

Proposal for change:

New Part J conditions allowing changes to Access Agreements to enable better use of the railway infrastructure

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Executive Summary

Proposal for change

1. This document is a formal proposal by the Office of Rail Regulation (ORR) to amend the Network Code by adding new conditions to Part J. This proposal is made under condition C5 of the Network Code but also constitutes a formal consultation under condition C8 at the same time.

Reason for change

2. We need to comply with regulation 18(5) of the Railways (Access and Management) Regulations 2005 (the 2005 Regulations). These regulations are currently subject to a recast by the European Commission and it is expected that regulation 18(5) will be retained, or at least remain substantially the same, when revised regulations come into effect next year. The change proposed here is to ensure that ORR's model template track access contracts comply with the regulations.

Impact

3. The change will allow the amendment or limitation of terms within a track access contract if that amendment or limitation would result in 'better use' of the railway infrastructure. This change will potentially affect anyone with a track access contract¹ with Network Rail. The proposed new conditions set out a formal structure to be followed as well as the protection of the Incumbents' interests, such as the right to compensation.

¹ As this proposal concerns changes to the Network Code we use the term 'Access Agreement' for the rest of this document, unless required otherwise by the context.

Section A: Introduction

A1. Purpose

1. This document is a formal proposal by ORR to amend the Network Code by adding a new set of conditions to Part J. This proposal is made simultaneously in accordance with both condition C5 and condition C8 of the Network Code.
2. The reason for the proposed change is to ensure compliance with regulation 18(5) of the 2005 Regulations. On 20 December 2012² we wrote to the industry explaining that the 2005 Regulations require all track access contracts to include provisions permitting the amendment of access rights. Our proposal is the result of subsequent discussions with a range of stakeholders including Network Rail and a sub-group of the Rail Delivery Group's Contracts Regulatory Reform Working Group (CRRWG). We are very grateful for the support, time and effort provided by them.

A2. Joint C5 proposal and C8 consultation

3. This document constitutes ORR's proposal under condition C5 to the Class Representative Committee (CRC) to add new conditions to Part J of the Network Code. The proposal and reasons for change are outlined in [Section B](#) of this document. [Section C](#) provides additional analysis.
4. This document also constitutes a consultation for the purposes of condition C8. As such, it is addressed to the Secretary of State, the CRC and all other interested parties as well as Network Rail. ORR is satisfied that the tests in condition C8.2 are met. This is dealt with in [Section C](#).
5. It is unusual to issue a proposal for change under condition C5 and a consultation under condition C8 at the same time. It would be preferable for the change to be made expeditiously using C5. We will pursue the C8 route if the proposal is not accepted under C5, because of the legal obligation.

Reason for change

6. Regulation 18(5) of the 2005 Regulations says:

A framework agreement must contain terms permitting the amendment or limitation of any condition contained in that framework agreement if such amendment or limitation would enable better use to be made of the railway infrastructure.

² <http://orr.gov.uk/what-and-how-we-regulate/track-access/current-work/industry-reform>

7. It is a legal requirement that we include such a provision in ORR's model contract³, although there is some scope for discretion about how it should be applied in practice. Background on this and ORR's role is included at Annex A.

Key elements

8. The proposed change will potentially affect anyone with an Access Agreement with Network Rail. The intention is that all Access Agreements will be capable of amendment or limitation in accordance with the new conditions. The proposed change is already known to some as the 'access rights reopener'. We refer here to an amendment or limitation of rights in order to achieve 'better use' as an Access Rights Change (ARC). ARCs will be facilitated by inserting new conditions into Part J of the Network Code. Some consequential amendments to Part J and the Access Dispute Resolution Rules (ADRR) will also be required.
9. We would like to emphasise that we do not expect this mechanism to be routinely used by Network Rail to change access rights. The draft provisions incorporate several checks and balances and the 'better use' threshold is quite high. In particular, Network Rail is not permitted to rely on an ARC if an alternative means of achieving the same outcome is available. Also, we expect that most changes required to achieve better use of the railway infrastructure should be made within the framework of more flexible rights in Access Agreements.

Implementation date

10. If the changes are accepted under condition C5 we propose they will come into effect on 1 March 2015, or as otherwise agreed between the CRC and ORR. If we cannot meet that date, we would prefer the new conditions to be in place before the coming into force of new domestic regulations implementing the recast of the EU's First Railway Package⁴, in which the requirement for a 'better use' reopener will most likely be restated. Also there are risks associated with unnecessary delays, as explained later on.
11. If CRC does not accept this proposal, we will issue a notice under condition C8.1, subject to this consultation. However, the proposal might not then come into effect for at least a further 225 days.

Structure of this document

12. This document sets out the proposed change, the reasons why it is needed and the rationale for the proposed approach. The structure is as follows:
 - Section A is this introduction.
 - [Section B](#) sets out the proposal for change:

³ A framework agreement in the Regulations equates to a track access contract in the Railways Act 1993.

⁴ See http://ec.europa.eu/transport/modes/rail/market/index_en.htm

- B1 introduces the issues.
- B2 describes the proposed changes.
- [Section C](#) sets out supporting detail:
 - C1 explains the background.
 - C2 discusses implementation.
 - C3 is our assessment.
- There are also several supporting annexes, as referred to in each part, including a glossary of terms used, at [Annex F](#).

13. We have not included any worked examples. First, they are difficult to predict in advance. Secondly, we do not want to be presumptive in respect of any future cases. Each case must be looked at on its own merits. There are however references below to the type of situation where an ARC might be used.

Next steps

14. The CRC is invited to consider the Proposal for Change under condition C5. Network Rail and the CRC will follow the procedures under Part C of the Network Code to progress this proposal.

15. If the Proposal for Change is rejected by the CRC then ORR will then proceed with a modification under condition C8, subject to this consultation. Parties will then be advised. We are not expecting any representations under the condition C8 consultation at this time. However, if the condition C5 process is not successful we will then immediately invite comments under condition C8.

16. Once changes are agreed to the Network Code, ORR will encourage other infrastructure managers to adopt similar provisions.

Contact

17. The ORR contact for any aspect of this document is:

Gordon Herbert Track Access Executive Office of Rail Regulation One Kemble Street London WC2B 4AN track.access@orr.gsi.gov.uk

Section B: Proposal for change

B1. Introduction

1. B2 (below) summarises the draft conditions. We also include analysis of key changes. The text of the draft conditions is set out in full at [Annex B](#). Consequent changes to the Access Dispute Resolution Rules (ADRR) are at [Annex C](#). A flowchart giving an overview of the process is at [Annex D](#), although please note that this is for illustrative purposes only and does not form part of the drafting.
2. It is proposed that the new conditions will be inserted as condition J10 in the Network Code and the existing condition J10 and subsequent conditions will be renumbered accordingly.

B2. Summary of the draft conditions

Part J

Right of Network Rail to make an Access Right Change

3. Under draft condition J10.1, Network Rail is placed under an obligation to facilitate a proposed ARC. This means that it must take all reasonable steps to facilitate the development of a proposed ARC, including in relation to:
 - evaluation of a submission for a proposed ARC submitted to Network Rail by a Third Party;
 - consultation with the Part J Access Beneficiary who holds a Firm Right subject to the proposed ARC (the Incumbent), before notice of an ARC is given;
 - consultation with relevant parties including any relevant funder before a notice of a proposed ARC is given; and
 - the preparation of a notice to be given by Network Rail under condition J10.2.
4. These provisions cover the period of time before Network Rail gives formal notice of an ARC under condition J10.2. Network Rail is expected to consult the Incumbent and the Department for Transport (DfT) if appropriate, or any other relevant funder, from the outset. Thus, the formal notice should not be the first time any of the parties, who might be impacted by the proposed ARC, learn of its existence.
5. An Access Beneficiary or a Potential Access Party may submit an ARC proposal to Network Rail (the party making the submission becomes known as a “Third Party” for the purposes of the draft conditions). Under condition J10.1, Network Rail should lead the development of the proposed ARC. This does not exempt the Third Party from the need to present as full a proposal as possible.

