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**PUBLIC SERVICE CONTRACT**

**Between**

**An tÚdarás Náisiúnta Iompair - National Transport Authority**

**and**

**Iarnród Éireann-Irish Rail**

**Concerning**

**Compensation for Public Service Obligations pursuant to**

**Dublin Transport Authority Act 2008**

**(as amended by the Public Transport Regulation Act 2009)**

**and EC Regulation 1370/2007**

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**THIS AGREEMENT** is made the 2nd day of December 2009

**BETWEEN**

**An tÚdarás Náisiúnta Iompair-National Transport Authority;** as established under the Dublin Transport Authority Act 2008, as amended by the Public Transport Regulation Act 2009 and having its principal office at Dún Scéine, Iveagh Court, Harcourt Lane, Dublin 2

**AND**

**Iarnród Éireann-Irish Rail** as established under the Transport (Re-Organisation of Córas Iompair Éireann) Act 1986 and having its principal office at Connolly Station, Dublin 1 (the “Operator” or “Irish Rail”);

**WHEREAS:-**

- (A) The Dublin Transport Authority Act 2008 (the “Act of 2008”) provides that the Authority shall secure the provision of public passenger transport services by means of public transport services contracts. That Act sets out how bus, rail, metro, and light rail passenger transport services are to be secured and the main provisions that are to be included in the public transport services contracts. Section 52 of the Act of 2008 provides that the Authority shall enter into a Direct Award Contract with Irish Rail to secure the provision of rail passenger services.
- (B) Part 3, Chapter 2 of the Act of 2008 establishes the general framework for the making of public transport services contracts. It also provides for the review of such contracts and the making of payments to a public transport operator, including financial or other incentives for exceeding specified performance standards as well as financial or other consequences for non-compliance with contract requirements.
- (C) Regulation (EC) No 1370/2007 (the “Regulation”) on public passenger transport services by rail and other track based modes and by road lays down the conditions under which competent authorities, when imposing or contracting for public service obligations, may compensate public service operators for costs incurred and/or grant exclusive rights in return for the discharge of public services obligations. Ireland is complying with the Regulation by concluding this and other agreements and this Contract is awarded in accordance with that Regulation.
- (D) Section 52 and section 53 of the Act of 2008 provide that Irish Rail shall be empowered to enter into public transport services contracts with the Authority and shall be bound by the terms and conditions of such contracts in relation to the rail passenger services specified in the contracts.
- (E) As Irish Rail provides rail passenger services in accordance with the provisions of section 7 of the Act of 1958, section 8 of the Act of 1986 and section 52(2) of the Act of 2008, the Authority has decided that Irish Rail shall provide the said rail passenger services and ancillary services on the network set out herein and in accordance with the terms and conditions hereinafter set out.

- (F) This Contract in no way diminishes or interferes with Irish Rail’s responsibility for all aspects of safety associated with its operations. Irish Rail shall conduct its operations with due regard to safety, including the safety of the public, passengers and staff, and in compliance with applicable laws and standards.
- (G) The Public Service Obligation (PSO) is based on securing network benefits. It is the characteristics of the network, for example, integration, interchange, ticket information, through ticketing, inter-available ticketing and accessibility between routes and services provided by the Operator and integrated with other public passenger transport services, which are being funded as the PSO. The PSO is not therefore the subject of individual routes or services but rather the wider characteristics of the network of public passenger transport services.

**WHEREBY IT IS AGREED** as follows:

**1. DEFINITIONS AND INTERPRETATIONS**

1.1 In this Contract the following words and expressions shall have the meaning herein assigned to them unless there is something in the subject matter or context inconsistent with such meaning:

“Act of 1950” means Transport Act 1950;

“Act of 1958” means Transport Act 1958;

“Act of 1961” means the Road Traffic Act 1961;

“Act of 1986” means Transport (Re-organisation of Córas Iompair Éireann) Act 1986;

“Act of 2008” means Dublin Transport Authority Act 2008, as amended;

“Act of 2009” means Public Transport Regulation Act 2009;

“Authorised Officer” means a person appointed under section 78 of the Act of 2008 as an authorised officer of the Authority;

“Authority” means the Dublin Transport Authority established under section 9 of the Act of 2008 and renamed An tÚdarás Náisiúnta Iompair-National Transport Authority under section 30 of the Act of 2009;

“Bus” means a mechanically propelled vehicle designed for travel by road having seating accommodation for more than nine persons (including the driver);

“Change” means a variation to the services provided for in Schedule A including any consequent change to the service levels, performance obligations, reporting arrangements and compensation funding provisions of the Contract;

