

27 March 2019

To consultation respondents

Dear Stakeholder,

Consultation on ORR's guidance on the Economic Equilibrium Test

1. In December 2018 we published a [stakeholder consultation](#) on our proposed guidance on the Economic Equilibrium Test (EE Test)¹. We published this consultation alongside a consultation on implementing infrastructure cost charges for open access operators (OAOs) in control period 6 (CP6).

2. We thank the 9 organisations who responded with comments regarding the EE Test guidance. We list these at Annex A, and their responses have been published in full on our website.

3. This document summarises the points raised by those who responded to our consultation and sets out our response and any subsequent changes to our guidance.

Substantial Modification

4. Four respondents commented on our proposed definition of substantial modification. Arriva UK Trains and the Rail Delivery Group (RDG) wanted a narrower definition, for example so that in some circumstances adding an individual additional service or station stop would not be judged as a substantial modification. The Department for Transport (DfT) and London North Eastern Railway (LNER) wanted the definition broadened, for example to also bring in changes to journey times. The respondents who commented on the definition agreed that it should be consistent with the substantial modification definition used for the Infrastructure Cost Charge (ICC).

5. The proposed definition covers all changes to access rights in Schedule 5 of track access contracts which might affect the economic equilibrium of a Public Service Contract (PSC). We consider that a narrower definition could miss some seemingly minor changes to access rights that might still impact the economic equilibrium of a PSC.

6. The EE Test cannot be applied where there is no application for a change to access rights. For example, changes to journey times can occur from timetable to timetable

¹ Based on Commission Implementing Regulation (EU) 2018/1795 of 20 November 2018 laying down procedure and criteria for the application of the economic equilibrium test pursuant to Article 11 of Directive 2012/34/EU of the European Parliament and of the Council.

through the Network Code Part D timetabling process and do not require ORR to approve new or amended access rights. For this reason, we consider that we could not broaden the definition to include elements such as journey times that are not included in track access contracts.

7. Therefore, having considered the points raised, we think it is appropriate to keep the proposed definition of substantial modification. This is consistent with the ICC substantial modification definition.

Calculation Clarity

8. A number of respondents asked us to provide further clarity about how we will assess the impact of open access on the profitability on the PSC and the net cost to the relevant competent authority awarding the PSC, e.g. by setting pre-determined thresholds. They also asked for clarity on how we will assess wider benefits.

9. We understand stakeholders' desire for greater clarity. However, the EE Test requires a new aspect to assessing applications, with the circumstances of individual applications likely to be very case specific. As such, we consider that our approach is best developed over time by building a body of casework. This is consistent with the approach we have taken to the NPA test where our approach has developed over a number of years.

10. We stated in our consultation that in our analysis we would benchmark our assessment of the financial sustainability of the PSC with reference to the financial performance of similar PSCs. Typically, we would expect to take account of factors such as whether the new services would cause the PSC operator to be unable to meet its franchise commitments, seek to re-negotiate its contract or seek significant additional funding as part of our assessment.

11. Overall, we consider that we have set criteria for assessing the impact on the net cost to the competent authority which provide as much clarity as is practicable at this stage. This does not involve predetermined thresholds but our assessment will take account of the authority's total railway funding budget. We will discuss our approach for each application with the parties, and applicants can seek discussions with us in advance of making a notification.

12. In terms of wider benefits, when deciding on the EE Test, we will take account of a range of benefits including consumer benefits arising from greater competition and enhanced services. We may also take account of other benefits of improved transport services such as user benefits and other external benefits.



Process timescales

13. Arriva asked for a reduction in the proposed lead time between advising ORR of a proposed new rail passenger service and the access rights coming into force accepting, however, that this may have needed further thought in order to comply with the Regulation.

14. We note that the notification period of at least 18 months is prescribed in the legislation², and shortening the period is not an option.

Process during competitive tender of a PSC

15. Both DfT and Network Rail requested further guidance about how the EE Test would be carried out during the competitive tender of a PSC.

16. For applications during the competitive tender of a relevant PSC, ORR can either suspend consideration or, where the EE Test on the existing PSC demonstrates that access can be granted, grant temporary access. DfT considered it likely that suspending consideration of open access applications during a relevant PSC tender would be appropriate. We note this view, however we will decide whether to suspend consideration or consider temporary access following discussions with the applicant and relevant parties. Decisions will then be made on a case by case basis.

17. DfT requested that we clarify in the guidance that temporary access could only be granted following an NPA test being applied. We have clarified in paragraph 5.27 of the guidance that any decision on temporary access would be taken within our existing regime, which includes the NPA test.

