

## Criteria and Procedures for the approval of framework agreements on the HS1 network

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# Contents

<b>1. Regulation of access to the HS1 network</b>	<b>4</b>
Introduction	4
Structure of this document	4
ORR's role and statutory responsibilities	5
Regulatory approach	6
The HS1 Network Code	8
Commitments to the European Commission	8
<b>2. The way in which HS1 track access applications will be processed and considered</b>	<b>10</b>
Introduction	10
Framework agreements	11
General matters	13
The form and content of applications	14
Consultation & hearings	15
Consultation procedure for agreed applications	18
Timing of applications	21
The process for agreed applications	23
The process for appeals	26
<b>3. The expression of access rights and the use of capacity</b>	<b>31</b>
Introduction	31
The use of capacity	31
Capacity allocation and utilisation	32
Safety	32
Expression of rights	33
Operational integrity	33
Consideration of alternative access rights	34
Capacity choices, criteria and competition	35
Certainty and flexibility in the expression of rights of freight operators	38
Certainty and flexibility in the expression of rights of passenger operators	38
Duration	39
Congested Infrastructure	40
<b>4. Charging, performance, possessions and liabilities</b>	<b>41</b>
Introduction	41
Track access charges	41
The performance regimes	42

The possessions regime	44
Liabilities	44
<b>5. Other issues</b>	<b>46</b>
Introduction	46
Bespoking and innovative provisions	46
Self-modification provisions	46
Consolidated contracts	47
Unfinished business	47
Incorporation of other documents by reference	48
Multilateral provisions	49
Side letters and other associated agreements	49
False information	49
Executing and submitting contracts	49
<b>Annex A: flowcharts</b>	<b>51</b>
Flowcharts	51
Key for application processes	51
Industry consultation process flowchart	52
Appeals	53
Agreed applications	54
<b>Annex B: the ‘not primarily abstractive’ test</b>	<b>55</b>

# 1. Regulation of access to the HS1 network

## Introduction

1.1 The *Criteria and Procedures for the approval of framework agreements on the HS1 network* (“the C&Ps”) sets out the criteria and procedures which the Office of Rail Regulation (“ORR”), as the regulatory body for the HS1 network, expects to follow in processing applications for framework agreements on the HS1 network. This involves exercising our functions under [The Railways Infrastructure \(Access and Management\) Regulations 2005](#) (“the Regulations”). The C&Ps support our aim of having clear and transparent processes that are as straightforward as possible for applicants to follow, and which facilitate our timely and efficient consideration of access applications. Throughout this document, “HS1” refers to the physical high speed railway network. “HS1 Limited” refers to the infrastructure manager of HS1, as defined by the Regulations.

1.2 We will consider every application for access on its own merits, and the C&Ps should not be interpreted as committing us to making a particular decision. The C&Ps may be revised and reissued from time to time to take account of further experience, changing circumstances and revised policies and processes (on which we would typically expect to consult). Readers are advised to confirm via the [ORR website](#) that they are using the most recent edition.

1.3 We expect train operators and HS1 Limited (and other relevant organisations) to follow the procedures outlined here when negotiating and submitting proposed framework agreements and amendments to existing agreements for ORR approval.

1.4 We encourage any party seeking a new framework agreement or an amendment to an existing access agreement to first discuss its requirements with HS1 Limited. To ensure that the approach is consistent with the C&Ps and to identify issues that can be addressed prior to the formal application being made, we also encourage the parties to seek a meeting with us before making an application.

## Structure of this document

1.5 This document is structured as follows:

- (a) [This](#) chapter sets out the framework which applies to the regulation of access to HS1. It also outlines our regulatory approach, and the relationship between framework agreements and the HS1 Network Code;



- (b) [Chapter 2](#) sets out the process by which HS1 track access applications will be processed and considered;
- (c) [Chapter 3](#) deals with the expression of access rights and the use of capacity;
- (d) [Chapter 4](#) deals with charging, performance, liabilities and possessions;
- (e) [Chapter 5](#) sets out other issues that are commonly raised, but which are not dealt with elsewhere;
- (f) [Annex A](#) contains flowcharts giving a high-level view of the industry consultation process and the processes for both agreed and not agreed applications; and
- (g) [Annex B](#) contains our ‘not primarily abstractive’ test for determining the approval of competing domestic operator applications.

## ORR’s role and statutory responsibilities

1.6 The [Channel Tunnel Rail Link Act 1996](#) disapplies HS1 from the economic regulatory regime under the [Railways Act 1993](#) (“the Act”). During the passage of the [Channel Tunnel Rail Link \(Supplementary Provisions\) Act 2008](#), the Government made a commitment that, as far as possible, the operation of HS1 should be subject to normal regulatory supervision. To put this into practice, the Regulations, under which we already had responsibility for appeals concerning access to HS1, were amended to give us additional responsibilities concerning the economic regulation of HS1.

1.7 The key elements of the regulatory framework are:

- (a) ORR pre-approval of all new framework agreements and of revisions to any existing framework agreements (i.e. framework agreements covering the reservation of capacity for more than one timetable period) for the use of HS1.
- (b) an appeal role in respect of the terms of track access and, more widely, under the Regulations;
- (c) a responsibility for ORR under Regulation 13 of the Regulations to ensure that HS1 Limited, with due regard to safety and maintaining and improving the quality of infrastructure service, is provided with incentives to reduce the cost of provision of infrastructure and the level of access charges. This will be achieved through the company’s obligations under the Concession Agreement<sup>1</sup> and the rights and responsibilities given to ORR which include:
  - (i) provision for periodic reviews by ORR of the operation, maintenance and renewal charges;

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<sup>1</sup> The Concession Agreement is an agreement between the British Secretary of State for Transport and HS1 Limited and outlines the rights, obligations and responsibilities of those parties in respect of the HS1 network

(ii) a general duty in respect of asset stewardship in the [Concession Agreement](#), requiring the company to secure the operation, maintenance, renewal and replacement of the railway infrastructure in accordance with best practice and in a timely, efficient and economic manner, and with a long-term (40 year) view; and

(iii) enforcement powers based on those in the Act; and

(d) an extension of our statutory information-gathering powers to our new responsibilities by means of a change to the Regulations.

## Regulatory approach

1.8 The focus of our regulatory involvement is to oversee the fair and efficient allocation of capacity on HS1, in accordance with the Regulations, and as set out in the relevant parts of the [Regulatory Statement](#). In the majority of instances, we would expect to follow similar processes to those we follow for the Great Britain national network, where access applications are made under sections 17-22A of the Act.

1.9 Our statutory duties under [section 4](#) of the Act are engaged by Regulation 28(1) of the Regulations to the extent that they are relevant and consistent with European Union Directives. We must exercise our functions in the manner we consider is best calculated to achieve those duties, which include:

(a) to protect the interests of users of railway services;

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

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

(d) to promote competition in the provision of railway services;

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

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

1.10 HS1 has been declared Specialised Infrastructure under Regulation 22 of the Regulations. This means that we have to have regard to the effect of the declaration in our consideration of access applications. The effect of the declaration is that HS1 is designated for use by specified types of rail service and may give priority to that specified type of rail service in the allocation of capacity. These priorities are as follows (from highest to lowest):

- (a) High Speed International Passenger Trains;
- (b) High Speed Domestic Passenger Trains;
- (c) High Speed Freight Trains; and
- (d) Other Trains.

1.11 In examining proposed contracts or amendments to existing contracts, and in determining whether, and on what terms, to approve those access arrangements, we expect to take a proportionate approach focusing on:

- (a) the implications of contracts submitted for the efficient consumption of railway network capacity over time;
- (b) actual and potential impacts on third parties;
- (c) any areas of disagreement; and
- (d) the fairness of their terms and their consistency with the Regulations, our published policies, our decisions in any periodic or interim review of access charges, and any other relevant considerations. This may include HS1 Limited's obligations and responsibilities under the [Concession Agreement](#), the charging framework (see [chapter 4](#)) published by the Secretary of State, and our Regulatory Statement of 30 October 2009.

1.12 Where train operators have not been able to agree terms, in whole or part, with HS1 Limited, we will deal with the appeal in accordance with our existing responsibilities under Regulation 29 of the Regulations. The process for dealing with such appeals is set out in our [guidance document](#) and in [Chapter 3](#) of this document.

1.13 In carrying out our functions, we will want to ensure that we facilitate a public interest outcome. As far as possible we will focus on areas where we can add value, in order to minimise the regulatory burden/cost and to keep the processes themselves as efficient and effective as possible. Performing our regulatory functions in this way will provide stakeholders with reassurance that our approach is not unnecessarily onerous and that it is consistent with our statutory responsibilities. This will be particularly important for those running over multiple networks. We recognise that some international stakeholders may not be familiar with our processes and approach and may require further guidance and clarification. We would be happy to provide this if needed.

## The HS1 Network Code

1.14 The [HS1 Network Code](#) is a common set of contractual provisions included by reference in every regulated framework agreement between HS1 Limited and an applicant (usually but not necessarily a train operator). The HS1 Network Code concerns areas where common processes are necessary or desirable, such as delay attribution (Part B), timetable change (Part D), vehicle and network change (Parts F and G), operational disruption (Part H), changes to access rights (Part J), and performance (Part L).

1.15 The HS1 Network Code does not create direct contractual relationships between train operators; any such relationships (obligations, remedies and liabilities) flow through HS1, although parties may have directly enforceable rights by virtue of the [Contracts \(Rights of Third Parties\) Act 1999](#).

1.16 The HS1 Network Code is subject to consultation and change by any organisation which is a party to it. Those referring to the HS1 Network Code are advised to check that they are using the most up to date version, available [here](#).

## Commitments to the European Commission

1.17 Société Nationale des Chemins de fer Français (SNCF), Société Nationale des Chemins de fer Belges (SNCB) and London & Continental Railways (LCR) have created a standalone entity, Eurostar International Limited (“Eurostar”) to operate Eurostar services.

1.18 As a result of this merger, the parties gave a number of assurances to the European Commission (referred to as commitments) to alleviate concerns that the merger might impact negatively on new entrants, particularly in relation to access and the provision of services at stations and depots and the charges for those services. These commitments complement existing legal arrangements, including a dispute resolution mechanism to provide authorised cross-channel train operators with fair and non-discriminatory access to the relevant stations and maintenance facilities which are managed by them across the UK, the Channel Tunnel, France and Belgium.

1.19 For facilities in Great Britain, these included commitments from HS1 relating to the provision of access to facilities and services at London St. Pancras International Station and Temple Mills depot. Details of the commitments can be found in the [Merger Regulation \(EC\) No. 139/2004](#).

1.20 Independent individuals or bodies have been appointed in the UK, France and Belgium with a duty to monitor compliance with the commitments, and they are known as “Monitoring Trustees”. A train operator can seek recourse from a Monitoring Trustee if a dispute arises between the parties regarding a request for access to any of the facilities covered by these commitments. The Monitoring Trustee is to provide prompt resolution in the event of a dispute but where a party is not happy with the decision of the Monitoring



Trustee then it has a right to make an appeal to the relevant appeal authority. This is the national regulator of the UK, France or Belgium, as appropriate. We are the national appeal authority for Great Britain and appeals can be made to us in respect of access to GB facilities. The UK Monitoring Trustee is Chris Bolt ([cwbolt@gmail.com](mailto:cwbolt@gmail.com)).

1.21 It is important to note that our role, as the national appeal authority for appeals in connection with the commitments, is separate from our role in connection with appeals regarding framework agreements for HS1. However, such appeals should be made to us in the same way, i.e., under Regulation 29 of the Regulations. Operators should therefore follow the same process as set out in paragraphs [2.99-2.120](#).

# 2. The way in which HS1 track access applications will be processed and considered

## Introduction

2.1 This chapter explains the procedures we expect to follow in considering applications for contracts granting access to HS1 for both passenger and freight services. Our aim is to ensure that our consideration of applications is undertaken in a timely manner in accordance with our statutory duties and the Regulations.

2.2 We would expect to deal with track access applications made to us for HS1 in the same way as those made to us under the Act for access to the Great Britain national network.

2.3 We expect train operators and HS1 Limited, and other interested parties (involved in the consultation process), to follow the procedures set out in the C&Ps when negotiating and submitting proposed framework agreements and amendments to existing agreements for approval. In particular, we will expect applications to be accompanied by an appropriate completed application form containing the information necessary to support the submission. Where these procedures are not complied with, or sufficient time is not allowed for the process to be completed, our approval may not be obtained in the desired timescales.

