



# Guidance on the Economic Equilibrium Test

March 2019

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# 1. Executive Summary

- 1.1 EU legislation has focused on opening up the European rail market and promoting competition in passenger rail markets. There are a number of protections within EU legislation to support this, including an overarching requirement that access to the network is granted in a fair and transparent manner. However, EU legislation also sets out limited circumstances where access to infrastructure can be denied. This includes the circumstance where there is evidence that there would be a substantial negative impact on the economic equilibrium of a public service contract (“PSC”), in the UK usually a franchise or concession agreement, resulting from a new open access service.
- 1.2 A new EU Implementing Regulation which applies from 1 January 2019 sets out how this limitation should be approached. It describes an “economic equilibrium test” (EE Test) which ORR, as independent regulator, must carry out in reaching a decision on whether to approve an open access application.
- 1.3 We already have a well-developed approach to assessing applications from open access operators. This approach takes into account a range of factors in reaching our decision on whether access should be granted. In principle, we consider that open access can bring benefits to consumers through competition. However, in line with our statutory duties, we must also consider the impact on the Secretary of State’s funds. We therefore balance these aspects when reaching our decision on whether to approve access. We do this in part through carrying out the “not primarily abstractive test” (NPA Test) which compares the revenue generated from a new service with the level of revenue it abstracts from incumbent operators. We also consider the absolute level of abstraction resulting from a new service.
- 1.4 We consider that this approach is consistent with the principles set out in the Implementing Regulation. However, our existing approach needs to be adapted to address the requirement set out in the Implementing Regulation to explicitly consider the impact of the new service on the profitability of services operated under the PSC and on the net cost for the competent authority awarding the PSC. This is described further below and in chapter 4.

## Guidance on the EE Test

- 1.5 The EE Test may only be triggered where there is an entirely new open access service or where there is a ‘substantial modification’ of an existing open access service, and when the EE Test is requested by a ‘relevant party’ (competent authority, infrastructure manager or affected PSC operator). We consider ‘substantial modification’ to mean any increase in service frequency, number of stops or

additional station stops. Further information on this is set out in chapter 3 of this guidance.

- 1.6 Where an EE Test is not requested, we will continue to carry out our assessment as we do currently. We will continue to take into account the abstraction of a new service in this assessment.
- 1.7 We set out in chapter 4 how we will approach the EE Test. We will carry out the NPA Test as we do currently for all open access applications, noting that we are also reviewing how we apply the NPA Test in light of our open access [infrastructure cost charge implementation](#). However, if requested we will now also assess whether the economic equilibrium of a PSC would be compromised by the proposed new service, meaning that this service would have a substantial negative impact on the profitability of services operated under the PSC or the net cost for the competent authority. We will not apply predetermined thresholds strictly or in isolation. As part of this assessment, we will also consider wider benefits from the application that cannot be quantified. We will balance all these factors in reaching our decision on whether the economic equilibrium of a PSC would be compromised.
- 1.8 Having balanced all the factors, if our assessment suggests the economic equilibrium of a PSC will be compromised, we may approve the application with modifications, approve the application only under conditions or deny it. We will, if appropriate, indicate possible changes to the proposed new service that could allow access to be granted and may also issue recommendations to the competent authority in relation to the PSC.
- 1.9 The EE Test may only be one of several factors we consider before approving an access application. For example, we also have to consider the capacity of the network and any safety implications. The assessment of the EE Test will therefore take place at the same time as our wider consideration of a track access application within the context of the existing track access regime. Our [guidance](#) for assessing track access applications still applies.
- 1.10 The open access applicant must notify the infrastructure manager and ORR of the proposed new service at least 18 months ahead of the relevant timetable start date. We will publish the application on our website and notify the relevant parties as quickly as possible and within 10 days at the latest. A relevant party can then request the EE Test within 1 month. We must reach a decision within 6 weeks of receiving all relevant information and in any event before the Priority Date for the relevant timetable (i.e. 40 weeks before the start of the timetable). Chapter 5 of this guidance explains the procedure and timescales for administering the EE Test.

- 1.11 The assessment process will be carried out on a case-by-case basis, based on the criteria explained in this document and may develop over time and through experience. However, if there were to be a significant amendment to the criteria used, or to our interpretation of when the economic equilibrium will be considered as compromised, we will carry out a consultation of relevant industry stakeholders on revisions to this guidance, and publish an updated version accordingly.
- 1.12 The EE Test may be carried out on applications for services starting from the Principal Change Date in December 2020 onwards. Applications for services starting before that date will not be subject to the EE Test. This guidance document was finalised following consultation with stakeholders in December 2018 and January 2019.

