the licence condition that appears in Annex A does not provide for third party access to the asset register.

2.16 The Regulator believes that the reasons given by those supporting the requirement for an asset register underline his view that an appropriate modification of Railtrack's network licence is consistent with his duties under section 4 of the Railways Act 1993. He recognises that Railtrack has made progress with its own plans for an asset register, but is not satisfied that Railtrack can be relied upon to remedy the present inadequacies of its asset knowledge without the establishment and maintenance of an asset register becoming a licence obligation. Moreover, in addition to the reasons given in his November 1999 document and by other parties, there are two further reasons for a licence condition:

- (a) it would allow the Regulator to ensure that the interests of parties other than Railtrack who may need information about Railtrack's assets are taken into account in determining the scope, detail and accuracy of the asset register; and
- (b) it would place a continuing obligation upon Railtrack to maintain the asset register, rather than allowing Railtrack the discretion to change its policy at will.

Draft licence condition

Primary obligation and purpose

2.17 Paragraph 1 of the draft licence condition at Annex A sets out the primary obligation of the licence holder to establish a register of relevant assets by given date and thereafter to maintain it. Paragraph 2 states the purpose of the asset register, which is to ensure that Railtrack holds and has access to knowledge of the condition, capability and capacity of the assets in the manner and to the extent and standard which best achieves the maintenance, renewal and development of the network, and the performance of any other of its activities in respect of which the Regulator has functions.

Guidelines

2.18 Paragraph 3 of the draft condition requires the licence holder to prepare guidelines specifying the detail and form of the register and the information in it. Paragraphs

2.22 to 2.23 below give examples of matters which may be expected to be provided for in the guidelines. Paragraph 4 of the draft condition requires the guidelines to satisfy the purpose set out in paragraph 2, to make provision for information to be kept up to date, and to be approved and published. Paragraph 7 allows the Regulator to prepare guidelines if the licence holder does not do so.

- 2.19 Paragraphs 5 and 6 set out the Regulator's powers to approve or modify the guidelines, and the procedures for doing so. Paragraph 17 requires the licence holder to comply with guidelines approved by the Regulator. Paragraphs 11 to 16 set out the circumstances in which either the licence holder or the Regulator may vary the guidelines, and the procedures for doing so.

Derogations and exclusions

- 2.20 Paragraph 8 provides that the Regulator may grant relief from the obligation to comply with any part of the Condition or the guidelines and to exclude from the definition of 'relevant assets' assets of such descriptions or classes as may be specified in the guidelines. Derogations and exclusions may relate to assets to which the Condition applies, and may be for particular periods and subject to particular conditions (paragraph 9). Paragraph 10 sets out the circumstances in which derogations and exclusions can be granted or agreed to.

Records and compliance monitoring

- 2.21 The licence holder is obliged to notify the Regulator of changes to the asset register to the extent that he requires (paragraph 18), and to maintain a record of the actions it has taken to comply with the Condition, and supply that record to the Regulator upon request (paragraph 19).

Content of the guidelines

- 2.22 The guidelines are to be prepared to ensure that the asset register satisfies the purpose provision in paragraph 2 of the draft Condition. The Regulator expects that the following list - which is included by way of example - would be included in that part of the guidelines which specifies the detailed coverage of the register:
- (a) the assets which constitute relevant assets (which will make clear which assets are to be included in the asset register, and which are not);