“Contract Year” means, in relation to the first Contract Year, the period commencing on the date of this Agreement and ending on 31 December next following and, in respect of each subsequent Contract Year, the period of twelve months commencing on the expiry of the preceding Contract Year and ending on 31 December next following;

“Contract” or this “Agreement” means the contract between the Authority and Irish Rail;

“Department” means the Department of Transport, Tourism and Sport its successors and assigns;

“Direct Award Contract” has the meaning assigned to it under section 47 of the Act of 2008;

“Fare” means any standard fare, smartcard fare, discounted fare, prepaid fare, concessionary fare, multi-journey fare, fare eligible for tax relief or combined fare with other operators charged by the Operator in respect of the Services;

“Greater Dublin Area” has the meaning assigned to it in the Act of 2008;

“Integrated Ticketing Scheme” or “ITS” means the scheme for integrated ticketing for public transport in the Greater Dublin Area being developed, procured, implemented, operated and maintained by the Authority in accordance with section 58(1) of the Act of 2008;

“Irish Rail” means Iarnród Éireann-Irish Rail, its successors and assigns;

“ITS Participation Arrangements” means such arrangements pursuant to which Irish Rail is to participate in the Integrated Ticketing Scheme, including without limitation (a) any regulations in relation to it prescribed by the Authority pursuant to section 58(4) of the Act of 2008; (b) any directions given by the Authority to Irish Rail in accordance with section 58(6) of the Act of 2008; (c) any agreement entered into by Irish Rail whereby it agrees to the conditions applicable to participation in the Integrated Ticketing Scheme and/or (d) any other arrangements or basis whereby Irish Rail participates in the Integrated Ticketing Scheme;

“Interchange Facilities” has the meaning assigned to it in the Act of 2008;

“Marketing Plan” means, in respect of each Quarter, the plan to be developed by the Operator in connection with the marketing and promotion of the Services during such Quarter;

“Minister” means the Minister for Transport, Tourism and Sport his successor and assignee;

“Month” means calendar month;

“Net Financial Effect” means the amount, calculated in accordance with Schedule D, equivalent to the total of the effects, positive or negative, of complying with the PSO on the costs and revenue of the Operator when compared against the situation which would have existed if the PSO had not been performed;

“NTA” means the National Transport Authority or in the Irish language, An tÚdarás Náisiúnta Iompair;

“Operator” means Iarnród Éireann-Irish Rail, its successors and assigns;

“Promotional Fare” means a Fare that:

- (a) is offered by the Operator on a temporary basis, or for a specific event, to encourage increased use of the Services; and
- (b) is subject to a Promotional Fares policy approved by the Authority under Clause 14.3;

“PSO” means Public Service Obligation;

“Public Bus Service” has the meaning assigned to it in the Act of 2008;

“Public Passenger Transport Service” has the meaning assigned to it in the Act of 2008;

“Public Service Compensation” has the meaning assigned to it in the Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road;

“Public Service Contract” has the meaning assigned to it in section 47 of the Act of 2008;

“Public Service Obligation” or “PSO” has the meaning assigned to it in section 47 of the Act of 2008;

“Public Transport Services Contract” has the meaning assigned to it in section 47 of the Act of 2008;

“Public Transport Infrastructure” has the meaning assigned to it in the Act of 2008;

“Public Transport Operator” has the meaning assigned to it in the Act of 2008;

“Quarter” means, in respect of the first Quarter, the period commencing on 2 December 2009 and ending on 31 December 2009 and, in respect of each subsequent Quarter, the period of three calendar months commencing on the expiry of the preceding Quarter;

“Regulation” or “Regulation (EC) No 1370/2007” means Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road;

“Service” or “Services” means the provision of rail passenger services by the Operator as set out in Schedule A hereto as the same may be amended from time to time by the Authority;

“Timetable” means the relevant Irish Rail timetable as at 2 December, 2009 and published on [www.irishrail.ie](http://www.irishrail.ie) and as may be amended from time to time by Irish Rail with the agreement of the Authority;

“Transport Acts” means the Transport Act 1950 and the Transport (Re-Organisation of Córas Iompair Éireann) Act 1986

“Working Day” means a day which is not a Saturday, Sunday or public holiday; and

“Writing” shall include electronic communications.

1.2 The masculine shall include the feminine and neuter and the singular number shall include the plural and vice versa and words importing persons shall include firms and companies and vice versa.

1.3 The section headings of this Contract are for convenience of reference only and shall not be considered to be a part of or affect the construction or interpretation of the Contract.

