

PLANNING ACT 2008

**THE INFRASTRUCTURE PLANNING (EXAMINATION PROCEDURE)
RULES 2010**

**APPLICATION BY NATIONAL HIGHWAYS FOR A DEVELOPMENT
CONSENT ORDER IN RESPECT OF THE A122 (LOWER THAMES
CROSSING)**

POSITION STATEMENT

ON BEHALF OF



HIGH SPEED 1 LIMITED

Deadline 8 – 5 December 2023

Introduction

1. Following HS1's submissions at Compulsory Acquisition Hearing 5, the Examining Authority ("ExA") directed that HS1 Limited should submit at Deadline 8 a marked-up version of the current protective provisions (DCO v8 submitted at Deadline 6), identifying proposed additions or deletions and the reasons for these.
2. Both tracked changes and clean versions of the protective provisions containing the amendments HS1 Limited is seeking are annexed to this Position Statement. The proposed amendments reflect discussions between HS1 Limited and the Applicant in relation to a Framework Agreement containing modified protective provisions. Aside from the two issues described below, HS1 Limited's understanding is that its proposed changes are agreed by the Applicant. HS1 Limited has, therefore, restricted its submissions on the changes to those points that it understands are not agreed between the parties.
3. HS1 Limited refers the ExA to its Written Representation (**REP1-362**) and its submissions at Compulsory Acquisition Hearing 5 for an explanation of its role in relation to the HS1 railway line.

Paragraph 4 – Restriction on Exercise of Compulsory Powers

4. HS1 Limited seeks the inclusion of the following restriction on the exercise of compulsory powers:

4.1 The undertaker shall not exercise the powers conferred by articles 21 (Authority to survey and investigate the land), 21 (Compulsory acquisition of land), 25 (Compulsory acquisition of rights), 28 (Power to override interests, rights and restrictions), 33 (Acquisition of subsoil or airspace only), 35 (Temporary use of land for carrying out the authorised development), 34 (Temporary use of land for maintaining authorised development) and 37 (Statutory undertakers) of the Order or the powers conferred by section 11(3) of the Compulsory Purchase Act 1965 in respect of any HS1 Property unless the exercise of such powers is with the consent of the Company.

4.2 The undertaker shall not in the exercise of the powers conferred by the Order prevent pedestrian or vehicular access to any HS1 Property, unless preventing such access is with the consent of the Company.

4.3 The undertaker shall not under the powers of the Order acquire or use or acquire new rights over any HS1 Property except with the consent of the Company.

5. The Applicant opposes this. Its reasons for doing so are summarised in the parties' Statement of Common Ground, as follows:

The Applicant does not agree that it is appropriate, necessary or proportionate for HS1 Ltd to enjoy authority over the Applicant's ability to exercise statutory powers conferred on it by the Secretary of State.

The railway protective provisions include appropriate and well precedented provisions to allow HS1 to review and approve the details of works affecting its railway and to inspect those works as they are undertaken. Indemnity provisions have also been provided and therefore adequate and appropriate protections are already proposed.

6. HS1 Limited notes that similar restrictions to those it proposes are contained in protective provisions for the benefit of Network Rail in almost all DCOs, including the following recent National Highways DCOs:
 - a. A1 Birtley to Coalhouse Improvement Scheme; and
 - b. A428 Black Cat to Caxton Gibbet Road Improvement Scheme.
7. HS1 Limited has the equivalent role in relation to the High Speed 1 line as Network Rail does in relation to most of the rest of the rail network in Britain, save that it is currently the only operator and infrastructure manager of a high speed rail network, which entails that it must apply greater levels of care in managing its estate. Therefore, at the very least, HS1 Limited submits that it should receive the same protection as Network Rail is routinely given. There is no logical reason why a private body exercising public functions should receive lesser protection than an arm's length body exercising the same functions (essentially, both are private companies). The Applicant has not explained why the

circumstances of this Project mean that different protective provisions than included in the DCOs referred to above are appropriate in this case.

8. HS1 Limited is a statutory undertaker within the meaning of section 127(8) of the Planning Act 2008 (“PA 2008”), being authorised to carry on a railway undertaking pursuant to the Channel Tunnel Rail Link Act 1996. All the land in respect of which the Applicant proposes to secure powers of compulsory acquisition (of interests or rights) or of temporary possession was acquired by HS1 Limited for the purposes of this undertaking. In these circumstances, section 127(2) and (5) of PA 2008 provide that any order granting development consent for the Project may only include provision authorising the compulsory acquisition of HS1 Limited’s land or rights therein if this can be done without serious detriment to the carrying on of HS1 Limited’s undertaking (whether by the provision of replacement land or otherwise) or any detriment in consequence of the acquisition of a right can be made good.
9. National Highways has not provided any evidence to demonstrate that compulsory acquisition of HS1 Limited’s land or rights can be done without serious detriment to the carrying on of HS1 Limited’s undertaking, nor has it demonstrated that any detriment can be made good. All of HS1 Limited’s land is held, and used, for the carrying on of its undertaking on behalf of the Secretary of State for Transport. The HS1 railway is the UK’s first, and currently only, high speed rail network. As such, it is nationally significant infrastructure of substantial importance to the UK.
10. Without sufficient safeguards in the form of appropriate protective provisions, serious detriment to HS1 Limited’s undertaking would result from the Project. HS1 Limited’s position is that the restriction on the exercise of compulsory powers set out at paragraph 4, above, is required to prevent such detriment from arising.

Paragraph 14 – Form of Indemnity

11. The Applicant seeks to include the following restriction on the indemnity sought by HS1 Limited:

14.5 In no circumstances is the undertaker liable to the Company under paragraph 14.1 for any indirect or consequential loss or loss of profits, except that the sums payable by the undertaker under that paragraph include a sum equivalent to the relevant costs in circumstances where:

(a) the Company is liable to make payment of the relevant costs pursuant to the terms of an agreement between the Company and a train operator; and

(b) the existence of that agreement and the extent of the Company’s liability to make payment of the relevant costs pursuant to its terms has previously been disclosed in writing to the undertaker, but not otherwise.

14.6 Subject to the terms of any agreement between the Company and a train operator regarding the timing or method of payment of the relevant costs in respect of that train operator, the Company must promptly pay to each train operator the amount of any sums which the Company receives under paragraph 14.1 which relates to the relevant costs of that train operator.

14.7 The obligation under paragraph 14.5 to pay the Company the relevant costs is, in the event of default, enforceable directly by any train operator concerned to the extent that such sums would be payable to that operator under paragraph 14.6.

12. For the reasons set out below, HS1 Limited submits that this restriction is not appropriate and should not be included in the protective provisions.
13. An indemnity is included in protective provisions for the benefit of Network Rail in DCOs where Network Rail’s interests are affected, including in the National Highways DCOs referred to in paragraph 6, and this indemnity is rarely limited in the way the Applicant proposes here. Again, there is no justification for HS1 Limited receiving lesser protection than that which Network Rail is routinely given, and the Applicant has advanced no justification as to why different protective provisions than those included in the DCOs referred to above are appropriate in this case. The Applicant has in no way justified why HS1 Limited’s high speed network belongs in the small class of railway networks that are afforded only a limited form of protection.

14. HS1 Limited submits that the starting point for consideration of this issue should be that any losses it suffers would not have occurred but for the Applicant's project and that the Applicant should, therefore, indemnify those losses. This point is of general application but is particularly powerful in the context of the HS1 network, which is critical national infrastructure.
15. The Applicant appears to accept the principle of indemnifying losses suffered by HS1 Limited as a result of the Project but seeks to exclude "*indirect or consequential loss or loss of profits*" from the indemnity. The reason for this is unclear. Both indirect and consequential losses (which are the same thing), and loss of profits are ordinarily recoverable under common law principles, provided that such losses are foreseeable. Only where such losses are not foreseeable would they be too remote and thus not recoverable. The Applicant's drafting therefore excludes losses that would potentially be recoverable under the general law. In HS1 Limited's submission, this would produce an unjust outcome. Further, in this case, both loss of profits by HS1 Limited and payments due to train operating companies would in fact be *direct* losses and not indirect losses as implied by the Applicant's drafting, and so it is difficult to discern what principle lies behind the Applicant's proposal. The attempt to exclude "indirect or consequential or loss of profits" is therefore both confusing and arbitrary.
16. In summary, HS1 Limited submits that the Applicant's proposed restriction on the indemnity should not be included in the Protective Provisions because it should:
 - a. be indemnified for losses that would not have occurred but for the Applicant's Project;
 - b. be indemnified for any losses caused by the Applicant that would ordinarily be recoverable under the general law; and
 - c. receive the same degree of protection as has been afforded to Network Rail on other DCOs, including those promoted by the Applicant.