## Information about reduced application of the EE Test

The Railways (Access, Management and Licensing of Railway Undertakings) (Amendment) Regulations 2019 that implement in UK law the provisions of the Market Pillar Directive, including the provisions on the EE Test as applied to domestic services came into force on 11 February 2019. A number of the amendments made, including the EE Test, only apply until 31 December 2020. As a result, after 31 December 2020 we cannot carry out the EE Test, or make decisions based on the EE Test, for domestic services.

We will continue to follow the process set out in this guidance up until 31 December 2020 for all notifications. Following 31 December 2020 we will revert to our previous processes, using only the NPA Test. 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 a track access decision.

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

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

## 2. Context

### Implementing Regulation

- 2.1 The Commission Implementing Regulation (EU) 2018/1795 of 20 November 2018 laying down the procedure and criteria for the application of the economic equilibrium test pursuant to Article 11 of Directive 2012/34/EU (as amended)<sup>1</sup> was published in the Official Journal of the European Union on 21 November 2018 and applies from 1 January 2019, in time for the working timetable starting on 12 December 2020. The Railways (Access, Management and Licensing of Railway Undertakings) Regulations 2016 and the Railways (Access, Management and Licensing of Railway Undertakings (Amendment) Regulations 2019 – hereafter the Regulations - implement Directive 2012/34/EU and its revision in domestic law.
- 2.2 The Implementing Regulation grants that access to infrastructure may be denied where the economic equilibrium of a PSC would be compromised by a new open access service.
- 2.3 The Implementing Regulation provides that at the request of a relevant party (as listed in paragraph 3.5) the regulatory body, the Office of Rail and Road (ORR) in the UK, is responsible for assessing whether the new service would compromise the economic equilibrium of a PSC.
- 2.4 This guidance document explains how we intend to assess open access applications and the procedure that will apply.

### Existing track access regime

- 2.5 The assessment of the EE Test will take place at the same time as our wider consideration of a track access application within the context of the existing track access regime.
- 2.6 The existing regime requires ORR to carry out an assessment of access applications prior to approving track access contracts under the Railways Act 1993, for passenger train services using the national railway network, except the High Speed 1 (HS1) network that is governed by different legislation. Our scrutiny of these applications is based on published [guidance](#) which reflects our statutory duties. It includes consideration of a range of issues including, for example, economic and efficient use of capacity; and operational performance.

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<sup>1</sup> The so called 'Recast Directive', recently amended as part of the Fourth Railway Package by Directive (EU) 2016/2370 (the 'Market Pillar Directive').

- 2.7 The Regulations provide that before entering into a track access agreement for the HS1 network, the infrastructure manager and the applicant must obtain the approval of ORR. Here, again, our decision on approval must be consistent with our statutory duties.
- 2.8 Our existing regime seeks to balance the benefits that open access operators can bring through increased competition against the potential costs to the incumbent operators and to the Secretary of State through lower franchise values. As part of assessing this we carry out the NPA Test. We have separately set out [guidance on the NPA Test](#).
- 2.9 If a new service can demonstrate that the loss of revenue to the incumbent (abstracted revenue) is offset by benefits to consumers then we would expect to approve an application, subject to assessing other factors such as the capacity on the network for that service.
- 2.10 The expression ‘not primarily abstractive’ is not intended to imply a rigid benchmark. Such a test would be unrealistic given the uncertainty about forecasting future revenue effects and this test alone would not allow all relevant factors to be taken into consideration. Instead we consider whether the overall effect of approving the access application is likely to attract sufficient new customers/revenue to rail such that abstraction from other operators could not be considered the primary impact of the proposal.
- 2.11 The EE Test does not replace this existing regime, but sits alongside it with a large degree of overlap especially in terms of consideration of the wider benefits associated with a new service. However, the EE Test requires us to explicitly consider the effect on the profitability of services operated under the PSC. This element is different, but linked, to our existing regime which focuses on the revenue gained by the new entrant and the source of that revenue.
- 2.12 All open access applications are subject to the NPA Test. These services will also be subject to the EE Test if requested by a relevant party. As there is overlap between the information required and elements of the analysis for both tests, we will use the results from our NPA Test analysis to inform elements of the EE Test.