1.4 Any reference to any provision of legislation shall, unless the contrary is clearly stated, be a reference to legislation of Ireland and any references shall include any modification, re-enactment or extension of such legislation. Any reference to legislation or to another provision in this Contract which is made in error shall be treated by the parties to this Contract as if the reference were made correctly.

## 2. **GRANT**

The Authority hereby grants to the Operator the rights specified in this Contract, under which the Operator agrees to provide the Services and on the terms herein stated in accordance with the Act of 2008, the Regulation and this Contract.

## 3. **THE PUBLIC SERVICE OBLIGATION**

3.1 This is a Direct Award Contract entered into in accordance with, and subject to, the provisions of Part 3 Chapter 2 of the Act of 2008.

3.2 Having regard to section 52(3) of the Act of 2008, the Authority hereby enters into this Contract with the Operator:

(a) for the provision of a network of rail passenger services and service capacity as set out in:

(i) Schedule A; and

(ii) that part of the Irish Rail timetable as at 2 December 2009 that relate to the Services and published and amended with such form of agreement of the Authority as the Authority shall require from time to time on [www.irishrail.ie](http://www.irishrail.ie);

(b) to meet the service level requirements set out in Schedules A and B in accordance with the terms of this Contract.

3.3 If the Authority adopts a transport strategy under section 12 of the Act of 2008 and/or an integrated implementation plan under section 13 of the Act of 2008, in each case in respect of the Greater Dublin Area, and/or integration measures under Part 3 Chapter 3 of the Act of 2008 then this Contract may be amended from time to time to take account thereof in accordance with the Act of 2008.

3.4 The Operator shall, in so far as possible, and, in any event, without discrimination integrate all Services provided by it with those of other public passenger transport services including by participating and complying with integration measures introduced by the Authority under Chapter 3 of Part 3 of the Act of 2008.

3.5 Without prejudice to Clause 3.4, the Operator:

(a) shall support using all due skill, care and diligence in the development and operation of, and shall participate in, the Integrated Ticketing Scheme in accordance with the ITS Participation Arrangements;

- (b) shall comply with the ITS Participation Arrangements and any other lawful requirements of the Authority in connection with the Integrated Ticketing Scheme;
  - (c) shall cease to operate an interim smartcard scheme established by it within a timeframe specified by the Authority in accordance with the ITS Participation Arrangements;
  - (d) shall support using all skill, due care and diligence in the development and operation of, and shall participate in, the Real Time Passenger Information system, the Authority's Journey Planner system and any other related Authority project;
  - (e) shall comply with the requirements of the Authority in connection with the Real Time Passenger Information system, the Authority's Journey Planner system and any other related Authority project;
  - (f) shall, as and when required by the Authority, co-operate in the development and implementation of a single public transport brand; and
  - (g) shall comply with the accessibility standards for members of the public with special needs set out in "Access for All – the Sectoral Plan for Transport".
- 3.6 The Operator shall participate in any review of the expansion of the Integrated Ticketing Scheme on a national basis, and also of interoperability with the scheme in Northern Ireland, undertaken by the Authority.
- 3.7 The Operator shall comply with all applicable laws (including those in relation to pay and terms and conditions of employment) relating to all staff employed by the Operator.

#### **4. CHANGES TO SERVICES**

- 4.1 Without prejudice to the powers of the Authority under sections 51 and 52 of the Act of 2008, the Operator may at any time propose a change including but not limited to the introduction of new lines, new rolling stock and new services to the Authority.
- 4.2 When considering any proposals to changes to the Services, the Operator may conduct a public consultation exercise on the proposed changes only after submitting the original proposals to the Authority and the Authority approving the carrying out of such consultation exercise.
- 4.3 The Authority shall consult with the Operator and shall not unreasonably withhold or delay whatever decision it may make on the Operator's request for a change. Where the Authority decides not to agree to a change it shall inform the Operator if asked of its reasons for the decision.
- 4.4 Following receipt of the proposed change from the Operator, the Authority shall respond in writing to the proposed change as soon as practicable and in any event, within ten Working Days or any such longer period as may be agreed by the Authority and the Operator.
- 4.5 Any agreement to a change will become valid as an amendment to this Contract only when recorded in writing and signed by the duly authorised representative of each party.

