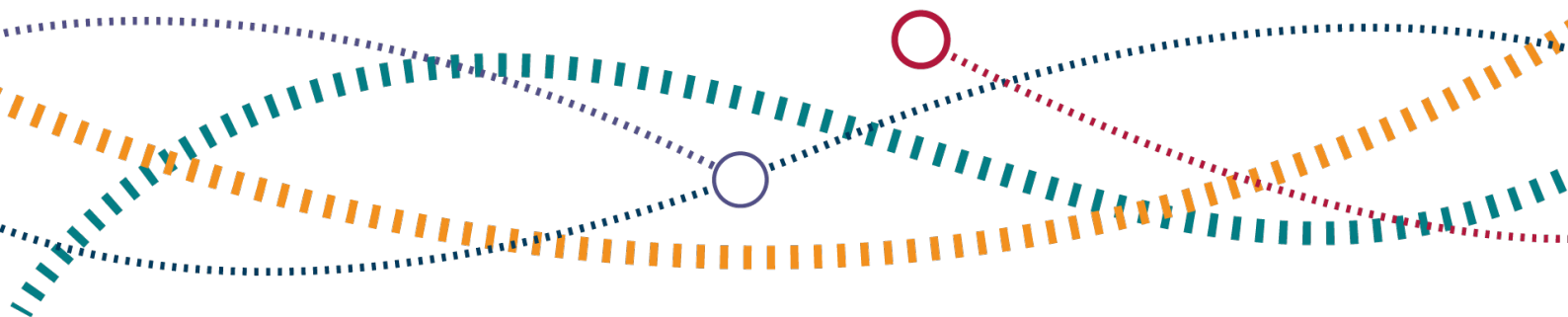




ORR Guidance on the assessment of new international passenger services

18 February 2022



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1. Overview

- 1 This guidance updates the Office of Rail and Road (ORR) guidance on the assessment of new international passenger services published in June 2009¹. Since then, the legal framework has evolved, both at EU and domestic level². The guidance reflects mainly the changes made to legislation following the exit of the United Kingdom (UK) from the European Union (EU) and the new rules which came into force from 1 January 2021 at the end of the transition period following the exit of the UK from the EU.
- 2 The applicable legislation as amended and retained in domestic legislation is set out in The Railways (Access, Management and Licensing of Railway Undertakings) Regulations 2016, as amended (the Regulations³) and in the Implementing Regulation (EU) 2018/1795 of 20 November 2018 laying down procedure and criteria for the application of the Economic Equilibrium Test (the Implementing Regulation⁴). The Implementing Regulation (EU) 869/2014 of 11 August 2014⁵ on new rail passenger services was repealed with effect from 12 December 2020.
- 3 This guidance document covers the elements of the legislation regarding the operation of international passenger services that infrastructure managers, railway undertakings and relevant parties should be aware of and explains ORR's policy and processes. However, we do not seek to cover every aspect of the legislation. It is the responsibility of individual businesses to ensure that they are compliant with the law.
- 4 The focus of the guidance is on these key areas:
 - Principal purpose test for international passenger services; and
 - Economic Equilibrium Test for international passenger services.

¹ [ORR guidance on assessment of new international passenger services](#)

² For further details, see <https://www.orr.gov.uk/about/how-we-work/strategy-duties/international-law> and [Brexit: New rules and legislation on rail transport from 1 January 2021 | Office of Rail and Road \(orr.gov.uk\)](#).

³ [The Railways \(Access, Management and Licensing of Railway Undertakings\) Regulations 2016 \(legislation.gov.uk\)](#) – See in particular Regulation 33 of the Regulations

⁴ [Commission Implementing Regulation \(EU\) 2018/1795 of 20 November 2018 laying down procedure and criteria for the application of the economic equilibrium test pursuant to Article 11 of Directive 2012/34/EU of the European Parliament and of the Council \(Text with EEA relevance\) \(legislation.gov.uk\)](#)

⁵ [COMMISSION IMPLEMENTING REGULATION \(EU\) No 869/2014 - of 11 August 2014 - on new rail passenger services - \(europa.eu\)](#)

- 5 This guidance document explains how ORR plans to assess new international rail passenger services. We set out how we intend to determine whether the principal purpose of a new passenger service is to carry passengers between stations located between the United Kingdom and a Member State (see chapter 3). We also set out the issues we consider relevant to assessing whether, based on evidence, we expect the new international passenger service competing with a public service contract to compromise that public service contract's economic equilibrium (chapter 4).
- 6 We intend to carry out a test which is based on the criteria set out in the applicable legislation that we believe will give us the information we require to carry out our assessment.
- 7 The assessment process will be carried out on a case-by-case basis, based on the criteria explained in this document, and may develop over time and through experience. However, if there were to be a significant amendment to the criteria used or to our interpretation of economic equilibrium, we would carry out a consultation of relevant industry stakeholders on revisions to this guidance, and publish an updated version accordingly.