## International passenger services

- 2.13 We have previously issued guidance on the assessment of new international passenger services. This included a version of the EE Test. This new guidance now replaces the guidance on the assessment of new international passenger services.<sup>2</sup>
- 2.14 That previous guidance included a ‘principal purpose’ test to assess whether the service was primarily an international passenger service, before the EE Test would be undertaken. As the EE Test now applies to all open access applications, whether they are international or domestic, the principal purpose test is no longer relevant.
- 2.15 The domestic elements of international services are subject to the NPA Test, and if an open access application it will also be subject to the EE Test if requested.

## Northern Ireland

- 2.16 ORR has a number of economic regulatory functions relating to rail in Northern Ireland. This Implementing Regulation also applies to open access services in Northern Ireland. If ORR were to receive such an application, we would follow this guidance but would make relevant adjustments to our process on a case by case basis, and would act in line with our published [guidance on Northern Ireland Regulations](#).

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<sup>2</sup> ORR *Guidance on the Assessment of New International Passenger Services*, June 2009.



## 3. Conditions for the Economic Equilibrium Test to apply

### Applications to which the Economic Equilibrium Test could apply

3.1 The Implementing Regulation sets out that the EE Test can be applied to ‘new rail passenger services’ which it defines as follows:

“A rail passenger service designed to be operated as a regular time-tabled service, that is either entirely new, or that implies a substantial modification of an existing rail passenger service, in particular in terms of increased frequencies of services or increased number of stops, and which is not provided under a public service contract”.<sup>3</sup>

3.2 This means that the EE Test can be applied to access applications from new open access operators and applications for substantial modifications from existing open access operators. Open access operators are those who operate services purely on a commercial basis, i.e. not under a PSC, usually in UK either a franchise or a concession agreement. The EE Test can also be applied to commercial services provided by the PSC operator that are not provided under a PSC. Any proposed commercial service operated by a PSC operator outside of a PSC must follow the notification timescales within this guidance, and can be subject to the EE Test if requested by a relevant party. For clarity in this guidance, we have referred throughout to ‘new rail passenger services’ as open access services.

3.3 It is for the ORR to assess whether a proposed modification of an open access service is ‘substantial’. Our view is that any increase in service frequency, number of stops or additional station stops should be considered a substantial modification.

3.4 Generally, applications to extend the duration of existing access rights will not be considered as a new service or a ‘substantial’ modification and will therefore not be subject to the EE Test. Our usual approach is that there is a presumption in favour of the continuation of access rights at the end of a track access contract, except where we have said otherwise. Based on this, we do not generally carry out an NPA Test when considering extending the duration of access rights, and we will adopt this approach also for the EE Test.

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<sup>3</sup> Article 3 (1) of the Implementing Regulation.

## Request for an Economic Equilibrium Test

3.5 ORR will only carry out an EE Test when requested by any of the following parties:

- The competent authority or competent authorities that awarded the PSC;
- Any other interested competent authority with the right to limit access under Article 11 of Directive 2012/34/EU (as amended);
- The infrastructure manager; or
- The PSC operator.

These entities are referred to in this document as the 'relevant parties'.

3.6 The request for an EE Test must be submitted to ORR within one month from the receipt of information regarding the proposed service. We set out more detail on this process in chapter 5 of this guidance.

3.7 The request must include substantiation that the economic equilibrium of the PSC risks being compromised by the proposed new service. We set out more detail on the information requirements in chapter 5 of this guidance.

