Criteria and procedures for the approval of passenger track access contracts: fourth edition

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1. Introduction to the fourth edition

1.1 This is the fourth edition of the *Criteria and procedures for the approval of passenger track access contracts*. The purpose of this document is to set out the criteria and procedures we expect to follow in processing applications for passenger track access contracts, exercising our functions under sections 17 to 22A of the Railways Act 1993, as amended (“the Act”). Our aim is to establish clear and transparent processes that are as straightforward as possible for applicants to follow, and which will facilitate our timely and efficient consideration of each application. This is particularly important given that we wish to encourage the industry to take greater responsibility for the terms of contracts and industry contractual codes.

1.2 We will consider every application on its individual merits, and this document should not be interpreted as committing the Office of Rail Regulation (ORR) in any individual case to making a particular decision. It may be further revised and reissued from time to time to take account of further experience and changing circumstances, and readers are therefore advised to confirm via the ORR website\(^1\) that this document remains the most recent edition. In addition, we are proposing to carry out a wider review of our track access application processes\(^2\), with the aim of adding value to the process and embedding our processes to a greater extent with those of the industry in order to minimise duplication of effort.

1.3 We expect passenger operators and Network Rail Infrastructure Limited\(^3\) (Network Rail), and other relevant facility owners, to follow the procedures outlined in this document when negotiating and submitting proposed track access contracts for directions and amendments to existing access agreements for our approval. In particular, we will expect such applications to

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1. This may be found at [http://www.rail-reg.gov.uk](http://www.rail-reg.gov.uk)


3. Network Rail Limited acquired Railtrack PLC in October 2002, which subsequently became Network Rail Infrastructure Limited. All subsequent references in this document are therefore to Network Rail unless they relate to statements or actions specific to Railtrack PLC prior to the acquisition.
be accompanied by the appropriate completed application form\(^4\) and comprehensive and specific information in support of the submission. This will help us to meet the timescales required by the parties for the commencement of the access rights sought. In preparing their applications the parties should have due regard to the expected timescales for processing applications set out in Chapter 3. Where these procedures are not complied with, or sufficient time is not allowed for the process to be completed, our approval may not be obtained by the required deadline.

1.4 We encourage any party seeking a track access contract or an amendment to an existing access agreement to first discuss and agree its access rights with Network Rail, as facility owner. In order to help ensure that their approach is consistent with our criteria and procedures, and identify issues that can be addressed prior to the formal application being made, we also encourage the parties to seek a pre-application meeting with us.

1.5 We have published separate guidance on obtaining freight track access contracts\(^5\). Applicants are advised to contact us if they are seeking guidance in respect of track access for charter services and intermediate traffic (such as yellow plant movements when not undertaking network services), connection agreements\(^6\) between Network Rail’s network and neighbouring railway facilities, and access to stations and light maintenance depots.

1.6 This document is structured as follows.

(a) Chapter 2 explains the framework which applies to the regulation of access to the rail network including under the Act, the Railways Infrastructure (Access and Management) Regulations 2005 (“the Access and Management Regulations“)\(^7\) and the Competition Act 1998. It also sets out the respective roles of the main industry bodies involved

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4 Passenger access application forms can be downloaded via the ORR website at http://www.rail-reg.gov.uk/server/show/nav.202


in the track access application processes, the form of the model contract and the relationship with the Network Code.

(b) Chapter 3 sets out the procedures for applications to ORR, including the provisions for issuing general approvals.

(c) Chapter 4 discusses the way that access rights are expressed in passenger track access contracts, the issues arising on the consumption of rail network capacity, the criteria we expect to apply when considering those issues, and the trade-offs between flexibility, certainty and duration on individual applications.

(d) Chapter 5 sets out our approach on charges, performance regimes, possessions (restrictions of use) and liability.

(e) Chapter 6 describes our approach to considering bespoke provisions being sought in place of, or in addition to, our published model passenger track access contract.

(f) Annexes A -D illustrate our approval processes for applications under sections 17, 18, 22 and 22A of the Act respectively.

1.7 All publications referred to in this document are available from the ORR library, the ORR website (www.rail-reg.gov.uk), or other sources indicated in the document.
2. Regulation of access to the network

Introduction

2.1 This chapter explains the framework which applies to the regulation of access to the rail network including the Act, the Access and Management Regulations and the concurrent application of the Competition Act 1998. It also sets out the respective roles of ORR, the Department for Transport (DfT), Network Rail and Transport Scotland in the track access application processes, the form of the passenger model contract, the relationship with the Network Code and our approach on the exemption of facilities.

The regulation of access to the rail network

2.2 The regulatory framework applying to the consumption of rail network capacity was established by the Railways Act 1993, subsequently amended by the Transport Act 2000, the Railways and Transport Safety Act 2003 and the Railways Act 2005 (RA 2005), and sits within an overarching framework of EU legislation.

2.3 Many of the matters set out in this document are affected by recent domestic legislation which transposed the First EU Railways Package and parts of the Second Railways Package into domestic law. In particular, the Access and Management Regulations, which came into force on 28 November 2005, apply to the allocation of capacity and levying of charges, and provide for open access for all types of rail freight services.

2.4 Having previously taken steps to ensure that our criteria and procedures reflect our understanding of Directives 2001/12/EC (amending Directive 91/440/EEC), and 2001/14/EC, we consider that our existing arrangements for approving and directing track access contracts are consistent with these Regulations.

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The Railways Act 1993

2.5 Under the Act, a person (e.g. a train operator) may only enter into a contract with a facility owner giving it permission to use that facility owner's railway facility (whether track, a station or a light maintenance depot) if ORR so directs. Once contracts have been entered into following our directions, they become access agreements. Hence, proposed contracts that have been negotiated by the parties require our approval and direction under section 18, whilst subsequent amendments to them require our approval under section 22.

2.6 Where agreement has not been reached on the terms of a contract, the proposed access beneficiary can apply to ORR to issue directions requiring the facility owner to enter into a contract as determined by ORR under section 17. Similarly, where agreement has not been reached on the terms of a proposed amendment to an existing contract to permit more extensive use, the beneficiary can apply to ORR to issue directions to require the amendment of the contract as determined by ORR under section 22A.

2.7 The statutory regulated access regime does not apply to all access contracts, in particular those under which the beneficiary obtains access in order to operate the facility in question itself, or those with a party whose facility is exempt from the regime under section 20 of the Act, including by virtue of the Railways (Class and Miscellaneous Exemptions) Order 1994 (“the CMEO”)\(^9\). However, the Access and Management Regulations provide applicants with right of appeal to ORR in relation to facilities which are otherwise exempt from the Act under section 20. This is discussed further in paragraph 2.64 below.

2.8 The vast majority of the national track network in Great Britain is owned and operated by a single facility owner (Network Rail) with train services run by operators under regulated access contracts. There are, in addition, other facility owners to whom the statutory access regime applies. However, for passenger operators the facility owner will nearly always be Network Rail and so this document refers generally to Network Rail as the facility owner. Clearly, responsibilities ascribed to Network Rail only apply where it is indeed the facility owner concerned.

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\(^9\) See sections 17(1), 17(3), 18(3) and 18(4) of the Railways Act 1993.
The Office of Rail Regulation

2.9 ORR is an independent statutory body, led by a board which is appointed by the Secretary of State. The Board is responsible for setting ORR’s strategy and the oversight of its efficient, effective and economic delivery. One of our key roles is to ensure that Network Rail, the owner and operator of the national railway infrastructure, manages the network efficiently and in a way that meets the needs of its users.

2.10 We are responsible for issuing and enforcing licences for the operation of all railway assets in Great Britain. For passenger or freight train operators, we grant European licences valid throughout the European Economic Area (EEA), along with a Statement of National Regulatory Provisions (SNRP) for Great Britain. A SNRP sets out specific requirements incumbent on a holder of a European licence operating in Great Britain. The DfT is responsible for approvals under some conditions in licences and SNRPs relating to consumer protection, and for the day to day monitoring of compliance with these conditions. European licences issued by other EEA states are normally also valid in Great Britain, although the operator will still need to hold the appropriate SNRP. Further information about licensing can be found on ORR’s website or by contacting the ORR Licensing team.

2.11 ORR (as well as the Secretary of State) may grant an exemption from the requirement to be authorised by licence to be the operator of railway assets, and grant exemptions from the access regime. ORR also has concurrent jurisdiction with the Office of Fair Trading (OFT) to investigate potential breaches of the Competition Act 1998 in respect of the supply of services relating to railways.

2.12 Specifically in respect of track access, we are responsible for overseeing the fair and efficient allocation of the capacity of the railway network and other railway facilities through our approval of access contracts. We may require proposed contracts to be modified before giving that approval. Where a prospective user is unable to agree access terms with Network Rail, we may direct Network Rail to grant access and determine the terms on which it must do so. In carrying out these functions, we must act impartially and fairly.

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10 The EEA comprises the EU Member States, Norway, Iceland and Liechtenstein.
11 Section 7 of the Railways Act 1993.
12 Section 20 of the Railways Act 1993.
2.13 Thus, we have an important role in acting as impartial referee, independent of Government, in addressing competing claims for access to the railway network. We ensure that the relationship between the infrastructure provider and its customers (including the DfT and other funders) is fair to all, and act as an appeal body for certain matters where so designated in an access contract, the Network Code\textsuperscript{13} and the Access and Management Regulations.

2.14 We must exercise our powers within the overall framework established by EU legislation and related domestic legislation, and in accordance with our statutory duties. It should be noted that the Access and Management Regulations prohibit undertakings from trading access rights with, or transferring access rights to, other undertakings\textsuperscript{14}. This is to ensure that all rail network capacity is allocated within the established regulatory framework.

Statutory duties of ORR

2.15 Section 4 of the Act sets out a number of general duties that ORR must discharge in exercising its functions under the Act and those under the RA 2005 that are not safety functions. These duties, which were recently amended by the RA 2005, are summarised below and require ORR to exercise its functions under the Act and the RA 2005 that are not safety functions in the manner which it considers is best calculated to:

(a) promote improvements in railway service performance (including reliability (and punctuality), the avoidance or mitigation of passenger overcrowding, and journey times that are as short as possible);

(b) otherwise protect the interests of users of railway services;

(c) promote the use of the railway network in Great Britain for the carriage of passengers and goods, and the development of that railway network, to the greatest extent that it considers economically practicable;

(d) contribute to the development of an integrated system of transport of passengers and goods;

\textsuperscript{13} References in this document to the “Network Code” are references to the Railtrack Track Access Conditions 1995 as amended from time to time; see paragraph 2.58 below.

\textsuperscript{14} Railways Infrastructure (Access and Management) Regulations 2005, regulation 16(6).
(e) contribute to the achievement of sustainable development;

(f) promote efficiency and economy on the part of persons providing railway services;

(g) promote competition in the provision of railway services for the benefit of users of railway services;

(h) promote measures designed to facilitate the making by passengers of journeys which involve use of the services of more than one passenger service operator;

(i) impose on the operators of railway services the minimum restrictions which are consistent with the performance of its functions under Part 1 of the Act or the RA 2005; and

(j) enable persons providing railway services to plan the future of their businesses with a reasonable degree of assurance.

2.16 ORR is also required to:

(a) take into account the need to protect all persons from dangers arising from the operation of railways (please also refer to paragraph 2.18 below);

(b) have regard to the effect on the environment of activities connected with the provision of railway services;

(c) have regard to any general guidance given to it by the Secretary of State about railway services or other matters relating to railways\(^\text{15}\);

(d) have regard to any general guidance given to it by the Scottish Ministers about railway services wholly or partly in Scotland or about other matters in or as regards Scotland that relate to railways; and in doing so, give what appears to it to be appropriate weight to the extent

(if any) to which the guidance relates to matters in respect of which expenditure is to be or has been incurred by the Scottish Ministers;

(e) act in a manner which it considers will not render it unduly difficult for persons who are holders of network licences (e.g. Network Rail) to finance any activities or proposed activities of theirs in relation to which ORR has functions under or by virtue of Part 1 of the Act or the RA 2005;

(f) have regard to the funds available to the Secretary of State for the purposes of his functions in relation to railways and railways services;

(g) have regard to any notified strategies and policies of the National Assembly for Wales, so far as they relate to Welsh services or to any other matter in or as regards Wales that concerns railways or railway services;

(h) have regard to the ability of the National Assembly for Wales to carry out the functions conferred or imposed on it by or under any enactment;

(i) have regard to the ability of the Mayor of London and Transport for London (TfL) to carry out the functions conferred or imposed on them by or under any enactment; and

(j) have regard to the interests of persons who are disabled.

2.17 In exercising our functions under the Act and those under the RA 2005 that are not safety functions, we are governed by statutory duties, most of which are set out in section 4 of the Act. We consider that the discharge of these duties is best achieved through having regard to these criteria and procedures and our relevant published policies when considering applications made under sections 17-22A of the Act. We are also committed to transparency and we will consult a full range of stakeholders to bring to our attention matters that might be relevant to the discharge of our statutory duties.
2.18 On 1 April 2006, ORR became the combined economic and safety regulator of the railways following the coming into force of the provisions of Schedule 3 of the RA 2005. Section 3 of the RA 2005 has amended ORR’s general duties under section 4 of the Act, which are applicable to the exercise of its economic regulatory functions, to take account of its new rail safety functions. ORR’s section 4 duty to take into account “the need to protect all persons from dangers arising from the operation of railways” has been retained but amended to reflect the transfer of responsibility for regulating rail safety from the Health and Safety Executive (HSE). The performance of ORR’s economic regulatory functions will therefore continue to require safety to be taken into account alongside its other section 4 duties. ORR’s section 4 duties will not apply to the exercise of any safety function that is transferred to ORR under Schedule 3 of the RA 2005; separate considerations will apply to these. The section 4 duties also will not apply where ORR is exercising its general economic regulatory functions for railway safety purposes. Railway safety regulation is discussed further in paragraphs 3.14 and 4.9-4.11 below.

2.19 ORR also has a duty under section 17 of the London Olympic Games and Paralympic Games Act 2006 to facilitate the provision, management and control of facilities for transport in connection with the London Olympics and to consult the Olympic Delivery Authority in relation to this duty.

2.20 In relation to the Channel Tunnel Rail Link, ORR has an overriding duty under section 21(1) of the Channel Tunnel Rail Link Act 1996 to exercise its functions in such a manner as not to impede the performance of any development agreement concerning this link, and, under section 21(2), to have regard to the financial position of the rail link undertaker in respect of trains used in connection with the construction of the link and trains used to provide international services.

2.21 In scrutinising proposed contracts or amendments, and in determining whether, and on what terms, to direct that access be granted, we expect to focus on: the implications of contracts submitted for the efficient consumption of railway network capacity over time; and the fairness of their terms and their consistency with our decisions in any periodic or interim review of access charges. Taking account of all of our duties, we may then indicate the variations or amendments we would wish to see made to a proposed access contract before we would be prepared to approve it (in the case of sections 17 and 22A, we would make the amendments, since in these cases we are
determining the overall content of the contract). The key issues we expect to consider, and the criteria we expect to apply, are discussed in Chapters 4 – 6 below.

The Department for Transport

2.22 The RA 2005 implemented the proposal in The Future of Rail White Paper\(^\text{16}\) (“the Rail Review” - published in July 2004) to allow the Government to take direct charge of setting the strategy for the railway. The DfT is now responsible for developing the Government’s long-term vision and strategy for rail within the wider transport context\(^\text{17}\), including specifying the national level strategic outputs and funding for the rail industry, i.e. the overall size and shape of the network in England and Wales.

2.23 The DfT also is responsible for approvals under some conditions in licences and SNRPs relating to consumer protection, and the day to day monitoring of compliance with these conditions, including through ticketing and passenger benefits, the provision of services for disabled people and complaints handling procedures.

2.24 The DfT should have a developed view of the capacity of the rail network and of the options for maximising its efficient use and development so as to inform its decisions on franchise agreement specifications (which in turn influence passenger operators’ requirements in access contracts); the award of investment grants; and its representations to ORR before we make our decisions. The DfT’s view of capacity will be informed by route utilisation strategies (RUSs). The DfT’s role, and that of RUSs, is discussed further in Chapter 4.

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\(^{17}\) References to the DfT should, where the context so requires, be construed as references to the Secretary of State. Any references to the powers of the DfT reflect those that it exercises on behalf of the Secretary of State.
Transport Scotland

2.25 The RA 2005 devolved greater responsibility for rail within Scotland to the Scottish Ministers, including an extended role with regard to infrastructure\[^{18}\].

2.26 Transport Scotland is an executive agency of the Scottish Executive and is responsible for executing the transport policies of the Scottish Ministers. With regards to railways, Transport Scotland’s role includes responsibility for planning, specifying, letting, managing and funding the contract for services operating under the existing Scottish passenger rail franchise and any other Scotland-specific franchise. Transport Scotland also specifies network outputs and finances Scottish infrastructure costs, and has the power to provide financial assistance in the provision, improvement or development of rail facilities. It will continue to be able to offer advice to the Government on the specification of cross-border passenger rail services. The infrastructure will continue to be owned and operated by Network Rail.

2.27 We have the same range of responsibilities in Scotland as in England and Wales. We will therefore continue to adjudicate on issues of access and cost. We have published a document setting out our approach to regulation in Scotland in the light of the new arrangements introduced by the RA 2005 and our arrangements for working with Scottish Ministers and Transport Scotland in the future\[^{19}\].

Network Rail

2.28 Network Rail is the owner and operator of the national rail network, which includes signals, tunnels, bridges, viaducts, level crossings and stations. It is responsible for the operation, maintenance and renewal of the rail network. The changes that resulted from the Rail Review gave Network Rail additional responsibility for overall network performance, requiring it to lead industry planning, set timetables and direct service recovery. To ensure that Network

\[^{18}\] References to Transport Scotland should, where the context requires, be construed as references to the Scottish Ministers. Any references to the powers of Transport Scotland reflect those that it exercises on behalf of the Scottish Ministers in accordance with their policies.

Rail is accountable for the new responsibilities placed upon it, we have modified the company’s Network Licence\textsuperscript{20}.

2.29 Network Rail has also taken on responsibility for establishing and maintaining RUSs from the Strategic Rail Authority (SRA). Once in place, RUSs will help inform funders (in particular the DfT and Transport Scotland) of the capacity of the rail network. When considering applications for track access contracts, and thereby for the allocation of track access rights, we will specifically consider whether approval of such applications would be consistent with relevant existing RUSs or those being developed. RUSs, and our procedures in relation to them, are explained in more detail in Chapter 4.

**Compulsory and agreed procedures – procedural differences and policy identity**

2.30 Sections 17 and 22A of the Act exist for the protection of train operators and others who need access to railway facilities. In prospective users’ dealings with a facility owner in attempting to gain access, they are a means of preventing any abuse of the facility owner’s monopoly power. They come into play whenever there has been a failure, for any reason, to reach agreement on the terms of access. Usually this will arise in cases where the prospective user considers that the facility owner is demanding unreasonable terms for access or is unreasonably refusing access altogether. It should of course be remembered that what may at first appear to be unreasonable behaviour on the part of the facility owner could subsequently be established to be justifiable. That is a matter to be tested in the section 17 or 22A process.

2.31 Section 17 provides for a prospective user to apply to ORR for it to give directions to the facility owner to enter into a new access contract with the applicant. Section 22A applies where a user with an existing approved access agreement is seeking amendments to that agreement which will permit more extensive use of the facility in question, such as running more trains. Note that section 22A cannot be used to extend the duration of an access agreement: see paragraph 3.77 below.

2.32 We expect facility owners to engage in access negotiations with prospective users in an open, constructive and responsive way, with access to appropriate

\textsuperscript{20} Network Rail’s Network Licence is available at http://www.rail-reg.gov.uk/upload/pdf/netwrk_licence.pdf
professional resources. Facility owners should provide prospective users with necessary information in a timely manner and generally behave as if they were in a competitive market. In the case of track, Condition 25 of Network Rail’s Network Licence lays down a standard of conduct for pre-contract negotiations which has been translated into its Code of Practice\textsuperscript{21} for dealings with Dependent Persons, and which is binding on Network Rail and enforceable by ORR.