- (b) their location, condition, capability and capacity;
- (c) their expected useful lives;
- (d) the dates on which they were installed;
- (e) the dates on which they were last inspected and the nature and extent of that inspection;
- (f) the frequency or regularity with which they should be, have been, are and will be inspected, and the nature and extent of the inspections in question;
- (g) in relation to particular relevant assets and classes and description of relevant asset specified in the guidelines:
 - (i) the use made of the relevant assets in question, using such measures as are specified in the guidelines; and
 - (ii) a statement of the amount of use which would require changes to the frequency and regularity of inspections, or changes in the nature and extent of inspections, and what those changes should be;
- (h) their relationship with other relevant assets and with other railway assets (including in matters of gauge, power supply, clearance, axle loading, line speed and electromagnetic compatibility, classified in such manner as are specified in the guidelines);
- (i) the steps taken to carry out work (whether of maintenance, modification, renewal, enhancement, replacement, improvement or development) on or in relation to the assets and the plans for such work to be done in the future;
- (j) the effects (if any) which such work or the introduction and use of other railway assets (for example, rolling stock) on or in relation to relevant assets will have or is likely to have on the maintenance or operation of relevant assets and those other railway assets, or on the operation of relevant assets or other railway assets on or in relation to them, or the maintenance of relevant assets or other railway assets; and

- (k) any changes to relevant assets which the licence holder or any other person has proposed or intends or expects to propose, or which have been proposed or which are expected to be proposed by any other person.

2.23 In addition to describing the scope of the asset register, the guidelines (in combination with the provisions for derogations and exclusions) are a mechanism for ensuring that the degree of detail, completeness, accuracy and coverage of the information in the asset register are no more and no less specific than they need to be. Thus the guidelines:

- (a) would prescribe the different information required for different classes of asset. For example, different levels of aggregation will be appropriate for different types of asset;
- (b) would prescribe different levels of accuracy for different classes of asset. For example, the inspection regime for different types of asset varies, so that the degree to which the information on the register is up to date will vary for different classes of assets;
- (c) would prescribe the time needed to populate the asset register fully with information. For example, given the different frequencies of inspection for different classes of asset, it may be possible to provide information on all track within a few months, while information on bridges and viaducts may take much longer to collect; and
- (d) would prescribe which classes of assets could be excluded from the asset register, either permanently or temporarily.

2.24 The Regulator considers that Railtrack would be best placed to prepare the guidelines. As the network operator, it should already have a good understanding about how an asset register should be structured to meet its own information needs, as well as those of other persons who require information from time to time. Indeed, the work it has already undertaken on developing its asset register will assist in this process.

Third party access to information

2.25 As indicated in paragraph 2.15 above, the Regulator accepts that third party access to information could be achieved in a number of ways, including:

- (a) a further licence condition;
- (b) an extension of the Regulator's presently proposed licence condition;
- (c) changes to Railway Group Standards;
- (d) the introduction of model clauses for track access agreements covering the provision of information;
- (e) in relation to information needed for the introduction of rolling stock, contracts of the kind established between Railtrack and two Virgin companies for vehicle and route acceptance¹³; or
- (f) the introduction of new provisions in the Track Access Conditions (the Network Code).

2.26 Each of these approaches would have different implications for enforcement:

- (a) the first three of these options would involve enforcement of the obligation only by the Regulator. The procedures for dealing with breaches of a licence condition (including breaches of a Group Standard) could be protracted, thus making it difficult for aggrieved parties to obtain timely remedies. Moreover, even if a licence breach has been established, an injured party can only claim financial compensation from the licence holder if there is a breach of an enforcement order following a licence breach (which may be too late) and the damage arises in consequence of that breach; the Regulator has no power to award financial compensation to an injured party following a licence breach and the enhancements of the enforcement regime (in the Transport Bill) do not go so far as to allow an injured party to make a claim for damages against a licence holder for a past breach of its licence;
- (b) model clauses and vehicle and route acceptance contracts would create a direct contractual relationship between those seeking the information and Railtrack, the terms of which could ultimately be determined by the Regulator. This

¹³ See for example *Vehicle and Route Acceptance Agreement between Railtrack PLC and West Coast Trains Limited in relation to new rolling stock to be designed, built and introduced for use on Railtrack's network*. 1 May 1998. This can be seen on ORR's website (<http://www.rail-reg.gov.uk>) and on ORR's public register.