## 4. Approach to assessing the impact on economic equilibrium

- 4.1 Article 10 of the Implementing Regulation describes the contents of the EE Test and the assessment criteria. It states that the economic equilibrium shall be considered as compromised where the new service would have a **substantial negative impact** on:
- the profitability of services operated under the PSC; and/ or
  - the net cost for the competent authority awarding the PSC.
- 4.2 The Implementing Regulation states that “predetermined thresholds or specific criteria may be applied but not strictly or in isolation from other criteria” and paragraph 5 states that the regulatory body shall also assess other factors including “the net benefits to customers arising from the new rail passenger service in the short and medium term”. The recitals also say that “the regulatory body’s decision should include an assessment of net benefits to customers arising from the new rail passenger service”. Our policy is therefore that we will weigh up a number of factors in reaching a decision on whether the economic equilibrium is compromised. These are described below. As we do currently with all access applications, we will consider each application on a case by case basis.
- 4.3 We consider that this policy is consistent with the stated intention of the Regulation in recital 3 to “balance the legitimate interests of operators performing a PSC and competent authorities, on the one hand, with the overarching objectives of completing the single European railway area and reaping its wider social benefits, on the other hand. The economic equilibrium test should achieve a balance between those competing interests”.
- 4.4 We will therefore consider four key elements when we carry out the EE Test, consistent with Article 10 of the Implementing Regulation;
- Impact on profitability of services operated under the PSC;
  - Impact on the net cost for the competent authority awarding the PSC;
  - NPA test – which we consider represents a measure of the wider benefits to consumers; and
  - Other factors set out in Article 10 including the impact on performance and quality of rail services.

## Profitability of services operated under the PSC

- 4.5 Our assessment of the profitability of services operated under the PSC will reflect the basis on which the PSC was awarded to the PSC operator, including any revenue risk sharing agreements between the PSC operator and the competent authority.
- 4.6 Our analysis will consider a range of measures of financial performance. These could include accounting measures of profitability (such as operating margins) or cash flow based approaches. It is likely that we will take more than one of the available measures into account, depending on the nature of the PSC in question. Our assessment will take into account all relevant costs and revenues including any direct premium or subsidy payments.
- 4.7 We will consider the impact of the proposed new service on the profitability of services operated under the PSC over the entire duration of the PSC.
- 4.8 We will as far as possible consider both the PSC operator's expectations of financial performance at the time it bids for the PSC as well actual performance.
- 4.9 On the **cost** side, we will consider all relevant input costs including staffing, fuel costs, etc.
- 4.10 On the **revenue** side, we will consider the provision of passenger services across the operations of the PSC as a whole, i.e. the whole franchise, but not as far as the owning group. In forecasting the impact of the proposed new service on the PSC operator's revenues we will consider the extent to which the impact of new proposed services can be mitigated by competitive pricing responses by the PSC operator.
- 4.11 The Implementing Regulation refers to the concept of a 'substantial negative impact' on the profitability of services operated under the PSC. Consistent with the text of the Regulation, we do not intend to apply strictly or in isolation set pre-determined decrements to profitability that would constitute a 'substantial impact'. We will, rather, consider each case on its merits. We will benchmark our results with reference to the rates of return earned by the PSC operator, both at the time we carry out the test and in its franchise bid. We will also consider the returns earned by other PSC operators.

## Net cost for the competent authority awarding the PSC

- 4.12 We will not set a pre-set threshold as to what is a substantial negative impact on the net cost for the competent authority awarding the PSC, although the magnitude of any change in the net cost of the PSC relative to its total value will be a key consideration. We will also consider the impact with reference to competent

authorities' total budgets. Our assessment of the net financial impact on the PSC will include the impact the new services will have on:

- changes in the PSC operator's operating costs and revenues;
- the level of financial effects generated from network benefits e.g. improved regional service connections between operators;
- the likely scope for competitive response by the PSC operator;
- the impact of any relevant investments by the PSC operator or competent authority;
- the value of any existing exclusive rights; and
- Any protections from risks arising from competitive entry such as revenue risk.

## Net benefits to customers

4.13 We will include an analysis of the wider net benefits to customers arising from the new services as part of our assessment, for example lower fares, reduced journey times, increased frequencies etc. Our assessment of wider benefits is likely to be informed by the outcome of the NPA Test (which we will conduct alongside the EE Test) and we may also draw on other sources for assessing wider benefits such as DfT's Webtag<sup>4</sup>.

4.14 We will carefully balance the results of our assessment of the impact of the new services on the PSC and the net benefits to customers in reaching a decision on the EE Test. This balance will reflect the benefits of increased competition against potential adverse impacts on the economic equilibrium of the PSC. In this regard the EE Test may be one of a number of criteria we will take into account when assessing open access applications.

## Interaction with the NPA Test

4.15 As described above, we will continue to apply the NPA Test as part of our decision making. We note that we are also reviewing how we apply the NPA Test for open access operators who will pay an infrastructure cost charge (ICC) as part of our [open access ICC implementation](#). Furthermore, because the NPA Test involves forecasting the amount of revenue the new services are likely to generate and

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<sup>4</sup> Webtag is the DfT's web-based transport analysis guidance; the Transport Scotland equivalent is Scot-Tag, WelTag in Wales.

abstract from existing services, we will use the results of the NPA Test in our EE Test to provide information on:

- revenues;
- operating costs; and
- customer benefits.