2.33 We also expect prospective users to try in good faith to reach agreement with facility owners on terms of access wherever possible before invoking the regulatory protections available under sections 17 or 22A. In that respect, it is therefore important that prospective users begin their discussions with facility owners early enough to allow sufficient time to invoke and follow through the section 17 or 22A processes and obtain the requisite directions from ORR should that become necessary. Our expected timescales for dealing with applications are set out in paragraphs 3.37-3.46 below.

2.34 Whilst agreed applications under section 18 or 22 are of course desirable, if negotiations with a facility owner are not making sufficient progress towards agreement and time is running short, a prospective user may wish to submit a section 17 or 22A application. This does not mean that proper and professionally conducted negotiations should not continue in parallel. Nor should it mean that negotiations are brought prematurely to an end or that the parties should regard themselves as having fallen out. Such an application is simply rational business practice for a prospective user not to allow itself to lose important protections it may eventually need. If the stance taken by the facility owner is regarded by a prospective user as unreasonable and therefore inconsistent with our statutory duties and these criteria, the prospective user should not feel it necessary to persevere fruitlessly with negotiations until there is only just enough, or not enough, time for a section 17 or 22A application to be dealt with. It should apply earlier.

2.35 Where a section 17 or 22A application is made, the issues on which the parties have failed to agree should be set out in section 3.2 of the relevant application form.

2.36 It is ORR that must determine what is the fair and efficient allocation of capacity, regardless of whether or not the parties have reached agreement on all pertinent points in negotiations. We will base our decision on the public interest as defined by our statutory duties, to determine the matter under sections 17 or 22A or, in the case of an agreed application, require modifications under section 18(7) or reject the application under sections 18 or 22. Therefore, we are able to determine the nature, content and length of access contracts. We are required, if appropriate, to put the public interest above the private commercial interests of the facility owner and the applicant, taking into account considerations which may be of little or no concern to the parties, but in the interests of third parties, for example rail users, funders or other potential users of the facility.

2.37 We will nevertheless have regard to, but by no means be constrained by, what the parties have or have not agreed. It is therefore important that in negotiations the parties have, as far as reasonably practicable, thoroughly considered the issues so that we and consultees can have the benefit of a developed proposition for capacity allocation.

2.38 The same capacity cannot be sold for consumption more than once. It is important that parties are aware that the legal consequences of overselling capacity by a facility owner are different as between agreed contracts (sections 18 and 22) and ones obtained through compulsory means (sections 17 and 22A). This is explained in paragraph 4.14 below.

**Track access contracts**

2.39 A track access contract is a contract between the access beneficiary (usually a train operator) and the facility owner (infrastructure provider) which encapsulates:

(a) the access rights held by the beneficiary: generally expressed in terms of an entitlement to have specified train slots incorporated in the compilation of the timetable in order to operate (or have operated on its behalf, see paragraph 3.12 below), a train service over a defined part of the network, subject to a defined amount of flexing;

(b) conditions and obligations attaching to those rights: including the performance regime, provisions relating to the application of the Rules.
of the Route and the Rules of the Plan,\(^\text{22}\) restrictions of use (e.g. engineering possessions), the use of specified equipment and confidentiality etc;

(c) charges for the exercise of the rights; and

(d) the liability of the parties to each other in the event of breach of contract.

**Access rights**

2.40 An access right is any right conferred on a train operator by its access contract with Network Rail. Access rights will represent a balance between:

(a) the train operator’s need to ensure that it can meet its key commercial requirements over the period of the contract, including, for franchised (or concession) passenger train operators, any obligations in a franchise agreement with the DfT, Transport Scotland, National Assembly for Wales or any other public body;

(b) the need to ensure flexibility so that Network Rail can optimise the use of network capacity in compiling a robust and reliable timetable reflecting the requirements of all access beneficiaries; and

(c) Network Rail’s need to reserve access to the network in order to maintain and renew it in a safe, competent, timely and efficient manner.

2.41 Access rights expressed in contracts are converted into the Working Timetable by the process set out in Part D of the Network Code. Essentially the process is as follows:

(a) Network Rail proposes Rules of the Route and Rules of the Plan, which are subject to consultation and appeal;

(b) train operators bid for train slots based on the access rights they hold, and in accordance with the by then established Rules of the Route/Rules of the Plan; and

\(^{22}\) The Rules of the Plan document the operating characteristics and constraints for the network, in terms of sectional running times, station dwell times etc. The Rules of the Route govern the application of temporary restrictions of use on a route, e.g. temporary speed restrictions, engineering possessions etc.
Network Rail may then exercise such flexing rights as it has in order to resolve conflicts between bids having equal priority. In doing so, Network Rail must have regard to prescribed Decision Criteria set out in Condition D6 of the Network Code. Network Rail’s exercise of a flexing right is subject to appeal to the relevant Access Dispute Resolution Rules (ADRR) panel and, beyond that, to ORR (discussed further in paragraphs 2.61-2.63 below).

Although changes to the Working Timetable can be made at any time, significant changes in the Passenger Timetable may be made only twice per year, at the dates referred to as the Principal Change Date (in December) and the Subsidiary Change Date (in June).

Applicants should note that this process has implications for the timing of access applications, which is discussed further in Chapter 3 (paragraphs 3.37–3.46) below.

Flex

Flex is the term used to describe the flexibility or freedom conferred by the contract on Network Rail to allocate train paths which do not exactly reflect the train operator's bid. The common term used to describe the boundaries of that flexibility is 'the envelope of flex'. An example is a firm right to a train path that is at xx00, plus or minus 10 minutes. This means that the train may be timetabled by Network Rail at any point between 10 minutes to the hour and 10 minutes past the hour. The train operator may bid for the train to operate anywhere within that envelope. If it does, Network Rail has the freedom to accept the bid exactly as submitted or, having due regard to the Decision Criteria, it may exercise its Flexing Right to allocate a train path which is different from the bid but still within the envelope. Being a firm right, the bid must be accepted if it is properly made by the Priority Date, but Network Rail still has the flexibility within the envelope.

Network Rail has no specific restriction on its Flexing Right to vary a bid which is not supported by a firm right but, in doing so, it must have due regard to the Decision Criteria.

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23 Condition D5.1 of the Network Code.
2.46 The converse of flex is the technique known as 'hardwiring'. A completely hardwired access right would be a firm right to a particular train path with no flex whatsoever. If a bid is timeously and properly made, and is in exercise of a firm access right, Network Rail would have no discretion; it would be obliged to allocate to the operator in question the train path for which it has bid. Hardwiring comes in degrees. The less the flex in the right, the greater the right is hardwired. Since hardwiring is, by its nature, so rigid, we will expect to receive from applicants a convincing case before approving it. This is because hardwiring is the most expensive use of capacity of all.

2.47 Different access contracts contain widely differing variations in the amount of flex or hardwiring they contain. On the one hand, some long distance intercity services have very little flex at the point of departure, when regular hourly clockface departures are an important part of the service provided to passengers. On the other hand, some freight services operate under access contracts which specify no more than a certain number of train slots a day. Within that very wide envelope of flex Network Rail can, subject to the Decision Criteria, timetable those freight trains around other trains as long as it supplies the quantum of train slots sought.

2.48 Flex applies to all train service characteristics. These include:

(a) the number (or quantum) of trains in any specified period (including rights to run additional trains or relief services);

(b) departure and arrival times (including clockface requirements);

(c) first and last trains;

(d) flighting;

(e) regularity of service intervals;

(f) maximum journey times;

(g) station stopping patterns (and rights to terminate short of a destination station);

(h) rights to use particular parts of railway facilities (such as dedicated platforms at stations), diversionary routes, routes to maintenance facilities and for ancillary services, connectional requirements; and
(i) rights to stable trains, maximum train length, and turnaround times which may vary from those in the relevant Rules of the Plan.

2.49 Access contracts will sometimes confer on Network Rail quite considerable amounts of flex, and we will usually expect to require reasonable amounts of flex in contracts unless the case can be made for less. Flex is necessary to maintain the integrity and workability of the timetable. However, there is no presumption of very wide or even unlimited degrees of flex. A reasonable balance is required to maintain operational practicability of the timetable on the one hand and the facilitation and protection of legitimate business planning on the other hand. Flex is discussed further in Chapter 4.

The model track access contract

2.50 In line with section 21 of the Act, we have published model passenger\(^{24}\) and freight\(^{25}\) track access contracts, and accompanying explanatory notes\(^{26}\).

2.51 We have also published a model contract for connections\(^{27}\), based on the provisions in the model passenger and freight track access contracts, but adapted to address the special issues that arise in a connection contract. Connection contracts set out the rights and obligations of the parties in respect of the ongoing maintenance of connections between two railway networks.

2.52 The guiding principle for establishing model track access contracts for passenger and freight operators was to create contracts that provide a sound, straightforward basis for supporting and facilitating a more effective and efficient working relationship between Network Rail and its customers purchasing access to the network, ensure the appropriate allocation of risk,


include incentives for efficiency, and, overall, encourage a culture of compliance and improved delivery.

2.53 The published model contract was developed in the light of experience of the privatised railway industry. It covers those matters we would expect to see covered in a passenger track access contract. That said, we will, of course, consider on their individual merits any applications for access contracts with bespoke provisions departing from or in addition to those in our model contract. Indeed, the contract, which is described in outline below, already contains templates for some optional provisions in Schedule 5 (the expression of the access rights).

2.54 In addition to the model passenger access contract, we also developed the application forms (discussed in Chapter 3 of this document) to streamline and simplify the process of making and reviewing applications. These invite applicants to provide certain specified information in support of their applications, including the reasons for any departures from the published model contract. Whenever a proposal contains a new process (e.g. a self-modification provision) we will wish to see a flow chart illustrating that the process is robust, internally consistent and leaves no loose ends.

2.55 We strongly encourage the adoption of our model clauses in any substantive amendments being made to existing access agreements through supplemental agreements.

2.56 Where applications for track access contracts relate to charter passenger services, we would expect applicants to use, as far as is possible, our model track access contract and one of our application forms as the basis for their application. We recognise that certain provisions in the model contract and sections of the application forms will not be appropriate to such operators and will consider bespoke arrangements on their merits.

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Format of access contracts

2.57 The following list sets out the content of ORR’s model passenger track access contract.

The contract

(a) Duration of the contract.

(b) Incorporation, by reference, of the Network Code.

(c) Conditions precedent: terms which need to be fulfilled before the train operator can be granted permission to use the network, which may include obtaining the necessary licences and holding a Safety Certificate or a Railway Safety Case (RSC).

(d) Permission to use specified routes on the network: subject to certain restrictions, including those contained in the Network Code, the Applicable Rules of the Route and the Applicable Rules of the Plan.

(e) Certain minimum operational standards, to which the parties must adhere: including obligations in respect of the reduction of railway crime (vandalism and trespass), safety obligations and the use of Railway Code Systems.

(f) Mutual liability and indemnity provisions, including restrictions on claims under indemnities and limitation on liability.

(g) Governing law and dispute resolution: using arbitration and the options for referral to the relevant ADRR panel or the High Court.

(h) A process for obtaining performance orders in respect of actual or anticipated breach.

(i) Confidentiality: the prohibitions on divulging certain information in the contract to a third party other than one listed in the contract.

30 These are systems referred to as necessary systems by the code of practice relating to the management and development of railway information systems as from time to time may be approved by ORR in accordance with Condition 20 of Network Rail’s Network Licence.
(j) Assignment and novation of the contract, which requires the consent of ORR.

(k) Payments, interest and VAT.

(l) Relief from force majeure events in certain limited circumstances.

(m) Exclusions from the Contracts (Rights of Third Parties) Act, 1999, such that third parties are only given rights to enforce the terms of the access contract where that is explicitly provided for in the contract.

Schedules to the contract

Schedule 1 Particulars of the parties.

Schedule 2 The routes covered by the contract.

Schedule 3 The list of collateral agreements, multilateral (such as the Claims Allocation Handling Agreement (CAHA), which provides for the prompt handling of claims by third parties (e.g. rail passengers)) or bilateral (such as a franchise agreement).

Schedule 4 Application of the Rules of the Route and the Rules of the Plan, including restrictions of use.

Schedule 5 The services and specified equipment: setting out the number, frequency and other characteristics of the train operator’s services. The service specification sets out limitations within which a train operator may bid for slots in the Working Timetable and the rights of Network Rail to vary (or flex) such bids to optimise capacity utilisation and reconcile conflicting bids for slots in compiling the Working Timetable. It also lists all classes of usual and alternative types of rolling stock used by the train operator to ensure compatibility with the network.

Schedule 6 Events of default, suspension and termination.

Schedule 7 Track charges by reference to ORR’s determination of the structure and levels of access charges.

Schedule 8 Performance incentives.
Schedule 9  Limitations on liability.

Schedule 10 Network Code modifications: mechanism for making modifications to the access contract consequent on changes to the Network Code.

The Network Code

2.58 The Network Code is a common set of contractual provisions contained in every regulated track access contract between Network Rail and an access beneficiary (usually a train operator). The Network Code concerns areas where common processes are necessary or desirable, such as delay attribution (Part B), timetable change (Part D), vehicle and network change (Parts F and G), operational disruption (Part H), changes to access rights (Part J), performance (Part L) and appeals (Part M). The rules for the resolution of access disputes, the ADRR, are annexed to the Network Code.

2.59 The only parties with contractually enforceable rights under the Network Code are the parties to track access contracts. We do not have any enforcement powers under the Network Code. The Network Code does not create any direct contractual relationship between train operators however; all the relationships (obligations, remedies and liabilities) flow through Network Rail.

2.60 We are currently working with the industry to take forward the phase 2 reforms of the Network Code, in particular addressing: Parts F and G; third party rights; and Part K, concerning the exchange of information between Network Rail and train operators. Our final conclusions document sets out our proposed approach. We have also initiated, with Network Rail, a review of Part J of the Network Code. This is discussed further in Chapter 4.

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32 The Network Code also applies to one unregulated contract with Eurostar, but does not apply to unregulated contracts with Heathrow Express or London Underground Limited.

Appeals and disputes

2.61 By incorporating the Network Code, track access contracts contain mechanisms for resolving disputes between industry parties. The ADRR, which are annexed to the Network Code, establish the Access Disputes Committee (ADC). The ADC appoints the relevant ADRR panel i.e. the Access Disputes Panel or the Timetabling Panel. Where there is a timetabling dispute between Network Rail and a train operator that cannot be resolved, Part D of the Network Code provides for the train operator to refer Network Rail's timetabling decision to the Timetabling Panel. Likewise, parties may refer non-timetabling access disputes to the Access Disputes Panel for resolution.

2.62 Where a party to a dispute is not satisfied with the decision of one of these panels, there is provision for appeal to ORR. The mechanisms for such appeals in respect of Parts D (Timetabling), F (Vehicle Change), G (Network Change), H (operational disruption) and L (Local Output Commitments) of the Network Code were consolidated into a new Part M (Appeals) on 10 January 2005. We expect to publish guidelines on appeals to ORR shortly, setting out in general terms the manner in which we will manage appeals and the manner in which the parties should conduct themselves.

2.63 The model passenger track access contract provides a suite of options for resolving disputes and addressing breaches, which run from mediation through to referral of claims for damages to the High Court. Our aim has been to provide a clear toolkit of remedies that should allow the parties to resolve problems quickly. This toolkit is described in our Guide to the model passenger track access contract.

2.64 Under the Access and Management Regulations (also discussed in paragraph 2.3 above and below in 2.68), applicants (a term widely defined in the Regulations) are provided with general rights of appeal to ORR if they have been unfairly treated, discriminated against or are in any other way aggrieved. In particular this will be against a decision by the infrastructure manager (which for the purpose of these Regulations also includes the Channel Tunnel Rail Link), a terminal or port owner, a service provider or a...
train operator. The appeal may be in relation to facilities that are otherwise exempt from the Act under section 20, provided that these facilities have not themselves been excluded from the scope of the Regulations\footnote{Railways Infrastructure (Access and Management) Regulations 2005, regulation 4. The DfT has published guidance on the scope of the Regulations, available at 

2.65 It should be noted that where the matter of an appeal is one for which directions may be sought under sections 17 or 22A of the Act, then an application should be made under these provisions and will be dealt with using that process, rather than by way of the appeal mechanisms available under the Access and Management Regulations.

**Exemptions**

2.66 Our approval of, or direction to enter into, a contract providing access to the network is not required where the network in question has been exempted from that requirement. A network facility owner may apply to ORR or the Secretary of State for an exemption, under section 20 of the Act\footnote{See also the section on exemptions on our website at \url{http://www.rail-reg.gov.uk/server/show/nav.247}.}. Exemption can be in respect of the whole or part of the network and it can be conditional.

2.67 In arriving at our decision in respect of any application for an access exemption, we will have regard to our statutory duties and apply as appropriate any criteria we have published on such exemptions. We will also take into account the views of parties we have consulted on the proposed exemption.

2.68 The Secretary of State exempted certain classes of railway facility from the access (and licensing) provisions of the Act under the terms of the CMEO. This exemption applies to certain railway assets that were already privately operated in the period prior to the coming into force of the Act and for facilities (including networks) for which the regulatory regime established by the Act...
was considered inappropriate. ORR has also approved network exemptions in specific instances, such as for extensions to the Docklands Light Railway. Applicants seeking access to a network should check with the facility owner whether the network in question is exempted from the access provisions contained in sections 17 and 18 of the Act. Such networks do not require agreements to be directed by ORR, and neither can applications under section 17 of the Act be made. For such facilities, however, appeal mechanisms may be available under the Access and Management Regulations (see paragraph 2.64 above).

2.69 We can provide further information on exempt facilities or on making an application to ORR for an access exemption.

Planned and uncompleted railway facilities

2.70 The access regime of the Act also applies to railway facilities which are proposed to be constructed but where work has not started, and to railway facilities which are in the course of construction. It also applies to a person before they become a facility owner. This ensures that there is regulatory oversight of capacity consumption and regulatory protections in respect of planned and uncompleted railway facilities as well as for those that have been completed and/or are in use.

Consistency with competition law

2.71 Agreements between undertakings which are restrictive of, or which distort, competition or which could amount to an abuse of a dominant position, may fall for consideration under the Chapter I or Chapter II prohibitions, respectively, of the Competition Act 1998 (and, in so far as they may affect trade between EU Member States, Articles 81 and 82 of the EC Treaty)\(^39\).

2.72 When exercising our powers under the Act, in directing access agreements, we will have regard to our statutory duties including the duty to promote competition in the provision of railway services for the benefit of users of railway services. In doing so we will need to be satisfied that proposed contracts are not framed in such a way as may unduly limit competition in the provision of railway services. It is important to note, however, that when balancing those duties in the fulfilment of our regulatory obligations under the

Act, the duty to promote competition is one of a number of duties which need to be balanced against each other and we are not undertaking a full competition assessment as would be required should the agreement come under scrutiny under competition law.

2.73 The EC Modernisation Regulation, which came into force on 1 May 2004, abolished the system of notifying agreements for exemption (under Article 81(3)) and consistent with this in domestic law, the OFT and ORR are now no longer able to grant an individual exemption from the Chapter I prohibition. It is now, therefore, the responsibility of undertakings to ensure that any contract that they enter into is compliant with competition law. This is a responsibility that should be particularly borne in mind when entering into or amending an agreement that requires approval from ORR as opposed to directions under section 17-22A of the Act. For further information on the application of competition law in the railway sector please refer to the guideline published concurrently with the OFT.

2.74 Contracts can be challenged under competition law by third parties: either by way of private litigation through the courts or by way of a complaint to the competition authorities (the OFT and ORR have concurrent jurisdiction as competition authorities to examine claims under the Competition Act 1998 and Articles 81 and 82 of the EC Treaty with regard to the supply of services relating to railways). To the extent that access agreements are entered into in compliance with ORR’s directions made under section 17-22A of the Act, it may be open to parties to such agreements to argue that they are excluded from the scope of the prohibitions. However, parties should be aware that the rulings of the European Court indicate that such a defence will only be available in very limited circumstances. If a challenge were to be investigated, parties would have to take advice on the individual circumstances of their case. In general terms, it would be necessary to demonstrate that the legislative regime of the Act required them to act in the way complained of and would have prevented the parties from making an agreement that would not have contravened competition rules.