2. Context

The legal requirements

- 8 Regulation 33 of the Regulations sets out the regulatory decisions concerning international passenger services. It provides that, at the request of a competent authority or interested railway undertaking, ORR is responsible for determining whether the new passenger service is an international passenger service, i.e. whether the principal purpose of the service is to carry passengers between stations located in the United Kingdom and a Member State.
- 9 The Regulations grant to providers of international rail passenger services the right of access to the infrastructure subject to certain restrictions⁶. One of these restrictions applies when the international passenger service would compromise the economic equilibrium of a public service contract (PSC).
- 10 Railway undertakings, in the course of operating an international passenger service, have the right to pick up passengers at any station located on the international route and set them down at another, including stations located within the United Kingdom (i.e. cabotage).
- 11 An international rail passenger service as defined⁷ in the Regulations means a passenger service where the train crosses the border between the United Kingdom and a Member State and where the principal purpose of the service is to carry passengers between stations located in the United Kingdom and a Member State. The train may be joined and/or split, and the different sections may have different origins and destinations, provided that all carriages cross at least one border.
- 12 New, open-access, international services with intermediate stops should not be used solely to bring about the opening of the market for domestic passenger services but should be focused on stops ancillary to the international route. Their introduction should concern services whose principal purpose is to carry passengers travelling on an international journey. We plan to determine this by considering criteria such as the proportion of turnover, the volume expected to be derived from the transport of domestic and international passengers, and the distance covered by the proposed new service in different countries and the location of the stops.

⁶ See regulation 5.

⁷ See regulation 3

- 13 ORR is also responsible for carrying out the Economic Equilibrium Test. The assessment process in order to determine whether the economic equilibrium of a PSC would be compromised by the proposed new international rail passenger service, including domestic portion(s) of that service, is further defined and set out in the Implementing Regulation⁸. The test is carried out by the ORR at the request of a 'relevant' party (competent authority, infrastructure manager or affected PSC operator)⁹.
- 14 ORR must make the determination on the basis of an objective economic analysis and in accordance with pre-determined criteria published by it¹⁰. The Implementing Regulation explicitly sets out a requirement to consider whether the new passenger service would have a substantial negative impact on the profitability of services operated under the PSC and on the net cost for the competent authority awarding the PSC. This is described further in chapter 4.
- 15 Regulatory bodies are progressively developing guidelines on this issue, based on their experience.

Definitions

- 16 The term '*international passenger service*' is defined in the Regulations¹¹ as 'a passenger service where the train crosses the border between the United Kingdom and a Member State and where the principal purpose of the service is to carry passengers between stations located in the United Kingdom and a Member State; the train may be joined and/or split, and the different sections may have different origins and destinations, provided that all carriages cross at least on border'.
- 17 The term '*new rail passenger service*' is set out in the Implementing Regulation¹² as 'a rail passenger service designed to be operated as a regular time-tabled service, that is either entirely new, or that implies a substantial modification of an existing rail passenger service, in particular in terms of increased frequencies of services or increased number of stops, and which is not provided under a public service contract'.

⁸ See Article 10.

⁹ See 33(4) of the Regulations and paragraph 40 of this guidance document)

¹⁰ See Regulation 33(3)(b) of the Regulations

¹¹ See Regulation 3

¹² See Article 3

- 18 The terms '*public service contract*', '*public service obligation*' and '*public service operator*' have the same meaning as in Article 2 of Regulation (EC) No 1370/2007 (as amended and retained in domestic legislation¹³).
- 19 The term '*public service contract*' is defined as 'one or more legally binding acts confirming the agreement between a competent authority and a public service operator to entrust to that public service operator the management and operation of public passenger transport services subject to public service obligations'.¹⁴ In the context of the GB rail industry, we consider that this definition would generally encompass the legally binding contracts between the Secretary of State and passenger train operating companies as well as concession agreements (such as Merseyrail and London Overground).
- 20 '*Public service obligation*' is defined as 'a requirement defined or determined by a competent authority in order to ensure public passenger transport services in the general interest that an operator, if it were considering its own commercial interests, would not assume or would not assume to the same extent or under the same conditions without reward'.
- 21 '*Public service operator*' is defined as 'any public or private undertaking or group of such undertakings which operates public passenger transport services or any public body which provides public passenger transport services'.
- 22 The term '*relevant public service contract*' is defined¹⁵ as a public service contract under which a relevant public service operator provided public passenger transport, the route or routes of which overlap with the route of an international passenger service notified to the ORR under regulation 19(7) of the Regulations.
- 23 The term '*relevant public service operator*' is defined¹⁶ as a public service operator providing public passenger transport, the route or routes of which overlap with the route of an international passenger service notified to the ORR under regulation 19(7) of the Regulations.

