

EXECUTION VERSION

DATED

2020

THE SECRETARY OF STATE FOR TRANSPORT

and

P&O FERRIES HOLDINGS LIMITED

ENTRUSTMENT OF PSO SERVICES AGREEMENT

relating to the provision of a guaranteed minimum capacity
on the route between Tilbury and Zeebrugge

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BETWEEN:

- (1) **THE SECRETARY OF STATE FOR TRANSPORT**, as represented by the Department for Transport, whose offices are located at Great Minster House, 33 Horseferry Road, London SW1P 4DR (the “**Grantor**”); and
- (2) **P&O FERRIES HOLDINGS LIMITED**, incorporated in England with company number 6038077, whose registered office is at Channel House, Channel View Road, Dover, CT17 9TJ, United Kingdom (the “**Freight Operator**”).

WHEREAS:

- (A) In order to achieve the Policy Objective (as defined below) in the context of the COVID-19 pandemic and in accordance with the criteria established by the Court of Justice of the European Union in Altmark (as defined below), the Grantor will entrust the Freight Operator with the delivery of a service of general economic interest to carry out the Service Obligation (as defined below) for the Service Term (as defined below) in accordance with the terms of this Agreement, pursuant to which the Freight Operator shall operate the Route (as defined below) and provide on the Route no less than the Minimum Capacity (as defined below), in accordance with the Policy Objective.
- (B) In consideration for the Freight Operator accepting and continuing to comply with the Service Obligation (as defined below) and as part of the entrustment of the Freight Operator with the service of general economic interest, and having used an open-book exercise to establish the actual costs of running the service supplied by freight operators over a comparative period as a benchmark to confirm least cost to the community, the Grantor will cover certain costs incurred by the Freight Operator in operating the Route (as defined below), in accordance with the terms set out in this Agreement, without overcompensating the Freight Operator.

WHEREBY IT IS AGREED as follows:

1. INTERPRETATION

1.1 In this Agreement:

“Additional Payment” means any: (i) True Up Payment; (ii) Adjustment Payment; (iii) amount alleged to be due in respect of a Disputed Error; (iv) amount due pursuant to clause 7.2(A); or (v) amount due pursuant to clause 7.2(B);

“Additional Payment Date” means:

(A) the first Payment Date falling no earlier than three (3) Business Days after the date on which a party receives an Additional Payment Notice; or

(B) if there are no further such Payment Dates

outstanding under this Agreement, the date falling one (1) week after the date on which a party receives an Additional Payment Notice;

“Additional Payment Notice”	has the meaning given to that term in clause 9.5;
“Adjustment Payment”	has the meaning given to that term in clause 8.2;
“Affiliate”	means, in relation to any person, another person that controls, is controlled by, or is under common control with, such person;
“Agreed Timetable”	means the timetable included at Schedule 7 (<i>Agreed Timetable</i>) to this Agreement;
“Altmark”	means case C-280/00 <i>Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH</i> ;
“Anti-corruption Laws”	means, in relation to a person, all Applicable Law relating to anti-bribery and corruption (including the UK Bribery Act 2010);
“Anti-slavery Laws”	means, in relation to a person, all Applicable Law relating to the prevention of slavery (including the Modern Slavery Act 2015);
“Anti-slavery Policy”	has the meaning given to that term in clause 22.1;
“Applicable Law”	means each law, enactment, order, regulation and mandatory guidance or code of conduct, judgments of a court of law or directives or requirements with which the parties are bound to comply;
“Arbitration Notice”	has the meaning given to that term in sub-clause 38.6;
“Associated Person”	has the meaning given to that term in Section 44(4) of the Criminal Finances Act 2017;
“Audit”	has the meaning given to that term in clause 6.1;
“Auditor”	means: (A) the Grantor;

- (B) the Audit Commission;
- (C) the National Audit Office; or
- (D) any professional services firm providing audit and/or accounting services appointed by and acting on behalf of any of the persons listed in (A) to (C) (inclusive) above;

“Business Day”

means a day (other than a Saturday or Sunday) on which clearing banks are ordinarily open for business in the City of London;

“Calculation Date”

means the date on which the Freight Operator sends the Grantor a Payment Invoice, being no later than ten (10) Business Days after the Service Period to which that Payment Invoice relates;

“Capacity Shortfall”

shall mean a failure by the Freight Operator to provide at least the Minimum Capacity during a Service Period, provided that:

- (A) such failure does not directly result from the occurrence of a Force Majeure Event; and
- (B) the capacity provided by the Freight Operator in that Service Period is not less than eighty per cent. (80%) of the then applicable Minimum Capacity;

“Central Government Body”

means a body listed in one of the following sub-categories of the Central Government classification of the Public Sector Classification Guide, as published and amended from time to time by the Office for National Statistics:

- (A) Government Department;
- (B) Non-Departmental Public Body or Assembly Sponsored Public Body (advisory, executive or tribunal);
- (C) Non-Ministerial Department;
- (D) Executive Agency; or
- (E) any other governmental body, department, ministry, entity or other ministerial body,

department, ministry or entity not included within sub-clauses (A) to (D) above;

“Claiming Party” has the meaning given to that term in the definition of “Force Majeure Event” in this clause 1.1;

“Claw-back Amount” has the meaning given to that term in clause 13.1;

“Clearance” means, at any time, any consent, licence, approval, permit or other authorisation of whatsoever nature which, at such time, is necessary, or is required, for the performance by the Freight Operator of its obligations pursuant to and in accordance with this Agreement;

“Commercially Sensitive Information” means:

(A) the information listed in Schedule 6 (*Commercially Sensitive Information*), comprising the information of a commercially sensitive nature relating to:

(i) the Freight Operator (including its holding companies and affiliates);

(ii) any information relating to the Freight Operator’s systems, operations, plans, intentions, strategies, pricing, market opportunities, know-how, trade secrets and business affairs; and

(iii) information which is derived from such commercially sensitive information; and

(B) any other information which, at the time that such information is provided to the Grantor, the Freight Operator has designated as “Commercially Sensitive Information”,

whether provided directly before or on the date of this Agreement in writing, verbally, in digital form or other means and which the Freight Operator has indicated to the Grantor that, if disclosed by the Grantor, would cause the Freight Operator significant commercial disadvantage or material financial loss;

“Compliance Certificate”	means a certificate in the form set out at Schedule 2 (<i>Form of Compliance Certificate</i>);
“Confidential Information”	means the Grantor’s Confidential Information and/or the Freight Operator’s Confidential Information, as the case requires;
“Consequential Loss”	<p>means:</p> <ul style="list-style-type: none"> (A) any indirect cost, expense, loss or damage; (B) any consequential cost, expense, loss or damage; (C) any incidental cost, expense, loss or damage; (D) any special cost, expense, loss or damage; (E) whether or not within any of sub-clauses (A) to (D) above and whether or not direct, any (1) loss of actual or anticipated profit, (2) losses caused by business interruption, (3) loss of or damage to goodwill or reputation, (4) loss of production, (5) loss of margin, (6) loss of revenue, (7) loss of contract; or (F) any liability to third parties, <p>in each case even if such cost, expense, loss or damage was reasonably foreseeable or might reasonably have been contemplated by the parties and whether arising from breach of contract, tort, negligence, breach of statutory duty or otherwise;</p>
“control”	<p>means:</p> <ul style="list-style-type: none"> (A) the power (whether by way of ownership of shares, proxy, contract, agency or otherwise) to: <ul style="list-style-type: none"> (i) cast, or control the casting of, more than one-half of the maximum number of votes that might be cast at a general meeting of the Freight Operator; (ii) appoint or remove all, or the majority,

of the directors or other equivalent officers of the Freight Operator; or

- (iii) give directions with respect to the operating and financial policies of the Freight Operator with which the directors or other equivalent officers of the Freight Operator are obliged to comply; or

- (B) the holding beneficially of more than fifty per cent. 50% of the issued share capital of the Freight Operator,

and “**controlling**” shall be construed accordingly;

“Corrupt Act”

means:

- (A) to directly or indirectly offer, promise or give any person working for or engaged by the Grantor a financial or other advantage to:
 - (i) induce that person to perform improperly a relevant function or activity; or
 - (ii) reward that person for improper performance of a relevant function or activity;
- (B) to directly or indirectly request, agree to receive or accept any financial or other advantage as an inducement or a reward for improper performance of a relevant function or activity in connection with this Agreement;
- (C) an offence:
 - (i) under the Bribery Act 2010 (or any legislation repealed or revoked by such Act);
 - (ii) under legislation or common law concerning fraudulent acts (including offences by the Freight Operator under Part 3 of the Criminal Finances Act 2017); or

	(iii) defrauding, attempting to defraud or conspiring to defraud the Grantor; or
	(D) any activity, practice or conduct which would constitute one of the offences listed under (C) above if such activity, practice or conduct had been carried out in the UK;
“Data Protection Legislation”	means: <ul style="list-style-type: none"> (A) the GDPR, the Law Enforcement Directive (Directive (EU) 2016/680), any applicable national implementing laws as amended from time to time; (B) the DPA to the extent that it relates to processing of Personal Data and privacy; and (C) all Applicable Law concerning the processing of Personal Data and privacy;
“De Minimis Amount”	means one thousand pounds sterling (£1,000);
“Default”	means an Event of Default or any event or circumstance specified in clause 12 (<i>Events of Default</i>) which would (with the expiry of a grace period, the giving of notice, the making of any determination under this Agreement or any combination of any of the foregoing) constitute an Event of Default;
“Determined Service Related Costs”	means the Service Related Costs as set out in the Financial Template from time to time;
“Devolved Administration”	means the Scottish Government, the Welsh Government and the Northern Ireland Executive;
“Disclosing Party”	has the meaning given to that term in clause 17.1;
“Disputed Error”	has the meaning given to that term in clause 4.3;
“Disputing Party”	has the meaning given to that term in clause 9.8;
“DPA”	has the meaning given to that term in sub-clause 10.2(A)(ix);

“EIRs”	means the Environmental Information Regulations 2004;
“Error”	has the meaning given to that term in clause 4.2;
“Estimated Information”	means any information provided by the Freight Operator that is: (i) based, in whole or in part, on good faith estimates made by the Freight Operator in relation to the operation of its business; and (ii) clearly marked by the Freight Operator as being based on such estimates;
“Event of Default”	has the meaning given to that term in clause 12 (<i>Events of Default</i>);
“Expiry Date”	means the date falling twelve (12) months after the Service Termination Date;
“Financial Template”	means the financial template agreed between the parties prior to the date of this Agreement (as such template may be amended from time to time in accordance with the terms of this Agreement);
“Floor Capacity Level”	means [REDACTED] per week;
“FOIA”	means the Freedom of Information Act 2000;
“Force Majeure Event”	<p>means, in relation to either party (the “Claiming Party”) a circumstance beyond the reasonable control of that party including lock outs, strikes and other industrial disputes (save where any lock outs, strikes or other industrial disputes arise as a result of any change to the terms and conditions of employment that apply to the Freight Operator’s employees or personnel (other than where any such change is required to comply with Applicable Law)), provided always that, the following shall not constitute events or circumstances that are capable of constituting Force Majeure Events:</p> <p>(A) a failure by either party to pay any amounts due under this Agreement;</p> <p>(B) an event or circumstance which arises, directly or indirectly, as a result of or in connection with the COVID-19 pandemic (including measures imposed by a Central</p>

Government Body, a Devolved Administration or any other national or devolved government or other public body in any country in response to the COVID-19 pandemic);

- (C) any mechanical or electrical breakdown or failure of any machinery or equipment, including Vessels or Rolling Stock (as applicable) utilised or intended to be utilised to fulfil the Freight Operator's obligations under this Agreement, which results from any matter which is within the control of the Freight Operator or any member of its Group or any matter which would be or would have been within its control were it acting and had it acted at all times as a Reasonable and Prudent Operator; or
- (D) the failure to obtain, or the withdrawal, expiration or termination of, any Clearance of which the Freight Operator was or should reasonably have been aware was necessary for it to comply with the terms of this Agreement and which would be or would have been within its control were it acting and had it acted as a Reasonable and Prudent Operator.

