Revision of ORR's policy on long term track access contracts: a consultation paper

June 2010

OFFICE OF **RAIL REGULATION**

Contents

1. Introduction

Background

1.1 In June 2005, we issued our final conclusions on our policy on long-term track access contracts (our "existing LTAC policy")[1]. This set out how we would consider applications for the approval of track access contracts of greater than five years' duration. This policy was based on the requirements of Directive 2001/14/EC which was subsequently transposed into UK law by the Railways Infrastructure (Access and Management) Regulations 2005 (the "2005 Regulations").

1.2 In late 2007, the European Union amended Directive 2001/14/EC through Directive 2007/58/EC. In particular, the requirements relating to the duration of framework agreements[2] have been revised. Great Britain has now amended the 2005 Regulations to transpose the changes made by Directive 2007/58/EC[3] and as a result, we need to revise our LTAC policy.

1.3 In addition, under the revised 2005 Regulations all framework agreements relating to the High Speed 1 network (HS1) are now subject to ORR's approval[4]. Our revised policy will apply to HS1.

Why have a policy?

1.4 Long-term track access contracts (that is, contracts over five years – "LTACs") can provide assurance to train operators by helping them to plan their businesses, justify new investment and comply with commercial contracts – whether these are franchise agreements or commercial freight contracts. In respect of freight, they can also provide a means for operators to attract and retain customers who may need to be satisfied that their goods will be able to

[1] Long-term track access contracts: final conclusions, Office of Rail Regulation, June 2005, available at http://www.rail-reg.gov.uk/upload/pdf/240.pdf.

[2] Under the 2005 Regulations, "framework agreements" include track access contracts and track access options which have been approved by ORR under the Railways Act 1993.

[3] These changes have been transposed by the Railway Infrastructure (Access and Management)(Amendment) Regulations 2009

[4] Regulation 18(12): this came into force on 1 October 2009.

be transported over the long-term. There are therefore benefits – in terms of greater assurance – for train operators and their customers from longer track access contracts.

1.5 However, there are disadvantages associated with the granting of LTACs. These include:

(a) the lack of flexibility for the infrastructure manager and other train operators when long-term rights are sold;

(b) the potential for ossification of capacity, as the best use of capacity now may not necessarily be the best use in, say, 20 years time. An LTAC could therefore prevent a more beneficial service from operating in the future; and

(c) the potential for reduced on-rail competition.

1.6 Because of this, we have a policy on the duration of LTACs to ensure that they are only approved where this would be in the public interest, having regard to our statutory duties and the legislative framework within which we work. As stated above, following the changes to the 2005 Regulations we propose to revise our policy accordingly.

1.7 However, you may wish to note that our proposed revision to our policy would not mean a significant departure from our current approach; in the majority of cases we expect there would be no change to either the duration of access contract that we would expect to approve or the justification required from applicants to support an application.

Consultation

1.8 This document sets out our proposed revised policy and seeks industry views on it. For ease of reference, our interpretation of the changes to the regulations is discussed in paragraphs 2.4-2.21, with our proposed approach to applying our policy set out in paragraphs 2.21-2.33.

1.9 We have set out in Annex B some focused questions to assist consultees in making their response. We would be grateful for comments to be emailed to Richard Gusanie (Senior Executive, Track Access) at richard.gusanie@orr.gsi.gov.uk by 17:00 on 21 September 2010.

1.10 Responses may be published on our website and may be quoted from by us. If you wish all or part of your response to remain confidential to ORR you should set out clearly why this is the case. You should be aware that under the Freedom of Information Act 2000, information submitted to us may be subject to disclosure where requested unless an exemption from disclosure applies. If you do make a response in confidence, please also send us a statement summarising the submission but excluding the confidential information, so that we can publish that instead. We will publish the names of respondents in future documents on our website, unless a respondent indicates that they want their name to be withheld.

