The statutory and contractual framework

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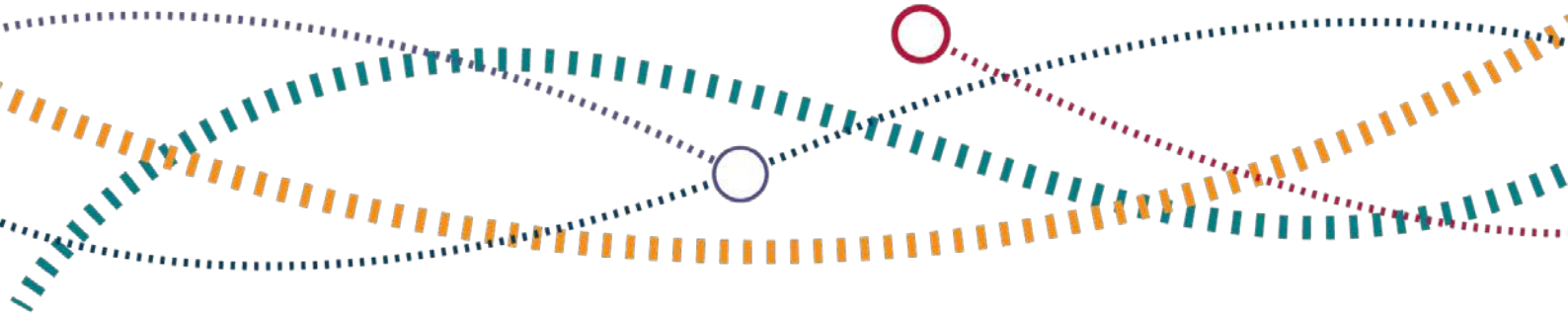

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Introduction

1 This module explains the statutory and contractual framework which applies to the regulation of access to the rail network including *The Railways Act 1993* (the Act), *The Railways (Access and Management and Licensing of Railways Undertakings) Regulations 2016* (the Regulations) and any parallel application of *The Competition Act 1998.* It also sets out the relationship with the Network Code.

2 The vast majority of the rail network in Great Britain is owned and operated by a single 'facility owner' - Network Rail Infrastructure Limited (Network Rail) - with train services run by passenger and freight train operators (referred to as 'beneficiaries') under regulated track access contracts. There are other facility owners to whom the statutory access regime applies, but this document generally refers to Network Rail as the facility owner. Clearly, responsibilities attributed to Network Rail only apply where it is the facility owner. Other facility owners will be responsible for their own facilities.

3 The general arrangements for Crossrail and Heathrow Airport Limited are mentioned in our module *Other Networks* which provides more information.

The statutory framework

4 The statutory framework applying to the use of rail network capacity was established by the Act. This sits within a framework of former European Union legislation which has been transposed into domestic legislation.

The Railways Act 1993 (The Act)

5 Under the Act, a person (usually, a train operator) may only enter into a contract with a facility owner (such as Network Rail) for the use of that facility (whether track, a station or a light maintenance depot) following ORR's approval and direction. Without this, any purported contract would be legally void and therefore unenforceable.

6 Proposed contracts that have been agreed by the parties require ORR's approval and direction under section 18 of the Act. Where the parties have not been able to reach agreement on the terms of a contract, the beneficiary can apply to ORR for determination and to issue directions requiring the facility owner to enter into a contract under section 17 of the Act.

7 Any subsequent agreed amendments to a contract require our approval under section 22 of the Act. If the parties have not been able to reach agreement on the terms of a proposed amendment to an existing contract the beneficiary may apply to ORR for determination and to direct the parties to amend the contract under section 22A. Note that only the beneficiary may apply under section 22A and it must be in order to make "more extensive use" of the facility. This would usually be to add services or extend the length of existing services to call at additional stations, ports or freight terminals. It would not usually cover changes to the terms of existing access rights such as adding journey time protection. Neither can it be used to extend the duration of an existing contract. In that situation, the applicant would need to apply under section 17 for a new contract starting immediately after the expiry of the existing contract. If challenged by Network Rail, the applicant will need to explain why it considers the amendment meets the definition of 'more extensive use'. After considering the arguments of both parties, ORR will decide the matter.

