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Track Access Stakeholders

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**Proposals to update ORR's track access guidance modules:
Guidance on the duration of track access agreements
Industry code of practice for track access consultations**

Background

1. This consultation proposes improvements to two elements of the Office of Rail and Road's (ORR's) track access guidance modules. These concern how long industry consultations remain valid and the duration of access agreements.
2. ORR ensures that passenger and freight train operating companies have fair access to the rail network and that best use is made of capacity. The modules in the Track Access Guidance series explain the criteria and procedures we expect to follow when dealing with applications for track access contracts. We explain in our [Introduction](#) module our approach to updating our set of guidance where it is needed. The full set of guidance is available on our [website](#).
3. Our guidance modules tend to be focused on the process for handling Network Rail's access agreements. These form the bulk of ORR's casework. However, in general, the same principles apply to other regulated infrastructure and facilities.

Validity of consultations

4. The guidance module [Industry of Code of Practice](#) sets out a process which Network Rail and access beneficiaries (together 'applicants') should follow when consulting on new or amended track access contracts. We are particularly keen on seeking stakeholders' views before making any changes to this Code of Practice.
5. The Code of Practice covers many aspects of how to conduct an industry consultation. However, it does not specify a period for how long a consultation remains valid after it has concluded in the context of its subsequent submission to ORR. The industry consultation is undertaken at the later stages of Network Rail's processes before application to ORR is usually promptly made. However, experience has shown that sometimes there can be unexpected delays, perhaps arising from consultees' responses, other applications needing to be considered, or the train operator needing more time.

6. If there is a delay, this can invite the question of whether the industry consultation ought to be repeated. There are no explicit timescales set out in the relevant legislation. ORR therefore normally asks that the applicant(s) review whether they consider the consultation remains meaningful and relevant given all the circumstances, especially taking into account any changes or recent developments. We propose setting out this approach in the Code of Practice. This should help potential applicants and develop the overall framework.
7. We propose adding a benchmark of **three months** as a general indication of an interim period that would usually be acceptable for ORR's purposes. This would only be a starting point. Longer intervals could still be acceptable to ORR, subject to the applicant providing sufficient reasoning. We do not think it would necessarily be helpful to provide firmer timescales, although we would be interested to hear stakeholders' views on this.
8. Our proposed wording is set out at [Annex A](#) to this consultation. This additional wording in the Code of Practice would only be relevant for access industry consultations covered by that guidance, and not to other matters, where different considerations will apply.

Duration of Access Agreements

9. When applying for framework agreements with a duration of longer than five years, each applicant has to justify its case. There is a statutory test that must be passed, as set out in the ORR guidance module [The Duration of Access Agreements](#). However, the question arises of at what point does the five-year period start to be counted from, especially for extensions to existing agreements.
10. ORR considers that, in applying the tests, the five-year period starts from the point at which ORR approval is granted under section 22 of the Act in the case of extensions to existing agreements. This would be regardless of the term left before that approval, or remaining before the Expiry Date. In the case of new agreements, the five-year period would start from the Commencement Date.
11. The proposal is to insert a new chapter into the Code of Practice that clarifies and explains this position. The proposed drafting is at [Annex B](#). ORR considers that this policy position is consistent with the legislation, as it currently stands, subject to consultees' views.

Responding to this consultation

12. We would be interested in hearing your views on these proposals. Responses should be sent to Track.Access@orr.gov.uk by **17:00 on 31 March 2023**.

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Annex A – proposed wording on the validity of industry consultations

Proposed new paragraphs (to be inserted between current paragraphs 20 and 21):

* The consultation should usually be concluded before an application is made to ORR. Sometimes delays can occur between the end of the consultation and submission to ORR for unforeseen reasons. In this event the parties should make a judgement on whether the consultation remains relevant and meaningful or whether it needs to be repeated. This judgement would include factors such as what developments there have been on the routes concerned, any changes in legislation, policy or guidance, whether there are any other new applications for the same capacity, whether the application is contentious and, potentially, the number of operators and nature of the network affected. However, in general, the delay should not be longer than three months after the consultation's closing date. There may be cases where the parties could justify a longer delay, without repeating the consultation, and explaining this ORR. In any event ORR reserves the right to ask for a consultation to be repeated, or to conduct its own industry consultation. This includes circumstances where the consideration of an application by ORR is delayed for any reason or if significant developments occur.

* It is important that the consultation takes place when the details of the agreement, or changes to an agreement, have been agreed so that the consultation can be fully transparent and meaningful. It may be that unforeseen changes to the proposed contract happen during or after that consultation period. In this instance the parties should consider whether the changes affect the validity of the consultation. A minor modification that does not impact other rail users may not warrant a full re-consultation. However, a change that affects the route, station calls or increases the number of services, or other substantive changes, would likely need further consultation, or an extension to an ongoing consultation. We would also expect applicants to be clear in their application to ORR about any changes made after the initial consultation had been completed.

Annex B – Duration of Framework Agreements

Proposed new chapter.

Duration of five years or more

- 1 As set out in the commercial contracts, specialised investment or risks section above, when applying for renewals, extensions or track access agreements with a duration longer than five years, there are specific matters that need to be included in your application. We encourage you to discuss your application with the relevant infrastructure manager, usually Network Rail, and ORR at an early stage. You should also carefully consider the timescales for applying to ORR set out in this section and the *Making an Application* module.

New track access agreements

- 2 ORR generally considers that the five-year period starts from the Commencement Date of the track access agreement. Applications for new agreements that are intended to last longer than five years would need to meet the statutory tests.
- 3 For new operators seeking access rights of more than five years we accept that there may be a ‘start-up’ period where they will need a track access agreement in place to have the requisite certainty. In these circumstances the statutory tests would be applicable (because the 2016 Regulations consider the length of the track access agreement) but we would take into account the specific circumstances that apply to the operation, in particular noting that new operators will not be earning revenue from services during the initial start-up period.

Example: a new open access operator might apply for a track access agreement to expire eight years from the date of application. However, it might not be operating services for the first four years – as it needs time to plan and establish services. In that instance the statutory test would still be applicable, but consideration could be given to the new operator’s need for a start-up period where no revenue can be earned so that a commensurate contract length might be needed.

Renewals and extensions to track access agreements

- 4 For renewals and extensions, for the purpose of considering if the statutory tests would apply, the relevant date for consideration is the day from which ORR approves the change of the expiry date. Therefore if the period for renewal or extension is more than five years from the date ORR approves the change, then the statutory test would apply.
- 5 In our *Making an Application* module we advise that applications need to be made in good time. We recommend that applications for renewals or extensions are normally made about 12-18 months before the end of the existing contract. This

helps to ensure certainty is provided for timetabling purposes (often needed months in advance). ORR would not include that application period when looking at whether the extension is longer than five years or not.