

25th August 2023

Dear colleagues

Consultation on revised access guidance in anticipation of changes to Retained EU Law

We have prepared updated guidance in preparation of DfT's intended revocation of four access related implementing regulations (IRs) later this year. We are consulting on our proposed updated guidance now, in advance of the revocation, so that industry may understand the implications of the revocation in advance and can use the relevant guidance as soon as the IRs are revoked.

We have arranged an open meeting at our London offices (Cabot Square) and via Microsoft Teams on 13 September, during which we will provide an overview of the changes and respond to any queries that you might have.

We would welcome your comments on proposed updates by Friday 6th October 2023.

Background

The Retained EU Law (Revocation and Reform) Act 2023 includes provisions for the Secretary of State to revoke IRs.

The implementing regulations that DfT intends to revoke are:

- [Commission Implementing Regulation \(EU\) 2017/2177 on access to service facilities and rail-related services](#)
- [Commission Implementing Regulation \(EU\) 2018/1795 laying down procedure and criteria for the application of the economic equilibrium test pursuant to Article 11 of Directive 2012/34/EU](#)
- [Commission Implementing Regulation \(EU\) 2015/10 of 6 January 2015 on criteria for applicants for rail infrastructure capacity and repealing Implementing Regulation \(EU\) No 870/2014](#)

- [Commission Implementing Regulation \(EU\) 2016/545 of 7 April 2016 on procedures and criteria concerning framework agreements for the allocation of rail infrastructure capacity](#)

In reaching their decision to propose revocation of these implementing regulations, DfT engaged with industry and ORR. DfT had initially proposed to revoke a further regulation (2015/909 on the modalities for the calculation of the cost that is directly incurred as a result of operating the train service), but following industry feedback, decided not to progress its revocation at this time.

We advised DfT that we agreed with its assessment that revocation of these IRs would not result in a material change to the regulatory framework governing access to Great Britain's rail network. This is because the core requirements of the relevant IRs are largely captured in other legislation, such as the Railways Act 1993 (the Act) or the Railways (Access, Management and Licensing of Railway Undertakings) Regulations 2016 (the "AMRs"). Equally, should DfT propose to amend the obligations of the AMRs in future it would not make sense to maintain detailed IRs that might conflict with future changes.

Policy changes

As noted above, because the IRs built on policy principles contained in other legislation, we do not think that any of our proposed changes to the guidance result in a substantial policy change.

We have removed the specific requirements and processes described in the implementing regulations. This means Railway businesses will in future have a choice whether to continue with current policies and processes developed in response to the implementing regulations (which we consider will normally achieve compliance with the AMRs), or to do something different provided they continue to meet the requirements of the AMRs.

A good example of this is in respect of access to service facilities. The IRs described specific processes such as the coordination procedure. Some facility owners may wish to continue to use any policies they have developed in accordance with that procedure to demonstrate they have attempted "to meet all requests in so far as possible." Other facility owners may prefer to refresh their approach so that it is tailored to their business, while ensuring they continue to meet the ongoing requirement to "attempt to meet all requests in so far as possible."

Amended guidance

We have produced a table which lists all the proposed changes to our guidance. It is appended to this letter. We have also produced an updated version of each guidance document so that the changes can be viewed in context.

In summary, we are proposing to amend eight ORR publications as follows:

Access to the rail network and service facilities, infrastructure management and appeals

- References to the IRs have been deleted throughout. This has resulted in large sections of text which explained relevant and now defunct requirements, being removed.
- Some of the legislative history has been removed as it is no longer necessary and is potentially confusing.
- We have clarified that service facility owners are no longer obliged to use the template to provide information to Infrastructure Managers.
- The specific provisions on what type of information must be included in the Network Statement have been removed. Service facility owners must still provide information to the Infrastructure Manager.
- The detailed requirements on access to services have been deleted, as have the diagrams on non-conflicting requests, conflicting requests and viable alternatives. It has been replaced with a short explanation of the requirements to meet requests as far as possible. The underlying principles are unchanged.

Duration of track access agreements (framework agreements)

- A reference to the IRs has been deleted.