Regulatory impact

1.11 We attach at Annex A an impact assessment of the effect of the proposed new policy. This has been developed in accordance with the "ORR Approach to Producing Impact Assessments version 1" published in July 2009. Our analysis indicates that there should not be any new burden placed on stakeholders.

Next steps

1.12 Following the consultation and our consideration of industry views, we will re-issue the policy statement currently set out in chapter 3 of our existing LTAC policy, making the changes necessary to reflect the revised regulations. We will aim to do this by the end of the autumn.

2. Legislative changes and proposed policy

Legislative changes to the 2005 Regulations

2.1 As stated above, the key provisions in the 2005 Regulations relating to the duration of framework agreements have been amended. Amongst other things, specific provisions have been introduced for framework agreements relating to infrastructure that has been declared as specialised under Regulation 22 of the 2005 Regulations ("specialised infrastructure").

2.2 Under Regulation 22, an infrastructure manager may, after consulting specified parties, give priority in the allocation of capacity to certain types of railway services, where the conditions in Regulation 22 are satisfied. For example, an infrastructure manager that has designated network as specialised for high speed passenger services could give priority to the operators of those services in the capacity allocation process.

2.3 The relevant revised regulations are set out as follows (for ease of reference, we have shown where insertions and deletions have been made).

Regulation 18(7)

> "Other than in circumstances described in paragraphs (8) ~~and (9)~~, (9) and (9A), a framework agreement made in accordance with paragraph (1) shall in principle be for a period of up to five years~~.~~ ,renewable for periods equal to its original duration; provided that the infrastructure manager may agree to a shorter or longer period in specific cases."

Regulation 18(8)

> "Subject to paragraphs 9 and 9(A), a ~~A~~ framework agreement for a period ~~of between~~ longer than five ~~and ten~~ years must be justified by the existence of commercial contracts, specialised investments or risks."

Regulation 18(9):

> "~~A framework agreement for a period in excess of ten years may only be made in exceptional cases, in particular where there is large-scale and long-~~

~~term investment, and particularly where such investment is covered by contractual commitments.~~

Subject to paragraph (9A), a framework agreement in relation to infrastructure which has been designated in accordance with Regulation 22(2) ("a designated infrastructure framework agreement") may be for a period of up to fifteen years where there is a substantial and long-term investment justified by the applicant."

Regulation 18(9A):

"A designated infrastructure framework agreement may be for a period in excess of fifteen years in exceptional circumstances, in particular where there is large-scale and long-term investment and particularly where such investment is covered by contractual commitments including a multi-annual amortisation plan."

Our proposed approach

2.4 We set out below what we consider to be the effect of the changes to the 2005 Regulations and how we propose to interpret them. In developing our proposed approach, we have had regard to our duties under section 4 of the Act[5] and also to the underlying purpose of Directives 2001/14/EC and 2007/58/EC (the "Directives"). As mentioned above, since all framework agreements relating to the HS1 network are now subject to ORR's approval, we intend to apply the approach set out below to the HS1 network.

Contracts of up to five years

2.5 Prior to the changes to the 2005 Regulations, the default duration of a track access contract was for a period of up to five years. Although amendments have been made to Regulation 18(7), this position has not changed and the default duration of a track access contract continues to be for a period of up to five years.

2.6 However, Regulation 18(7) has been amended to provide for the renewal of track access contracts for periods equal to their original duration, although the

[5] Under Regulation 28(1), these duties apply to our functions under the 2005 Regulations to the extent consistent with the applicable EU Directives.

infrastructure manager may agree to shorter or longer periods in specific cases.

2.7 In practice, we do not consider that these amendments materially change the existing arrangements. We interpret “renewing” a contract to mean extending an existing track access contract or replacing it with a completely new contract. Therefore, under Regulation 18(7) it continues to be the case that contracts may be renewed either by way of an amendment to an existing contract or by way of an entirely new contract. In either case, ORR’s approval is required.