¹³ <https://www.legislation.gov.uk/eur/2007/1370/contents>

¹⁴ According to Article 2(i) of Regulation (EC) 1370/2007, the contract may also consist of a decision adopted by the competent authority: -taking the form of an individual legislative or regulatory act, or -containing conditions under which the competent authority itself provides the services or entrusts the provision of such services to an internal operator.

¹⁵ See Regulation 3

¹⁶ See Regulation 3

- 24 The term ‘*economic equilibrium*’ is not defined. Our interpretation of ‘economic equilibrium’ is explained in chapter 4 of this guidance.

Track access regime

- 25 The assessment of ‘economic equilibrium’ may only be one of several factors ORR considers before approving access rights for an international rail passenger service. The track access regime in GB requires ORR to carry out an assessment of access applications prior to approving track access contracts under the Railways Act 1993 (as amended) (“the Act”), for passenger train services using the national railway network, except the High Speed 1 (HS1) network where access is covered by the Regulations.¹⁷ On the HS1 Network, the Regulations provide that before entering into a track access contract, the infrastructure manager and the applicant must obtain the approval of ORR. Our scrutiny of applications under the Act is based on published guidance¹⁸ which reflect our statutory duties. It therefore includes consideration of a range of issues including, for example, economic and efficient use of capacity and operational performance. Similarly, for access decisions taken on the HS1 Network taken under the Regulations, approval must be consistent with our statutory duties.
- 26 We envisage that, in practice, the assessment of ‘principal purpose’ and the impact on ‘economic equilibrium’ will take place at the same time as our consideration of a track access application.

‘Not primarily abstractive test’

- 27 For domestic rail passenger services, ORR has a long-standing policy of not approving rights to new competing services that are primarily abstractive of incumbents’ revenue without compensating economic benefits beyond proposed or potential lower prices for existing passengers. This is known as the ‘not primarily abstractive’ test (NPA). This test has some parallels with the ‘Economic Equilibrium’ Test, in particular in the information that both tests seek.
- 28 The ‘not primarily abstractive’ test and the ‘Economic Equilibrium’ Test apply to different types of services and have to follow different rules. The ‘not primarily abstractive’ test is different from the Economic Equilibrium Test as the former refers to the revenue gained by the new entrant and the sources of that revenue, whereas the focus of the Economic Equilibrium Test is the effect on the existing public service

¹⁷ The High Speed 1 network is the railway infrastructure running from London St Pancras to the British end of the Channel Tunnel. It is also known as the Channel Tunnel Rail Link.

¹⁸ [Track access guidance | Office of Rail and Road \(orr.gov.uk\)](https://www.orr.gov.uk/track-access-guidance)

contract. Therefore we have reached a view that it would not be appropriate to use the 'not primarily abstractive' test as a proxy for the 'Economic Equilibrium' Test. However, the type of information we need for both of these tests will, in many respects, be similar.

Northern Ireland

- 29 ORR has a number of economic regulatory functions relating to rail in Northern Ireland. The Implementing Regulation also applies in Northern Ireland. If ORR were to receive such an application, we would follow this guidance but would make relevant adjustments to our process on a case by case basis, and would act in line with our published guidance on Northern Ireland Regulations.

3. Approach to principal purpose test

Circumstances when the ‘principal purpose’ test could be triggered

- 30 The Regulations¹⁹ state that ORR must determine whether the principal purpose of the new passenger service is to carry passengers between stations located in the United Kingdom and a Member State, i.e. is international in nature.
- 31 This test can be carried out at the request of a competent authority or an interested railway undertaking.
- 32 While the ORR must still consider the principal purpose of a passenger service, the legislation setting out pre-determined criteria to carry out the test has been repealed. To assist in reaching its decision, the ORR intends however to refer to the principles previously set out in its guidance published in June 2009 and subsequently in the Implementing Regulation 869/2014.
- 33 Some of the criteria for considering the principal purpose of a new international service will include²⁰:
- the proportion of turnover derived from the transport of domestic or international passengers;
 - the proportion of volume derived from the transport of domestic or international passengers; and
 - the distance covered by the proposed new service in the UK and in the Member State and the location of the stops.
- 34 We will also take into account other factors such as passenger demand, marketing strategy and rolling-stock type.
- 35 Although we will not set out a strict predetermined threshold, where our results show a disproportionate amount of revenues and/or passenger volumes will arise from

¹⁹ See Regulation 33 (1)

²⁰ Article 8.2 of Regulation (EU) No 869/2014

²¹ Regulation 33(3) and (4)

domestic traffic we are likely to conclude that the service fails the 'principal purpose' test, i.e. is not an international passenger service. However, before reaching a final conclusion we will also take into account other factors such as the length of service in terms of distance and how the service is marketed.