Conclusion

17. The parties are continuing to discuss the protective provisions and remain hopeful of reaching an agreement. However, should agreement not be possible by the close of the examination, HS1 Limited will be requesting that protective provisions in the form annexed to this Position Statement are included in the DCO if it is made.

Annex 1 – HS1 Protective Provisions – Tracked Version

SCHEDULE 14

Article 59

PROTECTIVE PROVISIONS

PART 4

FOR THE PROTECTION OF RAILWAY INTERESTS

Application

01—The following provisions of this Part of this Schedule have effect, unless otherwise agreed in writing between the undertaker and the Company.

Interpretation

02— In this Part of this Schedule—

~~“Company” means Network Rail or, as the case may be, HS1;~~

Business Day means a day other than a Saturday or a Sunday on which banks are open generally for business in the City of London

CDM Regulations means the Construction (Design and Management) Regulations 2015

Company means HS1

~~“concession agreement”~~ means the agreement between the Secretary of State for Transport and HS1 Limited for the design, construction, financing, operation, repair and maintenance of High Speed 1, as amended and restated on 5 July 2022 and as may be further amended, restated or supplemented from time to time;

~~“construction”~~ includes execution, placing, alteration, testing and commissioning (and, where relevant, the removal, alteration, re-carrying out after testing/commissioning or re-testing/commissioning) and reconstruction and ~~“construct”~~ and ~~“constructed”~~ have corresponding meanings;

contamination means the presence of any substance at, in, on or under any given property, that is capable of causing harm to the environment

emergency means any fouling of the line, any plant and/or equipment failing and/or falling within the fence, anything touching the overheads, any breach of the security fence, or any activity which adversely affects the stability or safety of any earthwork or structure (including track, overheads and/or stanchions)

~~“the engineer”~~ means an engineer appointed by the Company for the purposes of this Order;

environment means any one or more of:

(a) air (including air within natural or manmade structures, above or below ground);

(b) water (including water under or within land, or in drains or sewers, and surface, ground, coastal and inland waters);

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(c) land (including surface land, sub-surface strata, land under water and natural and man-made structures); and

(d) living organisms (including humans) including the ecological systems of which they form part, and, in the case of man, his senses and his property

“**High Speed 1**” means the high speed rail link between St Pancras in the London Borough of Camden and the Channel Tunnel Portal at Castle Hill, Folkestone, Kent and the international stations at St Pancras, Stratford and Ebbsfleet and Ashford and all associated track, facilities and installations, including the Waterloo Connection and the maintenance depots at Temple Mills and Singlewell;

“**HS1**” means High Speed One (HS1) Limited (company number 06045862, whose registered office is at 5th Floor, Kings Place, 90 York Way, London N1 9AG) and any associated company of High Speed One (HS1) Limited Group Company 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 1159 (meaning of “subsidiary” etc.) of the~~ HS1 Group Company means any subsidiary or holding company of HS1 or of another subsidiary or holding company of HS1, as “subsidiary” and “holding company” are understood within section 1159, Companies Act 2006), but on the basis that the holding company of High Speed One (HS1) Limited, a subsidiary of High Speed One (HS1) Limited or another subsidiary of the holding company of High Speed One (HS1) Limited; of not less than one quarter of voting rights shall be deemed to satisfy the condition in section 1159(1)(a)

HS1 Property means any land (whether freehold or leasehold), easement, property interest, railway, infrastructure, structure (or any part of any of the foregoing) including works, apparatus or equipment, leased, owned, held or used by HS1 for the purposes of High Speed 1 that may be affected by the authorised development

“**network licence**” means the network licence, as the same is amended from time to time, granted to Network Rail HS1 by the Secretary of State in exercise of powers under section 8 (licences)^(*) of the Railways Act 1993;¹

~~“Network Rail” means Network Rail Infrastructure Limited (company number 02904587, whose registered office is at 1 Eversholt Street, London NW1 2DN) 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 1159 (meaning of “subsidiary” etc.)^(*) of the Companies Act 2006) 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, design data, software, 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; HS1 Property

“**protective works**” means any works specified by the engineer under paragraph 32;⁰

~~(X)~~ 1993 c. 43.

¹ 1993 c.43

~~(X)~~ 2006 c. 46.

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property agreement means the Surplus Land Agreement to be entered into between the Company and the undertaker

“railway operational procedures” means procedures specified under any access agreement (as defined in the Railways Act 1993^(*)²) or station lease;

~~“railway property” means any railway belonging to the Company and any station, land, works, apparatus and equipment belonging to the Company and connected with any such railway; and~~

~~any easement or other property interest held or used by the Company for or connected with the purposes of such railway or works, apparatus or equipment; and~~

“specified work” means so much of any of the authorised development as is, or is to be, situated upon, across, under, over or within 15 metres of, or may (or whose maintenance may) in any way adversely affect, railway property. HS1 Property

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~~0.03.1—~~a) Where under this Part of this Schedule the Company is required to give its consent, agreement or approval in respect of any matter, that consent, agreement or approval is subject to the condition that ~~it~~ the Company must comply with any relevant railway operational procedures, any obligations under statute and ~~in the case of—~~

~~Network Rail, its network licence; and~~
HS1, the concession agreement.

~~2.03.2~~ In so far as any specified work or the acquisition or use of ~~railway property~~ HS1 Property or rights over ~~railway property~~ HS1 Property is or may be subject to railway operational procedures, the Company must—:

~~(a)~~ (a) co-operate with the undertaker ~~with a view to avoiding undue~~ and use its reasonable endeavours to avoid delay and ~~securing~~ secure conformity as between any plans approved by the engineer and requirements emanating from those procedures; and

~~(b)~~ (b) use its reasonable endeavours to avoid any conflict arising between the application of those procedures and the proper implementation of the authorised development under this Order.

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4.1 The undertaker shall not exercise the powers conferred by articles 21 (Authority to survey and investigate the land), 21 (Compulsory acquisition of land), 25 (Compulsory acquisition of rights), 28 (Power to override interests, rights and restrictions), 33 (Acquisition of subsoil or airspace only), 35 (Temporary use of land for carrying out the authorised development), 34 (Temporary use of land for maintaining authorised development) and 37 (Statutory undertakers) of the Order or the powers conferred by section 11(3) of the Compulsory Purchase Act 1965 in respect of any HS1 Property unless the exercise of such powers is with the consent of the Company.

4.2 The undertaker shall not in the exercise of the powers conferred by the Order prevent pedestrian or vehicular access to any HS1 Property, unless preventing such access is with the consent of the Company.

~~(X)~~ 1993 c. 43.
² 1993 c.43

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4.3 The undertaker shall not under the powers of the Order acquire or use or acquire new rights over any HS1 Property except with the consent of the Company.

5 Where the Company is asked to give its consent pursuant to this clause, such consent shall not be unreasonably withheld but may be given subject to reasonable conditions.

~~0.05.1~~ b) The undertaker must, before commencing construction of any specified work, supply to the Company proper and sufficient plans of that work for the reasonable approval of the engineer and the specified work must not be commenced except in accordance with such plans as have been approved in writing by the engineer or settled by arbitration under article [64] (arbitration).

~~1.05.2~~ The approval of the engineer under ~~sub-paragraph (1)~~ paragraph 5.1 must not be unreasonably withheld, and if by the end of the period of ~~28 days~~ 30 Business Days beginning with the date on which such plans have been supplied to the Company the engineer has not intimated disapproval of those plans and the grounds of disapproval the undertaker may serve upon the engineer written notice requiring the engineer to intimate approval or disapproval within a further period of ~~14 days~~ 10 Business Days beginning with the date upon which the engineer receives written notice from the undertaker and if, by the expiry of the further ~~14 days~~ 10 Business Days period specified in the written notice the engineer has not intimated approval or disapproval, the engineer is deemed to have ~~approved~~ refused the plans as submitted, and the undertaker shall be entitled to refer the dispute for arbitration in accordance with the provisions of article 64 of this Order. Where the engineer notifies the undertaker that it withholds its approval under paragraph 5.2 and gives its reasons, the undertaker shall resubmit such plans amended to address the engineer's reasons as soon as practicable and the provisions of this paragraph 5 shall apply to the revised plans.

5.3 The undertaker shall ensure compliance with any conditions imposed by the engineer if and when approving any given plans.

