

SCHEDULES

SCHEDULE 10

Article 40

FOR PROTECTION OF NETWORK RAIL INFRASTRUCTURE LIMITED

1. The following provisions of this Schedule shall, unless otherwise agreed in writing between DLRL and Network Rail Infrastructure Limited, have effect.

2. In this Schedule—

“C2C” means C2C Limited and includes its successors from time to time;

“SET” means South Eastern Trains Limited and includes its successors from time to time;

“construction” includes execution, placing, alteration and reconstruction and “construct” and “constructed” have corresponding meanings;

“the engineer” means an engineer appointed by Network Rail Infrastructure Limited for the purposes of this Order;

“EWS” means English Welsh and Scottish Railway Limited and includes its successors from time to time;

“network licence” means the network licence, as the same is amended from time to time, granted to Network Rail (then called Railtrack PLC) by the Secretary of State in exercise of his powers under section 8 of the 1993 Act;

“Network Rail” means Network Rail Infrastructure Limited and any associated company of Network Rail Infrastructure Limited which holds property for railway purposes, and for the purpose of this definition “associated company” means any company which is (within the meaning of section 736 of the Companies Act 1985⁽¹⁾) the holding company of Network Rail Infrastructure Limited, a subsidiary of Network Rail Infrastructure Limited or another subsidiary of the holding company of Network Rail Infrastructure Limited;

“plans” includes sections, designs, drawings, specifications, soil reports, calculations, descriptions (including descriptions of methods of construction), staging proposals, programmes and details of the extent, timing and duration of any proposed occupation of railway property;

“railway operational procedures” means procedures specified under any access agreement (as defined in the 1993 Act) or station lease;

“railway property” means any railway belonging to Network Rail Infrastructure Limited and—

(a) any station, land, works, apparatus and equipment belonging to Network Rail Infrastructure Limited and directly related to any such railway; and

(b) any easement or other property interest held by or for the benefit of Network Rail and directly related to any such railway;

“relevant costs” means the costs, direct losses and expenses (including loss of revenue) reasonably incurred by each train operator as a consequence of any restriction of the use of Network Rail’s railway network as a result of the construction or failure of a specified work or any such act or omission as mentioned in paragraph 14(1).

(1) 1985 c. 6.

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“specified work” means so much of any of the authorised works as is situated upon, across, under, over or within 15 metres of, or may in any way adversely affect, railway property; and
“train operator” means any person who is authorised to act as the operator of a train by a licence under section 8 of the 1993 Act.

3.—(1) Subject to paragraph (5), DLRL shall not pursuant to the powers of this Order, without the consent of Network Rail Infrastructure Limited acquire or enter upon, take or use, whether temporarily or permanently or acquire any new rights over any railway property.

(2) DLRL shall not exercise the powers conferred by sections 271 or 272 of the 1990 Act, as applied by Schedule 9 to this Order, in relation to any right of access of Network Rail to railway property, but such right of access may be diverted with the consent of Network Rail Infrastructure Limited.

(3) DLRL shall not in the exercise of the powers conferred by this Order prevent pedestrian or vehicular access to any railway property, unless preventing such access is with the consent of Network Rail Infrastructure Limited.

(4) Where Network Rail Infrastructure Limited is asked to give its consent pursuant to sub-paragraph (1), (2) or (3), such consent shall—

- (a) not be unreasonably withheld or delayed but may be given subject to reasonable conditions; and
- (b) be subject to compliance by Network Rail Infrastructure Limited with any relevant railway operational procedures.

(5) Nothing in this paragraph shall prevent DLRL pursuant to article 24 of this Order from acquiring the interest of any person other than Network Rail Infrastructure Limited or C2C, EWS or SET in railway property.

4.—(1) DLRL shall before commencing construction of any specified work supply to Network Rail Infrastructure Limited proper and sufficient plans of that work for the reasonable approval of the engineer and the specified work shall not be constructed except in accordance with such plans as have been approved in writing by the engineer or settled by arbitration.

(2) The approval of the engineer under sub-paragraph (1) shall not be unreasonably withheld or delayed, and if by the end of the period of 28 days beginning with the date on which such plans have been supplied to Network Rail Infrastructure Limited the engineer has not intimated his disapproval of those plans and the grounds of his disapproval DLRL may serve upon the engineer written notice requiring the engineer to intimate his approval or disapproval within a further period of 28 days beginning with the date upon which the engineer receives written notice from DLRL. If by the end of the further period of 28 days the engineer has not intimated his approval or disapproval, he shall be deemed to have approved the plans as submitted.