Analysis - Role of the Third Party

6. The drafting allows a Third Party (an Access Beneficiary or a Potential Access Party) to submit a proposed ARC to Network Rail for evaluation. Network Rail is obliged to facilitate the development of a proposed ARC but this does not mean that it should undertake work that could have been reasonably undertaken by the Third Party. The Third Party should submit as full and detailed a submission as possible.
7. If, after evaluating a Third Party's submission, Network Rail believes that the criteria in condition J10.2.2 are satisfied, Network Rail must give notice of the proposed ARC. The draft conditions contain a mechanism for compensation, whereby a Third Party will transfer to Network Rail the compensation owed to an Incumbent, before Network Rail then pays the Incumbent. The Third Party must also reimburse Network Rail for its costs, and the costs of the Incumbent ([see below](#)).
8. Where a Third Party submits a proposal for an ARC, Network Rail can expect that Third Party to do everything it can to assist with its development. Therefore Network Rail could:
 - a. Require the Third Party to provide all the information it considers necessary, including responding to any reasonable information requests made by Network Rail.
 - b. Require that any such information is provided in good time.
 - c. Reject any proposals that are not made in good faith, including any that Network Rail considers frivolous or vexatious.
 - d. Explain in guidance, such as its code of practice for stakeholders⁵, its relationship with Third Parties, including in respect of payments to cover any potential liabilities.

Notice by Network Rail of a proposed ARC

9. After the informal, early consultation stage, Network Rail must give notice of a proposed ARC either submitted to it by a Third Party or identified by Network Rail on its own initiative only if it reasonably believes that the test set out in J10.2.2 is satisfied.
10. The first part of the test for giving notice is therefore 'Better Use'. The definition of 'Better Use' is:

'a positive significant impact on the ability of Network Rail to achieve the objective set out in Condition D4.6.1, that is, to share capacity on the Network for the safe carriage of passengers and goods in the most efficient and economical manner in the overall interest of current and prospective users and providers of railway services.'

⁵ <http://www.networkrail.co.uk/asp/1544.aspx>

Better use

11. Once Network Rail is satisfied that it reasonably believes the proposed ARC will achieve Better Use, it must then consider whether it reasonably believes that the positive impact of the ARC was not reasonably foreseeable when the relevant Firm Right took effect. The purpose of the 'reasonable foreseeability' test is to prevent anyone from relying on an ARC to make a change that could or should have been made before the Access Agreement was concluded.

Analysis – Better Use

12. The 2005 Regulations and the EU Directive do not specify what is meant by 'better use of the railway infrastructure'. However, Network Rail is already used to making decisions about competing demands for use of its network. It does this through the timetabling provisions in Part D of the Network Code. Our view is that Part D is a sound basis for evaluating any proposals for 'better use'.

13. Referencing the Part D objective and the Part D decision criteria in defining 'better use' has the following advantages:

- The Part D objective and decision criteria are already known to the industry and applied by Network Rail;
- The decision criteria are appropriately wide ranging; and
- A link between an ARC and the timetabling process is helpful and engenders consistency.

14. The final hurdle is aimed at preventing an ARC from being used in circumstances where an alternative mechanism already exists, either in Parts D, G or J of the Network Code, using a provision of the Act or through increased investment. An ARC is a last resort, to be used where there is no feasible alternative. Reasonableness is key, particularly in respect of increased investment. If the increased investment needed to achieve better use is so large as to be out of the question, then ORR would not consider this to be reasonable.

Example: A right that should be voluntarily surrendered by a freight operator under condition J2 should not be modified or removed by using an ARC. It would be more appropriate to use J2.

15. Network Rail must give notice at least 18 months before the start of the relevant Working Timetable during which ARC is proposed to take effect.

Analysis - Timescales

16. Requiring Network Rail to allow *at least* 18 months for the process reflects the need to get access rights changed before the relevant Priority Date and the time to be allowed for the change process to be completed. However, Network Rail might want to allow longer, especially for complex cases involving several parties.

17. The timescales mean that firm rights with limited duration, or new rights where changes should normally have been foreseeable, are not likely to be affected by an ARC Notice. The 18-month timeframe is included to protect these rights from uncertainty arising from a process that would be unlikely to affect them anyway. It is not however an absolute requirement that the process be concluded within an 18 month timeframe. Unexpected factors may delay the process into a later timetable planning period.

Content of notice of proposed ARC

18. Draft condition J10.3 sets out what Network Rail should provide in its notice to the Incumbent(s). Note that Network Rail, in its notice, must request from the Incumbent, an estimate of compensation, with evidence where possible. The Incumbent has 60 days to provide the estimate to Network Rail. Draft condition J10.7 contains the basis on which compensation should be calculated and the estimate should reflect this, using evidence where possible.

Negotiation following notice of a proposed ARC

19. Once Network Rail has given notice of a proposed ARC under condition J10.4.1 it must use reasonable endeavours to negotiate with the Incumbent and agree where possible:

- (a) the proposed ARC, if applicable; and
- (b) the compensation payable.

The Incumbent is bound by a mirror obligation.

20. Where the proposed ARC was submitted to Network Rail by a Third Party, Network Rail must carry out a Relevant Consultation during the negotiation, as appropriate. This means that Network Rail must consult the Third Party, who ultimately will be responsible for paying the compensation owed. Draft conditions J10.12 and J10.13 provide a link to the existing mechanism in Part J for protecting confidentiality. The effect of these two conditions, in relation to negotiation, is to allow Network Rail to negotiate with the Incumbent and consult with the Third Party on those negotiations, whilst utilising an existing means of protecting sensitive commercial information.

21. The ability of Network Rail and the Incumbent to agree a proposed ARC is time bound by the date on which ORR makes a direction under condition J10.16. If an agreement on the proposed ARC is reached before the cut-off date, then Network Rail and the Incumbent must submit the relevant Access Agreement to ORR for approval under section 22 of the Act and ORR's normal procedures will apply. If the proposed ARC was submitted to Network Rail by a Third Party, then Network Rail must obtain the agreement of that Third Party before reaching agreement with the Incumbent.

Response of Incumbent to proposed Access Right Change notice

22. Under condition J10.5.4 the Incumbent has 60 working days to respond to the ARC notice. That response must indicate whether the Incumbent agrees to the proposed ARC or has any objections.
23. A failure to respond to Network Rail's notice within 60 working days will constitute agreement to the proposed ARC, so the Incumbent needs to respond if it wants to challenge the proposal.

Offer of compensation

24. Assuming that compensation has not been agreed by negotiation, under condition 10.6, Network Rail must make a written offer of compensation, in confidence, to the Incumbent no later than 30 days after receiving the Incumbent's estimate of compensation.
25. If the proposed ARC was submitted to Network Rail by a Third Party, then Network Rail is not permitted to make an offer of compensation until it has carried out a Relevant Consultation with the Third Party and obtained its agreement to the offer (condition J10.6.3). This is because the compensation will ultimately be paid by the Third Party. Again, the confidentiality protections set out in conditions J10.13 and J10.14 apply to this process, as to the negotiation process.
26. If the Incumbent fails to provide an estimate of compensation, Network Rail will nonetheless make an offer of compensation. If the Incumbent fails to respond to the offer, it will be deemed to have accepted it under condition J10.8.2. A failure to engage does not halt the proposed ARC.

Amount of compensation

27. Under condition J10.7.1 Network Rail must pay compensation to the Incumbent in respect of an ARC (although see condition 10.9.2 in respect of a Third Party). The compensation formula is borrowed from that in Part G of the Network Code.