~~2.05.4~~ If by the end of the period of ~~14 days~~ beginning with the date on which written notice was served upon the engineer under ~~sub-paragraph (2)~~, If the Company gives notice to the undertaker that it desires itself to construct any part of a specified work or protective work (including in either case some or all of the requisite design) which in the reasonable opinion of the engineer will or may affect the stability of ~~railway property~~ HS1 Property or the safe operation of traffic on the railways of the Company then, if the undertaker desires such part of the specified work to be constructed and subject to paragraph [5.3], the Company must construct it (together with any adjoining part of the specified work which the undertaker reasonably requires to be constructed with that work) with all reasonable dispatch on behalf of and to the reasonable satisfaction of the undertaker 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 the undertaker.

~~3.05.5~~ When signifying approval of the plans the engineer may specify any protective works (whether temporary or permanent) which in the engineer's reasonable opinion should be carried out before the commencement of the construction of a specified work to ensure the safety or stability of ~~railway property~~ HS1 Property or the continuation of safe and efficient operation of the railways of the Company or the services of operators using the same (including any relocation de-commissioning and removal of works, apparatus and equipment necessitated by a specified work and the comfort and safety of passengers who may be affected by the specified works), and such protective works as may be reasonably necessary for those purposes must be constructed by the Company, or by the undertaker, if the Company so desires, and such protective works must be carried out at the expense of the undertaker in either case ~~with all reasonable dispatch~~ without unnecessary delay and the undertaker must not commence the construction of the specified works until the engineer has notified

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the undertaker that the protective works have been completed to the engineer's reasonable satisfaction.

5.6 Without prejudice to the provisions of paragraph 5.5, in a case of emergency the Company may elect to carry out itself any protective works or any alteration or addition (or other work) as may be specified under paragraph [9], in which case such work shall be carried out by the Company with all reasonable dispatch.

5.7 If, in any case, the carrying out of the specified works requires the diversion or other alteration of any road or the alteration, removal, replacement or protection of any apparatus belonging to third parties (including mains, sewers, pipes, drains and cables), the undertaker shall be responsible for:

(a) obtaining all requisite consents and approvals for such works;

(b) ensuring such works do not significantly impact on any access or any use of any utilities by the Company; and

(c) meeting any and all costs, fees, charges and expenses associated with such works, including any compensation or other amounts payable to third parties.

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~~0.06.1~~ e) Any specified work and any protective works to be constructed by virtue of paragraph ~~32(4)~~ 5.5 must, when commenced, be constructed—;

~~(a)~~ without unnecessary delay in accordance with the plans approved or deemed to have been approved or settled under paragraph ~~32~~ 5;

~~(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 reasonably possible to railway property ~~HS1~~ Property; and

~~(d)~~ so far as is reasonably practicable, so as not to interfere with or obstruct the free, uninterrupted and safe use of any railway of the Company or the traffic on it and the use by passengers of railway property. ~~HS1~~ Property

6.2 The undertaker shall forthwith halt the carrying out of any specified work or protective work or do anything reasonably required by the engineer (including the carrying out of emergency works) to ensure the safety, security, stability, operation or maintenance of High Speed 1. The engineer shall notify the undertaker of the action required to be taken by the undertaker in order to rectify the situation. The undertaker shall be entitled to recommence performance of the specified work or protective work provided that they are in accordance with such action as the engineer required the undertaker to take.

~~2.06.3~~ If any damage to railway property ~~HS1~~ Property or any such interference or obstruction is caused by the carrying out of, or in consequence of the construction of, a specified work by the undertaker or any person for whom the undertaker is responsible or a protective work carried out by the undertaker or any person for whom the undertaker is responsible, the undertaker must, regardless of any such approval, make good such damage and must pay to the Company all expenses properly and

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reasonably incurred by the Company and compensation for any direct loss which it may sustain by reason of any such damage, interference or obstruction.

6.4 If the carrying out of the specified works or the protective works or any act, omission, neglect or default on the part of the undertaker or any person for whom the undertaker is responsible, results in any contamination, or disturbs or causes to be disturbed any existing contamination in addition to any other rights:

(a) the Company may give the undertaker a notice specifying the remedial action it reasonably requires and a reasonable period for the undertaker to do it; and

(b) the undertaker shall undertake the remedial action within the stated period at its own costs and to the Company's reasonable satisfaction.

If the undertaker does not complete the remedial action within the stated period, the Company may do so and the undertaker shall pay the costs which the Company incurs in doing so plus 7% on account of overheads (on demand and as a debt) PROVIDED THAT any such delay could have been avoided by the undertaker acting reasonably.

~~4.16.5~~ Nothing in [this Part of] this Schedule imposes any liability on the undertaker with respect to any damage, costs, expenses or loss attributable to the negligence of the Company or its servants, contractors or agents, or any liability on the Company with respect of any damage, costs, expenses or loss attributable to the negligence of the undertaker or the undertaker's employees, contractors or agents.

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~~0.07.1~~ —d) The undertaker must—:

~~(a)~~ (a) at all times afford reasonable facilities to the engineer for access to a specified work or protective work during its construction; and

~~(b)~~ (b) supply the engineer with all such information as the engineer may reasonably require with regard to a specified work or protective work or the method of constructing it.

~~08~~ —The Company must at all times afford reasonable facilities to the undertaker and the undertaker's agents for access to any works carried out by the Company under [this Part of] this Schedule during their construction and must supply the undertaker with such information as the undertaker may reasonably require with regard to such works or the method of constructing them.

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~~0.09.1~~ —e) If any permanent or temporary alterations or additions to railway property, HS1 Property are reasonably necessary in consequence of the construction of a specified work or a protective work, or during a period of 12 months after the completion of that work in order to ensure the safety of railway property HS1 Property or the continued safe operation of the railway of the Company, such alterations and additions may be carried out by the Company and if the Company gives to the undertaker reasonable notice of its intention to carry out such alterations or additions (~~which~~ and the notice must be specified, including specify details of ~~the reasonable cost~~ alterations and additions including the costs of carrying out—, and in the case of any permanent alterations or additions, maintaining, working and, when necessary, renewing ~~those~~ such alterations or additions ~~in the notice~~), the undertaker must pay to the Company the reasonable cost of those alterations or additions

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including, in respect of any such alterations and additions as are to be permanent, a capitalised sum representing the increase of the costs which may be expected to be properly and reasonably incurred by the Company in maintaining, working and, when necessary, renewing any such alterations or additions provided the undertaker acting reasonably approves the costs contained in the notice provided under this paragraph prior to the works being carried out.

~~1.09.2~~ If during the construction of a specified work or a protective work by the undertaker, the Company gives notice to the undertaker that the Company desires itself to construct that part of the specified work or protective work which in the ~~reasonable~~ opinion of the engineer acting in good faith is endangering the stability of ~~railway property~~ HS1 Property or the safe operation of traffic on the railways of the Company then, if the undertaker decides that part of the specified work or protective work is to be constructed, the Company must assume construction of that part of the specified work or protective work and the undertaker must, regardless of any such approval of a specified work or protective work under paragraph ~~32(3)~~ 4.5, pay to the Company all expenses properly and reasonably incurred by the Company and compensation for any direct loss which it may suffer by reason of the execution by the Company of that specified work or protective work provided that the undertaker is not liable under this clause for any injury, loss, damage, costs arising from the negligence of the Company or any person for whom it is responsible in respect of any specified or protective works under.

~~2.09.3~~ 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 is to be notified to the undertaker by the Company as soon as reasonably practicable and is to be set off against any sum payable by the undertaker to the Company under this paragraph.

~~3.09.4~~ The engineer must, in respect of the capitalised sums referred to in this paragraph and paragraph ~~37(a)~~ 10 provide such details of the formula by which those sums have been calculated as the undertaker may reasonably require.

9.5 Other than as expressly set out in this Schedule, the Company shall have no liability to the undertaker arising out of or in consequence of any works to which this Schedule applies save where the Company or its contractors have been negligent. This applies whatever the manner in which liability might otherwise have arisen (whether for breach of contract, in tort, for breach of statutory duty or otherwise) and whether such liability would otherwise have arisen in respect of losses, damages, costs, liabilities, injuries, actions, claims, proceedings or matters suffered or incurred by or brought against the undertaker (including, without limitation, in respect of any works carried out pursuant to paragraphs 5.5, 5.7 or 9.2 of this Schedule) as a consequence of any act or omission of the Company or otherwise.

