



# Investing in the railway: securing access

January 2018

## Introduction

1. This guidance module is about how investors can secure access to the national rail network.
2. Track Access Options (TAOs) have been available to secure future access rights for several years. A TAO gives the TAO holder the right to enter into future contracts to access facilities such as tracks, stations and light maintenance depots. TAOs effectively reserve capacity for the holder. TAOs were used to support investment in Crossrail, ensuring the services envisaged in the Crossrail business case would have access rights to use Network Rail infrastructure.
3. TAOs remain available, although they are probably only relevant for the largest schemes. There are alternative mechanisms by which investors can get the certainty they need. This module describes them and indicates where more information is available. This module is therefore published in place of our previous guidance on track access options.

## ORR's role

4. We regulate the rail industry's health and safety performance, we hold Network Rail<sup>1</sup> to account, and we ensure the rail industry is competitive and fair. This includes the approval of terms of train operators' access to the national rail network in their track access contracts. We operate within the framework set by domestic and European legislation. In particular, we have statutory duties under section 4 of the Railways Act 1993 to which we must have regard (our section 4 duties) when making access decisions. We also have other functions concerning charging frameworks, licensing, as well as health and safety law, which are covered elsewhere on our website<sup>2</sup>.
5. Organisations wishing to invest in the national rail network have access to the **Investment Framework**<sup>3</sup> which contains guidance on the process for investment, the role of respective parties, current financing options, recovery of costs through facility charges (where financing has been provided by Network Rail) and remedies for any issues that may arise. It also includes template agreements that can be used and refers to both fixed and emerging cost options. ORR is not a source of funds.

<sup>1</sup> and other infrastructure managers such as HS1.

<sup>2</sup> <http://orr.gov.uk/>

<sup>3</sup> Please note our policy is under review as part of PR18 – please contact ORR for more information.

6. We encourage investment in the rail network. We understand that if people invest in the railways they may need some assurance that their investment will be supported by appropriate access to the network for their train services. If you want to discuss the regulatory issues in more detail please contact us<sup>4</sup>. Those wishing to invest in the national rail network or rail assets connected to it should also contact Network Rail at an early stage<sup>5</sup>. The Department for Transport (DfT) is also producing general guidance on opportunities for involvement in rail enhancements.

## Investment

7. There are many potential investors wishing to invest in different rail related projects. They can either be from the private or public sector (such as Department for Transport or Transport Scotland), Local Enterprise Partnerships or a mix of these<sup>6</sup>. Investment in railway projects includes:

- Rolling stock.
- Freight terminals.
- Stations.
- Light maintenance depots.
- Enhancements to the existing infrastructure.
- New network.

A net total of £801m was invested by private companies during 2015-16, much of which was in rolling stock<sup>7</sup>.

8. We are aware that some investors are concerned that if they invest in new facilities, others may want to use any new capacity that is created. This reflects the nature of the rail network: we have an increasingly busy rail network managed by infrastructure managers, such as Network Rail, that are separate from investors and independent of the train operators. However, if an investment is made in new assets, investors may expect to have exclusive use of them for a period of time sufficient to justify that investment<sup>8</sup>.
9. This guidance module is aimed at all types of investors and what they can do in terms of securing access. There is a separate process for determining government spending on the railways<sup>9</sup>. However, there will still be occasions where this guidance is relevant to government investment. There are several ways that an investor might secure access rights. What is appropriate will depend on their priorities and the circumstances.

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<sup>4</sup> email: [track.access@orr.gsi.gov.uk](mailto:track.access@orr.gsi.gov.uk)

<sup>5</sup> See its website at: <http://archive.nr.co.uk/asp/1536.aspx>

<sup>6</sup> Different models are described in the Hansford Review *Unlocking rail investment – building confidence, reducing costs* June 2017.

<sup>7</sup> [http://orr.gov.uk/\\_data/assets/pdf\\_file/0005/22982/rail-finance-statistical-release-2015-16.pdf](http://orr.gov.uk/_data/assets/pdf_file/0005/22982/rail-finance-statistical-release-2015-16.pdf)

<sup>8</sup> Investors concerned about charges for the use of assets should refer to our investment framework.

<sup>9</sup> <http://orr.gov.uk/rail/economic-regulation/regulation-of-network-rail/price-controls/periodic-review-2018/publications/hloss-and-sofas-for-cp6> & <https://www.gov.uk/government/publications/railways-statement-of-funds-available-2017>

## Train services

### Track access contracts

10. If a train operator wants to access the railway network, it has to apply to us for a track access contract (TAC)<sup>10</sup> with Network Rail. The duration of basic framework agreements is up to five years<sup>11</sup>. But they can be longer and provide certainty if justified by the existence of commercial contracts or specialised investments or risks. This is explained in our guidance *Duration of Framework Agreements*<sup>12</sup>.
11. Starting up a new train operating business is resource intensive. It can require significant capital investment in rolling stock and facilities. All these issues are already relevant to ORR's consideration of whether to approve a TAC.

