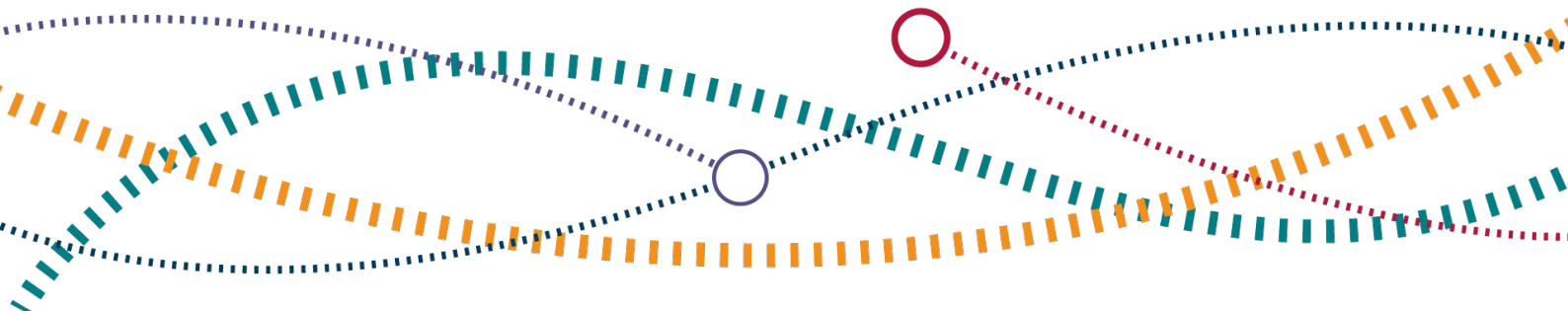




# Track access guidance

27 February 2026



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**Document Control**

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**Table 1.1 Document control history**

Date	Change
27 February 2026	<p>This document merges the following existing track access guidance documents into a single publication. Changes include the removal of out of date information and drafting changes to enhance useability. No policy changes have been made.</p> <p><b>Previous documents included in this guidance:</b></p> <p>“Introduction” (July 2021)</p> <p>“The statutory and contractual framework” (July 2022)</p> <p>An additional section has been inserted, providing information on the regulation of networks other than Network Rail</p> <p>“The expression of access rights” (July 2022)</p> <p>The contents of this document have been merged into this guidance and no longer occupy a separate section.</p> <p>“Making an application” (July 2021)</p> <p>This has been renamed as the chapter “Considering and processing track access applications”</p> <p>“The use of capacity” (July 2022)</p> <p>This has been renamed and included as the chapter “How we make decisions on the use of network capacity”</p> <p>“Duration of track access (framework agreements)” (July 2024)</p> <p>The contents of this have been re-ordered to increase useability</p>

# Introduction

- 1.1 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 focus of this guidance is the national rail network operated by Network Rail which forms the vast majority of the rail network in Great Britain. While many of the principles explained here may also apply to networks operated by other infrastructure managers.
- 1.2 If a train operator wants to access the national railway network, it will need a track access agreement with Network Rail which requires ORR's approval under the Railways Act 1993. This guidance explains the criteria and procedures we expect to follow when dealing with applications for new track access contracts or any amendments to existing track access contracts. It replaces our previous guidance, which was set out in modules by topic. Limited changes have been made from those modules when creating this single guidance document. The changes have been limited to removing out of date information, and to increase readability. None of the changes were intended to or should be considered to be a change in ORR policy.
- 1.3 For an overview of ORR's wider regulatory role and the matters a new entrant would need to consider, please see our other guidance document on [Starting Mainline Rail Operations](#). It provides summaries of the relationship between the regulatory and contractual requirements that govern the economic and health and safety regulation of the mainline network in Great Britain. Applicants are strongly advised to familiarise themselves with this document before making an application.
- 1.4 We will normally consult on major changes to our guidance, as appropriate. We will not necessarily conduct a full industry consultation on every update, particularly where changes are necessary to reflect changes in legislation, minor clarifications and amendments, or in response to recommendations from others that have already been consulted on.
- 1.5 Please let us know if you think any aspects of this guidance can be improved. Your feedback is greatly appreciated. The guidance includes links to other areas of track access work such as policy documents and access decisions. If you cannot find the guidance you need, please [contact us](#).

## 2. The statutory and contractual framework

### Introduction

- 2.1 This section 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](#).
- 2.2 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.
- 2.3 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 below, “Other networks”.

### The statutory framework

- 2.4 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)

- 2.5 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.
- 2.6 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 (in this case, the person seeking access) 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.

- 2.7 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.
- 2.8 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 protections and regulatory oversight of capacity use apply equally across facilities, regardless of their status.

### **The Railways (Access, Management and Licensing of Railway Undertakings) Regulations 2016 (The Regulations)**

- 2.9 The Regulations transposed certain EU rail directives into domestic law. They apply to the allocation of capacity, 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 (facility owner).
- 2.10 The Regulations require the necessary access agreements to be concluded with the infrastructure manager through a contract made under either 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.

- 2.11 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).
- 2.12 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.

## Other Networks

- 2.13 All networks are subject to the requirements of the Regulations. Where exemptions are in place for specific networks, these are set out below.

### Heathrow Airport Limited (HAL)

- 2.14 The railway line between the Great Western Main Line and London Heathrow Airport was built under the terms of the Heathrow Express Railway Act 1991 and thus was authorised before the privatisation of the main rail network in 1994.
- 2.15 The Railways (Heathrow Express) (Exemptions) Order 1994 provides exemptions from the licensing, franchising, and closure provisions of the Act. In particular exemption is granted from sections 17 and 18 of the Act which relate to access to railway facilities.
- 2.16 The exemption remains in place for 30 years from the commencement in 1998 of the first service running between Paddington and Heathrow Airport.

### Transport for London (TfL)

- 2.17 The Railways (London Regional Transport) (Exemptions) Order 1994 provides exemptions from the licensing, access, franchise and closure provisions of the Act. Therefore, sections 17 and 18 of the Act do not apply to TfL.

## Crossrail

- 2.18 Crossrail is part of the TfL network, with railway services operated under a concession let by TfL.
- 2.19 The Railways (Transport for London) (Exemptions) Order 2009 disappplies the Railways (London Regional Transport) (Exemptions) Order 1994, except in respect of certain stations, where there will be shared use by London Underground and Crossrail. Therefore, the licensing, franchise and closure provisions of the Act, including sections 17 and 18, apply to the majority of this network.