9.6 Where the Company has liability to the undertaker under this Schedule, the Company shall use best endeavours to pursue its appointed consultant(s) and contractor(s) in respect of the remedying of any defects in the relevant works in accordance with the terms of their appointments. To the extent that the Company recovers any monies from such consultant(s) or contractor(s) the Company shall pay or apply such monies as can, in its reasonable opinion, be apportioned to the relevant works:

(a) first in meeting its own costs, liabilities and losses (current, anticipated or otherwise) (if any);

(b) any balance then being paid to the undertaker.

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~~10~~ 10 -The undertaker must repay to the Company all ~~reasonable~~ fees, costs, charges and expenses properly and reasonably incurred by the Company—:

~~(a)~~ (a) in constructing any part of a specified work on behalf of the undertaker as provided by paragraph ~~32(3)~~4.5 or in constructing any protective works under the provisions of paragraph ~~32(4)~~4.6 including, in respect of any permanent protective works, a capitalised sum representing the cost of maintaining and renewing those works;

~~(b)~~ (b) in respect of the ~~reasonable~~ approval by the engineer, acting in good faith, of plans submitted by the undertaker and the supervision by the engineer of the construction of a specified work or a protective work;

~~(c)~~ (c) in respect of the employment or procurement of the services of any inspectors, signallers, watchkeepers and other persons whom it is reasonably necessary to appoint for inspecting, signalling, watching and lighting ~~railway property~~HS1 Property and for preventing, so far as may be reasonably practicable, interference, obstruction, danger or accident arising from the construction or failure of a specified work or a protective work;

~~(d)~~ (d) in respect of any special traffic working resulting from any speed restrictions which may in the reasonable opinion of the engineer, require to be imposed by reason or in consequence of the construction or failure of a specified work or a protective work or from the substitution ~~of~~ or diversion of services which may be reasonably necessary for the same reason; and

~~(e)~~ (e) in respect of any additional temporary lighting of ~~railway property~~HS1 Property in the vicinity of the specified works, being lighting made reasonably necessary by reason or in consequence of the construction or failure of a specified work or a protective work—;

provided that the undertaker is not liable for any injury, loss, damage, costs nor is the undertaker required to repay any sums under paragraphs (a) to (e) which arise from, or in connection with, the Company in carrying out any specified works or protective works negligently.

~~10.2~~ 10.2 —~~f~~— In this paragraph—:

“~~EMI~~” means, subject to ~~sub-paragraph (2)~~paragraph 10.3, electromagnetic interference with the Company’s apparatus generated by the operation of the authorised development where such interference is of a level which adversely affects the safe operation of the Company’s apparatus;

“~~the Company’s apparatus~~” means any lines, circuits, wires, apparatus or equipment (whether or not modified or installed as part of the authorised development) which are owned or used by the Company 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.

~~10.3~~ 10.3 This paragraph applies to EMI only to the extent that such EMI is not attributable to any change to the Company’s apparatus carried out after approval of plans under paragraph ~~32(1)~~5.1 for the relevant part of the authorised development giving rise to EMI (unless the undertaker has been given notice in writing before the approval of those plans of the intention to make such change).

~~10.4~~ 10.4 Subject to ~~sub-paragraph (5)~~paragraph 10.6, the undertaker must in the design and construction of the authorised development take all measures necessary to prevent EMI and must establish with the Company (both parties acting reasonably) appropriate arrangements to verify their effectiveness.

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~~3.0~~10.5 In order to facilitate the undertaker's compliance with ~~sub-paragraph (3)~~ paragraph 10.4:

~~(a)~~ (a) the undertaker must consult with the Company as early as reasonably practicable to identify all of the Company's apparatus which may be at risk of EMI, and must continue to consult with the Company (both before and after formal submission of plans under paragraph ~~32(4)~~5.1) in order to identify all potential causes of EMI and the measures required to eliminate them;

~~(b)~~ (b) the Company must make available to the undertaker all information in the possession of the Company reasonably requested by the undertaker in respect of the Company's apparatus identified under ~~sub-paragraph~~paragraph (a); and

~~(c)~~ (c) the Company must allow the undertaker reasonable facilities for the inspection of the Company's apparatus identified under ~~sub-paragraph~~paragraph (a).

~~4.0~~10.6 In any case where it is established that EMI can only reasonably be prevented by modifications to the Company's apparatus, the Company must not withhold or delay its consent unreasonably to modifications of the Company's apparatus, but the means of prevention and the method of their execution ~~may~~must be selected at the reasonable discretion of the Company, and in relation to such modifications paragraph ~~32(4)~~5.1 has effect subject to this ~~sub-paragraph~~paragraph.

~~5.0~~10.7 If at any time prior to the completion of the authorised development and regardless of any measures adopted under ~~sub-paragraph (3)~~paragraph 10.4, the testing or commissioning of the authorised development causes EMI then the undertaker must immediately upon receipt of notification by the Company 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) the undertaker'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)~~paragraph 10.6) to the Company's apparatus.

~~6.0~~10.8 In the event of EMI having occurred—

~~(a)~~ (a) the undertaker must afford reasonable facilities to the Company for access to the undertaker's apparatus in the investigation of such EMI;

~~(b)~~ (b) the Company must afford reasonable facilities to the undertaker for access to the Company's apparatus in the investigation of such EMI; and

~~(c)~~ (c) the Company must make available to the undertaker any additional material information in its possession reasonably requested by the undertaker in respect of the Company's apparatus or such EMI.

~~7.0~~10.9 Where the Company approves modifications to the Company's apparatus under ~~sub-paragraphs (5) or (6)~~ paragraphs 10.6 or 10.7:

~~(a)~~ (a) the Company must allow the undertaker reasonable facilities for the inspection of the relevant part of the Company's apparatus; and

~~(b)~~ (b) any modifications to the Company's apparatus approved under those ~~sub-paragraphs~~paragraphs must be carried out and completed by the undertaker in accordance with paragraph ~~56~~56.

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10.10 If any changes in operation of High Speed 1 causes EMI (whether or not measures have been adopted pursuant to paragraph 10.4) then the undertaker shall as quickly as reasonably practicable after notification by the Company of EMI take all measures necessary to remedy the same by way of modification to the source of such EMI or (as the case may be) further protective works or modification to the specified works or the Company's apparatus (subject to the Company's approval under paragraph 10.6).

10.11 To the extent that it would not otherwise do so, the indemnity in paragraph 14.1 applies to the costs and expenses reasonably incurred or losses suffered by the Company 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 the Company's apparatus) or in consequence of any EMI to which paragraph 10.8 applies.

~~8.0~~10.12 For the purpose of paragraph ~~379~~(a) any modifications to the Company's apparatus under this paragraph are deemed to be protective works referred to in that paragraph.

~~9.0~~10.13 In relation to any dispute arising under this paragraph the reference in article ~~[64]~~ (arbitration) to a single arbitrator to be agreed between the parties is to be read as a reference to an arbitrator being a member of the Institution of Engineering and Technology to be agreed.

~~0~~11 If at any time after the completion of a specified work or a protective work, not being a work vested in the Company, the Company gives notice to the undertaker informing it that the state of maintenance of any part of the specified work or protective work appears to be such as adversely affects the operation of ~~railway property~~HS1 Property, the undertaker must, on receipt of such notice, take such steps as may be reasonably necessary to put that specified work or protective work in such state of maintenance as to not adversely affect ~~railway property~~HS1 Property.

~~0~~12 -The undertaker must not provide any illumination or illuminated sign or signal on or in connection with a specified work or a protective work in the vicinity of any railway belonging to the Company unless the undertaker has first consulted the Company and the undertaker must comply with the Company'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.

~~0~~13 -Any additional expenses which the Company may properly and reasonably incur in altering, reconstructing or maintaining ~~railway property~~HS1 Property under any powers existing at the making of this Order by reason of the existence of a specified work or a protective work ~~must, provided~~must-provided that ~~56~~7 days' previous written notice of the commencement of such alteration, reconstruction or maintenance has been given to the undertaker, ~~be repaid by the undertaker to the Company.~~

14

~~0.0~~14.1 —~~g~~)—The undertaker must pay to the Company all reasonable and properly incurred costs, charges, damages and expenses not otherwise provided for in this Part of this Schedule (but subject always to the remaining provisions of this paragraph and to article 67 (no double recovery)) which may be occasioned to or reasonably incurred by the Company—~~;~~

~~(→)~~(a) by reason of the construction or maintenance of a specified work or a protective work or the failure of it by the undertaker or a person for whom it is responsible; or

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~~(b)~~ by reason of any act or omission of the undertaker or of any person in the undertaker's employ or of the undertaker's contractors ~~or others~~ whilst engaged upon a specified work or a protective work,

and the undertaker must indemnify and keep indemnified the Company from and against each and all losses, claims and demands, actions, proceedings, damages, matters, costs, expenses and liabilities whatsoever arising ~~out of or~~ in any way from, in connection with or relating to a specified work or a protective work or any such failure, act or omission; save where the Company or its contractors have been negligent and the fact that any act or thing may have been done by the Company on behalf of the undertaker or in accordance with plans approved by the engineer or in accordance with any requirement of the engineer or under the engineer's supervision will not ~~(if provided it was~~ is done without negligence on the part of the Company or of any person in its employ or of its contractors or agents) excuse the undertaker from any liability under the provisions of this ~~sub-paragraph~~ paragraph.