(3) If by the end of the period of 56 days beginning with the date on which written notice was served upon the engineer under sub-paragraph (2) Network Rail Infrastructure Limited gives notice to DLRL that Network Rail Infrastructure Limited desires itself to construct any part of a specified work which in the opinion of the engineer will or may affect the stability of railway property or the safe operation of traffic on the authorised railways then, if DLRL desires such part of the specified work to be constructed, Network Rail Infrastructure Limited shall construct it (together with any adjoining part of the specified work which DLRL reasonably requires to be constructed in one operation with that work) with all reasonable dispatch on behalf of and to the reasonable satisfaction of DLRL in accordance with the plans approved or deemed to be approved or settled under this paragraph and under the supervision (where appropriate and if given) of DLRL.

(4) In the event of Network Rail Infrastructure Limited not constructing or completing any part of a specified work pursuant to sub-paragraph (3) with all reasonable dispatch and to the reasonable

satisfaction of DLRL in accordance with such programme as may be agreed with DLRL or settled by arbitration, Network Rail Infrastructure Limited shall pay compensation to DLRL for any loss which it may sustain as a result.

(5) When signifying his approval of the plans the engineer may specify any protective works (whether temporary or permanent) which in his opinion should be carried out before the commencement of a specified work to ensure the safety or stability of railway property or the continuation of safe and efficient operation of the railways of Network Rail Infrastructure Limited or the services of operators using the same (including any relocation of works, apparatus and equipment necessitated by a specified work), and such protective works as may be reasonably necessary for those purposes shall be constructed by Network Rail Infrastructure Limited or by DLRL, if Network Rail Infrastructure Limited so desires, with all reasonable dispatch and DLRL shall not commence the construction of the specified works until the engineer has notified DLRL that the protective works have been completed to his reasonable satisfaction.

5.—(1) Any specified work shall, when commenced, be constructed—

- (a) with all reasonable dispatch in accordance with the plans approved or deemed to have been approved or settled under paragraph 4;
- (b) under the supervision (where appropriate and if given) and to the reasonable satisfaction of the engineer;
- (c) in such manner as to cause as little damage as is possible to railway property; and
- (d) so far as is reasonably practicable and consistent with the efficient and economic construction and operation of the specified work, so as not to interfere with or obstruct the free, uninterrupted and safe use of the authorised railways or the traffic thereon and the use by passengers of railway property,

and, if any damage to railway property or any such interference or obstruction is caused or takes place in consequence of the construction of a specified work, DLRL shall, notwithstanding any such approval, make good such damage and shall pay to Network Rail Infrastructure Limited all reasonable expenses to which Network Rail maybe put and compensation for any loss which it may sustain by reason of any such damage, interference or obstruction.

(2) Nothing in this Schedule shall impose any liability on DLRL with respect to any damage, costs, expenses or loss attributable to the negligence of Network Rail or its servants, contractors or agents.

6. DLRL shall—

- (a) at all times afford reasonable facilities to the engineer for access to a specified work during its construction; and
- (b) supply the engineer with all such information as he may reasonably require with regard to a specified work or the method of constructing it.

7. Network Rail Infrastructure Limited shall at all times afford reasonable facilities to DLRL and its agents for access to any works carried out by Network Rail Infrastructure Limited under this Schedule during their construction and shall supply DLRL with such information as it may reasonably require with regard to such works or the method of constructing them.

8.—(1) If any alterations or additions, either permanent or temporary, to railway property are reasonably necessary during the construction of a specified work, or during a period of 12 months after the commencement of regular revenue-earning train operations using the new railways comprised in any specified work, in consequence of the construction of a specified work, and Network Rail Infrastructure Limited gives to DLRL reasonable notice of its intention specifying the alterations or additions to be carried out, DLRL shall pay to Network Rail Infrastructure Limited the reasonable cost of those alterations or additions including, in respect of any such alterations

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and additions as are to be permanent, a capitalised sum representing the increase of the costs which may be expected to be reasonably incurred by Network Rail Infrastructure Limited in maintaining, working and, when necessary, renewing any such alterations or additions.

(2) If the cost of maintaining, working or renewing railway property is reduced in consequence of any such alterations or additions a capitalised sum representing such saving shall be set off against any sum payable by DLRL to Network Rail Infrastructure Limited under this paragraph.

9. DLRL shall repay to Network Rail Infrastructure Limited all reasonable fees, costs, charges and expenses reasonably incurred by Network Rail Infrastructure Limited—

- (a) in constructing any part of a specified work on behalf of DLRL as provided by paragraph 4(4) or in constructing any protective works under the provisions of paragraph 4(6) including, in respect of any permanent protective works, a capitalised sum representing the cost of maintaining and renewing those works; and
- (b) in respect of the approval by the engineer of plans submitted by DLRL and the supervision by him of the construction of a specified work.