2.75 Agreed amendments to access contracts entered into under section 22 of the Act, or any amendment provisions contained in access agreements

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themselves, cannot be considered subject to legal direction and can therefore be subject to investigation or enforcement action under the Competition Act 1998 although section 22(6A) of the Act prevents either the OFT or ORR issuing directions or interim directions under the Competition Act in relation to such agreements\footnote{Although interim directions can be issued in relation to conduct connected with an access agreement.}. Similarly, access agreements entered into under section 18, in reliance of a general approval given by ORR (as opposed to an agreement directed by ORR under section 18), are not the subject of ORR directions and can also therefore be subject to action under the Competition Act.
3. Making an application: procedures

Introduction

3.1 This chapter explains the procedures we expect to follow in considering applications for contracts granting access to the rail network for regular scheduled passenger train services. In establishing these procedures, our aim is to ensure that our consideration of applications is undertaken in a timely manner wholly consistent with our statutory duties, with EU legislation and transposing regulations, including such procedural obligations as they impose.

3.2 This chapter is divided into seven sections:

(a) general matters concerning the submission of applications and the need for ORR’s approval;

(b) ORR’s application forms, and standard information requirements;

(c) consultation and hearings;

(d) the timing of applications;

(e) the specific processes for agreed applications, where we are being asked either to approve a new contract under section 18 of the Act, or to approve amendments to an existing approved agreement (known as a “supplemental”) under section 22 of the Act;

(f) the specific processes for applications made by train operators which have not been agreed with Network Rail, in whole or part, where we are being asked either to direct Network Rail to enter into an agreement under section 17 of the Act, or to direct that an amendment be made to an existing approved agreement in order to permit more extensive use of the network or facility to which the existing agreement applies under section 22A; and

(g) the procedures we expect parties to adhere to when applying for an access option.
General matters

Validity of contracts

3.3 Our role in approving access contracts is established by the Act, which states that a facility owner shall not enter into an access contract unless it does so pursuant to directions we have made under sections 17 or 18 of the Act, and any access contract which is entered into otherwise is void (i.e. has no effect in law). Similarly any amendment to an access agreement is void unless we have approved the amendment under section 22 of the Act, or it is made pursuant to directions that we have given under section 22A (unless the amendment is made under self-modification provisions built into an approved agreement – see paragraphs 6.4–6.5 below).

General approvals

3.4 We have powers under sections 18 and 22 of the Act to grant general approvals. These may give our approval prospectively, without the need for specific submission and approval, to:

(a) amendments of a specified description to a particular access agreement;

(b) amendments of a specified description to access agreements generally or to access agreements of a particular class or description; and

(c) access contracts of a specified class or description.

3.5 In considering the case for issuing a general approval, we would expect, in particular, to consider the potential impact of future changes thus permitted, and whether they are likely to be so material as to require regulatory scrutiny at the time.

3.6 ORR has issued the Passenger Access (Short Term Timetable Changes) General Approval 2004, which provides, subject to certain conditions and the existence of a valid track access contract, for additional or amended passenger train services to be agreed without specific regulatory approval for
not more than 28 days\(^{42}\). Extensions of such additional or amended rights beyond this period still require formal approval under sections 22 or 22A.

**Non-Network Rail network**

3.7 These criteria and procedures refer commonly to contracts entered into between train operators as the beneficiary and Network Rail as the facility owner. However, where the facility owner is not Network Rail, we would expect the parties to the proposed agreement to use the model contract as the starting point for a track access contract and to follow the application procedures outlined in this chapter. We do, however, recognise that the provisions of the model contract may not be appropriate in their entirety; in such instances, we would be prepared to consider adaptations to the model provisions where the parties feel they do not meet their commercial requirements. We would need to be satisfied with the reasons for any such bespoke approach.

**Self-modification**

3.8 Track access contracts may themselves incorporate certain mechanisms for subsequent variations to be made with, or without, ORR’s approval, depending on how they are framed. Our criteria for considering such provisions are discussed in paragraphs 6.4–6.5 below.

**Licensed operators**

3.9 We will want to be sure that there is a clear intention to exercise access rights being sought, and that there is no material or insurmountable obstacle to their being exercised (to avoid capacity being wasted).

3.10 Operators of railway assets must either hold a licence to operate or have the benefit of a licence exemption\(^{43}\). Licences and licence exemptions may be granted by the Secretary of State or ORR (but are generally granted by ORR). Licences to operate passenger or freight trains granted by the licensing


\(^{43}\) Section 6 of the Railways Act 1993 and regulation 5 of the Railway (Licensing of Railway Undertakings) Regulations 2005.
authority of another EEA state are normally also valid in Great Britain. An operator will still need to hold an appropriate SNRP issued by ORR.

3.11 Holding a licence is a condition precedent to the exercise of rights to operate on the network in the model track access contract (clause 3). In practice, the vast majority of access rights are held by licensed passenger and freight train operators, and therefore this document generally refers to train operators as the most likely beneficiaries of access contracts. We would therefore generally wish to be satisfied that an operator seeking access rights either holds a licence to operate trains on the network, or that its application for a licence is at an advanced stage.

3.12 It is important to stress that it is not necessary to hold a licence or be a train operator in order to obtain access rights. Individuals and undertakings may obtain rights to be exercised on their behalf by a licensed operator. However, in considering whether to approve those rights, we would want to know the identity of that operator, and be advised of the arrangements that exist to enable it to operate the rights for which the applicant is applying.

3.13 Applicants seeking further guidance on licensing are advised to consult our website or contact ORR’s Licensing team.

Safety Certificate/Railway Safety Case

3.14 We will not issue directions in respect of a proposed track access contract until:

(a) for a new operator, it holds either a Safety Certificate or an accepted Railway Safety Case (RSC) covering the scope of the operation in question; or

(b) where an operator already holds a Safety Certificate or an accepted RSC, if the agreement represents a substantial change to the type or extent of the operation specified in the Safety Certificate or RSC, we have, in the case of a Safety Certificate, issued a notice amending it or, in the case of an RSC, processed a material change, so long as this is

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44 Via the ORR website (www.rail-reg.gov.uk); telephone 020 7282 2000; write to: Licensing Team, Office of Rail Regulation, One Kemble Street, London, WC2B 4AN; or email licensing.enquiries@orr.gsi.gov.uk.
submitted before 10 October 2006 (after 10 October 2006 any
substantial change will require a Safety Certificate to be in place).

Applicants should therefore ensure that they have obtained the necessary
safety certification in respect of their application. Further information on rail
safety can be obtained from ORR\textsuperscript{45}.

**Railway Industry Emergency Access Code**

3.15 If, in the event of an emergency, a train operator needs to use facilities for
which it does not hold access rights (e.g. network, stations or light
maintenance depots), the Railway Industry Emergency Access Code
(Emergency Access Code) exists to provide train operators with access to
those facilities for the period required. The Emergency Access Code is a
separate regulated access agreement between Network Rail and all train
operators. A new operator becomes a party to the Emergency Access Code
by signing an admission agreement with Network Rail (contained in Schedule

3.16 Applicants should be aware that being a party to the Emergency Access Code
is a condition precedent to the exercise of access rights in track access
contracts, and that failure to accede to this Code before the required date in
the access contract may result in that contract lapsing. Therefore, we
encourage applicants to take steps to ensure that they become a party to the
Emergency Access Code within the relevant timeframe by liaising with
Network Rail.

**Station and depot access – parallel applications**

3.17 When seeking access to the network, train operators will need to ensure that
they are developing parallel applications in respect of the access they may
require to stations and light maintenance depots. These railway facilities are
also covered by the regulatory regime established by the Act, and station and
depot access contracts also need to be approved or directed by ORR. We will
therefore generally expect to receive applications for station and light
maintenance depot access at the same time as or shortly after the new track
access rights are sought. Applicants seeking guidance on station or depot

\textsuperscript{45} Via the ORR website (www.rail-reg.gov.uk); telephone 020 7282 2000; or write to: Office
of Rail Regulation, One Kemble Street, London, WC2B 4AN
access are advised to look at our website or contact ORR’s Stations and Depots team\textsuperscript{46}.

\textit{Informal discussions}

3.18 As mentioned in paragraph 1.4, we encourage and welcome informal approaches from train operators and others contemplating seeking a track access contract or an amendment to an existing access agreement. However, we recommend any party to first discuss and agree its access rights with Network Rail, as facility owner. We invite operators to contact ORR to discuss their requirements at an early stage, preferably prior to their making a formal submission. This will provide an opportunity to detail our requirements for considering an application, identify any regulatory issues likely to arise and discuss the likely timescale for reaching our decision.

3.19 We are happy to provide guidance to prospective users and facility owners in relation to the criteria and procedures that will apply to applications. Whilst we should never become drawn into the negotiating process itself, we encourage approaches for clarification on policy and process, and will give guidance wherever appropriate. It should be noted that where negotiations relate to the level of infrastructure charges, these are only permitted if carried out under our supervision\textsuperscript{47}. We are concerned that if parties are uncertain or encounter disagreements over regulatory issues (e.g. over permissible departures from model clauses in particular cases, or alternative dispute resolution arrangements) they should contact ORR rather than proceed under what may be misapprehensions. In giving guidance, we will not, of course, fetter our discretion for when we consider the application. However, guidance at an early stage could be valuable and save the parties time and expense.

\textbf{The form and content of applications}

\textit{The application forms}

3.20 In order to consider and consult on applications in a timely and efficient manner, we have developed application forms setting out the standard form

\begin{footnotesize}
\begin{enumerate}
\item Information on station and depot access, plus contact details for ORR’s Stations and Depots team, is available at \url{http://www.rail-reg.gov.uk/server/show/nav.223} (Stations) and \url{http://www.rail-reg.gov.uk/server/show/nav.235} (Depots).
\item See regulation 28(3), Railways Infrastructure (Access and Management) Regulations 2005.
\end{enumerate}
\end{footnotesize}
and content of the material we will need to receive in each case. Copies of these forms can be accessed electronically via the ORR website.\textsuperscript{48}

3.21 The forms have been designed to be largely self-explanatory, particularly when read with this criteria document. The forms cross-reference to individual paragraphs of this document. The information required on the forms relates to the specific areas of regulatory concern discussed in this document. Applicants should note the following general points.

(a) All four forms require the applicant(s) to provide an appropriate summary of the proposed contract. We consider this summary to be an important component of any application we receive, both for our own scrutiny of the proposed contract, and to facilitate the process of wider consultation. The summary should cover all material parts of the proposed contract, not just those parts which the parties consider the most important, or to which they wish to draw particular attention (to avoid repetition applicants are advised to read through all the questions posed on the form and cross-reference, as necessary, between their answers to these questions and the summary).

(b) Although, under section 18(5) of the Act, it is for the facility owner to submit an agreed contract for approval, the forms for applications made under sections 18 and 22 of the Act both seek a statement of confirmation that both parties are prepared to enter into the contract or supplemental agreement in the terms submitted. Hence, the forms are designed for both parties to sign. Save in quite exceptional circumstances, we will be very unsympathetic in cases where parties, having given such a confirmation, continue to negotiate the contract further or where one party tries to persuade ORR to require modifications under section 18(7) which are inconsistent with the confirmation. In such cases, we may decide to suspend our consideration of the application or to reject it on the grounds that the confirmation has been wrongly given and the parties are not agreed on the terms of their proposed contract.\textsuperscript{49} We would be prepared to

\textsuperscript{48} At \url{http://www.rail-reg.gov.uk/server/show/nav.202}

\textsuperscript{49} This position is in contrast to cases under sections 17 and 22A where an applicant may need to proceed under one of those sections because negotiations with the facility owner appear to be unpromising and it must ensure it does not run out of time to invoke appropriate regulatory protection.
accept a form signed by one of the parties accompanied by a letter from the other that tracks the wording of the declaration at the end of the form specifically covering the requisite confirmation.

(c) We will wish to be able readily to identify any bespoke departures from the model track access contract, to assist with swift processing of the application. Applicants might find this easiest to achieve by supplying a mark-up of the contract from the model contract template. In addition, wherever provisions would incorporate new processes (e.g. self-modification provisions enabling the parties to agree subsequent modifications to the contract) we will wish to see a flow chart illustrating the process to ensure that it is robust, internally consistent (with no steps missing), and leaves no loose ends.

3.22 Where applicants are unclear about any question posed on the forms, or on any aspect of the application process, they are advised to contact ORR.

Confidentiality, consultation and ORR’s public register

3.23 We are required under section 72 of the Act to maintain a public register50. Section 72 sets out the provisions to be entered in the register, which include the provisions of every licence and licence exemption, every direction to enter into an access contract, every access agreement and every amendment of an access agreement. Under section 72(3), we are required to have regard to the need for excluding from the register, so far as that is practicable, any matter which relates to the affairs of an individual or body of persons, where publication of that matter would or might, in its opinion, seriously and prejudicially affect the interests of that individual or body of persons.

3.24 Beyond the public register, we believe it important that our consideration of applications for access rights should be as open, transparent and well-informed a process as possible. We wish to consult widely and ensure that the substance and basis of regulatory decisions is clear and well understood throughout the industry. However, in the case of a section 22 application by a franchised operator, where changes are proposed to an access agreement that are of a financial (and therefore confidential) nature only, for example changes to Appendix 1 of Schedule 8, we have established a practice of only

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50 A list of the documents on the public register is available online at http://www.rail-reg.gov.uk/server/show/nav.274.
consulting the relevant franchising authority. Our consultation process is described in paragraphs 3.32-3.33 below.

3.25 In considering whether to exclude material from wider circulation, we expect to have regard to the criteria under section 71(2) of the Act, which also apply to exclusions from the public register (i.e. whether publication of information relating to the affairs of an individual or body of persons would or might seriously and prejudicially affect the interests of that individual or body of persons). It is therefore important that applicants provide relevant reasons to support any request for excluding confidential material.

3.26 Once an access agreement has been entered into, the parties will be invited again to identify which if any parts of the agreement they consider that we should withhold from the copy to be entered into the public register. We will not withhold material that we have already published, e.g. charges (which were published as a result of an access charges review of the charges in Schedule 7). Subject to being satisfied with the justification provided, in appropriate cases we will be prepared to withhold certain material derived from our published information, such as the actual performance points, payment rates and monitoring point weightings that appear in Appendix 1 of Schedule 8.

3.27 Applicants under sections 17 or 22A of the Act should note that under the process established by Schedule 4 to the Act, we are obliged to send a copy of the application in full to the facility owner. We are also obliged to consult any “interested person” on the application and invite written representations from them.  

Electronic copies

3.28 Applications, including proposed access contracts and supporting documentation, should be made to us in electronic form as well as hard copy. This will enable consultation to be undertaken via e-mail and the ORR website, and will help our internal processing of applications. Many organisations have developed their own IT templates for documents, with

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51 The Act defines “interested person” as any person whose consent is required by the facility owner, as a result of an obligation or duty owed by the facility owner which arose after the coming into force of section 17 of the Act, before the facility owner may enter into the required access contract (Schedule 4, paragraph 1).
macros and other auto-formatting that generate paragraph and page numbers, cross-references etc. Experience has shown that this can result in problems when sharing documents across systems (e.g. paragraph numbers disappear, and cross-references are lost), and it can make subsequent amendment of proposed contracts difficult (a particular issue where we are determining the form and content of an access contract under a section 17 application).

3.29 We therefore wish to receive proposed contracts in electronic form in plain format, i.e. excluding any macros or other auto-formatting. Paragraph numbering should follow the convention in the published model passenger track access contract (see paragraph 6.20), and should be typed in, not self-generated. We strongly recommend applicants to begin from and continue with the model passenger track access contract, that may be obtained from the ORR website.

Complete submissions

3.30 In order to facilitate the timely and efficient processing of applications it is important for applications to be complete. In addition to ensuring that applications include all relevant supporting documentation, applicants should note the following.

(a) For agreed submissions under sections 18 and 22, we expect to consider complete contracts. The application forms require a statement from the parties confirming their willingness to enter into the proposed contract as submitted. This is because experience has shown that consideration and consultation based on incomplete contracts is inefficient, given the risk of the parties agreeing material changes at a later stage.

(b) For submissions under sections 17 and 22A, the proposed contract sought by the applicant must form part of the application and must be complete at the time of submission. This is a requirement of paragraph 2(1) of Schedule 4 to the Act.

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False information

3.31 Section 146 of the Act provides that any person, in giving any information or making any application under the Act, who makes any statement which he knows to be false in a material particular, or recklessly makes any statement which is false in a material particular, is guilty of an offence. If false or misleading information has been given and ORR’s decision would otherwise have been different, ORR’s directions or approval may be void as obtained on the faith of a fraud. That would mean that the access contract or amendment would itself be void.

Consultation and hearings

3.32 In order to ensure that we are giving due regard to our statutory duties, we will generally expect to consult certain bodies before reaching our decisions. These would normally include the DfT, Transport Scotland where an agreement affects Scotland, the National Assembly for Wales for agreements affecting Wales, and, for matters relating to London, the Mayor of London and TfL. Schedule 4 to the Act also requires ORR to seek representations from a defined category of “interested persons” for applications made under sections 17 and 22A. We are also concerned to ensure that the views of other potentially affected parties are sought and taken into account. This is important in ensuring that we have as complete a picture as possible of the implications of a proposed contract throughout its duration, including the implications for the plans of other operators to introduce new or varied services. Therefore, depending on where the services in a proposed contract would run and the nature of those services, we will routinely expect to consult other operators and Passenger Focus. We will also consult any relevant Passenger Transport Executive (PTE), and any other body with a direct role in funding or specifying services, such as a local authority.

3.33 The specific arrangements for consultation which we expect to follow are set out in the detailed description of the approval processes below. In all cases, we will be concerned to ensure consultees have adequate time in which to consider and make representations on an application. We will wish to provide information that is as full and clear as possible as the basis for consultation, including a note of the key regulatory issues on which we are seeking

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53 See paragraph 3.27.
consultees' views. For agreed applications under sections 18 and 22, we expect Network Rail to have discussed the implications of proposed contracts with other relevant operators before submission to ORR, so as to flush out and address those operators’ concern at an early stage. The time taken by Network Rail to complete its consultation process is in addition to our timescales for considering applications, as set out in paragraph 3.39 below.

3.34 We have established a practice of holding hearings wherever we consider it to be necessary or desirable to ensure that the issues of regulatory concern in an application are probed and tested. This is in addition to specific meetings which we may offer, or require one or both parties to attend, to discuss specific aspects of an application. A hearing allows key issues to be aired with several parties at once in open forum, and allows ORR and others with an interest in an application to raise supplementary issues of concern and clarification as the hearing progresses. For example, an application may raise new issues that are of wide interest for other members of the railway industry; some aspects of a proposed contract could impact greatly on several other operators’ current rights or plans. A hearing can be a useful and efficient opportunity to test the issues raised in written representations, and to test the recommendation that ORR staff might be minded to make, before final decisions are taken.

3.35 Where we decide to hold a hearing, we will invite all parties we consider to be likely to be directly and materially affected by or to have a substantial interest in the application. We will generally expect to put questions to the person seeking access rights, Network Rail and the DfT. We may also invite others to present their concerns, and may also allow cross-questioning (through the chair). We will not expect those present to repeat material that has already been supplied in written representations, but may invite examples.

3.36 We will usually give attendees advanced notice of the agenda of issues we expect to follow and its timing (for significant new contracts, a hearing may run for more than one day, and it may be appropriate to hold separate hearings to consider separate issues). It will always be open to those attending to arrange to be represented or assisted by legal advisers. A transcript will be taken of the hearing and copies made available. Attendees who have spoken are given the opportunity to propose corrections to their own words, using Hansard Rules before the hearing transcript is published on the ORR website (with any necessary confidentiality exclusions). For matters
that we consider should be confidential, in accordance with section 72 of the Act, we may arrange for a hearing to be closed, in whole or part, and attended only by the relevant parties. We will not expect to accept further material or representations after the hearing has concluded, other than in response to any further questions we may pose, or as we may have requested or permitted before or during the hearing.