Example 1: In 2016, we issued directions in respect of a TAC for Hull Trains<sup>13</sup>. We found that Hull Trains demonstrated that it was making a substantial investment in new rolling-stock to the benefit of passengers that meant a contract length of ten years was warranted.

Example 2: In 2016 we made directions in respect of applications from five freight operating companies (FOCs) for track access contracts with Network Rail. Among the issues we considered was the duration of the TACs. The applicants explained the wide range of investments they were making. This included locomotives, rolling stock, land, technology and training. The level and type of investment involved was one factor, amongst many considerations, in ORR determining that the FOCs should have TACs with durations until 2026<sup>14</sup>.

### Freight customers

12. Freight customers are those businesses who use trains to move goods but do not operate train services themselves. They often make investments in facilities, rolling stock and other assets. Freight customer track access contracts (FCTACs) enable freight customers to hold their own track access rights. FCTACs provide flexibility for freight customers who wish to choose, and easily change, a freight operating company to haul their traffic. FCTACs are between the freight customer and Network Rail. The access rights specified can be drawn down and used by a FOC to operate services on behalf of the freight customer. Further information is available on our website<sup>15</sup>.
13. FCTACs could be a consideration for developers considering new freight sites and who regard themselves as freight customers. The sale of access rights on a firm basis might not be appropriate in every instance. In some cases the parties might wish to consider making access rights conditional on investment targets and project milestones being met. This would involve some tailoring of ORR's model contract.

<sup>10</sup> also known as a framework agreement, depending on the context.

<sup>11</sup> see reg 21 of The Railways (Access, Management and Licensing of Railway Undertakings) Regulations 2016

<sup>12</sup> <http://orr.gov.uk/rail/access-to-the-network/track-access/guidance>

<sup>13</sup> [http://orr.gov.uk/data/assets/pdf\\_file/0010/21241/s17-hull-trains-company-limited-tac-decision-letter.pdf](http://orr.gov.uk/data/assets/pdf_file/0010/21241/s17-hull-trains-company-limited-tac-decision-letter.pdf)

<sup>14</sup> <http://orr.gov.uk/rail/access-to-the-network/track-access/track-access-decisions>

<sup>15</sup> <http://orr.gov.uk/about-orr/who-we-work-with/industry-organisations/freight-customers>

Example 3: Crossrail Limited entered into a freight customer track access contract with Network Rail on 16 March 2012<sup>16</sup>. This was to facilitate the movement by rail of excavated material ('spoil moves') during the construction of the Crossrail network.

## Track access options (TAOs)

14. A TAO is a special type of TAC, as defined in section 17(6) of the Railways Act 1993 (the Act). With a TAO the infrastructure manager confers an option, exercisable by the holder or its agent, to use its network at a specific time in the future. TAOs can be held directly by train operators, or by other parties who can designate a train operator to draw the rights from the TAO into a TAC at the appropriate time to utilise them on behalf of the TAO holder.
15. We will generally assess TAOs in the same way that we consider TACs<sup>17</sup>. However, we will focus on two particular issues:
  - the impact of the TAO on the overall use and efficiency of enhanced network capacity including to what extent the TAO locks up capacity; and
  - whether the TAO is needed to support a specific and significant investment in the railway, such that it cannot be secured in other ways.
16. There is no model TAO contract. However, we expect that any TAO will cover the key issues from the relevant model TAC, and:
  - How the access rights can be exercised.
  - The broad envelope of access rights to be reserved.
  - Mechanisms to handle the surrender of unused access rights.
  - Mechanisms for handling requests to buy-back option rights by the infrastructure manager where a 'better use' for the reserved capacity is identified.
17. Our experience is that TAOs are most relevant for very large projects planned several years in advance. ORR has directed TAOs for Crossrail<sup>18</sup> and the East London Line<sup>19</sup>.

Example 4: In 2007 Network Rail and the Secretary of State for Transport applied for a track access option in respect of the Crossrail project. The proposed Crossrail Access Option was to reserve access rights to the Network Rail infrastructure once the Crossrail works were completed. ORR's directions were issued in July 2008. The TAO was subsequently novated (transferred) to Transport for London.

18. We have had enquiries about the suitability of TAOs for other projects. However, it often transpires that the projects are of a smaller scale and of a much shorter time horizon than appropriate for a TAO. Rights drawn down into TACs from a TAO are likely to be quantum only<sup>20</sup>, as is usual for most TACs issued today.