4.16 We may augment this analysis using information listed in the Information Requirements in chapter 5 where necessary, for example the PSC operator business case. We may also request further information from all relevant parties, as necessary.

4.17 Once we consider we have sufficient information about changes in the PSC operator's revenues and operating costs as a result of the new services we will assess the impact on the profitability, net cost for the competent authority awarding the PSC and net benefits to customers as described above, in paragraphs 4.5-4.14.

## 5. Procedure

### Procedure and timescales

- 5.1 The Implementing Regulation sets out the procedure and timescales that apply to open access applications. We have described this process below. A summary flowchart is included at Annex A of this guidance.
- 5.2 The key change to timescales is that an open access applicant must give at least 18 months' notice of its proposals.

#### Open access notification form, 'Form OA'

- 5.3 When intending to apply for an open access service, the applicant must submit a completed Form OA to ORR and the infrastructure manager, no less than 18 months before the start of the working timetable to which the application relates. Form OA is available on [our website](#) and is also attached as Annex B to this guidance.
- 5.4 Information to be submitted in the Form OA includes:
- The applicant's name, address and contact information;
  - The planned start date of the services;
  - Details of the applicant's licence and safety certificate or indication of the point reached in obtaining them;
  - Details of the route including departure and destination stations and all intermediate stops;
  - Indicative timings and frequency including proposed departure and arrival times; and
  - Indicative information about the intended rolling stock.
- 5.5 If the Form OA is incomplete, we will notify the applicant that incomplete requests will not be considered and will give the applicant the possibility to complete the form within 10 working days.
- 5.6 On receiving a complete Form OA we will publish it on the [current applications page](#) of our website. We will do this as quickly as possible and within 10 days at the latest. We will also notify the relevant parties, listed in paragraph 3.5, of receipt of the application.

## Request for the Economic Equilibrium Test

- 5.7 The relevant parties listed in paragraph 3.5 may request ORR carry out the EE Test. Any request must be received within one month of ORR's publication of the Form OA, and should be sent to [track.access@orr.gov.uk](mailto:track.access@orr.gov.uk).
- 5.8 The entity requesting the EE Test must provide the details set out in paragraph 5.18. In particular, any request should include substantiation that the economic equilibrium of the PSC risks being compromised by the open access service.
- 5.9 If no request for an EE Test is received within one month, the applicant should proceed to submit its access application to ORR in accordance with published [guidance](#), and ORR will assess the application in the usual manner without an EE Test.

## Additional information and track access application

- 5.10 Within one month of receiving a request to undertake the EE Test, we may request further information from the parties, including from the entity requesting the EE Test, other relevant parties, and the applicant. We may request further information at a later date if the information provided is insufficient or incomplete. We will set reasonable deadlines for the provision of information. Details on the type of information we may request from the applicant and relevant parties are set out in paragraphs 5.16 to 5.22 below.
- 5.11 At this stage we will also request that the applicant submits its access application to ORR in accordance with our published [guidance](#). In particular, we will request that the applicant ensures that any relevant consultation is carried out, and submits a Form P and draft contract to us in the usual manner. We may set a reasonable deadline for this where necessary for the prompt completion of the EE Test.

## Incomplete information

- 5.12 The Implementing Regulation requires ORR to reach a decision within 6 weeks of the receipt of all relevant information, and in any event before the relevant Priority Date ('D-40') for the timetable during which services will start. Six weeks before ORR's deadline for reaching a decision, if:
- the applicant has provided incomplete information, we will perform the EE Test on the basis of the available information, or if we consider the information is insufficient to perform the test, we will reject the application;
  - the entity requesting the EE Test has provided incomplete information, we will perform the EE Test on the basis of the available information, or if we consider the information is insufficient to perform the test, we will reject the request to perform the EE Test; or



- the PSC operator is not the requesting entity, and it has provided incomplete information, we will perform the EE Test on the basis of the available information, or if we consider the information provided is insufficient to perform the test, we will assume that the service does not compromise the economic equilibrium of the PSC.