**Timescales**

3.37 Although the Act does not prescribe any timescales for the submission of contracts to ORR for directions or approval, beyond those for consultation in relation to applications under sections 17 and 22A, there are two key factors that applicants should consider:

(a) we will need sufficient time to come to a properly informed decision on each application; and

(b) at what point the operator will need rights to be approved in order for bids to be submitted into the compilation of the Working Timetable.

These factors are discussed further below.

3.38 The time we will require to consider an application will depend on the extent of its impact on the network, its complexity and the extent to which it departs from ORR’s published model contract. Even a supplemental concerning relatively few services submitted under section 22 can raise significant issues where, for example, network capacity is constrained. We are also concerned to allow adequate time for consultation with statutory consultees and those potentially affected by each application.

3.39 Allowing time for consultation and our full consideration, we would expect to take:

(a) *18 weeks* to reach and publish our conclusions on an application for a new or significantly amended agreement; and

(b) *12 weeks* for a simpler application with little potential impact on the rest of the network.
3.40 For applications under sections 17 and 22A, we are required by the Access and Management Regulations\(^5\) to make our decision within two months of receipt of the final piece of relevant information, which will usually be from the end of the consultation period or the end of the hearing, unless we identify a need for further representations.

3.41 We recognise that we will on occasion receive applications of a straightforward nature that will not require the same degree of regulatory scrutiny. In line with our aim to consider applications in a timely and proportionate manner, we would aim to reach our decision on such applications within a shorter timescale. This approach will be developed further as part of our wider review of our criteria and procedures (see paragraph 1.2 above).

3.42 When considering the timing for making an application to ORR, operators should be aware that there are significant lead times in the compilation of the Working Timetable. Operators can bid into the timetable for services for which they do not already hold access rights. However, in accordance with provisions in the Network Code (Condition D3.2.3), where there are competing bids for access:

(a) top priority is afforded to bids made by the Priority Date (stipulated in the applicable timetable period schedule), and which relate to firm rights held in an access agreement that cover the period of intended operation;

(b) second priority attaches to bids made where the operator holds firm rights for the services in question at the point of making the bid, but does not yet have approved rights for those services for the period for which the timetable is being developed; and

(c) third priority attaches to bids made which relate to contingent rights, bids for entirely new services for which rights have still to be approved, or bids for firm rights which were not made by the Priority Date.

3.43 So, for example, if it is important for an operator to have first priority bidding rights in respect of new services it wishes to operate in the December 2007

\(^5\) The Railways Infrastructure (Access and Management) Regulations 2005, regulation 29(7)
timetable, it will need to be in a position to bid for the necessary train slots by the Priority Date, which would be in February 2007. This means it will need to have had the corresponding rights approved by ORR by then. Working back, that suggests making an application to ORR by August 2006, where the new rights (or terms attaching) are likely to raise issues of regulatory significance or complexity, and by October 2006 at the latest for a less significant application.

3.44 However, it should be stressed that it is not always the case that operators will judge it necessary to have particular priority in the timetable compilation bidding process, e.g. where seeking a change to its service pattern on a part of the network where capacity constraints are not an issue. The ultimate constraint is then that the operator should have the new rights approved by ORR and in place such that the services to which they apply can be reflected in the revised timetable, which should in turn be finalised 12 weeks before the timetable change date, to comply with the T-12 licence condition.\(^\text{55}\) This suggests submission of an application no later than 24 weeks in advance of the timetable change date for minor variations and 30 weeks for more significant or complex changes.

3.45 The processes and timescales for compilation of the timetable established under Part D of the Network Code may be changed over time, through the Network Code’s own change procedures in Part C. Applicants are strongly advised to check at an early stage that they are working to the latest processes and timescales. These timescales apply where an operator is seeking a new contract on expiry of an existing agreement.

3.46 Although we will make every effort to deal with applications in a timely manner, we can give no guarantee that applications allowing less time for our consideration will be processed by the date sought (nor, indeed, that the rights sought and/or commercial terms attaching will necessarily be approved). We therefore strongly encourage all applicants to plan ahead and make applications in good time. If we consider that we have insufficient time to consider the proposed new contract thoroughly, we may invite the parties to submit a parallel application for a short extension of any existing agreement.

\(^{55}\) Condition 9 of Network Rail’s Network Licence requires procedures to revise the national timetable to be completed not less than twelve weeks prior to the date of change. Passenger train operator licences require operators to co-operate with Network Rail to achieve this timescale.
to ensure there is no gap in the provision of services and provide for the proper degree of regulatory scrutiny (including a reasonable period for consultation with other parties).

**Agreed applications – sections 18 and 22**

3.47 Sections 18 and 22 of the Act cover applications agreed between the train operator and the facility owner for new contracts (section 18) and supplemental agreements amending existing approved agreements (section 22).

3.48 The section 18 approval process comprises the four key steps described below (and illustrated in the flow chart in Annex B):

**Step 1 - Development**

3.49 In developing a new contract, we will expect the parties to have had some discussion with other potentially affected persons, including other passenger and freight train operators. We will also expect franchised passenger operators to have discussed with the DfT/Transport Scotland (and/or, where appropriate, other relevant funders) any issues relevant to the exercise of their functions. Where capacity is constrained, we will expect Network Rail to have undertaken the appropriate modelling or other analysis necessary to ensure that the rights being sought are capable of being accommodated and any additional risks arising from the rights being sought, including the wider performance implications, have been fully assessed and appropriate control measures developed.

3.50 We very much encourage applicants to contact us to discuss their intentions at an early stage and clarify the likely timing for submission and processing of the application.

**Step 2 - Submission of application**

3.51 The Act requires the facility owner to submit the proposed contract for our approval. The section 18 application form reflects the fact that the application is made on behalf of both parties, and seeks confirmation from both that they would be content to enter into the contract as submitted. The application form seeks the information we require for our own consideration of an application and to facilitate the process of consulting other bodies, including the dates by which the parties are hoping to secure our approval and later to exercise the
rights being sought. The form also seeks information on the extent to which the rights sought differ from those already held in an existing agreement. This information is helpful in assisting ORR (and consultees) to gain a swift understanding of the practical implications of the rights sought in comparison to the current position.

3.52 We will confirm receipt of the application, provide the name of the ORR case officer assigned to deal with it, and will check the form, the proposed contract and any associated documents for obvious errors, omissions, or matters requiring clarification with the parties. However, it is the responsibility of the applicants to submit a competent application.

3.53 Where a section 18 application is for renewal or replacement of rights held under an existing agreement, it is extremely helpful for ORR to be able to see clearly the changes being sought, so that we can quickly establish any new issues that might give rise to regulatory concern. Where the new contract reflects the re-mapping of franchises, we would still need to see the changes being sought over the relevant existing rights. For the commercial terms in the contract (the access rights as approved), this can be achieved by supplying a mark-up of the existing contract (other than where the changes reflect the adoption of ORR’s model access contract, in which case our concern will be to identify all departures from or additions to the model). For the access rights themselves, a separate schedule or mark-up might be appropriate, depending on the scale of changes being sought.

Step 3 - Consideration and consultation

3.54 Subject to any points of clarification, etc., we will then publish the application on the ORR website, including the proposed contract and the completed application form (subject to any section 71(2) confidentiality exclusions), and invite representations from statutory and other consultees. The length of the consultation period will depend on the nature of the application in question. For example, for more complex applications we may allow six weeks for consultees to submit their responses, whereas for more straightforward applications, we would generally expect to allow four weeks, and for the simplest applications, possibly less than this.

3.55 If, after an initial review of the proposed contract, we identify any key issues on which we would appreciate consultees’ specific comments, or which we
wish to draw to consultees’ attention, we will send a letter detailing those issues. We would expect to send such a letter within two to three weeks of the start of the consultation depending on the length of the consultation period.

3.56 In the meantime, we will discuss the proposed contract with the parties, and may write seeking formal responses on matters of significance.

3.57 For proposed agreements raising significant issues, we may decide to hold a hearing (see paragraphs 3.34-3.36 above). The hearing will generally be held shortly after the close of consultation, once we have been able to review consultees’ written representations and be confident that we have clarified all the issues warranting consideration in such a forum.

Step 4 - Conclusions and directions

3.58 Once we have reached our conclusions on a proposed contract we may:

(a) issue directions to Network Rail to enter into it within a specified period;

(b) issue directions to Network Rail to enter into it, within a specified period, subject to specified modifications (under section 18(7) of the Act); or

(c) reject the application.

3.59 Where we are minded to require modifications, we will first consult the parties. When directing that the contract be entered into subject to modification, ORR must allow Network Rail 14 days to give notice of any objections. If Network Rail gives a notice of objection during that 14 day period and does not sign the contract, it would be open to the operator to make an application under section 17 for directions, which would be binding. In such circumstances, we would need to adhere to the process set out in Schedule 4 to the Act, but would still expect to be able to complete the process more quickly because the proposed agreement would be similar to, or the same as, the one which we had just approved under section 18.

3.60 If Network Rail does not give a notice of objection during that 14 day period, ORR’s directions are binding and are enforceable by civil proceedings by ORR and by any other person with a sufficient interest, such as the applicant.
The directions are not binding on the operator who may decide not to sign the directed contract.

3.61 We will always give the parties a full written statement of the reasons for our decision. Subject to section 71(2) confidentiality exclusions, we will promptly publish our decision and statement on the ORR website.

3.62 New contracts may only be entered into by the parties once ORR has issued directions. Should the operator fail to enter into the contract within the specified period, the directions lapse. However, it is open to the parties to ask ORR to vary the directions\(^{56}\) to extend the date for compliance.

3.63 Within 14 days of the parties signing the contract, Network Rail must send a copy to ORR. Failure to do so is an offence.\(^ {57}\)

**Applications under section 22**

3.64 The process to which we intend to adhere for applications under section 22 is illustrated in Annex C. It generally follows the process for section 18, but there are two key differences.

3.65 First, under section 18 ORR has the ability to approve a proposed contract, reject it, or approve it subject to specified modifications being made, whereas under section 22 we may only approve or reject an application. This means that an informal application under section 22 should normally be made for our *provisional* approval. Only after the process of consultation and consideration will we be able to indicate to the parties whether we will require the proposed supplemental agreement to be amended before we would be willing to approve it, and to say what those amendments are. For this reason, a subsequent formal application under section 22 will also be required for approval.

3.66 Second, under section 22 ORR does not issue directions to Network Rail to enter into the approved supplemental agreement; it may only approve or reject it. Hence, Network Rail formally submits the *signed* supplemental agreement for ORR’s approval.

\(^{56}\) Section 144(3) of the Railways Act 1993.

\(^{57}\) Sections 72(5) and (6) of the Railways Act 1993.
3.67 Subject to these points, the steps in the section 18 process apply, including the publication of our reasons for approving or rejecting the supplemental agreement.

3.68 Copies of the ORR’s approval notice and of the supplemental agreement will be placed on the public register and published on the ORR website (subject to any section 71(2) confidentiality exclusions), and Network Rail is required to provide a consolidated version of the full agreement as amended within 28 days of the amendment being made (see paragraph 6.8 below for further guidance on the provision of consolidated versions of access agreements).

Other applications – sections 17 and 22A

3.69 Sections 17 and 22A of the Act provide for operators to apply directly to ORR for access to the rail network where they have been unable, for whatever reason, to reach agreement with Network Rail. Section 17 provides for a train operator to make an application to ORR for it to direct Network Rail to enter into a new contract. Section 22A applies where a train operator with an existing agreement is seeking amendments to that agreement to permit more extensive use of the network.

3.70 Schedule 4 to the Act establishes certain mandatory elements of the processes for applications under sections 17 and 22A, including some minimum fixed timescales. The overall processes we expect to follow are, nevertheless, the same in most respects to those for applications under sections 18 and 22, comprising the four key steps described below (and illustrated in Annexes A and D).

Step 1 - Development

3.71 We recognise that the extent of development work to address any issues arising out of the operation of services may be limited where an operator has not reached agreement with Network Rail. On the other hand, the operator’s recourse to section 17 or 22A may reflect disagreement only on a few specific aspects of a proposed contract. In order to process an application swiftly, we will therefore wish to see the product of such development work as has been possible, including capacity modelling and timetabling and consultation with other parties.
3.72 We wish to encourage operators to negotiate and agree terms with Network Rail wherever possible, in order to promote the most effective working relationship in the delivery of services. Where an operator considers it likely that agreement will not be reached, we strongly encourage early consideration being given to submitting a section 17 or 22A application, rather than regarding such an application as a last resort, given the timing considerations that apply to any application. The submission of a section 17 or 22A application need not mark the end of negotiations; it remains possible for the application to be withdrawn and an agreed application under section 18 or 22 submitted. Also, where, through further negotiation, an operator reaches agreement with Network Rail on certain aspects of a proposed contract, we will take into account any joint representation they make alongside such other representations as we might receive through our wider consultation. We strongly encourage operators to discuss their requirements with ORR at an early stage.

Step 2 - Submission of application

3.73 Schedule 4 to the Act (for section 17 applications) and section 22B of the Act (for section 22A applications) require that any application for directions under section 17 or section 22A (as appropriate), must be made in writing to ORR and must:

(a) contain particulars of the required rights;

(b) specify the terms which the applicant proposes should be contained in the required access contract or proposed amendment; and

(c) include any representations that the applicant wishes to make with regard to the required rights or the terms to be contained in the required access contract or proposed amendment.

3.74 As for applications under sections 18 and 22, we have developed application forms to be completed by the applicant covering the standard information we will require. The application forms seek the information we require to consider an application and to facilitate the process of consulting other bodies, including the dates by which the applicant wishes to secure our approval and to exercise the rights being sought. The forms also seek information on the extent to which the rights sought differ from those already held in any existing agreement. This information is helpful in assisting us (and consultees) to gain
a swift understanding of the practical implications of the rights sought in comparison to the current position. In particular, we will wish to understand exactly what is in dispute between the applicant and Network Rail, and what, if anything, has been agreed. As explained in paragraphs 2.30-2.37 above, applicants should note that our scrutiny of a proposed application will not be limited to areas of disagreement.

3.75 ORR must not give directions under section 17 or 22A where:

(a) the railway facility in question has been exempted from the provisions of section 17 of the Act;\(^{58}\)

(b) performance of an access agreement as contemplated by the proposed directions would necessarily involve the facility owner in being in breach of an access agreement; or

(c) as a result of an obligation or duty owed by the facility owner which arose before 2 April 1994, the consent of some other person is required by the facility owner before the facility owner can enter into the proposed contract.

3.76 ORR is also unable to issue directions under section 17 in relation to access to the network where that access is for the provision of network services (such as maintenance work) to that network.

3.77 Applicants under section 22A should note that this provision is limited to more extensive use of the network within the lifespan of the existing agreement to which the application applies\(^{59}\). ORR does not have the power under section 22A to extend the duration of an existing approved agreement. Such an application should therefore be for a new contract under section 17.

**Step 3 - Consideration and consultation**

3.78 On receipt of an application under section 17 or 22A, ORR must:

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\(^{58}\) By virtue of section 20 of the Railways Act 1993, including by virtue of the CMEO.

\(^{59}\) “Extensive use” is defined in Section 22A, sub-section 2 of the Railways Act 1993, and may include changes to an agreement, for example, such as new routes or extensions to existing routes.
(a) send a copy of the application to the facility owner and invite the facility owner to make written representations to ORR, allowing not less than 21 days for the facility owner to respond;

(b) send to the applicant a copy of the facility owner’s representations, allowing the applicant not less than ten days to submit further written representations in response;

(c) direct the facility owner to furnish a list of “interested persons” allowing not less than 14 days for the facility owner to respond;

(d) on receipt of the list, invite the “interested persons” to make written representations on the application to ORR, allowing them, in turn, not less than 14 days to respond; and

(e) copy any representations received from “interested persons” to the applicant and the facility owner seeking any representations they wish to make, allowing not less than ten days for the applicant and the facility owner to respond.

3.79 We will adopt the same approach to the section 17 or 22A application as we would for other applications, consulting widely so as to ensure that we have a well-informed basis for coming to our conclusions. We will expect to commence our wider statutory and non-statutory consultation at the same point as we invite representations from “interested persons”, generally expecting to allow four to six weeks for submission of written representations depending on the nature of the application. If, after an initial review of the proposed contract, we identify any key issues on which we would appreciate consultees’ specific comments, or which we wish to draw to consultees’ attention, we will send a letter detailing those issues. We would expect to send such a letter no later than three weeks before the close of the consultation period.

3.80 Given the contested nature of applications under sections 17 and 22A, it is likely that our consideration will include a hearing. Hearings are discussed in more detail in paragraphs 3.36-3.38 above.

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60 The Act defines an interested person as any person whose consent is required by the facility owner, as a result of an obligation or duty owed by the facility owner which arose after the coming into force of section 17 of the Act, before the facility owner may enter into the required access contract (Schedule 4, paragraph 1 of the Act).
Step 4 - Conclusions and directions

3.81 In accordance with the provisions of Schedule 4 to the Act, ORR must inform the applicant, the facility owner and any interested persons of its decision. If ORR decides to give directions under section 17 to the facility owner requiring it to enter into an access agreement or directions under section 22A for amendments to an existing agreement, the directions must specify:

(a) the terms of the access agreement or the amendments to be made;
and
(b) the date by which the access agreement must be entered into or amended.

They may also specify any compensation we have decided the facility owner should pay to any interested person. Subject to section 71(2) confidentiality exclusions, ORR will publish its decision and the reasons for it.

3.82 As with a section 18 application, for directions issued under section 17 the facility owner is released from its duty to comply with the direction if the applicant fails to enter into the access agreement on the terms as directed by the date specified (it is open to ORR to vary its directions to provide more time). It is important that parties be aware that this situation does not extend to directions issued under section 22A. Any direction issued under section 22A applies to both the facility owner and the applicant (i.e. both parties are required to enter into the agreement).

3.83 Once the agreement is entered into, the facility owner must send a copy to ORR within 14 days, after which a copy, less any section 71(2) confidentiality exclusions, will be placed on ORR's public register.

Access options

3.84 Under sections 17 and 18 of the Act ORR may direct a facility owner to enter into an access option granting access to its facility. We envisage that access options in respect of track access will be proposed where an applicant wishes

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61 However, in our experience we have found that hearings are not always helpful and in a number of past applications a hearing has not been held.

62 Section 17(6)(b) of the Railways Act 1993
to secure future access to a network. This might be for a number of reasons, typically, where investment is proposed by the beneficiary who wishes to secure future access against that investment. Where a party intends to make an application to ORR for an access option, we would recommend it contacts ORR at an early stage to discuss its plans and aspirations, and the likely timing of the application. We have found pre-application meetings a useful means of identifying issues that can be addressed prior to the formal application being made. They also help to ensure that the party's approach is consistent with our criteria and procedures.

3.85 In applying for an access option, we would expect applicants to use, as far as is possible, our model passenger track access contract and application forms as the basis for their application. We recognise that certain provisions in the model contract and sections of the application forms will not be appropriate to access options and will consider bespoke arrangements on their merits where the parties feel they are more appropriate to their commercial requirements. However, we believe that use of the model contract and application form will provide clarity and will also help to facilitate our scrutiny of the proposed contract and the process of wider consultation.

3.86 Our consideration of any application for an access option will be consistent with our policy on long-term access contracts\(^\text{63}\). Applicants should therefore have regard to this policy when making their application.

3.87 We expect to develop further our policy and procedures in relation to our consideration of access options, consulting the industry as appropriate.

