

Access Consultees

27 April 2023

Dear All

**Proposals to update ORR's track access guidance modules:
Guidance on the duration of track access (framework agreements)
Industry code of practice for track access application consultations**

Background

1. In February we published a limited consultation proposing improvements to two elements of the Office of Rail and Road's (ORR's) track access guidance modules. ORR has decided not to proceed with the idea of a three-month benchmark for the validity of consultations but will go ahead with the proposed wording in respect of the duration of access agreements.
2. ORR received seven responses before the closing date of 31 March. Two were from passenger Train Operating Companies (TOCs), three from Freight Operating Companies (FOCs), one from Rail Partners, and a more general letter from a freight customer on wider concerns. I am grateful for the time taken to respond to this consultation. This letter sets out our conclusions, in the light of those responses.

Three-month benchmark for Validity of Consultations

Introduction

3. The guidance module *Industry of Code of Practice for Consultations* sets out a process which Network Rail and access beneficiaries ('applicants') should follow when consulting on new or amended track access contracts. We proposed an indicative benchmark, of three months, which would help add clarity to the issue of how long industry consultations on track access contracts should remain valid.

Consultees

4. Consultees' views varied. One TOC had no concerns or objections. One FOC emphasised a perceived slowness of Network Rail's internal consultation process and supported a specified time limit being included in the Code of Practice. It also said that the whole process needed to be more streamlined. Two other FOCs

said that they did not want the benchmark to be rigidly applied, as applicants have limited influence over Network Rail's timeliness. One open access TOC said that it was comfortable with a three-month benchmark, but it should not become a threshold. Rail Partners pointed out that applications can take a significant amount of time, the benchmark should not be a threshold and a wider discussion with the industry is warranted and other consultees concurred.

ORR Review

5. We acknowledge the concerns that a benchmark might, over time, become regarded as a threshold. In some instances, rather than act as an incentive to process cases there are concerns it might prolong cases, for example by requiring further consultations, that might not necessarily be warranted.
6. Each case is different. Changes that could affect the validity of a consultation could happen at any time. We proposed that the time period of three months should only be a benchmark, beyond which further assessment would be required. Although there was some support, it was not universal or without caveats. In the absence of consensus, we will not be making any changes at this time in respect of benchmarks. Our view will remain that applicants should need to assess whether the industry consultations are likely to be meaningful and relevant. If there is any doubt, they would need to reassess whether fresh consultation is needed.
7. Further it seems to us that some consultees' views were reflective of wider concerns about the application process itself. We have noted these concerns and will take those forward in our discussions with Network Rail and other stakeholders.

Duration of Access Agreements

Introduction

8. We proposed adding clarity around the duration of framework agreements. There is some scope for a different interpretation of *The Railways (Access, Management and Licensing of Railway Undertakings) Regulations 2016* (the 2016 Regulations), than the standard approach, which might lead to ambiguity or uncertainty for train operators. In particular, the issue is when the five-year mark for an extension becomes relevant. We wish to make the matter clear.

Consultees

9. The FOCs' replies concentrated on different elements but they all emphasised the desirability of long-term access contracts, for example to plan services or secure investment. One FOC said that the statutory tests should be reconsidered or explained more fully. One FOC said that it was not aware of any problems in this area. Rail Partners said that it did not want any additional barriers or

constraints, amongst other concerns. The open access operator said that this is a very important subject for it.

ORR Review

10. On the issue of the desirability of longer-term contracts, there is a statutory test in the 2016 Regulations. Such contracts are not automatic and each applicant needs to demonstrate its case. The default position is that the duration of framework agreements is a maximum of five years. That remains the case and we consider that our guidance adequately explains this. However, we will keep the issue under review to see if improvements in ORR's approach can be developed.
11. ORR considers that, in applying the tests, the five-year period starts from the point at which ORR approval is granted in the case of extensions to existing agreements. This would normally be regardless of the term left before that approval. However, we do recommend that applications for renewals or extensions are normally made 12-18 months before the end of the existing contract. This helps to ensure certainty is provided for timetabling purposes (often needed up to 40 weeks in advance). ORR would not therefore include that application period when looking at whether the extension is longer than five years or not. We regard this position as consistent with the intention of the 2016 Regulations to ensure a fair allocation of infrastructure capacity, whilst allowing applicants' certainty to plan their businesses.
12. ORR will therefore proceed to insert the wording in the annex to this letter.

Conclusion

13. I had considered that these changes would be uncontentious minor clarifications. However, the responses do indicate a significant level of interest in these areas. We will continue our discussions with Network Rail on how we can make processes more efficient. We will add the wording on extended duration contracts, as we consider that this will add clarity and is an improvement explaining ORR's view and the legal position. I will also reflect further on how we approach future improvements to our guidance modules.

Yours sincerely

Gordon Herbert

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Annex – Duration of Framework Agreements

Duration of five years or more

- 1 As set out in the commercial contracts, specialised investment or risks section above, when applying for renewals, extensions or track access agreements with a duration longer than five years, there are specific matters that need to be included in your application. We encourage you to discuss your application with the relevant infrastructure manager, usually Network Rail, and ORR at an early stage. You should also carefully consider the timescales for applying to ORR set out in this section and the *Making an Application* module.

New track access agreements

- 2 ORR generally considers that the five-year period starts from the Commencement Date of the track access agreement. Applications for new agreements that are intended to last longer than five years would need to meet the statutory tests.
- 3 For new operators seeking access rights of more than five years we accept that there may be a 'start-up' period where it will need a track access agreement in place to have the requisite certainty but will not yet hold access rights. In these circumstances the statutory tests would be applicable (because the 2016 Regulations consider the length of the track access agreement) but we would take into account the specific circumstances that apply to the operation, in particular noting that new operators will not be earning revenue from services during the initial start-up period.

Example: a new open access operator might apply for a track access agreement to expire eight years from the date of application. However, it might not be operating services for the first four years – as it needs time to plan and establish services. In that instance the statutory test would still be applicable, but consideration could be given to the new operator's need for a start-up period where no revenue can be earned so that a commensurate contract length might be needed.

Renewals and extensions to track access agreements

- 4 For renewals and extensions, for the purpose of considering if the statutory tests would apply, the relevant date for consideration is the day from which ORR approves the change of the expiry date. Therefore, if the period for renewal or extension is more than five years from the date ORR approves the change, then the statutory test would apply.
- 5 In our *Making an Application* module we advise that applications need to be made in good time. We recommend that applications for renewals or extensions are normally made about 12-18 months before the end of the



existing contract. This helps to ensure certainty is provided for timetabling purposes (often needed up to 40 weeks in advance). ORR would not include that application period when looking at whether the extension is longer than five years or not.