## Core Valley Lines

- 2.20 Core Valley Lines (CVL) does not benefit from any exemptions.

## The High Speed One network

- 2.21 The Channel Tunnel Rail Link Act 1996 excludes HS1 from the economic regulatory regime under the Act. During the passage of the Channel Tunnel Rail Link (Supplementary Provisions) Act 2008, the Government made a commitment that, as far as possible, the operation of HS1 should be subject to normal regulatory supervision. To put this into practice, the Regulations, under which ORR already had responsibility for appeals concerning access to HS1, were amended to give ORR additional responsibilities concerning the economic regulation of HS1.
- 2.22 The key elements of the regulatory framework for the purpose of this guidance document are that ORR:
- (a) pre-approves all new framework agreements (track access contracts) and of revisions to any existing framework agreements (i.e. framework agreements covering the reservation of capacity for more than one timetable period) for the use of HS1; and,
  - (b) has an appeal role in respect of the terms of track access, rail related service facilities.
- 2.23 We have produced a separate [guidance on access to the HS1 network](#).

## ORR's statutory duties and our approach to regulation

- 2.24 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.

- 2.25 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

- 2.26 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.
- 2.27 When directing or approving new or amended access contracts, we aim to ensure that the contracts are as clear and robust as possible and strike the appropriate balance between certainty for the train operator and flexibility for Network Rail to accommodate the needs of all other passenger and freight train operators. Track access contracts (TACs) must set out access rights clearly and accurately so that ORR, Network Rail, operators and consultees can understand the access rights that have been agreed and those that are being sought.

## Model track access contracts

- 2.28 Section 21 of Act allows ORR to prepare and publish model clauses for inclusion in access contracts and to encourage or require their use. In consultation with the industry we have developed model contracts which contain standard clauses and tables setting out how access rights should be contractualised. In most cases we require infrastructure managers (IMs) and beneficiaries to use the relevant model

contract. Our model contracts, and guidance on completing them, can be found on our [website](#).

2.29 Reflecting that additional characteristics above ‘quantum rights’ in passenger contracts have rarely been used since 2014, those paragraphs are not included in our model contracts. They are still available as model clauses should, in exceptional circumstances, they be required.

2.30 The following model contracts can be found on our website:

- (i) Passenger model contract
- (ii) Charter trains model contract
- (iii) Open Access model contract
- (iv) Freight operator model contract
- (v) Freight customer model contract
- (vi) Freight operating company customer model contract

### Access rights

2.31 An access right is any right conferred on a beneficiary by its track access contract. Access rights will represent a balance between:

- (a) the beneficiary’s need to ensure that it can meet its key commercial requirements (including public service contract<sup>1</sup> 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.

2.32 Access rights are set out in Schedule 5 to track access contracts and are the key description of what the train operator is buying from Network Rail. Access rights

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<sup>1</sup> In this document, references to a “public service contract” may, where appropriate, also be taken to mean references to a “franchise” or a “concession”.

are given effect in the timetable through the timetabling process set out in Part D of the Network Code.

- 2.33 Access rights are usually expressed as ‘quantum rights’, i.e. the daily number of services from point of origin to destination; intermediate station calls; and the rolling stock to be used. Any additional characteristics, such as journey time or service interval protection will only be agreed by exception and must have strong justification.
- 2.34 Access rights for freight services also include arrival and departure time windows. Windows can be anywhere between 1 and 24 hours depending on the business need of the operator and the flexibility required by the infrastructure manager in order to make the best use of capacity.
- 2.35 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.

### Firm and Contingent access rights

- 2.36 There are generally two types of access rights: firm rights and contingent rights. In the timetable development process, if a train operator asks for a train slot to be included in the timetable (an access proposal) by the Priority Date (‘D-40’ – forty weeks before the timetable begins) using a firm right, Network Rail must comply with it when compiling the timetable. However, firm rights are subject to:
- (a) The infrastructure manager’s applicable Engineering Access Statement (EAS) and Timetable Planning Rules (TPR);
  - (b) Network Rail’s rights to flex an access proposal within the terms of the contract; and
  - (c) the operation of any other provisions of the Network Code.
- 2.37 Contingent rights are subject to additional factors outside the operator’s control – normally other operators’ firm rights but also the Decision Criteria of the Network Code. While Network Rail should try to accommodate access proposals underpinned by contingent rights, this may not always be possible. If Network Rail cannot accommodate all requests for train slots in the working timetable, firm rights (if exercised by the Priority Date) take priority over contingent rights. Under

the Decision Criteria<sup>2</sup> Network Rail could, for example, refuse a request to use a contingent right if it felt the impact on performance would be unacceptable.

### Train Operator Variation of Services

2.38 The freight market requires a more dynamic approach to planning services than the passenger market. In order to be able to respond quickly to requests from customers, the model freight contract gives the operator contingent rights to run Train Operator Variation Services for up to twelve months without specific rights in Schedule 5 of freight model contracts. These are services for which the operator has made a Train Operator Variation Request in the timetable process under Condition D3 of Part D of the Network Code and Network Rail has included them in the timetable. This allows the services to be introduced quickly and gives time for the operator to negotiate longer-term access rights to be included in the Rights Table in Schedule 5 of its TAC.

### The Network Code

2.39 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.

2.40 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

### Railways Act

2.41 Sections 17 and 22A of the Act provide for beneficiaries to apply directly to ORR for access to the network where they have been unable to reach agreement with the facility owner. Section 17 provides for a beneficiary to make an application to

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<sup>2</sup> The Decision Criteria contains a number of ‘Considerations’ which Network Rail must take into account in order to compile a timetable which shares the available capacity in the most efficient and economical manner, in the overall interest of users and providers of railway services.

ORR for it to direct the facility owner to enter into a new contract. Section 22A applies where a beneficiary with an existing contract is seeking amendments to that contract to permit “more extensive use” of the network. Further information on this process is set out below, under: ‘The processes for ‘non-agreed’ applications – sections 17 and 22A’.

### Network Code appeals

- 2.42 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 of a TAC. 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.
- 2.43 A party dissatisfied with either a decision of a Timetabling Panel in relation to a dispute arising under Part D or a decision reached by Access Disputes Adjudication in relation to a dispute arising under Part J, can appeal the matter to the Office of Rail and Road for determination under Part M. For more information see our [guidance document](#) on Network Code appeals.

### Appeals under the Regulations

- 2.44 Regulation 32 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.
- 2.45 For more information see our guidance document on [the Regulations](#), which includes information on our appeal role under those Regulations.
- 2.46 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

- 2.47 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.
- 2.48 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.
- 2.49 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](#).
- 2.50 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.
- 2.51 Access contracts entered into under section 18 of the Act, 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.