2.4 This chapter is divided into the following sections:

- (a) [framework agreements](#);
  - (b) [compulsory and agreed procedures](#);
  - (c) [general matters](#) (concerning the submission of applications and the need for ORR's approval);
  - (d) [the form and content of applications](#);
  - (e) [consultation and hearings](#);
  - (f) [the timing of applications](#);
  - (g) [the processes for agreed applications](#) (where we are being asked either to approve a new contract, or to approve amendments to an existing approved contract (known as a 'supplemental agreement'));
- and

(h) [the processes for appeals](#) (where train operators have not been able to agree terms, in whole or part, with HS1 Limited.).

2.5 We are aware that applications may be made for access to HS1 from operators based outside Great Britain. All documentation regarding all aspects of an application, and all verbal dialogue, including any and all meetings and hearings, must be in English.

## Framework agreements

2.6 Regulation 18 of the Regulations sets out certain principles and requirements in respect of framework agreements. HS1 Limited has developed a suite of such contracts for those wishing to gain access to HS1 that contain standard provisions and give those entering into the agreement a clear understanding of how their relationship is governed. Using such standard terms reduces costs as fewer resources are needed to negotiate each provision. Standard form contracts, in a format ORR has said it would be content to approve, are available from [HS1's website](#).

2.7 A framework agreement is a contract between an applicant and the infrastructure manager. In terms of HS1, framework agreements generally contain:

- (a) the access rights held by an applicant, generally expressed in terms of an entitlement to have 'daily quantum' incorporated in the working timetable in order for it to operate (or have operated on its behalf) a train service over a defined part of the network;
- (b) conditions and obligations attaching to those rights, including the performance regime, provisions relating to the application of the Engineering Access Statement ("EAS") and the Timetable Planning Rules ("TPR")<sup>2</sup>, the use of specified equipment, confidentiality etc;
- (c) charges for the exercise of the rights; and
- (d) the liability of the parties to each other if things go wrong or if there is a breach of contract.

## Access rights

2.8 An access right is any right conferred on an applicant by its framework agreement with HS1 Limited. Access rights will represent a balance between:

- (a) the applicant meeting its key commercial requirements over the period of the contract;

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<sup>2</sup> The TPR document the operating characteristics and constraints for the network, in terms of sectional running times, station dwell times etc. The EAS governs the application of temporary restrictions of use on a route, e.g. temporary speed restrictions, engineering possessions etc.

(b) flexibility for HS1 Limited to optimise the use of network capacity in compiling a robust and reliable timetable reflecting the requirements of all applicants; and

(c) reserving access to the network for HS1 Limited to maintain, renew and enhance it in a safe, competent, timely and efficient manner.

2.9 Access rights expressed in framework agreements are converted into the working timetable by the process set out in Part D of the [HS1 Network Code](#). Essentially this is as follows:

(a) HS1 Limited proposes EAS and TPR, which are subject to consultation and appeal; and

(b) train operators make an access proposal for train slots based on the access rights they hold, and in accordance with the EAS and TPR.

2.10 In accordance with Part D of the HS1 Network Code, HS1 Limited must take into account that, for international train operators, the timetable must provide a seamless transition between Eurotunnel and HS1. When undertaking timetabling work we would expect HS1 Limited to consider any constraints based on the timetabling of services which originate from railway networks other than HS1 and the GB national network.

2.11 Although changes to the working timetable may be made at any time, significant changes to the Passenger Timetable may be made only once per year, at the date referred to as the Principal Change Date (in December).

2.12 This process has implications for the timing of access applications, which is discussed in the section of [timing of applications](#).

### **Compulsory and agreed procedures**

2.13 We have set out earlier in this document the principles that we follow when considering agreed applications for access to the GB national network. Where the parties cannot agree on the terms of a new access contract, [Regulation 29](#) of the Regulations provides for an applicant to apply to us for a decision. Both processes are explained [in the section on the process for considering applications](#).

2.14 We expect HS1 Limited to engage in negotiations with prospective users in an open, constructive and responsive way, with access to appropriate professional resources. HS1 Limited should provide prospective users with necessary information in a timely manner and generally behave as if they were in a competitive market.

2.15 We also expect prospective users to try in good faith to reach agreement with HS1 Limited on terms of access before submitting applications. It is therefore important that prospective users begin discussions with HS1 Limited early enough to allow time to follow our expected [timescales for dealing with applications](#).

2.16 If a prospective user is not confident that its application will be agreed with HS1 Limited, it may wish to submit an application to us. Negotiations may still continue in parallel and the parties should not regard themselves as being in disagreement. Such a submission is simply rational business practice so that a prospective user does not lose important protections it may eventually need. If the stance taken by HS1 Limited is regarded by a prospective user as unreasonable, the prospective user should not feel it necessary to continue with negotiations until there is only just enough, or not enough, time to for ORR to determine an application.

2.17 When deciding on the fair and efficient allocation of capacity, we will base our decision on the public interest as defined by our statutory duties under Section 4 of the Act in accordance with Regulation 28(1) of [the Regulations](#). We may, if appropriate, put the public interest above the private commercial interests of HS1 Limited and the applicant. For instance, we may take into account considerations that may be of little or no concern to the parties, but which affect the interests of third parties. In doing so we will recognise the commercial aspects of both HS1 Limited and those seeking access to HS1.

2.18 We will also have considerable regard to what the parties have agreed, and our decisions will be consistent with an efficient HS1 Limited making a reasonable return. It is therefore important that, in negotiations the parties have, as far as reasonably practicable, thoroughly considered the issues so that we and consultees can have the benefit of a developed proposition for capacity allocation.

## General matters

### Standard contracts

2.19 We would expect passenger and freight applicants to base their contracts on the standard terms set out in the suite of framework agreements ([passenger/freight](#)) published by HS1 Limited, unless there is good reason for any departure. Where departures are made, ORR expects to see clearly set out reasons for them.

2.20 We will consider applications for access contracts with [bespoke provisions](#) departing from, or in addition to, those in the HS1 standard access terms on their individual merits.

2.21 We prefer short, clear drafting that is written in plain English. The shorter and clearer contracts are, the more likely they are to prove useful working documents for the people who need to use them.

### Validity of contracts

2.22 The Regulations provide that HS1 Limited shall not enter into a framework agreement or an amendment to a framework agreement with a train operator unless it does so with ORR approval. Any framework agreement or amendment to a framework agreement entered into without ORR approval will be invalid.



## The form and content of applications

### The application forms

2.23 The following standard application forms for agreed applications made for access to HS1 are available on [ORR's website](#):

- (a) new passenger framework agreements and amendments to existing passenger access contracts ("Form P"); and
- (b) new freight framework agreements and amendments to existing freight contracts ("Form F").

2.24 The use of such forms makes it easier for applicants to ensure that they have assembled the information we require, and so helps to ensure a faster and more efficient approval process.

2.25 Application forms for appeals can be found annexed to our [guidance on appeals under the Regulations](#).

### Confidentiality and the public register

2.26 We are required by section 72 of the Act to maintain a [public register](#). Section 72 sets out what we must enter in the register. This includes every direction to enter into an access contract, every access contract and every amendment of an access contract under the Act. We must have regard to the need for excluding from the register, so far as practicable, any matter which relates to the affairs of an individual or body of persons, where publication would, or might, in our opinion, seriously and prejudicially affect the interests of that individual or body.

2.27 Although the Act does not apply to regulation of HS1, and we have no statutory duty to do so, we would still expect to enter all framework agreements and amendments to framework agreements into the public register, in the interests of openness and transparency, with any appropriate redactions having been made.

2.28 Applicants must provide relevant reasons to support any request for excluding any confidential material from entry on the public register or publication generally.

2.29 Once a framework agreement has been entered into, the parties will, if necessary, be invited again to identify any parts of the agreement they want us to redact from the copy we will enter into the public register. We will not redact material we have already published. However, subject to being satisfied with the justification provided, in appropriate cases we may be prepared to redact certain material derived from what has already been published.

2.30 When we receive an appeal we will ask HS1 Limited to identify any interested parties, and invite written representations from them<sup>3</sup>. Since this will involve supplying them with details of the appeal, appellants should ensure that they are content for the details of their appeal to be disclosed in this way.

### **Electronic copies**

2.31 Applications, including proposed access contracts and supporting documentation, should be made to us in electronic form as well as hard copy. This will enable any consultation to be undertaken via e-mail and the ORR website, and will help with the speed and efficiency of our internal processing of applications.

2.32 Proposed contracts submitted in electronic form must be in plain format, i.e. excluding any macros or other auto-formatting. Paragraph numbering should follow the convention in the relevant published standard access terms and should be typed in, not self-generated. We strongly recommend applicants to use the relevant standard access terms.

### **Complete submissions**

2.33 It is important for applications to be complete. In addition to ensuring that applications include all relevant supporting documentation, applicants should note that we expect to consider complete contracts or supplemental contracts. The application forms require a statement from the parties confirming their willingness to enter into the proposed contract as submitted. This is because consideration and consultation based on incomplete contracts/supplemental contracts is inefficient, given the risk of the parties agreeing material changes at a later stage.

2.34 For appeals, the proposed contractual terms, to the extent applicable, sought by the applicant must form part of the application and must be complete at the time of submission.

## **Consultation & hearings**

### **Consultations**

2.35 Our consideration of applications for access rights must be as open, transparent and well-informed a process as possible. We wish to ensure that the substance and basis of regulatory decisions is clear and well understood throughout the industry. The consultation of potentially affected industry parties will help to support this. The consultation process is described below.

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<sup>3</sup> An interested party includes—(a) all applicants for infrastructure capacity as part of the specific allocation process to which the draft working timetable relates; and (b) other parties who have indicated to the ORR, in such form or manner as ORR may from time to time prescribe, that they wish to have the opportunity to comment as to the effect that the working timetable might have on their ability to procure rail services during the working timetable period to which the draft working timetable relates.

2.36 We would not expect a consultation to be necessary in the case of an amendment to a contract where the parties agree and where the changes proposed are of a financial nature only (and potentially commercially confidential) if they will have no effect on any third parties. In the case of such applications, we would still expect to ensure that any relevant franchising authority has had the opportunity to review the application. As such, operators should have consulted the authority concerned before making an application to us.

2.37 Responsibility for conducting industry consultations on most track access applications rests with HS1 Limited. HS1 Limited will be responsible for the Register of Industry Parties which it will use when conducting industry consultations.

2.38 HS1 Limited shall maintain an up-to-date list of industry contact details to use when publicising consultations.

2.39 Those industry parties wishing to be consulted on proposals by HS1 Limited shall inform HS1 Limited of any changes to their contact details so that HS1 Limited can maintain an accurate and up-to-date list of consultee contact details. Changes in contact details should also be sent to ORR.

### **Consultation arrangements**

2.40 The purpose of a pre-application consultation is to:

- (a) give other train operators and interested stakeholders an opportunity to raise issues arising from a proposed access contract or amendment which could materially affect their interests or those of other third parties; and
- (b) resolve any issues identified during a consultation to the greatest extent possible prior to submission to ORR.

2.41 The information made available to consultees must always be as full and clear as possible. Consultees must have adequate time in which to consider and make representations on an application. For applications where there is likely to be an impact on other operators, we would expect HS1 Limited and the operator to have discussed the implications of proposed contracts with other potentially or actually affected operators before consulting formally on the application.

2.42 If a consultation is necessary, HS1 Limited shall consult:

- (a) all affected, or potentially affected, passenger train operators;
- (b) all rail freight train operators in Great Britain;
- (c) any charter passenger train operators (those with firm or contingent rights);

(d) the Department for Transport and any relevant overseas Ministry of Transport where services run, or are proposed to run, in that country;

(e) any relevant devolved bodies, namely Transport for London and the Mayor of London in Great Britain, and any relevant overseas devolved bodies where services run, or are proposed to run, in that country;

(f) Passenger Focus, London TravelWatch and any other relevant overseas consumer body where services run, or are proposed to run, in that country;

(g) any 'interested person' named in HS1 Limited's Register of Industry Parties;

(h) any other relevant access contract holder or potential holder who is likely to have an interest in the proposal; and

(i) ORR.

2.43 Where there is any doubt as to whether a particular party should be consulted, that party should be included in the consultation. For significant applications, this might mean that all operators, statutory bodies and funders are consulted.