approach would enable contractual enforcement by individual parties to the contracts but would not allow those who could not obtain such contracts¹⁴ to require such information. This would potentially exclude a number of important stakeholders, including funding bodies such as the sSRA, PTEs and local authorities, and those undertaking work for railway parties or seeking to do so. It is possible that this could be addressed in respect of new contracts under the Contracts (Rights of Third Parties) Act 1999, which enables persons other than the parties to a contract to be given enforceable rights under that contract; and

- (c) the last of these options would be based on the Regulator's proposal to make the Track Access Conditions a Network Code¹⁵. It would involve amending the Track Access Conditions to create new rights for parties to access agreements with Railtrack in respect of information requirements; and under the Contracts (Rights of Third Parties) Act 1999 giving persons other than those parties the benefit of these rights. Thus, these new rights would be capable of being enforced by the third parties on whom they were conferred.

Issues for consultation

2.27 Consultees are invited to comment on the proposed licence condition at Annex A, and in particular on:

- (a) the public interest and commercial reasons for or against a licence condition requiring Railtrack to establish and maintain an asset register;
- (b) whether the matters specified in paragraph 2.22 should be covered in the guidelines and whether any should instead be covered explicitly on the face of the licence;

¹⁴ To fall within the Regulator's jurisdiction under section 17 of the Railways Act 1993, the contract would have to be an access contract. It is important to bear in mind that an access contract is a contract for the allocation of capacity of a railway facility. It is not necessary for the holder of an access contract to wish himself to operate trains. It is quite in order for a company to be a party to an access contract, buying trainpaths and associated rights, whilst arranging for the trains which use those trainpaths to be operated for him by another company (one which already holds the necessary operating licence and safety case under the Railways (Safety Case) Regulations 1994). Vehicle and route acceptance contracts which contain permission to use the network (e.g. test paths) are access contracts.

¹⁵ *Model Clauses for Track Access Agreements: Provisional Conclusions*, Office of the Rail Regulator, London, July 2000.

- (c) the date by which the guidelines required (by paragraph 4 of the draft condition) should be submitted to the Regulator for approval, and the date by which the asset register should be established (paragraph 1 of the draft condition);
- (d) any derogations which the Regulator should make to provide relief from compliance with any part of the Condition, and if so, why, for how long and to what extent; and
- (e) the exclusion of any asset or class of assets from the definition of 'relevant assets' to be included in the asset register.

2.28 In relation to the information needs of parties other than Railtrack, consultees' views are invited on:

- (a) who needs enforceable rights in respect of information about Railtrack's network;
- (b) the nature and detail of the information they need; and
- (c) the appropriate mechanism for giving them rights to the information.

3. Dealings with dependent persons

Background

Inadequacy of existing arrangements

- 3.1 Railtrack is the monopoly owner and operator of the national rail infrastructure. A range of different stakeholders depend on Railtrack, including train operators, long-term funding bodies such as the shadow Strategic Rail Authority (sSRA) and Passenger Transport Executives (PTEs), those bodies who may provide one-off funding (e.g. local authorities) and those working for or seeking to work for railway parties. It is important that in its dealings with such dependent persons Railtrack is, and is seen to be, fair, reasonable, responsive, prompt and competent.
- 3.2 The existing arrangements do not require Railtrack to deal with all dependent persons in these ways in all circumstances. The rights of such persons vary according to their status and the circumstances. Train operators enjoy some protection through their access agreements and the access provisions of the Railways Act 1993. The Regulator is proposing to strengthen this through model clauses for track access agreements. He has published provisional conclusions on model clauses for track access agreements and announced his intention to produce model clauses for other access agreements¹⁶. These proposals provide for each party to such an agreement to act with due efficiency and economy and in a timely manner, including in all respects with that degree of skill, diligence, prudence and foresight which should be exercised by a skilled and experienced network operator and train operator, as appropriate.
- 3.3 Such protection as is, or could be, afforded by access agreements does not extend to matters other than access matters, or to matters outside the contractual arrangements (e.g. pre-contract negotiations). Furthermore, there are other dependent persons for whom the access regime provides little or no protection. Some of the bodies providing long-term funding to the railways (e.g. the Franchising Director and PTEs) also have access agreements with Railtrack, but these do not relate to all parts of the network in which they may have an interest, nor do they cover all circumstances in which they might have dealings with Railtrack. Other dependent persons have no access agreements at all. These include bodies which may provide funding on a one-off basis

¹⁶ See footnote 6.