## 5. COMPENSATION

- 5.1 The Authority shall compensate the Operator in relation to the PSO in accordance with Schedule D, provided that such compensation in any Contract Year shall not exceed an amount equal to the estimated amount of the Net Financial Effect for that Contract Year.
- 5.2 For the period of 2 December 2009 to 31 December 2009, the Authority shall pay €4,360,000 to the Operator. In regard to the period commencing on 1 January 2010 until the termination of this Contract, the amount and terms of the compensation payable in relation to the PSO for a Contract Year shall be determined in accordance with Schedule D.
- 5.3 The parties agree that in accordance with section 52(7) of the Act of 2008, all compensation paid by the Authority in relation to the PSO must be made in accordance with the Annex to Regulation (EC) No 1370/2007.
- 5.4 The Authority may, in accordance with section 45 of the Act of 2008, make available to the Operator grants towards the cost of public transport infrastructure insofar as it relates to the provision of Services. Where the Authority decides to make available grants towards the costs of public transport infrastructure, the parties shall enter into a framework agreement substantially in the form specified in Schedule E.
- 5.5 An amount to be determined by the Authority but equivalent to no more than 10% of the amount of compensation for a Contract Year shall be payable by the Authority subject to the Operator meeting the performance targets marked with an asterisk in Schedule B, Part I during such Contract Year and subject to the Operator not exceeding the penalty point limits as described in Schedule B Part II. The Authority shall pay the amount for each target on a quarterly basis, in arrears, pro rata in accordance with the degree of compliance by the Operator with the performance targets marked with an asterisk in Schedule B Part I as determined by the Authority and subject to any penalties as described in Schedule B Part II.
- 5.6 In accordance with Article 4(1) of the Regulation, there shall be no overcompensation of the Operator and if such overcompensation occurs then such amounts shall be reimbursed to the Authority by the Operator.
- 5.7 No later than 10 Working Days before the start of each Quarter, the Operator shall submit a Marketing Plan for that Quarter for approval by the Authority setting out:
- (a) its proposals in relation to the marketing and other promotional activities to be undertaken by the Operator during that Quarter;
  - (b) its proposals in relation to the amount to be spent by the Operator on marketing and other promotional activities during that Quarter;
  - (c) a detailed breakdown of the business case for such proposed marketing and promotional activities during that Quarter;
  - (d) a detailed breakdown of costs, including third party costs, that will be incurred in undertaking the proposed marketing and promotional activities during that Quarter;
  - (e) its proposals in relation to the duration of each specific marketing or promotional activity during that Quarter; and

(f) such other matters as the Authority may determine.

- 5.8 Following the approval by the Authority of a Marketing Plan, the Operator shall implement such Marketing Plan in accordance with its terms.
- 5.9 The Operator shall not spend any amount on marketing or other promotional activities except where such activities are undertaken in accordance with the then applicable approved Marketing Plan.
- 5.10 Subject to Clause 5.11, the Operator may make non-material changes to an approved Marketing Plan.
- 5.11 The Operator shall not increase or decrease, in aggregate in any Quarter, by more than €10,000 the amount to be spent on marketing or promotional activities in accordance with an approved Marketing Plan without the prior written approval of the Authority.

#### **5.A DEVELOPMENT OF WEBSITES AND MOBILE APPLICATIONS (APPS)**

- 5.A.1 The Operator will submit any proposals to develop or procure any additional websites or mobile applications (apps) relevant to the Services to the Authority for approval.
- 5.A.2 The Operator will submit any proposals to significantly alter or amend existing websites or mobile applications relevant to the Services to the Authority for approval.
- 5.A.3 The Operator shall comply with the requirements of the Authority in relation to any changes the Authority considers necessary to existing websites or mobile applications relevant to the Services.

#### **6. PERFORMANCE OBLIGATIONS**

- 6.1 Having regard to section 48(3)(i) of the Act of 2008, the Operator shall ensure its adherence, at a minimum, to the performance obligations which are set out at Schedule B to this Contract.
- 6.2 The Operator undertakes to compile and maintain for a period of two (2) years following the end of the Contract all such performance-related information as may be required by the Authority and notified in writing to the Operator in order to determine the extent of the Operator's adherence to the performance obligations set out at Schedule B to this Contract.
- 6.3 Subject to Clause 23 the Operator undertakes to disclose any and all performance-related information requested by the Authority in order to determine the extent of the Operator's adherence to the performance obligations set out at Schedule B to this Contract.
- 6.4 The Operator shall not withhold any such performance-related or any other information of whatever kind from the Authority.
- 6.5 In recognition of the Government's Smarter Travel Policy for Sustainable Transport, the Operator must prepare a plan within such period as required by the Authority for the duration of the Contract which sets out how, while providing the agreed service levels, the Operator will:

- (a) minimise fuel consumption;
- (b) minimise greenhouse gas and other transport emissions;
- (c) outline proposals for fleet replacement based on the most sustainable rolling stock and fuel type; and
- (d) continuously monitor and improve environmental performance.

