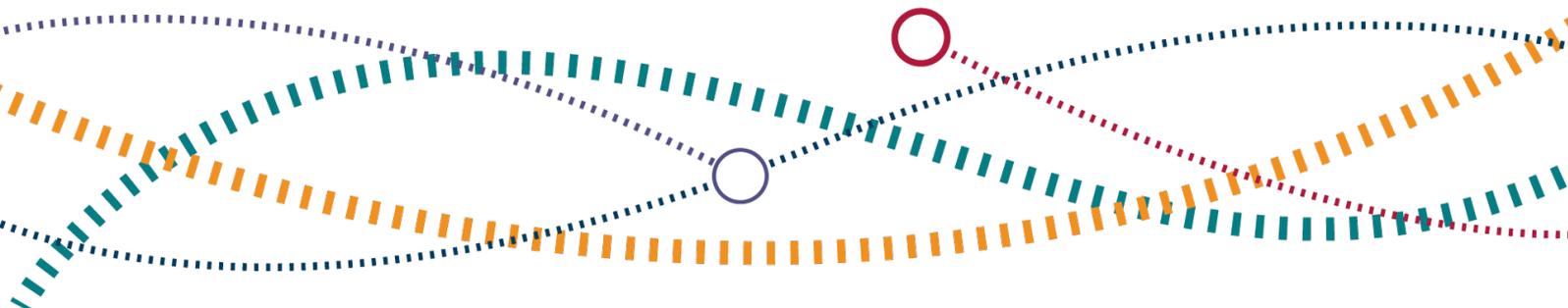




Consultation on revised access guidance in anticipation of changes to Retained EU Law

Consultation Responses

10 January 2024



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Heathrow Airport Limited

Heathrow Airport Limited has nil comments to return on this consultation.

Rail Safety and Standards Board (RSSB)

RSSB have reviewed the proposed changes and are 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

DB Cargo has had the opportunity to both feed into and frame the response of Rail Partners to the consultation on revised access guidance. This has included a thorough review of the lengthy annex.

DB Cargo will not be submitting a separate response to the consultation, but thoroughly endorse the response from Rail Partners to the consultation.

Great Western Railway

We have no comment save to support the proposed changes.

Rail Partners

Rail Partners welcomes the opportunity to respond to this consultation on future access guidance ahead of the intended revocation of four access-related implementing regulations sitting beneath the 2016 Access and Management Regulations as part of the Retained EU Law Bill. Rail Partners has engaged regularly with both the Department for Transport and ORR as the REUL Bill has passed through parliament which has provided the rail industry with opportunities to raise questions and concerns about the regulations that may be in scope for revocation or reform. We are grateful that the ORR has issued draft guidance in advance of revocation for Rail Partners and its members to consider. Rail Partners recognises the intent of removing the implementing regulations is to remove unnecessary duplication and prescription within the regulatory framework.

While we fully support efforts to simplify the regulations and remove bureaucracy, there are elements of implementing regulations that provided additional clarity that is valued by the rail industry. We are broadly satisfied that the updated guidance does retain much of this detail, though there are some specific points we would like to make which we feel could be strengthened.

This is particularly relevant to the updated draft guidance regarding the access to service facilities and rail-related services. Within ORR's existing guidance on the Access and Management Regulations, Chapter 1 paragraphs 21-22 and Chapter 4 paragraphs 1-2 provide important clarifications about the information that the service provider must make publicly available regarding the description of a service facility through the infrastructure manager's network statement. This level of specification enables a consistent approach to all facilities and is valued by the industry. While ORR would continue to expect that the service facility owner provides sufficient information for an applicant to decide whether a facility meets their needs, we are concerned that the updated guidance introduces a level of subjectivity and could limit industry cooperation on the access to service facilities. This may make it more difficult for ORR to scrutinise the decision of a service provider to refuse access, or for an applicant to appeal. This is also the case in relation to guidance set out in Chapter 4, paragraphs 56-64, which covers access to unused service facilities.

We support the updated guidance on framework agreements for the allocation of rail infrastructure capacity. Any commercial operator will continue to benefit from firm contractual assurance of access rights which provide detail on the specific paths and their duration in order to support continued investment in the sector. As set out in the consultation, there will continue to be a need for consultation on these agreements and we in principle support the intention to revert back to a consultation period of a minimum of 28 days which should ensure that new or modified agreements are processed in a timely manner. In some instances, such a narrow window of consultation may not be sufficient for other industry stakeholders to consider the impact of the agreement and therefore a Ian Biggar Senior Policy Advisor Office of Rail and Road By email 6 October 2023 longer period of consultation, in-line with the one to four months set out currently in the implementing regulations, may be appropriate. ORR should use its discretion when determining the industry consultation period and may wish to extend the consultation period when it is clear that more time is required by the industry. We support the intent of the draft guidance to establish a consistent approach to framework agreements on HS1.

Consistent with previous correspondence to DfT on the REUL Bill, Rail Partners is comfortable with the revocation of Implementing Regulation 2018/1795 (economic equilibrium test, on the basis that that this only applies to international services and the primary abstractive test will continue to apply for domestic services. Similarly, regarding Implementing Regulation 2015/10 (criteria for applicants for rail infrastructure capacity), as

existing mechanisms for controlling the extent of financial guarantee requirements for track access applicants will remain through the domestic licensing regime and existing guidance. Rail Partners is satisfied that the proposed guidance reinforces our initial view and we have no comments on these aspects of the guidance.

