



**ORR's criteria & procedures for the
approval of station and depot access
agreements - Final conclusions**

December 2010

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Foreword

1. One of the goals identified in our [corporate strategy](#) (“Promoting safety and value in Britain’s railways: ORR’s strategy for 2009-14”) is for the mainline industry to have in place arrangements to achieve the best use of capacity on the network. Consistent with this, one of the activities identified was the need to produce and publish documents which set out clearly the criteria and procedures we use to decide whether to approve applications for access to stations and depots
2. We therefore developed two draft criteria and procedures (“C&Ps) documents; one relating to station access and one relating to depot access. The purpose of both documents was to set out, in a clear and straightforward way, the criteria and procedures we expect to follow in exercising our functions under sections 17 to 22A of the Railways Act 1993, as amended (“the Act”); the Railways Infrastructure (Access and Management) Regulations 2005; and the concurrent application of the Competition Act 1998.
3. We issued our consultation on the draft C&Ps documents on 6 August 2010. The consultation closed on 29 October 2010.
4. This document records the key issues and comments raised by our consultation. The document also explains the changes made to the C&Ps as a result of consultees’ responses and outlines the next steps.

1. Consultation

Consultation respondents

- 1.1 ORR received responses from;
- (a) Chiltern Railways;
 - (b) Arriva Trains Wales;
 - (c) Network Rail;
 - (d) Northern Rail;
 - (e) ATOC;
 - (f) Stagecoach (on behalf of South West Trains and East Midlands Trains); and
 - (g) First Group (on behalf of First Capital Connect, First Great Western, First ScotRail and First/Keolis Transpennine).
- 1.2 The responses are available on the [ORR website](#). They were all supportive of the proposed content of the C&Ps documents, and welcomed the consolidated approach of the guidance. None raised any significant concerns.
- 1.3 Any substantive points made are outlined in Chapter 2, along with ORR's response.

2. Summary of consultation comments and ORR's response

Agreements entered into under the General Approvals

- 2.1 **Comment made** – when a new Station Access Agreement is entered into under the General Approval (Stations) 2010, there could be drawbacks if any unauthorised amendments to it were subsequently to make the agreement null and void, once operations had commenced at the station in question.
- 2.2 The respondent also requested that the option for submitting agreements for specific approval should not be withdrawn.
- 2.3 **ORR response** – it is important to note that the comment above and our response below could apply equally to depot access agreements.
- 2.4 Where the General Approval has been used, it is for the parties to ensure that they are content with the proposed agreement and that the relevant General Approval applies. Subsequent amendments to an agreement may also be submitted under the General Approval, or, where this does not apply, for specific approval. Again, it is the responsibility of the parties concerned to make sure that any amendments to an agreement have obtained approval in the correct manner. For the avoidance of doubt, agreements and amendments that are not covered by the General Approvals may still be submitted to ORR to consider granting our specific approval.
- 2.5 We have already prepared guidance documents on the use of the General Approvals and these can be found [here](#)¹.

Counterparts

- 2.6 **Comment made** – We had stated in paragraph 4.21 (stations) and 4.17 (depots), that executing an agreement in counterparts is not permitted under Scottish law. One respondent stated that we should remove this statement and not comment as, strictly, there is no provision in Scottish law that makes

¹ <http://www.rail-reg.gov.uk/server/show/nav.2515>

a contract completed in counterparts void. In fact, it would be more accurate to say that counterparts are not generally used.

- 2.7 **ORR response** – we have now amended both paragraphs to reflect the above suggestion.

Investment in enhancements

- 2.8 **Comment made** – about the reference to the ‘Investment Framework Consolidated Policy and Guidelines – draft for consultation’, in paragraph 4.2 of the depots C&Ps. It was suggested that as the consultation for the Investment Framework policy was still open, and the section about investing in depot enhancements is undecided at this stage, the corresponding section at paragraph 4.2 of the Depots C&Ps should be updated as and when an approach on this area has been established.
- 2.9 **ORR response** – both the stations and depots C&Ps will be updated to reflect the fact that the consultation on the Investment Framework policy has now closed, and will include a link to the final version of the Investment Framework policy document. In terms of the comment made above about the approach to depot enhancements, this is being taken forward separately. Once a final approach to investment in depot enhancements has been established, we will consider how this is best reflected in the depots C&Ps.
- 2.10 **Comment made** – paragraph 4.7 (stations) states that a facility charge will usually be recorded in Annex 9 of the Station Specific Annexes. The equivalent for the Managed Stations Specific Annexes is Annex 8.
- 2.11 **ORR response** - we have also inserted a reference to Annex 8 of the Managed Stations Specific Annexes in paragraph 4.7 of the stations C&Ps.
- 2.12 **Comment made** – the Excel spreadsheet used to calculate facility charges, which is referenced in paragraphs 4.8 (stations) and 4.4 (depots) is a template spreadsheet. We should explicitly state this, to ensure that parties understand that the template must be used, and they should not create their own spreadsheet.
- 2.13 **ORR response** – we have amended both paragraphs to clarify that the spreadsheet is an agreed template and must be used to calculate facility charges.