<sup>16</sup> [http://orr.gov.uk/data/assets/pdf\\_file/0008/3014/s18-crossrail-appform.pdf](http://orr.gov.uk/data/assets/pdf_file/0008/3014/s18-crossrail-appform.pdf) and [http://orr.gov.uk/data/assets/pdf\\_file/0011/3008/s18-crossrail-directed-contract.pdf](http://orr.gov.uk/data/assets/pdf_file/0011/3008/s18-crossrail-directed-contract.pdf)

<sup>17</sup> See our track access guidance at <http://www.orr.gov.uk/rail/access-to-the-network/track-access/guidance>

<sup>18</sup> <http://www.orr.gov.uk/rail/access-to-the-network/track-access/consolidated-agreements>

<sup>19</sup> [http://webarchive.nationalarchives.gov.uk/20140103212303/http://www.rail-reg.gov.uk/upload/pdf/s18-ELL\\_decllet.pdf](http://webarchive.nationalarchives.gov.uk/20140103212303/http://www.rail-reg.gov.uk/upload/pdf/s18-ELL_decllet.pdf)

<sup>20</sup> These rights give you access to a number of train slots between an origin and a destination, but not necessarily specific to any particular time slots.

19. We will consider TAO applications on their merits in the circumstances of each case. Due to their complicated nature and the number of issues to be resolved, we would expect parties to discuss plans for any TAOs with us well in advance. We would recommend at least three months for straightforward cases and considerably longer for larger or potentially contentious applications. You should allow plenty of time for negotiations with relevant infrastructure managers and consultation with affected parties.
20. TAOs can be novated to another party as set out in the terms of the TAO. For example the Crossrail TAO was novated from the DfT to Transport for London. However, TAOs, like other access contracts may not be sold or exchanged.

## Strategic Capacity

21. Network Rail produces a Strategic Capacity Statement which sets out unused capacity but which might be needed in future timetables. The associated code of practice<sup>21</sup> outlines the process which Network Rail uses to provide stakeholders with an indication of spare capacity that could be used for new services. Potential investors could seek to utilise this process but would need to discuss it with Network Rail.

## New or improved facilities

### Freight terminals

22. There are already hundreds of sites with connections to the rail network but there are opportunities for new rail facilities. The demands of the rail industry and its customers change over time and new investment needs to reflect this. Network Rail's website provides information on how it can help investors purchase or lease land already in railway ownership<sup>22</sup>. Please also refer to ORR's webpage on freight terminals and the permissions that are needed<sup>23</sup>.
23. In many cases improvements to the rail network are needed to support a new freight facility, particularly where capacity is constrained. This may take the form of new connections to the rail network ([see below](#)) and new or improved assets on the rail network, such as signalling. The investor may be expected to fund these improvements. However, in turn it may want some certainty that the enhanced capability is used to support train services using its new facility. Investors should therefore discuss their plans with the infrastructure manager at an early stage.
24. It may be that no ORR regulated agreements are needed; or the investor may prefer to consider a TAC, FCTAC or TAO. It might not be appropriate for Network Rail to unconditionally sell access rights that are dependent on future enhancements. In such cases the parties might wish to consider access rights being dependent on the investment being made and relevant milestones being met. This could be based on a model FCTAC or TAC but with elements of a TAO.

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<sup>21</sup> <https://cdn.networkrail.co.uk/wp-content/uploads/2017/11/Strategic-Capacity-Code-of-Practice.pdf>

<sup>22</sup> <https://www.networkrail.co.uk/industry-commercial-partners/rail-freight/freight-site-opportunities/>

<sup>23</sup> <http://orr.gov.uk/rail/access-to-the-network/track-access/how-to-apply-for-track-access/freight-terminals>

## Light maintenance depots

25. Several new light maintenance depots (LMD) have been constructed recently, often representing significant outlays of capital. New LMDs are often now associated with train manufacturers. These are not normally built on a speculative basis but rather to serve existing or known future traffic. New LMDs therefore tend to follow the securing of track access rights by the developer or a related train operator for its train services. Normally therefore there is no need for a dedicated access agreement other than the connection contract with the infrastructure manager ([see below](#)). LMD owners should however be prepared to enter into depot access agreements with beneficiaries<sup>24</sup> and to deal with access requests by other train operators.

## Stations

26. There are more than 2,500 stations on the national rail network. Most of them are owned by Network Rail but leased to, and operated by, franchised train operators. Network Rail has published guidance on investing in stations<sup>25</sup>. Southend Airport station is one example of private investment in a new station.

