

Service Facility Operating Constraints Change Procedure

This is the Service Facility Operating Constraints Change Procedure (edition 1) referred to and incorporated in DB Cargo's Service Facility Access Contracts.

Unless the context otherwise requires, Clause 1 (*Definitions and Interpretation*) in the Service Facility Access Contract between DB Cargo and the Access Beneficiary Counterparty shall apply in this Service Facility Operating Constraint Change Procedure, and:

"Access Beneficiary Counterparty" means a counterparty to a DB Cargo Service Facility Access Contract including the Access Beneficiary;

"change" includes:

- (a) improvement or deterioration, enlargement or reduction; and
- (b) for the purpose of paragraph (b) of the definition of Service Facility Operating Constraint Change, a series of changes;

"Mandatory Service Facility Operating Constraints Change" means a Service Facility Operating Constraints Change that in DB Cargo's reasonable opinion is necessary as a result of a Change in Law;

"notice" means a notice given in accordance with the requirements regarding notices set out in the applicable Service Facility Access Contract;

"Procedure Change Proposal" means any proposal to change this Service Facility Operating Constraints Change Procedure;

"relevant response date" means the date specified by DB Cargo in accordance with **paragraph 1.3(b)** below;

"Service Facility Access Contract" means a contract detailing access arrangements in respect of a Service Facility and Facility Services to be provided at such Service Facility; and

"Service Facility Operating Constraints Change" means, in relation to an Access Beneficiary Counterparty:

- (a) any change in or to any part of a Service Facility (including its layout, configuration or condition) which is likely materially to affect the operation of:
 - (i) the Service Facility; or
 - (ii) trains operated by, or anticipated as being operated in accordance with the Service Facility Access Contract by or on behalf of, that Access Beneficiary Counterparty at the Service Facility; or
- (b) any change to the operation of a Service Facility (being a change which does not fall within paragraph (a) above) which:
 - (iii) is likely to materially affect the operation of trains operated by, or anticipated as being operated in accordance with the Service Facility Access Contract, by or on behalf of that Access Beneficiary Counterparty on the Network; and

- (iv) has lasted or is likely to last for more than six (6) months; or
- (c) any material change to an established Service Facility Operating Constraints Change,

but EXCLUDING from each of sub-paragraphs (a) to (c) above, any such change arising as a result of Force Majeure.

1 Service Facility Operating Constraint Changes

- 1.1 Each Access Beneficiary Counterparty acknowledges that, provided that the procedure set out in this Service Facility Operating Constraints Change Procedure is followed, DB Cargo is entitled at any time, to make changes to the Service Facility Operating Constraints applicable to its Service Facilities it considers reasonably necessary or desirable.
- 1.2 If DB Cargo wishes to make a Service Facility Operating Constraints Change, it shall give notice of the proposed Service Facility Operating Constraints Change to each Access Beneficiary Counterparty whose Service Facility Access Contract grants access (but not solely the potential for Ad Hoc Access) to the Service Facility concerned.
- 1.3 DB Cargo's notice of Service Facility Operating Constraints Change given under **paragraph 1.1** shall:
 - (a) contain (to the extent reasonably necessary having regard to the nature of the change):
 - (i) the reasons why it proposes to make the change, including the effects it is intended or may reasonably be expected to have on the operation of the Service Facility or on trains at the Service Facility;
 - (ii) a specification of the works to be done (including a plan showing where the work is to be done and the parts of the Service Facility likely to be affected);
 - (iii) the proposed times within which the works are to be done and when they are intended or may reasonably be expected to be begun and completed;
 - (iv) DB Cargo's proposals (if any) for the division of the costs of carrying out the change;
 - (v) a statement that the Facility Operating Constraints Change is (i) a Mandatory Service Facility Operating Constraints Change or (ii) a Service Facility Operating Constraints Change which is in DB Cargo's reasonable opinion required to be made for safety reasons and DB Cargo's reasons for this view or DB Cargo's proposals in relation to whether and to what extent compensation should be paid to Access Beneficiaries in respect of the change and/or its calculation is in accordance with **paragraph 2** below;
 - (vi) a summary of the changes to the relevant Service Facility Access Contract that, in DB Cargo's reasonable opinion will be necessary following implementation of the Service Facility Operating Constraints Change; and
 - (vii) be prepared to a standard, and in such detail, as is reasonably necessary having due regard to the level of knowledge and expertise reasonably to be expected of the Access Beneficiary Counterparty, to enable it to assess the likely effect of the proposed change on its business; and