8 The statutory regulated access regime does not apply to all access contracts. For further information on exemptions from the statutory regulated access regime, please see our module *Other networks*.

9 The access regime also applies to railway facilities which are either planned or are under construction. It can also apply to a person before they become a facility owner.

This ensures that regulatory oversight of capacity use and regulatory protections apply equally across facilities, regardless of their status.

The Railways (Access and Management and Licensing of Railways Undertakings) Regulations 2016 (The Regulations)

10 The Regulations transposed certain EU rail directives into domestic law. They apply to the allocation of capacity and levying of charges, and provide for open access for all types of rail freight services and international passenger services. They provide for appeals to ORR where applicants are unable to agree what they consider to be fair terms with an infrastructure manager.

11 The Regulations require the necessary access agreements to be concluded with the infrastructure manager under public or private law (regulation 19(14)). Where the Act applies (in most cases), this should be done under the access provisions of the Act. Track access contracts with a duration of more than one year (i.e. the vast majority of track access contracts in GB) are referred to as Framework Agreements and regulation 21 contains additional requirements for this type of contract.

12 Set against a train operator's desire for certainty to meet its commercial needs, regulation 21(3) prohibits a track access contract from specifying any train path in detail. This is to ensure that the infrastructure manager can make best use of the railway infrastructure over the life of the contract to optimise timetables. Regulation 19(13) prohibits infrastructure manager from allocating capacity in the form of specific train paths for longer than one working timetable period (one year starting on a Principal Change Date.

13 Regulation 21(5) requires that all track access contracts contain terms permitting amendment of the contract if that amendment would enable better use to be made of the infrastructure. In order to meet this requirement we have included a process in Part J of the Network Code which is incorporated into each track access contract.

ORR's statutory duties and our approach to regulation

14 When determining access to the network, we must have regard to our *statutory duties*, most of which are set out in section 4 of the Act. We must exercise our functions (which include the approval of access contracts) in a way that we consider best achieves those duties.

15 When considering proposed contracts or amendments, we expect to focus on:

(a) the implications for the efficient use of network capacity over time;

(b) actual and potential impacts on third parties;

(c) any areas of disagreement; and

(d) consistency with our access charges determination for the relevant period.

Track access contracts

16 A track access contract is a contract between a beneficiary (usually a train operator) and the facility owner. Network Rail's track access contracts generally capture:

(a) the access rights held by the beneficiary: generally expressed in terms of an entitlement to have train slots incorporated in the working timetable in order to operate a train service over a defined part of the network; and

(b) conditions and obligations attached to those rights: including, charges; the performance regime; compensation for restrictions of use (for example, for engineering possessions); the rolling stock to be used; confidentiality provisions; and the liability of the parties to each other if things go wrong.

Access rights

17 An access right is any right conferred on a beneficiary by its track access contract with Network Rail. Access rights will represent a balance between

(a) the beneficiary's need to ensure that it can meet its key commercial requirements (including franchise[1] or commercial obligations) over the period of the contract;

(b) Network Rail's need for flexibility to optimise the use of network capacity in compiling a robust and reliable timetable reflecting the requirements of all beneficiaries; and

(c) Network Rail's need to reserve access to the network in order to maintain, renew and enhance it.

18 Access rights set out in track access contracts are converted into the working timetable by the process set out in Part D of the Network Code (Part D).

19 Although changes to the working timetable can be made at any time, significant changes in the passenger timetable will normally be made only twice per year, the Principal Change Date in December and the Subsidiary Change Date in May.

[1] In this document, references to a "franchise" may, where appropriate, also be taken to mean references to a "concession".

The Network Code

20 The Network Code is a common set of contractual provisions incorporated by reference into every regulated track access contract between Network Rail and a beneficiary. The Network Code does not create direct contractual relationships between beneficiaries. It concerns areas where common processes are necessary or preferred, such as delay attribution (Part B), timetable change (Part D), vehicle change (Part F) network change (Part G), operational disruption (Part H), changes to access rights (Part J), performance (Part L) and appeals (Part M). The Access Dispute Resolution Rules are included in an annex to the Code.