### **Result of the economic equilibrium test**

5.13 We envisage that the EE Test and NPA Test will be carried out at the same time as our wider consideration of a track access application. The results of these tests will be included in our decision letter on the track access application in question. This will be sent to all relevant parties and published on the [decisions page](#) of our website.

5.14 Where the open access service fails the EE Test, as part of the decision letter we will, if appropriate, suggest possible changes to the service, such as modification of frequencies, paths, intermediate stops which would lead to the service passing the Test. We may also include recommendations to the competent authorities concerning other changes not related to the open access service that would ensure that the conditions for granting the right of access are met.

5.15 Where appropriate, before taking the decision that the open access service fails the EE Test, we may give the applicant the opportunity to adjust its plan so that it would not fail the Test.

## **Information requirements**

5.16 The entity requesting the EE Test shall provide the information listed under paragraph 5.18 with its request. We may request further information from the competent authority, PSC operator, applicant and infrastructure manager necessary to undertake the EE Test. Typical examples of the information required are detailed below.

5.17 All information requested should be provided in electronic format and within the timescales as set out above.

### **Requesting entity**

5.18 The entity requesting the EE Test shall provide the following information:

- (i) the requesting entity's name, address, legal entity;
- (ii) contact information of the person responsible for queries;
- (iii) substantiation that the economic equilibrium of the contract risks being compromised by the open access service; and

(iv) if the requesting entity is a competent authority or the PSC operator, a copy of the PSC.

### **Competent authority**

5.19 ORR may request from the competent authority any necessary information, including:

- (i) relevant traffic, demand and revenue forecasts, including forecast methodology; and
- (ii) where appropriate, the methodology and data used to calculate the net financial effect in the case of a direct award.

### **PSC operator**

5.20 ORR may request from the PSC operator any necessary information, including:

- (i) a copy of the PSC, if not provided under 5.18 (iv) above;
- (ii) the PSC's business plan;
- (iii) relevant traffic, demand and revenue forecasts, including forecast methodology;
- (iv) information on revenues and profit margins;
- (v) timetable information for the services, including departure times, intermediate stops, arrival times and connections;
- (vi) estimated elasticities of the services (e.g. price elasticity, elasticity with respect to quality characteristics of the services); and
- (vii) cost of capital and operating costs for services provided under the PSC, as well as variations in costs and demand induced by the open access service.

### **The applicant**

5.21 ORR may request any necessary information from the applicant, including information concerning its plans for operating the open access service, such as its:

- (i) business plan;
- (ii) forecast of passenger traffic and revenues, including forecast methodology;
- (iii) pricing strategies;
- (iv) ticketing arrangements;

(v) rolling stock specifications (e.g. load factor, number of seats, vehicle configuration); and

(vi) marketing strategy.

### **Infrastructure manager**

5.22 ORR may request from the infrastructure manager any necessary information, including:

(i) information about available capacity;

(ii) information on potential performance and resilience impacts of the proposed open access service;

(iii) assessment of impacts on capacity use;

(iv) plans for developing infrastructure as regards routes covered by the proposed open access service, including an indication of the time when any such plans will be implemented; and

(v) information on other relevant track access contracts in place or under discussion.

## **Confidentiality**

5.23 ORR will not disclose commercially sensitive information received from the parties in connection with the EE Test. ORR will redact any commercially sensitive information from its decision letter. However, the Implementing Regulation explicitly states that information included in the Form OA shall not be considered commercially sensitive.

5.24 When considering whether information is commercially sensitive, we will follow our current track access guidance on excluding information from our public register or from wider circulation, where we must have regard to the criteria under section 71(2) of the Railways Act 1993. We will consider whether publication of any information relating to the affairs of an individual or body of persons would or might, in our opinion, seriously and prejudicially affect the interests of that individual or body of persons.

5.25 It is the responsibility of the party submitting information to notify and substantiate any proposed redaction of commercially sensitive information at the time of the submission. Such information may include, in particular, technical or financial information relating to an undertaking's know-how, business plan, cost structures, marketing and pricing strategies, supply sources and market shares,

5.26 If ORR decides not to redact any requested information this will be communicated and justified in writing to the party requesting confidentiality at least two weeks before the publication of ORR's decision.