(e.g. local authorities) and organisations undertaking work for railway parties (e.g. rolling stock manufacturers¹⁷, contractors and consultants) or seeking to do so.

3.4 The Regulator has in the past taken steps to address particular deficiencies in Railtrack's dealings with dependent persons. For example, in 1998, he secured undertakings from Railtrack to comply with Condition 7 of its network licence by putting in place procedures for:

- (a) assessing the reasonable requirements of its customers and funders;
- (b) affording train operators and funders a reasonable opportunity to procure enhancements as part of other maintenance, renewal or enhancement works; and
- (c) initiating and carrying out enhancements, including the way in which it makes its costs transparent to train operators and funders so as to demonstrate that the work will be carried out in accordance with best practice and in a timely and efficient manner.

3.5 However, the Regulator is aware of a number of cases in which dependent persons have complained of difficulties in their dealings with Railtrack. These include:

- (a) negotiations and consultation on new access rights, where following a number of hearings the Regulator has criticised the timeliness, transparency and co-ordination of Railtrack's approach to negotiations and third party consultation;
- (b) complaints by train operators and others that Railtrack takes a long time to prepare estimates for new work, and that these estimates are sometime inaccurate and lack transparency;
- (c) complaints by train operators that Railtrack has failed to adhere to committed timetables for completing renewal and enhancement works;

¹⁷ It should be remembered that parties who may need to buy capacity on the network, for example test paths for new trains, can use section 17 of the Railways Act 1993 to obtain those rights. A contract which the Regulator has directed a facility owner to enter into under section 17 is an access contract.

- (d) complaints by funders that procedures to procure works as part of other planned works do not allow sufficient time to respond effectively; and
- (e) complaints by train operators and freight users about insufficient advance warning of planned possessions for engineering purposes, and short notice changes to those plans.

3.6 In November 1999¹⁸, having regard to the concerns expressed by train operators and funders, the Regulator announced his intention to propose a licence condition requiring Railtrack to develop an enforceable code of practice setting out best practices in the way Railtrack deals with its customers. He considers that there may be merit in extending the benefits of such a code to any person having dealings with Railtrack in connection with the provision or contemplated provision of services relating to railways. This would include, for example, rolling stock manufacturers and those carrying out works for or on behalf of train operators.

Draft licence condition

3.7 A summary of the draft condition is set out in the following paragraphs. The text of the condition is at Annex B.

Scope and purpose

3.8 Paragraph 1 of the draft condition would require Railtrack to produce a code of practice covering its dealings with other persons arising out of the provision or contemplated provision of services relating to railways. It would be required to produce this code in consultation with the Regulator and others likely to be affected, within four months of the entry into force of the condition. It provides that the code should require Railtrack, in its dealings with relevant third parties, to adhere to standards of due efficiency and economy and timeliness, including skill, diligence, prudence and foresight, which should be attained by a skilled and experienced network facility owner and operator having the functions which Railtrack has. Paragraph 4 would enable the Regulator to prepare the code if Railtrack were to fail to do so.

¹⁸ See footnote 1.

Approval, modification and variation of the Code

3.9 Paragraph 2 of the draft condition would empower the Regulator to approve the code submitted by Railtrack, with or without modifications, subject to consultation with Railtrack and other persons he considers appropriate. Paragraph 3 sets out the conditions to be met by modifications. Paragraphs 4 to 8 and paragraph 10 set out the circumstances in which the code may be varied, and the procedures for doing so.