14.2 The indemnity in paragraph 14.1 shall include but shall not be limited to any losses, claims, demands, actions, proceedings, damages, matters, costs, expenses and liabilities which arise out of the works in respect of:

- (a) any disruption caused to High Speed 1 during the period of the authorised development;
- (b) any claims for personal injury or death to/concerning employees or third parties;
- (c) any loss, damage or environmental damage (to include pollution, contamination, the presence of hazardous substances or waste, and nuisance) to High Speed 1 and/or HS1 Property whether temporary or permanent or to any adjoining or neighbouring property (whether real or personal) belonging to, used by or in the possession of HS1 and/or any third parties or for which HS1 or any such third parties are responsible or liable;
- (d) any environmental damage;
- (e) any financial loss claims brought against HS1, any HS1 Group Company, any train or freight operating company, or any infrastructure manager, whether or not loss or damage to material property is suffered or incurred;
- (f) the carrying out of the specified works, or the failure of any such works
- (g) any act, omission or neglect on the part of the undertaker, or any person involved in the carrying out of a specified work.

14.3 During the period of the authorised development, the undertaker shall procure the undertaker's contractor is insured against the liabilities referred to herein for not less than £155,000,000 (one hundred and fifty five million pounds) for any one loss and shall provide details of such insurance upon request by the Company.

~~2.0~~14.4 The Company must—:

- ~~(a)~~ (a) give the undertaker written notice of any such claims or demands as soon as reasonably possible after the Company became aware of any such claims or demands;
- ~~(b)~~ (b) not admit liability or make any offer to settle or settle or compromise any such claim or demand without the prior consent of the undertaker-(which, if it withholds such consent, has

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the sole conduct of any settlement or compromise or of any proceedings necessary to resist the claim or demand);

(c) take all reasonable steps to mitigate any liabilities relating to such claims or demands; and

(d) keep the undertaker informed in relation to the progress of any such claims and demands and pay due regard to the undertaker's reasonable representations in relation to them.

In no circumstances is ~~the undertaker liable to the Company under sub paragraph (1) for any indirect or consequential loss or loss of profits, except that the sums payable by the undertaker under that sub paragraph include a sum equivalent to the relevant costs in circumstances where—~~

~~the Company is liable to make payment of the relevant costs pursuant to the terms of an agreement between the Company and a train operator; and~~

~~the existence of that agreement and the extent of the Company's liability to make payment of the relevant costs pursuant to its terms has previously been disclosed in writing to the undertaker, but not otherwise.~~

Subject to the terms of any agreement between ~~the Company~~ and a train operator regarding the timing or method of payment of the relevant costs ~~in respect of that train operator, the Company~~ must promptly pay to each train operator the amount of ~~any sums which the Company receives under sub paragraph (3) which relates to the relevant costs of that train operator.~~

The obligation under sub paragraph (3) to pay the Company the relevant costs is, in the event of default, enforceable directly by any train operator concerned to the extent that such sums would be payable to that operator under sub paragraph (4).

In this paragraph—

“the relevant costs” means the costs, direct losses and expenses (including loss of revenue) properly and reasonably incurred by each train operator ~~as a consequence of any restriction of the use of the Company's railway network as a result of the construction, maintenance or failure of a specified work or a protective work or any such act or omission~~ as mentioned in sub paragraph (1); and

“train operator” means any person who is authorised ~~to act as the operator of a train by a licence under section 8 (licences)(*) of the Railways Act 1993.~~

15 The Company must, on receipt of a request from the undertaker, from time to time, provide the undertaker free of charge with a written [breakdown of the](#) estimates of the costs, charges, expenses, ~~future cost forecasts~~ and other liabilities for which the undertaker is or will become liable under [this Part of] this Schedule (including the amount of the relevant costs mentioned in paragraph 4214 and with such information as may reasonably enable the undertaker to assess the reasonableness of any such estimate or claim made or to be made under [this Part of] this Schedule (including any claim relating to those relevant costs).

16 In the assessment of any sums payable to the Company under [this Part of] this Schedule there must 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 the Company 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 the undertaker under [this Part of] [this Schedule] or increasing the sums so payable.

17 The undertaker and the Company may, subject ~~in the case of Network Rail to compliance with the terms of its network licence and~~ in the case of HS1 to compliance with the terms of the concession agreement, enter into, and carry into effect, agreements for the transfer to the undertaker of—:

17.1 any railway property [HS1 Property](#) shown on the works plans or land plans and described in the book of reference;

(X) 1993 c. 43.

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~~1.2~~17.2 any lands, works or other property held in connection with any such railway property; and

~~1.3~~17.3 any rights and obligations (whether or not statutory) of the Company relating to any railway property HS1 Property or any lands, works or other property referred to in this paragraph.

~~18~~ -Nothing in this Order, or in any enactment incorporated with or applied by this Order, prejudices or affects the operation of Part 1 (the provision of railway services) of the Railways Act 1993.

19 Unless and to the extent agreed otherwise in writing by the parties, to the extent that the protective works and the specified works constitute a single project for the purposes of the CDM Regulations, the undertaker is to act as the only client for the purposes of the CDM Regulations and is to indemnify HS1 from and against any, each and all reasonably foreseeable and properly mitigated losses, claims, demands, actions, proceedings, damages, costs, expenses and liabilities arising directly from, in connection with or out of any breach (by the undertaker) of the CDM Regulations provided that HS1 [and the SoS] shall [each] comply with all health and safety laws and with its [respective] obligations under the CDM Regulations, and shall (without prejudice to the generality of the aforesaid) provide all information required by the undertaker in a timely manner and cooperate with the undertaker so as to enable the undertaker to fulfil its duties as the client.

20 The undertaker must give written notice to the Company if any application is proposed to be made by the undertaker for the Secretary of State's consent under article 8 (transfer of benefit of Order) of this Order in relation to HS1 Property or any specified works and any such notice must be given no later than 10 Business Days before any such application is made and must describe or give (as appropriate)-

(a) the nature of the application to be made;

(b) the extent of the geographical area to which the application relates; and

(c) the name and address of the person acting for the Secretary of State to whom the application is to be made.

~~21~~ -The undertaker must no later than ~~28 days~~20 Business Days from the date that the documents referred to in article 62 (certification of documents plans, etc.) are submitted to and certified by the Secretary of State in accordance with article 62, provide a set of those documents to the Company in ~~the form of a computer disc with read only memory~~a digital format reasonably specified by the Company.

22 Any notice:

22.1 from the undertaker which may be provided to the Company under this Part may be given by a contractor of the undertaker; and

22.2 from the Company which may be provided to the undertaker, may be provided to the contractor of the undertaker,

provided the undertaker has provided written notification of the contractor to the Company.

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Annex 1 – HS1 Protective Provisions – Clean Version

SCHEDULE 14

Article 59

PROTECTIVE PROVISIONS

PART 4

FOR THE PROTECTION OF RAILWAY INTERESTS

Application

- 1 The following provisions of this Part of this Schedule have effect, unless otherwise agreed in writing between the undertaker and the Company.