- 36 If we consider the principal purpose of the new service is a domestic service, then we will treat this new service as a domestic open access application; where relevant, we will assess the service using the 'not primarily abstractive' test.
- 37 Due to the similarities and overlaps between the criteria to consider the principal purpose of a passenger service and those for the 'Economic Equilibrium' Test explained in chapter 4 (e.g. in terms of revenue, stopping patterns and passenger demand), we intend to carry out both these assessments simultaneously.
- 38 However, if an interested party has asked us only to determine the principal purpose of a new service and has not requested that we assess whether the economic equilibrium of a public service contract would be compromised, we will only carry out the 'principal purpose' element of the test, and the 'not primarily abstractive test' if appropriate.

4. Assessing the impact on economic equilibrium

Introduction

39 The Regulations require the regulatory body to carry out the economic equilibrium test upon request of relevant parties. Article 10 of the Implementing Regulation describes the content of the Economic Equilibrium Test and the assessment criteria. It states that the economic equilibrium shall be considered as compromised where the new service would have a substantial negative impact on:

- the profitability of services operated under the PSC; and/or
- the net cost for the competent authority awarding the PSC.

40 The Regulations²¹ provide that whether the economic equilibrium would be compromised must be determined by ORR following a request from:

- the competent authority that awarded the PSC;
- any other competent authority with the right to limit access along the route of the international passenger service²²;
- the railway undertaking performing the relevant PSC; or
- the infrastructure manager concerned.

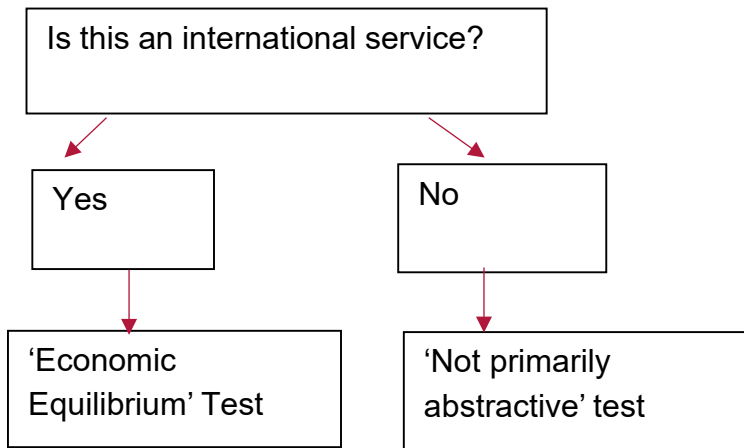
41 This test would apply when an international passenger operator requests access to the network to run a scheduled passenger service which would compete with an existing passenger operator which is operating a PSC.

42 This would include instances where the new international operator wants to call at stations within the United Kingdom to pick up and set down domestic passengers on its international journey. This is known as cabotage.

²¹ Regulation 33(3) and (4)

²² Notified under Regulation 19(7)

- 43 This could also include instances where the new international operator wants to use infrastructure parallel to the infrastructure used by an existing passenger operator which is operating under a public service contract.
- 44 The following flowchart shows how we intend to apply the tests:



- 45 Based on our decision using the 'economic equilibrium' test, the right of access for the international passenger service sought will be granted, modified, granted only under conditions, or denied.
- 46 To date, international passenger services between GB and continental Europe are provided by Eurostar which operates trains on the HS1 network. We regard Eurostar as an operator of international rail passenger services, therefore a new international applicant on the HS1 network would not face the 'economic equilibrium' test if it wanted to run services on the HS1 network in competition with Eurostar, but might face the test if it competed with the relevant public service contract operator, currently Southeastern.
- 47 This Chapter provides more detail of how we intend to interpret what it means to compromise the economic equilibrium of a PSC.
- 48 The 'economic equilibrium' test focuses on the impact on the PSC from the new entry of competing international rail services. In this regard, it differs from our 'not primarily abstractive' test because it is the impact on the incumbent's PSC instead of the revenue gained by the new entrant and the sources of that revenue that is at issue. However, as shown in chapter 5, much of the information that we need to review is the same as in our 'not primarily abstractive' test.
- 49 The rest of this chapter addresses:

- what is meant by an economic equilibrium?
- what is the impact on the PSC that we are trying to assess? and;
- what does this imply for our assessment of the type of change that is likely to be sufficient to compromise the economic equilibrium of a PSC?

Economic equilibrium

50 The term ‘economic equilibrium’ is not defined in the applicable legislation. A dictionary definition of equilibrium is a situation in which the forces that determine the behaviour of some variables are in balance. We consider that the economic equilibrium of a PSC relates to the value of the PSC, i.e. that a change in the value of the PSC could indicate a change in its economic equilibrium. This can be the value to the bidder of the PSC (i.e. the profitability of the PSC) and/or the value of the PSC to the public authority (the subsidy paid to or the premium paid by the franchisee/concession operator for the PSC).