Although not within the scope of this consultation, Rail Partners supports the decision not to revoke the Implementing Regulation 2015/909, relating to the calculation of the costs that is directly incurred as a result of operating the train service, at this stage. This implementing regulation was introduced because there were many different ways of interpreting the regulations and it was felt necessary to provide clear definitions of the costs that should be included in the calculation of variable charges. It is Rail Partners' view that within both current and reformed railway structures, this implementing regulation will continue to be of value to any commercial operator as it provides longer term certainty on cost which supports investment and therefore should not be revoked in future.

Network Rail

Many thanks for the opportunity to comment on the ORR's anticipated changes to access guidance as a result of potential revocation of a number of Implementing Regulations (IRs) that are currently retained EU law.

As noted in your letter, in reaching their decision to propose revocation of these implementing regulations, DfT engaged with industry and ORR. We note, and concur, with your statement that:

"...we agreed with [DfT's] 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. ... 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."

Since the Implementing Regulations (IRs) are built on policy principles contained in other legislation, commensurate changes to the guidance issued by ORR should not result in any substantial policy changes.

Where the IRs introduced specific requirements and processes to meet wider obligations contained in legislation, it is consistent that the ORR's related access guidance be updated upon removal of the implementing regulations. Indeed, failure to make changes that reflect any revocation would allow confusion and reduce the utility of the guidance.

As noted in the consultation, the changes to ORR's guidance could also indicate where revisions allow railway businesses a choice whether to continue with current policies and processes developed in response to the implementing regulations, or to do something different provided they continue to meet the requirements of the AMRs.

There are a few opportunities to review the way we undertake some activities such as some of the Network Statement's content, the Framework Capacity Statement, etc. However, any wider changes where permitted would likely be part of consulted changes in process such as through the Network Code.

Our comments therefore are both limited and positive, and provided in respect of each of the eight amended documents is set out below. The many deletions to references to the IRs throughout are noted and should be taken as read.

- **Guidance on: 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.**

Current paragraphs 21-22 describe the key changes made on the last occasion of updating the guidance. Rather than this section being removed, it could itself be updated to indicate the key changes being made on this occasion.

The update guidance on the provision of information by service providers does not appear to align with the provisions of the Access and Management Regulations 2016 in that it currently states "*Service providers must provide the infrastructure manager with information to be included in the infrastructure manager's Network Statement.*" whereas the requirement is provide either the information to the infrastructure manager or (as set out in Regulation 13.4(b)) "*details of a website where such information is available free of charge in electronic format.*" Although this is picked up later in the guidance note the opening sentence is incorrect.

Please also note that the language in CIR 2017/2177 used 'may' and did not mandate the use of the template as suggested in the Consultation letter.

While noting that the underlying principles regarding viable alternatives are unchanged, the suggested wording; "*It is therefore our expectation that in most cases service providers should provide the requested services where they are able to do so.*", 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.”*

- **Duration of track access agreements (framework agreements)**

We have no comments to this small change.

- **ORR Guidance on the assessment of new international passenger services**

Given the limited use of Network Rail’s infrastructure for international passenger services, the changes to this guidance note will be of more consequence to other infrastructure managers. The limited possibility of an infrequent / indirect impact on network considerations is noted given the changes to the guidance regarding the delayed consideration when imminent international and domestic service considerations might interact. However, the guidance will have to change because of the revocation.

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 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.

- **Industry code of practice for track access application consultations**

The clarification of the minimum consultation period is a welcome clarification that addresses a previously confusing wording.

We also note the additional clarification regarding the ORR’s potential to request an industry consultation in the case of a minor modification where it identifies issues that may impact other parties. While making clear the potential for this action there is no indication of the test that ORR would apply in deciding to do so, there could be an indication that the impact would need to be material in nature for this to apply. This would be consistent with ORR policy (Making an application (for track access) 28 July 2021) which points out that; *“Our model contracts include provisions to enable changes of an administrative or minor nature to be made without our approval. ... Any in-built flexibility should not allow provisions of the contract to be varied in a material way that might have an adverse or detrimental impact on other beneficiaries, or cut across regulatory policy. and be consistent with current ORR policy.”*

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

We have no comments to the limited changes relating to HS1.

- **Criteria and procedures for the approval of station access agreements**

We have no comments to the limited changes.

- **Criteria and procedures for the approval of depot access agreements**

We have no comments to the limited changes.

- **Starting Mainline Operations**

We have no comments to the limited changes.

Eurostar International Limited

Thank you for the opportunity to respond to the consultation on the access guidance update in preparation for the revocation of retained EU law.

We have reviewed the consultation letter and annex with interest. We welcome the approach to provide the proposed updates prior to any intended revocation. This provides certainty for the industry. We agree with the proposed changes, subject to the following comment on the proposed change to paragraph 2.42 of the Criteria and Procedures for the approval of framework agreements on the HS1 network.

We consider that a level of materiality for the modification to an existing framework agreement should apply before a 28 calendar day consultation is mandated. For minor modifications, a shorter or no consultation period should be available. We consider this to be a proportionate and efficient approach to making such modifications. Please let us know if you have any comments or questions on this response. We look forward to the ORR's response to the consultation.

Transport for London

Thank you for giving TfL the opportunity to consider the proposed revocation of various Implementing Regulations governing access to the rail network and associated facilities. We note that you consider that this will not result in a material change to the policies

governing this important area. It is nonetheless important that the overall situation is kept under review following revocation to ensure that the changes proposed are not resulting in any unreasonable treatment of access beneficiaries or abuses of dominant market position, given the greater flexibility that is now being afforded in terms of demonstrating compliance. If it becomes apparent that there are concerns in this area then consideration should be given to amending policy and / or regulations to ensure that a fair and reasonable approach to access to the network and associated facilities is maintained.



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