4. The expression of access rights and the consumption of capacity

Introduction

4.1 In deciding whether to direct or approve new or amended access rights, a major part of our role is to ensure the fair and efficient allocation of network capacity. That entails making judgements about:

(a) the realistic extent of spare capacity and the allocation of limited capacity between different requirements;

(b) the operational integrity of the services in a proposed contract and their wider implications for network performance; and

(c) the appropriate balance between certainty (for a train operator) and flexibility (for Network Rail to accommodate the needs of all other passenger and freight train operators).

4.2 This chapter discusses the issues we expect to address in making these judgements, and the criteria we expect to apply. It addresses in turn:

(a) capacity allocation and capacity utilisation;

(b) safety;

(c) the expression of rights and operational integrity;

(d) capacity choices and criteria;

(e) certainty and flexibility in the expression of rights;

(f) protected rights;

(g) moderation of competition;

(h) duration of contracts, and provisions for adjustment and surrender of rights; and

(i) enhancement.
Capacity allocation and utilisation: our role

4.3 Our role is discussed in Chapter 2. Specifically, on the issue of capacity, our role is to oversee the fair and efficient allocation of network capacity by the infrastructure provider, and determine that allocation ourselves in certain circumstances (e.g. where an operator has been unable to reach agreement with the infrastructure provider).

4.4 In making our decisions, we are under statutory duties to have regard to the funds available to the Secretary of State for the purposes of his functions relating to railways and railway services, and any general guidance from the Secretary of State or Scottish Ministers (under section 4 of the Act). In addition, the DfT and Transport Scotland will be concerned at any implications an application might have for their ability to secure value for money through franchising within their respective budgets. Therefore, we will consult the DfT or, where applicable, Transport Scotland or other franchising authorities, on individual applications for track access contracts. The DfT’s and Transport Scotland’s view of network capacity should be informed by the work that Network Rail is undertaking on RUSs. RUSs will also help to inform our decisions on the allocation of capacity for specific applications, particularly when we are considering likely changes to the pattern of services over time.

Route utilisation strategies

4.5 A RUS is a strategy that, for a particular part or the whole of the network, will promote the effective and efficient use of the capacity available, which is also consistent with the funding that is or is likely to be available during a particular timeframe. RUSs are based on information from industry stakeholders (including Network Rail, the DfT and Transport Scotland), and derived from regional planning assessments where available/applicable. They may cover a period of up to ten years. We have published guidelines on RUSs which are available on our website.

4.6 As stated in Chapter 2, the responsibility for producing RUSs transferred from the SRA to Network Rail following publication of The Future of Rail White Paper. Condition 7 of Network Rail’s Network Licence provides for it to establish and maintain RUSs, and sets out the process that Network Rail

must follow in establishing or amending a RUS\textsuperscript{65}. ORR oversees this process. Network Rail undertakes extensive industry consultation (including with funders and providers of railway services, the Secretary of State and the Scottish Ministers, the PTEs and Passenger Focus). Once the consultation process is complete, Network Rail publishes the proposed RUS, following which ORR has 60 days in which to assess the RUS and decide whether to issue a notice of objection. In the absence of such a notice, the RUS becomes established. Our involvement in the RUS development process ensures that our consideration of track access applications relating to a part of the network where a RUS is established is based upon an informed view of the likely capacity implications of the rights proposed. Network Rail has established a timetable for creating RUSs for various regions of the country, as well as a freight RUS and a national RUS. It expects to complete all planned RUSs by 2009.

4.7 Where a track access application relates to services in an area with an established RUS, we will expect to take into account the strategies described within that RUS when making our decision, and whether proposed new rights are consistent with the RUS. We do not however consider that a RUS can assume that existing contractual rights will necessarily be overridden: indeed, it should reflect existing rights, including the exercise of any variation mechanisms within contracts. We also would not expect to reject an application for proposed additional rights solely on the basis that those rights are not explicitly mentioned in relevant RUSs.

4.8 In their application forms, applicants should state how the proposed access rights relate to relevant RUSs. If proposed access rights are not consistent with a RUS, the application form should explain the reasons for this, in particular describing any benefits that this divergence might have, as we would need to understand and agree the public interest reason for this.

Safety

4.9 When considering track access applications made under sections 17-22A of the Act, our prime intention is to ensure that, where proposals for, or modifications to, track access contracts could materially affect safety, all such

matters (including amendments to Safety Certificates or Railway Safety Cases) are dealt with before we approve the track access contract, or amendment.

4.10 Our approval of, or direction, in respect of new or amended track access rights does not in any way affect the responsibilities of facility owners and train operators to ensure that the risks arising from their activities remain as low as is reasonably practicable, that, where necessary, appropriate risk control or mitigation measures have been taken and that they comply with relevant statutory regulations.

4.11 In general terms, we expect that the signalling system and operational rules for the network are designed so as to ensure that the timetable (which gives effect to operators’ access rights) can be operated safely and that changes to access agreements in respect of the pattern and quantum of services can be accommodated safely. However, we also recognise that changes to pattern and quantum may have wider effects, for example on Network Rail’s ability to obtain access to the network for inspection and maintenance activity. In addition, changes to the types of rolling stock which operators are permitted by their contracts to use on the network may affect the risks arising from the operation of trains. Where changes to an access agreement may generate such material changes to risk, we expect that the parties to the contract will have assessed these risks, identified adequate control or mitigation measures and progressed any necessary actions.

The expression of access rights

4.12 The access rights set out in Schedule 5 of passenger track access contracts are the key description of what the train operator is buying from Network Rail. They are therefore a vital part of each contract. Access rights are given effect in the timetable through the timetabling process set out in Part D of the Network Code.

4.13 It is important that the expression of access rights is clear and accurate. ORR, the facility owner, other operators and consultees must be able to ‘map’ the access rights being sought onto the existing pattern of rights held in existing approved agreements, and against other operators’ aspirations for changes and/or additions to the services that run. Before the introduction of the model contract there was great variation in the expression of access rights in
Schedule 5 of passenger track access agreements. We recognised the importance of train operators being able to negotiate rights which met the needs of their businesses and their funders, but concluded that it was possible to standardise the expression of the key elements of the rights, and that this would have significant benefits in:

(a) making the process of negotiation easier, because it would focus on the customisation of the rights to meet specific needs;

(b) reducing the potential for lack of clarity and disputes about the rights; and

(c) enabling other train operators and the facility owner to have a better understanding of the capacity that has been sold.

4.14 Whilst the model contract, and Schedule 5 in particular, is designed to minimise the risk that Network Rail will oversell track capacity, it should be noted that the legal consequences of overselling capacity differ depending on whether the contract has been obtained on an agreed basis (sections 18 and 22) or a compulsory one (sections 17 and 22A). If capacity has been oversold in an agreed contract, the facility owner faces liability for breach of contract if it fails to deliver the access it has contracted to provide. However, because of the statutory prohibition in sections 17(1)(b) and 22A(4)(b) of the Act, any directions given by ORR which would necessarily involve the facility owner breaking a pre-existing access agreement will be void. To avoid that happening, we developed model clauses concerning the defeasance of the contract only to the extent necessary to avoid such a clash. This is explained further in paragraphs 4.19-4.20 below.

4.15 ORR’s model passenger track access contract therefore contains a template Schedule 5 which was developed following consultation and discussion with the railway industry. It covers the number of train slots which the operator has a right to secure in the compilation of the timetable, and in respect of those slots (as appropriate for the services the operator intends to run):

(a) service intervals and clockface departures;

(b) timing of first and last trains;

(c) calling patterns;
(d) permitted specified equipment (rolling stock);
(e) flexing allowances Network Rail may apply in compiling the timetable;
(f) journey time protection; and
(g) any special rights.

4.16 We generally require the adoption of the expression of rights as in the model Schedule 5 because of the benefits that flow from a standardised expression of rights in terms of clarity for the operator, and Network Rail’s future ability to model illustrative timetables and establish the extent of available capacity. It will also help in ensuring the asset register required by Condition 24 of Network Rail’s Network Licence is sound in this respect. Applicants are strongly encouraged to check that the completed Schedule to be submitted is both comprehensive and accurate.

**Operational integrity**

4.17 In considering the operational integrity of the access rights sought, we will want to be satisfied that:

(a) the rights sought are capable of being exercised in a way that means that an operator’s own services and those of any other operator using the same routes should be able to operate reliably, and that would not preclude Network Rail having adequate access to the infrastructure for efficient maintenance and renewal (i.e. that the combination of specified equipment and expression of rights will work in practice given such operating constraints as apply to the routes over which the services are to run under the Rules of the Route/Rules of the Plan);

(b) the applicant intends and will be in a position to operate the services or have the services operated on its behalf; and

(c) their operation would not necessarily conflict with the exercise of rights held under another access agreement. We will not intentionally approve contractual rights that cannot be met without Network Rail thereby failing to meet its obligations in track access agreements with other operators. Indeed, in the case of applications made under sections 17 and 22A of the Act, the Act expressly states that we may not direct the facility owner to enter into such agreements.
4.18 It is possible that in certain circumstances Network Rail will not be able to predict with certainty whether access rights being sought would necessarily conflict with rights held in other existing approved access agreements. This may be due to the flexibility built into the expression of rights, variations between agreements in the degree of flex that Network Rail may apply in compiling the timetable, or uncertainty over infrastructure capacity. We wish to see such uncertainty eliminated as far as practicable, and believe that greater clarity will be achieved through the standardised expression of rights in the template Schedule 5.

Defeasance

4.19 Under section 17(1)(b) of the Act, we are forbidden from directing new or revised access rights that, if exercised, will necessarily clash with the exercise of a right held under an existing access agreement. Where there has been a risk that there might be such a clash, as an alternative to directing a shorter contract, we have included a defeasance clause in the contract. The defeasance clause defeases (i.e. nullifies) any right in the new contract that is found to necessarily conflict with the exercise of a right held in another predating contract to the extent and for the timetable development periods necessary to avoid the conflict. A defeasance provision can also provide for appropriate compensation to be payable to the operator.

4.20 We will generally only expect to consider directing the inclusion of a defeasance provision in an access contract where it has not been possible to be certain about the adequacy of capacity. We believe Network Rail should be in a position to know what capacity exists and what it has sold and that inclusion of such a provision should be exceptional. We would not expect a defeasance provision to be included in an access contract submitted to ORR under section 18 of the Act, as Network Rail should have agreed all aspects of the proposed access contract with the train operator, including the extent of the access rights within it.

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Access right modification provisions

4.21 Access right modification provisions provide for the adjustment of access rights in one operator's contract in order to accommodate access rights that are likely to be approved in another operator's contract in the future. We are extremely reluctant to use such provisions and will only do so where we consider their use is justified, having regard to our statutory duties. Modification provisions have been included in agreements containing access rights on the West Coast Main Line.

4.22 Our stated policy on the proposed Crossrail project is that where new access contracts contain access rights which could conflict with the access rights in any future Crossrail access option, we will incorporate in such access contracts a provision requiring the adjustment of access rights in the event of any conflicting rights, with compensation where appropriate\(^\text{67}\).

Consideration of alternative access rights

4.23 In many cases, the access rights sought may still require the timing of other operators’ services to be changed, or constrain the aspirations of other operators to amend their access rights and/or seek new access rights in future. In these cases, we expect to have regard to the firmness of any other operators’ alternative plans for the capacity being sought (e.g. the extent to which they are backed up by availability of suitable rolling stock, the state of negotiations with the facility owner). In comparing alternatives to the rights sought, we will expect to consider:

(a) the relative benefits to the users of railway services of the different service patterns, including the implications for performance and reliability (see below);

(b) the extent to which the allocation of the rights would impact on funds available to the Secretary of State for the purposes of his functions in relation to railways and railway services, and the extent to which rights sought and the plans of other operators reflect a contractual commitment to the DfT, Transport Scotland or another funder (e.g. through a franchise agreement);

\(^\text{67}\) One such example is English Welsh & Scottish Railway Limited’s track access contract with Network Rail which was approved by ORR on 9 February 2006. See Schedule 14 (page 187) at [http://www.rail-reg.gov.uk/upload/pdf/s17-ews_apagre.pdf](http://www.rail-reg.gov.uk/upload/pdf/s17-ews_apagre.pdf)
(c) the balance between the benefits of innovative new services being introduced against the benefits of timetable/planning stability for existing services;

(d) the likelihood of more efficient capacity utilisation resulting (e.g. where there are proposals to run longer trains or trains with improved specified equipment); and

(e) the extent to which an increase in the capacity available might be involved, as a result of associated funding of network enhancement.

4.24 The congestion charging arrangements in the current charging structure are designed to incentivise Network Rail to identify and pursue the most appropriate solution when considering the trade-off between accommodating additional services and sustaining operational performance. Nevertheless, in approving or directing new access rights which could affect performance, we expect to have regard to:

(a) the impact on the overall resilience and integrity of the network or parts of it, particularly insofar as these may not be adequately reflected in the charging arrangements; and

(b) the impact on delivery of specific national or route performance objectives.

4.25 Similarly, in respect of encouraging the right balance between accommodating additional services and Network Rail’s requirements for network access for maintenance and renewal, the variable cost element of the access charge is designed to reflect additional maintenance and renewal costs arising from additional traffic. Furthermore, the arrangements for establishing the Rules of the Route under Part D of the Network Code should enable the facility owner to restrict access to permit efficient maintenance and renewal. All access rights, including firm rights, are subject to the Rules of the Route. Where new or amended access rights materially increase the costs of efficient maintenance and renewal, there would need to be appropriate compensation for Network Rail. (Charging is discussed further in Chapter 5).

4.26 We recognise that as more trains run on the network, there comes a point where disbenefits of extra services in terms of train performance (e.g. in terms of the ability of the network to recover from disruptive events) outweigh the...
benefits of the services to passengers or freight customers. Therefore it may be desirable to reserve some unused capacity (or 'white space') for reasons of maintaining or improving performance. We expect to take this requirement into account, and would not expect to approve or direct new rights where there is a material risk that performance effects (both at the particular location and across the network) outweigh the benefits of the new service. We may also make clear when approving or directing rights which potentially bring network usage close to this threshold, the extent to which we would be prepared to approve or direct further rights (if at all).

4.27 In some cases, services may be discontinued because the adverse performance effect outweighs the benefits to passengers or freight customers. The removal of such services could arise in several ways, including a decision by an operator (either voluntarily or because of changes in franchise requirements) or ORR not approving continuation of some existing rights when an operator’s track access contract is due for renewal. In circumstances where improving the network’s robustness against disruption is the reason for a service being withdrawn, we would not expect to approve rights for another operator to use the capacity created, unless there had been a material change (e.g. an enhancement to the relevant part of the network that increased its capacity and its ability to recover from disruptions). In such circumstances, our usual procedures would give all relevant operators an opportunity to comment, including arguing that no new services should be approved or that other new services would offer greater benefits to railway users.

**Rights to be used**

4.28 We will not normally expect to approve firm rights to train slots (or any other entitlement) unless the train operator (or other beneficiary) satisfies us as to its intention and ability to use the capacity in question. Otherwise, scarce capacity would be wasted by Network Rail’s obligation to stand ready to accommodate the operator’s bid to take up the unused rights.

4.29 An operator may seek to increase the quantity of rights exercisable over time, for example where the availability of an increased number of train slots is dependent upon improvements to the infrastructure over a number of years. In this case we will expect to see the step-up in rights expressed in separate entries (or perhaps, separate tables) within Schedule 5, indicating the dates
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from which each is to apply, so that the actual extent of rights exercisable by operators at any one time is clear.

Capacity choices and criteria

4.30 We consider that there are certain key choices which need to be made in the allocation of limited network capacity between:

(a) different passenger and freight train operators (and funders) wishing to use the same capacity;

(b) running extra trains and network performance; and

(c) running trains on the network and the time required for safe, effective and adequate maintenance and renewal of the network.

4.31 These choices need to be well informed by analysis and quantification of the physical and economic trade-offs involved. We therefore consider that operators’ proposals for changes to access rights should be the subject of consultation by Network Rail with affected train operators and funders before they are submitted to ORR. As set out in paragraphs 3.32–3.36 above, we will undertake our own consultation as part of the formal process of considering applications, but this initial consultation by the facility owner should enable obvious problems and trade-offs to be identified and addressed in the application, which should, in turn, expedite our process of consideration. The submitted application forms should include details of any objections or unresolved concerns raised by interested parties in this initial consultation (in section 7.3 of the section 18 and 22 application forms).

4.32 Where an application involves significant changes, i.e. changes to the pattern of services, stopping patterns, quantum of services and new or amended rights through busy locations, we will also encourage, and may require, some further information to accompany an application. This may include:

(a) specimen timetables, to demonstrate that the required capacity is available;

68 We recognise that this may not be possible where an operator is applying directly for an access agreement under section 17 or for more extensive use of the network under section 22A.
(b) reports on performance modelling;

(c) details of the anticipated impact on achievement of performance targets such as PPM (Public Performance Measure) and Passengers Charter and any specific actions being taken to facilitate this;

(d) details of how the changes will affect the area in which they operate in relation to contingency planning and traffic management arrangements once the new services are operating;

(e) details of any specific plans by the parties on actions being taken to ensure an affective implementation of the changes;

(f) a statement of how the new rights will affect maintenance and renewal requirements on the route and the availability of access for safe, effective and adequate maintenance and renewal; and

(g) a statement explaining the consistency of the rights sought with any relevant RUS.

4.33 Where an operator is seeking to introduce a new service that competes with the existing services of one or more other operators, we will wish to consider the extent to which such additional services would benefit passengers and not be primarily abstractive of the incumbents’ revenues. The operator’s application should therefore specify what benefits passengers are likely to gain and the extent to which service volume growth is expected to lead to passenger volume growth.

4.34 With a clear understanding of the choices available, our focus can be on the criteria for making the choices. We are, of course, bound by our statutory duties, but the following paragraphs set out those factors to which, depending on the circumstances of the case, we will expect to have particular regard.

4.35 We will have regard to the benefits and costs of proposals for new or modified access rights, compared with alternative uses of the capacity. We may take into account cost-benefit analysis of the proposals and alternatives in order to facilitate this, and, if such evidence is presented, any difference in
assumptions compared with the SRA’s appraisal criteria\(^{69}\) should be highlighted.

4.36 We recognise that, in some cases, it may be appropriate to give additional weighting to certain factors such as:

(a) the benefits of providing completely new services as against an increase in the frequency of existing services. This is likely to be particularly important where certain passenger markets have particularly poor services;\(^{70}\)

(b) specific requirements in competitive markets, such as availability of paths at short notice for freight;

(c) the existence of direct funding support for a service or an associated network enhancement provided by a PTE or other public body; and

(d) the efficient use of scarce or expensive resources.

4.37 As noted above, we will consult the DfT on all applications (or Transport Scotland for applications relating to Scotland), as it will be concerned with the implementation of:

(a) its long-term plans for the development of the railway as set out in the High Level Output Specification (HLOS) (when published); and

(b) any RUSs published by Network Rail.

We will also have regard to the funds available to the Secretary of State for the purposes of his functions in relation to railways and railway services and any constraints on his ability to fund enhancements as well as any general

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\(^{69}\) *Appraisal criteria – a guide to the approval of support for passenger and rail freight services*, Strategic Rail Authority, April 2003 (please note that whilst the SRA’s appraisal criteria at present still apply, the DfT intends to replace it with Rail Webtag (Transport Analysis Guidance)).

\(^{70}\) The desirability of facilitating the introduction of a new service was a particular factor in the then Regulator’s decision in respect of applications for capacity on the East Coast Main Line – *Third supplemental track access agreement between Railtrack PLC (in railway administration) (Railtrack) and Hull Trains Limited (Hull Trains) and thirty third supplemental track access agreement between Railtrack and Great North Eastern Railway Limited (GNER) – letter to the parties from Steve Gooding, Director of Access, Competition & Licensing*, Office of the Rail Regulator, June 2002; available from the ORR library.
guidance from the Secretary of State or Scottish Ministers (and indeed our other statutory duties).

4.38 We will also expect to consult and have regard to the views of other operators, Passenger Focus and, depending on where the services are to run, Transport Scotland, the National Assembly for Wales, the Mayor of London, TfL, and any PTE likely to have an interest.