"Freight Operator's Confidential Information"

means any information, including Personal Data, however it is conveyed, that relates to the business, affairs, developments, trade secrets, knowhow, employees and suppliers of the Freight Operator, including intellectual property rights, together with information derived from the above, and any other information clearly designated as being confidential (whether or not it is marked as "confidential") or which ought reasonably to be considered to be confidential;

"Freight Operator Warranties"

means the warranties set out in Schedule 4 (*Freight Operator Warranties*);

"GDPR"

has the meaning given to that term in sub-clause 10.2(A)(ix);

"Government Data"

means any and all data (including any Personal Data in respect of which the Grantor is the controller), text, drawings, diagrams, images or sounds (together with

any database made up of any of these) which are embodied in any electronic, magnetic, optical or tangible media, including any of the Grantor's Confidential Information, and which:

- (A) are supplied to the Freight Operator by or on behalf of the Grantor; or
- (B) the Freight Operator is required to generate, process, store or transmit pursuant to this Agreement;

"Grantor's Confidential Information"

means any information, including Personal Data, however it is conveyed, that relates to the business, affairs, developments, trade secrets, know-how, employees, and suppliers of the Grantor and, including all intellectual property rights, together with all information derived from any of the above, and any other information clearly designated as being confidential (whether or not it is marked "confidential") or which ought reasonably to be considered to be confidential;

"Group"

means in relation to a party, that party and each of its Affiliates;

"Insolvency Event"

means, in relation to the Freight Operator:

- (A) an order has been made, petition presented (save for any petition which is frivolous or vexatious and is discharged, stayed or dismissed within ten (10) Business Days of its presentation) or resolution passed for its winding up or for the appointment of a liquidator or provisional liquidator in relation to it, other than for the sole purpose of a scheme for a solvent amalgamation of the Freight Operator with one or more other companies or the solvent reconstruction of the Freight Operator;
- (B) an administrator, receiver or administrative receiver has been appointed in relation to it;
- (C) a notice has been given or filed with the court of an intention to appoint an administrator, receiver or administrative receiver in relation to it and/or a petition or

application has been presented or order made in relation to it for the appointment of an administrator, receiver or administrative receiver;

- (D) it is unable to pay its debts within the meaning of section 123 of the Insolvency Act 1986, or there are unsatisfied written demands that have been served on it pursuant to section 123(1)(a) of the Insolvency Act 1986 or an unsatisfied judgment or court order is outstanding against it; or
- (E) it is, in any jurisdiction, subject to or threatened by any other procedures or steps which are analogous to those set out in sub-clauses (A) to (D) above;

“LCIA”	means the London Court of International Arbitration;
“Maximum Capacity Level”	means [REDACTED] per week;
“Mediator”	has the meaning given to that term in clause 38.4(A);
“Minimum Capacity”	means [REDACTED] per week, or such other level of minimum freight capacity as the Grantor may notify to the Freight Operator from time to time, in accordance with clauses 7.1(B) and 7.5;
“Non-Claiming Party”	has the meaning given to that term in clause 16 (<i>Force Majeure</i>);
“Non-Disputing Party”	has the meaning given to that term in clause 9.8;
“Payment”	has the meaning given to that term in clause 3.1;
“Payment Date”	means the date falling ten (10) Business Days after each Calculation Date, provided that, if such date falls on a day that is not a Business Day, the Payment Date shall be the next occurring Business Day;

“Payment Invoice”	means an invoice setting out the Freight Operator’s good faith calculation (if applicable, based on Estimated Information) of the amount of any Payment payable in respect of a Service Period in the form notified by the Grantor to the Freight Operator from time to time;
“Payment Invoice Deadline”	means 5:30 p.m. on the Calculation Date for the Service Period to which a Payment Invoice relates;
“Personal Data”	has the meaning given to that term in the GDPR;
“Policy Objective”	means the objective of making available, and preserving in the short term, the freight capacity needed to ensure that the minimum service levels necessary for effective supply of goods into the UK continue to be provided on the Route in a cost-effective manner;
“PO Number”	has the meaning given to that term in clause 9.13;
“Reasonable and Prudent Operator”	means a person in good faith seeking to perform its obligations under this Agreement and in the general conduct of its undertaking exercising that degree of skill, diligence, prudence and foresight which would reasonably and ordinarily be expected from a skilled and experienced operator operating in material compliance with Applicable Law engaged in the same type of undertaking, in the same industry, and under the same or similar circumstances and conditions;
“Recipient”	has the meaning given to that term in clause 17.1;
“Recognised Revenue”	means the total revenues that are: <ul style="list-style-type: none"> (A) paid or payable to the Freight Operator in connection with its operation of the Route in respect of a relevant Service Period; and (B) recognised as attributable to that Service Period in accordance with the Freight Operator’s accounting policies as applied in its most recent set of audited accounts prepared prior to the date of this Agreement;
“Records”	has the meaning given to that term in paragraph 1.3 of Part A of Schedule 1 (<i>Information and Records</i>);

“Representative”	has the meaning given to that term in clause 26 (<i>Notices</i>);
“Request for Information”	means a request for information relating to this Agreement or compliance with the Service Obligation or an apparent request for such information under the Code of Practice on Access to Government Information, FOIA or the EIRs;
“Review Meeting”	has the meaning given to that term in clause 10.2(A)(x);
“Revised Amount”	<p>means, where the data inputs into the Financial Template are revised as a result of:</p> <ul style="list-style-type: none"> (A) any Verification Process (including in relation to information provided by the Freight Operator pursuant to paragraph 1.1(D) of Schedule 1 (<i>Information and Records</i>)) to replace Estimated Information previously provided to the Grantor; (B) any Audit; or (C) the delivery of any notice by the Freight Operator pursuant to paragraph 1.1(B) of Schedule 1 (<i>Information and Records</i>) in respect of any difference, inaccuracy or mistake in Recognised Revenue information, <p>the amount of any Payment calculated as being payable in respect of a Service Period by the Financial Template using such revised inputs;</p>
“Rolling Stock”	means locomotives, carriages, wagons or other vehicles used on a railway (for the avoidance of doubt, the term “railway” includes the train line that runs through the Channel Tunnel);
“Route”	means the route between Tilbury and Zeebrugge using RORO Vessels;
“Service Document”	means a claim form, application notice, order, judgment or other document relating to any proceedings;
“Service Obligation”	has the meaning given to that term in clause 2.1;

“Service Period”	means:
	(A) a period of seven (7) days from and including 11 May 2020; and
	(B) thereafter, a period of seven (7) days from and including the day immediately following the last day of the previous Service Period;
“Service Related Costs”	means the aggregate of:
	(A) the variable costs incurred by the Freight Operator as a direct consequence of providing the Minimum Capacity on the Route (excluding any amount of variable costs that is attributable to provision of freight capacity on the Route in excess of the Minimum Capacity); and
	(B) a notional amount representing a proportion of the fixed costs directly attributable to the Freight Operator’s provision of the Minimum Capacity on the Route;
“Service Term”	means the period from and including the date of this Agreement to and including the Service Termination Date;
“Service Termination Date”	means the earlier of:
	(A) the expiry of the ninth (9 th) Service Period under this Agreement; and
	(B) the date on which the Service Term is terminated in accordance with clause 11 (<i>Termination of Service Term</i>);
“Term”	means the period from and including the date of this Agreement to and including the Expiry Date;
“Transparency Information”	has the meaning given to that term in clause 18.1;
“True Up Payment”	has the meaning given to that term in clause 8.1;
“Validation Process”	has the meaning given to that term in clause 4.1;

“VAT”	means: <ul style="list-style-type: none"> (A) within the European Union, any tax imposed by any member state thereof in conformity with the Directive of the Council of the European Union on the common system of value added tax (2006/112/EC); (B) to the extent not included in sub-clause (A), any value added tax imposed by the Value Added Tax Act 1994 and any legislation and regulations supplemental thereto; and (C) to the extent not included in sub-clauses (A) or (B), any tax corresponding to, or substantially similar to, the common system of value added tax referred to in sub-clause (A) of this definition;
“Verification Process”	has the meaning given to that term in clause 5 (<i>Verification</i>);
“Vessel”	means vessels, ships, boats or any other vehicles used to transport freight across bodies of water;
“Withheld Amount”	has the meaning given to that term in clause 9.8(A); and
“Working Hours”	means the period from 9:30 a.m. to 5:30 p.m. on a Business Day.

1.2 In this Agreement, unless otherwise specified or the context otherwise requires:

- (A) references to the parties hereto include their respective permitted assignees and/or the respective successors in title to substantially the whole of their respective undertakings;
- (B) references to clauses, paragraphs and Schedules are to clauses of, schedules to, and paragraphs in schedules to, this Agreement;
- (C) references to a **“company”** shall be construed so as to include any company or other body corporate wherever and however incorporated or established;
- (D) references to a **“person”** shall be construed to include any individual, firm, company, Central Government Body, government, state or agency of a state or any joint venture, association or partnership (whether or not having separate legal personality);

- (E) references to statutes or statutory provisions include references to any orders or regulations made thereunder and references to any statute, provision, order or regulation include references to that statute, provision, order or regulation as amended, modified, re-enacted or replaced;
- (F) any reference to a “**day**” (including in the definition of “**Business Day**”) shall mean a period of 24 hours running from midnight to midnight (London (UK) time);
- (G) references to times of the day are to London time;
- (H) any reference to a “**month**” is a reference to a period starting on one day in a calendar month and ending on the numerically corresponding day in the next succeeding calendar month save that, where any such period would otherwise end on a day which is not a Business Day, it shall end on the next succeeding Business Day, unless that day falls in the calendar month succeeding that in which it would otherwise have ended, in which case it shall end on the immediately preceding Business Day provided that, if a period starts on the last Business Day in a calendar month or if there is no numerically corresponding day in the month in which that period ends, that period shall end on the last Business Day in that later month (and references to “**months**” shall be construed accordingly);
- (I) references to “**£**”, “**pounds**” or “**sterling**” are to pound sterling, the lawful currency of the United Kingdom;
- (J) references to include, includes, including and included shall be construed without limitation to the generality of the preceding words; and
- (K) words importing the singular shall include the plural and vice versa, and words importing the masculine shall include the feminine and neuter and vice versa.

1.3 The schedules form part of the operative provisions of this Agreement and references to this Agreement shall, unless the context otherwise requires, include references to the schedules.

2. **PROVISION OF MINIMUM CAPACITY**

2.1 Subject to clause 2.2, for the duration of the Service Term, the Freight Operator shall procure that:

- (A) the amount of freight capacity that it provides on the Route shall be no less than the Minimum Capacity; and
- (B) unless otherwise agreed in advance by the Grantor, the number of services across which the Freight Operator makes such Minimum Capacity available on the Route is not reduced below the frequency of services specified in the Agreed Timetable,

being the “**Service Obligation**”.

2.2 The Freight Operator shall not be in breach of the Service Obligation where:

- (A) there is a Capacity Shortfall, provided that the Freight Operator makes available in the immediately following Service Period additional freight capacity (in excess of the then applicable Minimum Capacity) of an amount not less than the Capacity Shortfall; or
- (B) the failure of the Freight Operator to make available the Minimum Capacity in a Service Period is a direct consequence of a Force Majeure Event.

2.3 In consideration of the Freight Operator accepting and continuing to comply with the Service Obligation, the Grantor shall, in accordance with the terms of this Agreement, pay to the Freight Operator on each Payment Date the Payment due on such Payment Date as calculated in accordance with clause 3 (*Payment calculation*).

3. PAYMENT CALCULATION

3.1 Subject to clause 3.3, in respect of each Service Period, any amount payable by the Grantor to the Freight Operator in consideration of the Freight Operator accepting and continuing to comply with the Service Obligation shall be determined using the Financial Template (comprising the Determined Service Related Costs and the Recognised Revenue information in respect of the relevant Service Period) and shall be paid in accordance with clause 9 (*Payment terms*) (any such payment in respect of a Service Period being a “**Payment**”).

3.2 It is the agreed intention of the parties that the purpose of the Financial Template used to determine the amount of any Payment in accordance with clause 3.1 shall be to ascertain the amount (if any) by which the Determined Service Related Costs exceed the Recognise Revenue in respect of the Route, in each case, for the relevant Service Period.

3.3 No Payment shall be payable by the Grantor for any Service Period in respect of which the Freight Operator:

- (A) has failed to provide a materially complete Payment Invoice;
- (B) has breached the Service Obligation; or
- (C) was prevented from providing the Minimum Capacity due to the occurrence of a Force Majeure Event (notwithstanding clause 16 (*Force Majeure*)).

4. VALIDATION

4.1 Following receipt of a Payment Invoice, the Grantor shall review and verify the Freight Operator's good faith calculation of the Payment as set out in that Payment Invoice, including by reference to the information provided by the Freight Operator in compliance

with its obligations under paragraphs (A) and (C) of Schedule 1 (*Information and Records*) (the “**Validation Process**”).