Compliance and relief

3.10 Paragraph 9 would require Railtrack to comply with guidelines approved by the Regulator, while paragraph 12 would enable the Regulator to relieve Railtrack of the obligation to comply with the code to the extent set out in directions.

Issues for consultation

3.11 The Regulator seeks the views of consultees on:

- (a) the public interest and commercial reasons for or against a licence condition requiring Railtrack to prepare and comply with a code of practice on its dealings with dependent persons;
- (b) the proposed scope of the code and whether the persons stated to be intended to benefit are appropriate; and
- (c) whether there are any aspects of best practice from which Railtrack should be relieved, and, if so, why and to what extent.

Annex A: Text of draft condition on Railtrack's asset register

CONDITION []: ASSET REGISTER

Primary obligation

1. By [state date] the licence holder shall establish and thereafter shall maintain a register of relevant assets.

Purpose of asset register

2. The purpose of the asset register is to ensure that the licence holder holds, and has appropriate access to and records of, knowledge of the relevant assets, including knowledge of their condition, capability, capacity and any other characteristic relevant to, and in the manner and to the extent and standard which best achieves:
 - (a) the maintenance of the network;
 - (b) the renewal and replacement of the network;
 - (c) the improvement, enhancement and development of the network; and
 - (d) the performance of any other of its activities in respect of which the Regulator has functions.

Guidelines

3. The licence holder shall prepare guidelines in accordance with paragraph 4, specifying the detail and form of the asset register, the information in it and the methods (including criteria of measurement) to be used in it.
4. The guidelines provided for under this Condition:
 - (a) shall be in writing;
 - (b) shall be submitted to the Regulator for his approval by [state date];

- (c) shall satisfy the purpose set out in paragraph 2;
 - (d) shall state the extent to which the asset register shall be up to date:
 - (i) in any respect; and
 - (ii) in relation to assets or descriptions or classes of asset; and
 - (e) shall be published in such manner as shall most likely bring them to the attention of persons likely to be affected by them.
5. The Regulator may approve the guidelines as submitted to him by the licence holder or, after consultation with the licence holder and such other persons as he considers appropriate and having regard to the result of such consultation, approve them with such modifications as he considers necessary or expedient for the licence holder to comply with the purpose set out in paragraph 2.
6. Any modifications to the guidelines made by the Regulator under paragraph 5:
- (a) shall be in writing;
 - (b) shall comply with the purpose set out in paragraph 2; and
 - (c) shall be given to the licence holder by serving a copy of them on it.
7. If the licence holder fails to submit guidelines to the Regulator as provided for in paragraph 4, the Regulator may prepare guidelines in place of the licence holder. Any guidelines prepared by the Regulator shall accord with the provisions set out in subparagraphs (a) to (c) of paragraph 6 and shall come into effect on such date, or the happening of such event, as shall be specified in the guidelines.

Derogations and exclusions

8. The Regulator may:
- (a) grant relief from the obligation to comply with any part of this Condition or any part of the guidelines; and

- (b) permit the licence holder to exclude from the definition of "relevant assets" assets of such descriptions or classes as shall be specified in the guidelines.

9. Without prejudice to the generality of paragraph 8, derogations or exclusions under paragraph 8 may be granted:

- (a) as to the assets or descriptions or classes of assets to which this Condition applies; and
- (b) for such time and subject to such conditions as the Regulator may specify by notice in writing to the licence holder.

Circumstances in which derogation or exclusion may be granted

10. The Regulator may grant a derogation or an exclusion:

- (a) on his own initiative or on the application of any person; and
- (b) after consulting the licence holder and such other persons as he considers appropriate.

Power to vary and power to require variation

11. Subject to the approval of the Regulator, the licence holder may vary and, if the circumstances so require, shall vary in the appropriate manner any part of the guidelines.