Acceptance of compensation

28. The Incumbent should respond to an offer of compensation within 30 working days of the offer (see condition J 10.8). As noted above, a failure to respond to the offer will result in deemed acceptance of the offer.

Payment of compensation

29. Under condition J10.9.1 compensation must be paid to the Incumbent by Network Rail before the date on which the ARC is due to take effect.
30. If a Third Party is involved, then the Third Party must pay Network Rail an amount equal to the amount of compensation payable to the Incumbent, on a date agreed with Network Rail or no later than the date on which the ARC is due to take effect. This will enable Network Rail to discharge its obligation to pay compensation to the Incumbent on or before the date on which the ARC is due to

take effect. Network Rail should not pay the Incumbent without first receiving the corresponding amount from the Third Party. This limits Network Rail's financial exposure.

Analysis - Compensation

31. It is clear to us that forced amendments to Access Agreements should be compensated if they lead to losses for an Incumbent. Without such a provision the value of the Access Agreement would be diminished, affecting the confidence of business to invest in the rail industry.
32. Access Beneficiaries already face business risks. It is already a risk for FOCs that their Access Agreement might expire before the end of a commercial contract with their customers. The two are not always aligned. Franchised passenger train operators may also find that their access rights need changing during the term of a franchise. These processes can normally be managed without significant difficulties. We take the view that while the proposed conditions add to risk, the amount of risk is substantially mitigated because they are likely to be used very infrequently.
33. The amount of compensation owed to an Incumbent will vary depending on individual circumstances. The compensation formula means that where access rights are only slightly adjusted with limited financial impact on the Incumbent, any claim for compensation will be small. At the other extreme however, there may be cases where access rights have to be removed or substantially modified.
34. We recognise the difficulties of measuring definitively the compensation required to cover potential losses. The proposed condition J10.7 draws heavily on the concepts already in Part G of the Network Code used to calculate losses for network change. The comparison is not exact. For example if a right for a passenger train service were removed, it is unlikely that this would be replaced by a bus rail-replacement service. However the principle of calculating losses directly attributable to a change in rights is established. In condition J10.7 the factors to be taken into account are set out. We would expect an Incumbent to provide evidence to support its estimate, but the form of such evidence is not prescribed.

Reimbursement of costs

35. Under condition J10.10, the Incumbent is entitled to reimbursement by Network Rail of all reasonable costs it incurs in assessing a proposed ARC, provided that where a Third Party is involved, the Third Party reimburses Network Rail in turn for the reimbursement it pays to the Incumbent and also for Network Rail's own reasonable costs. Network Rail's reimbursement of costs to the Incumbent is subject to itself being reimbursed by the Third Party.

Analysis – reimbursement of costs by the Third Party

36. Under condition J10.1 Network Rail would be able to decline considering a proposal for an ARC Notice if the Third Party cannot demonstrate it has the means to meet potential liabilities arising from the process. This could include, if appropriate, the advance payment to Network Rail of a bond or guarantee (see above).

37. It is a principle of the process that Incumbents are reimbursed for reasonable costs that they incur in answering an ARC Notice. However where the process is initiated by a Third Party, it is the Third Party that should ultimately be responsible for reimbursing those costs, albeit via Network Rail. The provision is drafted so that Network Rail's payment to an Incumbent is subject to Network Rail itself receiving payment from the Third Party. If, for any reason, the Third Party fails to reimburse those costs, it would be Network Rail who should seek to recover them on behalf of the Incumbent. If an Incumbent is dissatisfied with any matter concerning reimbursement, it may refer the matter for determination under the ADRR using condition J10.14 (see below).

Confidentiality of the Incumbent and the Application of the Part J confidentiality mechanism

38. Where a Third Party is involved, as well as an obligation to carry out a Relevant Consultation during negotiation, Network Rail is also obliged to carry out a Relevant Consultation before making a written offer of compensation. Under condition J10.12.1 if it is necessary to disclose information but in Network Rail's opinion that would or might seriously and prejudicially affect the interests of the Incumbent then it must tell the Third Party. Condition 10.13 sets out how the existing Part J confidentiality mechanism would then apply.

Right of appeal to relevant ADRR forum

39. If the Incumbent is dissatisfied as to the compensation offered by Network Rail, it has a right under condition J10.14 to refer the matter for determination in accordance with ADRR, as long as it does so within 30 working days of receiving the offer.

40. The ADRR need amending to reflect this right and the proposed changes are at Annex C. Under the amended rules, for compensation disputes the parties can choose between Access Disputes Adjudication (ADA) or expert determination and the usual appeal routes then apply.

41. If an Incumbent is dissatisfied as to any matter concerning the reimbursement of costs, it may also refer the matter for determination in accordance with ADRR. Such disputes will be settled by expert determination.

Right to withdraw

42. Under condition J10.15, Network Rail must withdraw a notice of a proposed ARC if requested to do so by the Third Party. If a notice is withdrawn on the request of the Third Party, then the Third Party will remain liable for costs incurred up to and including the date on which notice is withdrawn.
43. It is possible that Network Rail may wish to pursue a proposed ARC even where a Third Party does not wish to continue. If this is the case, then Network Rail can choose to continue on its own initiative and is not obliged to begin the process again. It does not have to serve another notice under condition J10.2. However, it must notify ORR and the Incumbent of its decision as soon as reasonably possible.
44. There could be cost implications associated with withdrawing a notice, and conditions J10.5.4 and J10.5.5 mean that costs are reimbursed under J10.10 to cover the period until either the notice is withdrawn or, if Network Rail is continuing on its own initiative, the date on which Network Rail notifies the parties of its intention.

Office of Rail Regulation power to direct an Access Right Change

45. Condition J10.16 is tied to condition J10.5. If the Incumbent objects to the proposed ARC because it does not believe the criteria in condition J2.2.2 are met, or because it believes the notice is deficient, then it may appeal to ORR. This appeal route is triggered automatically upon the Incumbent responding to Network Rail's notice of the proposed ARC. There is no appeal route to ORR for any matter relating to compensation or costs.
46. ORR will consider Network Rail's notice, the Incumbent's response and any other material it considers relevant. It will consider the determination of the relevant ADRR forum, if applicable. For this reason, where the Incumbent has objected in respect of a failure to meet the condition J10.2.2, ORR will not make any direction until a matter referred to ADRR has been determined. This is because the amount of compensation payable may be relevant to the question of 'Better Use.'
47. When reaching a decision, ORR will have regard to its duties under section 4 of the Act and will do one of the following:
- (a) direct Network Rail to withdraw notice of the proposed ARC. This means that the proposed ARC will not go ahead.
 - (b) approve the proposed ARC and direct that it should take effect on a date specified by ORR.
 - (c) after consultation with Network Rail, the Incumbent and the Third Party, approve the proposed ARC with modifications and direct that it should take effect on a date specified by ORR.
48. A direction under (b) or (c) will deal with both approval of the proposed ARC, the date on which it will take effect and related changes to the Incumbent's Access Agreement. The corresponding approval

of a Third Party's new access rights would be handled in the usual way under sections 17-22A of the Act.

Exclusion

49. The draft conditions will not apply to Access Agreements that already contain provision for compensating an amendment or limitation of Firm Rights, beyond those required in the Network Code. An example is the Crossrail track access option⁶.

Other consequential changes

50. The new conditions will not be subject to the catch-all appeal mechanism at existing conditions J11.1. and J.11.2.1. There are also some changes consequential to the new provision being inserted at J10 i.e. the current condition J10 should be renumbered J11 and the current condition J11 should be renumbered J12.

ADR rules

51. The necessary changes to the ADRR are at [Annex C](#). These are intended to give effect to the procedures explained above.