2.52 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.

# 3. Considering and processing track access applications

## Introduction

- 3.1 This section explains the procedures for considering applications under the Railways Act 1993 (the Act) for track access contracts granting access to the network for passenger operators, freight operators and freight customers, and applications to amend existing contracts (known as supplemental agreements). We aim to consider applications in a timely manner consistent with our statutory duties and the obligations they impose.
- 3.2 We consider every application on its merits and in accordance with our statutory duties. Nothing in this guidance should be interpreted as committing us to making any particular decision.
- 3.3 We will have regard to, but will not be constrained by, what the parties have agreed. Before making an application it is important that the parties have, as far as reasonably practicable, considered all the issues so that we and consultees have a proper understanding of the proposed capacity allocation. Industry consultation is covered briefly in this section and in more detail in our guidance: [The Industry code of practice for track access application consultations](#).
- 3.4 ORR will determine the fair and efficient allocation of capacity, whether or not the parties have reached agreement on all points. Our decision will be based on the public interest as defined by our statutory duties. We are required, if appropriate, to put the public interest above the private commercial interests of the facility owner and the applicant. We may need to take into account considerations that may be of little or no concern to the parties, but which affect the interests of third parties, for example, rail users, funders or other potential users of facilities.
- 3.5 We expect:
- (a) beneficiaries (passenger and freight train operators, freight customers and any other holders of an access contract who have their services operated by someone else), Network Rail, and other relevant facility owners, to follow the procedures outlined here when negotiating and submitting new track access contracts or amendments to existing track access contracts for directions or approval;

- (b) applications to be accompanied by a completed [application form](#) and comprehensive and specific information in support of the submission;
- (c) parties to use the relevant [model contract](#) as published by ORR under section 21 of the Act;
- (d) any party seeking a new track access contract or an amendment to an existing track access contract to first discuss and try to agree its access rights with Network Rail;
- (e) where confidentiality is not an issue, any party seeking a new track access contract or an amendment to an existing track access contract, to first discuss this with relevant stakeholders including, but not limited to, beneficiaries who may be affected by changes to the timetable, prior to the formal consultation; and
- (f) parties to understand the expected timescales for processing applications set out later in this section.

3.6 If necessary, please contact us to arrange a pre-application meeting to ensure consistency with our criteria and procedures and to identify issues that can be addressed prior to the formal application.

3.7 This section is divided into the following sub headings:

- general matters (concerning the submission of applications and the need for ORR's approval);
- the model track access contracts;
- the form and content of applications;
- significant projects and programmes;
- consultations and timescales;
- hearings;
- the processes for 'agreed applications', (sections 18 or 22 of the Act );
- the processes for 'non-agreed applications' (sections 17 and 22A of the Act);
- track access options and enhancements;

- the process for applying for a facility access exemption under section 20 of the Act; and
- our criteria for focused scrutiny of agreed applications.

In addition, the annex includes various flowcharts which should be read in conjunction with this guidance.

## General matters

### Validity of contracts

3.8 Our role in approving access contracts is established by the Act, which states that a facility owner shall not enter into an access contract unless:

- (a) it does so pursuant to directions we have made under sections 17 or 18 of the Act;
- (b) we have issued a general approval permitting contracts of that type to be entered into; or
- (c) the facility in question is exempt from sections 17 and 18 of the Act.

3.9 Any access contract which is entered into other than as detailed in the preceding paragraph is void, meaning it has no legal effect and is unenforceable.

3.10 Similarly, any amendment to an access contract is void unless:

- (a) we have approved the amendment under section 22 of the Act;
- (b) we have issued a general approval permitting amendments of that type to be made;
- (c) it is made pursuant to directions that we have given under section 22A; or
- (d) the amendment is made under a specific modification provision contained in the access contract.

### Signing and dating contracts

3.11 For a contract or supplemental agreement to be valid, the document itself must be signed and dated in the appropriate places. Electronic signatures can be used. The date normally appears at the top of page one. It is not sufficient to date only the front cover, as this is not legally part of the contract or supplemental agreement.

- 3.12 Any person signing a contract or supplemental agreement on behalf of their company must have the authority to do so. Each company must ensure that the relevant people have the necessary authority. The name of the signatory should be printed under the signature so that it is clear who has signed the document on behalf of each company.

### Counterparts

- 3.13 It is legally valid to sign contracts in counterparts. This means the parties independently signing separate but identical copies. The two copies (counterparts) taken together form the contract and must be kept together. It is not acceptable to have one contract signed by one party and only the signature page from the second party, as there is no record of what the second party actually signed. Given the risk of non-identical contracts being signed by mistake, or one of the counterparts being mislaid or discarded in the belief that the second is just a copy of the first, we would suggest that contracts are only executed in counterparts if absolutely necessary, when time is limited, and it is not possible for both parties to sign a single copy of the contract.

### Consolidated contracts

- 3.14 We maintain copies on our website of the current versions of every track access contract, i.e. a version of the original contract as amended to show all subsequent amendments. These are known as consolidated contracts. Network Rail has a contractual obligation to provide ORR and the relevant beneficiary with an updated consolidated version of the contract within 28 days of any amendment or modification being made to it. This should be sent in MS-Word format or Open Document format. Hard copies are not required.

### General approvals

- 3.15 Under sections 18 and 22 of the Act we can issue general approvals. A general approval gives approval prospectively, without the need for specific submission and approval, to:
- (a) the making of access contracts of a specified class or description;
  - (b) amendments of a specified description to a particular access contract; and
  - (c) amendments of a specified description to access contracts generally or to access contracts of a particular class or description.
- 3.16 In considering the case for issuing a general approval, we consider the potential impact of future changes which the general approval would permit. We would not

issue a general approval which approved a contract or modification if we considered we might not approve it if we were undertaking a full review in accordance with our policies and statutory duties.