## Process during competitive tender of a public service contract

5.27 If at the time an EE Test has been requested, a PSC covering the same route or an alternative route is being competitively tendered:

- ORR may decide to suspend consideration of the proposed application for a limited period of time pending the award of the new PSC. This suspension will last no longer than 12 months from the receipt of the application or until the tender process has concluded, whichever is sooner; or
- ORR may decide to undertake the EE Test against the existing PSC, and if it demonstrates that access can be granted, the access will be time-limited until the expiry of the existing PSC. Any decision on time-limited access would be within our existing track access application regime, which includes the NPA test.

5.28 ORR will decide whether to suspend consideration or consider temporary access following discussions with the applicant and relevant parties.

## Competing applications

5.29 Where ORR is examining more than one application for access under the EE Test, we may take different decisions on the applications received, based on an analysis of their respective impacts on the economic equilibrium of the PSC, competitive effects, net benefits to customers and network impacts, and of their cumulative effects on the economic equilibrium of the PSC.

## Cooperation between regulatory bodies

5.30 Upon receipt of an application for a new international service, ORR will inform other relevant regulatory bodies which have competence over the proposed route. ORR and the other regulatory bodies will share and check the information received to inform each other of any inconsistencies. ORR will also inform the other competent regulatory bodies if a request for an EE Test is received for this service.

5.31 When carrying out the EE Test on a proposed new international service, ORR and the other regulatory bodies will share the results of their respective EE Tests in order to give each other sufficient opportunity to comment on the results before they are

finalised. The regulatory bodies will cooperate in accordance with Article 37 of the Regulations.

5.32 During any exchange of information regarding the EE Tests, ORR and other regulatory bodies will respect the confidentiality of commercially sensitive information received from the parties involved. They will only use the information for the case concerned.

## Reconsideration of decision

5.33 The following parties can request the EE Test decision be reconsidered:

- (a) the relevant competent authority or competent authorities;
- (a) the infrastructure manager;
- (b) the PSC operator; or
- (c) the applicant.

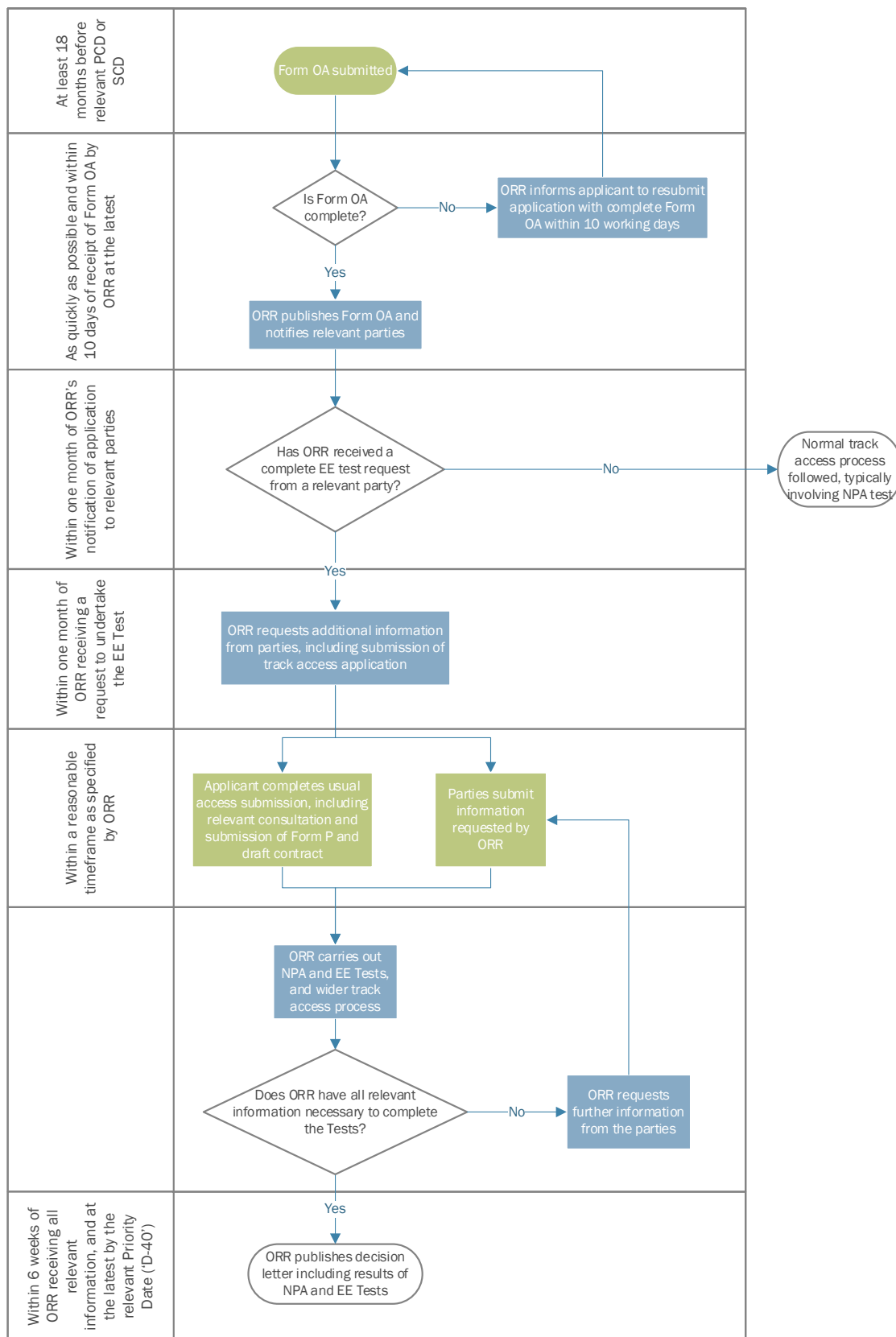
5.34 When making a decision, we will give grounds for it and specify the conditions under which the relevant parties may request a reconsideration of the decision, which must be made within one month of ORR's decision.