- 4.2 The purpose of the Validation Process is to identify and correct any manifest errors contained in a Payment Invoice (including any incorrect information, missing information, or non-compliance with the terms of this Agreement or the operation of the Financial Template, the form of Payment Invoice notified to the Freight Operator from time to time or the requirements of Schedule 3 (*Invoicing Requirements*)) (an “**Error**”) before any payment in respect of that Payment Invoice is made to the Freight Operator.
- 4.3 Where the Freight Operator disputes the existence or extent of any Error identified by the Grantor pursuant to clause 4.2 (a “**Disputed Error**”) it shall notify the Grantor of the Disputed Error in the form of an Additional Payment Notice in accordance with clauses 9.5 and 9.6 and the matter shall then be resolved in accordance with the provisions of clauses 9.7 to 9.10 (inclusive).
- 4.4 Notwithstanding the conduct or completion of any Validation Process, each Payment shall remain subject to further adjustment as a result of: (i) the Verification Process; (ii) any Audit; and/or (iii) any Additional Payments.

5. **VERIFICATION**

At any time up to and including the date falling two (2) months after the date on which the Freight Operator has, pursuant to Part A of Schedule 1 (*Information and Records*), provided all information required by the Grantor in respect of a Service Period (including information in replacement for Estimated Information), and notwithstanding the operation of the Validation Process, the Grantor shall be entitled to undertake a detailed review and verification of the calculation of any Payment made in respect of that Service Period (including in relation to any data inputs into the Financial Template) (the “**Verification Process**”) and data inputs into the Financial Template shall be adjusted by reference to the outcome of such Verification Process such as may produce Revised Amounts, in respect of which clause 8 (*True up and adjustments*) shall apply.

6. **AUDIT**

- 6.1 At any time up to and including the Expiry Date, any Auditor shall, on giving reasonable notice to the Freight Operator, be entitled to carry out an audit in connection with the operation of this Agreement (an “**Audit**”) and data inputs into the Financial Template shall be adjusted by reference to the outcome of such Audit such as may produce Revised Amounts, in respect of which clause 8 (*True up and adjustments*) shall apply.
- 6.2 The Grantor shall notify the Freight Operator upon the commencement of any Audit.
- 6.3 The Auditor may request from the Freight Operator access to the information and records referred to in Schedule 1 (*Information and Records*) and, on giving reasonable notice, to any such other information, records and accounts or copies of the same as may, in the Auditor's opinion, be required to assess compliance by the Freight Operator

with any of the Freight Operator's obligations under this Agreement, including in order to:

- (A) verify the accuracy of any Payment paid or payable by the Grantor under this Agreement;
- (B) verify the data provided to the Grantor under this Agreement (including any data inputs into the Financial Template);
- (C) analyse whether the Financial Template operates to achieve the Policy Objective;
- (D) identify or investigate any actual or suspected breach by the Freight Operator of the terms of this Agreement;
- (E) verify the Freight Operator's compliance with Applicable Law insofar as such compliance relates to the provision of the Service Obligation or compliance with the terms of this Agreement;
- (F) identify or investigate actual or suspected impropriety or accounting mistakes or any breach or threatened breach of security (in such circumstances the Grantor shall have no obligation to inform the Freight Operator of the purpose or objective of its investigations);
- (G) obtain such information as is necessary to fulfil the Grantor's obligations to supply information for parliamentary, ministerial, judicial or administrative purposes including the supply of information to the Comptroller and Auditor General;
- (H) enable the National Audit Office to carry out an examination pursuant to Section 6(1) of the National Audit Act 1983 of the economy, efficiency and effectiveness with which the Grantor has used its resources; and/or
- (I) review any records relating to the Freight Operator's compliance with the Service Obligation and to verify that these reflect the Freight Operator's own internal reports and records,

and the Freight Operator shall comply with any such request as soon as practicable after it is made.

- 6.4 The Grantor shall use reasonable endeavours to ensure that the conduct of an Audit does not unreasonably disrupt the Freight Operator's business, save insofar as the Freight Operator accepts and acknowledges that control over the conduct of Audits carried out by Auditors other than the Grantor is outside of the control of the Grantor.

- 6.5 Subject to the Grantor's obligations of confidentiality, the Freight Operator shall, on being given reasonable notice by an Auditor, provide that Auditor with all reasonable co-operation and assistance in relation to any Audit, including by providing:
- (A) all information within the scope of the Audit requested by the Auditor;
 - (B) reasonable access to any sites controlled by the Freight Operator and to equipment used by the Freight Operator in complying with the Service Obligation; and
 - (C) reasonable access to the Freight Operator's officers and employees.
- 6.6 The parties agree that they shall each bear their own respective costs and expenses incurred in respect of compliance with their obligations under this clause 6, unless an Audit determines that a Default has occurred (or would have occurred before the Expiry Date, but for the termination or expiry of any term of this Agreement), in which case the Freight Operator shall reimburse the Grantor for all of the Grantor's reasonable costs and expenses incurred in connection with the Audit.

7. AMENDMENTS

- 7.1 The parties agree that the Financial Template may be amended:
- (A) by the Grantor at its sole discretion where it reasonably considers that the proposed amendment is required in order to:
 - (i) comply with Applicable Law (including judgments or decisions of any court, tribunal or commission), on giving not less than two (2) Business Days' notice to the Freight Operator;
 - (ii) to correct a manifest error in the Financial Template; or
 - (iii) ensure that the Financial Template continues to meet the Policy Objective; and
 - (B) by agreement between the parties, following a request from one party to the other and following good faith negotiations, provided that if the parties are unable to agree the terms of an amendment within a reasonable timeframe, no amendment shall be made.
- 7.2 The parties agree that, where the Freight Operator's Service Related Costs in respect of a Service Period (as reported to the Grantor pursuant to paragraph 1.1(A) of Schedule 1 (*Information and Records*)):
- (A) are lower than the Determined Service Related Costs, the difference between the Service Related Costs and the Determined Service Related Costs shall be refunded by the Freight Operator to the Grantor and such payment shall be made as an Additional Payment in accordance with clauses 9.5 to 9.10,

provided that no amount in excess of the Payment actually paid to the Freight Operator in respect of the relevant Service Period shall be payable by the Freight Operator pursuant to this clause 7.2(A); or

(B) are higher than the Determined Service Related Costs, the matter shall be discussed by the parties at the next Review Meeting.

7.3 Following a discussion pursuant to clause 7.2(B), the Grantor may, at its sole discretion, elect to pay to the Freight Operator an amount equal to all or part the difference between the Service Related Costs and the Determined Service Related Costs for that Service Period and any such payment shall be made to the Freight Operator as an Additional Payment in accordance with clauses 9.5 to 9.10.

7.4 Subject to clauses 7.5 and 7.6, the parties agree that the Grantor may, at its sole discretion, following a Review Meeting at which the matter is raised, and on giving reasonable notice to the Freight Operator, increase or reduce the amount of the Minimum Capacity in order to ensure that the amount of the Minimum Capacity continues to meet the Policy Objective.

7.5 Where the Grantor requires the Minimum Capacity to be increased pursuant to clause 7.4, the Freight Operator shall propose such amendments to the Determined Service Related Costs as it, acting in good faith, considers reasonable, proportionate and necessary in each case to reflect only the increase in its Service Related Costs that will directly result from the required increase in the Minimum Capacity (but otherwise calculated on the same basis) and the parties shall negotiate in good faith in order to agree the terms of such amendments, provided that, if the parties are unable to agree the terms of such amendments within a five (5) Business Days, no change shall be made to the Minimum Capacity pursuant to clause 7.4 and the Grantor shall be entitled to terminate the Service Term pursuant to clause 11.1(C).

7.6 Any request by the Grantor under clause 7.1(B) to: (i) increase the Minimum Capacity such that it would exceed the Maximum Capacity Level; or (ii) decrease the Minimum Capacity such that it will fall below the Floor Capacity Level, shall be subject to the prior agreement of the Freight Operator and to such period of notice as the Freight Operator may reasonably require.

8. TRUE UP AND ADJUSTMENTS

8.1 If any Revised Amount:

(A) is higher than a Payment paid in respect of a Service Period, the difference between the amount of the Payment actually paid to the Freight Operator and the Revised Amount shall be payable by the Grantor to the Freight Operator; or

(B) lower than a Payment paid in respect of a Service Period, the difference between the amount of the Payment actually paid to the Freight Operator and the Revised Amount shall be refunded by the Freight Operator to the Grantor,

in each case, in accordance with the terms of clause 9 (*Payment terms*) (a “**True Up Payment**”).

8.2 If any changes to the Financial Template are determined in accordance with clause 7.1(A)(i) or 7.1(A)(ii), the aggregate amount of the Payments due under this Agreement in respect of the already elapsed part of the Service Term shall, unless otherwise agreed between the parties, be recalculated using the updated Financial Template. If such recalculated amount is:

- (A) greater than the aggregate amount of the Payments paid to the Freight Operator in respect of the already elapsed part of the Service Term, the difference shall be payable by the Grantor to the Freight Operator; or
- (B) is less than the aggregate amount of the Payments paid to the Freight Operator in respect of the already elapsed part of the Service Term, the difference shall be refunded by the Freight Operator to the Grantor,

in each case, in accordance with the terms of clause 9 (*Payment terms*) (an “**Adjustment Payment**”).

9. PAYMENT TERMS

Payments

- 9.1 By no later than the Payment Invoice Deadline for a Service Period, the Freight Operator shall provide a Payment Invoice to the Grantor in respect of that Service Period.
- 9.2 Subject to clause 9.3, the Grantor shall pay to the Freight Operator on the relevant Payment Date the amount of any Payment set out in the Payment Invoice provided by the Freight Operator in accordance with clause 9.1, as such Payment amount may be adjusted by the Grantor to take account of any Errors in respect of that Payment Invoice identified during the course of the Validation Process.
- 9.3 Other than in respect of any Payment payable on the Payment Date in respect of the final Service Period, where the amount of any Payment due on a Payment Date is less than or equal to the De Minimis Amount, no Payment shall be payable on that Payment Date.
- 9.4 Any Payment that, but for the operation of clause 9.3, would have been payable on a Payment Date shall be included in the calculation of the amount of Payment payable on the next Payment Date in accordance with clause 3 (*Payment calculation*).

Additional Payments

- 9.5 Subject to clause 9.6, where a party believes that an Additional Payment is due, it shall notify the other party of that fact. In order to be valid, such notification shall include, as a minimum:

- (A) an invoice (in the case of an invoice addressed to the Grantor, complying with the requirements of Schedule 3 (*Invoicing Requirements*)) in the amount of the Additional Payment;
- (B) the data inputs into the Financial Template used to determine the Additional Payment;
- (C) the supporting information on which the data inputs into the Financial Template used to determine the Additional Payment are based; and
- (D) the specified Additional Payment Date,

an “**Additional Payment Notice**”.

9.6 An Additional Payment Notice shall be invalid and of no effect if received by the receiving party:

- (A) in the case of an Additional Payment Notice relating to a Disputed Error pursuant to clause 4.3, on a date falling later than four (4) Business Days after the Payment Date on which a Payment paid to the Freight Operator was adjusted as result of the Disputed Error pursuant to clause 9.2; and
- (B) in the case of any other Additional Payment Notice, on a date falling after the Expiry Date.

9.7 Each Additional Payment shall, to the extent not disputed pursuant to and in accordance with clause 9.8, be payable in immediately available funds by the relevant party on the Additional Payment Date specified in the relevant Additional Payment Notice.

9.8 Where a party (the “**Disputing Party**”) disputes the amount of an Additional Payment claimed by the other party (the “**Non-Disputing Party**”) pursuant to an Additional Payment Notice:

- (A) the Disputing Party may withhold all or any part of the Additional Payment which it reasonably considers is not due and properly payable in accordance with clause 8 (*True up and adjustments*) (the “**Withheld Amount**”) until the dispute is settled between the parties in accordance with clauses 37 (*Governing law and jurisdiction*) and 38 (*Dispute resolution*);
- (B) the Disputing Party shall otherwise be required to pay the Additional Payment less the Withheld Amount in accordance with clause 9.7; and
- (C) following the settlement of the dispute in accordance with clause 38 (*Dispute resolution*) if adversely determined against:

- (i) the Disputing Party, the Disputing Party shall pay the amount that it is determined is payable to the Non-Disputing Party (taking into account any amounts paid under sub-clause 9.8(B)); and
- (ii) the Non-Disputing Party, the Non-Disputing Party shall pay the amount that it is determined is payable to the Disputing Party (including, if relevant, the return of any amounts paid pursuant to sub-clause 9.8(B)),

in each case, within three (3) Business Days of the dispute being settled.