3.17 There are several general approvals currently in place, which can be found on our website. They allow Network Rail and beneficiaries to enter into a track access contract or amend their existing track access contract without needing to apply to ORR for our specific approval. They are:

- (a) [The Passenger Access \(Short Term Timetable and Miscellaneous Changes\) General Approval 2023](#). This provides, amongst other things, for access rights to run additional or amended services for up to 90 days without an industry consultation, or up to one timetable period following industry consultation.
- (b) [The Passenger Access \(Model Charter Track Access Contract\) General Approval 2024](#). This permits the making of contracts for charter services based on the model charter contract. It also permits the amendment of the expiry date and the update of contractual terms where the equivalent provisions in the model charter contract have been revised.
- (c) The [General Approval for connection contracts 2014](#). This permits the making of connection contracts between Network Rail and another facility owner, provided that certain conditions are met.
- (d) [The General Approval for freight track access contracts 2024](#) which:
  - (i) enables Network Rail and a freight operator to enter into a track access contract for up to 5 years and permits contingent and some firm access rights;
  - (ii) permits Network Rail and the freight operator to amend their track access contract without our specific approval, subject to certain conditions. Any other amendments will require our specific approval under section 22 or directions under section 22A of the Act;
  - (iii) enables Network Rail and freight end-customers to enter into a track access contract for up to 5 years and permits contingent and some firm access rights;

- (iv) allows Network Rail and a freight operator (nominated by a freight end-customer) to enter into an end-customer-specific freight track access contract; and
  - (v) enables a freight operator and Network Rail to make certain changes to their existing track access contract relating to liability; necessary where the freight operator has a customer-specific track access contract.
- (e) [The Facility Access General Approval 2018](#). This permits facility owners of facilities such as ports and terminals and their beneficiaries to enter into access contracts (Facility Access Agreements) at those facilities, for up to five years' duration, and to extend existing generally and specifically approved agreements provided they do not exceed five years from the original commencement date.

3.18 The general approvals contain more information on what amendments are permitted and the associated conditions. Some of the amendments permitted require a Network Rail-led industry consultation of potentially affected parties to be completed with no outstanding concerns. Changes beyond those permitted by these general approvals, or continuation of additional or amended rights beyond the periods permitted, need our specific approval.

3.19 We may also revoke, amend, or issue new general approvals from time to time. When considering using a general approval, you should check ORR's [website](#) for any changes.

### Non-Network Rail contracts

3.20 This guidance generally refers to contracts where Network Rail is the facility owner. Where the facility owner is not Network Rail, we would expect the parties to the proposed contract to use the model contract as the starting point and to follow the application procedures outlined in this guidance. We recognise that the provisions of the model contract may not be appropriate in their entirety in all cases. In such instances we would be prepared to consider adaptations to the model provisions where the parties feel they do not meet their commercial requirements. We would, however, need to be satisfied with the reasons for any such bespoke approach.

### Non-Network Rail networks general approval

3.21 A single general approval has been established that is applicable to non-Network Rail networks. [The Passenger Access \(\(Infrastructure Managers Other Than Network Rail\) Short Term Timetable and Miscellaneous Changes\) General](#)

[Approval 2023](#) provides, amongst other things, for access rights to run additional or amended services for up to 90 days without an industry consultation.

### Operator Licences

- 3.22 Operators of railway assets must either hold a licence to operate or have a licence exemption. Licences and licence exemptions may be granted by the Secretary of State or ORR (but are generally granted by ORR). See our [guidance on licensing](#) for further information.
- 3.23 Holding a licence is a condition precedent to the exercise of rights to operate on the network in the passenger and freight model contracts. In practice, the vast majority of access rights are held by licensed passenger and freight train operators. We would therefore generally expect the intended operator of the services covered by an application for an access contract to hold, or be in the process of obtaining, a licence.
- 3.24 For potential holders of freight customer track access contracts there is no requirement to hold a licence. Any operator appointed under this contract, holding a model freight operating company customer contract, must be a licensed operator.
- 3.25 It is not necessary to hold a licence or be a train operator in order to obtain access rights. Individuals and undertakings may obtain rights to be exercised on their behalf by a licensed operator. However, in considering whether to approve those rights, we need to know the identity of that operator and the existing arrangements which will enable it to operate the rights for which the applicant is applying.

### Safety certificate

- 3.26 We would not expect to issue directions in respect of a proposed passenger or freight track access contract until:
- (a) for a new operator, where necessary, it either holds a safety certificate covering the scope of the operation in question, or it is sufficiently advanced in the process of obtaining a safety certificate and there is a condition precedent in the contract making the exercise of rights conditional on having obtained a safety certificate; or
  - (b) where an operator already holds a safety certificate, if the contract represents a substantial change to the type or extent of the operation specified in the safety certificate, we have issued a notice amending the safety certificate. (Where necessary, operators should ensure that they have applied for an

amended certificate in sufficient time before they wish to commence their substantially changed services.)

- 3.27 Applicants should ensure that they, or their nominated party, have obtained the necessary safety certification in respect of their application. Further information on safety certificates and authorisations can be found on our [website](#).

### Railway Industry Emergency Access Code

- 3.28 If, in an emergency, a train operator needs to use facilities to which it does not hold access rights (such as network, stations or light maintenance depots), the Railway Industry Emergency Access Code (the Code) exists to provide train operators with access to those facilities for the period required.
- 3.29 A list of all parties to the Code is contained in Schedule 1 to the Code. New parties can enter into the Code by an admission agreement as provided in Schedule 2 and can withdraw from it by a withdrawal agreement as provided in Schedule 3. New facilities can be added to the Code by the new facility owner signing the form provided in Schedule 4 to the Code. Network Rail is responsible for keeping Schedule 1 up to date and must send a copy to ORR for whenever the Code is amended, including any changes to Schedule 1.
- 3.30 Being a party to the Code is a condition precedent to the exercise of access rights in the model passenger and freight contracts. Failure to sign up to the Code before the required date in the access contract may result in that contract lapsing. We encourage applicants to take steps to ensure that they become a party to the Code within the relevant timeframe by liaising with Network Rail.

### Access to stations, depots and other railway facilities – parallel applications

- 3.31 When seeking access to the network, train operators will need to ensure that they are developing parallel applications for the access they may need to stations, light maintenance depots and other railway facilities. Stations and light maintenance depots will generally also be covered by the regulatory regime established by the Act; these access contracts will also need to be approved or directed by us. Before approving track access rights, we would wish to be satisfied that arrangements for access to other relevant facilities have been made, or will be in place by the time the contract came into effect. Applicants seeking guidance on station or depot access should contact us at [StationsandDepots@orr.gov.uk](mailto:StationsandDepots@orr.gov.uk).

3.32 For some other facilities, including some ports and freight terminals, access is not covered by the access regime established by the Act, as the facilities are exempted by The Railways (Class and Miscellaneous Exemptions) Order 1994 (the CMEO). Exempt facilities, and the effect of the The Railways (Access, Management and Licensing of Railway Undertakings) Regulations 2016 (the Regulations) on them, are also discussed later in this section. Whether access to another railway facility is regulated or exempt, we expect operators to ensure that they have all the necessary access contracts in place by the date they intend to start their operations, and operators are advised to check the regulatory status of facilities with the facility owner.