10.—(1) In this paragraph—

“EMI” means, subject to sub-paragraph (2), electromagnetic interference with Network Rail’s apparatus generated by the operation of the authorised works where such interference is of a level which adversely affects the safe operation of Network Rail’s apparatus; and

“Network Rail’s apparatus” means any lines, circuits, wires, apparatus or equipment (whether or not modified or installed as part of the authorised works) which are owned or used by Network Rail for the purpose of transmitting or receiving electrical energy or of radio, telegraphic, telephonic, electric, electronic or other like means of signalling or other communications.

(2) This paragraph shall apply to EMI only to the extent that such EMI is not attributable to any change to Network Rail’s apparatus carried out after approval of plans under paragraph 4(1) for the relevant part of the authorised works giving rise to EMI (unless DLRL has been given notice in writing before the approval of those plans of the intention to make such change).

(3) Subject to sub-paragraph (5), DLRL shall in the design and construction of the authorised works take all measures necessary to prevent EMI and shall establish with Network Rail Infrastructure Limited (both parties acting reasonably) appropriate arrangements to verify their effectiveness.

(4) In order to facilitate DLRL’s compliance with sub-paragraph (3)—

- (a) DLRL shall consult with Network Rail Infrastructure Limited as early as reasonably practicable to identify all Network Rail’s apparatus which may be at risk of EMI, and thereafter shall continue to consult with Network Rail Infrastructure Limited (both before and after formal submission of plans under paragraph 4(1)) in order to identify all potential causes of EMI and the measures required to eliminate them;
- (b) Network Rail Infrastructure Limited shall make available to DLRL all information in Network Rail Infrastructure Limited’s possession reasonably requested by DLRL in respect of Network Rail’s apparatus identified pursuant to sub-paragraph (a); and
- (c) Network Rail Infrastructure Limited shall allow DLRL reasonable facilities for the inspection of Network Rail’s apparatus identified pursuant to sub-paragraph (a).

(5) In any case where it is established that EMI can only reasonably be prevented by modifications to Network Rail’s apparatus, Network Rail Infrastructure Limited shall not withhold its consent unreasonably to modifications of Network Rail’s apparatus, but the means of prevention and the method of their execution shall be selected in the reasonable discretion of Network Rail

Infrastructure Limited, and in relation to such modifications paragraph 4(1) shall have effect subject to this sub-paragraph.

(6) If at any time prior to the commencement of regular revenue-earning train operations on the new railways comprised in the authorised works and notwithstanding any measures adopted pursuant to sub-paragraph (3), the testing or commissioning of the authorised works causes EMI then DLRL shall immediately upon receipt of notification by Network Rail of such EMI either in writing or communicated orally (such oral communication to be confirmed in writing as soon as reasonably practicable after it has been issued) forthwith cease to use (or procure the cessation of use of) DLRL's apparatus causing such EMI until all measures necessary have been taken to remedy such EMI by way of modification to the source of such EMI or (in the circumstances, and subject to the consent, specified in sub-paragraph (5)) to Network Rail's apparatus.

(7) In the event of EMI having occurred—

- (a) DLRL shall afford reasonable facilities to Network Rail Infrastructure Limited for access to DLRL's apparatus in the investigation of such EMI;
- (b) Network Rail Infrastructure Limited shall afford reasonable facilities to DLRL for access to Network Rail's apparatus in the investigation of such EMI; and
- (c) Network Rail Infrastructure Limited shall make available to DLRL any additional material information in its possession reasonably requested by DLRL in respect of Network Rail's apparatus or such EMI.

(8) Where Network Rail Infrastructure Limited approves modifications to Network Rail's apparatus pursuant to sub-paragraphs (5) or (6)—

- (a) Network Rail Infrastructure Limited shall allow DLRL reasonable facilities for the inspection of the relevant part of Network Rail's apparatus;
- (b) any modifications to Network Rail's apparatus approved pursuant to those sub-paragraphs shall be carried out and completed by DLRL in accordance with paragraph 5.

(9) To the extent that it would not otherwise do so, the indemnity in paragraph 14(1) shall apply to the costs and expenses reasonably incurred or losses suffered by Network Rail through the implementation of the provisions of this paragraph (including costs incurred in connection with the consideration of proposals, approval of plans, supervision and inspection of works and facilitating access to Network Rail's apparatus) or in consequence of any EMI to which sub-paragraph (6) applies.

(10) For the purpose of paragraph (8)(a) any modifications to Network Rail's apparatus under this paragraph shall be deemed to be protective works referred to in that paragraph.

(11) In relation to any dispute arising under this paragraph the reference in article 54 of this Order to the Institution of Civil Engineers shall be read as a reference to the Institution of Electrical Engineers.