- 9.9 Any Additional Payments due from one party to the other under this Agreement may be set off against one another and against any Payment due from the Grantor on the Additional Payment Date or on such other date on which the Additional Payment is due to be paid in accordance with the terms of this Agreement.
- 9.10 Other than where there are no Payment Dates outstanding under this Agreement, where the amount of any Additional Payment is less than or equal to one thousand pounds sterling (£1,000) and there is no Payment payable on the next occurring Payment Date, the paying party shall be entitled to make the Additional Payment on the next date on which any Payment is payable.

General

- 9.11 All payments due under this Agreement shall be payable in pounds sterling (£) and the party making any payment shall transfer the amount of that payment by way of bank transfer to such account in the UK as the other party shall notify to it prior to the date of this Agreement or otherwise on no less than five (5) Business Days' notice.
- 9.12 The Freight Operator shall keep or cause to be kept such records as are reasonably necessary to show the basis for calculation of all amounts payable by it and the Grantor under this Agreement.
- 9.13 The Grantor shall provide and the Freight Operator shall include in all invoices rendered under this Agreement a unique purchase order number ("**PO Number**") details of which shall be provided by the Grantor no later than seven (7) Business Days after the date of this Agreement. All invoices submitted to the Grantor must be accompanied by such supporting documentation as may reasonably be requested by the Grantor and must quote the relevant PO Number and the other information contained in Schedule 3 (*Invoicing Requirements*), and be submitted to:

Address:

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Email: [REDACTED]

[REDACTED] [REDACTED]

Invoices that do not comply with these requests will be returned and shall be deemed to not to have been validly received by the Grantor.

9.14 The parties agree that no disputes arising out of or in connection with the amount of any Payment or any Additional Payment shall fall to be determined until the earlier of:

(A) the completion of any Audit carried out by or on behalf of the Grantor in accordance with clause 6 (Audit); and

(B) the Expiry Date.

9.15 The parties shall not be entitled to any remuneration, expenses, or commission save as set out in this Agreement.

10. REPRESENTATIONS, WARRANTIES AND UNDERTAKINGS

10.1 The Freight Operator represents and warrants to the Grantor that:

(A) each of the Freight Operator Warranties is true and not misleading as at the date of this Agreement; and

(B) each of the Freight Operator Warranties will be true and accurate on each Payment Date and each Additional Payment Date as if repeated on each such date by reference to the facts and circumstances subsisting at that time on the basis that any reference in the Freight Operator Warranties, whether express or implied, to the date of this Agreement is substituted by a reference to the relevant Payment Date or Additional Payment Date (as applicable).

10.2 The Freight Operator undertakes to the Grantor that it shall:

(A) for the duration of the Service Term:

(i) maintain in full force and effect all Clearances and, to the extent within its control, access to all infrastructure and assets required for it to continue to provide the Minimum Capacity on the Route to the standard expected of a Reasonable and Prudent Operator;

(ii) operate in material compliance with all Applicable Laws;

(iii) operate at all times in compliance with all applicable rules, guidance and best practice promulgated by any: (i) Central Government Body; (ii) Devolved Administration; (iii) other public body; or (iv) relevant industry body in relation to the COVID-19 pandemic;

- (iv) operate at all times in compliance with Anti-slavery Laws and Anti-corruption Laws;
- (v) operate at all times in compliance with all industry-specific guidance and best practice that a Reasonable and Prudent Operator would be expected to adopt and to the standard expected of a Reasonable and Prudent Operator;
- (vi) pay in full, and within the applicable payment periods (whether contractual or arising through the ordinary course of practice and, in each case, in accordance with such agreements between the Freight Operator and its counterparties as may be in place from time to time), all amounts falling due and payable in respect of its port dues (if applicable), employment expenses, amounts owing to its suppliers and sub-contractors and other similar amounts arising in connection with the provision of freight capacity in accordance with the Service Obligation;
- (vii) (a) continue to sell tickets for the Route in accordance with its standard commercial practices as such practices were implemented prior to the date of this Agreement and not change its pricing methodology, algorithms or refund policy; and (b) not reduce its pricing below the level at which Recognised Revenue per lane metre on the Route would be ten per cent. (10%) or more lower than such Recognised Revenue as at the date of this Agreement, in each case, without the prior consent of the Grantor;
- (viii) not make any changes to its standard terms and conditions without the prior consent of the Grantor;
- (ix) (and procure that any of its employees involved in connection with compliance with the Service Obligation hereunder shall) comply with any applicable data protection and notification requirements under the Data Protection Act 2018 (the “**DPA**”) and the General Data Protection Regulation (EU) 2016/679 of the European Parliament (“**GDPR**”) (as amended from time to time) and shall duly observe all obligations under all Data Protection Legislation applicable to it, including but not limited to the DPA and GDPR, and Law Enforcement Directive (Directive (EU) 2016/680) which arise in connection with this Agreement; and
- (x) procure that, on request by the Grantor on reasonable notice, its Representatives shall participate in a weekly teleconference meeting with the Grantor’s Representatives (a “**Review Meeting**”), to discuss, among other things:
 - (1) the operation of this Agreement;
 - (2) the Freight Operator’s financial status;

- (3) financial and other information provided by the Freight Operator in connection with this Agreement (including in relation to the accuracy of such information and any Additional Payments);
 - (4) the services provided or to be provided on the Route; and
 - (5) progress in achieving the Policy Objective; and
- (B) for the duration of the Term:
 - (i) allow the Grantor and/or any Auditor (as applicable), access to its records, accounts and such other information as may be required to assess the Freight Operator's compliance with the terms of this Agreement (including to verify the amount of any Payment and/or any Additional Payment);
 - (ii) keep and maintain full and accurate records and accounts in accordance with good industry practice and law, including in relation to the operation of this Agreement, the freight capacity provided pursuant to the Service Obligation and the amount of any Payments paid by the Grantor; and
 - (iii) comply with the requirements of Schedule 1 (*Information and Records*).

11. TERMINATION OF SERVICE TERM

11.1 The Grantor may terminate the Service Term:

- (A) immediately upon notice to the Freight Operator if:
 - (i) in the reasonable opinion of the Grantor, this Agreement is or may become unlawful, provided that the Grantor may elect to negotiate in good faith with the Freight Operator to agree such changes as the Grantor considers may be necessary to remedy such situation;
 - (ii) an Event of Default occurs;
 - (iii) a Force Majeure Event occurs;
 - (iv) the Freight Operator undergoes a change of control; or
 - (v) the Freight Operator accepts or is in receipt of any other government support (whether provided by a Central Government Body, a Devolved Administration or any other national or devolved government or other public body in any country), unless the Grantor has consented in writing to the Freight Operator receiving such support; or

- (B) on giving not less than four (4) Business Days' notice to the Freight Operator if, following a Review Meeting, the Grantor determines that either:
 - (a) the Policy Objective has ceased to apply in respect of the Route and there is no further need for the Service Obligation; or
 - (b) this Agreement no longer achieves the Policy Objective; or
 - (C) at the end of the Service Period during which the Grantor gives notice to the Freight Operator that it intends to terminate the Service Period in accordance with clause 7.5.
- 11.2 The Freight Operator may, on giving not less than five (5) Business Days' notice to the Grantor, terminate the Service Term with effect from the end of the Service Period during which such notice is given if, in the reasonable opinion of the Freight Operator, an amendment to the Financial Template proposed to be made by the Grantor pursuant to clause 7.1(A)(iii) would directly result in the Freight Operator's continued compliance with the Service Obligation being more economically unviable for the freight Operator relative to the costs that it would incur were it to cease to comply with the Service Obligation, provided that any notice of termination given pursuant to this clause must be provided to the Grantor no later than the second Business Day following the date on which the Freight Operator was first notified of the proposed amendment to the Financial Template pursuant to clause 7.1(A)(iii).
- 11.3 Where either the Service Term or Agreement is terminated by the Grantor it shall be entitled to damages and the parties acknowledge and agree, without prejudice to clause 15 (*Damages as an inadequate remedy*), that the objective of this Agreement, in so far as the Grantor is concerned, is to achieve the Policy Objective through the performance by the Freight Operator of the Service Obligation as set out in this Agreement, and that therefore if there is a breach by the Freight Operator of this Agreement damages for direct loss shall neither be sufficient nor represent the loss to the Grantor and that the loss to the Grantor shall include the cost of procuring alternative capacity with another freight operator or operators and that this shall not be considered to be Consequential Loss.
- 11.4 The Grantor may, within fifteen (15) Business Days of the Expiry Date or earlier termination of this Agreement pursuant to this clause 11, require the Freight Operator to, and the Freight Operator shall if so required, securely erase or destroy all Government Data (save to the extent that it is strictly necessary for the Freight Operator to retain any such data pursuant to Applicable Law or for the operation of its business, provided always that any data required to be erased or destroyed for the purposes of Applicable Law shall not be retained). The provisions of this clause 11 shall continue to apply for twelve (12) months following the expiry or termination of this Agreement.

12. EVENTS OF DEFAULT

12.1 The occurrence of each of the following circumstances shall constitute a separate Event of Default:

- (A) non-payment of any amounts owing to the Grantor, unless such non-payment is due to a technical error and the payment is made no later than: (i) the end of the then current Service Period; or (ii) when no Service Period is then current, the date falling one (1) week after the date on which it was originally due (or such other date as may be agreed by the Grantor);
- (B) any failure by the Freight Operator to comply with the Service Obligation (excluding, for the avoidance of doubt, any Capacity Shortfall);
- (C) any failure by the Freight Operator to comply with:
 - (i) any of the undertakings set out in Part A of Schedule 1 (*Information and Records*);
 - (ii) clauses 17 (*Confidentiality*), 18 (*Transparency*), 19 (*Freedom of information*) and/or 20 (*Protection of Personal Data*);
- (D) any material breach by the Freight Operator of any applicable rules, guidance and best practice promulgated by any: (i) Central Government Body; (ii) a Devolved Administration; (iii) other public body in relation to: (a) health and safety (including with regard to the COVID-19 pandemic); (b); equality and diversity; or (c) section 182 of the Finance Act 1989;
- (E) the Freight Operator fails to comply with or perform any other obligations under this Agreement unless such default (if capable of remedy) is remedied by the Freight Operator before the end of the then current Service Period (or such other date as may be agreed by the Grantor);
- (F) any representation or statement made or deemed to be made by the Freight Operator in this Agreement or any other document delivered or information provided under or in connection with this Agreement is or proves to have been incorrect or misleading in any material respect when made or deemed to be made, unless the facts or circumstances giving rise to such misrepresentation (if capable of remedy) are remedied before the end of the then current Service Period (or such other date as may be agreed by the Grantor);
- (G) the occurrence of an Insolvency Event; or
- (H) the Freight Operator rescinds or repudiates (or evidences an intention to rescind or repudiate) this Agreement,

each, an “**Event of Default**”.

13. CONSEQUENCES OF AN EVENT OF DEFAULT

13.1 Following the occurrence of an Event of Default, the Grantor shall be entitled to:

- (A) terminate the Service Term pursuant to sub-clause 11.1(A)(ii);
- (B) notwithstanding any other provision of this Agreement, withhold any Payments payable in respect of any Service Period during which an Event of Default occurred or persisted (and the Freight Operator shall be deemed to have forfeited such Payments); and
- (C) where:
 - (i) the Event of Default in question is a material breach of the Service Obligation; or
 - (ii) the Event of Default that has occurred arose as a result of a material breach by the Freight Operator of its obligations under sub-clause 10.2(A)(ii) or sub-clause 10.2(A)(vi),

require the Freight Operator to repay in full the aggregate of all Payments (as adjusted by any Additional Payment) paid to the Freight Operator under this Agreement (the “**Claw-back Amount**”).

13.2 The Grantor shall notify the Freight Operator of: (i) its intention to exercise its right to claim any Claw-back Amount pursuant to clause 13.1(C); and (ii) the amount so claimed, no later than five (5) Business Days after it has notified the Freight Operator of its election to terminate this Agreement pursuant to sub-clause 11.1(A)(ii).

13.3 The Freight Operator shall pay to the Grantor the Claw-back Amount claimed by the Grantor pursuant to clause 13.1 and specified in the notice given to the Freight Operator pursuant to clause 13.2 no later than seven (7) Business Days from receipt of such notice.

14. LIMITATIONS ON LIABILITY

14.1 Neither party shall be liable to the other party (and in the case of the Grantor to any member of the Freight Operator’s Group) whether in contract, tort (including negligence and breach of statutory duty) or otherwise for Consequential Loss provided always that the parties acknowledge and agree that the loss to the Grantor described in clause 11.2 shall not constitute Consequential Loss.