## **7. RIGHT TO REVIEW/AMEND/ALTER THIS CONTRACT**

7.1 Notwithstanding any other provision of the Contract, the Operator accepts that:

- (a) in accordance with section 51 of the Act of 2008, the Authority, may, subject to section 52(6) of the Act of 2008, unilaterally alter this Contract, including the scope of the Contract, where the Authority is of the opinion that such alteration is necessary to guarantee safe, efficient and high quality rail passenger services or transparency in the performance of rail passenger services;
- (b) in accordance with section 52(6) of the Act of 2008, the Authority may at any time review this Contract and may following such a review unilaterally make amendments to this Contract; and
- (c) for the avoidance of doubt any alteration or amendment to this Contract under section 51 or 52(6) of the Act of 2008, as the case may be, shall take effect upon this Contract, as altered or amended, being notified to the Operator.

7.2 Where, as a result of one or more alterations or amendments to this Agreement contemplated by Clause 4 or Clause 7.1, the anticipated cost to the Operator of performing the PSO increases or decreases by not less than €135,000 in aggregate in a Contract Year, the Operator shall submit a detailed breakdown, taking into account the matters referred to in Clause 7.4, of such increased costs or decreased costs, as the case may be, to the Authority and, having regard to the principles of compensation set out in Schedule D, details of the effect of such increased costs or decreased costs, as the case may be, on its performance of the PSO for that Contract Year.

7.3 The Authority shall evaluate any submission made by the Operator under Clause 7.2 and, to the extent that the Authority is satisfied that an alteration or amendment to this Agreement resulted, or will result, in increased costs or decreased costs, taking into account the matters referred to in Clause 7.4, as the case may be, of not less than €135,000 in aggregate in a Contract Year to the Operator in performing the PSO, the Authority may:

- (a) in the case of increased costs, compensate the Operator in respect of such increased costs; or
- (b) in the case of decreased costs, reduce the amount of compensation payable to the Operator having regard to such decreased costs.

7.4 In determining the amount of increased costs or decreased costs consequent on an alteration or amendment to this Contract, the Operator shall calculate such costs after the anticipated effect

of any changes in its Fare revenue consequent on such alteration or amendment has been taken into account.

## **8. STEP-IN RIGHTS**

After consulting with the Operator and acting reasonably, if the Authority is of the opinion that the Operator is in breach of this Contract and where such a breach has material adverse consequences on the provision of the Services, the Authority may issue a written notice of the breach requiring the breach to be remedied within a specific time no longer than 90 Working Days after receipt of the notice and may then in the event that the Operator fails to remedy such breach, in cooperation with any person, body or agency, appoint any such third party, for as long as it deems fit, to fulfil the duties of the Operator in respect of that part of the Services in respect of which the breach has not been remedied. If the Authority acting reasonably believes that such breach requires an urgent and immediate remedy the provision of notice will not be required.

## **9. DURATION**

- 9.1 In accordance with section 52(4) of the Act of 2008, the duration of this Contract shall be ten (10) years.
- 9.2 The Contract shall commence on 1 December 2009.
- 9.3 The parties acknowledge that subject to section 52(6)(c)(ii) of the Act of 2008, the Authority may enter into Direct Award Contracts with the Operator subsequent to this Contract.

## **10. INSPECTION AND ENFORCEMENT**

The Authority may, in accordance with its powers under Part 4 of the Act of 2008, carry out such inspections of the Operator's Services and seek and obtain promptly such information as it considers necessary or useful to monitor compliance with this Contract.

## **11. REPORTING REQUIREMENTS**

- 11.1 The Operator shall, within eight (8) weeks of the end of each reporting period, supply in full to the Authority all the information requirements outlined in this Contract including information relating to service, customer, vehicle, rolling stock, reporting, financial and contractual requirements which are set out in the Schedules to this Contract.
- 11.2 To assist the Authority in discharging its duties and functions under Part 2 and Part 3 of the Act of 2008 and generally, the Operator shall satisfy the Authority, with such information and in such form as the Authority may reasonably specify, including information, in respect of:
- (a) compensation for the performance of a Public Service Obligation, that the compensation does not exceed that which is necessary to cover all or part of the costs incurred in discharging the Public Service Obligation taking into account the relevant receipts and a reasonable profit for discharging the obligation;

- (b) the costs incurred in discharging the Public Service Obligation, that such costs do not exceed those, which in the opinion of the Authority, an operator that is well run and adequately provided with means of transport would be expected to incur in discharging the Public Service Obligation; and
- (c) the maintenance of separate accounts in accordance with paragraph 5 of the Annex to the Regulation.