### Informal discussions

3.33 We welcome informal approaches from any beneficiary contemplating seeking a track access contract or an amendment to an existing access contract. We expect beneficiaries to contact ORR to discuss their requirements at an early stage, preferably prior to making an application. This will provide an opportunity to detail our requirements for considering an application, identify any regulatory issues likely to arise and discuss the likely timescale for reaching our decision. It is also likely to save the parties time and expense.

### Multilateral provisions

3.34 An access contract is a bilateral contract between Network Rail and a beneficiary. We would be concerned if an applicant sought to incorporate in a proposed access contract multilateral provisions other than the Network Code because the bilateral contract cannot bind other parties (even where specific provision is made for enforcement by third parties under the Contracts (Rights of Third Parties) Act 1999).

### Unfinished business

3.35 Applicants may wish to include provisions in their access contracts for certain matters to be agreed between the parties later (for example, where the parties may need to seek ORR's approval of new access rights as part of a timetable change but consequential issues, such as the performance regime, still have to be resolved. To ensure there are no loose ends in the contractual provisions that would allow matters to drift unresolved, we expect the contract to make clear provision:

- (a) for the process through which the parties are expected to arrive at an agreement, including time limits;

- (b) for the issue to be resolved in a timely manner should the parties fail to reach agreement;
- (c) if the parties fail to agree within the specified time, for the matter to be referred for determination under the Access Dispute Resolution Rules (ADRR), which is required to apply clear, adequate and appropriate criteria (including current regulatory policy where appropriate). It is very important that the criteria are specified in the contract or arrived at through an objectively justifiable process; we will refuse to approve cases where the parties merely ask the third party to make a contract for them as it is not part of the role of ADRR;
- (d) in matters of regulatory importance, for the agreed/determined matters to be referred for ORR's approval;
- (e) where we do not give our approval, for the parties and the expert to take account of our reasons when revising the proposal, and resubmitting it; and
- (f) for including the result of the process in the contract.

3.36 We may need to see a flow chart illustrating the process to ensure that it is robust, has no steps missing and leaves no loose ends.

### **Incorporation of other documents by reference**

3.37 Where the Act requires us to approve an access contract, our jurisdiction provides for us to supervise and determine all the terms on which the capacity of railway facilities is used. This jurisdiction exists for the protection of railway industry participants and users in ensuring that the possible abuse of monopoly power and arrangements contrary to the public interest are checked and prevented. It also exists to ensure that the use of capacity is fair and efficient and meets the public interest criteria in section 4 of the Act. In order to do this, we need to be satisfied with all the factors that establish and may influence and change the effect of the access contract.

3.38 By bringing into the access relationship external legal rights or obligations through unregulated documents, the effectiveness of our jurisdiction for the benefit of railway industry participants and users could be diminished and important protections circumvented.

3.39 Certain external documents are already subject to regulatory protections. Railway Group Standards, the Engineering Access Statement, the Timetable Planning Rules and the ADRR are examples of external documents where all parties have

regulatory protections against possible abuse of power or changes that may be objectionable and harmful to the interests of others.

3.40 Where the parties want to incorporate by reference an external document, it may be that changes to that document will not have an adverse effect on the access relationship. However, our concern is that any changes to the external document are outside our jurisdiction and we may not be able to prevent changes that alter the balance of rights and obligations between the parties. Accordingly, we would expect strong justification for the incorporation of non-standard rail industry documents into an access contract.

3.41 For these reasons we will wish to:

- (a) see and review any documents referred to in proposed access contracts at the time the application is made (or before);
- (b) be satisfied that the references and any obligations imported are appropriate and justified (as part of which we will also need to take into account the potential and mechanisms for later amendment of these documents), including flow-through; and
- (c) ensure that the documents are publicly available, or publish them ourselves, subject to any confidentiality exclusions.

## The model track access contracts

3.42 We have published model contracts, available on our website, for:

- (a) [freight services](#);
- (b) [passenger services](#);
- (c) [open access](#);
- (d) [freight customers](#) who wish to hold their own access rights;
- (e) [freight operators](#) to operate services where those rights are held by a freight customer;
- (f) [charter passenger services](#); and
- (g) [connections](#) between two separate networks.

- 3.43 The model contracts should be used as the basis for all submissions made to us. The passenger, freight, and freight customer contracts are explored in more detail in [our separate guidance documents](#) on how to complete those model contracts. The other types of model contract are briefly explained below.

### Model contract for charter passenger services

- 3.44 The charter passenger services model contract does not need customisation, except for the insertion of certain dates, the completion of company information and the deletion or completion of clause 19 as appropriate. We have issued a general approval permitting the making of contracts based on the model charter contract without the need to make an application to us. However, if an operator wanted to customise the model contract it would need to seek our approval and use the passenger application form as the basis for its application.
- 3.45 The charter trains contract does not contain rights to any specific services but gives the operator the right to make a 'train operator variation request' in the timetabling process in Part D of the Network Code and, if Network Rail is able to include them in the timetable, to run the services.

### Model connection contract

- 3.46 Connection contracts set out the rights and obligations of the parties for the on-going maintenance of connections between two railway networks. We have issued a general approval which permits the making of connection contracts between Network Rail and another facility owner without the need for our specific approval, provided that the model contract is used and certain conditions are met. For more information see our separate guidance on [Connection contracts](#).

### Model freight operating company customer contract

- 3.47 This contract is largely based on the model contract for freight services and forms part of the contractual structure for holders of freight customer access contracts. A freight operator enters into the freight operating company customer track access contract with Network Rail once it has received a drawdown notice from the freight customer. More detail on the process for entering into a contract and the mechanisms for drawing down and revoking access rights are set out in the [Guidance on completing the model freight customer track access contract](#).

### Other access contracts

- 3.48 For applications relating to intermediate traffic, such as moving rolling stock or movements of infrastructure maintenance vehicles (known colloquially as 'yellow

plant') when not undertaking 'network services', we expect applicants to use, as far as possible, the model freight contract and our application form. Where certain provisions in the model contract and sections of the application form are not appropriate to such operators we will consider bespoke arrangements on their merits.

- 3.49 Section 18 (4) (a) of the Act exempts railway vehicles carrying out 'network services' from the access provisions of the Act. 'Network services' is defined in section 82 of the Act and, in summary, covers services related to constructing, operating, maintaining and renewing the network. They are most commonly operated by vehicles known as 'yellow plant', but also include trains such as snow ploughs, 'leaf-buster' trains and measurement trains.