ORR guidance

52. We generally issue guidance on our approach to approving new Access Agreements and amendments to them. The current guidance (*Criteria and procedure for the approval of track access contracts*) is under review. We will issue guidance on the new Part J conditions. The new guidance will be based on statements made in this document and will reflect any comments made about the proposed provision, where appropriate.

⁶ <http://webarchive.nationalarchives.gov.uk/20111108204718/http://www.rail-reg.gov.uk/server/show/ConWebDoc.9362>

Section C: Supporting analysis and implementation

C1. Background

1. This part of the document sets additional regulatory context and proposals for implementation.

ORR's approach

2. Access Agreements provide operators with certainty that they will be able to use train paths over the duration of that contract. On that basis they can commit resources and undertake the necessary investment (in respect of crews, rolling stock and finance). These Access Agreements could involve medium-long term commitments for Network Rail in relation to timetabling. The more prescriptive the Access Agreement in terms of access rights, the less flexibility Network Rail has when preparing the timetable. A provision under regulation 18(5) could allow for the access rights in an Access Agreement to be amended or limited in prescribed circumstances. This in turn would affect the degree of confidence that the operator would have about its future services. There is therefore a certain tension between the aims of contractual certainty and timetabling flexibility.
3. ORR has therefore sought the informal views of some stakeholders. The CRRWG access rights sub group has also had regulation 18(5) on its agenda. It is made up of representatives of Network Rail and the main owning groups, including freight operators, franchised passenger train operators and open access operators. We held two workshops, including representatives of the CRRWG sub group, in April and July 2014. The contributions made at those workshops informed the way that the proposals in this document were developed. We also liaised with others, including the secretary of the Access Disputes Committee, the DfT and Transport Scotland.
4. In drafting our proposals a guiding principle has been that the ARC process should sit alongside existing Network Code processes, rather than replace or override them. Our intention has always been that the new provision is an additional means of adding flexibility to access agreements and completes implementation of regulation 18(5). We have particularly drawn on Part G of the Network Code.

Network Code change

5. The legislation requires that framework agreements (Access Agreements) contain terms allowing them to be amended or limited if better use can be made of the railway infrastructure. We considered whether provisions should be directly incorporated into all Access Agreements. The drawback with this approach is that contracts are due to expire at different times so there could be a considerable

lag before all operators have an appropriate term in their contracts. It would be difficult to make any subsequent amendments to these provisions.

6. However, ORR model contracts already incorporate the Network Code which contains, in Part J, provisions for the amendment of Access Agreements. There are also procedures in place for amending the Network Code. We consider that the best way to demonstrate compliance with the 2005 Regulations is to insert new conditions in Part J. These conditions would apply consistently and equally all access beneficiaries from the same point in time. When we explored this idea with stakeholders informally and at the workshops there was support for the use of Part J.
7. From a legal perspective, the introduction of the new conditions will give us confidence that we have fully implemented regulation 18(5). This reduces the risk of challenge and last minute ad hoc changes consequent to any challenge.

C2. Implementation

Background

8. This section covers in more detail our proposed way forward for implementing the proposed changes.

C8 Process

9. The process under condition C8 requires us to be satisfied on reasonable grounds that either or both of the following conditions have been satisfied:
 - (a) the modification in question is or is likely to be reasonably required in order to promote or achieve the objectives specified in section 4 of the Act; and
 - (b) the interests of any relevant person or persons would be unfairly prejudiced if the modification in question were not made, and the need to avoid or remedy such unfair prejudice outweighs or is likely to outweigh any prejudice which will or is likely to be sustained by any other relevant person or persons if the modification is made, having due regard to the need to enable relevant persons to plan the future of businesses with a reasonable degree of assurance.
10. We believe (a) is satisfied because the modification is reasonably required in order to promote or achieve the objectives in section 4, specifically the duty to exercise our functions in the manner best calculated:
 - to promote efficiency and economy on the part of persons providing railway services; and
 - to promote competition in the provision of railway services.

11. ORR believes (b) is satisfied because better demonstrating compliance with EU law is in the interests of the rail industry and rail users. Further, the protections incorporated into the new conditions, especially the criteria at condition J10.2.2, coupled with the definition of Better Use and the compensation provisions mean that there is very limited scope for an ARC to unfairly prejudice an Incumbent.

12. C8 also prohibits a modification to the Network Code if its effect would be:

(a) to prevent to a material extent the Train Operator or Access Option Holder exercising, or receiving the benefit of, a protected right; or

(b) materially to increase any protected obligation of the Train Operator or Access Option Holder.

13. We do not consider that the proposal is prohibited on either of these grounds.

C3. Assessment

Impact assessment

14. We have prepared a regulatory impact assessment at [Annex E](#). We consider that of the options we have, the way forward described here is the best one. By using a model that draws on mechanisms already established in the Network Code, we have procedures that will be better understood.

Access rights policy

15. There is of course currently a discussion about how Network Rail sells its access rights. Network Rail would like to see a lesser prescription of access rights that would enable better use of its network overall. Debate continues about how exactly this is done while protecting the interests of rail users. However, it is clear that there will be more flexibility in the types of contract offered by Network Rail.

16. It is therefore quite reasonable, in future, to expect that more flexible access rights will be sufficient for most timetabling improvements. This should further limit the need to use an ARC-type process in all but the most exceptional cases.

Conclusion

17. It should be in everyone's interests to have a mechanism that would result in 'better use' of railway infrastructure. But changes must be made in a way that does not unduly disrupt market mechanisms, commercial contracts and business certainty. It should also fit into the existing regulatory system. We believe that our proposal does all of that. It is also consistent with our statutory duties and published policies.

18. Formalising the process through a change to Part J provides procedural certainty and within the existing framework for amending Access Agreements. It is also consistent with other parts of the Network Code and would apply to all Access Beneficiaries equally at the same time.

Annex A: Background

Access Agreements

1. Under the Act, a person (for example, a train operator) may only enter into a contract with Network Rail giving it permission to use the railway network following directions issued by ORR. ORR has issued several model access contracts. In the Network Code all access contracts are referred to as 'Access Agreements'.

ORR's statutory duties

2. ORR has statutory duties derived from the Act and other legislation, as well as specific responsibilities in respect of the access system established under the Act. ORR takes these duties into account, as appropriate. The duties are listed on ORR's website⁷. They include (but are not limited to):
 - *To promote improvements in railway service performance;*
 - *Otherwise to protect the interests of users of railway services;*
 - *To promote the use of the railway network... for the carriage of passengers and goods, and the development of that railway network, to the greatest extent that it considers economically practicable;*
 - *To promote efficiency and economy on the part of persons providing railway services;*
 - *To promote competition in the provision of railway services for the benefit of users of railway services;*
 - *To impose on the operators of railway services the minimum restrictions which are consistent with the performance of ORR's functions....;*
 - *To enable persons providing railway services to plan the future of their businesses with a reasonable degree of assurance;*
 - *To act in a manner which it considers will not render it unduly difficult for persons who are holders of network licences to finance any activities or proposed activities of theirs in relation to which ORR has functions;*
 - *To have regard to the funds available to the Secretary of State for the purposes of his functions in relation to railways or railway services;.....*

Network Rail's role

3. Network Rail is bound by its network licence to manage its network to the greatest extent reasonably practicable having regard to all relevant circumstances, including the ability of the licence holder to finance its licensed activities. It enters into Access Agreements with train operators, subject to ORR approval and direction.
4. It also plans and manages the timetable of scheduled services using its network. Where Network Rail is required to decide a timetabling matter under condition D4.6 it does so using the criteria in condition D4.6.2 ("the decision criteria"). It does so in order to achieve the objective of sharing capacity on the network for the safe carriage of passengers and goods in the most efficient and economical manner in the overall interest of current and prospective users and providers of railway services.