Interpretation

- 2 In this Part of this Schedule

Business Day means a day other than a Saturday or a Sunday on which banks are open generally for business in the City of London

CDM Regulations means the Construction (Design and Management) Regulations 2015

Company means HS1

concession agreement means the agreement between the Secretary of State for Transport and HS1 Limited for the design, construction, financing, operation, repair and maintenance of High Speed 1 as amended and restated on 5 July 2022 and as may be further amended, restated or supplemented from time to time

construction includes execution, placing, alteration, testing and commissioning (and, where relevant, the removal, alteration, re-carrying out after testing/commissioning or re-testing/commissioning) and reconstruction and **construct** and **constructed** have corresponding meanings

contamination means the presence of any substance at, in, on or under any given property, that is capable of causing harm to the environment

emergency means any fouling of the line, any plant and/or equipment failing and/or falling within the fence, anything touching the overheads, any breach of the security fence, or any activity which adversely affects the stability or safety of any earthwork or structure (including track, overheads and/or stanchions)

engineer means an engineer appointed by the Company for the purposes of this Order

environment means any one or more of:

(a) air (including air within natural or manmade structures, above or below ground);

(b) water (including water under or within land, or in drains or sewers, and surface, ground, coastal and inland waters);

(c) land (including surface land, sub-surface strata, land under water and natural and man-made structures); and

(d) living organisms (including humans) including the ecological systems of which they form part, and, in the case of man, his senses and his property

High Speed 1 means the high speed rail link between St Pancras in the London Borough of Camden and the Channel Tunnel Portal at Castle Hill, Folkestone, Kent and the international stations at St Pancras, Stratford and Ebbsfleet and Ashford and all associated track, facilities and installations, including the Waterloo Connection and the maintenance depots at Temple Mills and Singlewell

HS1 means High Speed One (HS1) Limited (company number 06045862, whose registered office is at 5th Floor, Kings Place, 90 York Way, London N1 9AG) and any HS1 Group Company which holds property for railway purposes

HS1 Group Company means any subsidiary or holding company of HS1 or of another subsidiary or holding company of HS1, as "**subsidiary**" and "**holding company**" are understood within section 1159, Companies Act 2006, but on the basis that the holding of not less than one quarter of voting rights shall be deemed to satisfy the condition in section 1159(1)(a)

HS1 Property means any land (whether freehold or leasehold), easement, property interest, railway, infrastructure, structure (or any part of any of the foregoing) including works, apparatus or equipment, leased, owned, held or used by HS1 for the purposes of High Speed 1 that may be affected by the authorised development

network licence means the network licence, as the same is amended from time to time, granted to HS1 by the Secretary of State in exercise of powers under section 8 (licences) of the Railways Act 1993¹

plans includes sections, designs, design data, software, 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 HS1 Property

protective works means any works specified by the engineer under paragraph 0

property agreement means the Surplus Land Agreement to be entered into between the Company and the undertaker

railway operational procedures means procedures specified under any access agreement (as defined in the Railways Act 1993²) or station lease

specified work means so much of any of the authorised development as is, or is to be, situated upon, across, under, over or within 15 metres of, or may (or whose maintenance may) in any way adversely affect, HS1 Property

¹ 1993 c.43

² 1993 c.43

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3.1 Where under this Part of this Schedule the Company is required to give its consent, agreement or approval in respect of any matter, that consent, agreement or approval is subject to the condition that the Company must comply with any relevant railway operational procedures, any obligations under statute and the concession agreement.

3.2 In so far as any specified work or the acquisition or use of HS1 Property or rights over HS1 Property is or may be subject to railway operational procedures, the Company must:

- (a) co-operate with the undertaker and use its reasonable endeavours to avoid delay and secure conformity as between any plans approved by the engineer and requirements emanating from those procedures; and
- (b) use its reasonable endeavours to avoid any conflict arising between the application of those procedures and the proper implementation of the authorised development under this Order.

4

4.1 The undertaker shall not exercise the powers conferred by articles 21 (Authority to survey and investigate the land), 21 (Compulsory acquisition of land), 25 (Compulsory acquisition of rights), 28 (Power to override interests, rights and restrictions), 33 (Acquisition of subsoil or airspace only), 35 (Temporary use of land for carrying out the authorised development), 34 (Temporary use of land for maintaining authorised development) and 37 (Statutory undertakers) of the Order or the powers conferred by section 11(3) of the Compulsory Purchase Act 1965 in respect of any HS1 Property unless the exercise of such powers is with the consent of the Company.

4.2 The undertaker shall not in the exercise of the powers conferred by the Order prevent pedestrian or vehicular access to any HS1 Property, unless preventing such access is with the consent of the Company.

4.3 The undertaker shall not under the powers of the Order acquire or use or acquire new rights over any HS1 Property except with the consent of the Company.

5 Where the Company is asked to give its consent pursuant to this clause, such consent shall not be unreasonably withheld but may be given subject to reasonable conditions.

5.1 The undertaker must, before commencing construction of any specified work, supply to the Company proper and sufficient plans of that work for the reasonable approval of the engineer and the specified work must not be commenced except in accordance with such plans as have been approved in writing by the engineer or settled by arbitration under article [64] (arbitration).

5.2 The approval of the engineer under paragraph 5.1 must not be unreasonably withheld, and if by the end of the period of 30 Business Days beginning with the date on which such plans have been supplied to the Company the engineer has not intimated disapproval of those plans and the grounds of disapproval the undertaker may serve upon the engineer written notice requiring the engineer to intimate approval or disapproval within a further period of 10 Business Days beginning with the date upon which the engineer receives written notice from the undertaker and if, by the expiry of the further 10 Business Days period specified in the written notice the engineer has not intimated approval or disapproval, the engineer is deemed to have refused the plans as submitted and the undertaker shall be entitled to refer the dispute for arbitration in accordance with the provisions of article 64 of this Order. Where the engineer notifies the undertaker that it withholds its approval under paragraph 5.2 and gives its reasons, the undertaker shall resubmit such plans amended to

address the engineer's reasons as soon as practicable and the provisions of this paragraph 5 shall apply to the revised plans.

- 5.3 The undertaker shall ensure compliance with any conditions imposed by the engineer if and when approving any given plans.
- 5.4 If the Company gives notice to the undertaker that it desires itself to construct any part of a specified work or protective work (including in either case some or all of the requisite design) which in the reasonable opinion of the engineer will or may affect the stability of HS1 Property or the safe operation of traffic on the railways of the Company then, if the undertaker desires such part of the specified work to be constructed and subject to paragraph [5.3], the Company must construct it (together with any adjoining part of the specified work which the undertaker reasonably requires to be constructed with that work with all reasonable dispatch on behalf of and to the reasonable satisfaction of the undertaker 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 the undertaker.
- 5.5 When signifying approval of the plans the engineer may specify any protective works (whether temporary or permanent) which in the engineer's reasonable opinion should be carried out before the commencement of the construction of a specified work to ensure the safety or stability of HS1 Property or the continuation of safe and efficient operation of the railways of the Company or the services of operators using the same (including any relocation de-commissioning and removal of works, apparatus and equipment necessitated by a specified work and the comfort and safety of passengers who may be affected by the specified works), and such protective works as may be reasonably necessary for those purposes must be constructed by the Company, or by the undertaker, if the Company so desires, and such protective works must be carried out at the expense of the undertaker in either case without unnecessary delay and the undertaker must not commence the construction of the specified works until the engineer has notified the undertaker that the protective works have been completed to the engineer's reasonable satisfaction.
- 5.6 Without prejudice to the provisions of paragraph 5.5, in a case of emergency the Company may elect to carry out itself any protective works or any alteration or addition (or other work) as may be specified under paragraph [9], in which case such work shall be carried out by the Company with all reasonable dispatch.
- 5.7 If, in any case, the carrying out of the specified works requires the diversion or other alteration of any road or the alteration, removal, replacement or protection of any apparatus belonging to third parties (including mains, sewers, pipes, drains and cables), the undertaker shall be responsible for:
- (a) obtaining all requisite consents and approvals for such works;
 - (b) ensuring such works do not significantly impact on any access or any use of any utilities by the Company; and
 - (c) meeting any and all costs, fees, charges and expenses associated with such works, including any compensation or other amounts payable to third parties.

6

- 6.1 Any specified work and any protective works to be constructed by virtue of paragraph 5.5 must, when commenced, be constructed:

- (a) without unnecessary delay in accordance with the plans approved or deemed to have been approved or settled under paragraph 5;
- (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 reasonably possible to HS1 Property; and
- (d) so far as is reasonably practicable, so as not to interfere with or obstruct the free, uninterrupted and safe use of any railway of the Company or the traffic on it and the use by passengers of HS1 Property

6.2 The undertaker shall forthwith halt the carrying out of any specified work or protective work or do anything reasonably required by the engineer (including the carrying out of emergency works) to ensure the safety, security, stability, operation or maintenance of High Speed 1. The engineer shall notify the undertaker of the action required to be taken by the undertaker in order to rectify the situation. The undertaker shall be entitled to recommence performance of the specified work or protective work provided that they are in accordance with such action as the engineer required the undertaker to take.

6.3 If any damage to HS1 Property or any such interference or obstruction is caused by the carrying out of, or in consequence of the construction of, a specified work by the undertaker or any person for whom the undertaker is responsible or a protective work carried out by the undertaker or any person for whom the undertaker is responsible, the undertaker must, regardless of any such approval, make good such damage and must pay to the Company all expenses properly and reasonably incurred by the Company and compensation for any direct loss which it may sustain by reason of any such damage, interference or obstruction.