- (b) invite each Access Beneficiary Counterparty to submit comments by a date which shall have regard to the size and complexity of the change and its likely impact on Access Beneficiary Counterparties and in any event not be less than twenty (20) days from the date on which the notice under **paragraph 1.1** above is given.
- 1.4 DB Cargo shall, after giving notice of any proposal for Service Facility Operating Constraints Change under **paragraph 1.1** above, consult with Access Beneficiaries to the extent reasonably necessary for a period of twenty eight (28) days so as properly to inform them of the change and enable them to assess the consequences of the proposed change.
- 1.5 To the extent that a Service Facility Operating Constraints Change within the meaning of **paragraph (a)** of that term's definition is in DB Cargo's reasonable opinion required to be made by DB Cargo for safety reasons, DB Cargo shall not be obliged to implement the procedure set out in this Service Facility Operating Constraints Change Procedure until the change has lasted for three (3) months. Upon expiry of the relevant period, DB Cargo shall promptly commence implementing and thereafter comply with the procedures set out in this Service Facility Operating Constraints Change Procedure (save that DB Cargo shall not be liable to pay compensation to Access Beneficiaries in respect of such a Service Facility Operating Constraints Change).
- 2 Amount of compensation**
- 2.1 Subject to **paragraphs 2.2** to **2.4**, the amount of compensation payable to an Access Beneficiary Counterparty in respect of a Service Facility Operating Constraints Change shall be an amount equal to the amount of the costs, direct losses and expenses (including loss of revenue) which are reasonably incurred or can reasonably be expected to be incurred by the Access Beneficiary Counterparty as a consequence of the proposed Service Facility Operating Constraints Change once implemented.
- 2.2 The amount of compensation referred to in **paragraph 2.1** shall exclude the amount of the costs, direct losses and expenses (including loss of revenue) which are reasonably incurred or can reasonably be expected to be incurred by the Access Beneficiary Counterparty as a consequence of the implementation of the proposed Service Facility Operating Constraints Change.
- 2.3 There shall be taken into account in determining the amount of compensation referred to in **paragraph 2.1**:
 - (a) the benefit (if any) to be obtained or likely in the future to be obtained by the Access Beneficiary Counterparty as a consequence of the proposed Service Facility Operating Constraints Change; and
 - (b) the ability or likely future ability of the Access Beneficiary Counterparty to recoup any costs, losses and expenses from third parties including customers (and the Access Beneficiary Counterparty acknowledges that it has a duty to mitigate its losses arising from implementation of any Service Facility Operating Constraints Change).
- 2.4 Each Access Beneficiary Counterparty acknowledges and accepts that no compensation shall be payable to it in respect of a Mandatory Service Facility Operating Constraints Change or a Service Facility Operating Constraints Change made for in DB Cargo's reasonable opinion for safety reasons under **paragraph 1.5** above.

3 Access Beneficiary's response to notice of Service Facility Operating Constraints Change

3.1 Each Access Beneficiary Counterparty shall take all reasonable steps to provide to DB Cargo by the relevant response date a response to the notice of Service Facility Operating Constraints Change received in accordance with **paragraph 1.2** above, which shall set out:

- (a) the Access Beneficiary's comments on DB Cargo's proposals relating to:
 - (i) timing (provided pursuant to **paragraph 1.3(a)(iii)** above);
 - (ii) compensation (provided pursuant to **paragraph 1.3(a)(iv)**);
 - (iii) changes to the Service Facility Access Contract (provided pursuant to **paragraph 1.3(a)(vi)**); and
- (b) details of any further information required by the Access Beneficiary Counterparty in connection with its response to DB Cargo's notice of Service Facility Operating Constraints Change.

3.2 Any notice provided to DB Cargo pursuant to **paragraph 3.1** by an Access Beneficiary Counterparty must include reasons for its comments and, if it does not agree with DB Cargo's proposals, set out the Access Beneficiary Counterparty's alternative proposals in relation to matters included in **paragraphs 3.1(a)(i) to 3.1(a)(iii)**.