⁷ <http://orr.gov.uk/about-orr/what-we-do/the-law/our-duties>

5. The decision criteria are:

- (a) maintaining, developing and improving the capability of the Network;
- (b) that the spread of services reflects demand;
- (c) maintaining and improving train service performance;
- (d) that journey times are as short as reasonably possible;
- (e) maintaining and improving an integrated system of transport for passengers and goods;
- (f) the commercial interests of Network Rail (apart from the terms of any maintenance contract entered into or proposed by Network Rail) or any Timetable Participant of which Network Rail is aware;
- (g) seeking consistency with any relevant Route Utilisation Strategy;
- (h) that, as far as possible, International Paths included in the New Working Timetable at D-48 are not subsequently changed;
- (i) mitigating the effect on the environment;
- (j) enabling operators of trains to utilise their assets efficiently; and
- (k) avoiding changes, as far as possible, to a Strategic Train Slot other than changes which are consistent with the intended purpose of the Strategic Path to which the Strategic Train Slot relates.

6. Current flexibility within Access Agreements means Network Rail already has some scope for planning scheduled services through the timetable. Access rights cannot be fixed to specific time slots and we expect there to be even more flexible in future.

Existing change mechanisms

7. Part J of the Network Code allows certain changes to be made to Access Agreements:

- Condition J2 requires an access beneficiary to surrender access rights for which it has no current or foreseeable reasonable on-going commercial need.
- Condition J5 sets out the process for a third party to seek the surrender of a train operator's unused rights.
- Condition J6 also allows for the reduction of the cordon cap in the event of failure to use.
- Condition J7 applies to FOCs only and is intended to enable the smooth transfer of rights where a FOC wins existing traffic from an incumbent FOC. This provision was revised in 2012 to make use easier.
- Condition J9 sets out the process for holding regular meetings between Network Rail and FOCs, where current access rights can be reviewed.

8. Any agreed changes to an Access Agreement between Network Rail and an Access Beneficiary require approval by ORR under section 22 of the Act. If the parties cannot reach agreement, ORR may direct the parties to amend their Access Agreement under section 22A of the Act.

Conclusion

9. Access Agreements can be altered and amended once they have been approved. They also contain flexibility allowing Network Rail to plan its timetable of scheduled services. However, it is not clear that the existing methods of amending an Access Agreement would cover every possible scenario of 'better use' of the railway infrastructure. Therefore we have developed the proposals in this document.

Annex B: Proposed changes to Part J

DRAFT ACCESS RIGHTS REOPENER – PART J EXTRACT

Insert at existing J1.1.4: Condition J10 allows Network Rail to amend access rights in order to achieve 'Better Use' and subject to certain criteria. An Access Right Change is subject to ORR approval.

At existing J1.1.4: Renumber current J1.1.4 to J1.1.5 and update the reference to J10 to J11.

At existing J1.1.5: Renumber current J1.1.5 to J1.1.6 and update the reference to J11 to J12.

Insert at J1.2 Interpretation:

“Access Right Change”	amendment or limitation of a Part J Access Beneficiary's Firm Right in order to achieve Better Use;
“Better Use”	means a positive significant impact on the ability of Network Rail to achieve the objective set out in Condition D4.6.1, that is, to share capacity on the Network for the safe carriage of passengers and goods in the most efficient and economical manner in the overall interest of current and prospective users and providers of railway services;
“Relevant Consultation”	means a consultation carried out by Network Rail with a Third Party during negotiation under Condition J10.4 or before an offer of compensation is made under J10.6;
“Third Party”	means an Access Beneficiary or a Potential Access Party who has submitted an Access Right Change proposal to Network Rail;

Amend the following definitions in existing Condition J1.2 as follows:

“Incumbent”	has the meaning shown in: (a) Condition J5.1.1(b)(ii); (b) Condition J7.2; or (c) Condition J10.1.2(b)
“Qualifying Information”	means information which Network Rail has acquired in relation to the affairs of: (a) any Affected Person; or (b) an Incumbent under an Access Agreement between Network Rail and that person.

Insert at J10 (and renumber existing J10 and J11 to J11 and J12 respectively):

Right of Network Rail to make an Access Right Change

10.1 Obligation to facilitate a proposed Access Right Change

10.1.1 Network Rail shall take all reasonable steps to facilitate the development of a proposed Access Right Change.

10.1.2 Where applicable, the obligation of Network Rail under Condition J10.1.1 includes but is not limited to:

- (a) evaluation of a submission for a proposed Access Right Change proposal submitted to Network Rail by a Third Party;
- (b) consultation as may reasonably be expected to enable any Part J Access Beneficiary who holds a Firm Right subject to the proposed Access Right Change (the “Incumbent”) to make representations, before notice of a proposed Access Right Change is given;
- (c) consultation before a notice of a proposed Access Right Change is given with relevant parties including any relevant funder; and
- (d) the preparation of a notice given under Condition J10.2.1

10.2 Notice by Network Rail of a proposed Access Right Change

10.2.1 Network Rail shall give notice of a proposed Access Right Change:

- (a) submitted to Network Rail by a Third Party; or
- (b) identified by Network Rail on its own initiative

if it considers that the criteria in Condition J10.2.2 have been satisfied.

10.2.2 Network Rail must reasonably believe that:

- (a) the proposed Access Right Change will achieve Better Use;
- (b) the positive impact of the Access Right Change was not reasonably foreseeable when the relevant Firm Right took effect; and
- (c) Better Use cannot reasonably be achieved using:
 - (i) Parts D, G or Conditions J2.1 – 9.3 of Part J of this Network Code;
 - (ii) Relevant provisions of the Railways Act 1993; or
 - (iii) Increased investment in the network.

10.2.3 Network Rail shall give notice of a proposed Access Right Change to:

- (a) any Incumbent;
- (b) the Office of Rail Regulation; and
- (c) any relevant funder.

10.2.4 Network Rail shall give notice no less than 18 months before the commencement of the relevant Working Timetable during which the Access Right Change is proposed to take effect.

10.3 Content of notice of a proposed Access Right Change

10.3.1 Notice of a proposed Access Right Change given by Network Rail under Condition J10.2.1 shall:

- (a) identify the Firm Right of any Incumbent which is subject to the Access Right Change;
- (b) set out the Access Right Change;
- (c) explain, referencing evidence where possible, why Network Rail believes that each of the criteria in Condition J10.2.2 is met;
- (d) state the date on which it is proposed the Access Right Change will take effect; and
- (e) request from the Incumbent an estimate of compensation with evidence where possible, payable under Condition J10.7 and to be provided in confidence by the Incumbent to Network Rail within 60 working days of the date on which notice is given by Network Rail under Condition J10.2.1.

10.4 Negotiation following notice of a proposed Access Right Change

10.4.1 Network Rail shall use reasonable endeavours to negotiate with the Incumbent so as to agree:

- (a) after giving notice under Condition J10.2, the proposed Access Right Change, if applicable; and
- (b) after receiving an estimate of compensation under Condition J10.5.1, the compensation payable under Condition J10.7.

10.4.2 In any negotiation carried out under Condition J10.4.1, the Incumbent shall use reasonable endeavours to negotiate with Network Rail the matters set out at (a) and (b) of Condition 10.4.1.

10.4.3 If the proposed Access Right Change was submitted to Network Rail by a Third Party, Network Rail shall carry out a Relevant Consultation as appropriate during the negotiation.

10.4.4 Subject to Condition J10.4.5, Network Rail and the Incumbent may agree a proposed Access Right Change at any time before the date on which the Office of Rail Regulation makes a direction under Condition J10.16, where applicable.