Certainty and flexibility in the expression of rights

4.39 We recognise that train operators (and funders) will require track access rights sufficiently certain to enable them to plan their businesses with a reasonable degree of assurance. We consider that the appropriate degree of certainty will depend on the importance to the operator’s business plan of various aspects of the proposed contract and the expression of rights, both in the context of the operator's costs and revenues and of any franchise or similar (e.g. a concession) commitments. Our analysis of the rights sought will take account of the impact of and justification for the cumulative impact of those rights being exercised (e.g. where a train operator is seeking rights both to clockface departures and regular service intervals).

Quantum of train slots

4.40 The quantum of passenger train slots and additional slots, described by routing under a service group heading, should be listed in Tables 2.1 and 2.2 respectively of Schedule 5 of the model passenger track access contract. The rights to start or terminate trains short (paragraph 2.2 of Schedule 5) and to link services to form through services (paragraph 2.3 of Schedule 5) are likely to be bespoke for the individual circumstances surrounding the specific agreement. The Service Groups in Table 2.1 should be consistent with those in Appendix 1 of Schedule 8. Further guidance on this is available from the ORR website\(^71\).

Service intervals and clockface departures

4.41 Schedule 5 of the model access contract includes tables both for regular interval services (Tables 3.1, 3.1(a) and 3.1(b)) and for services with clockface departures (Table 3.2). We expect to require these to be used as

alternatives, to be chosen according to the type of service and the commercial needs of the train operator, rather than cumulatively. For example, the requirement of a metro-style commuter service with services every ten minutes is likely to be best expressed in Table 3.1, with sufficient flexing rights for Network Rail to vary intervals to, say, between eight and twelve minutes. We are likely to accept appropriately proportionate maximum flexing rights for services with greater intervals. Provision is made (paragraph 3.4 of Schedule 5) for services not to be flexed cumulatively to the extent that slots are lost from the agreed quantum.

4.42 For an inter-city service, rights to clockface departures are likely to be more important. These could be flexed to later times (under paragraph 3.7 of Schedule 5), although the extent of such flex would need to be limited (e.g. probably not beyond two to three minutes) to avoid the whole point of a right to clockface departures being undermined. Since users of clockface will not normally use intervals for the same service groups, but they may need to operate more than an hourly service over a route, paragraph 3.5 of Schedule 5 makes provision for these to be regularly spaced.

4.43 Provision is made for the peak times to be defined in Tables 2.1, 2.2, 3.1, its variants and in 3.2, or they can be defined in paragraph 1.1 of Schedule 5 (the definitions). Where an interval is to be applied in Tables 3.1 and 3.2, the times between which the interval applies will need to be defined. This is provided for in the footnotes to these tables in the model contract. We will expect these to be used sensibly to ensure clarity.

4.44 An operator may wish to choose the regular interval table for some of its services or service groups and the clockface departure table for others (or it may opt for one table exclusively or neither). It may also wish to combine services so that, on trunk sections, services dovetail with each other to form regular intervals or interleaving clockface departures. This should be achieved by judicious use of columns 1 and 2 of Tables 3.1 and 3.2. Separate Tables 3.1(a) and 3.1(b) are provided for use if required for peak hour services.

4.45 For services passing through a hub station, it may make more sense for regular intervals or clockface departures to apply at this station, rather than at the point of departure. The tables allow for this option.
4.46 In discharging our statutory duty to promote the use of the network, we will wish to be satisfied that a requirement for specified intervals and/or clockface departures will not lead to an inefficient use of capacity. For example, where the capacity on a route is sufficient to allow trains to run at three-minute intervals, it would be inefficient for an operator to have rights to run trains every five minutes since this would effectively reduce the route’s capacity from a possible maximum of 20 to 12 trains per hour. However, we accept that there may be valid reasons for seeking such requirements, for example improved reliability through not operating to the minimum intervals between trains theoretically permitted, and we will, of course, consider each case, and its justification, on its merits.

First and last trains

4.47 We will wish to be satisfied that an appropriate balance is struck between the specification of first and last trains, driven by commercial requirements and/or franchise commitments, and the implications this has for safe, effective and adequate overnight maintenance and renewal activity, and its funding.

Calling patterns

4.48 We expect that the calling patterns negotiated for Table 4.1 of the template Schedule 5 will take account of any obligations that a passenger train operator may have under a franchise or concession agreement with the DfT, Transport Scotland or other such authority. We expect to accept some degree of flexibility in calling patterns: options could be created which enable services to stop at a range of alternative destinations (e.g. stops at A, B and one from C, D or E). However, such flexibility is more likely to be possible on the less congested parts of the network. On very congested parts, little flexibility in calling pattern is likely to be permissible if contractual journey times are to be maintained since the ability to vary calling patterns could have an adverse effect on available capacity. Conversely, the ability to ‘skip-stop’ (i.e. for the operator to omit intermediate stops) can increase available capacity. We will consider to what extent flexible calling patterns impact on available capacity on a given piece of network before such rights are approved.

Specified equipment

4.49 In the interests of flexibility, we wish operators to be able to vary the rolling stock they operate on particular services or service groups. However, such
flexibility cannot be open-ended. The ability to run stock with different operational characteristics, for example in terms of speed, acceleration and deceleration, could have an adverse effect on the efficient use of capacity in restricting the compilation of the timetable, and could also constrain Network Rail's ability to model future timetables and thus be clear about the extent of capacity available.

4.50 We expect to approve provision for several types of rolling stock with similar (although not necessarily identical) operational characteristics to be included as "standard specified equipment" in Table 5.1 of the template. Rolling stock with inferior performance and not intended to be in regular service on the route in question, would meanwhile be described as "additional specified equipment" and the operator would hold only contingent access rights, such that, depending on the circumstances and the precise provisions of the contract, an inability by Network Rail to accommodate those rights, based on using that additional specified equipment, in the timetable would not constitute a breach of the contract. Where the number of vehicles can affect trains’ performance, we will expect this to be reflected in what is shown in the table (e.g., HST 2+8, Cl.90+10 MkIII coaches), enabling Network Rail to understand the nature of the rights it is selling. Multiple units would normally be expressed only by the class number, not the number of vehicles to be operated, as performance would not be affected by the addition of extra units. Restrictions on the length of trains can be found in Rules of the Plan and/or the Sectional Appendix.

Flexing allowances

4.51 The tables contained in the model Schedule 5 include space for an allowance for flexibility – the maximum amount by which Network Rail may vary the operator's bids made in exercise of their rights (see paragraphs 2.44–2.49). It is expected that maximum journey times will allow a suitable amount of flexibility. This will enable Network Rail to incorporate pathing time for maximising use of the network and adjusting timings where a conflict occurs with other services.

Journey time protection

4.52 The model track access contract provides templates for three different types of journey time protection, all of which apply to specific services with specified
calling patterns and specified rolling stock: maximum journey times, fastest key journey times and maximum key journey times.

4.53 Maximum journey times may be specified in Table 6.1, expressed in minutes, and can be varied for peak and off-peak services and for weekdays and weekends. They entitle the operator to have the specified maximum journey times met in the Working Timetable provided the services are operated to the specified calling pattern and with the specified rolling stock. Maximum journey times are, in effect, contractual caps on the maximum journey time for a service that Network Rail can put into the timetable. However, the specified maximum journey times increase or decrease automatically to reflect any changes in sectional running times, station dwell times, performance allowances, engineering recovery allowances and any other allowances provided for in the Rules of the Route and Rules of the Plan.\(^{72}\)

4.54 A maximum journey time expressed as a number of minutes, with a certain number or percentage of trains allowed to be timetabled to a stipulated higher time or required to be timetabled to a lower time, offers a flexible approach. It gives Network Rail the ability to insert larger amounts of pathing time for those services where there is more likely to be a conflict (e.g. peak hour services or late night services running on two tracks rather than the normal four track railway), while ensuring that the average journey time remains lower. Such an approach would also reflect the way in which obligations tend to be expressed in franchise agreements.

4.55 Maximum journey times can be established for defined groupings of services, depending on the nature of the train operator's services. We do not wish to be prescriptive in this regard. The same consideration applies to the other tables in the template Schedule 5.

4.56 We would expect Network Rail and franchised passenger train operators to base negotiations of maximum journey times partly upon the operator’s franchise obligations. However, Table 6.1 is unlikely to be a simple reproduction of such obligations. For example, it may not prove possible in practice for Network Rail to resolve all conflicts and deliver all operators’

\(^{72}\) Changes to the Rules of the Route and the Rules of the Plan are proposed by Network Rail, but operators are consulted, and may appeal against the changes to the Timetabling Panel of the Access Disputes Committee and ultimately to ORR.
franchise obligations exactly in the form specified by the DfT. The DfT may decide, in such instances, to vary the relevant franchise obligations in an appropriate manner (jointly with any PTE which is party to the franchise specification). Transport Scotland, as a franchising authority, has similar power to vary franchise obligations where it sees fit.

4.57 Additionally, whilst franchise service obligations may only represent a proportion of an operator’s services, for commercial reasons and to protect its investment that operator may wish to negotiate maximum journey times for all or most of its services. Negotiations here might be based on journey times currently achieved in practice, although again we would not expect such times simply to flow through to the maximum journey time table, given the need to retain some flexibility in the construction of future timetables.

4.58 The specific benefit to the operator of specified key journey times is the greater protection they provide against degradation of the network affecting journey times. Network Rail is not only obliged to see that they are met in the compilation of the Working Timetable, but is also prevented from proposing changes to the Rules of the Route or the Rules of the Plan that would prevent them being met. Not all journeys will be covered by key journey times.

4.59 Fastest key journey times may be specified in Table 6.2. The obligation they create is dependent on the operator bidding for at least three slots with the required characteristics in every weekday, so that Network Rail has some choice over which slot to allocate the fastest time. They are intended to protect the capability of the network by establishing the fastest time that a specified train can travel between set points on the network.

4.60 Maximum key journey times may be specified in Table 6.3. The obligation they create on Network Rail is to ensure that the timetable is constructed so as to avoid the maximum key journey times being breached, and is dependent on the operator complying with the calling pattern and rolling stock specified.

4.61 If, during a timetable period, 90% or more of trains relating to a specific service, which have the characteristics defined in any part of the key journey Tables 6.2 or 6.3, exceed their scheduled journey time as a direct result of the condition or operation of the network then this is treated as a network change. The result of this is that Network Rail could be liable to pay compensation under the provisions of Part G of the Network Code.
4.62 If there is a network change for this reason, there is provision for the parties to agree a revised journey time, and/or to refer the matter to arbitration or mediation.

4.63 At any time, ORR may issue a Journey Time Review Notice which requires the parties to agree an amendment to one or more of the journey times set out in Tables 6.1, 6.2 and 6.3. (The notice must contain ORR’s reasons for issuing it). In the case of maximum journey times in Table 6.1, ORR would only expect to issue a Journey Time Review Notice at the request of one of the parties and only where the circumstances were wholly outside the control of that party. In general, we would expect maximum journey times to be changed via changes to the Rules of the Route or Rules of the Plan, and would need to be persuaded that using this route would not be possible before issuing a Journey Time Review Notice. Either party may approach ORR to request that it issues a notice to amend journey times in Tables 6.1, 6.2 and 6.3 and, if it does, the parties are thereby required to agree and submit an amendment to their access agreement for ORR’s approval. If they fail to agree, there is provision to refer the matter to an independent expert who is required to make a determination on the basis of set criteria.

4.64 Once the parties have submitted an amendment to the relevant journey times for approval it is open to ORR, after consultation, to issue a modification notice requiring any changes to the amendment we consider necessary. The modifications should then be incorporated into the track access contract by submission of a draft supplemental agreement under section 22 of the Act. We will consider the merits of issuing a general approval for incorporation of these modifications in the future.

4.65 Tight constraints on the timetabling of journey times clearly create significant limitations on Network Rail’s ability to flex rights to put together the Working Timetable from operators’ bids. Whilst recognising that a degree of contractual protection for journey times is of commercial importance to operators, and a legitimate part of the access ‘product’ that Network Rail supplies, we will expect proposed contracts to apply journey time constraints only to a limited range of key services, sufficient to provide an operator with the appropriate degree of comfort in respect of the physical network over which that operator runs trains. We would not usually expect services with the same calling pattern and the same specified equipment to be given both maximum journey times and maximum key journey times. These services should normally have
one or the other. We would expect that maximum key journey times in Table 6.3 would be set for the operator's most commercially important services.

4.66 We have deliberately not prescribed a formula for the calculation of journey times, or the difference between Maximum and Fastest Key Journey Times. Our view is that Network Rail and operators should have the flexibility to ensure an efficient, robust and safe timetable, based on what is achievable. We will consider each case on its merits rather than necessarily applying exactly the same approach to every case, and the criteria for the expert’s determination should provide a sufficient basis for the relevant factors to be taken into account.  

Other rights

4.67 There are other, more specific, rights which operators may wish to have for commercial purposes but whose effect on capacity consumption means that they should generally be the exception rather than the rule. Such rights might be in relation to: specific departure times; use of particular platforms; and particular connections and stabling. We have proposed separate tables in the model access contract Schedule 5 to cover these rights. However, we do not expect to approve such rights as a matter of course. Operators will normally need to demonstrate that such rights are a very important commercial requirement, while Network Rail should expect to be required to establish that they do not create an undue constraint on its ability to exercise flexing rights or to satisfy the aspirations of other users or potential users of the network.

4.68 In addition to an overall entitlement to a maximum number of trains, a proposed contract may contain contingent rights to additional train slots in a particular timetable, subject to no other operator having an entitlement which prevents those additional trains being run, and subject also to Network Rail being able to flex such bids or, indeed, decline them under the timetabling procedures in Part D of the Network Code.  

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73 A fuller discussion of the rationale for journey time protection can be found in Chapter 2 of Great Western Trains Company Ltd, South West Trains Ltd, Gatwick Express Ltd and South Central Ltd, Rail Regulator’s conclusions on applications under section 17 of the Railways Act 1993, Office of the Rail Regulator, June 2002; available at http://www.rail-reg.gov.uk/upload/pdf/145_s17passconc.pdf

74 See the former Regulator’s judgment in the Eurostar case, Office of the Rail Regulator, 6 March 2003, which can be found on the ORR website at http://www.rail-reg.gov.uk/upload/pdf/ap-eurostar.pdf
for Network Rail, our main concern will be over the adequacy of capacity to make the exercise of such contingent rights feasible.

**Protected rights**

4.69 Protected rights and protected obligations have very specific meanings defined in Part C of the Network Code. If a modification to the Network Code made by ORR under Condition C8 materially prevents a train operator exercising or receiving the benefit of a protected right, or materially increases a protected obligation, the operator can prevent the modification from taking effect.

4.70 We recognise that there may be certain rights which are so vital to an operator's business, or to meeting an operator's obligations under a franchise agreement, that the operator will wish to secure them as protected rights. However, we will wish to see a very clear justification for such rights, and will wish to be satisfied that any protected rights and obligations have been drawn as narrowly as possible. Furthermore, we will wish to ensure that the risk of such protected rights and obligations placing an undue constraint on the use of our change power under the Network Code is minimised. In this context it is possible, for example, that a protected right to the basic quantum of train slots required to satisfy the obligations in a franchise agreement may be acceptable.

**Moderation of competition and approval of competing services**

4.71 In May 2004 we published a statement of our policy on moderation of competition\(^{75}\); the contractual protection within an access contract from the competitive entry by other operators to the same market. Our policy is that only in exceptional circumstances would we consider that it may be appropriate for access contracts to contain such contractual protection. These circumstances, as further set our final decisions document, would be where:

(a) it would be necessary to encourage investment; and

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(b) that investment would either not occur, or would be materially more expensive, without this protection.

A flow chart of our process for assessing such an application is provided in Annex 2 of our final conclusions document.

4.72 As further set out in our policy statement, we would not expect to approve competing services that would be primarily abstractive of an incumbent’s revenue without providing compensating economic benefits. To enable us to consider whether the proposed rights are primarily abstractive in nature we have established a five-stage process (see paragraph 3.18 of our policy statement).

4.73 This policy does not affect flows which enjoy contractual moderation of competition protection under the terms of existing track access contracts, which will continue to enjoy such protection until the date stipulated in the contract, subject to the relevant contractual provisions in each case.

Duration, adjustment and surrender

4.74 Regulation 18 of the Access and Management Regulations establishes the presumption that access contracts (referred to as “Framework Agreements”) should normally not exceed five years. This regulation also provides that agreements of between five and ten years must be justified by the existence of commercial contracts, specialised investments or risks, and that agreements over ten years may only be made in exceptional cases, in particular where there is large-scale and long-term investment, and particularly where such investment is covered by contractual commitments.

4.75 Our policy on long-term access contracts, setting out the framework against which we will consider any application for a long-term access contract, is consistent with the provisions of the Access and Management Regulations. Applicants intending to make an application for a long-term access contract should read the policy alongside these criteria and procedures.

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76 Railways Infrastructure (Access and Management) Regulations 2005, regulation 18

4.76 Beyond the EU framework, the main factors we expect to take into account when considering the appropriate length of contract include:

(a) the likelihood that franchised passenger or concessionary passenger operators will wish to relate the duration of their track access contracts to the duration of their franchise or concession agreements. Commitments in such an agreement may provide justification for an access contract of more than five years, and the DfT has indicated that it expects henceforward to be awarding franchises of up to ten years’ duration;

(b) whether rights of a certain duration are necessary as a basis for investment (e.g. where an operator may be seeking access rights for the duration of an investment financing arrangement);

(c) whether the duration sought would provide a reasonable degree of certainty for the train operator and for the facility owner to plan their businesses, bearing in mind the lead times for the construction of the timetable, the planning of services, and investment;

(d) whether the facility owner is in a position, at the time an application is made, to confirm the availability of the capacity in question for the period sought (e.g. if conflicting rights are already committed to another operator from some future date) or may only be able to warrant the provision of other rights from a date in the future (e.g. if conflicting rights are already committed to another operator until that future date); and

(e) the extent of flexibility within the proposed contract to allow for the adjustment of rights over time to respond to changing circumstances.

4.77 We will therefore expect applicants to set out the rationale for the length of access contract sought, particularly having regard to the above factors. We will also wish to understand the case for any in-built mechanisms to extend the life of a proposed access contract without further regulatory approval.

4.78 We recognise that it has proven difficult to model available capacity and construct illustrative timetables, particularly for parts of the network where several operators may have flexibility to exercise rights in multiple permutations. Where Network Rail is unable satisfactorily to confirm the
availability of capacity for the full duration of a proposed contract, or the extension of an existing contract, we may be prepared either to approve an access contract or amendment which clearly specifies the shorter duration of certain rights, or to require that the contract contain an appropriate mechanism to test the availability of capacity at the time, with that test being passed (i.e. Network Rail confirming the capacity to be available having consulted with other operators) before the additional rights can be exercised.

4.79 Whilst we will expect Network Rail to ensure that the overall capacity of the network does not degrade, operators should not assume that the quantum or expression of rights in an agreement will automatically be available at its expiry for extension or ‘rolling over’ into a new contract. Even where operators are seeking new access contracts to maintain existing service levels, we will require appropriate justification for the quantum, expression and term sought.

Part J of the Network Code

4.80 In our final conclusions on changes to access rights,\(^\text{78}\) we proposed several mechanisms for making changes to the access rights of train operators in track access contracts, to be included in a new Part J in the Network Code. The main intention of Part J is to enable access rights to be either transferred between, or surrendered by, train operators, to ensure that capacity that is not being used, or is being significantly under-used, can be released. Part J came into effect on 10 January 2005 covering ‘use it or lose it’ (UIOLI) arrangements, provisions for the voluntary adjustment or surrender of rights, and other mechanisms that are specific to freight operators. Part J therefore applies to all track access contracts incorporating the Network Code.

4.81 Since the implementation of Part J, a number of issues have arisen regarding the effectiveness and efficiency of the surrender of access rights under the Part J mechanism. The industry is currently reviewing Part J to identify those aspects of the processes that need to be clarified or improved and to determine what changes are required and how they should be effected. The aim is to implement required changes to Part J by the end of June 2006.