3.3 Any notice provided to DB Cargo pursuant to **paragraph 3.1** shall contain such detail and be supported by such supporting evidence as is reasonable to enable DB Cargo to assess the merits of the Access Beneficiary Counterparty's comments.

4 DB Cargo's decision regarding the proposed Service Facility Operating Constraints Change

4.1 Subject to **paragraph 4.2**, within thirty (30) days of receipt of response(s) from Access Beneficiary Counterparties pursuant to **paragraph 3.1** and having taken this into consideration, DB Cargo shall notify each Access Beneficiary Counterparty of the details of the Service Facility Operating Constraints Change that it intends to implement. Such notice shall include DB Cargo's decision regarding each of the matters identified at **paragraph 1.3(a)** including the amount and nature of any compensation to be paid to the Access Beneficiary (if any). If DB Cargo's decision includes a contribution from an Access Beneficiary Counterparty to the cost of the Service Facility Operating Constraints Change such contribution shall constitute a Facility Service Charge under the terms of the relevant Access Beneficiary Counterparty's Service Facility Access Contract

4.2 If an Access Beneficiary Counterparty fails to comply with **paragraph 3.1** and does not provide a response to DB Cargo by the relevant response date, the Access Beneficiary Counterparty concerned shall be deemed to agree the contents of DB Cargo's notice of Service Facility Operating Constraints Change served pursuant to **paragraph 1.2**.

5 Implementation of a Service Facility Operating Constraints Change

5.1 Following adherence to the procedure set out in **paragraphs 1 to 4**, DB Cargo shall be entitled to implement either:

- (a) the Service Facility Operating Constraints Change notified to the Access Beneficiary Counterparty in accordance with **paragraph 4.1**; or
- (b) the Service Facility Operating Constraints Change deemed accepted by the Access Beneficiary Counterparty in accordance with **paragraph 4.2**.

5.2 DB Cargo shall be entitled to make appropriate amendments to any Service Facility Access Contract to accommodate the Service Facility Operating Constraints Change outlined in the notice referred to in either **paragraph 4.1** or **paragraph 4.2** as appropriate.

6 Appeal

6.1 Each Access Beneficiary Counterparty acknowledges that it has no right of appeal in respect of the implementation of a Service Facility Operating Constraints Change.

6.2 If an Access Beneficiary Counterparty is dissatisfied:

- (a) as to any matter concerning the operation of the procedure in this Service Facility Operating Constraints Change Procedure; and/or
- (b) with a contribution to the cost of the Service Facility Operating Constraints Change of which DB Cargo has notified the Access Beneficiary Counterparty pursuant to **paragraph 4.1**; and/or
- (c) with the level of compensation (if any) that should be paid in respect of the implementation of a Service Facility Operating Constraints Change of which DB Cargo has notified the Access Beneficiary Counterparty pursuant to **paragraph 4.1**,

that Access Beneficiary Counterparty may refer the matter for determination in accordance with the Access Dispute Resolution Rules (“ADRR”) within fourteen (14) days of receipt of the notice referred to in **paragraph 4.1**.

6.3 Each Access Beneficiary Counterparty acknowledges that if more than one Access Beneficiary Counterparty applies for ADRR in connection with the same Service Facility Operating Constraints Change, DB Cargo may apply to the ADRR Allocation Chair for the disputes to be joined or heard and resolved together and no Access Beneficiary Counterparty will oppose such an application.

7 Changes to this Procedure

7.1 If DB Cargo wishes to make a Procedure Change Proposal it shall give notice of such Procedure Change Proposal to all Access Beneficiary Counterparties and the Access Beneficiary Counterparties shall have fourteen (14) days to comment.

7.2 Following reasonable consideration of any comments received from Access Beneficiary Counterparties, DB Cargo shall in its sole discretion decide whether to implement the Procedure Change Proposal and shall notify the Access Beneficiary Counterparties of its decision as soon as reasonably practicable after making it.

7.3 DB Cargo shall be entitled to make appropriate amendments to any Facilities Access Agreement to accommodate the amendment to the Service Facility Operating Constraints Change Procedure outlined in the notice referred to in **paragraph 7.2**.

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