12. A variation made under paragraph 11:

- (a) shall be in writing;
- (b) shall be submitted to the Regulator for his approval not less than 30 days before it is to come into effect; and
- (b) shall satisfy the purpose set out in paragraph 2.

13. In relation to a variation submitted to him by the licence holder, the Regulator may:
 - (a) approve the variation as submitted;
 - (b) disallow the variation; or
 - (c) after consultation with the licence holder and such other persons as he considers appropriate and having regard to the result of such consultation, approve it with such modifications as he considers necessary or expedient so as to satisfy the purpose set out in paragraph 2.

14. Any modifications to a variation made by the Regulator under paragraph 13:
 - (a) shall be in writing;
 - (b) shall comply with the purpose set out in paragraph 2; and
 - (c) shall be given to the licence holder by serving a copy of them on it.

15. If the Regulator fails to approve (with or without modifications) a variation submitted to him under paragraph 12 before the date it is intended to have effect, the variation shall come into effect on that date unless the Regulator disallows the variation, in which case it shall not come into effect.

16. The guidelines shall have effect with such variations as the Regulator shall determine to be necessary or expedient and specify in a notice given by him to the licence holder. Any such variation must comply with paragraph 4 (c) and shall not have effect unless:
 - (a) it appears to the Regulator that the guidelines are no longer sufficient to satisfy the purpose; and
 - (b) the Regulator has first consulted the licence holder and such other persons as he considers appropriate.

Compliance

17. The licence holder shall comply with the guidelines as approved by the Regulator or, where no such approval has been given, as prepared by the Regulator under paragraph 7 or 16 or as varied and having effect pursuant to paragraph 15. Guidelines which have not, under this Condition, been approved, made by the Regulator or authorized under paragraph 15 (as the case may be) shall have no effect.

Records and compliance monitoring

Notification of changes

18. To the extent that the Regulator may request, the licence holder shall give notice to him of any deletions, additions or modifications of or to the asset register by such date and in such form as the Regulator may specify by notice in writing to the licence holder.

Records

19. The licence holder shall establish and maintain, for such time as shall be specified in the guidelines, records of the actions it has taken to comply with its obligations under this Condition and upon request the licence holder shall provide the Regulator with those records.

Definitions and interpretation

Definitions

20. In this Condition:

“asset”	includes property, real or personal, heritable or moveable, tangible or intangible, in which the licence holder has a relevant interest;
“asset register”	means the register referred to in paragraph 1 of this Condition;
“derogation”	means relief from the obligation to comply with this Condition, granted by the Regulator under paragraph 8 of this Condition;

- “excluded assets” means assets which are the subject of an exclusion granted under paragraph 8 of this Condition;
- “guidelines” means guidelines established in accordance with this Condition;
- “network” includes, where the licence holder has any estate or interest in, or right over, a station or light maintenance depot, such station or light maintenance depot;
- “relevant assets” means assets in which the licence holder has a relevant interest, but does not include excluded assets; and
- “relevant interest” in relation to an asset, means an interest of the licence holder in that asset (including as owner, licensee, occupier, operator, lessee (of whatever rank) or the holder of any other right), legal or beneficial.

Interpretation

21. In this Condition:

- (a) the words "including" and "in particular" shall be construed as being by way of illustration or emphasis and shall not limit or prejudice the generality of any foregoing words;
- (b) where this Condition confers a power or imposes an obligation, it is implied, unless the context otherwise requires, that the power may be exercised and the obligation is to be performed from time to time as occasion requires;
- (c) references to an asset of, or belonging to, the licence holder include a relevant interest of that person in that asset; and
- (d) where the context so demands the singular shall include the plural and vice versa.