\(^{79}\) Flow charts illustrating these processes are set out in appendices to Part J of the Network Code.
Enhancement

4.82 This criteria document is focused on the allocation of existing capacity and instances where provisions for enhancement have been agreed. When considering an application predicated on enhancement works, our key concern will therefore be to establish the certainty of those works proceeding, for example whether: the relevant processes for network and vehicle change have been completed; the facility owner or a third party is contractually committed to deliver the project; or full ‘Railsys’ modelling has been done to check that the capacity increase is viable and adequate etc. Where an enhancement project is covered by the terms of an access contract, we will also wish to be satisfied that it has been agreed in compliance with our Policy Framework for Investments. Paragraphs 5.12-5.14 below set our policy on access charging in relation to enhancements.

4.83 Section 16A of the Act gives ORR the power, on application by either the Secretary of State (for facilities in England and Wales) or the Scottish Ministers (for facilities in Scotland), or by others with the consent of the Secretary of State or the Scottish Ministers as applicable, to direct a person to deliver a new railway facility or upgrade a current railway facility whilst ensuring that they are adequately rewarded for doing so. Section 16A came into force on 15 October 2005 albeit with exemptions for certain facilities and facility owners. We intend to publish a draft code of practice for consultation on the application of section 16A shortly.

4.84 The Access and Management Regulations require that where an infrastructure manager cannot accommodate a request for capacity, it declares the relevant section of infrastructure to be congested and must then complete a capacity analysis, identifying the reasons for the congestion and the measures which might be taken in the short and medium term to ease the congestion. This must be followed by a capacity enhancement plan detailing, amongst other things, the constraints on infrastructure development, the options and costs for capacity enhancement, and the likely changes that

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81 See the Railways ( Provision etc. of Railway Facilities ) (Exemptions) Order 2005 for details of these exemptions. This is available from www.opsi.gov.uk
would follow for access charges\(^{82}\). The infrastructure manager must provide those interested parties (as it may have identified when producing the plan) with a copy of the capacity enhancement plan and a timetable for the completion of the measures identified within it to resolve the congestion.

4.85 Applicants should note that where an application is made which relates to a part of the network that has been declared congested by Network Rail, this will not affect the process we undertake in considering it. Paragraphs 4.30-4.38 above set out the factors we will consider when allocating limited network capacity.

\(^{82}\) *Railways Infrastructure (Access and Management) Regulations 2005*, regulations 23-25
5. Charging, performance and possessions

Introduction

5.1 This chapter explains in turn our policy approach on track access charges, performance regimes, possessions regimes and the liability framework for access contracts. We are concerned to ensure that access contracts contain the appropriate incentives to promote efficient and effective performance and facilitate the appropriate recovery of cost and compensation, secure efficient use of network capacity and thus promote better services for rail customers.

5.2 We will shortly be publishing a consultation document on the structure of track access and station long-term charges. This will describe the structure and type of charges that we might want to consider as part of the Periodic Review 2008 (PR 2008). This consultation may result in changes to the structure of charges described below. Any changes will be introduced with the implementation of the PR 2008 from 1 April 2009.

Charging

5.3 An important aspect of our role is to protect train operators from being charged unduly high prices by the monopoly facility owner (Network Rail) for access to its network whilst ensuring that the access charges paid by operators are sufficient to enable it to recover the costs of operating, maintaining and renewing its network. Our role in setting variable charges is intended to provide incentives for train operators (and their funders and suppliers) to make efficient use of the network and to consider costs implied to Network Rail when appraising choices and design of rolling stock.

5.4 This section explains Network Rail’s track access charges for franchised passenger train operators and the criteria for their approval. The criteria for the approval of track access charges for open access operators are slightly different and are addressed in paragraphs 5.25–5.27 below. The two contractual incentive regimes, possessions (Schedule 4) and performance (Schedule 8) are addressed separately in paragraphs 5.28–5.51 below.
5.5 On an annual basis, charges for franchised passenger train operators comprise the following elements:

(a) fixed track charge;

(b) variable track usage charge;

(c) traction electricity charge (incorporating the electrification asset usage charge);

(d) capacity charge; and

(e) change of law charge (payable where the conditions set out in Part 3 of Schedule 7 are met).

5.6 In addition, there are provisions for a possible rebate to be paid by Network Rail under certain circumstances.

5.7 There are also Additional Permitted Charges covering payments for enhancement charges paid through the track access contract. In addition, the Schedules 4 and 8 regimes feature access charge supplements explained in the respective sections of this document.

**Fixed track charge**

5.8 Fixed track charges for all the franchised passenger train operators were most recently established by the Access Charges Review in 2003 (ACR2003)\(^83\). These amount to Network Rail’s total revenue requirement for control period 3 (CP3) after deduction of:

(a) expected income from variable charges and sources of Network Rail income (e.g. income related to freight, stations, property); and then from

(b) the amount the DfT was obliged to pay directly to Network Rail in grant payments at the time of the conclusions of that review in December 2003.

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The Schedule of Fixed Charges sets out fixed charges for each year of the control period (i.e. until 31 March 2009)\(^{84}\).

5.9 On 10 March 2004, a notice\(^{85}\) was published specifying values for two terms that have the effect of reducing the fixed charges actually paid by the franchised train operators below the level set out in the Schedule referred to in paragraph 5.8 above. These terms relate to the decision made at the ACR2003 enabling a greater amount of Network Rail’s revenue requirement to be met through direct grant from Government and for a change in the profile of Network Rail’s income in the first two years of CP3. Annex E of our document on the approval of Network Rail’s proposed financing arrangements\(^{86}\) shows the fixed charges payable following these changes.

5.10 If an operator negotiates changes to its track access rights during the control period, there will not normally be any change to the fixed track charge before the end of the control period unless the additional rights require a capacity enhancement to be funded through the track access contract. Such changes in rights will, however, lead to corresponding changes in variable charges.

5.11 Exceptionally, if there has been a redistribution of access rights between train operators (such as occurs as a result of franchise re-mapping), there can be adjustments in the fixed charge simply as a means of reallocating charges between operators. However, Network Rail’s overall income from the fixed track charge would generally remain unchanged by such an adjustment. See Part J of the Network Code and part 8 of Schedule 7 of the model contract for mechanisms for adjusting and surrendering access rights and resultant possible financial changes (referred to in paragraphs 4.80-4.81 above).

**Enhancements**

5.12 Additional fixed charges\(^{87}\) may be incurred in relation to physical enhancements, and these should be charged on a basis consistent with

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\(^{84}\) The schedule is available on our website at [http://www.rail-reg.gov.uk/upload/pdf/arev-price_list3_19dec.pdf](http://www.rail-reg.gov.uk/upload/pdf/arev-price_list3_19dec.pdf)


\(^{87}\) It should be noted that enhancements might also generate additional variable charges e.g. incremental operating costs.
ORR’s **Policy Framework on Investments**\(^{88}\). This framework provides for efficient development and delivery of investment projects not included in a periodic review determination and sets out:

(a) Network Rail’s role and obligations and how these will be secured;

(b) default terms (including principles for risk allocation) for carrying out investments;

(c) specific proposals in relation to third party investments to overcome barriers caused by the impact of low-probability, high-impact risks which cannot be efficiently managed or insured; and

(d) the remedies available when things go wrong.

5.13 A further type of additional fixed charge may be incurred in relation to non-infrastructure enhancements to the capacity of the network, e.g. an extension of signal box opening hours. Here we will wish to understand the nature of the costs being charged for and any other operators who will benefit from the non-physical enhancement.

5.14 We are currently considering what kind of mechanisms might be appropriate to allow recovery of a fair proportion of costs by a funder of a project in situations where other parties (e.g. passenger operators) benefit from the use of an enhancement to the network (e.g. provision of additional capacity or higher gauge). This would be an incremental costs provision.

**Variable track usage charge**

5.15 The variable track usage charge is designed to enable Network Rail to recover the additional maintenance and renewal costs associated with additional traffic. It is calculated by multiplying the number of vehicle miles for each vehicle type by the usage charge rates for each type of rolling stock as set out in the track usage price list published by ORR\(^{89}\). This charge is adjusted each year to take account of changes in the retail prices index (RPI).

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\(^{89}\)This can be accessed on our website at [http://www.rail-reg.gov.uk/upload/pdf/arev-price_list1_19dec.pdf](http://www.rail-reg.gov.uk/upload/pdf/arev-price_list1_19dec.pdf)
There is, however, no real price adjustment to usage charges during control period 3.

5.16 Operators expecting to introduce new rolling stock, or rolling stock which is not listed in the track usage price list, should ensure that the operating parameters necessary for the calculation of the variable track usage charge are made available as early as possible. These are:

(a) weight of the vehicle (this is the tare weight\(^{90}\) plus an uplift based on all seats being occupied at 80kg for inter-city vehicles (70kg elsewhere);

(b) unsprung mass (on the primary suspension);

(c) unconstrained maximum speed; and

(d) number of axles.

Network Rail will normally determine the charge (on the receipt of the characteristics) with possible reference to arbitration through the provisions in Schedule 7 of franchised passenger operators’ track access agreements (paragraph 9 of Part 2) and such similar provisions as may be specified in other agreements. This amendment to the price list will also be subject to ORR’s approval and will only apply to that specific franchised passenger train operator’s track access contract.

5.17 The variable track usage charge is always based on a mileage cost for individual vehicles. This is the case even when vehicles are connected on a semi-permanent basis, and the operating parameters should be submitted accordingly.

*Traction electricity charge*

5.18 This charge is designed to recover the costs Network Rail faces in procuring electricity for train operators for traction. It is calculated by reference to the calibrated modelled consumption rate based on train mileage for electric multiple units and on gross tonne mileage for locomotive-hauled stock, by train category as shown in the Traction Electricity Price List published by

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\(^{90}\) The weight of a train without passengers.
ORR\textsuperscript{91}. The modelled consumption rate is then multiplied by the value set out in the Traction Electricity Price List per kilowatt-hour as adjusted for changes in the index of industrial electricity costs.\textsuperscript{92} A charge for electrification asset usage is also levied in order that Network Rail recovers its additional costs of maintaining and renewing the electrification assets\textsuperscript{93}. The initial traction electricity charge is adjusted according to a wash-up adjustment process based on the difference between the total calibrated modelled consumption rate for that region and the actual volume of usage in that region.

5.19 Train operators can obtain a 16.5\% discount on their traction electricity charge where they have the capability to operate and use regenerative braking technology.

5.20 For new vehicle types or where existing vehicles are proposed to run on new routes, a proposal in relation to consumption rates should be made by Network Rail or the operator in accordance with paragraph 9 of Part 2 of Schedule 7. Such amendments are subject to regulatory approval.

\textit{Capacity charge}

5.21 The capacity charge is applied to all franchised passenger train services to recover the expected increase in Schedule 8 costs incurred by Network Rail as a result of the additional traffic. These costs arise because additional services reduce Network Rail’s ability to recover from an incident and increase the probability of delays. (The capacity charge was introduced from June 2002.)

5.22 Since the ACR2003, a simplified approach to the charge has been applied and the payment is derived from the list of capacity charge rates by service group\textsuperscript{94}.

5.23 Prior to the Periodic Review 2000 (PR2000), these costs were recovered through passenger operators’ fixed charge. The capacity charge payable is therefore reduced by a capacity charge offset, equal to this expected value.


\textsuperscript{92} As published by the Department of Trade and Industry.

\textsuperscript{93} As such assets are excluded from the calculation of the variable usage charge.

\textsuperscript{94} This can be accessed on our website at http://www.rail-reg.gov.uk/upload/pdf/arev-price_list4_19dec.pdf
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Change of law charge

5.24 There is provision for adjustments to charges to be made to reflect the effect of changes of law. In general, changes of law are legislative changes and/or the direction of a competent authority as defined in the track access contract. The template Schedule 7 provides for such adjustments to be made and for ORR to determine the adjustments if necessary.

Other passenger train operators

5.25 There are a number of different types of passenger train operators, other than franchised passenger train operators, running timetabled services. Some of these, such as charter train operators and certain open access operators, currently run under a different charging framework to that described above.

5.26 We will expect the standard charging regime for non-franchised passenger train operators to comprise:

(a) a variable track usage charge;

(b) a traction electricity charge (where applicable); and

(c) a capacity charge.

We will need to understand the reasons for any proposed deviations from this regime, which is discussed more fully in Chapter 9 of the PR2000 final conclusions.

Other charging regimes

5.27 We will consider any applications for proposed access contracts containing alternative charging regimes on their merits, and particularly whether the proposed regime:

(a) properly reflects the financial position of and allocation of risk between the parties; and

(b) provides appropriate incentives and remedies for the parties; and

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95 The Tyne and Wear Metro.

(c) is consistent with relevant requirements under EU law.

**Performance**

5.28 The performance regime in Schedule 8 of the model passenger track access contract is designed to fulfil three broad objectives:

(a) to compensate train operators for the farebox revenue lost in the event of lateness and cancellations attributed to Network Rail or other train operators;

(b) to incentivise train operators and Network Rail to improve operational performance; and

(c) to set the appropriate signals and provide information so as to drive the decision-making by both Network Rail and the train operators in relation to performance management, e.g. investment prioritisation and preparation of business cases for performance improvement schemes.

**Benchmarked regime**

5.29 The Schedule 8 performance regime contains specified levels of benchmark performance (also known as performance points) for Network Rail and train operators (the benchmarks being measured in average lateness per day). If the actual level of performance is equal to this benchmark level then no payments are made through the regime. Penalty payments are made when performance is worse than the benchmark levels and bonus payments are received when performance is better than benchmark levels.

5.30 Benchmarks (or performance points) are established for both Network Rail and train operators for each train operator’s service groups (a collection of train services). These rates were last calculated at the ACR2003 and are based on actual performance over the twelve months to October 2002. The Network Rail benchmarks contain year-on-year improvements as established in the ACR2003.

**Train operator compensation**

5.31 Since the implementation of the ACR2003, the compensation to train operators has been solely based upon the assessed marginal revenue effect (MRE) to that train operator. This followed the removal of a societal element
(the societal rate) from these payments. The MRE is the forecast loss of farebox revenue to the train operator resulting from poor performance (or conversely the farebox gain resulting from good performance). Its measurement is estimated using elasticities (i.e. projected responses in customer demand to poor performance). These are set out in the Passenger Demand Forecasting Handbook. Different responses to poor performance are observed for different types of passenger (e.g. commuters and leisure travellers) and therefore the distribution of elasticities to individual train operator service groups was mapped by ORR and its consultants at previous access charges reviews to model the effect.

Star model

5.32 On a multi-user rail network, any one train operator’s operational performance can affect others’ performance. This effect is far wider than simply those train operators whose services run along the same routes. Indeed it is quite possible that a significant performance incident such as that caused by a train failure on the East Coast Main Line at Peterborough could affect other operators on that line, those operators running services that cross that line at some point and indeed other lines as far away as the Transpennine route and the West Coast Main Line.

5.33 Any payment as a result of the impact of one train operator’s performance on another’s is channelled through the Star Model with Network Rail at its centre. The TOC (train operating company) payment rate is calculated such that at the level of national performance across all service groups during the calibration period, Network Rail could expect to be compensated in full by the responsible train operators for the payment it makes to the affected train operators.

Other features of the Schedule 8 performance regime

5.34 The Schedule 8 performance regime also sets out:

(a) the requirement for Network Rail and train operators to gather information relating to the reasons for delays and incidents and for Network Rail to establish and agree the records necessary to operate all train performance schemes (i.e. not just that in the Schedule 8 performance regime);
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(b) the procedures and compensation payable as a result of cancellations of services;

(c) monitoring points and monitoring point weightings, ensuring that compensation payments reflect the passenger usage along the route of the service;

(d) sustained poor performance (SPP) provisions, introduced at the review of the Schedule 8 performance regime in 2005, provides for additional compensation to be claimed by train operators in the event of sustained poor performance by Network Rail; and

(e) Passenger Charter compensation arrangements relating to the compensation train operators need to recover from Network Rail to then pay to end customers under the Passenger Charter arrangements.

Bespoke performance regimes

5.35 Where applicants are seeking the approval or direction of bespoke performance regimes, we will expect to consider them against the above criteria, and to be satisfied that they would not:

(a) change the value of Network Rail’s expected cash-flows;

(b) make it difficult for the operator to meet its financial commitments to the relevant franchising authority; or

(c) require additional and unnecessarily burdensome delay attribution systems.

5.36 When requested to approve changes to existing performance regimes for franchised passenger train services, we will expect to see:

(a) performance points or benchmarks representing the expected level of performance, reflecting historic levels of performance for each service group and capturing expected future improvements in performance over time; and
(b) a constant payment rate related to the marginal revenue effect on the operator (regardless of the level of performance relative to the benchmark).

5.37 When additional services are added to an existing approved agreement, this may involve new routes where there are no existing monitoring points, or it may require a change to the monitoring point weightings. When determining the need for additional monitoring points, we will wish to take into account whether such an addition is needed to maintain the principle that all services are incentivised.

5.38 Changes to monitoring point weightings are likely to be needed if the number of passengers alighting between or at the particular monitoring point(s) changes as a proportion of the total passengers alighting for the service group as a result of additional services.

5.39 Where draft contracts propose the addition of new monitoring points or changes to monitoring point weightings, we will expect to receive supporting data for the changes.

5.40 We will expect performance in respect of new services to be incentivised, either through their inclusion in existing service groups or through the creation of new service groups. We will also expect the relevant parameters for new service groups to be based on modelled figures.

5.41 On the specific elements of performance incentives, our views are as follows:

(a) monitoring points – our standard approach is that there should be around four to five monitoring points for each service code and all end points should be covered. Weightings should be based on demand forecasts for the new services;

(b) payment rates – the marginal revenue effect (MRE) should be based on the expected financial flows and passenger numbers; and

(c) performance points (or benchmarks) – the operator performance point should be based on the average historic performance of the operator over the most relevant stretch of network, whereas for Network Rail it should be based on performance on the line or its nearest equivalent. In both cases, if information about performance with similar rolling stock is available, this should be used. For some services this is
complicated by the coverage of the network. We will expect Network Rail and the operator to discuss the most appropriate approach before submitting a regime to ORR. It should typically be based on an average of performance in similar service groups.

5.42 Further details about making changes to benchmarks and payment rates are set out in our document *Review of the Schedule 8 performance regime: final conclusions*[^97].

5.43 In some cases, we may be prepared to approve a new operator’s contract containing provisions for the operator subsequently to develop and agree a full performance regime with Network Rail, or have one established in an arbitral process. In such cases, we will expect this development to be completed as quickly as possible, to reflect our principle that all parties should be incentivised to improve performance. We will also expect the provisions to establish a very clear process for the development and incorporation of the established regime.

**Restrictions of use**

5.44 The arrangements under which Network Rail is able to carry out restrictions of use on its network (e.g. for engineering possessions, through imposing temporary speed restrictions, etc.) are set out in Part D of the Network Code. The compensation regime for such restrictions, incorporated in Schedule 4 of the model track access contract (and retrofitted into franchised passenger train operators’ existing agreements), reflects ORR’s conclusions in its PR2000 and the interim review of the possessions incentive regime concluded in March 2002. There are also compensation provisions in Part G of the Network Code. Possessions must be managed safely. The resulting model compensation regime is intended to incentivise the safe, early, efficient planning of engineering work by Network Rail.

5.45 In the final conclusions of the PR2000[^98], we identified the following principles for possessions regimes:

[^97]: For further details see [http://www.rail-reg.gov.uk/server/show/nav.177](http://www.rail-reg.gov.uk/server/show/nav.177)

[^98]: *Periodic review of Railtrack’s access charges, final conclusions, Volume 1*, Office of the Rail Regulator, October 2000. This is available at [http://www.rail-reg.gov.uk/server/show/nav.166](http://www.rail-reg.gov.uk/server/show/nav.166)
(a) operators should receive compensation for all disruptive possessions, thereby ensuring that Network Rail is incentivised to plan all work carried out on the network efficiently;

(b) such compensation should be based on a standard tariff, no matter whether the possession is related to maintenance, renewals or enhancement work; and

(c) the tariff should be based on Schedule 8 payment rates, with discounts for early notification.