2.8 In general, we would expect to approve extensions to, or replacements of, track access contracts where the circumstances surrounding them have not changed since we approved them. We would give our approval where we considered it would still be consistent with our statutory duties and published policies to do so. However, the circumstances surrounding certain agreements may change and we must ensure that we approve the allocation of scarce capacity in accordance with our statutory duties. Although a track access contract may be renewable for a period equal to its original duration, we may approve a contract of shorter or longer duration depending on the circumstances of the case. We consider that this is consistent with the ability of the infrastructure manager to agree to a shorter or longer period in specific cases.

2.9 The phrase “*renewable for periods equal to its original duration*” in Regulation 18(7) might be viewed as allowing self-renewal provisions to be included within track access contracts so that the contract can be extended automatically. We do not believe that this is the correct approach because it could result in evergreen track access contracts, which in our view would be contrary to the purpose of the Directives. The Directives aim to encourage the liberalisation of rail markets and promote competition. Self-renewal provisions, on the other hand, would lead to long-term allocations of capacity which could, in our view, limit market entry and ossify capacity. Therefore, we are satisfied that this was not the intention behind this amendment.

2.10 In summary, the default duration of a track access contract will continue to be for a period of up to five years. This is already reflected in our current arrangements and therefore we do not propose to change our policy in this

regard. In addition, for the reasons set out above, we do not intend to approve track access contracts that contain self-renewing provisions.

Contracts of over five years

2.11 Regulations 18(8), 18(9) and 18(9A) set out the circumstances under which a track access contract may be for a period of greater than five years. Regulations 18(9) and 18(9A) introduce specific provisions in relation to specialised infrastructure and set out the circumstances under which a track access contract may be: (i) for a period of up to 15 years[6]; and (ii) for a period in excess of 15 years[7]. In contrast, Regulation 18(8) is silent as to the nature of the infrastructure to which it applies. It simply sets out the circumstances under which the duration of a track access contract may for a period of greater than five years - there is no express upper limit on duration. Therefore, there is a potential area of overlap since Regulation 18(8) applies (on its face) equally both to specialised and non-specialised infrastructure. We set out below our understanding of the interaction between these provisions and how we intend to apply them.

Specialised and non-specialised infrastructure

2.12 Although the amended Regulations appear to distinguish between specialised and non-specialised infrastructure, we propose to adopt the same approach regardless of the nature of the infrastructure concerned. We think it would be arbitrary to apply different rules on duration solely on the basis of whether or not a network has been declared as specialised infrastructure.

2.13 We consider that this approach would provide for a clearer and more coherent policy, particularly in the context of the network in Great Britain, which in most places is multi-purpose rather than designed for a particular type of use (e.g. for high speed passenger or freight services). In addition, we consider that this approach is consistent with the aims of the Directives, in particular to encourage investment in railway infrastructure.

[6] Regulation 18(9)

[7] Regulation 18(9A)

Relationship between Regulations 18(8), 18(9) and 18(9A)

2.14 Regulation 18(8) provides that: "*Subject to paragraphs 9 and 9A, a framework agreement for a period longer than five years must be justified by the existence of commercial contracts, specialised investments or risks*" (emphasis added).

2.15 Therefore, track access contracts may be for a period longer than five years where they are justified by commercial contracts, specialised investments or risks. Prior to the amendments to the 2005 Regulations, Regulation 18(8) provided for a maximum duration of 10 years. This cap has now been removed, ostensibly providing for contracts of greater than 10 years to be justified on the basis of the criteria contained in Regulation 18(8). However, this provision is "*subject to Regulations 18(9) and 18(9A)*" and therefore Regulation 18(8) needs to be considered in the light of these other provisions.

2.16 Regulation 18(9) provides that framework agreements in relation to specialised infrastructure may be "*for a period of up to fifteen years where there is a substantial and long-term investment justified by the applicant*" (emphasis added).

2.17 Regulation 18(9A) provides that framework agreements in relation to specialised infrastructure may be "*for a period in excess of fifteen years in exceptional circumstances, in particular where there is large-scale and long-term investment and particularly where such investment is covered by contractual commitments including a multi-annual amortisation plan*" (emphasis added).