Annex B: Text of draft condition on code of practice on Railtrack's dealings with dependent persons

CONDITION []: CODE OF PRACTICE ON RAILTRACK'S DEALINGS WITH DEPENDENT PERSONS

Scope and purpose

1. The licence holder shall, in consultation with the Regulator and all persons liable to be materially affected thereby, within four months of the coming into force of this condition, prepare and at all times have in force and (subject to paragraph 13) shall comply with a code:
 - (a) covering its dealings with and in relation to other persons arising out of or in connection with the provision or contemplated provision of services relating to railways by or on behalf of the licence holder and all things incidental thereto including the maintenance and construction of any railway facility; and
 - (b) which is designed so as to ensure that in such dealings with all such persons the licence holder shall act with due efficiency and economy and in a timely manner, including in all respects with that degree of skill, diligence, prudence and foresight which should be exercised by a skilled and experienced network facility owner and operator having the functions which the licence holder has.

General

2. The Regulator may approve the code as submitted to him by the licence holder or, after consultation with the licence holder and such other persons as he considers appropriate and having regard to the result of such consultation, approve them with such modifications as he considers necessary or expedient for the licence holder to comply with the purpose set out in paragraph 1.
3. Any modifications to the code made by the Regulator under paragraph 2:
 - (a) shall be in writing;

- (b) shall comply with the purpose set out in paragraph 1; and
 - (c) shall be given to the licence holder by serving a copy of them on it.
4. If the licence holder fails to submit the code to the Regulator as provided for in paragraph 1, the Regulator may prepare the code in place of the licence holder. Any code prepared by the Regulator shall accord with the provisions set out in subparagraphs (a) to (c) of paragraph 3 and shall come into effect on such date, or the happening of such event, as shall be specified in the code.

Power to vary and power to require variation

5. Subject to the approval of the Regulator, the licence holder may vary and, if the circumstances so require, shall vary in the appropriate manner, any part of the code.
6. A variation made under paragraph 5:
- (a) shall be in writing;
 - (b) shall be submitted to the Regulator for his approval not less than 30 days before it is to come into effect; and
 - (c) shall satisfy the purpose set out in paragraph 1.
7. In relation to a variation submitted to him by the licence holder, the Regulator may:
- (a) approve the variation as submitted;
 - (b) disallow the variation; or
 - (c) after consultation with the licence holder and such other persons as he considers appropriate and having regard to the result of such consultation, approve them with such modifications as he considers necessary or expedient so as to satisfy the purpose set out in paragraph 1.
8. Any modifications to a variation made by the Regulator under paragraph 7:
- (a) shall be in writing;

- (b) shall comply with the purpose set out in paragraph 1; and
 - (c) shall be given to the licence holder by serving a copy of them on it.
9. If the Regulator fails to approve (with or without modifications) a variation submitted to him under paragraph 6 before the date it is intended to have effect, the variation shall come into effect on that date unless the Regulator disallows the variation, in which case it shall not come into effect.
10. The code shall have effect with such variations as the Regulator shall determine to be necessary or expedient and specified in a notice given by him to the licence holder. No such variation shall have effect unless:
- (a) it appears to the Regulator that the code is no longer sufficient to satisfy the purpose; and
 - (b) the Regulator has first consulted the licence holder and such other persons as he considers appropriate
11. Insofar as the code, under this Condition, has not been approved, made by the Regulator or authorized under paragraph 9 (as the case may be) it shall have no effect.

Miscellaneous provisions

12. The licence holder shall publish the code or cause it to be published on its website.
13. The Regulator may from time to time (following consultation with the licence holder and such persons as the Regulator believes may be materially affected thereby) issue directions relieving the licence holder of its obligations to implement or comply with the code in respect of such parts of the licence holder's business and to such extent as may be specified in the directions.

Interpretation

14. In this Condition:

- “code” means the code referred to in paragraph 1 (including every revision thereof) as approved from time to time by the Regulator;
- “railway facility” has the meaning given by the Railways Act 1993; and
- “services relating to railways” has the meaning given by clause 230 of the Transport Bill as introduced in the House of Lords.