### **Length of consultation**

2.44 In all cases, it is important that consultees have adequate time in which to consider and make representations. The standard consultation period shall be 28 days for all proposed changes to existing framework agreements and all new framework agreements, except:

(a) in exceptional circumstances, where an application is urgent, and HS1 Limited, acting reasonably, is satisfied that it is appropriate to consult for a shorter period. However, where HS1 Limited exercises this discretion, it must still give consultees a reasonable period in which to respond. It shall also give consultees the opportunity to object to the shorter period on the grounds that the consultee (acting reasonably) considers that the period is insufficient for it to assess adequately the likely impact on its interests. If a consultee makes such an objection, HS1 Limited shall discuss the matter with that party and give it the time it reasonably requires to review the application. Where time is particularly tight, HS1 Limited and the Train Operator may find it helpful to speak directly with those consultees most likely to be affected to brief them in advance of the consultation and discuss any concerns they may have; or

(b) where HS1 Limited, acting reasonably, considers it appropriate to consult for longer, for example, when consulting on a particularly significant application such as an access option.

## Consultation procedure for agreed applications

### Prior to consultation

2.45 Before beginning a consultation, sections 2 to 6 of the appropriate application form should be completed accurately and the draft contract/amendment produced. For agreed proposals, HS1 Limited and the applicant will do this jointly. (For appeals, the applicant is responsible for preparing the application form and draft contract/amendment.)

2.46 HS1 Limited and the applicant shall decide what, if any, information needs redacting from the draft contract/amendment and/or application form. Information should only be redacted where it is confidential (see the section on [confidentiality](#)).

2.47 It should be made clear in the consultation documentation where something has been redacted (for example, by using the “✂” symbol or by marking as [REDACTED]). When ORR receives an application, it will wish to be satisfied that the redaction of confidential information did not undermine the consultation that was conducted. ORR will make the final decision on what information is redacted from the public register and documents placed on its website.

2.48 HS1 Limited and the applicant should have confirmed that they are prepared to enter into the new contract or amendment to an existing contract before proceeding to consult on it.

### Commencing a consultation

2.49 In order to commence a pre-application consultation, HS1 Limited shall place the following on its website:

- (a) the details of the proposal including a link to the completed application form and the draft contract or amendment;
- (b) the date that the consultation period will end (the consultation period should not commence earlier than the date on which HS1 Limited notifies relevant consultees of the proposal); and
- (c) any other information HS1 Limited and the applicant consider appropriate.

2.50 Once the documents have been posted on its website, HS1 Limited shall e-mail consultees with:

- (a) a short explanation of the proposal and the name of the applicant;
- (b) a link to the web page containing the full details of the proposal;
- (c) the date by which any consultation responses should be sent; and
- (d) the contact details of those to whom consultation responses should be sent.



## **Consultees' responses**

2.51 Consultees should send comments or questions on or objections to the proposal to the nominated representatives of HS1 Limited and the applicant before the end of the consultation period (or, with the written agreement of HS1 Limited, by a date after the end of the consultation period). If a consultee is likely to have significant concerns with a proposal, it should make HS1 Limited and the applicant aware as soon as possible, even if the consultee requires the full consultation period in which to make its response.

2.52 Consultation responses should ideally be sent by email and must:

- (a) set out any concerns the consultee has with the proposal with substantiation as to why the issue mentioned could or would adversely affect its interests or the interests of other relevant parties;
- (b) set out what, if any, assurances or measures could be undertaken to mitigate the consultee's concerns or lead to the removal of its objections; and
- (c) not be of a frivolous or time-wasting nature.

## **Consideration of consultation responses**

2.53 HS1 Limited and the applicant shall respond to every consultation response that raises issues using all reasonable endeavours to resolve the concerns. HS1 Limited and the applicant will discuss the concerns raised by the consultee, agree which of them should respond to the issue raised, and respond in a timely fashion.

2.54 Where either HS1 Limited or the applicant is able to answer the concerns of the consultee without having first discussed it with the other, it may respond directly to the consultee. However, it must copy all correspondence to the other party. When making a solo response, neither HS1 Limited nor the applicant should purport to place a commitment on the other unless that party has already agreed to undertake it.

2.55 Where HS1 Limited and/or the applicant send correspondence to a consultee which has made representations on a proposal, they shall give that consultee a reasonable period of time to make a further response.

## **Consultee consideration of applicant response**

2.56 On receipt of a response from HS1 Limited and/or the applicant to its representations, the consultee shall consider whether or not it is content with the response. The consultee should aim to respond within two days (excluding weekends and public holidays) and write to HS1 Limited and the applicant advising:

- (a) whether the response has satisfied its concerns; or
- (b) whether it wishes to object, or maintain its objection, to the proposal, and the reasons for this and/or whether the response raises new concerns; or

(c) of any concerns it continues to have with the proposal including details of any further reassurance it would require before it is able to confirm that it is content with the proposal, or relevant questions it would like answered.

### **Consideration of further consultee responses**

2.57 After receipt of any further representations made by a consultee in response to correspondence sent to it by both or either of HS1 Limited and the applicant, the applicant shall decide whether:

(a) they are able to resolve the concerns or objections, in which case they shall attempt to do so and liaise further with the consultee as might be required; or

(b) the objections or concerns are such that they are unable to resolve or mitigate them sufficiently to satisfy the objector, in which case, they shall decide whether:

(i) to submit the application to ORR (i.e. as a draft contract or informal submission) for it to consider the issue and determine the outcome;

(ii) not to proceed with the application and then produce a materially different revised proposal which shall be subject to consultation; or

(iii) to withdraw the application completely. This might be because HS1 Limited no longer wishes to submit a joint application on the basis of an unresolved issue, in which case, the applicant may decide to appeal to us.

2.58 Whatever the outcome, HS1 Limited and the applicant shall inform those consultees who responded whether they are going to submit the application to ORR.

### **Hearings**

2.59 A live hearing enables us to probe and test issues of particular and wide-ranging regulatory concern together with relevant interested parties. Being able to air issues with several parties at once allows interested parties (including ORR) to raise issues of concern and clarification as the hearing progresses. A hearing can be a useful opportunity to test the issues raised in written representations, and to test any recommendation that ORR might be minded to make, before final decisions are taken. A hearing may be held in addition to the specific meetings which we may offer to, or require one or both parties to attend, to discuss specific aspects of an application.

2.60 Given the time and resources required for hearings, we only hold them where we consider that they will add value to our decision-making process. We will consider on a case by case basis whether a hearing is appropriate. If we decide to hold a hearing, we will invite all parties we consider likely to be directly and materially affected by, or to have a substantial interest in, the application. We will generally expect to put questions to the person seeking access rights, HS1 Limited and any relevant funding authorities. We may

also invite others to present their concerns, and may also allow cross-questioning (through the chair). We will not expect those present to repeat material that has already been supplied in written representations, but may invite examples.

2.61 We will give attendees advance notice of the agenda of issues we expect to follow and its timing. For significant applications, a hearing may run for more than one day, and it may be appropriate to hold separate hearings to consider separate issues. Those attending may arrange to be represented or assisted by legal advisers. A transcript will be taken of the hearing. A draft will then be made available to those attendees who have spoken to give them the opportunity to propose corrections to their own words, using Hansard Rules<sup>4</sup>, before the hearing transcript is published on the ORR website (with any necessary confidentiality redactions).

2.62 For matters that we consider should be confidential, we may arrange for a hearing to be closed, in whole or part, and attended only by the relevant parties. We will not expect to accept further material or representations after the hearing has concluded, other than in response to any further questions we may pose, or as we may have requested or permitted before or during the hearing.

## Timing of applications

2.63 Although we do not prescribe timescales for the submission of contracts to ORR for approval (beyond those timescales we are proposing for consultation in relation to appeals), there are three key factors that applicants should consider:

- (a) the time required for the pre-application consultation (if required);
- (b) our need for sufficient time to come to a properly informed decision on an application; and
- (c) the point at which the applicant will need rights to be approved in order for access proposals to be accepted into the working timetable.

These factors are discussed further below.

2.64 We suggest that at least six weeks be allocated for HS1 Limited to conduct the consultation process (four weeks consultation period, with two weeks to address issues). For applications where consultees are likely to raise significant concerns, additional time should be factored in.

2.65 The time we will require to consider an application will depend on the extent of its impact on the network and other operators, its complexity and the extent to which it departs from the relevant standard

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<sup>4</sup> Hansard is the official record of proceedings in the UK Houses of Parliament. It is not a strict verbatim record, but is substantially verbatim whilst removing errors and inaccuracies.

access terms. Even a supplemental contract concerning relatively few services can raise significant issues where, for example, network capacity is constrained. Where a satisfactory pre-application industry consultation of potentially-affected industry parties has not occurred, we will also need to allow sufficient time to ensure that those parties are adequately consulted.

2.66 After industry consultation on an application, to allow time for our full consideration we would expect our review to take up to:

- (a) *twelve weeks* to reach and publish our conclusions on an application for a contentious contract (including those submitted to us as an appeal under the Regulations), and;
- (b) *six weeks* for a more straightforward application.

2.67 We may be able to complete our review and come to a decision sooner than the timescales mentioned above. Equally, in some circumstances, there may be applications that require longer than these indicative timescales, particularly if a hearing is required.

2.68 For appeals, we are required by the Regulations to make our decision within two months of receipt of the final piece of relevant information.

### **Making track access applications to ORR following a consultation**

2.69 Following a consultation, where an application is made to ORR, the applicant(s) shall detail in section 7 of their application form the results of the consultation. This shall include:

- (a) a list of parties who were consulted;
- (b) details of whether or not there were any concerns or objections raised during the consultation, and whether there were any outstanding objections;
- (c) details of all material responses received from consultees;
- (d) details of how any concerns or objections from consultees were resolved, including details of any assurances given by HS1 Limited or the applicant to the consultee; and
- (e) where there is an outstanding objection from a consultee, the applicant's comments in respect of that objection (that is, why the applicant considers the objection should not preclude ORR's approval of the application).

2.70 The application form requires the applicant(s) to certify that the information they have submitted to ORR is, to the best of their knowledge, true and complete.

2.71 Where there are unresolved consultation issues, ORR will normally expect to place the consultation correspondence on its website alongside the rest of the application documentation. This is to provide

transparency so that consultees can see that their representations have been properly submitted to ORR. For this reason, consultees should assume that any responses they make may be put in the public domain, unless they specifically make representations against this and these meet the confidentiality test set out in this document.

### **Agreed applications**

2.72 Except in certain circumstances (see the section on [consultations and hearings](#)), ORR will expect any agreed application to have been subject to an HS1 Limited-led consultation. Where a consultation has not been held, ORR will consider the justification set out by the applicants. If the justification is unsatisfactory, ORR may reject that application and advise HS1 Limited to undertake a consultation before resubmitting it.

2.73 Where a pre-application consultation has taken place and the applicants have confirmed that no concerns or objections were raised by any consultees, ORR will consider that consulted parties are content with the proposal and continue with any other aspects of its review necessary before it is able to make a decision on that application.

2.74 Where concerns were raised during a consultation which HS1 Limited and/or the applicant were able to resolve to the satisfaction of the consultee, ORR will review how the issues were resolved before considering whether to approve the application.

2.75 Where the application form contains details of an unresolved issue, ORR will consider the representations of the consultee(s) and the applicants. This information may be sufficient for ORR to make its decision, but if not, ORR may ask the applicant(s) and the consultee for further information or arrange a meeting for further discussion.

## **The process for agreed applications**

2.76 We would expect to follow the following five step process in considering agreed applications for new contracts or amendments to existing contracts.

### **Step 1 - Development**

2.77 In developing a new contract or amending an existing one, we will expect the parties to have had some discussion with other potentially affected persons, including other freight and passenger train operators. We will also expect franchised/concession passenger operators to have discussed with their franchising/concession authority any issues relevant to the exercise of that authority's functions. Where capacity is constrained, we will expect HS1 Limited to have undertaken the appropriate modelling or other analysis necessary to ensure that the rights being sought are capable of being accommodated and any additional risks arising from the rights being sought, including the wider performance implications, have been fully assessed and appropriate control measures developed.



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

2.79 Once HS1 Limited and the applicant have agreed contractual terms, HS1 Limited has satisfied itself that the capacity is available, and the parties have completed the relevant sections of the application form, they will be able to start a formal consultation.

## **Step 2 – Industry consultation**

2.80 Except in special circumstances (that have been agreed with us) a pre-application consultation led by HS1 Limited should be undertaken for all applications. This is to be conducted in accordance with the arrangements set out in the section on consultation above.