11. If at any time after the completion of a specified work, not being a work vested in Network Rail, Network Rail Infrastructure Limited gives notice to DLRL informing it that the state of maintenance of the specified work appears to be such as adversely affects the operation of railway property, DLRL shall, on receipt of such notice, take such steps as may be reasonably necessary to put that specified work in such state of maintenance as not adversely to affect railway property.

12. DLRL shall not provide any illumination or illuminated sign or signal on or in connection with a specified work in the vicinity of any railway belonging to Network Rail Infrastructure Limited unless it shall have first consulted Network Rail Infrastructure Limited and it shall comply with Network Rail Infrastructure Limited's reasonable requirements for preventing confusion between such illumination or illuminated sign or signal and any railway signal or other light used for controlling, directing or securing the safety of traffic on the railway.

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13. Any additional expenses which Network Rail Infrastructure Limited may reasonably incur in altering, reconstructing or maintaining railway property under any powers existing at the making of this Order by reason of the existence of a specified work shall, provided that 56 days' previous notice of the commencement of such alteration, reconstruction or maintenance has been given to DLRL, be repaid by DLRL to Network Rail Infrastructure Limited.

14.—(1) DLRL shall pay to Network Rail Infrastructure Limited all reasonable costs, charges, damages and expenses not otherwise provided for in this Schedule which may be occasioned to or reasonably incurred by Network Rail Infrastructure Limited—

- (a) by reason of the construction or maintenance of a specified work or the failure thereof; or
- (b) by reason of any act or omission of DLRL or of any person in its employ or of its contractors or others whilst engaged upon a specified work;

and DLRL shall indemnify Network Rail Infrastructure Limited from and against all claims and demands arising out of or in connection with a specified work or any such failure, act or omission; and the fact that any act or thing may have been done by Network Rail Infrastructure Limited on behalf of DLRL or in accordance with plans approved by the engineer or in accordance with any requirement of the engineer or under his supervision shall not (if it was done without negligence on the part of Network Rail Infrastructure Limited or of any person in its employ or of its contractors or agents) excuse DLRL from any liability under the provisions of this sub-paragraph.

(2) Network Rail Infrastructure Limited shall give DLRL reasonable notice of any such claim or demand and no settlement or compromise of such a claim or demand shall be made without the prior consent of DLRL.

(3) The sums payable by DLRL under sub-paragraph (1) shall include a sum equivalent to the relevant costs.

(4) Subject to the terms of any agreement between Network Rail Infrastructure Limited and a train operator regarding the timing or method of payment of the relevant costs in respect of that train operator, Network Rail Infrastructure Limited shall promptly pay to each train operator the amount of any sums which Network Rail Infrastructure Limited receives under sub-paragraph (3) which relates to the relevant costs of that train operator.

(5) The obligation under sub-paragraph (3) to pay Network Rail Infrastructure Limited the relevant costs shall, in the event of default, be enforceable directly by any train operator concerned to the extent that such sums would be payable to that operator pursuant to sub-paragraph (4).

15. Network Rail Infrastructure Limited shall, on receipt of a request from DLRL, from time to time provide DLRL free of charge with written estimates of the costs, charges, expenses and other liabilities for which DLRL is or will become liable under this Schedule (including the amount of the relevant costs mentioned in paragraph 14) and with such information as may reasonably enable DLRL to assess the reasonableness of any such estimate or claim made or to be made pursuant to this Schedule (including any claim relating to those relevant costs).

16. In the assessment of any sums payable to Network Rail under this Schedule there shall not be taken into account any increase in the sums claimed that is attributable to any action taken by or any agreement entered into by Network Rail if that action or agreement was not reasonably necessary and was taken or entered into with a view to obtaining the payment of those sums by DLRL under this Schedule or increasing the sums so payable.

17. DLRL and Network Rail Infrastructure Limited may subject in the case of Network Rail Infrastructure Limited to compliance with the terms of its network licence enter into, and carry into effect, agreements for the transfer to DLRL of—

- (a) any railway property shown on the deposited plans and described in the book of reference;
- (b) any lands, works or other property held in connection with any such railway property; and

- (c) any rights and obligations (whether or not statutory) of Network Rail relating to any railway property.

18. In so far as any specified work or the acquisition or use of railway property is or may be subject to railway operational procedures, Network Rail, SET, EWS and C2C shall—

- (a) co-operate with DLRL with a view to avoiding delay and securing conformity as between any plans approved by the engineer and any requirements resulting from those procedures; and
- (b) use best endeavours to avoid any conflict arising between the application of railway operational procedures and the proper implementation of the authorised works pursuant to this Order.