### Bespoke provisions

- 3.50 Model contracts include those matters we expect to see covered in that particular type of track access contract. Although we have the power under section 21 of the Act to require the use of model clauses and in most cases do so, we are willing to consider some departures from the published model, for example where some bespoke elements are desirable to meet the particular commercial circumstances of a particular train operator, network operator or other beneficiary. We will consider applications for access contracts with bespoke provisions on their individual merits, and will publish the reasons for our decisions.
- 3.51 The model contracts contain draft templates for certain optional provisions which beneficiaries may wish to exercise. While we are keen to promote innovation and best practice in the further refinement of access contracts over time, when considering new or novel approaches in proposed access contracts we will have in mind the provisions in Network Rail's network licence prohibiting undue discrimination, which counters the risk of new provisions in access contracts incentivising Network Rail to favour one beneficiary over another.

### Self-modification provisions

- 3.52 Our model contracts include provisions to enable changes of an administrative or minor nature to be made without our approval.
- 3.53 In some cases contracts may contain provisions for the determination of the value of a particular parameter by a clearly defined process and within a defined range. 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. Consequently, we expect that

provisions establishing a process for significant variation of the contract terms should ensure that these can only be made subject to our specific approval. However, provision should be made for ORR to be notified of all changes before the changes in question become effective.

## The form and content of applications

### Applications to be made by email

3.54 All applications should be submitted by email to [Track.Access@orr.gov.uk](mailto:Track.Access@orr.gov.uk). Please submit editable versions of contracts and supplemental agreements in either MS-Word format or Open Document format. This is so that we can make redacted copies (when required) and make copies that meet our website accessibility guidelines. Hard copies are not required.

### The application forms

3.55 Our application forms help streamline and simplify the process of making, consulting on and reviewing access applications and require applicants to provide specified information in support of their applications.

3.56 Copies of the application forms can be downloaded from our website. They are largely self-explanatory, particularly when read in conjunction with this document. The information required on the forms relates to the specific areas of regulatory concern discussed in this guidance.

3.57 The forms require applicants to provide an appropriate summary of the proposed contract. This summary is an important component of the application, both for our own scrutiny of the proposed contract, and to facilitate the process of wider consultation. The summary should be accurate and cover all material parts of the proposed contract or amendment. The form must make clear which services are affected, and demonstrate the likely impact of this, so that other operators may make informed representations on the application.

3.58 For those applications that will undergo an industry consultation, sections 1-9 of the application form should be completed prior to the consultation to inform consultees of the proposal. After completing the consultation, sections 10 and 11 should be completed before the application is submitted to us. In those limited cases where industry consultation is not required, enter “not applicable”, where appropriate, and an explanation of why consultation was not carried out.

3.59 For agreed applications under section 18 or 22, Network Rail should complete section 11, confirming that both parties are prepared to enter into the contract or

supplemental agreement in the terms submitted. Except in exceptional circumstances, parties should not continue to negotiate the contract after it is submitted to us. Parties to the contract should also not attempt to persuade ORR to require modifications under section 18(7) which are inconsistent with that confirmation. In such cases, we may decide to suspend our consideration of the application or to reject it on the grounds that the confirmation has been wrongly given and the parties are not agreed on the terms.

- 3.60 This contrasts with applications under sections 17 and 22A where an applicant may need to proceed under one of those sections because negotiations with the facility owner appear to be unproductive and it must ensure it does not run out of time to invoke appropriate regulatory protection. In these cases, the applicant should complete the required information in section 11.
- 3.61 All bespoke departures from the model contract should be clearly identified by supplying a track-changes mark-up of the contract from the model contract template. Wherever provisions would incorporate new processes we will wish to see evidence that the process is robust, internally consistent (with no steps missing), and leaves no loose ends.
- 3.62 If you are unclear about any question posed on the forms, or on any aspect of the application process, please contact us.

### Confidentiality, consultation and ORR's public register

- 3.63 Section 72 of the Act requires us to maintain a public register and sets out what we must enter in it - including every direction to enter into an access contract, every access contract, every amendment of an access contract, and every facility exemption granted under section 20(3) of the Act. The public register is available on our [website](#).
- 3.64 Section 72(5) of the Act requires the facility owner to send to ORR within 14 days a copy of every new access contract and any amendment to an existing contract.
- 3.65 Beyond the public register, we believe it is important that our consideration of applications for access rights should be as open, transparent and well informed a process as possible. We wish to ensure that the substance and basis of regulatory decisions is clear and well understood throughout the industry and the consultation of potentially affected industry parties will help to support this. The consultation process is described in the [Industry code of practice for track access applications](#).

- 3.66 In deciding whether to exclude information from the public register or from wider circulation, we must have regard to the criteria under section 71(2) of the Act; so we must 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.
- 3.67 In line with this, we have considered what information normally found in track access contracts meets this requirement. On this basis ORR normally only redacts from passenger contracts:
- (a) the figures in the column headed "Total Train Cost per Mile (Pence)" in Annex C to Part 3 of Schedule 4 (Payment Rate per train mile);
  - (b) the figures in the column headed "Defined Service Group Revenue" in Annex D to Part 3 of Schedule 4;
  - (c) the Performance Points, Payment Rates and Monitoring Point Weightings in Appendix 1 of Schedule 8; and
  - (d) the Sustained Poor Performance Thresholds in Appendix 3 of Schedule 8.
- 3.68 From freight, freight customer and freight operating company contracts, we would normally only redact the train operator and Network Rail caps in Appendix 1 of Schedule 8.
- 3.69 If either party wants any other information to be redacted from the public register or publication generally, they must explain why publication of the information would seriously and prejudicially affect their interests.
- 3.70 It should be made clear in the consultation documentation where something has been redacted (for example, by using the "☞" symbol). When we receive an application, we need to be satisfied that the redaction of confidential information did not undermine the consultation that was conducted. Furthermore, as mentioned above, we will make the final decision on what information is redacted from the public register and documents placed on our website.
- 3.71 Beneficiaries making applications under sections 17 or 22A of the Act should note that under the process established by Schedule 4 to the Act, we are obliged to send a copy of the application in full to the facility owner. We are also obliged to consult any "interested person" identified by the facility owner on the application and invite written representations from them.