14.2 Nothing in this Agreement shall exclude, restrict or limit the liability of either party for:

- (A) death or personal injury resulting from negligence or wilful misconduct; and
- (B) fraud or any other matter, action, or omission if and to the extent that, under Applicable Law, it cannot be excluded, restricted or limited.

- 14.3 The maximum aggregate liability of the Grantor under this Agreement shall be, in all cases, an amount equal to the aggregate gross amount of all Payments (as adjusted by any Additional Payments) payable by the Grantor pursuant to this Agreement in respect of the Service Term.
- 14.4 The maximum aggregate liability of the Freight Operator under this Agreement shall be, in all cases, an amount equal to the aggregate gross amount of all Payments (as adjusted by any Additional Payments) received from the Grantor pursuant to this Agreement in respect of the Service Term.
- 14.5 Subject to clauses 14.1, 14.2 and 14.4, the Freight Operator acknowledges that the Grantor may, without prejudice to any other losses that may be recoverable by it, recover from the Freight Operator any amounts payable by the Freight Operator to the Grantor in respect of any Additional Payments pursuant to clause 9 (*Payment terms*).

15. DAMAGES AS AN INADEQUATE REMEDY

The Freight Operator agrees that damages would not be an adequate remedy for any breach by it of the provisions of this Agreement and consequently that the equitable remedy of specific performance of the terms hereof should be available in the event of any breach by it.

16. FORCE MAJEURE

- 16.1 Subject to the Grantor's right to terminate the Service Term pursuant to clause 11.1(A)(iii), the Claiming Party will not be in breach of this agreement or otherwise liable to the other party (the "**Non-Claiming Party**") for any delay in performance or any non-performance of any obligations under this Agreement (and the time for performance will be extended accordingly) if and to the extent that the delay or non-performance is by reason of a Force Majeure Event. This clause 16.1 only applies if:
- (A) the Claiming Party could not have avoided the effect of the Force Majeure Event by taking precautions which, having regard to all matters known to it before the occurrence of the Force Majeure Event and all relevant factors, it ought reasonably to have taken but did not take; and
 - (B) the Claiming Party has used reasonable endeavours to mitigate the effect of the Force Majeure Event and to carry out its obligations under this agreement in any other way that is reasonably practicable.
- 16.2 The Claiming Party shall promptly notify the Non-Claiming Party of the nature and extent of the circumstances giving rise to a Force Majeure Event. As soon as possible after the notification of the occurrence of a Force Majeure Event, the parties shall, if either party so elects, enter into bona fide discussions with a view to alleviating the effects of such Force Majeure Event or agreeing alternative arrangements that shall be fair and reasonable taking into account their respective obligations to third parties.

- 16.3 The Claiming Party shall notify the Non-Claiming Party as soon as practicable after a Force Majeure Event ceases or no longer causes the Claiming Party to be unable to comply with its obligations under this Agreement. Following such notification, this Agreement shall continue to be performed on the terms existing immediately prior to the occurrence of the Force Majeure Event, save that the Non-Claiming Party shall be entitled to act in accordance with any binding arrangements that it (acting reasonably) put in place at the time after the Force Majeure Event in order to mitigate the effect of the Force Majeure Event. The Non-Claiming Party shall use reasonable endeavours to ensure that the binding arrangements that it enters into in mitigation of a Force Majeure Event are reasonable and proportionate given the nature and anticipated duration of the Force Majeure Event.
- 16.4 The Claiming Party on giving notice in accordance with clause 16.2 shall be excused from the performance or punctual performance, as the case may be, of the obligations notified for so long as the circumstances notified (or the effects thereof) continue and the Claiming Party shall be deemed not to be in breach of this Agreement to the extent that such breach is caused by the circumstances constituting a Force Majeure Event.

17. CONFIDENTIALITY

- 17.1 For the purposes of this clause 17.1, the term “**Disclosing Party**” shall mean a party which discloses or makes available directly or indirectly its Confidential Information and “**Recipient**” shall mean the party which receives or obtains directly or indirectly Confidential Information.
- 17.2 Except to the extent set out in this clause 17 or where disclosure is expressly permitted elsewhere in this Agreement, the Recipient shall:
- (A) treat the Disclosing Party's Confidential Information as confidential and keep it in secure custody (which is appropriate depending upon the form in which such materials are stored and the nature of the Confidential Information contained in those materials);
 - (B) not disclose the Disclosing Party's Confidential Information to any other person except as expressly set out in this Agreement or without obtaining the Disclosing Party's prior written consent;
 - (C) not use or exploit the Disclosing Party's Confidential Information in any way except for the purposes anticipated under this Agreement; and
 - (D) immediately notify the Disclosing Party if it suspects or becomes aware of any unauthorised access, copying, use or disclosure in any form of any of the Disclosing Party's Confidential Information.

- 17.3 The Recipient shall be entitled to disclose the Confidential Information of the Disclosing Party where:
- (A) the Recipient is required to disclose the Confidential Information by law, provided that clause 19 (*Freedom of information*) shall apply to disclosures required under the FOIA or the EIRs;
 - (B) the need for such disclosure arises out of or in connection with:
 - (i) any legal challenge or potential legal challenge against the Grantor arising out of or in connection with this Agreement;
 - (ii) the examination and certification of the Grantor's accounts (provided that the disclosure is made on a confidential basis) or for any examination pursuant to Section 6(1) of the National Audit Act 1983 of the economy, efficiency and effectiveness with which the Grantor is making use of its resources; or
 - (iii) the conduct of a Central Government Body review in respect of this Agreement; or
 - (C) the Recipient has reasonable grounds to believe that the Disclosing Party is involved in activity that may constitute a criminal offence under the Bribery Act 2010 and the disclosure is being made to the Serious Fraud Office.
- 17.4 If the Recipient is required by Applicable Law to make a disclosure of Confidential Information, the Recipient shall as soon as reasonably practicable and to the extent permitted by Applicable Law notify the Disclosing Party of the full circumstances of the required disclosure including the relevant Applicable Law and/or regulatory body requiring such disclosure and the Confidential Information to which such disclosure would apply.
- 17.5 Subject to clauses 17.2 and 17.3, the Freight Operator may only disclose the Confidential Information of the Grantor on a confidential basis to:
- (A) its officers and employees who are directly involved in the provision of the Service Obligation and need to know the Confidential Information to enable the performance of the Freight Operator's obligations under this Agreement; and
 - (B) its professional advisers for the purposes of obtaining advice in relation to this Agreement.
- 17.6 Where the Freight Operator discloses the Confidential Information of the Grantor pursuant to clause 17.5, it shall remain responsible at all times for compliance with the confidentiality obligations set out in this Agreement by the persons to whom disclosure has been made.

17.7 The Grantor may disclose the Confidential Information of the Freight Operator:

- (A) to any Central Government Body or Devolved Administration on the basis that the information may only be further disclosed to Central Government Bodies and Devolved Administrations;
- (B) to the British Parliament and any committees of the British Parliament or if required by any Parliamentary reporting requirement;
- (C) to the extent that the Grantor deems disclosure necessary or appropriate in the course of carrying out its public functions;
- (D) on a confidential basis to a professional adviser, consultant, supplier or other person engaged by any of the entities described in clause 17.7(A) (including any benchmarking organisation) for any purpose relating to or connected with this Agreement;
- (E) on a confidential basis for the purpose of the exercise of its rights under this Agreement; or
- (F) to a proposed transferee, assignee or novatee of, or successor in title to the Grantor,

and for the purposes of the foregoing, references to disclosure on a confidential basis shall mean disclosure subject to a confidentiality agreement or arrangement containing terms no less stringent than those placed on the Grantor under this clause 17.

17.8 Nothing in this clause 17 shall prevent a Recipient from using any techniques, ideas or know-how which the Recipient has gained during the performance of this Agreement in the course of its normal business to the extent that this use does not result in a disclosure of the Disclosing Party's Confidential Information or an infringement of intellectual property rights.

18. TRANSPARENCY

18.1 The parties acknowledge that the contents of this Agreement, including any changes to this Agreement agreed from time to time, except for:

- (A) any information which is exempt from disclosure in accordance with the provisions of the FOIA, which shall be determined by the Grantor; and
- (B) Commercially Sensitive Information;

are not Confidential Information (the "**Transparency Information**").

18.2 Notwithstanding any other provision of this Agreement, the Freight Operator hereby gives its consent for the Grantor to publish to the general public the Transparency Information in its entirety (but with any information which is exempt from disclosure in

accordance with the provisions of the FOIA redacted). The Grantor shall, prior to publication, consult with the Freight Operator on the manner and format of publication and to inform its decision regarding any redactions but shall have the final decision in its absolute discretion.

- 18.3 The Freight Operator shall assist and cooperate with the Grantor to enable the Grantor to publish the Transparency Information.
- 18.4 If the Grantor believes that publication of any element of the Transparency Information would be contrary to the public interest, the Grantor shall be entitled to exclude such information from publication. The Grantor acknowledges that it would expect the public interest by default to be best served by publication of the Transparency Information in its entirety. Accordingly, the Grantor acknowledges that it will only exclude Transparency Information from publication in exceptional circumstances and agrees that where it decides to exclude information from publication it will provide a clear explanation to the Freight Operator.
- 18.5 The Grantor shall publish the Transparency Information in a format that assists the general public in understanding the relevance and completeness of the information being published to ensure the public obtain a fair view on how this Agreement is being performed, having regard to the context of the wider commercial relationship with the Freight Operator.

19. FREEDOM OF INFORMATION

- 19.1 The Freight Operator acknowledges that the Grantor is subject to the requirements of the FOIA and the EIRs. The Freight Operator shall:
- (A) provide all necessary assistance and cooperation as reasonably requested by the Grantor to enable the Grantor to comply with its information disclosure obligations under the FOIA and EIRs;
 - (B) transfer to the Grantor all Requests for Information relating to this Agreement that it receives as soon as practicable and, in any event, within two (2) Business Days of receipt;
 - (C) provide the Grantor with a copy of all information belonging to the Grantor requested in the Request for Information which is in the Freight Operator's possession or control in the form that the Grantor requires within five (5) Business Days (or such other period as the Grantor may reasonably specify) of the Grantor's request for such information; and
 - (D) not respond directly to a Request for Information unless authorised in writing to do so by the Grantor.
- 19.2 The Freight Operator acknowledges that the Grantor may be required under the FOIA and EIRs to disclose information (including Commercially Sensitive Information) without consulting or obtaining consent from the Freight Operator. The Grantor shall take

reasonable steps to notify the Freight Operator of a Request for Information (in accordance with the Freedom of Information Code of Practice issued under Part 1 of the FOIA) to the extent that it is permissible and reasonably practical for it to do so but (notwithstanding any other provision in this Agreement) for the purpose of this Agreement, the Grantor shall be responsible for determining in its absolute discretion whether any Commercially Sensitive Information and/or any other information is exempt from disclosure in accordance with the FOIA and/or the EIRs.

20. PROTECTION OF PERSONAL DATA

- 20.1 The Freight Operator acknowledges that it must process Personal Data relating to this Agreement and ensure that its officers and employees process Personal Data relating to this Agreement only in accordance with this clause 20.
- 20.2 The Freight Operator must not remove any ownership or security notices in or relating to the Government Data.
- 20.3 If at any time the Freight Operator suspects or has reason to believe that the Government Data provided under this Agreement is corrupted, lost or sufficiently degraded, then the Freight Operator must notify the Grantor and immediately suggest remedial action.
- 20.4 If the Government Data is corrupted, lost or sufficiently degraded so as to be unusable the Grantor may:
 - (A) instruct the Freight Operator to restore or have restored the Government Data as soon as practical but no later than five (5) Business Days from the date that the Grantor receives notice, or the Freight Operator finds out about the issue, whichever is earlier; and/or
 - (B) restore the Government Data itself or using a third party.
- 20.5 The Freight Operator must pay the Grantor's reasonable costs of complying with clause 20.4 unless the Grantor is at fault.
- 20.6 The Freight Operator shall:
 - (A) provide the Grantor with all Government Data in an agreed open format within ten (10) Business Days of a written request;
 - (B) have documented processes to guarantee prompt availability of Government Data if the Freight Operator stops trading;
 - (C) securely destroy all storage media that has held Government Data at the end of life of that media in accordance with good industry practice;
 - (D) securely erase all Government Data and any copies it holds when asked to do so by the Grantor unless required by Applicable Law to retain it; and

- (E) indemnify the Grantor against any and all losses incurred if the Freight Operator breaches this clause 20 and any Data Protection Legislation.