11.3 Subject to Clause 23, the Operator expressly accepts that the Authority may share any or all relevant documents, records or other information, given under this Contract to the Authority by the Operator, with the Minister for Transport and his Department or such other parties as the Authority believes to be reasonable.

## **12. SUBCONTRACTING**

12.1 The level of subcontracting undertaken by the Operator in respect of the Services shall be agreed with the Authority. For the avoidance of doubt, any services referred to in Schedule A which are provided by a subcontractor of the Operator shall, unless otherwise agreed with the Operator:

- (a) constitute Services for the purposes of this Contract; and
- (b) continue to be provided by or on behalf of the Operator.

12.2 Any subcontracted Services shall be treated for the purposes of this Contract as if they were being provided directly by the Operator.

12.3 The Operator shall require the subcontractor to comply with all applicable laws and standards including those relating to safety and employment matters. In this regard the Operator shall assist the Authority by producing any such document or information (whether written or oral), which may be required by the Authority in accordance with the terms of this Contract.

## **13. FARES**

13.1 The Operator will retain the Fare revenue.

13.2 Except in the case of Promotional Fares offered in accordance with a Promotional Fares policy approved by the Authority under Clause 14.3, pending the development and implementation of a fare scheme under section 59 of the Act of 2008, any changes to the Fares shall be subject to the prior written approval of the Authority.

14.3 No later than 1 July in each Contract Year, the Operator shall develop and submit for the approval of the Authority a Promotional Fares policy for the next following Contract Year, to include the following:

- (a) a review of the Promotional Fares policy for the preceding Contract Year and the then Contract Year up to the date of such submission, including details of Promotional Fares revenue received by the Operator during such preceding Contract Year and during the then Contract Year to date;

- (b) availability outlets for Promotional Fares;
- (c) pricing policy in respect of Promotional Fares for the Contract Year;
- (d) any specific advertising or promotional activities in respect of Promotional Fares for the Contract Year;
- (e) any booking charges applicable to the Promotional Fares;
- (f) details of the estimated Promotional Fares revenue to be collected by the Operator during the Contract Year; and
- (g) such other matters as the Authority may determine.

14.4 Except in the case of Promotional Fares, the Operator will give reasonable advance notice to the public of any change in Fares under this Clause, including by means of an announcement on its website at least 10 Working Days in advance of such changes taking effect.

14.5 The Operator may propose changes to the Promotional Fares policy referred to in Clause 14.3 during a Contract Year by giving notice in writing to the Authority setting out the reasons for, and effect of, such proposed changes on:

- (a) the Operator's estimated Fare revenue in respect of the Services for that Contract Year;
- (b) the estimated passenger numbers for the Services for that Contract Year; and
- (c) such other matters as the Authority may determine.

14.6 The Authority shall consider any notice given by the Operator in accordance with Clause 14.5 and shall inform the Operator within 14 Working Days of receipt of such notice of its decision in relation to the proposed changes to the Promotional Fares policy.

#### **14. AUDIT PROVISIONS**

14.1 The Authority may at any time require an audit to be carried out for the purpose of verifying the adequacy of the record keeping in place to fulfil the requirements of this Contract provided that, if such audits confirm that the record keeping is adequate, the total number of such audits in respect of the Contract shall not exceed two (2) in any one calendar year. The Authority shall provide the Operator with not less than ten (10) Working Days prior written notice of any requirement for an audit.

14.2 If the audits identify inadequate record keeping of a material nature then the Operator will use its reasonable endeavours to improve forthwith its record keeping arrangement in accordance with the Authority's written recommendation and the Authority may require as many audits as may be necessary to confirm that adequate record keeping has been achieved in accordance with the Authority's written recommendation.

14.3 Not later than four (4) Months after the end of each financial year the Operator shall submit audited accounts in respect of the business covered in the Contract. These accounts shall be consistent in all respects with the Operator's published accounts.

14.4 The Operator and Authority shall share the cost of all audits carried out for the purpose of this Contract.

**15. SEVERANCE**

Each of the provisions of this Contract is severable and if any provision of this Contract is or becomes invalid, illegal or unenforceable, then the validity, legality or enforceability of the remaining provisions of this Contract shall not in any way be affected or impaired.

**16. DUTIES OF THE BOARD OF THE OPERATOR**

Nothing in this Contract shall prejudice the duties (including the duty in relation to safety) of the Operator and the board of the Operator under the Transport Acts and other applicable laws and standards.