2.18 We consider that the requirements under Regulations 18(9) and 18(9A) are more stringent than those under Regulation 18(8). Regulation 18(8) requires the existence of commercial contracts, specialised investments or risks but not necessarily the substantial and long-term or large scale and long-term investment required under Regulations 18(9) and 18(9A) respectively. Given that Regulations 18(9) and 18(9A) provide for the duration of track access contracts to be up to 15 years and greater than 15 years respectively, we do not consider that we could approve a contract which satisfied the criteria under Regulation 18(8) with a longer duration than that which we would approve under Regulations 18(9) and 18(9A). Otherwise, we would in effect

be approving track access contracts of a longer duration on the basis of a smaller investment/portfolio of lower risk.

2.19 Therefore, we believe there should be an implied upper limit of 15 years duration for track access contracts that satisfy the requirements of Regulation 18(8) but not Regulation 18(9A). We consider that there is a continuum between 5 and 15 years, and that as duration approaches 15 years, it should become increasingly difficult to justify a contract of that duration against the criteria in Regulation 18(8).

2.20 Although Regulations 18(9) and 18(9A) apply specifically to specialised infrastructure, we propose to adopt the same approach to both specialised and non-specialised infrastructure for the reasons set out above. We consider that this approach is consistent with the amended Regulations. The requirements in relation to substantial/large scale and long term investment under Regulations 18(9) and 18(9A) can be viewed as a more detailed subset of the requirements under Regulation 18(8) relating to specialised investments or risks.

2.21 Therefore, in relation to non-specialised infrastructure, we propose also to approve under Regulation 18(8) track access contracts for a period of up to 15 years or in excess of 15 years on the same basis as which we would approve, in relation to specialised infrastructure, track access contracts for the same duration under Regulations 18(9) or 18(9A).

Application of the policy

2.22 In summary, we propose to apply the following approach:

(a) in general, the default assumption would be that any contract we approve would have a duration of **up to five years** unless any of the criteria in Regulations 18(8)-18(9A) apply (see paragraphs (b) and (c) below). As is currently the case, we would be minded to approve extensions to, or the replacement of, contracts where we are satisfied that to do so would be consistent with our duties;

(b) we will consider approving contracts for a period **over five and up to fifteen years** where justified by:

(i) **commercial contracts, specialised investments** or **risks; or**

(ii) **substantial** and **long-term investment** by the applicant; and

(c) we will consider approving contracts for a period **greater than fifteen years**, in exceptional circumstances, in particular where there is **large-scale** and **long-term investment** and particularly where such investment is covered by **contractual commitments** including a **multi-annual amortisation plan**[8].

2.23 We set out below what we propose a beneficiary should demonstrate in order to qualify for a track access contract of a particular duration. This reflects to a large extent the criteria contained in our existing LTAC policy, which we consider remain relevant in the context of the changes to the revised Regulations. It will continue to be the responsibility of the applicant beneficiary to justify any increment in duration above five years against our LTAC policy.

Contracts of over five and up to fifteen years

2.24 A contract of over five and up to fifteen years may be justified on the basis of commercial contracts, specialised investments or risks (or a combination of these) or substantial and long-term investment.

Commercial contracts

2.25 A beneficiary may use the existence of relevant commercial contracts to support a case for a track access contract of over 5 and up to 15 years in duration. Such commercial contracts might include a freight customer contract, a rolling stock leasing contract or a franchise agreement[9].

2.26 We would take into account the length and nature of any commercial contract relied upon by a beneficiary to justify an LTAC. However, we would not necessarily expect to approve an access contract with the same duration as any commercial contract. For example, the holding of a 15 year freight customer contract would not mean we would necessarily approve a 15 year track access contract. Indeed, given the risks of ossification from LTACs, we consider that we would only approve a contract of over ten years justified solely on commercial contracts in exceptional cases.

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8 That is, a plan to depreciate the value of the investment over a number of years.