2.81 Where consultees raise issues, the applicants should use all reasonable efforts to resolve those issues before submitting an application to us.

## **Step 3 - Submission of application**

2.82 Any application for approval should make clear that it is being made on behalf of both parties, and should be submitted with accompanying confirmation from both parties that they would be content to enter into the contract *as submitted*.

2.83 It is the responsibility of HS1 Limited and the applicant to submit a competent application. We will not, as a matter of routine, look for drafting errors or examine the robustness of the contract. However, should we identify significant problems or drafting errors, we will inform the applicants and may, depending on their extent and significance, reject the application.

2.84 Where an application is for renewal or replacement of rights held under an existing contract, it is extremely helpful for us to be able to see clearly the changes being sought, so that we can quickly establish any new issues that might give rise to regulatory concern. For the commercial terms in the contract, this can be achieved by supplying a mark-up of the existing contract (other than where the changes reflect the adoption of the relevant standard contract, in which case our concern will be to identify all departures or additions). For the access rights themselves, a separate schedule or mark-up might be appropriate, depending on the scale of changes being sought.

## **Step 4 - Consideration**

2.85 We will confirm receipt of the application and provide the name of the ORR case officer assigned to deal with it. We will then expect to:

- (a) check that the application form has been completed properly and any relevant documentation has been included (incomplete applications will be rejected);

- (b) check whether a pre-application consultation has been completed (including whether the appropriate third parties were consulted) and review any outstanding objections or concerns;
- (c) review the application to establish whether any aspects of the contract will require more detailed ORR scrutiny; and
- (d) carry out a high level check to ensure that the contract does not have any material effect in addition to that described in the application form.

2.86 If we are satisfied at this stage that the application does not merit more detailed examination by us, we would expect to approve it. If necessary, we will examine the application in more detail and discuss the proposed contract with the parties. We may also write seeking formal responses on significant matters.

2.87 If we identify any issues on which we would appreciate the specific comments of other industry parties, or which we wish to draw to the attention of those who were consulted on the application, we will send a letter detailing those issues. We would expect to send such a letter within two to three weeks of receipt of an application.

2.88 In line with the policy set out in this document, our consideration may involve a [hearing](#).

## **Step 5 - Conclusions and approval**

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

- (a) issue an approval to the parties to enter into it within a specified period;
- (b) issue an approval to the parties to enter into it, within a specified period, subject to specified modifications; or
- (c) reject the application.

2.90 Where we are minded to require modifications prior to our approval, we will first consult the parties. In any such case, we intend to allow the parties 14 days to give notice of any objections. If HS1 Limited were to object to our proposed modifications, one option open to an applicant would be to appeal to us. We will always give the parties a full written statement of the reasons for our decision. Subject to any confidentiality exclusions, we will also publish our decision and reasons promptly on the ORR website.

2.91 New contracts may only be entered into by the parties once ORR has issued its approval. The parties may also ask ORR to vary the approval to extend the date for compliance. However, given that it is an agreed, joint application, we will assume that it is the intention of the parties to enter into the contract once we have approved it and any request for an extension would have to be accompanied by strong justification. We accept that circumstances will change over time and for this reason we propose to time limit our approvals to three months, after which, the approval will lapse.

2.92 Within 14 days of the parties signing the contract, HS1 Limited must send a copy to ORR for the public register.

### **Supplemental contracts**

2.93 We would expect to follow the same five step process in considering agreed applications for supplemental contracts amending existing approved contracts.

2.94 Copies of ORR's approval notice and the supplemental contract will be placed on the public register and published on the ORR website (subject to any section 71(2) confidentiality exclusions), and we will expect HS1 Limited to provide a consolidated version of the full contract as amended within 28 days of the amendment being made (see the relevant section for further guidance on the provision of [consolidated versions of access contracts](#)).

### **The process for appeals**

In circumstances where an applicant believes that it has been unfairly treated, discriminated against or is any other way aggrieved regarding arrangements in connection with entitlements to access, an appeal for access and services may be made to us under Regulation 29 of the Regulations.

2.95 Where an applicant intends to do this, before submitting an appeal, the applicant should discuss its plans with potentially-affected third parties to identify any concerns that it may need to mitigate. Such discussions should facilitate the earlier resolution of third party concerns and serve to keep the application period as short as possible.

2.96 The provisions for an appeal can be used for the protection of applicants who need access to HS1 but who cannot agree terms with HS1 Limited. They are a means of preventing abuse of the infrastructure manager's dominant position. They can be used whenever there has been a failure, for any reason, to reach agreement on the terms of access, or when a potential user considers that HS1 Limited is acting unreasonably. It could be the case that what may at first appear to be unreasonable behaviour on the part of HS1 Limited is actually justifiable.

2.97 Where an applicant wishes to make an appeal to ORR in relation to terms of access to HS1, it may:

- (a) Submit the application directly to ORR, for ORR to conduct a consultation;
- (b) request HS1 Limited to conduct a pre-application consultation; or
- (c) conduct a pre-application consultation itself.

2.98 Where ORR receives an appeal and it is confirmed that a pre-application consultation has not been carried out, ORR will conduct its own consultation of potentially affected parties, as well as HS1 Limited and any 'interested persons'.

2.99 Whilst an applicant may apply directly to ORR, it might be more efficient for HS1 Limited to conduct the consultation in cases where the applicant and HS1 Limited have negotiated and agreed the nature of access rights to be sold but are unable to agree on a purely commercial matter. This is because HS1 Limited and the applicant would be able to work together as they would for an agreed application to resolve the concerns of consultees. ORR would then carry out the statutory consultation of 'interested persons' required by the Regulations, considering the representations made as well as any unresolved concerns raised in the pre-application consultation.

2.100 Where the applicant requests HS1 Limited to undertake a consultation, it shall send to HS1 Limited a draft contract and an accurate application form completed up to and including section 6. Upon receiving a request from an applicant for it to conduct a pre-application consultation, within seven days of receipt HS1 Limited shall commence the consultation. ORR should be copied into the consultation.

2.101 Where an applicant decides to conduct a consultation itself, it shall follow the guidance in the C&Ps though where appropriate treating references to HS1 Limited as references to itself. Where it does not wish to request HS1 Limited to host the application documentation on the HS1 website, it should place the documentation on its own website so that consultees can access this information from there. If this is not possible, it may conduct the consultation by emailing the documentation to consultees.

2.102 Where a consultee raises a question that the applicant is unable to answer without the assistance of HS1 Limited, or the question relates directly to something for which HS1 Limited is responsible, HS1 Limited shall provide a timely reply when asked for a response. Following the end of the consultation, the applicant shall make its decision on whether to proceed with an appeal to ORR.

2.103 Where an appeal submitted to ORR has undergone a pre-application consultation, the applicant will set out in its application form any issues arising from that consultation.

2.104 ORR will then follow its statutory process for dealing with such applications. This includes directing HS1 Limited to furnish it with a list of 'interested persons'. ORR must then consult any interested persons.

2.105 At the time ORR consults any 'interested person', it will also place the application on its website and copy it to those parties who were consulted in the pre-application consultation as well as any parties it considers should have been consulted in the pre-application consultation but were not. ORR would not expect those parties who were consulted in the pre-application consultation to make further representations to it (as they will have been able to raise concerns during the pre-application consultation). However, where

a party was not consulted or is unhappy with the proposal and it has not been listed in the application as a consultee with outstanding objections, it will then be able to notify ORR of this.

2.106 When ORR carries out its review of the application it will have regard to any outstanding objections lodged by consultees during the pre-application consultation, any new objections arising from ORR's consultation and, of course, the representations of HS1 Limited and any other representations received through its statutory consultation.

2.107 We have produced [guidance](#) on making such appeals. This guide also contains application forms which should be used when making an appeal to us. For the benefit of all consultees, and for clarity, this procedure is outlined below.

### **Step 1 – Development**

2.108 We recognise that the extent of development work to address any issues arising out of the operation of services may be limited where an operator has not reached agreement with HS1 Limited. On the other hand, the operator's reason(s) for submitting an appeal may reflect disagreement only on a few specific aspects of a proposed contract. We will wish to see the product of any development work, including capacity and performance modelling and timetabling and consultation with other parties. Full details of the information required for appeals are set out in our [appeals guidance document](#).

2.109 We encourage operators to negotiate and agree terms with HS1 Limited wherever possible. If it is likely that agreement will not be reached, we strongly encourage early consideration of submitting an appeal, rather than regarding such an appeal as a last resort, given the timing considerations that apply to any application. Submission of an appeal need not mark the end of negotiations. It would be possible for the appeal to be withdrawn and an agreed application submitted if agreement is reached later on. However, it may be quicker to continue the appeal process whilst having regard to the fact that the disagreement between the parties has been resolved.

2.110 Where, through further negotiation, an operator reaches agreement with HS1 Limited on certain aspects of a proposed contract, we will take into account any joint representation they make alongside such other representations as we might receive through our wider consultation.

### **Step 2 – Discussion with other operators and industry consultation (where applicable)**

2.111 Where a train operator intends to make an appeal for access to HS1, we recommend that it informally discusses it plans at an early stage with those operators likely to be affected by its proposals. This will help to identify the main concerns that other parties are likely to have and enable the applicant train operator to try to resolve those concerns sooner rather than later.

### **Step 3 – Submission of application to ORR**

2.112 Any appeal must be made in writing to us, and must:

- (a) contain specific details of the required rights;
- (b) specify the terms which the appellant proposes should be contained in the required access contract (or proposed amendment); and
- (c) include any representations that the appellant wishes to make with regard to the required rights or the terms to be contained in the required access contract or proposed amendment.

### **Step 4 – Consideration and consultation**

2.113 On receipt of an appeal for access to HS1, we will:

- (a) send a copy of the appeal to HS1 Limited (if one has not already been provided) and invite HS1 Limited to make written representations to us, allowing at least 21 days for this; and
- (b) direct HS1 Limited to provide us with a list of interested persons – allowing at least 14 days for HS1 Limited to respond;
- (c) on receipt of the list of interested persons, invite them to make written representations on the appeal, allowing them at least 14 days to respond;
- (d) on receipt of HS1 Limited's representations, send the appellant a copy, allowing it at least 10 days to submit any further representations; and
- (e) copy any representations received from 'interested persons' to the appellant and HS1 Limited seeking any representations they wish to make, allowing them at least ten days to respond.

2.114 We will publish details of the appeal together with any supporting information, subject to any redaction of commercially sensitive and confidential aspects.

2.115 Where we consider that an adequate industry consultation has not been conducted by the appellant or HS1 Limited, we will consult widely so as to ensure that we have a well-informed basis for coming to our conclusions. We will expect to start a wider consultation at the same time as we invite representations from interested persons, generally expecting to allow four to six weeks for submission of written representations depending on the nature of the appeal. If, after an initial review of the appeal, we identify any key issues on which we would appreciate consultees' specific comments, or to which we wish to draw to consultees' attention, we will send an email or letter detailing those issues.

2.116 In line with the policy published in this document, our consideration may involve a hearing.

## **Step 5 – Conclusions and determination**

2.117 We will inform the appellant, HS1 Limited, and any interested persons of our decision, and in doing so, specify:

- (a) the terms of the access contract or the amendments to be made; and
- (b) the date by which the access contract must be entered into, or amended, as the case may be.

2.118 We will publish our determination, subject to any redaction of commercially sensitive and confidential aspects.

2.119 When a determination is issued for an appeal, HS1 Limited will be released from its duty to comply with the determination if the appellant fails to enter into the contract on the terms as directed by the date specified (although we can vary our determination to provide more time).

2.120 Once the contract is entered into, HS1 Limited must send a copy to us within 14 days to be placed on our public register.



# 3. The expression of access rights and the use of capacity

## Introduction

3.1 ORR supports the objective of making the best use of capacity on the HS1 network. We also support making best use of capacity on the Channel Tunnel corridor as a whole and, through our role in regulating the GB national network (including HS1) and in the Intergovernmental Commission for the Channel Tunnel, we shall work to meet this objective.

## The use of capacity

3.2 In deciding whether to approve new or amended access rights, we must ensure the fair and efficient allocation of network capacity. This means making judgements about:

- (a) the realistic extent of spare capacity and the allocation of limited capacity between different requirements;
- (b) the operational integrity of the services in a proposed contract and their wider implications for network performance; and
- (c) the appropriate balance between certainty (for a train operator) and flexibility (for HS1 to accommodate the needs of all other passenger and freight train operators, bearing in mind the terms of the [Declaration of Specialised Infrastructure](#)).