21. PUBLICITY AND BRANDING

- 21.1 Subject to clause 21.2, the Freight Operator shall not:
 - (A) make any press announcements or publicise this Agreement in any way or publish publicly any content in relation to this Agreement using any media, including on any electronic medium; or
 - (B) use the Grantor's name or brand in any promotion or marketing without the prior approval of the Grantor, at its absolute discretion.
- 21.2 The Freight Operator may publish publicly any content in relation to this Agreement where it is required to do so by Applicable Law, provided that the Freight Operator shall, as soon as reasonably practicable before such publication, to the extent permitted by Applicable Law, notify the Grantor of the full circumstances of the required disclosure including the relevant Applicable Law and/or regulatory body the Freight Operator considers to require such disclosure.
- 21.3 Each party acknowledges to the other that nothing in this Agreement either expressly or by implication constitutes an approval and/or endorsement of any products or services of the other party and each party agrees not to conduct itself in such a way as to imply or express any such approval and/or endorsement.
- 21.4 The Grantor shall be entitled to publicise this Agreement in accordance with any legal obligation upon the Grantor, including any examination of this Agreement by the National Audit Office pursuant to the National Audit Act 1983 or otherwise.

22. PREVENTION OF MODERN SLAVERY

- 22.1 The Freight Operator shall, and shall procure that each of its sub-contractors shall, operate at all times in compliance with the Grantor's anti-slavery policy provided to the Freight Operator by the Grantor from time to time (the "**Anti-slavery Policy**").
- 22.2 The Freight Operator shall:
 - (A) implement due diligence procedures for its subcontractors and other participants in its supply chains, to ensure that there is no slavery or trafficking in its supply chains;
 - (B) respond promptly to all slavery and trafficking due diligence questionnaires issued to it by the Grantor from time to time and ensure that its responses to all such questionnaires are complete and accurate;
 - (C) maintain a complete set of records to trace the supply chain of all services provided to the Grantor pursuant to this Agreement; and

- (D) implement a system of training for its employees to ensure compliance with the Modern Slavery Act 2015.

22.3 The Freight Operator shall notify the Grantor as soon as it becomes aware of:

- (A) any breach, or potential breach, of the Anti-slavery Policy; or
- (B) any actual or suspected slavery or trafficking in a supply chain which relates to this Agreement.

22.4 If the Freight Operator makes a notification to the Grantor pursuant to clause 22.3, the Freight Operator shall respond promptly to the Grantor's enquiries, co-operate with any investigation, and allow the Grantor to review any books, records and/or any other relevant documentation in accordance with the terms of this Agreement.

23. PREVENTION OF FRAUD AND BRIBERY

23.1 The Freight Operator shall not during the term of this Agreement:

- (A) commit a Corrupt Act; or
- (B) do or suffer anything to be done which would cause the Grantor or any of the Grantor's employees, consultants, contractors, sub-contractors or agents to contravene any of the Anti-corruption Laws or otherwise incur any liability in relation to all Anti-corruption Laws.

23.2 The Freight Operator shall during the term of this Agreement:

- (A) establish, maintain and enforce, and require that its sub-contractors establish, maintain and enforce, policies and procedures which are adequate to ensure compliance with all Anti-corruption Laws and prevent the occurrence of a Corrupt Act;
- (B) have in place reasonable prevention measures (as defined in sections 45(3) and 46(4) of the Criminal Finance Act 2017) to ensure that Associated Persons of the Freight Operator do not commit tax evasion facilitation offences as defined under that Act;
- (C) keep appropriate records of its compliance with its obligations under clause 23.2(A) and make such records available to the Grantor on request; and
- (D) take account of any guidance about preventing facilitation of tax evasion offences which may be published and updated in accordance with Section 47 of the Criminal Finances Act 2017.

24. SET-OFF

All payments to be made by any party to this Agreement shall be made in full and free and clear of any right of set-off and any restriction, condition or deduction because of any counterclaim (save as pursuant to clause 9.9).

25. VAT

Any sum payable under this Agreement by one party to another party is deemed to be exclusive of any amounts in respect of any VAT chargeable on the supply for which that sum is the consideration (in whole or in part) for VAT purposes. If anything done by one party under this Agreement constitutes, for VAT purposes, the making of a supply to another party and VAT is or becomes chargeable on that supply, the party receiving the supply shall pay the other party, in addition to any amounts otherwise payable under this Agreement by the party receiving the supply, a sum equal to the amount of the VAT chargeable on that supply against delivery of a valid VAT invoice to the party receiving the supply.

26. NOTICES

26.1 Every notice, request, authorisation, approval, consent, demand, invoice or other communication made under this Agreement shall:

- (A) be in writing delivered personally or by first class prepaid post providing proof of delivery or by e-mail;
- (B) be deemed to have been received, in the case of an e-mail, immediately after receipt in legible form and, in the case of a letter, when delivered personally or at the time recorded by the delivery service; and
- (C) be sent and addressed as follows (as applicable), or to such alternative notice details as a party may notify (in respect of itself) to the other party to this Agreement in accordance with this clause 26 (provided that such notice shall only be effective on the day falling five (5) Business Days after the notification has been received or such later date as may be specified in the notice):

- (i) to the Freight Operator:

Address: Channel House,
Channel View Road,
Dover,
CT17 9TJ,
United Kingdom

For the attention of: Legal Department

E-mail:

(ii) to the Grantor:

Address: Department for Transport
Great Minster House,
33 Horseferry Road,
London
SW1P 4DR

For the attention of:

E-mail:

- 26.2 Any notice given under this Agreement outside Working Hours shall be deemed not to have been given until the start of the next period of Working Hours.
- 26.3 The provisions of this clause 26 shall not apply in relation to the service of any claim form, application notice, order, judgment or other document relating to any proceeding, claim, suit or action arising out of or in connection with this Agreement.
- 26.4 For the purposes of discharging and managing their respective obligations under this Agreement, each of the parties shall appoint two (2) representatives (the “**Representative**”). The initial Representatives are set out in Schedule 5 (*Initial Representatives*). Each party may change its Representatives at any time upon giving notice (including, without limitation, by e-mail) to the other party.
- 26.5 The Representatives shall be readily available and shall correspond on a regular basis throughout the term of this Agreement to discuss the provision of the Service Obligation and any issues in relation thereto. Any such issues shall be dealt with expeditiously and constructively with a view to reaching a mutually acceptable resolution as soon as reasonably practicable.

27. SURVIVING PROVISIONS

Termination or expiry of this Agreement shall be without prejudice to the survival of any provision of this Agreement which, expressly or by implication, is to be performed or observed notwithstanding termination or expiry of this Agreement, including the provisions of clauses 1 (*Interpretation*), 6 (*Audit*), 14 (*Limitations on liability*), 15 (*Damages as an inadequate remedy*), 17 (*Confidentiality*), 18 (*Transparency*), 19 (*Freedom of information*), 20 (*Protection of Personal Data*), 21 (*Publicity and branding*), 24 (*Set-Off*), 26 (*Notices*), 29 (*Remedies and Waivers*), 30 (*Invalidity*), 31 (*Entire Agreement*), 34 (*Third Party Rights*), 37 (*Governing law and jurisdiction*) and 38 (*Dispute resolution*).

28. RELATIONSHIP OF THE PARTIES

- 28.1 The parties acknowledge that nothing in this Agreement or any document referred to in it or any arrangement contemplated by it shall be construed as creating a partnership or agency relationship between the parties for any purpose and no party shall have the power or authority to bind the other party or impose any obligations on it for the benefit of any third party and that the Commercial Agents (Council Directive) Regulations 1993/3053 shall not apply to this Agreement.
- 28.2 The Grantor will not be liable for any damages, costs or losses to any person in connection with the Freight Operator's compliance with the Service Obligation save for the amounts payable to the Freight Operator pursuant to and in accordance with clause 9 (*Payment terms*).

29. REMEDIES AND WAIVERS

- 29.1 No delay or omission on the part of any party to this Agreement in exercising any right, power or remedy under this Agreement shall:
- (A) impair such right, power or remedy; or
 - (B) operate as a waiver thereof.
- 29.2 The single or partial exercise of any right, power or remedy under this Agreement shall not preclude any other or further exercise thereof or the exercise of any other right, power or remedy.
- 29.3 The rights, powers and remedies provided in this Agreement are cumulative and not exclusive of any rights, powers and remedies provided by law.

30. INVALIDITY

If, at any time, any provision of this Agreement is or becomes illegal, invalid or unenforceable in any respect under the law of any jurisdiction, such illegality, invalidity or unenforceability shall not affect or impair:

- (A) the legality, validity or enforceability in that jurisdiction of any other provision of this Agreement; or
- (B) the legality, validity or enforceability under the law of any other jurisdiction of that or any other provision of this Agreement.

31. ENTIRE AGREEMENT

- 31.1 Save as expressly set out in this Agreement, no party gives any warranty, condition, representation, collateral contract, assurance, guarantee, stipulation, liability or obligation whatsoever (without limitation, whether in contract or tort, including negligence or otherwise, whether express or implied or otherwise and whether arising at

common law or by statute, custom, usage, course of dealing or otherwise) in relation to the Service Obligation or this Agreement. Each party waives any rights and remedies which it may nevertheless have and the liability of each party is limited accordingly, provided that nothing in this clause 31 shall limit or exclude any liability for fraud or fraudulent misrepresentation.

31.2 This Agreement constitutes the whole and only agreement between the parties relating to Service Obligation and supersedes and extinguishes any prior drafts, agreements, undertakings, representations, warranties and arrangements of any nature whatsoever, whether or not in writing, relating thereto.

31.3 Each party acknowledges that, in entering into this Agreement on the terms set out in this Agreement, it is not relying upon any representation, warranty, promise or assurance made or given by the other party or any other person, whether or not in writing, at any time prior to the execution of this Agreement which is not expressly set out or referred to herein.

32. VARIATION

Subject to clause 7 (*Amendments*) no provision of this Agreement shall be amended except in writing signed by the parties or their duly authorised representatives.

33. ASSIGNMENT AND TRANSFER

33.1 The Freight Operator shall not assign, novate or otherwise dispose of or create any trust in relation to any or all of its rights, obligations or liabilities under this Agreement without the prior consent of the Grantor.

33.2 The Grantor may at its discretion assign, novate or otherwise dispose of any or all of its rights, obligations and liabilities under this Agreement and/or any associated licences to:

(A) any Central Government Body; or

(B) to a body other than a Central Government Body (including any private sector body) which performs any of the functions that previously had been performed by the Grantor,

and the Freight Operator shall, at the Grantor's request, enter into a novation agreement or any other documentation required by the Grantor in such form as the Grantor shall reasonably specify in order to enable the Grantor to exercise its rights pursuant to this clause 33.2 and clause 35 (*Further assurance*) shall apply.

33.3 A change in the legal status of the Grantor such that the Grantor ceases to be a Central Government Body shall not affect the validity of this Agreement and this Agreement shall be binding on any successor body to the Grantor.

33.4 The Freight Operator may sub-contract or otherwise delegate the performance of any services in respect of the Service Obligation, provided that the Freight Operator may not

sub-contract or otherwise delegate all or materially all of the performance of the services in respect of the Service Obligation and, in any event, the Freight Operator shall remain at all times responsible to the Grantor for the performance of the Freight Operator's obligations under this Agreement.

34. THIRD PARTY RIGHTS

The parties to this Agreement do not intend that any term of this Agreement should be enforceable, by virtue of the Contracts (Rights of Third Parties) Act 1999, by any person who is not a party to this Agreement.

35. FURTHER ASSURANCE

The parties undertake to perform all such acts and do all such other things as may be incidental to, or necessary to give effect to, the transactions contemplated by this Agreement.

36. COSTS AND EXPENSES

Each party shall pay its own costs and expenses in relation to the negotiation, preparation, execution and carrying into effect of this Agreement.

37. GOVERNING LAW AND JURISDICTION

Subject to clause 38 (*Dispute resolution*), this Agreement and any non-contractual obligations arising out of, or in connection with, it shall be governed by and construed in accordance with English law and the parties submit to the exclusive jurisdiction of the English courts to settle any dispute (whether contractual or otherwise) arising out of or in connection with it.