5.35 Where we have received a properly made and evidenced request for reconsideration of our decision, any decision previously indicated may be suspended or may not take effect pending reconsideration. We intend to issue and publish our final reconsidered decision within six weeks of the date of receipt of all relevant information.

## Fees

5.36 The Implementing Regulation allows ORR to decide that a fee be paid for the EE Test by the entity requesting the test. We do not intend, initially, to charge a fee for the carrying out of the test, but we may review this based on our experience in administering the test.

# Annex A – Summary flowchart of EE Test process



# Annex B – Open Access Applicant Notification Form, ‘Form OA’

## NOTIFICATION TO THE OFFICE OF RAIL AND ROAD OF A PROPOSED OPEN ACCESS SERVICE THAT MAY BE SUBJECT TO THE ECONOMIC EQUILIBRIUM TEST

Please use this form to notify the Office of Rail and Road (ORR) of an open access service that may be subject to the Economic Equilibrium Test.

For further information, please see our published [Guidance on the Economic Equilibrium Test](#).

Information submitted in this form regarding the planned operation of the service should cover at least the first three years and, as far as possible, the first five years of operation.

Submitted forms will be published on the ORR website and notified to the relevant parties.

If this form is submitted with incomplete information, ORR will inform the applicant that incomplete requests will not be considered and will give the applicant the possibility to complete its request within ten working days.

This form does not replace our usual access application process, which should be followed in the usual manner as set out in our published [guidance](#).

ORR may request additional information in order to undertake the Economic Equilibrium Test.

### **What to send:**

Please supply this form by e-mail, **in plain Microsoft Word or Open Document Text format** (i.e. excluding any macros, auto-para or page numbering, or other auto-formatting).

### **Where to send it:**

Email: [track.access@orr.gov.uk](mailto:track.access@orr.gov.uk)

You should also send a completed copy of this notification form to the relevant infrastructure manager.



**Applicant details:**

Company:  
Contact individual:  
Job title:  
Address:

Telephone number:  
E-mail address:

Date of Form OA submission to ORR:	
------------------------------------	--

Planned start date of services:	
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Does the applicant:

(a) hold a valid train operating licence under section 8 of the Railways Act 1993 or an exemption under section 7, or under The Railway (Licensing of Railway Undertakings) Regulations 2005, **and**

(b) hold a valid safety certificate under the Railways and Other Guided Transport Systems (Safety) Regulations 2006.

If the answer to (a) **or** (b) is no, please state the point reached in obtaining a licence, exemption and/or safety certificate.

--

**Summary of the proposed service:**

*Please include the detailed route of the proposed service, indicating departure and destination stations and all intermediate stops.*

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*Please set out the indicative timings and frequency of the proposed service, including proposed departure and arrival times. This information may be submitted in an annex if preferred.*

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*Please set out indicative information about the intended rolling stock.*

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