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

- (a) [capacity allocation and utilisation](#);
- (b) [safety](#);
- (c) [the expression of rights](#);
- (d) [operational integrity](#);
- (e) [consideration of alternative access rights](#);
- (f) [capacity choices, criteria and competition](#);
- (g) [certainty and flexibility in the expression of rights for freight operators](#);

- (h) [certainty and flexibility in the expression of rights for passenger operators](#);
- (i) [duration and unilateral termination](#); and
- (j) [congested infrastructure](#).

## Capacity allocation and utilisation

3.4 Our role is to oversee the fair and efficient allocation of network capacity by HS1 Limited, and determine that allocation ourselves in certain circumstances (for example, where an operator has been unable to reach agreement with HS1 Limited).

3.5 In making our decisions, we will have regard to our statutory duties, the C&Ps and any other relevant policy or statement we may publish from time to time. We will also have regard to any statutory guidance, Charging Framework or any future Capacity Allocation Framework issued by the Secretary of State. We will, where relevant, also have regard to the Declaration of Specialised Infrastructure (Regulation 22 of the Regulations).

## Safety

3.6 We do not expect to approve a framework agreement or amendment to an existing framework agreement if we consider that it would give rise to safety issues that could not be properly addressed in time for the planned commencement of services.

3.7 Our approval of access rights does not in any way affect the responsibilities of the parties to ensure that the risks arising from their activities remain as low as is reasonably practicable. It is the parties' responsibility to ensure that all appropriate risk control or mitigation measures have been taken and that they comply with relevant statutory regulations. This includes obtaining any necessary safety approvals.

3.8 In general terms, we expect that the signalling system and operational rules for the network are designed so as to ensure that the timetable (which gives effect to operators' access rights) can be operated safely and that changes to access contracts in respect of the pattern and quantum of services can be accommodated safely. We recognise that changes to pattern and quantum may have wider effects, for example on the ability of HS1 Limited (or a party acting on their behalf) to obtain access to the network for inspection and maintenance activity. In addition, changes to the types of rolling stock which operators are permitted by their contracts to use on the network may affect the risks arising from the operation of trains. Where changes to an access contract may generate such material changes to risk, we expect that the parties will have assessed these risks, identified adequate control or mitigation measures and taken any necessary actions.

## Expression of rights

3.9 The access rights set out in the template Schedule 5 are the key description of what the train operator is buying from HS1 Limited. They are therefore a vital part of each contract and we will want to understand the reasons for any proposed departures from the Schedule 5 template before we approve them. Access rights are given effect in the timetable through the timetabling process set out in Part D of the HS1 network code.

3.10 The expression of access rights must be clear and accurate. ORR, HS1 Limited, other operators and consultees must be able to 'map' the access rights being sought onto the existing pattern of rights held in existing approved contracts, and against other operators' aspirations for changes and/or additions to the services that run. We recognise the importance of train operators being able to negotiate rights which meet the needs of their businesses and their funders, but consider that it is possible to standardise the *expression* of the key elements of the rights, which has significant benefits in:

- (a) making the process of negotiation easier, because it focuses on the customisation of the rights to meet specific needs;
- (b) reduces the potential for lack of clarity and disputes about the rights; and
- (c) enables other train operators, ORR and the infrastructure manager to have a better understanding of the capacity that has been sold.

## Operational integrity

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

- (a) the rights sought are capable of being exercised in a way that means that an operator's own services and those of any other operator using the same routes should be able to operate reliably, and that would not preclude HS1 Limited having adequate access to the infrastructure for efficient maintenance and renewal;
- (b) the applicant intends and will be in a position to operate the services or have the services operated on its behalf; and
- (c) their operation would not necessarily conflict with the exercise of rights held under another access contract. We will not intentionally approve rights that cannot be met without HS1 Limited failing to meet its obligations in framework agreements with other operators.

## Consideration of alternative access rights

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

- (a) the Declaration of Specialised Infrastructure;
- (b) any relevant connecting timetabling issues;
- (c) the relative benefits to the users of railway services of the different service patterns, including the implications for performance and reliability;
- (d) the extent to which the allocation of the rights would impact on the funds available to any relevant funder for the purposes of their functions relating to domestic railways and railway services, and the extent to which rights sought and the plans of other operators reflect a contractual commitment to a funder;
- (e) the balance between the benefits of new services being introduced against the benefits of timetable/planning stability for existing services;
- (f) the likelihood of more efficient capacity utilisation resulting (e.g. where there are proposals to run longer trains or trains with improved specified equipment);
- (g) the extent to which an increase in the capacity available might be involved, as a result of associated funding of network enhancement; and

3.13 In approving new access rights which could affect performance, we expect to have regard to the impact on the overall resilience and integrity of the network or parts of it.

3.14 Similarly, in respect of encouraging the right balance between accommodating additional services and HS1 Limited's requirements for network access for maintenance and renewal, the variable cost element of the access charge is designed to reflect additional maintenance and renewal costs arising from additional traffic. Furthermore, the arrangements for establishing the EAS under Part D of the HS1 Network Code and the possessions allowance provisions in Section 4 of the contract should enable HS1 Limited to restrict access to permit efficient maintenance and renewal. All access rights, including firm rights, are subject to the EAS and TPR. Where new or amended access rights materially increase the costs of efficient maintenance and renewal, there would need to be appropriate compensation for HS1 Limited. (Charging is discussed in more detail in [Chapter 4](#)).

3.15 We recognise that as more trains run on the network, there comes a point where the disbenefits of extra services in terms of train service performance outweigh the benefits of the additional services to passengers or freight customers. Therefore it may be desirable to reserve some unused capacity (or 'white space') for reasons of maintaining or improving performance. We expect to take this requirement into account, and would not expect to approve new rights where there is a material risk that performance disbenefits (both at the particular location and across the network) outweigh the benefits of the new service.

3.16 In reaching such a conclusion we would take into account the available performance modelling, and the views and information provided by affected operators and other interested parties. We may also make clear when approving or directing rights which potentially bring network usage close to this threshold, the extent to which we would be prepared to approve further rights (if at all).

3.17 In some cases, services may be discontinued because the adverse performance effect outweighs the benefits to passengers or freight customers. The removal of such services could arise from a decision by an operator or from us not approving the continuation of some existing rights when an operator's framework agreement is up for renewal. In circumstances where improving the network's robustness against disruption is the reason for a service being withdrawn, we would not expect to approve rights for another operator to use the capacity created, unless there had been a material change (for example, an enhancement to the relevant part of the network that increased its capacity and its ability to recover from disruptions).

3.18 In such circumstances, our usual procedures would give all relevant operators an opportunity to comment; including arguing that no new services should be approved or that other new services would offer greater benefits to railway users. In deciding the issue, we would also consider the needs of any affected freight customers. In doing so we would have regard to HS1 Limited's current expectation that any conventional freight services would run at night and should not therefore be affected (although high speed freight may operate during the daytime). Performance and charging arrangements are discussed in more detail in [Chapter 4](#).

## Capacity choices, criteria and competition

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

- (a) different passenger and freight train operators (and funders) wishing to use the same capacity (as appropriate with regard to the priorities laid out in the Declaration of Specialised Infrastructure);
- (b) running extra trains and network performance; and

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

3.20 These choices need to be well informed by analysis and quantification of the physical and economic trade-offs involved. Operators' proposals for changes to access rights should therefore be the subject of informal consultation by HS1 Limited and the applicant with affected train operators and funders *before* HS1 Limited conducts its formal consultation. In the case of proposals on which HS1 Limited and the train operator have been unable to agree and are to be submitted to ORR, an operator may still find it helpful to discuss its proposals with those potentially affected parties before submitting any appeal.

3.21 If a train operator is seeking a small increase in, or minor changes to, its access rights and both it and HS1 Limited are satisfied that this would have no adverse effect on delivering the performance targets contained within the Concession Agreement and access contracts, as long as there are no unresolved consultation concerns, we would not normally require any supporting performance information.

3.22 We will require supporting performance information as part of an application where:

- (a) the parties cannot agree and an application is made under appeal; and/or
- (b) there are unresolved issues arising from HS1 Limited's consultation of potentially affected operators regarding the likely operational performance impact.

3.23 We reserve the right to require further information from the parties where we consider this necessary in order to satisfy our statutory duties.

3.24 Supporting information might include:

- (a) specimen timetables, to demonstrate that the required capacity is available;
- (b) reports on performance modelling;
- (c) a statement of any access rights that are being surrendered;
- (d) details of how the changes will affect the area in which they operate in relation to contingency planning and traffic management arrangements once the new services are operating;
- (e) details of any specific actions being taken by the parties to ensure an effective implementation of the changes; and
- (f) a statement of how the new rights will affect maintenance and renewal requirements on the route and the availability of access for safe, effective and adequate maintenance and renewal.

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

3.26 We will have regard to the benefits and costs of proposals for new or modified access rights, compared with alternative uses of the capacity. We may take into account cost-benefit analysis of the proposals and alternatives in order to facilitate this and, if such evidence is presented, any difference in assumptions compared with the appraisal criteria in [WebTAG](#) (Transport Analysis Guidance), should be highlighted.

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

- (a) the benefits of providing completely new services as against an increase in the frequency of existing services. This is likely to be particularly important where certain passenger markets have particularly poor services;
- (b) specific requirements in competitive markets;
- (c) the existence of direct funding support for a service or an associated network enhancement provided by another public body; and
- (d) the efficient use of scarce or expensive resources.

3.28 We accept that there may be particular circumstances where WebTAG may need to be augmented by other forms of supporting analysis and in such cases we will explain why we have had to deviate from the WebTAG appraisal criteria.

3.29 As noted above, we will ensure that the DfT has been consulted on all applications. We will also expect to consult and have regard to the views of other operators and known potential operators, in addition to Passenger Focus, London TravelWatch, the Mayor of London, TfL, OTIF the Rail Freight Group, RailNet Europe and the European Rail Freight Association.

### **Approval of competing services**

3.30 Where a passenger operator is seeking to introduce a new service (international or domestic) that competes with the existing services of one or more other such operators, we will wish to consider the extent to which such additional services would:

- (a) for domestic services: benefit passengers and not be primarily abstractive of the revenue of other operators. The operator's application should therefore specify what benefits passengers are likely to gain and the extent to which service volume growth is expected to lead to passenger volume growth. To



enable us to consider whether the proposed rights are primarily abstractive in nature we have established a five-stage test found at [Annex B](#). ;

(b) for international services: impact on the economic equilibrium of services operated under a public service contract. Our guidance on the assessment of new international passenger services, including our approach to the economic equilibrium question, can be found [here](#).

### **Rights to be used**

3.31 We would not normally expect to approve firm rights to train slots (or any other entitlement) unless the train operator satisfies us about its intention and ability to use the capacity in question. Otherwise, scarce capacity would be wasted by HS1 Limited's obligation to stand ready to accommodate the operator's access proposal to take up the unused rights. We would therefore want to see evidence supporting an operator's intention to use that capacity, for example, business case information, including details of resourcing plans.

3.32 For a freight operator, this might include confirmation of a contract, or negotiation of a contract with the proposed customer, details of resourcing arrangements for the proposed services and evidence of any other relevant preparations. However, we would make allowance for prospective new freight flows, where the operator may need to have demonstrated that it had firm rights approved by ORR before the potential customers would enter into haulage contracts with it. In such cases we would want to see clear evidence of the operator's prospects of winning sufficient business before approving or directing the rights sought.

### **Certainty and flexibility in the expression of rights of freight operators**

3.33 We have not yet seen any applications from freight operators for access to HS1, so have less understanding of what will be required. Now that standard freight access terms have been agreed, we would expect to receive applications from those operators currently using short-term, unregulated contracts, and from any future freight operators. Without prejudice to the applications we receive, we would expect the expression of rights for freight operators to follow the principles of that for passenger operators. In particular, we would expect the applicants to state the extent to which the firm access rights in the proposed contract or amendment are required to service freight haulage contracts currently held by the applicant and how the length of these contracts compare with the length of the proposed contract or amendment. The C&Ps will be updated and supplemented as and when we gain an understanding of the requirements.

### **Certainty and flexibility in the expression of rights of passenger operators**

3.34 The parties (and relevant funders) also require track access rights sufficiently certain to enable them to plan their businesses with a reasonable degree of assurance. We consider that the appropriate degree of certainty will depend on the importance to the operator's business plan of various aspects of the

proposed contract and the expression of rights, both in the context of the operator's costs and revenues and of any franchise or similar commitments (e.g. a concession). Our analysis of the rights sought will take account of the justification for, and the cumulative impact of, those rights being sought.