9 This includes a concession agreement – for example, such as the one granted by Transport for London.

2.27 We have previously approved contracts for up to ten years on the basis of a beneficiary holding a franchise agreement. We propose to continue to approve track access contracts of up to 10 years for passenger operators if the purpose of that contract is to provide services in compliance with a franchise agreement and such approval is consistent with our duties. Due to the risk of ossification, we would not expect to approve a track access contract of longer than ten years solely on the basis of a franchise agreement.

2.28 We propose to continue to permit track access contracts to expire up to two years after the expiry of a franchise agreement, subject to a ten year cap. As is presently the case, we will do this if it is necessary to allow the orderly transfer of the franchise to a new franchisee and/or to ensure the continuation of priority bidding rights.

Specialised risks

2.29 We would take into account the length and nature of a specialised risk profile. We consider a specialised risk to be a risk that is not necessarily faced by other parties who are operating in the same market sector. Such risks might include those arising from demand and costs, as well as competition from other transport modes. We will also consider past investment made in the context of current risks providing the applicant can justify that it is relevant. We do not consider that being an open-access operator in itself represents a specialised risk.

Specialised investments

2.30 We would take into account the length and nature of specialised investments, on the basis of:

(a) an underlying investment in railway assets which would be primarily sunk (i.e. where that investment could not be reasonably recovered by selling those assets or by using them elsewhere). We will have regard to any evidence that specific investment could not be made (because of its size or payback period) without a longer-term track access contract; and

(b) a requirement by the beneficiary for the access rights for the period proposed in order to secure the benefits of investment or other public

interest benefits in accordance with our section 4 duties[10], provided that the rights do not provide the opportunity to eliminate competition from other operators in respect of a substantial part of the services in question.

Substantial and long-term investment

2.31 We will also approve contracts of up to fifteen years duration where there is substantial and long-term investment. In deciding whether an investment meets these criteria, we will take into account:

(a) the scale of investment in relation to the size of the applicant/applicant's company group (for instance in terms of turnover). In determining whether an investment is substantial we would look at the investment value against the beneficiary's size. So, for example, a £100m investment made by smaller company/company group could be considered more substantial than the same investment made by a bigger company/company group;

(b) the payback period for that investment, though the duration may not necessarily be the same as the payback period. We would only expect to provide reasonable surety for the investment to proceed. We would not expect the duration of the contract to be longer than the payback period; and

(c) the anticipated contribution of the investment to the growth of greater efficiency of rail markets, compared to alternative uses of capacity. For example, we will consider the relative economic benefits of alternative uses.

Contracts of over 15 years

2.32 Regulation 18(9) provides for contracts of up to 15 years where justified by substantial and long-term investment. Regulation 18(9A) provides for track access contracts to be for a period of greater than 15 years in exceptional circumstances, in particular where there is large-scale and long-term

[10] Such as better use of capacity and increased benefits to passengers/freight customers in terms of performance, reliability and specifically for passengers, reduced overcrowding,

investment and particularly where such investment is covered by contractual commitments including a multi-annual amortisation plan.

2.33 In determining the duration of track access contracts where there is large-scale and long-term investment, we would look at the same criteria as for substantial and long-term investment in paragraph 2.31 above. However, we would also look at the degree to which the investment is covered by contractual commitments and whether there is a multi-annual amortisation plan (e.g. where the cost of the investment is to be repaid over a period of years). In line with paragraph 2.31(b) above, it would be necessary for the payback period of the investment to exceed 15 years in order to make a case for a contract of over 15 years.

Buy-back provisions

2.34 As contracts longer than 15 years present a particular risk of ossification, we would expect any contract over 15 years to contain a buy-back provision that becomes effective from year 10 of the contract, as set out in our Track Access Option Policy[11].

[11] Track Access Option Policy, paragraphs 3.14-3.17, available at http://www.rail-reg.gov.uk/upload/pdf/350.pdf.

Annex A: Impact assessment

Section 1: The issue

What is the issue?