51 In the context of the current GB contractual framework, the public service contract is generally a result of a competitive bidding process. The winning bidder will have made a series of assumptions about its expected revenues and costs when assessing the level of subsidy (or premium) to bid to operate the group of rail services covered in the public service contract. In doing this it will have taken account of its expectations on a number of variables including:

- input costs, e.g. fuel costs;
- general economic outlook (and its likely impact on revenue);
- potential impact of competition; and
- any protections from change in its public service contract, e.g. arrangements holding the public service contract free from harm from regulatory changes to access charges and any revenue gain or loss sharing mechanism with the promoter of the public service contract.

In these cases, we would also need to assess the impact of such protections on the relevant competent authority, e.g. a requirement for increased subsidy.

52 In reality the successful public service operator would have expected the value of the public service contract to fluctuate around the assumptions made at the time of bidding so that both revenues and costs associated with the public service contract are within a range of possible outcomes rather than a specific level. If the specific

subsidy profile was referred to as the centre of the equilibrium of the public service contract, in reality there would be a range around that level for each year to which the outcomes could vary without moving away from the range of assumptions applied by the successful bidder²³.

- 53 The Implementing Regulation states that “predetermined thresholds or specific criteria may be applied but not strictly or in isolation from other criteria” and Article 10(5) states that ORR shall also assess other factors including “the net benefits to customers arising from the new rail passenger service in the short and medium term”. Our policy is therefore that we will weigh up a number of factors in reaching a decision on whether the economic equilibrium is compromised. These are described below. As we do currently with all access applications, we will consider each application on a case by case basis.
- 54 We will consider four key elements when we carry out the Economic Equilibrium Test, consistent with Article 10 of the Implementing Regulation;
- Impact on profitability of services operated under the PSC;
 - Impact on the net cost for the competent authority awarding the PSC;
 - NPA test – which we consider represents a measure of the wider benefits to consumers; and
 - Other factors set out in Article 10 including the impact on performance and quality of rail services

Profitability of services operated under the PSC

- 55 Our assessment of the profitability of services operated under the PSC will reflect the basis on which the PSC was awarded to the PSC operator, including any revenue risk sharing agreements between the PSC operator and the competent authority.
- 56 Our analysis will consider a range of measures of financial performance. These could include accounting measures of profitability (such as operating margins) or cash flow based approaches. It is likely that we will take more than one of the available measures into account, depending on the nature of the PSC in question. Our assessment will take into account all relevant costs and revenues including any direct premium or subsidy payments.

²³ We will need to adapt this test where the public sector takes the revenue risk.

- 57 We will consider the impact of the proposed new service on the profitability of services operated under the PSC over the entire duration of the PSC.
- 58 We will as far as possible consider both the PSC operator's expectations of financial performance at the time the operator bids for the PSC as well actual performance.
- 59 On the **cost** side, we will consider all relevant input costs including staffing, fuel costs, etc.
- 60 On the **revenue** side, we will consider the provision of passenger services across the operations of the PSC as a whole, i.e. the whole franchise or concession contract, but not as far as the owning group. In forecasting the impact of the proposed new service on the PSC operator's revenues we will consider the extent to which the impact of new proposed services can be mitigated by competitive pricing responses by the PSC operator.
- 61 The Implementing Regulation refers to the concept of a 'substantial negative impact' on the profitability of services operated under the PSC. Consistent with the text of the Regulation, we do not intend to apply strictly or in isolation set pre-determined decrements to profitability that would constitute a 'substantial impact'. We will, rather, consider each case on its merits. We will benchmark our results with reference to the rates of return earned by the PSC operator. We will also consider the returns earned by other PSC operators.

Net cost for the competent authority awarding the PSC

- 62 We will not set a pre-set threshold as to what is a substantial negative impact on the net cost for the competent authority awarding the PSC, although the magnitude of any change in the net cost of the PSC relative to its total value will be a key consideration. We will also consider the impact with reference to competent authorities' total budgets. Our assessment of the net financial impact on the PSC will include the impact the new services will have on:
- changes in the PSC operator's operating costs and revenues;
 - the level of financial effects generated from network benefits e.g. improved regional service connections between operators;
 - the likely scope for competitive response by the PSC operator;
 - the impact of any relevant investments by the PSC operator or competent authority;

- the value of any existing exclusive rights; and
- any protections from risks arising from competitive entry such as revenue risk.