## **Flex**

3.35 Flex is the term used to describe the flexibility which an infrastructure manager has under a contract to allocate train paths which do not exactly reflect the train operator's access proposal. As agreed with ORR, HS1 Limited does not currently employ flex provisions in its framework agreements. This reflects the circumstances of the interface with the Channel Tunnel infrastructure, and the need to timetable and hand over trains from one network to the other seamlessly, including instances where trains are 'flighted' (i.e. several trains travel in the same direction at once, with regard to the permitted headway) to make best use of capacity. This also reflects the Declaration of Specialised Infrastructure which has been applied to the HS1 network, and the extent to which HS1 Ltd must reflect the requirements of that Declaration.

3.36 However, HS1 Limited has the freedom to accept the access proposal as submitted or, having due regard to the Decision Criteria contained in Part D of the HS1 Network Code, it may flex an access proposal to allocate a path which is different to the access proposal but still within a pre-agreed parameter. Being a firm right, the access proposal must be accepted if it is properly made by the Priority Date, but HS1 Limited still has flexibility, should it require it, when pathing the train.

3.37 Where an access proposal is not supported by a firm right, HS1 Limited has no specific restriction on its flexing right but it must have due regard to the Decision Criteria.

3.38 The converse of flex is the approach known as 'hardwiring'. Applicants would need to submit a convincing case before we would be prepared to approve a significant degree of hardwiring. This is because hardwiring is the most expensive use of capacity. Indeed, regulation 18(3) of the Regulations forbids the detailed specification of a train path in an agreement lasting more than one timetable period.

3.39 Whilst HS1 Limited does not employ flexing provisions (such as those seen on the GB national network), flex may be necessary to maintain the integrity and workability of the timetable. However, there is no presumption of any particular degree of flex. As more capacity is used on the HS1 network, a more reasonable balance required to maintain operational practicability of the timetable on the one hand and the facilitation and protection of legitimate business planning on the other hand.

## **Duration**

3.40 Regulation 18 of the Regulations establishes the presumptions in relation to the duration of access contracts. Applicants must justify the proposed duration of the framework against the framework of the Regulations.

3.41 This section will be updated once our policy setting out the framework against which we will consider any applications for a long term framework agreement is published.

## **Congested Infrastructure**

3.42 The Regulations (Regulations 23 to 25) require that where an infrastructure manager cannot adequately accommodate a request for capacity, it must declare the relevant section of infrastructure to be congested. It must then undertake a capacity analysis, identifying the reasons for the congestion and the measures which might be taken in the short and medium term to ease the congestion. This must be followed by a capacity enhancement plan detailing, amongst other things, the constraints on infrastructure development, the options and costs for capacity enhancement, and the likely changes that would follow for access charges. We note that both the Passenger and Freight Access Terms allow HS1 Limited, subject to DfT and ORR approval, to levy a congestion tariff (principally a scarcity charge). The infrastructure manager must provide interested parties with a copy of the capacity enhancement plan and a timetable for the completion of the measures identified within it to resolve the congestion. However, the infrastructure manager is not required by the regulations to implement the plan.

3.43 Applicants should note that where an application is made which relates to a part of the network that has been declared congested by HS1 Limited, this will not affect the process we undertake in considering it.

# 4. Charging, performance, possessions and liabilities

## Introduction

4.1 This chapter explains our policy on track access charges, performance regimes, possession regimes and the liability framework for access contracts. We wish to ensure that access contracts contain incentives that will: promote efficient and effective performance; provide for cost recovery and payment of appropriate compensation; secure efficient use of network capacity; and thus facilitate better services for passengers and rail customers.

## Track access charges

4.2 The government established a charging framework for HS1 through the Concession Agreement pursuant to regulation 12(4) of the Regulations. The framework was established by the Secretary of State following [consultation](#) and is intended to operate in a manner that is consistent with the Regulations.

4.3 The track access charges paid by a passenger TOC (train operating company) for reservation of capacity and use of HS1 (except stations) comprise the following components:

- (a) Investment Recovery Charge;
- (b) Operations, Maintenance and Renewal Charge;
- (c) Traction Electricity Charge; and
- (d) Capacity Reservation Charge (including a potential rebate on such a charge).

4.4 There is also provision in the contracts for a Congestion Tariff, Other Service Charge and Carbon Costs charge, but these charges are not currently levied.

4.5 The track access charges paid by a freight operator for reservation of capacity and use of HS1 comprise the following components:

- (a) Operations, Maintenance and Renewal Charge;
- (b) Traction Electricity Charge;
- (c) Capacity Reservation Charge (including a potential rebate on such a charge); and
- (d) (in the case of high speed freight only) contributions to common costs.

4.6 There is also provision in the contracts for a Congestion Tariff, Other Service Charge and Carbon Costs charge, but these charges are not currently levied.

4.7 The definitions and nature of these charges can be found in Part 6 of the [HS1 Network Statement](#).

4.8 One of our key roles is to protect train operators from being charged unduly high prices for access to this network. In doing this we must ensure that the access charges paid by operators are sufficient to enable HS1 Limited to recover the costs of operating, maintaining and renewing its network. We carry out this role through our [Periodic Reviews of HS1 and interim access charges reviews](#).

### **Prepayment of charges**

4.9 HS1 Limited requires the pre-payment of track access charges in order to achieve credit protection for HS1 Limited. HS1 Limited states that it would need to raise additional working capital, potentially reconsider its debt structure and seek other forms of credit protection without the pre-payment of charges.

4.10 Whilst we recognise that HS1 Limited has a different business model and that many of the new operators are likely to be large organisations, it is important that we also bear in mind that pre-payment may have an impact on the cash-flow of some train operators, who may be somewhat smaller and less able to bear such an arrangement, including any increased costs incurred as a result of this method of prepayment, than HS1 Limited.

4.11 The pre-payment method fairly reflects the commercial arrangements of HS1 Limited and passenger train operators must pay track access charges three months in advance. However, we want to ensure that the pre-payment mechanism does not act as a barrier to entry for new small operators, and will monitor to see if it has this effect. We are also prepared to consider applications from new entrants containing provisions for payment in arrears, so long as the access charges paid to HS1 Limited reflect the additional costs it incurs as a result of changes in the charge structure.

### **The performance regimes**

4.12 The HS1 performance regime is intended to fulfil the following objectives:

- (a) the incentivisation of HS1 Limited and operators to deliver improved levels of performance;
- (b) to take account of and minimise TOC on TOC delay;
- (c) to ensure financial risk on each party is manageable and proportionate;
- (d) to be as simple as possible to understand and operate; and
- (e) to be based on efficient and accurate monitoring and recording.

4.13 The HS1 performance regime is included in Section 8 of the Passenger and Freight Access Terms. The performance regime is a benchmarked regime which provides incentives for all parties to minimise performance-disrupting incidents when they occur.

4.14 Under the regime, train operators which cause a delay make a performance payment to HS1 Limited for the delay or cancellations caused to other TOCs, subject to the overall performance experienced by that TOC being worse than a defined TOC on TOC benchmark. Payments are based on the number of minutes delay attributable to the TOC with a payment rate specific to the type of traffic affected. For TOC on TOC delays/cancellations, HS1 Limited will pay compensation to the affected TOCs based on the compensation received. The regime is set up so that the compensation paid by HS1 Limited to the affected TOCs does not exceed the performance payments it receives from TOCs responsible for the TOC-on-TOC delay/cancellations.

4.15 HS1 Limited will make payments to a TOC in the event that HS1-attributed delays or cancellations (excluding TOC-on-TOC delays or cancellations) experienced by the TOC are worse than a defined poor performance threshold.

4.16 The performance regime also entitles HS1 to a bonus payment from a TOC in the event that the sum of the HS1-caused delay minutes and cancellation minutes per train and TOC-on-TOC delay minutes and cancellation minutes per train experienced by that TOC is less (i.e. better) than a defined good performance threshold.

4.17 The regime does not take account of delays arising from networks other than HS1. Hence late presentation of trains onto HS1 will be attributed against the TOC at the point at which it enters HS1. Third party causes arising off HS1 which affect network performance will also be excluded for both HS1 Limited and the TOC.

4.18 Either party will be required to submit a performance improvement plan if the party's performance payment exceeds one thirteenth of the annual cap in any 3 out of 13 consecutive 28 day periods, or if its performance fails to satisfy certain other criteria in any 8 out of 13 consecutive 28 day periods.

4.19 In addition to this initial review, the performance regime can be reviewed after a material change/. A material change for this purpose would include a physical modification to HS1, an increase or decrease of more than 4% in the number of train movements; a significant change in the performance of the rolling stock used by the operator; a change in the performance regime of another train operator or the entering of a track access agreement with a train operator, which has a material effect on the performance regime.

4.20 Parties may also request an additional recalibration of payment rates and thresholds 12 months after a material change occurs.

## The possessions regime

4.21 The arrangements under which HS1 Limited is able to carry out restrictions of use on HS1 (e.g. for engineering possessions, through imposing temporary speed restrictions, etc.) are set out in Part D of the HS1 Network Code. The possessions regime is set out in Section 4 of the Passenger and Freight Access Terms. The intention of the regime is to incentivise the safe, early, and efficient planning of engineering work by HS1 Limited.

4.22 The possessions regime sets out the compensation payable by HS1 Limited to train operators when it places restrictions of use on HS1 for the purposes of carrying out inspections, maintenance, repair, renewal and enhancement works. Under the possessions regime, the relevant operator will be entitled to recover its direct costs arising from a restriction of use placed by HS1 Limited. The direct costs recoverable by an operator for any restriction of use (other than a competent authority restriction of use and a network change restriction of use) each year are capped at 1% of an amount equal to the aggregate of total IRC (in the case of passenger operators) and OMRC payable by such operator in the relevant year in the case of a passenger operator, and 1% of the aggregate Freight OMRC payable by such operator in the relevant year in the case of a freight operator.

## Liabilities

4.23 We consider it important that parties to an access contract are clear about their obligations and the liabilities for failure to comply with them. The other key principle underpinning liability provisions is that they should achieve the most efficient allocation of risk, such that risk is borne by the party best able to manage it. Our view is that any regime should incentivise efficient behaviour, underpin a culture of contractual compliance and minimise total industry costs. Furthermore, any liability framework should distinguish between operational failures that are contemplated by the contract and breaches of the contract.

4.24 The standard HS1 passenger and freight contracts contain a liability framework. Liability for operational failures (i.e. delays or cancellations of trains and temporary restrictions on the use of HS1) is compensated under the Section 8 performance regime and, to an extent, the Section 4 possessions regime. These arrangements establish the payments to be made when restrictions are applied to the use of the network (Section 4), and when services in the working timetable fail to run within the established performance parameters (Section 8). Payment under these provisions is capped and neither party may claim *force majeure* relief.

4.25 If there are operators who feel that the liability caps set by HS1 Limited are not appropriate to them then it is open to them to put forward alternative proposals as part of the access application. We will



consider these as we would any other request for bespoke provisions in line with our [policy](#) set out in this document.

# 5. Other issues

## Introduction

5.1 This chapter addresses some of the other issues that may arise in a track access application, in particular in the drafting of departures from the model contracts and some of the key pitfalls to avoid. It also discusses other issues and requirements relevant to track access applications.

## Bespoking and innovative provisions

5.2 We will always consider departures from the standard access terms; for example where some tailoring is desirable to meet the particular commercial circumstances of a particular operator. Any standard access terms contain draft templates for certain optional provisions which operators may wish to exercise (e.g. on restrictions of use/possessions). We will always look at each application on its merits, taking into account the circumstances of each case, and will publish the reasons for our decisions.

## Self-modification provisions

5.3 We expect that access contracts will contain appropriate amounts of flexibility required for the effective operation of HS1 without the continual need for us to approve amendments. For example, contracts may specify contingent rights to run trains in a particular timetable subject to:

- (a) no other operator exercising firm rights which would prevent those trains being run; and
- (b) HS1 Limited being able to fit such access proposals into the timetable.

5.4 We expect that access contracts will contain provisions to enable changes of administrative or minor detail without the need to seek our approval. There may also be cases where contracts contain provisions for the determination of the value of a particular parameter in the contract by a clearly defined process and within a defined range.