1. The rules relating to duration of framework agreements in the Access and Management Regulations 2005 have been amended as a result of changes to EU legislation. Our current policy on duration is based on the 2005 Regulations, which means we need to revise our policy to reflect the change in legislation.

Why are we intervening?

2. We already have responsibility for approving track access contracts and since 2005 have had a policy setting out our criteria for approving different lengths of these contracts. Our only intervention now is to revise our existing policy to ensure it remains consistent with UK and EU law.

What is the desired outcome?

3. Our aim in revising our policy is to ensure that:

   (a) our approach is consistent with the amended 2005 Regulations and the overriding EU Directives. In particular, we wish to ensure that long-term track access contracts are approved only where there are sufficient corresponding benefits; and

   (b) industry parties have a reasonable expectation of the justification they would need to make to us to support an application for an LTAC.

When will we review the success of the intervention?

4. We do not plan to review the change in policy, mainly because we do not expect that it will have a significant impact. However, we understand that the impact of the underlying directives will be evaluated by the EU in a review of market development by 31 December 2012.

Section 2: The options

Option 1: Do nothing

5. If we do nothing, aspects of our existing policy will be inconsistent with legislation and neither we nor our stakeholders would be able to rely on it in making decisions where it is inconsistent. We do not believe that this is a viable option.

Option 2: Revise existing policy as proposed in chapter 2

6. Revising our policy in line with what we have proposed in chapter 2 will ensure a continuation of much of our existing policy, whilst providing a sensible way of interpreting the new arrangements set out in the amended legislation. We consider that this is the only viable option, for the reasons set out under Option 1.

Section 3: The preferred option

Impact on stakeholders/duty holder

7. **Network Rail/ HS1** – We consider that the only impact on Network Rail/ HS1 would be that when it considers the appropriate duration of a track access contract, it will have regard to a different policy. Since the new regulations have come into force, Network Rail/ HS1 has had regard to both our existing LTAC policy and the new regulations. As these are now inconsistent in places, revising our policy will make it more straightforward for Network Rail/ HS1 to make decisions on proposed access contracts.

8. **Government** – There is no expected effect on government. Whilst ORR as an office has developed the revised policy, as it is merely a revision to existing arrangements we do not expect that there will be an ongoing cost when we consider applications.

9. We estimate that the total costs to ORR of developing the revised policy will be around £5,000, which will be borne as part of ORR's normal operating costs. This is based on the time taken to review the amended regulations and devise an appropriate policy to implement the new arrangements. This is based on the following assumptions:

- staff costs estimated at £70,000 per person (full time equivalent). This includes employer national insurance contributions, pension contributions, allowances and support staff costs and accommodation costs (arrived at by doubling basic salary);
- it will take 15 days of work to develop and implement the revised policy; and
- we have assumed the 'on-going' costs – namely those costs involved in processing applications against the revised policy – will be negligible. This is because the only change from existing arrangements will be that ORR has regard to a revised policy. Hence, there will be no increase in administration costs from using the revised policy.

10. **Freight train operators** – We do not expect that there will be a significant impact on freight operators. In most cases, they can expect to gain approval for the same lengths of contracts as they did previously. However, as a result of the removal of the statutory cap on duration for contracts without long-term investment, our proposed policy would provide more flexibility by permitting (where justified) contracts of over 10 years and up to 15 years without the need for substantial and long-term investment. This flexibility would be beneficial to freight operators.

11. Conversely, there may be a disbenefit as the increased scope for us to approve contracts of up to fifteen years would provide for capacity to be allocated for longer, thus leading to a risk of ossification. This could prevent the capacity being allocated to the best available use at the time. However, we do not expect that there will be many contracts that would qualify for between 10 and 15 years duration without long-term investment. Those that are approved would need to provide sufficient countervailing benefits. Therefore, we believe the risk of ossification will be mitigated by these factors.

12. **Passenger train operators** – We consider that the same benefits and risks apply as for freight train operators above.

