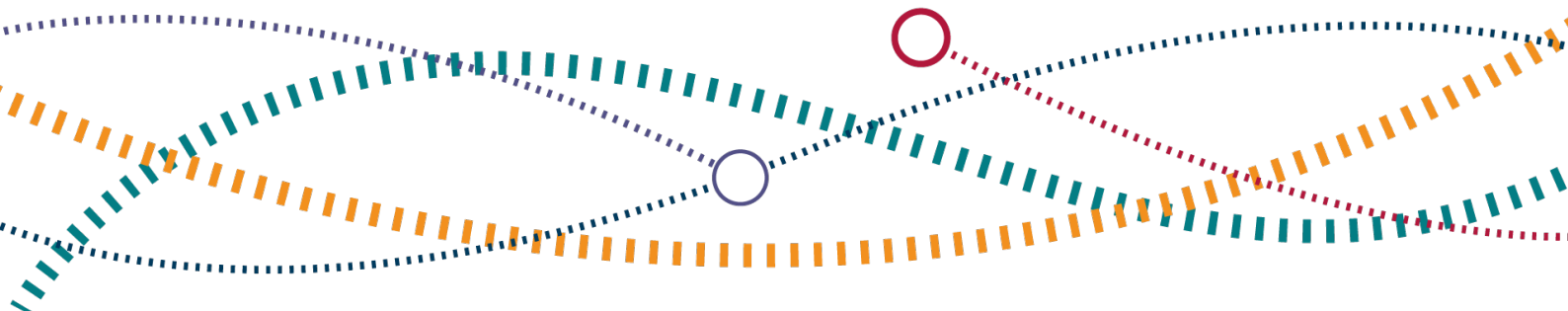




Duration of track access agreements (framework agreements)

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Introduction

- 1 This module explains our policy on the duration of track access agreements. Please read this guidance alongside the other track access guidance modules on our [website](#).
- 2 When applying for agreements with a duration of longer than five years, it is for the applicant to justify its case. Each case is assessed on its merits as each case is different. This guidance therefore is in general terms. You are welcome to contact ORR at any time for an informal discussion before making your application.

The legislation

- 3 The regulation of access contracts is governed by domestic and former European legislation which has been incorporated into domestic legislation, in particular *The Railways Act 1993* (the Act) and *The Railways (Access, Management and Licensing of Railway Undertakings) Regulations 2016* (the 2016 Regulations).
- 4 The law relating to the duration of track access agreements is contained in the 2016 Regulations which uses the term 'Framework Agreement'. This includes track access contracts entered into pursuant to sections 17 or 18 of the Act (the vast majority of track access agreements) and, where the Act does not apply (in limited circumstances such as HS1), to any track access agreement with a duration in excess of one year. For ease of understanding, and consistency with the rest of our access guidance, in this module we refer to 'track access agreements' notwithstanding that the 2016 Regulations refers to 'Framework Agreements'.

The Act

- 5 We formulate our policy in the context of our duties under section 4 of the Act. These duties include exercising our functions in order to:
 - promote improvements in railway service performance;
 - protect the interests of users of railway services;
 - promote the use of railway network in Great Britain for the carriage of passengers and goods, and the development of that railway network, to the greatest extent it considers economically practicable;
 - promote efficiency and economy on the part of persons providing railway services; and
 - enable persons providing railway services to plan the future of their businesses with a reasonable degree of assurance.

The 2016 Regulations

- 6 Regulation 21(7) of the 2016 Regulations states that, in principle, track access agreements will be for a period of five years, renewable for periods equal to the original duration, provided that the infrastructure manager may agree to shorter or longer cases in specific cases.

- 7 Regulation 21(7) is directly applicable only to Framework Agreements as defined in the 2016 Regulations. There are a small number of track access agreements which do not meet that definition. For example, we do not consider heritage railways to be Infrastructure Managers under the 2016 Regulations so agreements with them would not meet the definition of Framework Agreements. Some freight operators and possibly charter train operators may enter into track access agreements with heritage railways to access their network. Although the law is not directly applicable to such agreements, we would expect them to follow similar principles.

Commercial contracts, specialised investment or risks

- 8 Regulation 21(8) says that track access agreements for a period longer than five years must be justified by the existence of commercial contracts, specialised investments or risks.
- 9 Commercial contracts might include:
- Franchise or concession arrangements.
 - Contracts with suppliers.
 - Contracts with customers.
- 10 We are open to representations concerning specialised investments or risks. For example, an investment programme to purchase dedicated rolling stock for a particular open access route might be justification for an agreement longer than five years. However, the general purchase of locomotives and rolling stock necessary for day-to-day operations is less likely to be sufficient justification, without other supporting reasons.
- 11 As a general principle, we expect that where investment is given as a reason, the payback period should be no less than the duration of the track access agreement applied for. We would also want to be convinced that the investment was conditional on the duration of the contract. The longer the duration requested, the stronger the justification will need to be.
- 12 To ensure that forecast investment is made within specified timescales we may consider including review provisions and/or investment conditions in the track access agreement which would shorten its duration if these investment commitments are not met.
- 13 We discuss below potential scenarios faced by different train operator types.