10.4.5 If the proposed Access Right Change was submitted to Network Rail by a Third Party, Network Rail and the Incumbent may not agree a proposed Access Right Change until Network Rail has obtained the agreement of the Third Party.

10.4.6 If an agreement is reached under Condition J10.4.4, Network Rail and the Incumbent shall submit the relevant Access Agreement, amended to reflect the proposed Access Right Change, to the Office of Rail Regulation for approval under section 22 of the Railways Act 1993.

10.5 Response of Incumbent to notice of a proposed Access Right Change

10.5.1 The Incumbent shall provide an estimate of compensation in accordance with Condition 10.3.1(e).

10.5.2 The Incumbent shall give notice to Network Rail and the Office of Rail Regulation if it:

- (a) agrees to the proposed Access Right Change;
- (b) considers that one or more of the criteria in Condition J10.2.2 is not met; or
- (c) considers that any other aspect of the notice was deficient.

10.5.3 If the Incumbent gives notice under Condition J10.5.2 (b) or (c), it shall provide reasons, referencing evidence where possible,

10.5.4 Notice shall be provided to Network Rail and ORR under this Condition J10.5 within 60 working days of the date on which notice is given by Network Rail under Condition J10.2.

10.5.5 A failure to give notice under Condition J10.5.1 shall constitute agreement to the proposed Access Right Change, as if notice had been given under part (a) of Condition J10.5.2.

10.6 Offer of compensation

10.6.1 Subject to Conditions J10.4.1 and J10.6.3, Network Rail shall, no later than 30 working days after receiving an estimate of compensation provided by the Incumbent pursuant to Condition J10.3.1(e), make a written offer of compensation in confidence to the Incumbent.

10.6.2 Subject to Condition J10.6.3, if the Incumbent fails to provide an estimate of compensation pursuant to Condition J10.3.1(e), Network Rail shall, no later than 90 working days after the date on which notice is given by Network Rail under Condition J10.2.1, make a written offer of compensation in confidence to the Incumbent.

10.6.3 If the proposed Access Right Change was submitted to Network Rail by a Third Party, Network Rail shall not make a written offer of compensation until it has carried out a Relevant Consultation and obtained agreement of the Third Party to fund the offer of compensation.

10.7 Amount of compensation

10.7.1 Subject to Condition J10.9.2, Network Rail shall pay compensation to the Incumbent in respect of an Access Right Change.

10.7.2 The amount of the compensation referred to in Condition J10.7.1 shall be an amount equal to the amount of the costs, direct losses and expenses (including loss of revenue) which are reasonably incurred or can reasonably be expected to be incurred by the Incumbent as a consequence of the implementation of the proposed change.

10.7.3 There shall be taken into account in determining the amount of compensation:

- (a) the benefit (if any) to be obtained or likely in the future to be obtained by the Incumbent as a consequence of the Access Right Change; and
- (b) the ability or likely future ability of the Incumbent to recoup any costs, losses and expenses from third parties including passengers and customers or to otherwise mitigate the costs, direct losses and expenses (including loss of revenue).

10.8 Acceptance of offer of compensation

10.8.1 If the Incumbent wishes to accept the compensation offered under Condition J10.6, it shall, within 30 working days of receiving the offer, indicate its acceptance in writing.

10.8.2 A failure to indicate acceptance in writing in accordance with Condition J10.8.1 or to refer the matter for determination in accordance with Condition J10.14, shall constitute acceptance of the offer.

10.9 Payment of compensation

10.9.1 Subject to Condition J10.9.2, the compensation payable under Condition J10.7 shall be paid to the Incumbent by Network Rail on or before the date on which the proposed Access Right Change is due to take effect.

10.9.2 If the proposed Access Right Change was submitted to Network Rail by a Third Party, the Third Party shall pay Network Rail an amount equal to the compensation payable under Condition J10.7 on a date agreed with Network Rail but no later than-

- (a) the date on which the Access Right Change is due to take effect, or
- (b) where a matter has been referred for determination under Condition J10.14.1 and the date on which the Access Right Change is due to take effect has been missed or is likely to be missed, a revised date notified to the Incumbent and the Third Party by Network Rail, or
- (c) where notice has been given under parts (b) or (c) of Condition J10.5, the date specified by the Office of Rail Regulation pursuant to Condition J10.16.1 (b) or (c), where relevant.

10.9.3 Network Rail shall not pay compensation to the Incumbent until an amount equal to the compensation owed has been received by Network Rail from the Third Party.

10.9.4 The Access Right Change shall not take effect until the compensation payable under Condition J10.7 has been received by the Incumbent.

10.10 Reimbursement of costs

10.10.1 Subject to Condition J10.10.2, the Incumbent shall be entitled to reimbursement by Network Rail of all reasonable costs incurred by the Incumbent in assessing any Access Right Change.

10.10.2 If the proposed Access Right Change was submitted to Network Rail by a Third Party, that Third Party shall reimburse Network Rail for:

- (a) the reasonable costs incurred by Network Rail in giving notice of a proposed Access Right Change; and
- (b) the reasonable costs incurred by an Incumbent and reimbursed by Network Rail pursuant to Condition J10.10.1.

10.11 Obligation to incur no further costs

10.11.1 The Incumbent shall, if requested by Network Rail at any time, incur no further costs (except any costs which cannot reasonably be avoided) in respect of any Access Right Change.

10.12 Confidentiality of the Incumbent

10.12.1 If Network Rail has reasonable grounds for believing that, in order to carry out a Relevant Consultation:

- (a) it is necessary for it to disclose to the Third Party any Qualifying Information; and
- (b) such disclosure would or might, in Network Rail's reasonable opinion, seriously and prejudicially affect the interests of the Incumbent,

Network Rail shall give notice to that effect to the Third Party.

10.13 Application of Part J confidentiality mechanism

10.13.1 The provisions of Conditions J3.2 to J3.15 apply to the conduct of a Relevant Consultation as if:

- (a) Notice served under Condition J10.12.1 was served under Condition J3.1;
- (b) “Relevant Response” means “Relevant Consultation”;
- (c) “Part J Access beneficiary” means “Third Party”; and
- (d) “Affected Person” means “Incumbent”.

10.14 Right of appeal to relevant ADRR Forum

10.14.1 If the Incumbent is dissatisfied as to the compensation offered under Condition J10.7, it may, within 30 working days of receiving the offer refer the matter for determination in accordance with ADRR.

10.14.2 If the Incumbent is dissatisfied as to any matter concerning the reimbursement of costs, it may refer the matter for determination in accordance with ADRR.

10.15 Right to withdraw

10.15.1 Network Rail may withdraw the notice of a proposed Access Right Change identified by Network Rail on its own initiative if it believes that the criteria in Condition J10.2.2 are no longer met.

10.15.2 Subject to Condition J10.15.3, Network Rail shall withdraw the notice of a proposed Access Right Change as soon as possible if it is requested to do so by the Third Party.

10.15.3 If Network Rail receives a request to withdraw the notice of a proposed Access Right change and wishes to pursue the proposed Access Right Change on its own initiative, it may do so without serving another notice under Condition J10.2 but must notify the Incumbent and the Office of Rail Regulation of its decision as soon as reasonably possible.

10.15.4 If Network Rail withdraws the notice of a proposed Access Right Change identified by Network Rail on its own initiative, Condition J10.10 applies to costs incurred up to and including the date on which notice is withdrawn.

10.15.5 If the Third Party requests Network Rail to withdraw the notice of a proposed Access Right change, Condition J10.10 applies to costs incurred up to and including:

- (a) the date on which notice is withdrawn; or
- (b) the date on which Network Rail notifies the Incumbent and the Office of Rail Regulation under Condition J10.15.3

as applicable.