6.4 If the carrying out of the specified works or the protective works or any act, omission, neglect or default on the part of the undertaker or any person for whom the undertaker is responsible, results in any contamination, or disturbs or causes to be disturbed any existing contamination in addition to any other rights:

- (a) the Company may give the undertaker a notice specifying the remedial action it reasonably requires and a reasonable period for the undertaker to do it; and
- (b) the undertaker shall undertake the remedial action within the stated period at its own costs and to the Company's reasonable satisfaction.

If the undertaker does not complete the remedial action within the stated period, the Company may do so and the undertaker shall pay the costs which the Company incurs in doing so plus 7% on account of overheads (on demand and as a debt) PROVIDED THAT any such delay could have been avoided by the undertaker acting reasonably.

6.5 Nothing in [this Part of] this Schedule imposes any liability on the undertaker with respect to any damage, costs, expenses or loss attributable to the negligence of the Company or its servants, contractors or agents, or any liability on the Company with respect of any damage, costs, expenses or loss attributable to the negligence of the undertaker or the undertaker's employees, contractors or agents.

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7.1 The undertaker must:

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

8 The Company must at all times afford reasonable facilities to the undertaker and the undertaker's agents for access to any works carried out by the Company under [this Part of] this Schedule during their construction and must supply the undertaker with such information as the undertaker may reasonably require with regard to such works or the method of constructing them.

9

9.1 If any permanent or temporary alterations or additions to HS1 Property are reasonably necessary in consequence of the construction of a specified work or a protective work, or during a period of 12 months after the completion of that work in order to ensure the safety of HS1 Property or the continued safe operation of the railway of the Company, such alterations and additions may be carried out by the Company and if the Company gives to the undertaker reasonable notice of its intention to carry out such alterations or additions (and the notice must specify details of alterations and additions including the costs of carrying out, and in the case of any permanent alterations or additions, maintaining, working and, when necessary, renewing such alterations or additions), the undertaker must pay to the Company the reasonable cost of those alterations or additions including, in respect of any such alterations and additions as are to be permanent, a capitalised sum representing the increase of the costs which may be expected to be properly and reasonably incurred by the Company in maintaining, working and, when necessary, renewing any such alterations or additions provided the undertaker acting reasonably approves the costs contained in the notice provided under this paragraph prior to the works being carried out.

9.2 If during the construction of a specified work or a protective work by the undertaker, the Company gives notice to the undertaker that the Company desires itself to construct that part of the specified work or protective work which in the opinion of the engineer acting in good faith is endangering the stability of HS1 Property or the safe operation of traffic on the railways of the Company then, if the undertaker decides that part of the specified work or protective work is to be constructed, the Company must assume construction of that part of the specified work or protective work and the undertaker must, regardless of any such approval of a specified work or protective work under paragraph 4.5, pay to the Company all expenses properly and reasonably incurred by the Company and compensation for any direct loss which it may suffer by reason of the execution by the Company of that specified work or protective work provided that the undertaker is not liable under this clause for any injury, loss, damage, costs arising from the negligence of the Company or any person for whom it is responsible in respect of any specified or protective works under.

9.3 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 is to be notified to the undertaker by the Company as soon as reasonably practicable and is to be set off against any sum payable by the undertaker to the Company under this paragraph.

9.4 The engineer must, in respect of the capitalised sums referred to in this paragraph and paragraph 10 provide such details of the formula by which those sums have been calculated as the undertaker may reasonably require.

- 9.5 Other than as expressly set out in this Schedule, the Company shall have no liability to the undertaker arising out of or in consequence of any works to which this Schedule applies save where the Company or its contractors have been negligent. This applies whatever the manner in which liability might otherwise have arisen (whether for breach of contract, in tort, for breach of statutory duty or otherwise) and whether such liability would otherwise have arisen in respect of losses, damages, costs, liabilities, injuries, actions, claims, proceedings or matters suffered or incurred by or brought against the undertaker (including, without limitation, in respect of any works carried out pursuant to paragraphs 5.5, 5.7 or 9.2 of this Schedule) as a consequence of any act or omission of the Company or otherwise.
- 9.6 Where the Company has liability to the undertaker under this Schedule, the Company shall use best endeavours to pursue its appointed consultant(s) and contractor(s) in respect of the remedying of any defects in the relevant works in accordance with the terms of their appointments. To the extent that the Company recovers any monies from such consultant(s) or contractor(s) the Company shall pay or apply such monies as can, in its reasonable opinion, be apportioned to the relevant works:
- (a) first in meeting its own costs, liabilities and losses (current, anticipated or otherwise) (if any);
 - (b) any balance then being paid to the undertaker.
- 10 The undertaker must repay to the Company all fees, costs, charges and expenses properly and reasonably incurred by the Company:
- (a) in constructing any part of a specified work on behalf of the undertaker as provided by paragraph 4.5 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;
 - (b) in respect of the approval by the engineer, acting in good faith, of plans submitted by the undertaker and the supervision by the engineer of the construction of a specified work or a protective work;
 - (c) in respect of the employment or procurement of the services of any inspectors, signallers, watchkeepers and other persons whom it is reasonably necessary to appoint for inspecting, signalling, watching and lighting HS1 Property and for preventing, so far as may be reasonably practicable, interference, obstruction, danger or accident arising from the construction or failure of a specified work or a protective work;
 - (d) in respect of any special traffic working resulting from any speed restrictions which may in the reasonable opinion of the engineer, require to be imposed by reason or in consequence of the construction or failure of a specified work or a protective work or from the substitution or diversion of services which may be reasonably necessary for the same reason; and
 - (e) in respect of any additional temporary lighting of HS1 Property in the vicinity of the specified works, being lighting made reasonably necessary by reason or in consequence of the construction or failure of a specified work or a protective work,
- provided that the undertaker is not liable for any injury, loss, damage, costs nor is the undertaker required to repay any sums under paragraphs (a) to (e) which arise from, or in

connection with, the Company in carrying out any specified works or protective works negligently.

10.2 In this paragraph:

EMI means, subject to paragraph 10.3, electromagnetic interference with the Company's apparatus generated by the operation of the authorised development where such interference is of a level which adversely affects the safe operation of the Company's apparatus;

Company's apparatus means any lines, circuits, wires, apparatus or equipment (whether or not modified or installed as part of the authorised development) which are owned or used by the Company 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.

10.3 This paragraph applies to EMI only to the extent that such EMI is not attributable to any change to the Company's apparatus carried out after approval of plans under paragraph 5.1 for the relevant part of the authorised development giving rise to EMI (unless the undertaker has been given notice in writing before the approval of those plans of the intention to make such change).

10.4 Subject to paragraph 10.6, the undertaker must in the design and construction of the authorised development take all measures necessary to prevent EMI and must establish with the Company (both parties acting reasonably) appropriate arrangements to verify their effectiveness.

10.5 In order to facilitate the undertaker's compliance with paragraph 10.4:

- (a) the undertaker must consult with the Company as early as reasonably practicable to identify all of the Company's apparatus which may be at risk of EMI, and must continue to consult with the Company (both before and after formal submission of plans under paragraph 5.1) in order to identify all potential causes of EMI and the measures required to eliminate them;
- (b) the Company must make available to the undertaker all information in the possession of the Company reasonably requested by the undertaker in respect of the Company's apparatus identified under paragraph (a); and
- (c) the Company must allow the undertaker reasonable facilities for the inspection of the Company's apparatus identified under paragraph (a).

10.6 In any case where it is established that EMI can only reasonably be prevented by modifications to the Company's apparatus, the Company must not withhold or delay its consent unreasonably to modifications of the Company's apparatus, but the means of prevention and the method of their execution must be selected at the reasonable discretion of the Company, and in relation to such modifications paragraph 5.1 has effect subject to this paragraph.

10.7 If at any time prior to the completion of the authorised development and regardless of any measures adopted under paragraph 10.4, the testing or commissioning of the authorised development causes EMI then the undertaker must immediately upon receipt of notification by the Company 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) the undertaker'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 paragraph 10.6) to the Company's apparatus.