Franchise/concession operators

- 14 We consider it would be consistent with the 2016 Regulations and our section 4 duties to approve agreements with a term longer than five years if the purpose is to operate passenger services under a franchise or concession agreement. The total

duration can include a period of up to two years after the end of the relevant franchise or concession to:

- support the orderly transfer of the franchise or concession; and/or
- ensure the continuation of priority bidding rights.

15 We will consider applications for extensions to an operator's existing agreement, including where a franchise/concession term is extended during the period of the contract. In such circumstances we would expect the train operator to apply for an extension in the normal manner.

Open access operators

16 Open access passenger operators do not have franchise or concession agreements. We recognise, however, that, depending on the nature of their services, they might have other contracts with suppliers or be making investments which require a payback period in excess of five years. We would expect to see this demonstrated through the business case.

Freight operators

17 Freight operators will also need to justify longer contracts through the existence of commercial contracts, specialised investments or risks. Although we will consider each case on its merits, consistency between operators facing similar market conditions is an important consideration. We have previously approved freight track access contracts of ten years duration. An example of such a decision can be found [here](#).

Flexibility in long-term agreements

- 18 In line with legal requirements, we expect long-term agreements to have enough flexibility to provide for the review of access rights and transfer/loss of access rights where they are no longer justified. For agreements with Network Rail, this function is served through the operation of Part J of the Network Code.
- 19 We expect all operators who want to enter into long-term agreements with other infrastructure managers to conform with provisions similar to ORR's model contracts. In particular, we would expect parties to sign up to an arrangement similar to Part J of the Network Code allowing for the transfer/loss of access rights.

Designated infrastructure

- 20 Regulations 21(9) to 21(12) concern agreements for railway infrastructure which has been designated in accordance with regulation 25(2) (designated railway infrastructure). Regulation 21(9) allows for such agreements to be for a period of up to 15 years where there is substantial and long-term investment justified by the applicant. Where such an application is made, we will apply the principles discussed above.
- 21 Regulation 21(10) says that agreements using designated infrastructure may be for a period in excess of 15 years in “exceptional circumstances”. The regulation refers to large-scale and long-term investment, particularly where such investment is covered by contractual commitments including a multi-annual amortisation plan. We consider these exceptional circumstances would have to be for major investment schemes with considerable amounts of capital involved.

Renewals and extensions

- 22 While track access agreements are time limited, with specified expiry dates, it is most likely that the train operator or funder will intend the services (or similar services) to continue running after the expiry date of the agreement. When planning new services, existing or prospective train operators should therefore anticipate applications will be forthcoming for the continuation of existing services and that the capacity they are using will not be freely available beyond the expiry date of any current agreements.
- 23 Reflecting this, there is a strong presumption in our approach in favour of the extension of current access rights except where we have said otherwise (for example, where there was uncertainty about capacity or performance impacts, or if we anticipate a significant change in infrastructure configuration/capacity). Any applications for new services that could preclude the extension of existing services, or adversely impact them, would need to demonstrate that their benefits clearly outweighed the disbenefits to passengers or freight users from the loss of, or impact on, the existing services. We will reach any decision in accordance with our section 4 duties.
- 24 Although the 2016 Regulations say that track access agreements can be renewable for periods equal to their original duration (or shorter or longer in specific cases) we will consider applications to extend the duration by other periods, subject to the total remaining duration being justified and consistent with the rest of our policy.

Unilateral termination (freight and freight customer contracts)

- 25 The model freight and freight customer track access contracts contain a unilateral power for the freight operator or freight customer to terminate the contract by giving one year's notice. A passenger operator does not have the same right under the model passenger track access contract. This difference recognises the more changeable nature of the freight business and the absence of franchise/concession agreements for freight beneficiaries.

Duration of five years or more

- 26 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
- 27 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.
- 28 For new operators seeking access rights of more than five years we accept that there may be a 'start-up' period where it will need a track access agreement in place to have the requisite certainty but will not yet hold access rights. 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

- 29 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.
- 30 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 up to 40 weeks in advance). ORR would not include that application period when looking at whether the extension is longer than five years or not.

Track access options

- 31 Track access options are one way of securing capacity on a future rail facility for when it has been built. Access options can provide reassurance that enhanced or new capacity made available by proposed investments can be used for the intended services. More information is available in our guidance "[Investing in the railway: securing access](#)". Our experience is that track access options require greater customisation than is generally the case with other agreements. We will therefore provide advice on the development of individual track access options and their duration clauses, as appropriate and in the context of each case.



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