10.16 Office of Rail Regulation power to direct an Access Right Change

10.16.1 If the Office of Rail Regulation receives a notice under parts (b) or (c) of Condition J10.5 it shall, after assessing objectively the merits of that notice, the notice provided by Network Rail under Condition J10.2.1, and any other material it considers relevant, whilst having regard to the duties set out at section 4 of the Act:

- (a) direct Network Rail to withdraw notice of the proposed Access Right Change;

- (b) approve the proposed Access Right Change and direct that it should take effect on a date specified by the Office of Rail Regulation; or
- (c) after consultation with Network Rail, the Incumbent, and the Third Party, approve the proposed Access Right Change with modifications and direct that it should take effect on a date specified by the Office of Rail Regulation.

10.16.2 The Office of Rail Regulation may also take into consideration the determination of the relevant ADRR Forum made under Condition J10.14, where applicable.

10.16.3 The Office of Rail Regulation shall not make a direction in respect of a notice received under part (b) of Condition J10.5 until:

- (a) a matter referred for determination under Condition J10.14.1 has been so determined; and
- (b) the determination has been disclosed to the Office of Rail Regulation in confidence.

10.17 Exclusion

10.17.1 Conditions J10.1 – J10.16 have no application to an Access Agreement that already contains provision for compensating an amendment or limitation of Firm Rights, other than provision required in this Network Code.

Other amendments to existing Part J:

At Condition J11.1.1, before 'Any dispute arising..' insert, 'Except in relation to Conditions J10.1 – J.10.17,'

At Condition J11.2.1, before 'Where either Network Rail...' insert 'Except in relation to Conditions J10.1 – J.10.17'

Annex C: Proposed changes to the ADRR

Proposed amendments to ADR Rules

1. Rule B7:

Amend opening sentence:-

Except as stipulated in Rule B8, all disputes referred

19. Insert new Rule B8:

All disputes referred for resolution in accordance with these Rules under Condition J10.14 of the Network Code shall:

(a) if concerning Condition J10.14.1, be referred to an ADA in accordance with Chapter G or referred for expert determination in accordance with Chapter I.

(b) if concerning Condition J10.14.2, be referred for expert determination in accordance with Chapter I.

20. Renumber existing Rules B8 to B21 to become B9 to B22.

21. Newly numbered Rule B14:

Insert new clause (k):

(k) in the event that no agreement is reached between the parties under Rule B8(a), shall determine that, unless the parties reach a contrary agreement within seven days of the allocation hearing, the matter shall be referred to final determination by expert determination subject to Chapter I and shall draw up the Procedure Agreement accordingly and shall sign it as Allocation Chair.

22. 5. Rule G50:

Add second sentence:

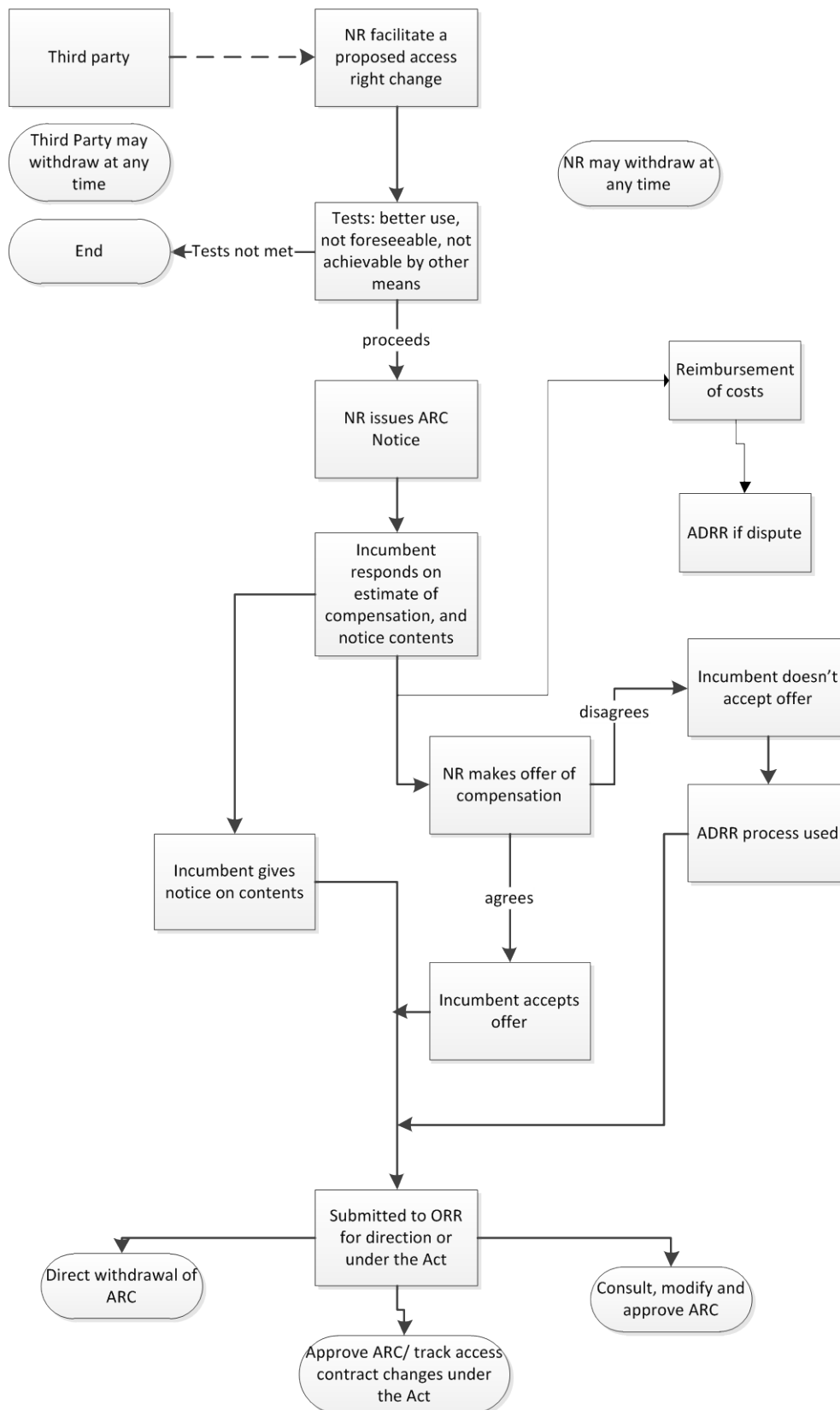
Where a dispute has arisen in connection with Condition J10.14.1 of the Network Code, the Hearing Chair shall deliver his reasoned written determination within ten working days of final submission to the ADA of all relevant information.

23. Insert new Rule G63:

Documents including the determination produced or disclosed in the course of an ADA in connection with Condition J10.14.1 of the Network Code shall be kept confidential and such Documents shall not be published on the access disputes website.

24. Renumber existing Rules G63 to G69 to become G64 to G70.

Annex D: Indicative flowchart



Annex E: Impact assessment

Introduction

1. The Railways Infrastructure (Access and Management) Regulations 2005 implement a European Directive. It is a legal requirement that ORR model contracts contain the relevant terms that would allow better use to be made of the railway infrastructure. There is currently a gap which needs to be filled in order to demonstrate complete compliance with the requirements of European law.

2. This impact assessment describes the impact the proposal will have on stakeholders compared to other options available.

Options

3. The main options we have identified are:

- I. Amend the Network Code, as proposed in this document.
- II. Do nothing, continue with the system described in Annex A.
- III. Include a provision directly into the ORR model contracts and all existing agreements.

4. Option I recognises that the proposal reflects a legal requirement. Implementation by amending the Network Code will affect all Access Beneficiaries equally and at the same time. It provides a consistent framework to adjust access rights. It also provides clear rules on the procedures to be followed and on the payment of compensation. It also complements GB's position in negotiations at the European level on the wider framework governing the sale of access rights. This is therefore the option ORR prefers.