21 Although ORR approved the Network Code originally and any amendments require our approval, we do not own it. It is an “industry” code managed and maintained by Network Rail. ORR does not have any direct enforcement powers under the Network Code, except where we are determining an appeal.

Appeals and disputes

Network Code appeals

22 The Network Code contains the Access Dispute Resolution Rules (the ADRR), which set out the process for dispute resolution to be used by the parties. The dispute process is managed by the Access Disputes Committee. Under the ADRR, beneficiaries can either refer a dispute through mediation and early neutral evaluation, or through determinative processes such as the timetabling panel (TTP), access disputes adjudication (ADA), expert determination and arbitration. These are all in addition to the option of referring the dispute to court. For more information see our module on *Network Code appeals*.

Appeals under the Regulations

23 Regulation 29 provides applicants (a term defined in the Regulations) with a general right of appeal to ORR if they feel they have been unfairly treated or discriminated against. In particular, this will be against a decision by an infrastructure manager (a facility owner), a terminal or port owner, a service provider or a train operator. The appeal may be in relation to facilities that are otherwise exempt from the Act under section 20, or by virtue of *The Railways (Class and Miscellaneous Exemptions) Order 1994* ("CMEO"), provided that these facilities have not themselves been excluded from the scope of the Regulations. See our module *Appeals for access to facilities and services* on the approach we will adopt in considering appeals under the Regulations.

24 Where the matter of an appeal is one for which directions may be sought under sections 17 or 22A of the Act, an application should be made under these provisions, rather than the appeal mechanisms available under the Regulations.

Consistency with competition law

25 Agreements which are restrictive of, or which distort, competition, or which could amount to an abuse of a dominant position, may fall for consideration under the Chapter I or Chapter II prohibitions, respectively, of the Competition Act 1998 (and, in so far as they may affect trade between EU Member States, Articles 81 and 82 of the EC Treaty).

26 When exercising our powers under the Act we will have regard to our statutory duties, including the duty to promote competition in the provision of railway services for the benefit of users. We will need to be satisfied that proposed contracts do not unduly limit competition in the provision of railway services but we will not undertake a full competition assessment as would be required under competition law.

27 The EC Modernisation Regulation, which came into force on 1 May 2004, abolished the system of notifying agreements for exemption (under Article 81(3)). Consistent with this in domestic law, the Competition and Markets Authority (CMA) and ORR are no longer able to grant an individual exemption from the Chapter I prohibition. It is the responsibility of undertakings to ensure that any contract that they enter into is compliant with competition law. For further information on the application of competition law in the railway sector please refer to our guidance on the *Competition Act*.

28 Contracts may be challenged under competition law by third parties: either by private litigation through the courts or by a complaint to the CMA and ORR who have concurrent jurisdiction as competition authorities. To the extent that access contracts are compliant with ORR's directions made under sections 17 to 22A of the Act, the parties may claim that they are excluded from the scope of the prohibitions. However, rulings of the European Court indicate that such a claim will only be upheld in very limited circumstances. If a challenge were to be investigated, parties would have to take advice on the individual circumstances of their case. In general terms, it would be necessary to demonstrate that the legislative regime of the Act required them to act in the way complained of and would have prevented the parties from making a contract that would not have contravened competition rules.

29 Access contracts entered into under section 18, in reliance of a general approval given by ORR (as opposed to a contract *specifically directed* by ORR under section 18), are not the subject of ORR directions and can therefore be subject to action under the Competition Act 1998 as can agreed amendments to access contracts

entered into under section 22 of the Act, or any amendment provisions contained in access contracts themselves.

30 Finally, section 22(6A) of the Act prevents either the CMA or ORR issuing enforcement directions or interim directions under the Competition Act 1998 in relation to access contracts, although interim directions may be issued over matters of conduct related to an access contract where there is a reasonable suspicion that an abuse of dominance under Chapter II has occurred.

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