ORR Guidance on the assessment of new international passenger services

- References to the IR have been deleted throughout.
- The guidance explains that ORR is required to conduct the principal purpose test for international passenger service and to conduct the economic equilibrium test (EET) for international passenger services with cabotage.
- The timeframe for submitting a request to conduct an economic equilibrium test has been changed from one month to 28 days. This brings the timescales into line with other industry processes.
- A specific power to include an analysis of the wider net benefits to customers arising from the new services as part of our EET assessment was contained in IR 2018/1795. We consider that post revocation, ORR may continue to conduct this analysis in reference to our section 4 duties under the Act and have retained this provision in the guidance.
- The IR required operators of prospective new international services to notify ORR of their intentions using a different process to that which applies for domestic services. We have removed that process and instead expect all applicants to follow the standard process and timescales to apply for track access rights.

- The IR contained a specific provision allowing the regulatory body to delay consideration of an international application when a domestic PSC is being competitively tendered. ORR does not consider it would be able to do this in the event the IR was revoked. However, in a GB context, we do not consider it would be necessary to suspend our consideration in this way. We therefore propose to remove this option from our processes. We do not consider this likely to have any material impact on the outcome of any potential ORR decisions.

Industry code of practice for track access application consultations

- The minimum consultation period has been amended to a minimum of 28 calendar days. This provides consistency of duration across the year.
- We have clarified that where the parties to a contract have decided not to conduct an industry consultation (in the case of a minor modification) and issues that may impact other parties are identified by ORR during our review of the application, we may request a consultation is carried out. This change is not directly related to the IRs, but reflects current ORR policy.

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

- Merger commitments made by Eurostar International Limited to the European Union have now expired and the relevant section has been removed.
- In the absence of the specific requirements of the IRS, consultation requirements for HS1 have been aligned with industry procedures. Specifically, we have clarified our expectation that all consultations should be for a minimum of 28 days, in line with other infrastructure managers.

Criteria and procedures for the approval of station access agreements

- References to the IRs have been deleted throughout.

Criteria and procedures for the approval of depot access agreements

- References to the IRs have been deleted throughout.

Starting Mainline Operations

- References to the IRs have been deleted throughout.



Northern Ireland

The IRs applied to United Kingdom, but we understand that they are only being revoked for Great Britain. This means that we expect that the IRs will continue to apply in Northern Ireland.

We previously published a separate Northern Ireland version of *Access to the rail network and service facilities, infrastructure management and appeals* which will not change. We will preserve a Northern Ireland version of our *ORR Guidance on the assessment of new international passenger services*.

How to respond to the consultation

We hope that our guidance is useful to industry. We welcome comments on any changes that are unclear or where you feel that our changes do not appropriately reflect the requirements of the AMRs or the Act.

Please respond by email to Ian.Biggar@ORR.gov.uk by Friday 6th October 2023.

If you would like to join the open meeting, have any questions, or would like to discuss a particular issue with us prior to responding, please email Ian and we will arrange to speak to you.

Next steps

Once we have reviewed the responses to this consultation, we will publish our intended updates to the guidance in draft. We will also publish a summary of the consultation responses. This will explain why we have made any changes and if there are comments we did not incorporate, we will explain why we reached this decision. We expect to do this by the end of October.

The updated guidance will not be published as final guidance until the implementing regulations have been revoked. Our current guidance will continue to apply until that time. If the IRs are not revoked as we currently expect, we will continue to use our existing guidance. We will update industry if there are any changes to our timescales or approach.

Yours sincerely

Esther Sumner, Head of Access Reform Delivery.

Head of Access reform delivery

Appendices

1. [Summary table](#)
2. Updated guidance:
 - a. [The Railways \(Access, Management and Licensing of Railway Undertakings\) Regulations 2016](#)
 - b. [Duration of track access agreements \(framework agreements\)](#)
 - c. [ORR Guidance on the assessment of new international passenger services](#)
 - d. [Industry code of practice for track access application consultations](#)
 - e. [Criteria and Procedures for the approval of framework agreements on the HS1 network](#)
 - f. [Criteria and procedures for the approval of station access agreements](#)
 - g. [Criteria and procedures for the approval of depot access agreements](#)
 - h. [Starting Mainline Operations](#)