Net benefits to customers

- 63 We will include an analysis of the wider net benefits to customers arising from the new services as part of our assessment, for example lower fares, reduced journey times, increased frequencies etc. Our assessment of wider benefits is likely to be informed by the outcome of the NPA Test (which we may conduct to inform the Economic Equilibrium Test if appropriate) and we may also draw on other sources for assessing wider benefits such as DfT's Webtag²⁴.
- 64 We will carefully balance the results of our assessment of the impact of the new services on the PSC and the net benefits to customers in reaching a decision on the Economic Equilibrium Test. This balance will reflect the benefits of increased competition against potential adverse impacts on the economic equilibrium of the PSC. In this regard the Economic Equilibrium Test may be one of a number of criteria we will take into account when assessing new international passenger service applications.

Interaction with the NPA Test

- 65 As described above, we may continue to apply the NPA Test as part of our decision making. Furthermore, because the NPA Test involves forecasting the amount of revenue the new services are likely to generate and abstract from existing services, we may use the results of the NPA Test in our Economic Equilibrium Test to provide information on:
- revenues;
 - operating costs; and
 - customer benefits.
- 66 We may augment this analysis using additional information listed in the Information Requirements in chapter 5 where necessary, for example the PSC operator business case. We may also request further information from all relevant parties, as necessary.

²⁴ Webtag is the DfT's web-based transport analysis guidance; the Transport Scotland equivalent is Scot-Tag, WelTag in Wales.

- 67 Once we consider we have sufficient information about changes in the PSC operator's revenues and operating costs as a result of the new services we will assess the impact on the profitability, net cost for the competent authority awarding the PSC and net benefits to customers as described above.
- 68 As set out in chapter 5, the assessment will involve a more detailed review of how the public service contract would be affected by the new international passenger service.

5. Procedure

Introduction

69 During the assessment process, we will consider the principal purpose of a proposed new service and, where appropriate, consider whether the economic equilibrium of a public service contract would be compromised. We will carry out both a qualitative and quantitative analysis that takes into account the foreseeable evolution of the service as well as foreseeable changes in market conditions during the period covered in the applicant's notification.

Notification form

70 When intending to apply for a new international passenger service, the applicant must submit a completed notification form to ORR and the infrastructure manager. The notification form is available on our website and is also attached as an Annex to this guidance.

71 Information to be submitted in the notification form includes:

- The applicant's name, address and contact information;
- The planned start date of the services;
- Details of the applicant's licence and safety certificate or indication of the point reached in obtaining them;
- Details of the route including departure and destination stations and all intermediate stops;
- Indicative timings and frequency including proposed departure and arrival times; and
- Indicative information about the intended rolling stock.

72 If the form is incomplete, we will notify the applicant that incomplete requests will not be considered and will give the applicant the possibility to complete the form within 10 working days.

73 On receiving a complete form we will publish it on the current applications page of our website. We will do this as quickly as possible and within 10 days at the latest. We will also notify the relevant parties, listed in paragraph 40.

Request for the Economic Equilibrium Test

- 74 The relevant parties listed in paragraph 40 may request ORR to carry out the Economic Equilibrium Test. Any request must be received within one month of ORR's publication of the notification form and should be sent to track.access@orr.gov.uk.
- 75 The entity requesting the Economic Equilibrium Test must provide the details set out in paragraph 71. In particular, any request should include substantiation that the economic equilibrium of the PSC risks being compromised by the new passenger service.
- 76 If no request for an Economic Equilibrium Test is received within one month, the applicant should proceed to submit its access application to ORR in accordance with published guidance, and ORR will assess the application in the usual manner without and Economic Equilibrium Test. The ORR shall inform the applicant and the infrastructure manager without delay.

Additional and incomplete information

- 77 Within one month of receiving a request to undertake the Economic Equilibrium test, we may request further information from the parties, including from the entity requesting the Economic Equilibrium test, other relevant parties, and the applicant. We may request further information at a later date if the information provided is insufficient or incomplete. We will set reasonable deadlines for the provision of information. Details on the type of information we may request from the applicant and relevant parties are set out in paragraphs 83 to 91 below.
- 78 The Implementing Regulation requires ORR to reach a decision within 6 weeks of the receipt of all relevant information, and in any event before the relevant Priority Date ('D-40') for the timetable during which services will start. Six weeks before ORR's deadline for reaching a decision, if:
- the applicant has provided incomplete information, we will perform the Economic Equilibrium Test on the basis of the available information, or if we consider the information is insufficient to perform the test, we will reject the application;
 - the entity requesting the Economic Equilibrium Test has provided incomplete information, we will perform the Economic Equilibrium Test on the basis of the available information, or if we consider the information is insufficient to perform the test, we will reject the request to perform the Economic Equilibrium Test; or

- the PSC operator is not the requesting entity, and it has provided incomplete information, we will perform the Economic Equilibrium Test on the basis of the available information, or if we consider the information provided is insufficient to perform the test, we will assume that the service does not compromise the economic equilibrium of the PSC.