**17. FORCE MAJEURE**

17.1 No party shall be liable for any breach of its obligations herein resulting from Force Majeure and any non-performance shall not for so long as such event continues constitute a default in relation to the affected obligation under this Contract or entitle the other party to terminate this Contract by virtue of any non-performance arising from such event PROVIDED THAT:

- (a) the party affected by the Force Majeure (the “Affected Party”) shall have taken all reasonable steps to have overcome, avoided or minimise the effects of any such occurrence; and
- (b) the Affected Party shall have notified the other party as soon as is reasonably practicable.

17.2 Without prejudice to any other provision in this Contract, if an event referred to in Clause 17.1 shall continue for a period of ninety (90) days the other party may therefore terminate this Contract upon giving twenty one (21) Working Days’ written notice.

17.3 The parties shall negotiate in good faith with a view to agreeing on measures (if appropriate) to mitigate the effects of any interruption to Services arising from an event referred to in Clause 17.1. If an event of Force Majeure is, causes, or is caused by damage to the Operator’s infrastructure, the Operator shall repair the damage as soon as possible and shall ensure that any available insurance proceeds are applied to the repair.

17.4 In this clause “Force Majeure” means the occurrence after the date of this Contract of any of the following: riot; civil unrest; war; act of terrorism; threat or perceived threat of terrorism; accidental damage to Operator’s infrastructure; third party bridge strikes; third party curtailment of energy supplies; suicide; fire; earthquake; extraordinary storm; flood; abnormal weather conditions or other natural catastrophe or strikes, lock-outs or other industrial disputes (in the case of strikes, lock-outs or other industrial disputes not confined to employees of the Operator or C oras Iompair  ireann and its subsidiaries) to the extent that such event has materially affected the ability of the Affected Party to perform its obligations in accordance with the terms of this Contract but excluding any such event insofar as it arises from or is attributable to the wilful act, omission or negligence of the Affected Party or the failure on the

part of the Affected Party to take reasonable precautions to prevent such event of Force Majeure or its impact.

## **18. INDEMNITY**

18.1 Subject to sub-clauses 18.2 and 18.3, the Operator shall indemnify the Authority and the State, their servants and agents (each an “Indemnified Person”) against any action, expense, cost, claim, demand, and any other liability arising from:

- (a) death or personal injury;
- (b) damage to property;
- (c) breach of statutory duty;
- (d) third party claims

in respect of the provision of Services under this Contract provided always that the Operator’s liability to indemnify an Indemnified Person shall be reduced proportionately to the extent that the negligence, breach of duty or a breach of statutory duty of such Indemnified Person or a breach of this Contract by the Authority caused or contributed to the matters specified in subsections 18.1(a) to 18.1(d) above.

18.2 The Operator’s liability pursuant to Clause 18.1 shall be limited to €50million.

18.3 Neither party shall be liable, in contract, tort (including negligence) or for breach of duty or breach of statutory duty for:

- (a) any economic loss (including loss of revenues, profits, contracts, business or anticipated savings);
- (b) any loss of goodwill or reputation; or
- (c) any special or indirect or consequential losses

in any case, whether or not such losses were within the contemplation of the parties at the date of this Contract, or were suffered or incurred by a party arising out of or in connection with any matter arising under this Contract.

18.4 Such indemnity shall not operate to the extent that the act complained of arises directly from the Operator’s compliance with a direction of the Authority under the Act of 2008 or an express written direction of the Authority under this Contract.

## **19. WAIVERS AND ALTERNATIVE REMEDIES**

19.1 No delay, omission or forbearance on the part of either party to this Contract in exercising any right, power, privilege or remedy provided by law or under this Contract shall operate to or be construed or interpreted as operating to:

- (a) impair such rights, power, privilege or remedy; or

(b) operate as a waiver thereof.

- 19.2 The single or partial exercise by a party of any right, power, privilege, or remedy provided by law or under this Contract shall, whether or not exercised, not preclude any other or further exercise thereof.
- 19.3 The rights, powers, privileges, and remedies of a party provided in this Contract are cumulative and not exclusive of any rights, powers, privileges and remedies it would otherwise be entitled to under common law or statute.