38. DISPUTE RESOLUTION

- 38.1 The parties shall attempt in good faith to negotiate a settlement to any dispute between them arising out of or in connection with this Agreement within twenty (20) Business Days of either party notifying the other of the dispute, and such efforts shall involve the escalation of the dispute to the finance director (or equivalent) of each party and such persons shall be involved in the negotiations.
- 38.2 Nothing in this dispute resolution procedure shall prevent the parties from seeking from courts of England in accordance with clause 37 (*Governing law and jurisdiction*) an interim order restraining the other party from doing any act or compelling the other party to do any act.
- 38.3 If the dispute cannot be resolved by the parties pursuant to clause 38.1 the parties shall refer it to mediation pursuant to the procedure set out in clause 38.4, unless: (i) the Grantor considers that the dispute is not suitable for resolution by mediation; or (ii) the Freight Operator does not agree to mediation.

38.4 The procedure for mediation and consequential provisions relating to mediation are as follows:

- (A) a mediator (the “**Mediator**”) shall be chosen by agreement between the parties or, if they are unable to agree upon a Mediator within ten (10) Business Days of a request by one party to the other or if the Mediator agreed upon is unable or unwilling to act, either party shall within ten (10) Business Days from the date of the proposal to appoint a Mediator or within ten (10) Business Days of notice to either party that he is unable or unwilling to act, apply to the Centre for Effective Dispute Resolution or other mediation provider to appoint a Mediator;
- (B) the parties shall within ten (10) Business Days of the appointment of the Mediator meet with the Mediator in order to agree a programme for the exchange of all relevant information and the structure to be adopted for negotiations to be held. If considered appropriate, the parties may at any stage seek assistance from the Centre for Effective Dispute Resolution or other mediation provider to provide guidance on a suitable procedure;
- (C) unless otherwise agreed, all negotiations connected with the dispute and any settlement agreement relating to it shall be conducted in confidence and without prejudice to the rights of the parties in any future proceedings;
- (D) if the parties reach agreement on the resolution of the dispute, the agreement shall be recorded in writing and shall be binding on the parties once it is signed by their duly authorised representatives;
- (E) failing agreement, either of the parties may invite the Mediator to provide a non-binding but informative written opinion. Such an opinion shall be provided on a without prejudice basis and shall not be used in evidence in any proceedings relating to this Agreement without the prior written consent of both parties; and
- (F) if the parties fail to reach agreement in the structured negotiations within sixty (60) Business Days of the Mediator being appointed, or such longer period as may be agreed by the parties, then any dispute or difference between them may be referred to the Courts of England and Wales, unless the dispute is referred to arbitration pursuant to the procedures set out in clause 38.5.

38.5 Subject to clause 38.2, the parties shall not institute court proceedings until the procedures set out in clause 38.1 have been completed save that:

- (A) the Grantor may at any time before court proceedings are commenced, serve a notice on the Freight Operator requiring the dispute to be referred to and resolved by arbitration in accordance with clause 38.6;
- (B) if the Freight Operator intends to commence court proceedings, it shall serve notice on the Grantor of its intentions and the Grantor shall have twenty-one (21) days following receipt of such notice to serve a reply on the Freight

Operator requiring the dispute to be referred to and resolved by arbitration in accordance with clause 38.6; and

- (C) the Freight Operator may request by notice to the Grantor that any dispute be referred and resolved by arbitration in accordance with clause 38.6, to which the Grantor may consent as it sees fit.

38.6 In the event that any arbitration proceedings are commenced pursuant to clause 38.5:

- (A) the arbitration shall be governed by the provisions of the Arbitration Act 1996;
- (B) the Grantor shall give a notice of arbitration to the Freight Operator (the “**Arbitration Notice**”) stating:
 - (i) that the dispute is referred to arbitration; and
 - (ii) providing details of the issues to be resolved;
- (C) the LCIA procedural rules in force at the date that the dispute was referred to arbitration in accordance with sub-clause 38.6(B) shall be applied and are deemed to be incorporated by reference to this Agreement and the decision of the arbitrator shall be binding on the parties in the absence of any material failure to comply with such rules;
- (D) the tribunal shall consist of a sole arbitrator to be agreed by the parties;
- (E) if the parties fail to agree the appointment of the arbitrator within ten (10) days of the Arbitration Notice being issued by the Grantor under sub-clause 38.6(B) or if the person appointed is unable or unwilling to act, the arbitrator shall be appointed by the LCIA;
- (F) the arbitration proceedings shall take place in London and in the English language;
- (G) the seat of the arbitration shall be London; and
- (H) the arbitration proceedings shall be governed by, and interpreted in accordance with, English law.

39. COUNTERPARTS

This Agreement may be executed in counterparts, and the counterparts when taken together shall constitute one and the same agreement. This Agreement will only become effective when both parties have released their signed counterparts to one another.

Schedule 1
Information and Records

Part A

1. Undertakings given by the Freight Operator

1.1 The Freight Operator shall supply to the Grantor:

- (A) by no later than the Payment Invoice Deadline for a Service Period, the financial information (including, if applicable, Estimated Information) required for the purposes of calculating the amount of any Payment payable in respect of that Service Period or any Additional Payment that may be payable pursuant to clause 7.2 or for conducting any Validation Process, Verification Process or Audit (including details of its good faith calculations (or, if applicable, estimates) of its Service Related Costs and Recognised Revenues);
- (B) promptly upon becoming aware, details of any difference, inaccuracy or mistake in the Financial Template or in any information (including, if applicable, Estimated Information) delivered to the Grantor pursuant to paragraph 1.1(A) of this Schedule 1;
- (C) on a weekly basis and by no later than the relevant Payment Invoice Deadline, complete and accurate financial and non-financial information, on an “open book” basis (including, if applicable, Estimated Information), which is sufficient to enable the Grantor to operate the Validation Process and to verify any Payment already paid or payable or any Payment forecast to be paid during the Service Term;
- (D) no later than three Business Days following the end of a calendar month, definitive information in substitution for all Estimated Information previously provided to the Grantor in accordance with paragraphs 1.1(A) to (C) (inclusive) in respect of Service Periods occurring during that calendar month with data reflecting the Freight Operator’s actual operations during such Service Periods;
- (E) immediately and, in any case, prior to acceptance, details of any government or financial assistance program (whether offered by a Central Government Body, a Devolved Administration or any other national or devolved government or other public body in any country) which the Freight Operator is using at the date of this Agreement or intends to use to apply for additional financial assistance or working capital relief;
- (F) promptly following a request from the Grantor, documentary evidence that any port dues payable by the Freight Operator have been paid in accordance with such agreements as may be in place between the Freight Operator and the relevant port from time to time, if applicable;
- (G) at the same time as information is distributed, copies of all information distributed to the Freight Operator’s creditors and shareholders generally;

- (H) promptly, details of any material adverse change to its business, assets and/or financial condition which may impair its ability to operate generally or perform its obligations under this Agreement in particular;
 - (I) promptly, details of any change of control of the Freight Operator;
 - (J) promptly following request, details of the Freight Operator's fixed costs and other operating expenses;
 - (K) promptly, details of any Force Majeure Event affecting the Freight Operator;
 - (L) as soon as reasonably practicable following request by the Grantor, reasonable details of the Freight Operator's budget, business plan and projected cash flow forecasts for the next twelve (12) month period;
 - (M) on the Calculation Date for a Service Period, a Compliance Certificate providing confirmation and evidence of compliance with the Service Obligation in that Service Period and certifying that any information provided pursuant to paragraphs 1.1(A) and (C) of this Schedule 1 is (to the best of the Freight Operator's belief, having made all reasonable enquiry and including, if applicable, Estimated Information) true, accurate and not misleading and confirming that no Default or Event of Default under this Agreement has occurred or is continuing;
 - (N) promptly upon becoming aware, notice and details of any Default or Event of Default under this Agreement;
 - (O) promptly following request, details in respect of its pricing terms and conditions (including payment terms and details of any payments received in advance of the provision of goods or services) and profit percentage in respect of the Route at any given time; and
 - (P) promptly following request, such other information as the Grantor may reasonably request from time to time in connection with this Agreement, the Freight Operator and the operation of the Route.
- 1.2 The information undertakings at paragraphs 1.1(A), (B), (C), (D), (L) and (P) of this Schedule 1 shall remain in full force and effect until the Expiry Date.
- 1.3 The Freight Operator shall retain and maintain all the records (including superseded records) referred to in paragraph 2 of Part B of this Schedule 1 (the "**Records**"):
 - (A) in accordance with the requirements of The National Archives and industry practice of a Reasonable and Prudent Operator;
 - (B) in chronological order;
 - (C) in a form that is capable of audit; and

(D) at its own expense.

- 1.4 The Freight Operator shall make the Records available for inspection to the Grantor on request, subject to the Grantor giving reasonable notice.
- 1.5 Where Records are retained in electronic form, the original metadata shall be preserved together with all subsequent metadata in a format reasonably accessible to the Grantor.
- 1.6 The Freight Operator shall, during the Term and a period of at least seven (7) years following the expiry or termination of this Agreement, maintain or cause to be maintained complete and accurate documents and records in relation to the provision of the services under this Agreement including but not limited to all Records.
- 1.7 Records that contain financial information shall be retained and maintained in safe storage by the Freight Operator for a period of at least seven (7) years following the expiry or termination of this Agreement.

Part B

2. Records to be kept by the Freight Operator

2.1 The records to be kept by the Freight Operator are:

- (A) this Agreement, its Schedules and all amendments to such documents;
- (B) all other documents which this Agreement expressly requires to be prepared;
- (C) documents prepared by the Freight Operator or received by the Freight Operator from a third party relating to a Force Majeure Event;
- (D) all formal notices, reports or submissions made or received by the Freight Operator in connection with the provision of the services under this Agreement;
- (E) all certificates, licences, registrations or warranties in each case obtained by the Freight Operator in relation to the provision of the services under this Agreement;
- (F) documents prepared by the Freight Operator in support of claims for the payments under this Agreement;
- (G) documents submitted by the Freight Operator pursuant to invocation by it or the Grantor of the resolution procedure in clause 38 (*Dispute resolution*);
- (H) invoices and records related to VAT or other applicable duties or taxes;
- (I) financial records, including audited and un-audited accounts of the Freight Operator;
- (J) records required to be retained by the Freight Operator by law, including in relation to health and safety matters and health and safety files and all consents;
- (K) all documents relating to the insurances to be maintained pursuant to this Agreement and any claims made in respect of them; and
- (L) all other records, notices or certificates required to be produced and/or maintained by the Freight Operator pursuant to this Agreement.

Schedule 2
Form of Compliance Certificate

To: The Secretary of State for Transport

From: P&O Ferries Holdings Limited

Dated: [Calculation Date]

Service Period: [Service Period to which this Compliance Certificate relates]

Dear Sirs,

Entrustment of PSO Services Agreement
dated 2020 (the "Agreement")

1. We refer to the Agreement. This is a Compliance Certificate. Terms defined in the Agreement have the same meaning when used in this Compliance Certificate unless given a different meaning in this Compliance Certificate.
2. We confirm that the Service Obligation (including, where applicable, the obligation under clause 2.2(A) of the Agreement to remedy a previous Capacity Shortfall) has at all times been complied with in the Service Period specified above and that evidence to support such compliance accompanies this Compliance Certificate.
3. We certify that any information (including, if applicable, Estimated Information):
 - (A) provided pursuant to paragraph 1.1(A) of Schedule 1 (*Information and Records*) to the Agreement; and
 - (B) contained in the "open book" financial and non-financial information provided pursuant to paragraph 1.1(C) of Schedule 1 (*Information and Records*) to the Agreement,is, to the best of our belief, having made all reasonable enquiry, true, accurate and not misleading.
4. We confirm that no Default or Event of Default under the Agreement has occurred or is continuing.*

Signed

.....

Authorised signatory
of
P&O Ferries Holdings Limited

NOTES:

- * If this statement cannot be made, the certificate should identify any Default or Event of Default that has occurred or is continuing and the steps, if any, being taken to remedy it.

Schedule 3

Invoicing Requirements

1. Invoices to be submitted by the Freight Operator

- 1.1 Each invoice submitted by the Freight Operator under this Agreement shall include, as a minimum, the details set out in paragraph 1.3 of this Schedule 3 (together with such other information as the Grantor may reasonably require to assess whether the payments that will be detailed therein are properly payable).
- 1.2 If the invoice is not approved by the Grantor then the Freight Operator shall make such amendments as may be reasonably required by the Grantor. If the Grantor uses an e-invoicing system then the Freight Operator shall instead comply with the requirements of that system.
- 1.3 The Freight Operator shall ensure that each invoice is submitted in the correct format for the Grantor's e-invoicing system, or that it contains the following information:
 - (A) the date of the invoice;
 - (B) the PO Number;
 - (C) the period(s) to which the invoice relates;
 - (D) the correct reference for this Agreement;
 - (E) a contact name and telephone number of a responsible person in the Freight Operator's finance department in the event of administrative queries; and
 - (F) the banking details for payment to the Freight Operator via electronic transfer of funds (i.e. name and address of bank, sort code, account name and number).
- 1.4 Each invoice shall at all times be accompanied by supporting documentation. Any assessment by the Grantor as to what constitutes supporting documentation shall be conclusive and the Freight Operator undertakes to provide to the Grantor any other documentation reasonably required by the Grantor from time to time to substantiate an invoice.