Result of the principal purpose and economic equilibrium tests

- 79 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. The results of these tests will be included in our decision letter on the track access application in question. This will be sent to all relevant parties and published on the decisions page of our website.
- 80 Where the new service fails the Economic Equilibrium Test, as part of the decision letter we will make a direction and, if appropriate, suggest possible changes to the service, such as modification of frequencies, paths, intermediate stops which would lead to the service passing the Test. We may also include recommendations to the competent authorities concerning other changes not related to the new service that would ensure that the conditions for granting the right of access are met.

Information requirements evidence from international passenger operator and other relevant parties

- 81 The entity requesting the Economic Equilibrium Test shall provide the information listed under paragraph 83 with its request. We may request further information from the competent authority, PSC operator, applicant and infrastructure manager necessary to undertake the Economic Equilibrium Test. Typical examples of the information required are detailed below.
- 82 All information requested should be provided in electronic format.

Requesting entity

83 The entity requesting the Economic Equilibrium Test must provide the following information²⁵:

- (a) the requesting entity's name, address, legal entity;
- (b) contact information of the person responsible for queries;
- (c) substantiation that the economic equilibrium of the contract risks being compromised by the new rail passenger service; and
- (d) if the requesting entity is a competent authority or the railway undertaking performing the public contract, a copy of the PSC.

Competent authority

84 ORR may request from the competent authority any necessary information, including:

- (a) relevant traffic, demand and revenue forecasts, including forecast methodology,
- (b) where appropriate, the methodology and data used to calculate the net financial effect in the case of a direct award,

PSC operator:

85 ORR may request from the PSC operator any necessary information, including:

- (a) copy of the public service contract, if not provided,
- (b) the PSC operator's business plan,
- (c) relevant traffic, demand and revenue forecasts, including forecast methodology,
- (d) information on revenues and profit margins,
- (e) timetable information for the services, including departure times, intermediate stops, arrival times and connections,
- (f) estimated elasticities of the services (e.g. price elasticity, elasticity with respect to quality characteristics of the services),

²⁵ Article 7.1 of the Implementing Regulation

- (g) cost of capital and operating costs for services provided under the PSC, as well as variations in costs and demand induced by the new rail passenger service;

The applicant

86 ORR may request any necessary information from the applicant, including information concerning its plans for operating the new rail passenger service, including:

- (a) business plan,
- (b) forecast of passenger traffic and revenues, including forecast methodology,
- (c) pricing strategies,
- (d) ticketing arrangements,
- (e) rolling stock specifications (e.g. load factor, number of seats, vehicle configuration),
- (f) marketing strategy;

Infrastructure manager

87 ORR may request from the infrastructure manager any necessary information, including:

- (a) information about available capacity,
- (b) information on potential performance and resilience impacts of the proposed new rail passenger service,
- (c) assessment of impacts on capacity use,
- (d) plans for developing infrastructure as regards routes covered by the proposed new rail passenger service, including an indication of the time when any such plans will be implemented,
- (e) information on relevant track access contracts concluded or under discussion, in particular with the undertaking performing the public service contract.

88 However, these lists are not exhaustive and we may request additional information which we deem to be relevant to assessing the particular case.

Confidentiality

- 89 ORR will not disclose commercially sensitive information received from the parties in connection with the principal purpose and the Economic Equilibrium Test. ORR will redact any commercially sensitive information from its decision letter. However, the Implementing Regulation explicitly states that information included in the Form IA shall not be considered commercially sensitive.
- 90 When considering whether information is commercially sensitive, we will follow our current track access guidance on excluding information from our public register or from wider circulation, where we must have regard to the criteria under section 71(2) of the Railways Act 1993. We will consider whether publication of any information relating to the affairs of an individual or body of persons would or might, in our opinion, seriously and prejudicially affect the interests of that individual or body of persons.
- 91 It is the responsibility of the party submitting information to notify and substantiate any proposed redaction of commercially sensitive information at the time of the submission. Such information may include, in particular, technical or financial information relating to an undertaking's know-how, business plan, cost structures, marketing and pricing strategies, supply sources and market shares.
- 92 If ORR decides not to redact any requested information this will be communicated and justified in writing to the party requesting confidentiality at least two weeks before the publication of ORR's decision.

Process during competitive tender of a public service contract

- 93 If at the time an Economic Equilibrium Test has been requested, a PSC covering the same route or an alternative route is being competitively tendered, ORR may decide to suspend consideration of the proposed application for a limited period of time pending the award of the new PSC. This suspension will last no longer than 12 months from the receipt of the application or until the tender process has concluded, whichever is sooner; or
- 94 ORR may decide to undertake the Economic Equilibrium Test against the existing PSC, and if it demonstrates that access can be granted, the access will be time-limited until the expiry of the existing PSC. Any decision on time-limited access would be within our existing track access application regime.