5.46 In the subsequent interim review of the possessions incentive structure, we further refined the calculation of compensation such that:

(a) the benefit of early notification of possessions is calculated by reference to the date at which information is available for passengers, because the impact of a possession on a train operator’s revenue depends on when the passenger is informed;

(b) operator-specific payment rates relate to the losses it is expected each train operator will incur at the different stages of the timetable planning process; and

(c) the total amounts payable in compensation are set at a level no higher than is necessary for incentivising efficient possessions planning.

5.47 The ACR2003 provided a clearer definition of the costs to be taken into account in relation to a significant restriction of use.

5.48 We expect franchised passenger track access contracts to incorporate the template Schedule 4 as it appears in the model track access contract (Part 3 of which incorporates both the principles set out in the PR2000 and the changes subsequently made in the March 2002 interim review).

5.49 We consider that, in cases where restrictions of use compensation cannot be derived by using the main template algorithm set out in Part 3 of Schedule 4 (e.g. where a train–bus–train movement misses monitoring points, or for a

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high-speed diversion), different formulae will be appropriate. Drafting for bespoke provisions has therefore been included within the template to cater for significant restrictions of use.

5.50 Where applicants are seeking a bespoke regime, we would want to be sure that it would:

(a) incentivise Network Rail to plan possessions early and to manage them efficiently;

(b) incentivise the parties to limit the effects of possessions on the passenger timetable;

(c) ensure that no perverse incentives are caused between different operators’ possessions and performance regimes;

(d) not alter the value of Network Rail’s expected cash flows; and

(e) not require unnecessarily burdensome additional systems for processing data.

Further review

5.51 Train operators pay for the possessions regime through access charge supplements. The sum of these access charge supplements is equal to the total expected compensation payments Network Rail will pay to operators for withholding access to the network\(^{100}\).

The model liability framework

5.52 The model passenger track access contract incorporates ORR's model liability framework. We consider it important that parties to an access contract are clear about their obligations and the liabilities for failure to comply with them. The other key principle underpinning the model liability provisions is that they should achieve the most efficient allocation of risk, such that risk is borne by the party best able to manage it. Thus, our view is that the model regime should incentivise efficient behaviour, foster a culture of contractual

\(^{100}\) The Schedule 4 Access Charge Supplement Terms are available on our website at http://www.rail-reg.gov.uk/upload/pdf/arev-price_list2_19dec.pdf
compliance and minimise total industry costs. The full rationale for our conclusions was set out in the final conclusions on model clauses.¹⁰¹

5.53 The liability framework distinguishes between operational failures that are contemplated by the contract and breaches of the contract. Liability for operational failures (i.e. delays or cancellations of trains and temporary restrictions on the use of the network) is compensated under Schedules 4 and 8. These schedules establish the payments to be made where restrictions are applied to the use of the network (Schedule 4), and when services in the Working Timetable fail to run within the established performance parameters (Schedule 8). Payment under these provisions is uncapped and neither party may claim force majeure relief.

5.54 Local Output Commitments (LOCs) add a further liability for particularly poor performance. LOCs, and their successors, Joint Performance Improvement Plans (JPIPs), are discussed in more detail in paragraphs 5.59-5.62 below.

5.55 For other breaches of the contract, the train operator or Network Rail would be able to apply for a performance order, but whether or not it did so the party in breach would still be liable to pay compensation for proven losses from the point the initial breach occurred. Compensation for breach of contract is also subject to the annual cap (with certain exceptions) and to relief from the obligation to pay compensation where the breach results from a force majeure event.

5.56 Our model access contract provides options for the parties to have disputes determined by the relevant ADRR panel or the High Court. These options sit alongside the options of expert determination and mediation provided for in the Network Code and the specific dispute resolution mechanisms contained in individual parts of the Network Code and the model contract (e.g. those in Schedules 4 and 8 of the model contract for determining sums payable in respect of delays, cancellations and restrictions of use). These options are

discussed further in our document containing the final conclusions on the template passenger track access contract.\(^{102}\)

5.57 We believe that the default liability arrangements in the model track access contract represent the most appropriate position in terms of optimal risk allocation and are part of the overall package which Network Rail offers to its customers. We therefore consider it appropriate that the costs of the regime form an integral part of the overall access charge, which is subject to periodic review. However, if for commercial reasons an operator wishes to negotiate bespoke liability arrangements with Network Rail, such as asymmetrical caps on liability\(^{103}\) or a minimum cap of £10 million a year, we will consider them, including against the following criteria of whether the proposed regime:

(a) properly reflects the financial position of and allocation of risk between the parties;

(b) provides appropriate incentives and remedies for the parties; and

(c) is appropriate, taking account of the allocation of risk to the train operator under any franchise agreement.

5.58 In such cases we will expect Network Rail and the operator to agree an appropriate access charge supplement or access charge rebate, the levels of which will be dependent on the degree to which risk has been transferred from one party to the other.

**Local Output Commitments and Joint Performance Improvement Plans**

5.59 LOCs are contractually enforceable agreements and are set on a three-year basis in which Network Rail commits to meet operational performance targets. Following the publication of *The Future of Rail* White Paper, and in light of concerns that LOCs may not have encouraged an aspirational approach to improving performance, the industry developed JPIPs as an alternative.


\(^{103}\) See chapter 2 of *Model clauses: the template passenger track access contract - Regulator’s final conclusions*, Office of the Rail Regulator, June 2003.
5.60 JPIPs provide a framework within which Network Rail and train operators work together to improve performance, with bilateral JPIPs and monitoring/challenge arrangements between Network Rail and each franchised train operator, and regular monitoring of performance against plans. If Network Rail’s performance is consistently below the agreed threshold, we can take enforcement action against it under the Network Licence. We have issued a policy statement on the circumstances in which we would consider taking enforcement action\(^\text{104}\).

5.61 A new Condition LA, providing for the agreement of JPIPs between train operators and Network Rail, was incorporated into Part L of the Network Code on 27 March 2006. Franchised passenger train operators have now switched from LOCs to JPIPs, following the fulfillment of the necessary conditions precedent.

5.62 For train operators other than franchised passenger train operators, LOCs remain in place and Part L continues to require Network Rail to establish LOCs with these operators. However, Condition LA contains a switching mechanism enabling these operators to replace LOCs with JPIPs. We would welcome all operators switching to JPIPs.

\(^{104}\) This is available at http://www.rail-reg.gov.uk/upload/pdf/nr-operational-performance-delivery-150306.PDF
6. Other issues

Introduction

6.1 Our aim is to see access contracts established that present the parties' obligations and remedies in a clear and legally robust form and which are straightforward for the parties to follow and use. This will foster a culture of compliance and efficiency, and lead to the delivery of better services. This chapter therefore addresses some of the other issues that may arise in a track access application, in particular in the drafting of departures from the model passenger track access contract and some of the key pitfalls to avoid.

Bespoke and innovative provisions

6.2 The model track access contract is intended to be a model and not a straitjacket. Although we have the power under section 21 of the Act to require the use of model clauses, we are always willing to consider bespoke departures from the published model, for example where some tailoring is desirable to meet the particular commercial circumstances of a particular operator. The model track access contract contains draft templates for certain optional provisions which operators may wish to exercise (e.g. on restrictions of use/possessions).

6.3 As the rail industry moves forward and matures, we are keen to promote innovation and best practice in the further refinement of access contracts over time. When considering new or novel approaches in proposed access contracts, we will have in mind the provisions in Network Rail's Network Licence prohibiting undue discrimination (Condition 10), which would counter the risk of new provisions in access contracts incentivising Network Rail to favour one operator over another. The key point is that we will always look at each application on its merits, taking into account the circumstances of each case, and will publish the reasons for our decisions.

Self-modification provisions

6.4 We expect that access contracts will contain appropriate amounts of flexibility required for effective operation of the railway without the continual need for our approval under section 22 of the Act. For example, contracts may specify contingent rights to run trains in a particular timetable subject to:
(a) no other operator exercising firm rights which would prevent those trains being run; and

(b) Network Rail being able to flex such bids sufficiently to fit them into the timetable.

6.5 We expect that access contracts will contain provisions to enable changes of administrative or minor detail without the need to seek our approval. There may also be cases where agreements contain provisions for the determination of the value of a particular parameter in the agreement by a clearly defined process and within a defined range. However, we consider that any in-built flexibility should not be such as to enable provisions of the contract to be varied in a material way such as might have an adverse or detrimental impact on other operators, or cut across regulatory policy. Consequently, we expect that provisions establishing a process for significant variation should ensure that such significant variations can only be made subject to our specific approval. Provision should be made for ORR to be notified of all changes before the changes in question become effective.

Public register

6.6 Under section 72 of the Act, ORR is required to maintain a public register of several classes of regulatory document of public importance. In the case of access contracts, the register must contain a copy of: every facility exemption granted under section 20(3) of the Act; every direction to enter into an access contract or an installation access contract; every access agreement; every amendment (however described) of an access agreement; every general approval and every document issued or made by ORR under an access agreement.

6.7 Section 72(5) of the Act requires the facility owner to send to ORR within 14 days a copy of every new access agreement and amendment to an existing one. Every variation of an access agreement (however brought about) should be sent to ORR promptly so that the statutory requirements are met and interested parties can see the current state of the consumption of capacity of railway facilities. Condition 24 of Network Rail’s Network Licence also requires it to include information relating to the condition, capability and capacity of its assets in the asset register, and the current state of access contracts will be a material factor in ensuring the asset register complies with
that obligation. Network Rail should therefore ensure that its records are maintained in good and timely order as well.

Consolidated agreements

6.8 Network Rail has a contractual obligation to provide a consolidated (conformed) version of the full approved agreement within 28 days of any amendment or modification being made to it. This requirement is for the benefit of Network Rail and the train operator, as well as anyone else who needs to read and understand the full agreement. It is therefore very important that we receive consolidated agreements in a timely manner.

6.9 Furthermore, we expect amendments to the full agreement to be submitted for approval in a form which gives effect to the desired changes by inserting additional or amended text or tables into the agreement and/or by deleting existing text or tables. This approach ensures greater clarity for all concerned, and facilitates the maintenance of consolidated agreements.

Unfinished business

6.10 Applicants may wish to include provisions in their access contracts for certain matters to be agreed subsequently between the parties (for example, where the parties may need to seek ORR’s approval of new access rights as part of a timetable change but consequential issues, such as a revised performance regime, may still remain to be resolved, as discussed at paragraph 5.43 above). In such cases we will be concerned to ensure that there are no loose ends in the contractual provisions that would allow matters to drift unresolved. We will therefore expect the contract to make clear provision:

(a) for the process through which the parties are expected to arrive at an agreement, including time limits;

(b) for the issue to be resolved in a timely manner should the parties fail to reach agreement;

(c) if the parties fail to agree within the specified time, for the matter to be referred for determination to an independent third party – such as an

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arbitrator or expert – who is required to apply clear, adequate and appropriate criteria (including, in suitable cases, current regulatory policy on the matter in question). It is very important that the criteria are specified in the contract or arrived at through an objectively justifiable process; we will expect to refuse our approval in cases where the parties merely ask the third party to make a contract for them, which is not part of the role of such a tribunal;

(d) for matters of regulatory importance, provision for the agreed/determined matters to be referred for ORR’s approval;

(e) where we are not minded to give our approval, for the parties and the arbitrator/mediator to take our reasons into account in revising the proposal, and for resubmitting it; and

(f) for incorporating the result of the process in the contract.

6.11 As indicated on the application form, we will wish to see a flow chart illustrating the process to ensure that it is robust, internally consistent (with no steps missing), and leaves no loose ends.

Incorporation of other documents by reference

6.12 As explained in Chapter 2, our access jurisdiction provides for us to supervise and determine all the terms on which the capacity of railway facilities is consumed, in those cases where the Act provides for our approval of an access contract. That jurisdiction exists for the protection of railway industry participants and users in ensuring that the possible abuse of monopoly power and arrangements contrary to the public interest are checked and prevented, and the consumption of capacity is fair and efficient and meets the public interest criteria in section 4 of the Act. In order to do this, we need to be satisfied with all the factors that establish and may influence and change the effect of the access contract.

6.13 By bringing into the access relationship external legal rights or obligations (from unregulated documents), the effectiveness of that jurisdiction for the benefit of railway industry participants and users could be diminished and important protections circumvented. For example, parties may wish to say in
an access contract that certain rights conferred in it are to be affected by or subject to change by reference to a separate, unregulated commercial contract, such as a contract for the carrying out of works for the improvement of physical facilities. The difficulty such a scheme presents is that the external contract may be varied or replaced in a way that magnifies or otherwise alters its effect on the regulated access relationship, to the detriment of the fair and efficient use of railway capacity. Because of its unregulated nature, this would happen without regulatory scrutiny or control, and the unforeseen and possibly objectionable changes to the external document would be brought into and adversely affect the regulated relationship.

6.14 On the other hand, certain types of external documents are already subject to regulatory protections. In those cases, provisions in access contracts that allow the effects of these external instruments to flow through into the access relationship are likely to be unobjectionable. Railway Group Standards, the Rules of the Route and the Rules of the Plan and the ADRR are examples of external documents where all parties have regulatory protections against possible abuse of power or change in ways that may be objectionable and harmful to the interests of others.

6.15 It may well be that, at the outset, when an access contract is being considered, the external document whose effects the parties wish in some way to flow into the access relationship will be entirely unobjectionable. However, as illustrated above, our principal concern is that it may be changed over time so as to have an objectionable effect on the access relationship. Since such changes are beyond our jurisdiction, we have no ability to stop this happening at the time. Accordingly, parties should expect ORR to be unsympathetic to any such devices, and to require very substantial justification for their adoption.

6.16 For these reasons we will wish to:

(a) see and review any documents referred to in proposed access contracts at the time the application is made (or before);

(b) be satisfied that the references and any obligations imported are appropriate and justified (in which we will also need to take into account the potential and mechanisms for subsequent amendment of such documents), including flow-through; and
(c) ensure that the documents are publicly available, or publish them ourselves (subject to section 71 confidentiality exclusions).

**Multilateral provisions**

6.17 An access contract is a bilateral contract between Network Rail and a train operator. The Network Code, which must be incorporated in every track access contract with Network Rail, contains certain provisions applying to such industry-wide matters as compilation of the Working Timetable. The Network Code contains its own in-built change procedures.

6.18 We will be concerned if an applicant seeks to incorporate in a proposed access contract multilateral provisions other than the Network Code because the bilateral contract cannot bind other parties (even where specific provision is made for enforcement by third parties under the Contracts (Rights of Third Parties) Act 1999). Applicants should therefore consider whether the desired effect would be better delivered through pursuing an amendment to the Network Code itself.

**Brevity and form**

6.19 We favour short, clear drafting that is as far as possible written in plain English. This is because the shorter and clearer contracts are, the more likely they are to prove useful working documents for the people who need to use them.

6.20 We prefer track access contracts to follow a standard form, including a standard order and paragraph numbering convention, as established by the model track access contract. This will help us when considering applications, will make the process of subsequent modification simpler (for example, in terms of retrofitting revised template provisions) and will help operators navigate their way quickly around each others' contracts when they are being consulted on them, or when checking matters subsequently via the ORR website.

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106 Eurostar also has its own network code relating to its network.

107 Part C of the Network Code contains the relevant general change procedure.
Side letters and other associated agreements

6.21 We require to see the whole contract that the parties wish to make for the allocation and use of capacity. It is therefore necessary for any side letters or collateral or associated agreements, if they are to qualify or otherwise affect the access contract, also to be submitted for our approval. If they are not approved, and in law they form part of the access contract, they will be void. The application forms require confirmation that everything pertinent has been submitted.

6.22 Applicants and consultees are reminded that it is an offence for any person, in giving any information or making any application under or for the purposes of any provision of the Railways Act 1993, to make any statement which he knows to be false in a material particular, or recklessly to make any statement which is false in a material particular. If false or misleading information has been given and ORR’s decision would otherwise have been different, ORR’s directions or approval may be void as obtained on the faith of a fraud. That would mean that the access contract or amendment would itself be void.
Annex A: Section 17 process flow chart

1. **Step 1: Development**
   - Applicant seeks access contract from facility owner, but terms are not agreed (in whole or in part)
   - Informal discussions with ORR

2. **Step 2: Application**
   - Applicant applies to ORR under section 17 specifying the rights required, the proposed access contract and making representations
   - Proceed under section 17 Railways Act 1993
   - ORR sends copy of application to facility owner and invites its representations. ORR directs facility owner to identify all 'interested persons'

3. **Step 3: Consideration and consultation**
   - ORR invites representations from 'interested persons'
   - ORR sends facility owner's representations to applicant, and interested persons' representations to facility owner and applicant, and invites further representations
   - ORR undertakes wider consultation

4. **Step 4: Conclusions and directions**
   - ORR decides whether to grant section 17 application
     - **YES**
       - ORR directs facility owner to enter into access contract on terms and by date specified by it. ORR also publishes reasons for its decision
       - Access agreement signed unless applicant fails to sign within specified period, in which case facility owner is released from obligations
       - Copy of signed agreement submitted to ORR and placed on public register
     - **NO**
       - ORR publishes reasons for its decision
Annex B: Section 18 process flow chart

Step 1
Development

Applicant seeks access contract from facility owner on agreed terms
Informal discussions with ORR

Step 2
Application

Proceed under section 18 Railways Act 1993
Facility owner submits proposed access contract to ORR

ORR undertakes consultation

Step 3
Consideration and consultation

ORR decides whether to approve terms as submitted
YES
ORR directs facility owner to sign contract within specified period, without modifications
NO

ORR decides whether to direct facility owner to sign contract with modifications
YES
After consulting parties, ORR directs facility owner to sign contract within specified period, with ORR’s modifications
NO
Facility owner accepts ORR’s modifications

Access contract not signed

NO
Access agreement signed unless applicant fails to sign within specified period, in which case facility owner is released from obligations

YES
Operator may decide to make section 17 application

ORR publishes reasons for its decision

Copy of signed agreement submitted to ORR and placed on public register

Step 4
Conclusions and directions

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Facility owner and beneficiary discuss and agree terms for amendment of existing access contract

Proceed under section 22 Railways Act 1993

The parties jointly submit the proposed amendment informally to ORR in the form of a draft supplemental agreement

ORR undertakes consultation

ORR decides whether to invite formal submission of the supplemental agreement

Parties decide whether to make formal submission

Parties submit formally a signed supplemental agreement requesting approval under section 22

ORR decides whether to approve supplemental agreement

ORR publishes reasons for its decision

Copy of signed supplemental agreement submitted to ORR and placed on public register
Annex D: Section 22A process flow chart

1. **Development**
   - Applicant applies to ORR under section 22A specifying the additional rights required, the proposed supplemental agreement (containing the proposed amendment) and making representations.

2. **Application**
   - ORR sends copy of application to facility owner and invites its representations. ORR also directs facility owner to identify all 'interested persons'.

3. **Consideration and consultation**
   - ORR invites representations from 'interested persons'.

4. **Conclusions and directions**
   - ORR decides whether to grant section 22A application.
     - **YES**: ORR decides whether to grant section 22A application on terms and by date specified by it. ORR also publishes reasons for its decision.
     - **NO**: ORR publishes reasons for its decision.

   - **Parties enter into supplemental agreement to amend the existing access agreement**

   - **Copy of signed supplemental agreement submitted to ORR and placed on public register**

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Steps:
- **Step 1**: Development
- **Step 2**: Application
- **Step 3**: Consideration and consultation
- **Step 4**: Conclusions and directions

Actions:
- Informal discussions with ORR
- ORR sends copy of supplemental agreement to ORR and placed on public register
- ORR directs facility owner and applicant to make amendments to existing access agreement on terms and by date specified by it.