13. **Consumers** – The extra flexibility for longer contracts may provide benefits in terms of greater assurance, particularly for freight customers. However, there would also be a small impact arising from the risk of ossification where we approve longer contracts. But, as stated above, we do not expect there will be

many more contracts that qualify for longer than 10 years on the basis of our proposed revised policy and any impact should be marginal.

Impact on specific consumer groups

14. **Disability** – This policy involves allocation and utilisation of track access capacity only and is disability neutral. It should therefore have no impact on disability compared with the existing LTAC policy.

15. **Gender** – This policy involves allocation and utilisation of track access capacity only and is gender neutral. It should therefore have no impact on gender compared with the existing LTAC policy.

16. **Race** – This policy involves allocation and utilisation of track access capacity only and is race neutral. It should therefore have no impact on race compared with the existing LTAC policy.

17. **Other** – We do not consider that the impact of this policy would vary across consumer groups, for example low income households.

Impact on health and safety

18. As only licensed operators, who have already obtained necessary safety certifications, can exercise access rights held in track access contracts, we do not consider that the policy revision will impact on health and safety.

Impact on sustainable development

19. We do not consider that the revision of our policy will lead to an impact on sustainable development. However, we consider that by facilitating investment in the rail network, long-term access contracts can contribute to sustainable development.

Impact on competition

20. Whilst the length of track access contracts can influence competition, as we do not believe that our proposed policy revision will lead to a significant change to durations of track access contracts, we do not consider that there will be a change to current levels of competition.

Geographic impacts

21. We do not consider that the policy would have a distinct geographic impact as it will apply to all the networks that we regulate in Great Britain.

Statutory duties

22. We think the following statutory duties are relevant to this policy proposal:

- to promote improvements in railway service performance;
- to protect the interests of users of railway services;
- to promote the use of the railway network in Great Britain for the carriage of passengers and goods, and the development of that railway network, to the greatest extent that [ORR] 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; and
- to enable persons providing railway services to plan the future of their businesses with a reasonable degree of assurance.

Overall impact

23. Aside from the administrative costs of revising the policy, which will be borne through ORR normal operating costs, we do not consider that the proposed policy would lead to a significant financial impact on the industry compared to the current situation. Industry parties currently have regard to our existing LTAC policy when considering what length of contract they might be able to obtain. Likewise, we have regard to it when deciding what length of contract to approve. Under our proposals, this situation would continue, albeit with a revised policy.

Conclusion

24. From the impacts described above, we do not consider that there will be any significant adverse impact from our proposed policy change. Whilst there would be an increased risk of ossification from the potential for contracts of

between 10 and 15 years to be approved without the requirement for long-term investment, we do not think this is a significant concern. This is because in considering any such application, we would assess the merits of the longer duration against the possible disbenefits, including ossification. We would only expect to give our approval where we considered that to do so would be consistent with our revised policy and statutory duties. We also believe that our revised policy will benefit the industry by providing clarity on how we will interpret the revised regulations.

25. We welcome any comments on this analysis, particularly any additional evidence of the costs and benefits of the policy.

Annex B – focused questions for consultees

Along with any other comments that you wish to make, we would be grateful for your views on the following:

- Do you agree with our proposal to treat networks, for the purposes of duration, the same regardless of whether or not they have been declared as specialised infrastructure? (Paragraphs 2.12-2.13)
- Do you agree with our view that, under the amended Regulation 18(8), the period between five and fifteen years is essentially a continuum whereby, as contract length increases, it becomes more difficult to justify a contract of that duration on the basis of commercial contracts, specialised investments or risks? (See paragraph 2.19)
- Do you agree with our proposal that, aside from in exceptional circumstances, track access contracts justified solely on the basis of commercial contracts should be no longer than ten years? (Paragraphs 2.25-2.28)
- Do you consider there is a need for clarification of any aspect of our current policy or our approach for how to apply our proposed revised policy?
- Do you have any comments to make on our impact assessment of the proposed policy (set out in Annex A)?