Timescales for approval of new agreements and amendments

- 2.14 **Comment made** – the C&Ps could be improved by stating the timescales set for the approval of, rather than just the processing of, new agreements and amendments. This would enable the industry to build the timescales into planned work streams.
- 2.15 **ORR response** – we have stated that we aim to process a submission under the General Approval within two weeks, and a submission for specific approval within six weeks, on receipt of all relevant information. For General Approval submissions, the submission is already “pre-approved”, and we subsequently send out an acknowledgement letter containing the ORR reference number. For specific approval submissions under sections 18 and 22 of the Act, we are unable to provide a guarantee that we will approve within these timescales, as we may discover on receipt of all information that we are still unable to approve the submission. We have amended paragraphs 3.45 and 3.57 (stations), and 3.44 and 3.56 (depots) in the C&Ps to make clear that *we will reach a decision on whether to approve* within six weeks of receiving all relevant information.
- 2.16 Please note that applications made under sections 17 and 22A of the Act follow a different process, as defined in Schedule 4 of the Act and described in the C&Ps documents.

Collateral agreements

- 2.17 **Comment made** – in paragraphs 2.19 (stations) and 2.17 (depots), it is incorrect to say that where a facility owner fails to fulfil its responsibilities at a station or depot, a beneficiary can use the collateral agreement to require Network Rail to perform certain obligations that are set out in the relevant access conditions. Rather, where a facility owner fails to fulfil its obligations, then the beneficiary can employ one of the remedies available to it as outlined in Part L of the access conditions. The remedies do not include a right to require Network Rail to undertake the obligation in question in place of the facility owner. The purpose of the collateral agreement is in fact to create a direct contractual link between Network Rail and the beneficiary, to enable the beneficiary to enforce any obligation placed on Network Rail by the access conditions against it directly, and vice versa.

- 2.18 **ORR response** – we have reviewed our original description of collateral agreements, and agree that this is not accurate. We have amended both paragraphs to read as follows: “should Network Rail fail to fulfil its obligations to a beneficiary as set out in the SACs/DACs or in certain circumstances, other obligations as set out in an access agreement, then a beneficiary can use the collateral agreement to require Network Rail to perform them.”

Submission of an application under section 18 of the Act

- 2.19 **Comment made** – paragraphs 3.35 (stations) and 3.34 (depots) should make clear that section 18(5) of the Act requires the facility owner to submit the proposed access agreement to ORR for approval.
- 2.20 **ORR response** – we have amended these sections to make clear that the responsibility for submitting the proposed agreement lies with the facility owner, although a beneficiary may also submit the agreement if they wish to.
- 2.21 **Comment made** – it is not clear in paragraphs 3.36 (stations) and 3.35 (depots), why we require a letter of consent from the facility owner, when the agreement will have been lodged by the facility owner.
- 2.22 **ORR response** – there may be occasions where a beneficiary submits a proposed access agreement, and in these circumstances, we would need to see that the facility owner has consented to the proposed terms. In most cases where the facility owner submits the agreement, a letter or email from that facility owner has been included in the submission, stating that the application is made under section 18, as well as indicating its consent to the terms of the agreement. Although a letter or email of consent is not necessarily required, we have stated we would prefer this, as it will differentiate between an agreed application made under section 18, and an application made under section 17 (*where the parties have not been able to agree the terms of the agreement*).

Directions

- 2.23 **Comment made** – it would be more accurate to use the term “beneficiary” in paragraphs 3.44 (stations) and 3.43 (depots) rather than “applicant”, as the applicant will be the facility owner.
- 2.24 **ORR response** – we agree that it would be more appropriate to use the term “beneficiary”, and have amended both paragraphs accordingly.

Flowcharts

- 2.25 **Comment made** – in line with the track access C&Ps, it would be useful to include flowcharts as part of an annex, particularly to show how the process for applications under sections 17, 18, 22 and 22A work.
- 2.26 **ORR response** – we have prepared flowcharts and included them as an annex to the C&Ps documents.

Dispute resolution process

- 2.27 **Comment made** – since the draft C&Ps went out to consultation, the new dispute resolution process has come into force. This should be clarified for the avoidance of confusion.
- 2.28 **ORR response** – we have now updated the C&Ps to make reference to the new dispute resolution process.