5.5 Any in-built flexibility should not enable provisions of the contract to be varied in a material way which might have an adverse impact on other operators, or cut across regulatory policy. Consequently, we expect that provisions establishing a process for significant variation should ensure that such significant variations can only be made subject to our specific approval. ORR must be notified of *all* changes before the changes in question become effective.

## Consolidated contracts

5.6 The provision of consolidated contracts, whilst not a statutory requirement, would be to the benefit of HS1 Limited and the train operator, as well as anyone else who needs to read and understand the full agreement. We therefore expect HS1 Limited to provide us with consolidated copies of access contracts within 28 days of amendments being made.

5.7 Furthermore, we expect amendments to the full agreement to be submitted for approval in a form which gives effect to the desired changes by inserting additional or amended text or tables into the agreement and/or by deleting existing text or tables. This approach ensures greater clarity for all concerned, and makes it easier to keep consolidated contracts up to date.

## Unfinished business

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

- (a) for the process through which the parties are expected to arrive at an agreement, including time limits;
- (b) for the issue to be resolved in a timely manner should the parties fail to reach agreement;
- (c) if the parties fail to agree within the specified time, for the matter to be referred for determination to an independent third party – such as an arbitrator or expert – who is required to apply clear, adequate and appropriate criteria (including, in suitable cases, current regulatory policy on the matter in question). It is very important that the criteria are specified in the contract or arrived at through an objectively justifiable process. We will expect to refuse our approval in cases where the parties merely ask the third party to make a contract for them, which is not part of the role of such a tribunal;
- (d) in matters of regulatory importance, for the agreed/determined matters to be referred for ORR's approval;
- (e) where we are not minded to give our approval, for the parties and the arbitrator/mediator to take our reasons into account in revising the proposal, and for resubmitting it; and
- (f) for incorporating the result of the process in the contract.

5.9 The application forms indicate that we wish to see a flow chart illustrating the process (unless standard provisions are used) to ensure that it is robust, internally consistent (with no steps missing), and leaves no loose ends.

## **Incorporation of other documents by reference**

5.10 The Regulations provide for our approval of an access contract to protect railway industry participants and users by ensuring that the possible abuse of monopoly power and arrangements contrary to the public interest are checked and prevented, and the consumption of capacity is fair and efficient (and meets the public interest criteria in our statutory duties). To do this, we need to be satisfied with all the factors that establish and may influence and change the effect of the access contract.

5.11 By bringing into the access relationship external legal rights or obligations (from unregulated documents), the effectiveness of that jurisdiction for the benefit of railway industry participants and users could be diminished and important protections circumvented.

5.12 Certain types of external documents, such as the TPR and EAS, are already subject to regulatory protections. In those cases, provisions in access contracts that allow the effects of these external instruments to flow through into the access relationship are unlikely to raise concerns.

5.13 Where the parties want to incorporate by reference an external document, it may be that changes to that document will not have an adverse effect on the access relationship. However, our concern is that any changes to the external document are outside our jurisdiction and we may not be able to prevent changes which alter the balance of rights and obligations between the parties. Accordingly, we would expect robust justification for the incorporation of non-standard rail industry documents into an access contract.

5.14 For these reasons we will wish to:

- (a) see and review any documents referred to in proposed access contracts at the time the application is made (or before);
- (b) be satisfied that the references and any obligations imported are appropriate and justified (we will also need to take into account the potential, and mechanisms, for subsequent amendment of such documents), including flow-through; and
- (c) ensure that the documents are publicly available, or publish them ourselves (subject to any confidentiality exclusions).

## Multilateral provisions

5.15 An access contract is a bilateral contract between HS1 Limited and an applicant. The HS1 Network Code, which must be incorporated in every framework agreement with HS1 Limited, contains certain provisions applying to such industry-wide matters as compilation of the working timetable. The HS1 Network Code contains its own in-built change procedures.

5.16 We will be concerned if an applicant seeks to incorporate in a proposed access contract multilateral provisions other than the HS1 Network Code because the bilateral contract cannot bind other parties (even where specific provision is made for enforcement *by* third parties under the [Contracts \(Rights of Third Parties\) Act 1999](#)). Applicants should therefore consider whether the desired effect would be better delivered through pursuing an amendment to the HS1 Network Code itself.

## Side letters and other associated agreements

5.17 We will expect to see the whole contract that the parties wish to make for the allocation and use of capacity. Any side letters or collateral or associated agreements, if they are to qualify or otherwise affect the access contract, must also be submitted for our approval. The application forms require confirmation that everything pertinent has been submitted.

## False information

5.18 Regulation 37 of the Regulations states that any person, in giving any information or making any application under or for the purposes of any provision of the Regulations, to make any statement which he knows to be false in a material particular, or recklessly to make any statement which is false in a material particular, is an offence. If false or misleading information has been given and our decision would otherwise have been different, the access contract or amendment may be voidable on the grounds of fraudulent misrepresentation.

## Executing and submitting contracts

5.19 It is the responsibility of the parties to a contract to ensure that they execute their contracts correctly in accordance with English law. However, as an aid, we set out below some guidance for executing contracts with the aim of preventing commonplace mistakes.

## **Signing and dating contracts**

5.20 For a contract or subsequent amendment to be valid, it must be signed and dated in the appropriate place. The date normally appears at the top of page one. It is not sufficient merely to date the front cover (which is not legally part of the contract).

5.21 Any person signing a contract on behalf of their company must have delegated authority to do so. It is for each company to ensure that the relevant people have the necessary authority. We recommend that the name of the signatory is printed under the signature so that it is clear who has signed the contract on behalf of each company.

## **Counterparts**

5.22 For contracts executed in accordance with English law, it is acceptable to submit a signed contract to ORR in counterparts when time is limited and it is not possible for both parties to sign a single copy of the contract. This means the infrastructure manager and the applicant independently signing separate but identical copies. The two, separately signed, copies (counterparts) form the one contract and as such must be kept together. It is not acceptable to submit one contract signed by one party accompanied by, for example, a faxed copy of the signature page from the other party. Given the risk of one of the counterparts being mislaid or non-identical contracts being signed by mistake (which would bring the validity of the contract into question), we would suggest that contracts are only executed in counterparts if absolutely necessary.

## **Numbers of copies of documents to be submitted to ORR**

5.23 Where either an informal submission for an agreed new contract or amendment is being made to us, we require just one copy of the relevant form, draft contract/amendment and any associated documentation, along with emailed electronic copies in MS Word format so that we can make any redactions that might be necessary before posting them on our website.

5.24 Where HS1 Limited and a train operator are entering into an agreement, the number of copies that should be submitted to us depends on the type of application. We require:

- (a) two copies where HS1 Limited is submitting an executed contract or contract amendment in consequence of ORR approval for unagreed applications, or agreed new applications only; and
- (b) three copies where HS1 Limited and a train operator are making a formal submission for our approval of an agreed amendment. We will then return one copy of the approved agreement to each of HS1 Limited and the train operator, keeping one copy for the public register.

5.25 Electronic MS-Word versions of the final agreement should also be sent to us by email for placement on our website

# Annex A: flowcharts

## Flowcharts

The following pages set out the process flowcharts for the pre-application consultation process and applications submitted to us. The purpose of these is to provide a high-level guide; if used, they should be read alongside the written guidance provided elsewhere in this document.