95 ORR will decide whether to suspend consideration or consider temporary access following discussions with the applicant and relevant parties.

Timescales

96 We intend to consult during our assessment of the principal purpose of the new international passenger service and whether it would compromise the economic equilibrium of a public service contract, before reaching our final decision. The consultation will be published on our website, inviting representations from interested parties. We would expect that this would generally be open for four weeks.

97 Within six weeks of receiving all relevant information and after the consultation, we will reach a decision on the request made, providing the grounds for our decision. This will be circulated to parties directly involved in the decision and published on our website.

98 We envisage that the 'principal purpose' and 'economic equilibrium' tests will be carried out at the same time as ORR's consideration of a track access application.

Reconsideration of decision

99 The applicable legislation also provides that the following parties can request the regulatory body's decision or direction to be reconsidered:

- the competent authority which awarded a relevant public service contract;
- any other competent authority with a right to limit access along the route of the international passenger service;
- the infrastructure manager;
- a railway undertaking operating the relevant PSC; or
- the railway undertaking seeking access.

100 When making a decision, we will specify a reasonable time period within which, and the conditions under which, the relevant parties may request a reconsideration of the decision or direction made by ORR. We envisage this period to be around four weeks, and in any event will not be less than two weeks; but it will depend on the circumstances, facts and complexity of the particular case.

101 Where we have received a properly made and evidenced request for reconsideration of our decision, any decision previously indicated will be suspended or will not take

effect pending reconsideration. We will issue our final reconsidered decision within six weeks of the date of receipt of all relevant information.

Cooperation with other regulatory bodies

- 102 The applicable legislation²⁶ allows us to cooperate with regulatory bodies competent for the route of the proposed new service in exchanging relevant information subject to receiving appropriate undertakings as regards confidentiality.
- 103 Upon receipt of the applicant's notification to start a new international passenger service or a request for either a principal purpose test or an economic equilibrium test, we may inform other regulatory bodies having competence for the route of the proposed service. We intend to inform relevant parties of our plan to engage with other regulatory bodies.
- 104 We may communicate the results of the tests to the other regulatory bodies having competence for parts of the route of the proposed new service. We intend to do so sufficiently ahead of the final adoption of our decision to give other regulatory bodies the opportunity to comment on the results of the tests.
- 105 During any exchange of information regarding the tests, we intend to respect the confidentiality of commercially sensitive information received from the parties involved in the tests.
- 106 However, our ultimate decision in respect of both the 'principal purpose' test and the 'Economic Equilibrium' Test will only relate to the impact of the proposed new service on an existing service operating under a public service contract in GB.

²⁶ See article 12 of the Implementing Regulation

**INTERNATIONAL APPLICATION
NOTIFICATION TO THE OFFICE OF RAIL AND ROAD OF A PROPOSED
SERVICE THAT MAY BE SUBJECT TO
THE PRINCIPAL PURPOSE AND ECONOMIC EQUILIBRIUM TESTS**

Please use this form to notify the Office of Rail and Road (ORR) of a proposed new service that may be subject to the Principal Purpose and Economic Equilibrium tests.

For further information, please see our published [Guidance on International Passenger Service](#).

Information submitted in this form regarding the planned operation of the service should cover at least the first three years and, as far as possible, the first five years of operation.

Submitted forms will be published on the ORR website and notified to the relevant parties.

If this form is submitted with incomplete information, ORR will inform the applicant that incomplete requests will not be considered and will give the applicant the possibility to complete its request within ten working days.

This form does not replace our usual access application process, which should be followed in the usual manner as set out in our published [guidance](#).

ORR may request additional information in order to undertake the Economic Equilibrium Test.

What to send:

Please supply this form by e-mail, **in plain Microsoft Word or Open Document Text format** (i.e. excluding any macros, auto-para or page numbering, or other auto-formatting).

Where to send it:

Email: track.access@orr.gov.uk

You should also send a completed copy of this notification form to the relevant infrastructure manager.

Applicant details:

Company:
Contact individual:
Job title:
Address:
Telephone number:
E-mail address:

Date of submission to ORR:	
Planned start date of services:	

Does the applicant:

(a) hold a valid train operating licence under section 8 of the Railways Act 1993 or an exemption under section 7, or under The Railway (Licensing of Railway Undertakings) Regulations 2005, **and**

(b) hold a valid safety certificate under the Railways and Other Guided Transport Systems (Safety) Regulations 2006.

If the answer to (a) **or** (b) is no, please state the point reached in obtaining a licence, exemption and/or safety certificate.

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Summary of the proposed service:

Please include the detailed route of the proposed service, indicating departure and destination stations and all intermediate stops.

Please set out the indicative timings and frequency of the proposed service, including proposed departure and arrival times and connections. This information may be submitted in an annex if preferred.

Please set out indicative information about the intended rolling stock.



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