- 3.72 The Act defines an “interested person” as any person whose consent is required by the facility owner, as a result of an obligation or duty owed by the facility owner which arose after the coming into force of section 17 of the Act, before the facility owner may enter into the required access contract (Schedule 4, paragraph 1). In our experience, it is unusual for anyone to meet this definition.
- 3.73 Once an access contract has been entered into, the parties will, if necessary, be invited again to identify which parts of the contract, if any (in addition to the information specified earlier in this section) they want us to redact from the copy to be entered into the public register.

### Complete submissions

- 3.74 To help the timely processing of applications it is important that submissions are complete and accurate. If they are not, they may be rejected. Applicants should note that:
- (a) for agreed submissions under sections 18 and 22, we expect to consider complete contracts or supplemental agreements, as experience has shown that consideration and consultation based on incomplete contracts/supplemental agreements is inefficient, given the risk of the parties agreeing material changes at a later stage. For applications under section 22, it is also helpful if a marked-up copy of the contract showing any amendments to the contract is provided; and
  - (b) for submissions under sections 17 and 22A, the proposed contract or supplemental agreement sought by the applicant must form part of the application and must be complete at the time of submission. This is a requirement of paragraph 2(1) of Schedule 4 to the Act.

### False information

- 3.75 Section 146 of the Act says that if any person, in giving any information or making any application under the Act, makes any statement which they know to be false in a material particular, or recklessly makes any statement which is false in a material particular, they are guilty of an offence. Apart from being a criminal offence, if false or misleading information has been given and our decision would otherwise have been different, the access contract or amendment may be void on the grounds of fraudulent misrepresentation.

## Significant projects and programmes

- 3.76 Part D of the Network Code provides for the publication of a Calendar of Events (CoE) and the establishment of an Events Steering Group (ESG) for each Event (significant change). An 'Event' is defined as a proposal which is likely to require significant changes to the timetable. The CoE gives the industry clear, timely and transparent visibility of such changes and likely timescales. ORR often attends ESGs as an observer but is not part of the decision-making process.

### Deadlines

- 3.77 To support timely and coherent decision making we may set cut-off dates for applications related to significant projects. Where this happens, last minute applications from both new aspirants and existing operators will not be accepted after the cut-off date. When requesting applications, we will typically specify a cut-off period of eight weeks, by which time we must receive applications if they are to be considered. We will only publish applications received once the closing date has passed. All applications will be published simultaneously on our website.

## Consultations and timescales

### Consultations

- 3.78 The full extent of a consultation will depend on the nature of the proposal. A consultation will be required in most cases where new access rights or changes to existing access rights are being sought but we would not expect a consultation to be necessary if the changes proposed are of a financial nature only and have no effect on any other operator. The application forms require applicants to confirm that they have completed a consultation in line with this code of practice or explain why no consultation was considered necessary.
- 3.79 Please see the [Industry code of practice for track access application consultations](#) for full details of when and how consultations should be undertaken.
- 3.80 We would expect Network Rail to conduct the consultation for all agreed applications under sections 18 and 22. For section 17 and 22A applications, the applicant may either conduct the industry consultation itself, or, for applications where Network Rail is the facility owner, request Network Rail to carry out the consultation. We would recommend that latter as there are established processes with which consultees are familiar and a dedicated page on Network Rail's website.

- 3.81 For applications by public service or concession operators, we would expect the funder to have had the opportunity to review the application and that it has the funder's support.
- 3.82 In all cases, it is important that the information made available to consultees is as full and clear as possible and that consultees have adequate time in which to consider and make representations on an application. We would expect the applicant and/or Network Rail to discuss their proposals with other potentially affected operators before making an application. This will assist in understanding how to best mitigate/resolve any issues at an early stage.
- 3.83 To ensure that we give due regard to our statutory duties, it is important that certain bodies have the opportunity to comment on proposed contracts before we reach our decisions. These bodies would normally include, as appropriate, the Department for Transport (DfT), Transport Scotland for Scottish Ministers, Transport for Wales for the Welsh Ministers, and Transport for London for the Mayor of London. Schedule 4 to the Act also requires ORR to seek representations from a defined category of "interested persons" for applications made under sections 17 and 22A (see earlier in this section).
- 3.84 We also consider it important that other potentially affected parties have the opportunity to comment on proposed contracts so their views can be taken into account. This lets us obtain a complete picture of the implications of a proposed contract throughout its duration, including the implications for the plans of other operators to introduce new or varied services. Depending on where the proposed services would run and the nature of those services, we will expect the parties listed in the code of practice to have had the opportunity to comment on a proposed contract.
- 3.85 Network Rail will copy us into all consultations which it issues, so that we have an opportunity to review and identify any potential issues or concerns. If we identify any issues at this stage, we raise them with the parties, allowing them to be addressed prior to submission of the application to us. However, we would only expect to make detailed comments on an application following submission to us, not during the consultation stage.
- 3.86 Involving ORR in this way at an earlier stage should:
- (a) enable us to reduce the time we take for our initial review of any formal application (although, in the case of more contentious applications, our consideration is still likely to take longer than our advertised timescales);

- (b) avoid the need for an extended or new consultation where material issues have been identified;
- (c) allow us to identify at an earlier stage contentious issues and plan accordingly;
- (d) reduce the need for the level of 'back and forth' between ORR and the parties, to the benefit of all; and
- (e) overall, allow decisions on applications to be reached more quickly.

3.87 Upon receipt of an application following the consultation, we will occasionally publish all responses received by Network Rail during the course of the consultation, whether or not they raise issues which have been resolved prior to submission to us, if those issues are likely to be in the public interest. We will not typically publish on-going exchanges of correspondence between parties where a non-agreed application is being debated, unless it is in the public interest to do so. We will review on an on-going basis whether it is practicable to publish all information and correspondence in respect of a particular application.

### Timescales

3.88 Although the Act does not prescribe timescales for the submission of contracts to ORR for directions or approval, beyond those for consultation in relation to applications under sections 17 and 22A, there are three key factors that applicants should consider:

- (a) the time required for the pre-application industry consultation (in most cases);
- (b) our need for sufficient time to come to a properly-informed decision on each application; and
- (c) the point at which the beneficiary will need rights to be approved in order for access proposals to be accepted into the working timetable (usually 40 weeks in advance of the relevant timetable).

3.89 We suggest at least six weeks be allocated for the industry consultation; a minimum of 28 calendar days for the consultation itself, and two weeks to address any issues raised by consultees. For applications where consultees may be expected to raise significant concerns, additional time should be factored in.

3.90 The time we require to consider an application will depend on its impact on the network and other operators, its complexity and the extent to which it departs from

the relevant model contract. Even a supplemental agreement concerning relatively few services submitted under section 22 can raise significant issues where, for example, network capacity is constrained.