5. Option II (do nothing) would be a continuation of the status quo, whereby we will continue to make amendments to track access contracts as set out in Annex A. There is no specific regulation 18(5) mechanism at present. It might be argued that this is not needed in practice due to way in which access rights are negotiated and used. However, that is not the complete picture and there are downsides to this position:

- Compliance with the 2005 Regulations would not be clearly demonstrated. There is a risk of challenge by the European Commission or in the courts.
- It would arguably also not be compliant with new regulations in 2015 to implement the EC's recast of the Directive, reinforcing the 2005 requirement.
- Opportunities to secure better use of the railway infrastructure might be missed.
- There is uncertainty for Network Rail and train operators about whether and how Access Agreements might be challenged (even without a specific term in the contracts).

This option therefore contains serious risks, and is not supported by ORR.

6. Option III would require ORR to insert a new provision directly into its model template. These would apply to all new Access Agreements. Existing Access Agreements would either have to be modified with the consent of the parties involved, or on renewal. This process might take years to apply to all existing agreements. Any subsequent amendments would be similarly difficult to achieve. Therefore it does not have all the advantages of Option I.

7. Other variations relate to different definitions of better use or calculations of compensation within the actual provision. However, no one variation would be acceptable to everyone nor produce significantly better outcomes, in our assessment. We think that the version developed in this proposal represents a pragmatic and sensible approach, given the circumstances.

Impact

Compliance costs

8. Generally new rules add to the compliance costs of Network Rail and the rail operators. However the proposals in this document (as Option 1) draw on existing procedures within the Network Code where relevant, including Parts G and J. Unless or until the provision is triggered the compliance costs will be minimal. However there could be concern among some operators that a provision that could allow track access rights to be modified adds to the risk and uncertainty they face, even with the compensation provisions. These risks are however faced and managed by businesses as part of their general activities on a day to day basis. It is inherent within the legal requirement in any event.

9. There will be no additional ORR staff or resources. Any additional costs to ORR will be subsumed within general track access casework and budgets.

10. Compliance costs would be similar under Option 3, or greater if ORR and operators were to revise existing contracts.

Impact

11. This section considers the impact of the proposed change on different types of stakeholder:

- There may be an impact in terms of how resources (management and planning time) are used. But the process will provide an additional tool to enable more efficient use of its network; although one that is to be used only occasionally.
- Freight Operating Companies (FOCs) might see this as an opportunity as well potential cost. They rely on Access Agreements to provide some certainty for their business and their ability to fulfil commercial contracts. Their ability to propose a better use of the infrastructure in favour of any individual FOC could be limited by the costs associated with this proposal (costs and compensation). However the impact could be mitigated by 1) the prospect of compensation where rights are changed; and 2) the infrequency with which Network Rail is expected to use this provision.
- Train Operating Companies operating under a franchise or concession will need to liaise very closely with their franchising authorities. Generally they are not allowed to agree to changes to Access Agreements without the funder's approval. If their contracts are changed and this impacts on their commitments under the franchise, they will be able to claim compensation. It is likely that proposals involving only franchised operators could be resolved between the funder, Network Rail and the operators without needing to use the proposed provision.
- Open access operators might regard this as an opportunity to challenge existing access rights. Where this would result in better use of the railway infrastructure this provision this might have a positive effect for them. This may be mitigated by the challenge of demonstrating better use and potentially the costs of paying compensation. Open access operators also value the certainty provided by Access Agreements once they have been approved, as described above for the other operators.
- Funders, such as the DfT and Transport Scotland, are responsible for £billions of new investment⁸ in the railway. They will want to be sure that the full realisation of benefits from new developments and projects will not be stifled by ageing Access Agreements drawn up years previously. These contracts will potentially be able to be adjusted subject to compensation. However the full impact is uncertain. The full benefits of investment can normally be realised under existing mechanisms, and the provision should not be used to adjust rights in response to changes that were foreseeable when Access Agreements were initially approved (noting that large investment programmes are generally planned well in advance).
- The impact on end-users (passengers and freight customers) is difficult to calculate. It will depend on how often and in what circumstances the mechanism is used. It may be that a very few freight

⁸ Page 11, ORR's 2103 periodic review, full report stated: "the UK Government is investing £11.4bn in enhancements to the network in the next five years; and the Scottish Government £1.4bn, with other funders including the Welsh Government funding major improvements...."

traffic or passenger services might have to be altered. However that would only be the case if there was an otherwise overall 'better use' of the network. In making a determination on a better use proposal ORR would have regard to its section 4 duties which include protecting the interests of users of railway services. So although there might be some people adversely affected, this could only happen if there was an overall positive outcome.

Benefits

12. By definition the proposal can only have any effect where its use would result in the better use of the rail infrastructure. It will not replace existing processes but rather complement them. With appropriate protections and safeguards, the net effect of the proposal must be beneficial. The exact effect would depend on when and how often the mechanism is ever used and the circumstances of the case, but it would normally leave customers or end-users better off, in aggregate.

Wider Impact

Equalities assessment

13. We consider that the proposals will have no specific impact on our responsibilities under the Equality Act 2010 or any other social considerations.

Equity/Fairness

15. One of the advantages of the proposal supported in this document is that the addition to the Network Code applies to all Access Beneficiaries equally and at the same time.

Environmental

16. Environmental benefits should normally flow from 'better use' of the railway. We cannot be precise on the actual effect. It will depend on each individual case pursued under the provision.

Competition Assessment

17. The proposed change is unlikely to affect firms' incentives or ability to compete vigorously. In due course it could be used to challenge inefficient use of railway infrastructure, possibly generating new services. But it is also important that regulation and reduction in contract certainty does not divert traffic from the railways nor leave Incumbents financially worse off. There are safeguards and protections incorporated within this provision.

Assumptions

18. ORR's role will be to consider any proposals for better use that are submitted to it. ORR will be able to take its statutory duties into account when making its determination (exceptionally so in the case of the Network Code decisions). This will provide additional safeguards and protections to ensure that track access policy remains with ORR's duties under the access regime established under the Railways Act 1993.

19. It is assumed that Network Rail will be able to manage the relationship with any Third Parties proposing changes. The proposed provision also assumes that Network Rail will have the resources and capability to apply the process and administer the payments.

Overall impact

21. There are some costs and risks associated with this proposal. However there are benefits. On balance, the net impact is likely to be very limited, given the circumstances when the provision could be triggered and the offsetting compensation for anyone whose rights are affected. Importantly, this is a legal requirement (under regulation 18(5)). ORR's view is that the provision proposed in this document (Option I) is the best way forward.

Annex F: Glossary

Term	Explanation
Access Agreement	Is an access contract, whether or not entered into pursuant to any directions of the Office of Rail Regulation under the Act, incorporating the Network Code. See Part A of the Network Code.
ADC	Access Disputes Committee
ADRR	Access Disputes Resolution Rules
ARC	Access Rights Change
ARC Notice provision	The proposed new Part J conditions set out in this document
CRRWG	RDG's Contracts Regulatory Reform Working Group
FOC	Freight Operating Company
Incumbent	An Access Beneficiary directly affected by an ARC Notice
ORR	Office of Rail Regulation
RDG	Rail Delivery Group
Relevant Consultation	The discussions between Network Rail and the Third Party
Regulation 18(5)	Regulation 18(5) of The Railway Infrastructure (Access and Management) Regulations 2005
The 2005 Regulations	The Railway Infrastructure (Access and Management) Regulations 2005
The Act	The Railways Act 1993
Track Access Contract	An Access Agreement which ORR has directed a party and Network Rail to enter into under section 17 or 18 of the Act.
The meaning of each term is as defined in the Network Code, the legislation or Annex B of this document.	

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