Electronic copies

- 2.29 **Comment made** – although paragraph 3.23 (in both the stations and the depots C&Ps) indicates that the failure to provide an electronic copy of any documentation for the purposes of the audit process “may” count as one instance of misuse of the General Approval, paragraph 3.25 suggests that this failure would definitely count as an instance of misuse. In addition, paragraph 3.36 (3.35 depots) states that we would “prefer” electronic applications, but goes on to state that we will request an electronic application anyway. The respondent suggested that it would be clearer to state upfront that electronic applications are mandatory.
- 2.30 **ORR response** – the comment above relates to different parts of our process; the use of the General Approvals and those matters that are examples of misuse of the General Approvals; submissions made for consideration of our specific approval; and the use of electronic submissions.
- 2.31 We thought it important that we provided guidance to the industry on the sorts of issues that we considered would be examples of misuse of the General Approvals. However, the fact that a party might find that it appears to have misused the General Approvals, based on the factors listed in paragraph 3.25, it will not necessarily mean that it would actually count as an instance of misuse *for the purposes of being declared an Excluded Party*. This is because

where an apparent instance of misuse is spotted as part of the audit, we will write to the party or parties affected asking for an explanation of how it took place. If we are satisfied that there has been a genuine inadvertent misuse of the General Approvals, then this may not count as an instance of misuse for the purposes of being declared an Excluded Party.

- 2.32 Paragraphs 3.35 (depots) and 3.36 (stations) deal with applications for entering into new agreements under section 18 of the Act which require our specific approval. These applications are not subsequently subject to the General Approvals audit process. However, given that we will always require an electronic version of an agreement in order to carry out a contract comparison, we accept the point made above and have amended the wording to make it clear that electronic versions are required. Electronic submissions for specific approval under section 22 of the Act are not mandatory and we also make this clear in the C&Ps.

Template agreements

- 2.33 **Comment made** – the phrase “bespoke customisation”, used in paragraph 3.30 (both) appears tautologous, and therefore should be reworded.
- 2.34 **ORR response** – we agree. We have now amended the phrase to refer only to “customisation”.
- 2.35 **Comment made** – the use of template agreements should be made mandatory, particularly in light of the issues raised in paragraphs 3.79–3.80 (stations) and 3.77-3.78 (depots) about the problems with sharing documents across systems. We are asked what our position would be if the templates were not used.
- 2.36 **ORR response** – we have stated that we strongly recommend the use of the templates in order that fewer problems occur when an agreement is sent to us electronically. We have already said in our guidance notes that the template agreements must be used in order for the General Approvals to apply. Agreements that have been customised and deviate from the templates (other than the permitted departures allowed by the General Approvals) must be submitted for consideration of our specific approval. We would, on receiving an agreement that does not follow a template at all, request that the applicant explain the reasons for not using the template as a starting point, and if necessary, request that the template is used as the basis of the application.

We have changed the wording in paragraphs 3.79-3.80 (stations) and 3.77-3.78 (depots) to reflect this.

Consideration and criteria for approval of amendments under section 22

- 2.37 **Comment made** – in paragraph 3.50(b) (stations) and 3.49(b) (depots), the phrase “tacit approval” had been used in reference to obtaining approval from other station users. However, the access conditions actually contain the phrase “deemed approval”, and this phrase should be used for consistency.
- 2.38 **ORR response** – we agree that the phrase “deemed approval” would be more consistent with the terminology used in the access conditions, and have therefore amended the paragraph accordingly.

Station and depot annexes

- 2.39 **Comment made** – it is understood that ORR has already identified an error in paragraphs 3.90 (stations) and 3.88 (depots), regarding the regulatory approval of annexes.
- 2.40 **ORR response** – under the Act, ORR only has the power to direct new access agreements or approve amendments to existing access agreements. In cases where there are no beneficiaries at a station or depot, there will be no access agreements in place (only a lease between the landlord and the facility owner). In such circumstances, ORR cannot “approve” the station or depot annexes. However, station or depot annexes can be submitted for inclusion on our Public Register, and an ORR reference number will be allocated, but ORR cannot formally “approve” the annexes in the same way that we must approve access agreements and amendments to them. Both paragraphs have now been amended to remove any reference to ORR “approving” annexes in such circumstances.

Incorporation of other documents by reference

- 2.41 **Comment made** – the section “Incorporation of other documents by reference” in Chapter 4 could be condensed into a shorter and simpler single paragraph.
- 2.42 **ORR response** – the inclusion of this information is consistent with that contained in the ‘Criteria & Procedures for the approval of track access contracts’. Where there are identical considerations for all of track, stations

and depots access, we believe that the relevant C&Ps documents should provide the same information and guidance. Therefore, we do not feel it is appropriate to revise this section at this stage, and will instead keep it under review.

3. Next steps

- 3.1 The revised C&Ps are published and became effective on 2010. We will keep these documents under review and make any further changes as necessary.
- 3.2 We will consult the industry where changes to the documents are significant.
- 3.3 The C&Ps can be accessed [here](#)².

² <http://www.rail-reg.gov.uk/server/show/nav.2514>