Example 5: London Southend Airport Company Limited (LSACL) decided to build a station at Southend airport. LSACL leases the land on which the station is built from Network Rail; the lease runs until 2144. All station build costs were met by LSACL and for the duration of the lease, all station operating costs fall to the station operator; including operation, maintenance, renewal and staffing costs. The station is operated by Stobart Rail Limited, an affiliate of LSACL.

Discussions with the DfT, the relevant franchised operator and Network Rail resulted in agreement that scheduled passenger train services would call at the new station. Changes were needed to the train operator's stopping patterns and the relevant train operator's TAC.

27. Station owners need to enter into station access contracts with beneficiaries<sup>26</sup>. These however flow from the agreed changes to stopping patterns.

## Developing stations

28. The Station Access Conditions (SACs) in their various forms are incorporated into Station Access Agreements. The SACs contain provisions for the direct involvement of developers at stations. These provisions give such investors contractual rights and obligations subject to a minimum level of investment<sup>27</sup>. In addition, a Station Investor that is proposing and sponsoring a Material Station Change must sign a deed, which binds them to the relevant provisions of the SACs. It is through this deed that a Station Investor accepts obligations and liabilities to other station access parties<sup>28</sup>, while at the same time acquiring commensurate rights. The deed also provides protection for the station access parties. A more detailed description of this process can be found in chapter 5 of our document *A revised contractual regime at stations – Final*

<sup>24</sup> <http://orr.gov.uk/rail/access-to-the-network/station-and-depot-access/depot-access>

<sup>25</sup> [Investment in stations: A guide for promoters and developers June 2017](#)

<sup>26</sup> [Criteria & procedures for the approval of station access agreements](#)

<sup>27</sup> Details at Network Rail's webpage: <https://cdn.networkrail.co.uk/wp-content/uploads/2016/11/Regulatory-Change-Station-Change-Threshold-Figures-2016-17.pdf>

<sup>28</sup> usually the station facility owner and any station access beneficiaries.

*conclusions*<sup>29</sup>. A number of station schemes have been successfully delivered using these contractual provisions.

## Connection to the national network

29. Connection contracts are agreements between the owner of a new facility and the infrastructure manager whose network is being connected to. This will be relevant to the new types of rail facility described above. These contracts set out the rights and obligations of the respective parties. They provide contractual certainty about how new connections to the national network are to be maintained and renewed.
30. We do not normally issue directions on connection contracts years in advance of them being needed, as might be the case with a TAO. There is little or no demand for this. The exact assets and associated ongoing costs are not always identified until construction is underway. However ORR does have a role in approving connection contracts and ensuring that the terms are fair and reasonable. Full details are set out in our guidance module *Connection Contracts*<sup>30</sup>.

## New network

31. The national rail network is well established. However, new network is still being developed. Notable current projects are Crossrail and HS2. HS1 and the Heathrow spur are other, earlier, examples of new network. There are also proposals for extra network at Heathrow Airport. Borders Railway is another example of a new network, although it now functions as part of Network Rail's national network.
32. Services on a new network may need to run on to existing rail network of another infrastructure manager. As construction could take some years and be resource intensive, investors will consider how best to get certainty about its future train services. The Crossrail project is where a TAO<sup>31</sup> was utilised but they are not always necessary.

Example 6: The High Speed Rail (London-West Midlands) Act 2017 became law on 23 February 2017. On 20 July 2017, the DfT updated its statutory guidance to ORR to, amongst other things, ask ORR to facilitate the future introduction of HS2 services on both new and existing infrastructure. DfT then wrote to us to ask how we would approach the track access issues arising from this.

ORR worked closely with the DfT to understand its concerns around future access and how these might be addressed. On 21 September 2017 ORR started an industry consultation on the various access issues arising from the introduction of HS2 services<sup>32</sup>. A way forward, rather than a TAO, could be a combination of extended TACs and a regulatory statement setting out our approach to HS2 matters.

<sup>29</sup> <http://webarchive.nationalarchives.gov.uk/20130514071228/http://www.rail-reg.gov.uk/upload/pdf/stations-contract-reform-may-2013.pdf> and also see the Network Rail document *Investment in Stations* <https://www.networkrail.co.uk/wp-content/uploads/2017/01/Investment-in-Stations-2017.pdf>

<sup>30</sup> <http://orr.gov.uk/rail/access-to-the-network/track-access/guidance>

<sup>31</sup> <http://webarchive.nationalarchives.gov.uk/20110906155545/http://www.rail-reg.gov.uk/server/show/ConWebDoc.9362>

<sup>32</sup> <http://orr.gov.uk/rail/consultations/closed-consultations/policy-consultations/consultation-on-orrs-proposed-approach-to-track-access-and-the-future-operation-of-high-speed-2-hs2>



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