Schedule 4
Freight Operator Warranties

1. The Freight Operator

- 1.1 The Freight Operator is a limited liability company duly incorporated, and validly existing, under the laws of its jurisdiction of incorporation
- 1.2 The Freight Operator has full power under its constitutional documents to conduct its business as conducted at the date of this Agreement.
- 1.3 The execution and delivery of, and the performance by the Freight Operator of obligations under this Agreement will not result in a breach of any provision of the constitutional documents of the Freight Operator for the time being in force or of any other material contract to which the Freight Operator is a party where such breach would materially adversely affect the Freight Operator's ability to enter into or perform its obligations under this Agreement.
- 1.4 This Agreement constitutes binding obligations of the Freight Operator in accordance with its terms, subject to: (i) the Grantor having the capacity, power and authority to enter into and perform its obligations under this Agreement; (ii) the due execution and delivery of this Agreement by the Grantor.
- 1.5 The Freight Operator has obtained all corporate authorisations and all other Clearances required to empower it to enter into and perform its obligations under this Agreement.

2. Solvency

No Insolvency Event has occurred in respect of the Freight Operator;

3. Default

- 3.1 The Freight Operator is not in default (including any default in respect of its payment obligations) under any of its financing agreements or under any other contracts that are material to either:
 - (A) its ability to comply with the Service Obligation; or
 - (B) the continued operation of its business to the standard of a Reasonable and Prudent Operator.
- 3.2 If applicable, the Freight Operator has paid, and is not overdue in any payment of, any amount of port dues that are payable in accordance with such agreements as may be in place between the Freight Operator and the relevant port from time to time.

4. Provision of information

- 4.1 All information provided by the Freight Operator to the Grantor pursuant to the terms of this Agreement is true and accurate in all material respects and there is no misleading information (including by omission).
- 4.2 All data inputs into the Financial Template and all other estimates provided by the Freight Operator have been prepared in good faith, with reasonable care and in accordance with all applicable accounting principles, on the basis of recent information and using reasonable assumptions.
- 4.3 All calculations provided by the Freight Operator to the Grantor pursuant to the terms of this Agreement are true, accurate and not misleading in any material respect.

5. Litigation

- 5.1 The Freight Operator:
 - (A) is not involved (whether as claimant, defendant or other party) in: (i) any court, tribunal or other litigation, arbitration, or material contentious administrative proceedings (including tax disputes); or (i) any enforcement action or investigation; and
 - (B) has not been and is not currently subject to any order or judgement, decree, award or decision of any court, tribunal or other authority in connection with: (i) any litigation, arbitration, or material contentious administrative proceedings (including tax disputes); or (ii) any enforcement action or investigation.
- 5.2 The Freight Operator has not received any written notice threatening any court, tribunal or other litigation, arbitration or material contentious administrative proceedings (including tax disputes).

6. Compliance with laws

- 6.1 The Freight Operator has not failed to comply with Applicable Law (in conducting its business or otherwise), where such failure would have a material and adverse impact its ability to comply with the Service Obligation.

7. Anti-slavery

- 7.1 The Freight Operator is in compliance with all Anti-slavery Laws.
- 7.2 The Freight Operator's responses to all slavery and trafficking due diligence questionnaires issued to it by the Grantor from time to time are complete and accurate.

7.3 Neither the Freight Operator nor any of its sub-contractors, nor any other persons associated with the Freight Operator:

- (A) has been convicted of any offence involving slavery and trafficking; or
- (B) has been or is the subject of any investigation, inquiry or enforcement proceedings by any governmental, administrative or regulatory body regarding any offence regarding slavery and trafficking.

8. Anti-bribery and corruption

8.1 The Freight Operator is in compliance with all Anti-corruption Laws.

8.2 The Freight Operator:

- (A) has not committed a Corrupt Act in connection with the Service Obligation or the entry into or performance of this Agreement or been formally notified that it is subject to an investigation or prosecution which relates to an alleged Corrupt Act;
- (B) has not, since its incorporation, been convicted of any offence involving a breach of Anti-corruption Laws;
- (C) is not subject to any continuing prosecution or any continuing investigation which relates, in either case, to an alleged breach of Anti-corruption Laws; and
- (D) has not been listed by any government department or agency as being debarred, suspended, proposed for suspension or debarment, or otherwise ineligible for participation in government procurement programmes or contracts on the grounds of a Corrupt Act.

9. Operations

9.1 The Freight Operator has good, valid and marketable title to (or, as applicable valid leases or licences of) and all appropriate authorisations to use all assets and infrastructure required in order for it to conduct its business and to comply with the Service Obligation to the standard expected of a Reasonable and Prudent Operator.

9.2 The Freight Operator has insurance cover in place on such terms and covering such risks, including in respect of its provision of the Minimum Capacity on the Route, as would be maintained by a Reasonable and Prudent Operator.

9.3 The Freight Operator is able to provide freight capacity on the Route in an amount that is not less than the Minimum Capacity for the duration of the Service Term.

9.4 Without the benefit of this Agreement and any Payments made pursuant to this Agreement the Route would cease to be economically viable as a consequence of the impact of the COVID-19 pandemic.

10. Governmental support

The Freight Operator is not in receipt of any other government support (whether provided by a Central Government Body, a Devolved Administration or any other national or devolved government or other public body in any country), save as disclosed to, and agreed by, the Grantor prior to the date of this Agreement.

Schedule 5
Initial Representatives

Initial Freight Operator Representatives:	Name:	████████████████████ ████████████████
	Address:	Channel House, Channel View Road, Dover CT17 9TJ
	Mobile Telephone:	██████████
	Office Telephone	██████████
	E-Mail:	████████████████████
	██████████	████████████████████ ██████████
	██████████	████████████████████ ████████████████
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████████████████████	████████████████████ ██████████ date of this Agreement.	

Schedule 6
Commercially Sensitive Information

1. Purpose

- 1.1 In this Schedule 6 the parties have sought to identify the Freight Operator's Confidential Information that is genuinely commercially sensitive and the disclosure of which would be the subject of an exemption under the FOIA.
- 1.2 Where possible, the parties have sought to identify when any relevant Confidential Information will cease to fall into the category of information to which this Schedule 6 applies.
- 1.3 Without prejudice to the Grantor's obligation to disclose information in accordance with the FOIA or clause 19 (*Freedom of information*), the Grantor will, in its sole discretion, acting reasonably, seek to apply the relevant exemption set out in the FOIA to the following information:

No.	Date	Item(s)	Duration of Confidentiality
1.	The date of this Agreement	Systems and operations information	Three (3) years from the end of the Term
2.	The date of this Agreement	Expressed commercial intentions	Three (3) years from the end of the Term
3.	The date of this Agreement	Business strategies and planning information	Three (3) years from the end of the Term
4.	The date of this Agreement	Pricing information	Three (3) years from the end of the Term
5.	The date of this Agreement	Know-how and trade secrets	Three (3) years from the end of the Term
6.	The date of this Agreement	Information concerning market opportunities	Three (3) years from the end of the Term

7.	The date of this Agreement	Information which is derived from the categories of information listed above	Three (3) years from the end of the Term
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Schedule 7
Agreed Timetable

Capacity Report - Scheduled

OPERATOR: P&O Ferries
REPORT
DATE: 08/05/2020

Please provide data for the next two weeks of services.

Each service should be given its own line.

There are spaces for capacity and bookings figures to be in lane meters (LM) and HGVs/vehicles - you can provide just one or both

PERIOD
COVERED Start date: Monday End date: Sunday

Departure Date	Departure Time	Vessel name	Vessel IMO number	Origin	Destination	RoPax / Freight	Accompanied / Unaccompanied						
<i>Date service scheduled to depart (dd/mm/yy)</i>	<i>Time service scheduled to depart (hh:mm)</i>	<i>Name of ship (if applicable)</i>	<i>Ship IMO number (if applicable)</i>	<i>Origin port</i>	<i>Destination port</i>	<i>Is the vessel RoPax or freight only?</i>	<i>Does the vessel carry accompanied HGVs, unaccompanied trailers, or both?</i>						
Monday	10:00	Norstream	9186194	Tilbury	Zeebrugge	Freight	Unaccompanied						
Monday	21:00	Estraden	9181077	Tilbury	Zeebrugge	Freight	Unaccompanied						
Monday	23:00	Norstream	9186194	Zeebrugge	Tilbury	Freight	Unaccompanied						

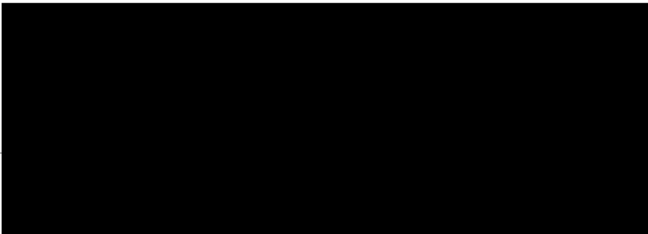
Tuesday	10:00	Norstream	9186194	Tilbury	Zeebrugge	Freight	Unaccompanied					
Tuesday	21:00	Estraden	9181077	Tilbury	Zeebrugge	Freight	Unaccompanied					
Tuesday	23:00	Norstream	9186194	Zeebrugge	Tilbury	Freight	Unaccompanied					
Wednesday	10:00	Norstream	9186194	Tilbury	Zeebrugge	Freight	Unaccompanied					
Wednesday	11:00	Estraden	9181077	Zeebrugge	Tilbury	Freight	Unaccompanied					
Wednesday	22:00	Estraden	9181077	Tilbury	Zeebrugge	Freight	Unaccompanied					
Wednesday	23:00	Norstream	9186194	Zeebrugge	Tilbury	Freight	Unaccompanied					
Thursday	10:00	Norstream	9186194	Tilbury	Zeebrugge	Freight	Unaccompanied					
Thursday	11:00	Estraden	9181077	Zeebrugge	Tilbury	Freight	Unaccompanied					
Thursday	22:00	Estraden	9181077	Tilbury	Zeebrugge	Freight	Unaccompanied					
Thursday	23:00	Norstream	9186194	Zeebrugge	Tilbury	Freight	Unaccompanied					
Friday	10:00	Norstream	9186194	Tilbury	Zeebrugge	Freight	Unaccompanied					
Friday	11:00	Estraden	9181077	Zeebrugge	Tilbury	Freight	Unaccompanied					
Friday	22:00	Estraden	9181077	Tilbury	Zeebrugge	Freight	Unaccompanied					
Friday	23:00	Norstream	9186194	Zeebrugge	Tilbury	Freight	Unaccompanied					
Saturday	11:00	Estraden	9181077	Zeebrugge	Tilbury	Freight	Unaccompanied					
Saturday	22:00	Estraden	9181077	Tilbury	Zeebrugge	Freight	Unaccompanied					
Saturday	23:00	Norstream	9186194	Zeebrugge	Tilbury	Freight	Unaccompanied					
Sunday	11:00	Estraden	9181077	Zeebrugge	Tilbury	Freight	Unaccompanied					
Sunday	22:00	Estraden	9181077	Tilbury	Zeebrugge	Freight	Unaccompanied					
Sunday	23:00	Norstream	9186194	Zeebrugge	Tilbury	Freight	Unaccompanied					

THIS AGREEMENT has been executed by or on behalf of the parties on the date stated at the beginning of this Agreement.

THE GRANTOR

Signed for and on behalf of **THE SECRETARY OF STATE FOR TRANSPORT**

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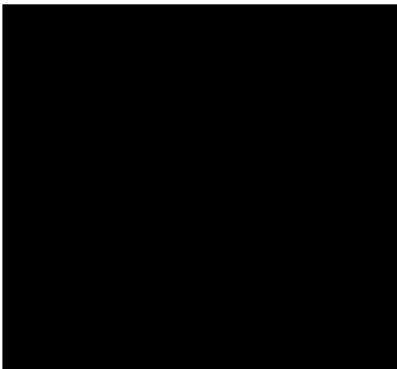
Name

Title: [Redacted], DfT Group Commercial Directorate

THE FREIGHT OPERATOR

Signed for and on behalf of **P&O FERRIES HOLDINGS LIMITED** by its authorised signatory

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Name:

Title: