Letter to industry

10 January 2024

Dear colleagues

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

Between 25 August and 6 October 2023, we consulted[1] on draft updated guidance in preparation of the intended revocation of four access related implementing regulations (IRs) later this year. We undertook the consultation in advance of the revocation so that industry can understand the implications of the revocation in advance and be able to use the relevant guidance as soon as the IRs are revoked.

We received eight responses[2]. Those responses have been published on our website. We also held an open meeting for consultees on 13 September.

As a result of feedback received during the consultation process, we have clarified two points within the draft guidance documents. A summary of responses and the clarifications are set out in the annex to this letter.

ORR will now await the outcome of the Parliamentary process. Should the IRs be revoked as planned, we will publish the new guidance documents promptly.

Yours sincerely

Esther Sumner

[1] Access guidance update in preparation for revocation of retained EU law | Office of Rail and Road

[2] Heathrow Airport Limited; RSSB; DB Cargo; GWR; Rail Partners; Network Rail; Eurostar International Limited (EIL); Transport for London.

Responses to the consultation

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

- Eurostar International Limited (EIL) agree with the proposed changes, subject to a comment on paragraph 2.42. EIL considers that a level of materiality for the modification to an existing framework agreement should apply before a 28 calendar day consultation is mandated. It suggested that in such cases a shorter or no consultation period should be available.

Paragraphs 2.43 and 2.44 of the draft guidance discuss the matter of minor modifications. They set out examples of what ORR would consider to be non-substantive changes. In such cases, HS1 may decide whether to consult other potential applicants. If a consultation is not carried out and issues that may impact other parties are identified by ORR during its review of the application, ORR may request a consultation is carried out or seek specific comments from industry parties.

In exercise of the powers conferred upon it by section 22(3) of the Railways Act 1993 (The Act), ORR is able to establish a "General Approval" allowing parties to an access contract to amend that contract (for specified changes) by agreement and without the need for a specific ORR approval. A further General Approval for infrastructure managers other than Network Rail was established by ORR in September 2023. We note that HS1 track access agreements are regulated under The Railways (Access, Management and Licensing of Railway Undertakings) Regulations 2016 (the AMRs), which does not contain a provision that would allow ORR to establish a similar General Approval.

The Railways (Access, Management and Licensing of Railway Undertakings) Regulations 2016, as amended Access to the rail network and service facilities, infrastructure management and appeals

Network Rail

- In the current guidance, paragraphs 21-22 describe the key changes made on the last occasion of updating this guidance. It suggests that rather than removing the section, it could be updated to indicate the key changes being made on this occasion.

We note that a previous update to this guidance included such a summary of changes. Although such summaries can be helpful, we consider that an expanded narrative history would provide diminishing value in enabling stakeholders to understand their current regulatory obligations.

- The Regulations set out the obligation of service providers to provide information to infrastructure managers. Network Rail suggested that

stakeholders could mis-understand this obligation due to the order in which it had been set out in the draft guidance.

We agree with the suggestion and have amended Chapter 4, paragraph 4 of the draft guidance as follows:

> *"Service providers must provide the infrastructure manager with information to be included in the infrastructure manager's Network Statement, or details of a website where such information is available free of charge in electronic format. This information must include: information on access to and charges for the supply of service facilities listed in Schedule 2 of the 2016 Regulations, including those services which are provided by only one supplier, and including information on technical access conditions~~, or details of a website where such information is available free of charge in electronic format.~~. We would expect this information to be sufficiently detailed to allow an applicant to understand whether a service (or facility or any rail related services within that facility) is suitable to meet its needs. Facility owners may find it helpful to use the template provided by infrastructure managers when compiling this information."*

- Paragraph 15 of the draft guidance refers to viable alternatives. It states: "[…] *It would therefore be our expectation that in most cases service providers should provide the requested services where they are able to do so*". Network Rail suggested that it might be less prejudicially worded in its context to state that; "It is therefore our expectation that in most cases service providers would therefore need to provide the requested services where they are able to do so.".

The inclusion of the word "should" in this sentence was an error in the annex to the consultation letter. It was not included in the draft guidance itself, which states: "It would therefore be our expectation that in most cases service providers provide the requested services where they are able to do so". We thank Network Rail for highlighting this.

Rail Partners

- Chapter 1 paragraphs 21-22 and Chapter 4 paragraphs 1-2 sets out the information that service providers must include in a service facility description. The current guidance includes a list of required information. This has been removed and replaced with an expectation that the information provided will be sufficiently detailed to allow an applicant to understand whether a service (or facility or any rail related services within that facility) is suitable to meet its needs. Rail Partners consider that the current level of specification enables a consistent approach. It is concerned that the updated

guidance introduces a level of subjectivity and could limit industry cooperation on access to service facilities. This is also the case in relation to guidance set out in Chapter 4, paragraphs 56-64, which covers access to unused service facilities.

The current detailed specification for these two areas are requirements of IR 2017/2177[3], which is expected to be revoked. We do not consider it would be appropriate for ORR to replace these specific provisions of that revoked law with guidance. The core provisions of the AMRs require relevant service providers to provide information on access to and charges for the supply of service facilities, including information on technical access conditions. This should result in the provision of an appropriate level of information to applicants. We also note that should either the infrastructure manager or an applicant consider that insufficient information has been provided, the AMRs provide routes for both parties to seek ORR's intervention. Information on appeals was included in this section as a new addition.

Industry Code of Practice for Track Access Consultations

Network Rail

- The clarification of the minimum consultation period is a welcome clarification that addresses a previously confusing wording.
- Network Rail noted the draft guidance gave no indication of the test that ORR would apply in deciding to request an industry consultation in the case of a minor modification where its review of an application identifies issues that may impact other parties.

The draft guidance sets out that in such cases, ORR may request a consultation is carried out or seek specific comments from industry parties. Our approach will be pragmatic and based on the circumstances of the individual application. We do not consider it necessary to develop a specific test for this possibility.

Rail Partners

- Rail partners noted that in some instances a consultation period of 28 days may be insufficient for industry to consider the impact of the proposed change. It suggested that ORR should use its discretion when determining the industry consultation period and may wish to extend the consultation period when more time is required by industry. In addition, Rail Partners supported

[3] https://www.legislation.gov.uk/eur/2017/2177

the intent of the draft guidance to establish a consistent approach to framework agreements on HS1.

The draft guidance sets out that the consultation period shall be a minimum of 28 days. Industry consultations should be of sufficient duration to allow a full opportunity for relevant parties to raise issues arising from the proposal. This will also provide a greater opportunity to resolve any such issues prior to submission to ORR. The guidance has been amended to state:

> *"17. Where the infrastructure manager receives a request to enter into or modify a framework agreement, it should take reasonable steps to inform other potentially affected parties. Framework agreements are complex and can have impacts on multiple parties. As such, the consultation period for new framework agreements or modifications to framework agreements is a minimum of 28 calendar days in order that all potentially affected parties have adequate time in which to consider and make representations. In more complex cases, or where an individual stakeholder requires additional time, the infrastructure manager shall discuss the matter with all potentially affected parties and agree with those parties a reasonable time period for consultation."*

ORR Guidance on the assessment of new international passenger services

Network Rail

- The changes to timeframes from 1 month to 28 days, and the harmonisation of domestic and international notification processes to ORR provide small simplifications and standardisations.
- We note the change to Paragraph 78 means that the Regulator is no longer required to make access decisions before the Priority Date (D40) meaning such applications may be decided later in the Timetabling process.

The requirement to reach a decision on the Economic Equilibrium Test before the priority date is contained within IR 2018/1795[4], which is expected to be revoked. As set out in paragraph 72 of the draft guidance, we envisage that the Economic Equilibrium Test and the principal purpose test will be carried out at the same time as our wider consideration of a track access application.

Other matters raised

TfL noted ORR's view that revocation of these IRs would not result in a material change to the regulatory framework governing access to Great Britain's rail network. It considers that it is important that the overall situation is kept under review following

[4] https://www.legislation.gov.uk/eur/2018/1795

revocation to ensure that the changes do not resulting in any unreasonable treatment of access beneficiaries or abuses of dominant market position.

Heathrow Airport Limited and First Greater Western Limited confirmed that they had no comments to make on the consultation.

RSSB confirmed that it is content that none of the proposed changes to REUL have a potential impact on the standards framework or the applicability of standards to (parts of) the network.

DB Cargo did not submit an individual response as it had fed into and framed the response of Rail Partners to the consultation.