Information requirements

18. Network Rail requested further guidance on the type of information and the level of detail ORR will seek in completing the EE Test, particularly in regard to assessment of impacts on capacity use. The type of information we will require is the same as we would normally expect from Network Rail when considering applications under the current process, and therefore we do not plan any further guidance on this.

19. Arriva requested that the guidance includes that ORR will require from the competent authority and PSC operator information on the mix of Public Service Obligation (PSO) and commercial services operated by the affected PSC operator, in order for ORR to test whether the franchise is a PSC compliant with EU Regulation 1370/2007. First Rail also raised this issue.

20. The Implementing Regulation grants that access to infrastructure may be denied where the economic equilibrium of a PSC would be compromised. A PSC can comprise a

² The Railways (Access, Management and Licensing of Railway Undertakings) (Amendment) Regulations 2019 – Schedule 6, Capacity rights regulation 9 (a) (ii).

mix of PSO services and commercial services; the EE Test covers the impact on the whole of the PSC and does not differentiate between impacts on PSO services and commercial services within a PSC. Further, ORR does not have jurisdiction to investigate alleged infringements of EU legislation by government departments and has no role in judging whether PSCs are compliant with EU Regulation 1370/2007.

21. The EE Test guidance explains that we can request from the competent authority or PSC operator any information deemed necessary for the assessment of the EE Test. We think it is unlikely that information on the mix of PSO and commercial services operated under the PSC will be required in carrying out the EE Test. We do not therefore intend to update the guidance to refer to this.

22. LNER advised that information shared by the applicant in terms of pricing and marketing strategies, and ticketing arrangements, could be different from that eventually implemented by the applicant. We agree with this point, and as with our current process when carrying out the NPA test, we will consider the plausibility of any business plans submitted. We will not add a specific reference to this in the EE Test guidance, as it is already part of our wider economic assessment approach.

Commercial services operated by the Public Service Contract operator

23. Arriva felt that ORR had equated open access services with open access operators, and overlooked the ability of the EE Test to be carried out on commercial services provided by the PSC operator.

24. We have, for brevity, referred to open access operators throughout the guidance. The EE Test can also be applied to commercial services provided by the PSC operator that are not provided under a PSC. Thus, any proposed commercial service operated by a PSC operator outside of a PSC must follow the notification timescales within the guidance, and can be subject to the EE Test if requested by a relevant party. We have included some additional text in paragraph 3.2 of the guidance clarifying this point.

Impact on open access operators

25. Grand Union Trains requested that the EE Test also include an assessment of the impact on existing and future open access operators.

26. The EE Test legislation only considers the impact on a PSC, and does not cover any impact on open access operators. An assessment of the impact on open access operators of any new rail passenger service will continue to be covered by the NPA test.

Reconsideration of decision

27. LNER requested clarity on how ORR will ensure that it is not the same individuals or team who undertake a reconsideration of the original decision when this is requested.



28. Decisions on open access applications, including when subject to the EE Test, will continue to be made either by ORR officials or the ORR Board, as appropriate. Where a reconsideration has been requested, ORR will put in place safeguards to ensure fairness of decision making.

Other issues

29. Following the close of our consultation, The Railways (Access, Management and Licensing of Railway Undertakings) (Amendment) Regulations 2019³ implemented in UK law the provisions of the Market Pillar Directive, including the provisions on the EE Test as applied to domestic services. A number of the amendments made, including the EE Test, will only apply until 31 December 2020. We have carefully considered the impacts of this time limitation on the EE Test.

30. As a result, after 31 December 2020, we cannot carry out the EE Test, or make decisions based on the result of an EE Test, for domestic services. We will continue to follow the process set out in the guidance up until 31 December 2020 for all notifications. Following 31 December 2020 we will revert to our previous processes. This means that we will only consider the NPA test when making a decision after this point. We may, however, use any relevant information we have gathered in the EE Test process up to that point in assisting us in balancing our Statutory Duties as part of the NPA test in order to reach our decision. We have updated the executive summary of the guidance for this point.

31. We expect all track access applications made in advance of 31 December 2020 to follow the notification timescales set out in the guidance.

32. Applicants unsure of how this will affect them should seek to discuss this with us in advance of making a notification.

33. The final guidance has been published on [our website](#).

Yours sincerely



Catherine Williams

³ The 2019 Regulations came into force on 11th February 2019.

Annex A: Respondents to the consultation

1. Arriva UK Trains
2. Department for Transport
3. First Rail
4. Grand Union Trains
5. Heritage Railway Association
6. London North Eastern Railway
7. Network Rail
8. Rail Delivery Group
9. Transport for London