## Key for application processes

Train Operator only action

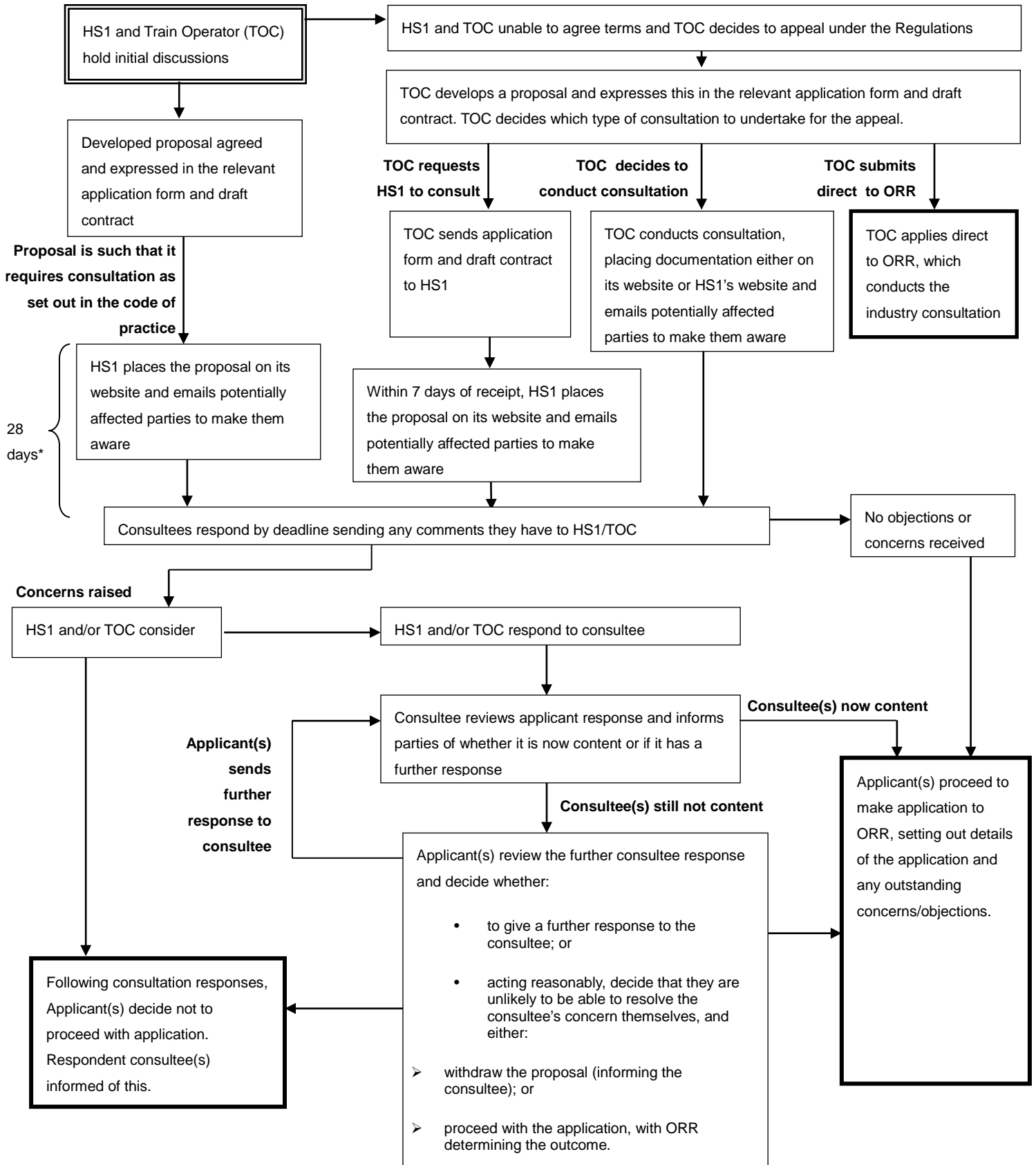
Joint Train Operator-HS1 action

HS1 only action

ORR action

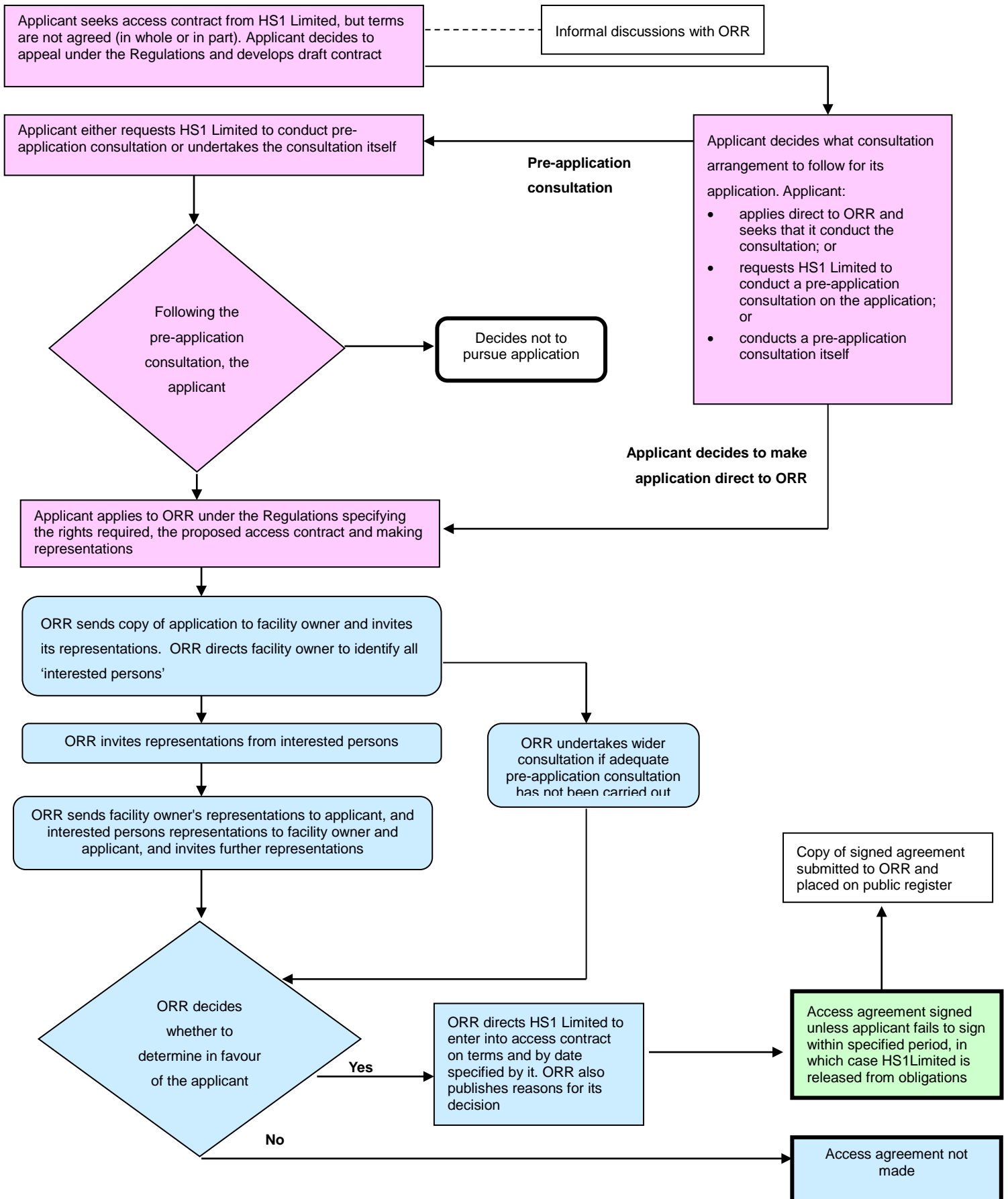


# Industry consultation process flowchart

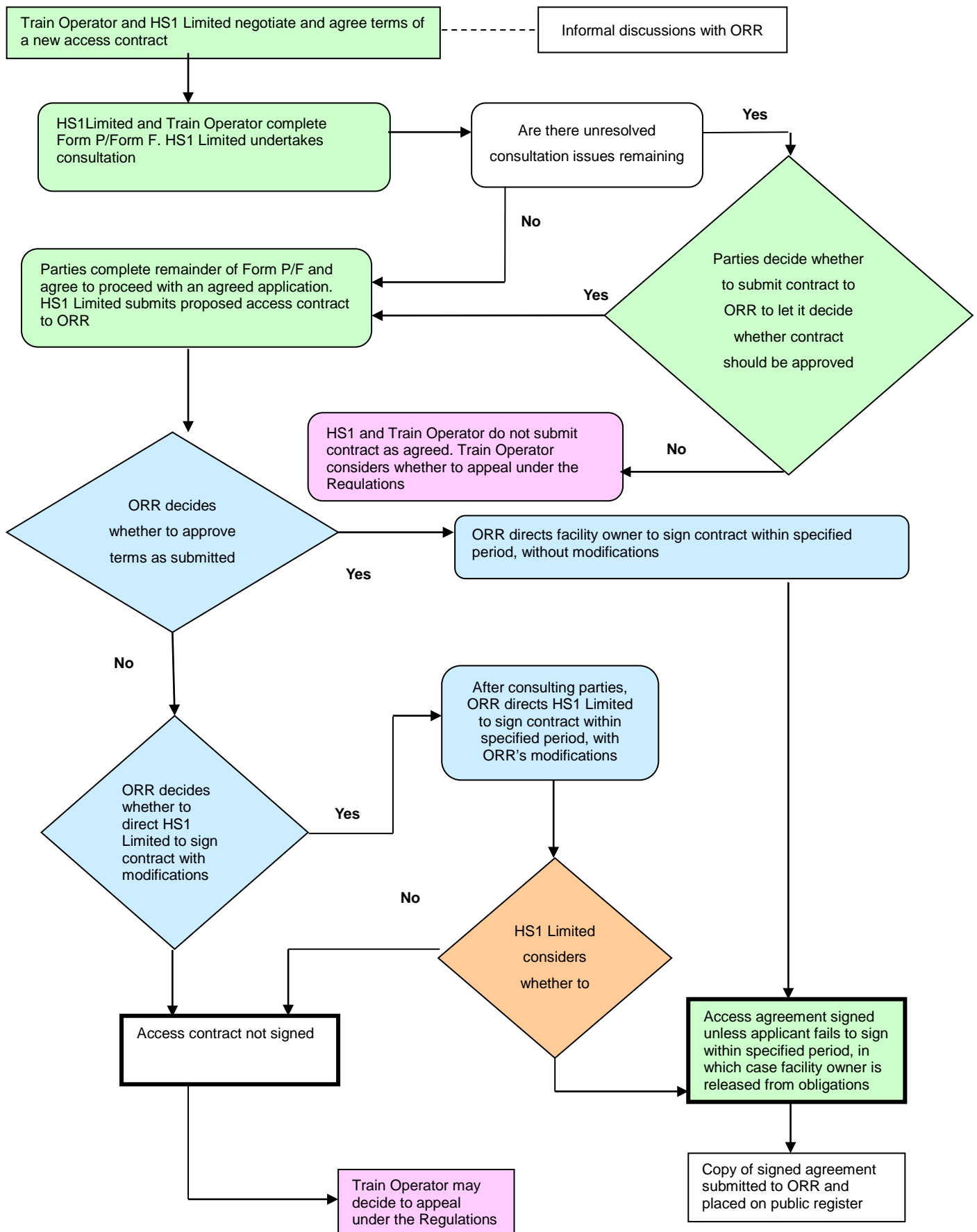


\*Or other period as provided for in this document

# Appeals



# Agreed applications



# Annex B: the ‘not primarily abstractive’ test

We would not expect to approve competing services on HS1 that would be primarily abstractive of an incumbent’s revenue; that is to say services which take revenue from other, existing services without providing sufficient compensating economic benefits. To allow us to consider whether the proposed rights are primarily abstractive in nature we have established a five-stage test. Please note, references to ‘franchises’ below apply only to domestic franchise operators in Great Britain, and do not apply to international operators (a different test is applied in this instance). Further information on the test applied to international operators can be found [here](#).

We would apply the test when:

- (a) a new open access service would compete with franchised services and so impact on the franchise funder’s budget;
- (b) a new franchised service would compete with an existing franchised service where the competing services are supported by different funders or there are other concerns over the impact on a funder’s budget; or
- (c) a new open access or franchised service would compete with an existing open access service, where that new service could force the existing open access operator to withdraw from the market and reduce overall competition on the network.

There could also be circumstances where we would apply the test when one franchisee proposes to increase the level of competition against another franchisee (which might include, for example, an increase in the number of services or station calls) in order to help inform us whether it would be likely to be wasteful competition.

Once a service has been established, an application to approve an extension of the duration of access rights does not amount to a new competing service. We would not therefore expect to reassess such services against the ‘not primarily abstractive’ test.

Our five stage test is as follows. Stage 1 will use standard industry models of growth and patterns of changes in demand, notably the passenger demand forecasting handbook (PDFH<sup>5</sup>) and MOIRA<sup>6</sup> software, to make an initial broad estimate of the likely level of revenue abstraction and generation. The current version of MOIRA only allocates demand based on timetable factors such as journey time and speed. Where material and practical, we would expect to take explicit account of the following factors:

- (a) differential dedicated fares on new competing services;

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<sup>5</sup> The PDFH summarises existing knowledge on rail passenger demand forecasting and is based on information gained in a large number of research studies. It gives clear recommendations that enable users to forecast changes in demand in light of anticipated changes in circumstances.

<sup>6</sup> MOIRA is a computer model which models the effect of changes in rail timetables on passenger demand and passenger train operator revenue. It is consistent with the PDFH and may be used alongside it.

(b) service quality and marketing, for example the use of different rolling stock on new competing services;

(c) crowding: where new services would reduce existing crowding or the level of crowding on new services is likely to be different to that on existing ones;

(d) large time savings: where time savings are large and the existing rail service is poor (for example if the new service provides a direct service where none previously existed). In these circumstances, and where data is available, we would also expect to take account of railheading<sup>7</sup>.

In our assessment of these impacts, where appropriate and practical, we would expect to build on the approach that we have used previously. For example, in more detailed cases we would expect to take into account the approach taken by MVA for East Coast Main Line services<sup>8</sup> which used higher demand elasticities for large time savings.

Stage 2 will review the broad estimate produced in stage 1 in the light of information provided by:

(a) the operator proposing the new competing services;

(b) incumbent operators potentially affected by the new competing services;

(c) the funder(s) in question; and

(d) any other interested parties, such as Transport for London, ITAs, Passenger Focus London TravelWatch and other similar parties not necessarily located in Great Britain.

To inform this assessment, the operator proposing the new services will be asked for its business plan, including:

(a) details of the forecast revenues and costs for the proposed services;

(b) details of the forecast benefits to passengers using its services;

(c) details of the proposed fare structure and pricing policies; and

(d) forecast demand growth on the route (i.e. the level of growth in overall rail passenger usage, as opposed to the impact on incumbent train operators).

The information provided by an incumbent operator is likely to include analysis illustrating the impact on its business, including the expected levels of abstraction. It may also provide demand forecasting analysis that is on a different basis or uses a different approach to that used by us in stage 1, if it considers this is likely to provide a more accurate estimate of likely impacts.

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<sup>7</sup> Railheading is the practice of travelling further than necessary to reach a rail service, typically by car due to, for example, discounted fares available from stations further away from their home station or when their home station has no direct service or is served less frequently than stations further away.

<sup>8</sup> Assessment of alternative track access applications, MVA, January 2009. This document can be accessed [here](#).

The realism of any forecasts will be assessed and we may request meetings with, in particular, the applicant and the relevant franchising authority to inform this assessment.

Stage 3 will use readily available benchmarking and survey information from any comparable situations and, where available, from relevant independent surveys in order to refine the estimates produced by stages 1 and 2. Over recent years, a number of new competitive services have been introduced. Information from these services, where applicable, will be used to refine earlier estimates.

Stage 4 will consider the likely impact that the proposed new services would have one to two years after their introduction, on the basis of available relevant information, including information from the applicant, the franchising authority and incumbent operators. This is to identify material impacts that would not occur immediately on introduction of the new competing services. The likely effect would be a reduction in the estimated proportion of revenue abstracted from existing services, as more people who previously did not use rail became aware of the new services over time. This 'ramp-up' effect is common with the introduction of new services that have different characteristics to those of an incumbent's services. On the other hand, this stage may also consider circumstances in which abstraction may increase (for example, if the operator of the new services were to change its pricing policy).

Stage 5 will consider other relevant factors. Stages 1 to 4 will provide a quantitative estimate – almost certainly in the form of a range - of the revenue from the proposed new services that might be expected to be new to rail (i.e. generated revenue rather than abstractive). However, this figure needs to be put in context and other relevant factors may need to be assessed, including:

- (a) the degree of confidence that can be placed in the various estimates derived in stages 1 to 4 (for example, whether all or most of the evidence points towards a level of abstraction falling within a narrow range, or whether there is considerable uncertainty about the likely revenue effect);
- (b) whether the levels of abstraction and generation are relatively evenly spread across the services under consideration; and
- (c) where a new service competes with an open access service - whether this would cause the open access operator to withdraw from the market, reducing competition on the network.

Having completed this five stage process, we will then consider whether the proposed rights are primarily abstractive in nature. There will necessarily be a degree of judgment involved in this decision. We will need to strike a balance between a number of our statutory duties applicable to the regulation on HS1, in particular to promote the use of the railway network and competition for the benefit of rail users; whilst enabling persons planning railway services to plan with a reasonable degree of assurance and having regard to our duties in relation to funders.



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