## **20. NOTICES AND SERVICE**

- 20.1 Any notice required or authorised by this Contract to be given by either party to the other shall be in writing and may be given by hand or sent by registered post or fax transmission or email transmission to the other party to the addresses and facsimile numbers or email address and marked for the attention of the following persons:

on behalf of An tÚdarás Náisiúnta Iompair – National Transport Authority:

**Mr. Gerard Murphy, CEO, National Transport Authority, Dún Scéine, Iveagh Court, Harcourt Lane, Dublin 2.**

and

on behalf of Irish Rail – Iarnród Éireann:

**Mr. Dick Fearn, CEO, Irish Rail, Connolly Station, Dublin 1.**

- 20.2 Any notice or other information given by post under Clause 20.1 which is not returned to the sender as undelivered shall be deemed to have been given on the fourth day after the envelope containing the same was so posted and proof that the envelope containing any such notice or information was properly addressed and sent by prepaid post, and that it has not been so returned to the sender, shall be sufficient evidence that such notice of information has been duly given.
- 20.3 Any notice or other information sent by fax transmission or email shall be deemed to have been duly sent on the date of transmission provided that such date is a Working Day and that the sender's facsimile machine or computer issues confirmation that the relevant pages have been transmitted to the recipient's facsimile machine or email address.
- 20.4 Any notice or other information given by hand shall be deemed to have been given at the time of delivery.
- 20.5 Either party may, by notice to the other (in compliance with this Clause), change the address, fax, e-mail address or the person to which such notice is to be sent or delivered.

## **21. ENTIRE AGREEMENT**

This Contract contains the entire agreement between the parties and contains all the terms, which the parties have agreed with respect to its subject matter and this Contract supersedes

and extinguishes all previous drafts, agreements, contracts, and undertakings between the parties.

## **22. GOOD FAITH**

The parties shall conduct all discussions and negotiations called for under this Contract in good faith and perform all obligations under this Contract in good faith.

## **23. CONFIDENTIALITY**

23.1 “Confidential Information” means all confidential information disclosed (whether in writing, orally or by another means and whether directly or indirectly) by a party (the “Disclosing Party”) to the other party (the “Receiving Party”) whether before, on or after the date of this Contract including, without limitation, information relating to the negotiation, provisions and subject matter of this Contract or the Disclosing Party’s operations, processes, plans or intentions, know-how, design rights, trade secrets or business affairs.

23.2 Subject to sub-clause 23.3, during the term of this Contract and at any time after the termination or expiry of this Contract (for any reason) the Receiving Party:

- (a) may not use any Confidential Information for any purpose other than in the performance of its obligations under this Contract;
- (b) may not disclose any Confidential Information to any person except with the prior written consent of the Disclosing Party or in accordance with sub-clause 23.3; and
- (c) shall make every effort to prevent the use or disclosure of Confidential Information.

23.3 Subject to sub-clause 23.4, the Receiving Party may disclose information, which would otherwise be Confidential Information if and to the extent that:

- (a) it is required by law or by a binding court order;
- (b) in the case of the Operator, disclosure is required by its parent company, or shareholder, or a Minister of the Government of Ireland;
- (c) the information has come into the public domain or into the knowledge of the Receiving Party, otherwise than through a breach of this clause or any other confidentiality agreement with the Disclosing Party by the Receiving Party;
- (d) it is required by existing contractual obligations of which the Disclosing Party is aware;
- (e) it is required by any securities exchange or regulatory or governmental body to which it is subject;
- (f) the disclosure is to its professional advisers, auditors, or banker;
- (g) the disclosure is to any of its directors, other officers, employees, and sub-contractors (a “Recipient”) and is reasonably necessary for the performance of their obligations in connection with this Contract.

- 23.4 Where the Authority receives a request under the Freedom of Information Acts 1997 and 2003 (the “FOI Acts”) for disclosure of the Operator’s Confidential Information, the Authority shall deal with such request in accordance with the provisions of the FOI Acts, in particular section 26(1)(b) of the FOI Acts. For the avoidance of doubt, nothing in this Clause 23.4 shall prejudice the Authority’s rights or obligations under the FOI Acts.
- 23.5 The Receiving Party shall ensure that a Recipient is made aware of and complies with the Receiving Party’s obligations of confidentiality under this Contract as if the Recipient was a party to this Contract.

**24. NON ASSIGNABILITY**

This Contract shall not be assigned, or otherwise transferred, to any third party without the prior written consent of the Authority

**25. EXECUTION**

This Contract may be executed in one or more counterparts each signed by one of the parties and such counterparts shall together constitute one Contract.

**26. GOVERNING LAW AND JURISDICTION**

This Contract shall be governed by the laws of Ireland and all matters of interpretation of law arising hereunder or in connection with this Contract shall be subject to the exclusive jurisdiction of the Irish Courts.

**GIVEN under the seal of  
An tÚdarás Náisiúnta Iompair -  
National Transport Authority**

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**Member or authorised signatory**

**GIVEN under the seal of  
IRISHRAIL-IARNRÓD ÉIREANN**

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**Director**

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**Director/Secretary**