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- 10.8 In the event of EMI having occurred
- (a) the undertaker must afford reasonable facilities to the Company for access to the undertaker's apparatus in the investigation of such EMI;
 - (b) the Company must afford reasonable facilities to the undertaker for access to the Company's apparatus in the investigation of such EMI; and
 - (c) the Company must make available to the undertaker any additional material information in its possession reasonably requested by the undertaker in respect of the Company's apparatus or such EMI.
- 10.9 Where the Company approves modifications to the Company's apparatus under paragraphs 10.6 or 10.7:
- (a) the Company must allow the undertaker reasonable facilities for the inspection of the relevant part of the Company's apparatus; and
 - (b) any modifications to the Company's apparatus approved under those paragraphs must be carried out and completed by the undertaker in accordance with paragraph 6.
- 10.10 If any changes in operation of High Speed 1 causes EMI (whether or not measures have been adopted pursuant to paragraph 10.4) then the undertaker shall as quickly as reasonably practicable after notification by the Company of EMI take all measures necessary to remedy the same by way of modification to the source of such EMI or (as the case may be) further protective works or modification to the specified works or the Company's apparatus (subject to the Company's approval under paragraph 10.6).
- 10.11 To the extent that it would not otherwise do so, the indemnity in paragraph 14.1 applies to the costs and expenses reasonably incurred or losses suffered by the Company 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 the Company's apparatus) or in consequence of any EMI to which paragraph 10.8 applies.
- 10.12 For the purpose of paragraph 9(a) any modifications to the Company's apparatus under this paragraph are deemed to be protective works referred to in that paragraph.
- 10.13 In relation to any dispute arising under this paragraph the reference in article [64] (arbitration) to a single arbitrator to be agreed between the parties is to be read as a reference to an arbitrator being a member of the Institution of Engineering and Technology to be agreed.
- 11 If at any time after the completion of a specified work or a protective work, not being a work vested in the Company, the Company gives notice to the undertaker informing it that the state of maintenance of any part of the specified work or protective work appears to be such as adversely affects the operation of HS1 Property, the undertaker must, on receipt of such notice, take such steps as may be reasonably necessary to put that specified work or protective work in such state of maintenance as to not adversely affect HS1 Property.
- 12 The undertaker must not provide any illumination or illuminated sign or signal on or in connection with a specified work or a protective work in the vicinity of any railway belonging to the Company unless the undertaker has first consulted the Company and the undertaker must comply with the Company'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.

- 13 Any additional expenses which the Company may properly and reasonably incur in altering, reconstructing or maintaining HS1 Property under any powers existing at the making of this Order by reason of the existence of a specified work or a protective work must—provided that 7 days' previous written notice of the commencement of such alteration, reconstruction or maintenance has been given to the undertaker—be repaid by the undertaker to the Company.

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- 14.1 The undertaker must pay to the Company all reasonable and properly incurred costs, charges, damages and expenses not otherwise provided for in this Part of this Schedule (but subject always to the remaining provisions of this paragraph and to article 67 (no double recovery)) which may be occasioned to or reasonably incurred by the Company:

- (a) by reason of the construction or maintenance of a specified work or a protective work or the failure of it by the undertaker or a person for whom it is responsible; or
- (b) by reason of any act or omission of the undertaker or of any person in the undertaker's employ or of the undertaker's contractors whilst engaged upon a specified work or a protective work,

and the undertaker must indemnify and keep indemnified the Company from and against each and all losses, claims, demands, actions, proceedings, damages, matters, costs, expenses and liabilities whatsoever arising in any way from, in connection with or relating to a specified work or a protective work or any such failure, act or omission; save where the Company or its contractors have been negligent and the fact that any act or thing may have been done by the Company on behalf of the undertaker or in accordance with plans approved by the engineer or in accordance with any requirement of the engineer or under the engineer's supervision will not (provided it is done without negligence on the part of the Company or of any person in its employ or of its contractors or agents) excuse the undertaker from any liability under the provisions of this paragraph.

- 14.2 The indemnity in paragraph 14.1 shall include but shall not be limited to any losses, claims, demands, actions, proceedings, damages, matters, costs, expenses and liabilities which arise out of the works in respect of:

- (a) any disruption caused to High Speed 1 during the period of the authorised development;
- (b) any claims for personal injury or death to/concerning employees or third parties;
- (c) any loss, damage or environmental damage (to include pollution, contamination, the presence of hazardous substances or waste, and nuisance) to High Speed 1 and/or HS1 Property whether temporary or permanent or to any adjoining or neighbouring property (whether real or personal) belonging to, used by or in the possession of HS1 and/or any third parties or for which HS1 or any such third parties are responsible or liable;
- (d) any environmental damage;
- (e) any financial loss claims brought against HS1, any HS1 Group Company, any train or freight operating company, or any infrastructure manager, whether or not loss or damage to material property is suffered or incurred;

- (f) the carrying out of the specified works, or the failure of any such works
 - (g) any act, omission or neglect on the part of the undertaker, or any person involved in the carrying out of a specified work.
- 14.3 During the period of the authorised development, the undertaker shall procure the undertaker's contractor is insured against the liabilities referred to herein for not less than £155,000,000 (one hundred and fifty five million pounds) for any one loss and shall provide details of such insurance upon request by the Company.
- 14.4 The Company must:
- (a) give the undertaker written notice of any such claims or demands as soon as reasonably possible after the Company became aware of any such claims or demands;
 - (b) not admit liability or make any offer to settle or settle or compromise any such claim or demand without the prior consent of the undertaker(which, if it withholds such consent, has the sole conduct of any settlement or compromise or of any proceedings necessary to resist the claim or demand);
 - (c) take all reasonable steps to mitigate any liabilities relating to such claims or demands; and
 - (d) keep the undertaker informed in relation to the progress of any such claims and demands and pay due regard to the undertaker's reasonable representations in relation to them.
- 15 The Company must, on receipt of a request from the undertaker, from time to time, provide the undertaker free of charge with a written breakdown of the estimates of the costs, charges, expenses, and other liabilities for which the undertaker is or will become liable under [this Part of] this Schedule (including the amount of the relevant costs mentioned in paragraph 14 and with such information as may reasonably enable the undertaker to assess the reasonableness of any such estimate or claim made or to be made under [this Part of] this Schedule (including any claim relating to those relevant costs).
- 16 In the assessment of any sums payable to the Company under [this Part of] this Schedule there must 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 the Company 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 the undertaker under [this Part of] [this Schedule] or increasing the sums so payable.
- 17 The undertaker and the Company may, subject in the case of HS1 to compliance with the terms of the concession agreement, enter into, and carry into effect, agreements for the transfer to the undertaker of:
- 17.1 any HS1 Property shown on the works plans or land plans and described in the book of reference;
 - 17.2 any lands, works or other property held in connection with any such railway property; and
 - 17.3 any rights and obligations (whether or not statutory) of the Company relating to any HS1 Property or any lands, works or other property referred to in this paragraph.
- 18 Nothing in this Order, or in any enactment incorporated with or applied by this Order, prejudices or affects the operation of Part 1 (the provision of railway services) of the Railways Act 1993.

- 19 Unless and to the extent agreed otherwise in writing by the parties, to the extent that the protective works and the specified works constitute a single project for the purposes of the CDM Regulations, the undertaker is to act as the only client for the purposes of the CDM Regulations and is to indemnify HS1 from and against any, each and all reasonably foreseeable and properly mitigated losses, claims, demands, actions, proceedings, damages, costs, expenses and liabilities arising directly from, in connection with or out of any breach (by the undertaker) of the CDM Regulations provided that HS1 [and the SoS] shall [each] comply with all health and safety laws and with its [respective] obligations under the CDM Regulations, and shall (without prejudice to the generality of the aforesaid) provide all information required by the undertaker in a timely manner and co-operate with the undertaker so as to enable the undertaker to fulfil its duties as the client.
- 20 The undertaker must give written notice to the Company if any application is proposed to be made by the undertaker for the Secretary of State's consent under article 8 (transfer of benefit of Order) of this Order in relation to HS1 Property or any specified works and any such notice must be given no later than 10 Business Days before any such application is made and must describe or give (as appropriate)-
- (a) the nature of the application to be made;
 - (b) the extent of the geographical area to which the application relates; and
 - (c) the name and address of the person acting for the Secretary of State to whom the application is to be made.
- 21 The undertaker must no later than 20 Business Days from the date that the documents referred to in article 62 (certification of plans, etc.) are submitted to and certified by the Secretary of State in accordance with article 62, provide a set of those documents to the Company in a digital format reasonably specified by the Company.
- 22 Any notice:
- 22.1 from the undertaker which may be provided to the Company under this Part may be given by a contractor of the undertaker; and
 - 22.2 from the Company which may be provided to the undertaker, may be provided to the contractor of the undertaker,
- provided the undertaker has provided written notification of the contractor to the Company.