- 3.91 To give us time to give proper consideration of an application before reaching and publishing our decision, and allow us to manage our workload, applicants should allow:
- (a) six weeks from submission to ORR of a more straightforward application (one that does not meet any of our criteria for focused regulatory scrutiny); and
  - (b) twelve weeks from submission to ORR of an application for a contentious contract (including those submitted under sections 17 or 22A and those meeting any of our criteria for focused regulatory scrutiny). The additional time should be allowed in order for ORR to seek additional evidence or clarification from the parties.
- 3.92 Where we are dealing with major applications from multiple applicants which potentially compete for the same capacity, our review may take significantly longer.
- 3.93 These timescales are indicative only. We may be able to complete our review and come to a decision sooner than the timescales mentioned above. But there will inevitably be applications that require longer, particularly if a hearing is required (see later in this section).
- 3.94 Our policy is to reach decisions on all access applications within six weeks of receipt of all relevant information. It will be for ORR to decide when we have all relevant information. This is consistent with our separate statutory obligation under the Regulations, where ORR is required to conclude Regulation 32 appeals within the same timeframe.

### Advice on timescales for submitting an application

- 3.95 When considering the timing for making an application to ORR, beneficiaries should be aware that there are significant lead times in the compilation of the working timetable. Beneficiaries can make an access proposal in the timetable development process in the expectation of having the necessary rights in place by the time the services will run but, where there is insufficient capacity to accommodate all requests, they take the lowest priority and may not be included in the final timetable.

- 3.96 For example, if it is important for a beneficiary to have certainty in respect of new services it wishes to operate in a timetable starting in December, it would need approved access rights in place by the Priority Date in the timetable development process, which is in early March of the same year. Working back, that suggests making an application to us by late November/early December of the previous year where the new rights are likely to raise issues of regulatory significance or complexity, and by no later than mid-January for a less significant application (these dates include some additional time to cover the holiday period).
- 3.97 Beneficiaries may not always require priority in the timetable development process, e.g. where new or revised services would be on a part of the network where capacity constraints are not an issue. Passenger operators should, as a minimum, aim to have the new rights approved by ORR and in place so that the services to which they apply can be reflected in the public timetable at least 12 weeks before the services are due to run (T-12) so that passengers can buy advance purchase tickets. This means submission of an application no later than 18 weeks in advance of the timetable change date for minor variations and 24 weeks for more significant or complex changes.
- 3.98 The processes and timescales for compilation of the timetable established under Part D may be changed over time, through the Network Code's own change procedures in Part C. Applicants are strongly advised to check at an early stage that they are working to the latest processes and timescales.
- 3.99 We will make every effort to deal with applications in a timely manner, but we can give no guarantee that applications allowing less time for our consideration will be processed by the date sought (nor, indeed, that the rights sought and/or commercial terms attaching will necessarily be approved). Applicants should therefore make applications in good time.
- 3.100 Where applicants believe that they will not be able to meet the timescales set out above, they should contact us as soon as possible in order to discuss whether and how it might be possible to manage the application to facilitate approval by the desired date.

## Hearings

- 3.101 A hearing enables us to probe and test issues of particular and wide-ranging regulatory concern together with relevant interested parties. Being able to air issues with several parties at once allows interested parties to raise issues of concern and allows for clarification as the hearing progresses. A hearing can be a

useful and efficient opportunity to test the issues raised in written representations, and to test the recommendation that ORR might be minded to make, before final decisions are taken. A hearing may be held in addition to the specific meetings which we may offer, or require one or both parties to attend, to discuss specific aspects of an application.

- 3.102 However, given the significant time and resources required for hearings, we only hold them by exception and where we consider that they will add value to our decision making process. We will consider on a case by case basis whether a hearing is appropriate. If we decide to hold a hearing, we will invite all parties we consider likely to be directly and materially affected by, or to have a substantial interest in, the application. We will generally expect to put questions to the person seeking access rights, Network Rail and any relevant funders. We may also invite others to present their concerns, and may also allow cross-questioning (through the chair). We will not expect those present to repeat material that has already been supplied in written representations, but may invite examples to be given.
- 3.103 We will usually give attendees advanced notice of the agenda, of issues we expect to follow and its timing. For significant new contracts, a hearing may run for more than one day, and it may be appropriate to hold separate hearings to consider separate issues. It will always be open to those attending to arrange to be represented or assisted by legal advisers. A transcript will be taken of the hearing. A draft will be available to those attendees who have spoken, to give them the opportunity to propose corrections to their own words, using Hansard Rules, before the hearing transcript is published on our website (with any necessary confidentiality redactions).
- 3.104 For matters we consider confidential, in line with the test in section 71 of the Act, we may arrange for a hearing to be closed, in whole or part, and attended only by the relevant parties. We will not accept further material or representations after the hearing has concluded, other than in response to any further questions we may pose, or request or permit before or during the hearing.

## The processes for agreed applications – sections 18 and 22

- 3.105 Sections 18 and 22 of the Act cover applications agreed between the beneficiary and the facility owner for new contracts (section 18) and supplemental agreements amending existing approved contracts (section 22).

## Applications under section 18

- 3.106 We have established criteria to enable us to adopt a more proportionate approach to our review of agreed applications under sections 18 and 22. These criteria for focused regulatory scrutiny are set out below.
- 3.107 The section 18 approval process comprises the five key steps described below (and is illustrated in a flow chart at the end of this section):

### Step 1 - Development

- 3.108 In developing a new contract, we will expect the parties to have had discussions with other potentially or actually affected persons, including other freight customers and freight and passenger train operators. We also expect Public Service Operator (PSO)/concession passenger operators to have discussed the application with their funder. Where capacity is constrained, we expect Network Rail to have undertaken the appropriate modelling or other analysis necessary to ensure that the rights being sought are capable of being accommodated. We also expect any additional risks arising from the rights being sought, including the wider performance implications, to have been fully assessed and appropriate control measures developed.
- 3.109 Once Network Rail has satisfied itself that the capacity is available and the parties have agreed on contractual terms and completed the relevant sections of the application form, they will be in a position to start a formal consultation of relevant industry parties.

### Step 2 – Industry consultation

- 3.110 Network Rail should undertake the consultation for all section 18 applications where it is the facility owner. This should be conducted in line with the ORR's Industry code of practice for track access application consultations. Where consultees raise issues, the applicants should use all reasonable endeavours to resolve those issues before submitting an application to us. Network Rail will also send us a copy of the consultation so that we can identify potential issues and concerns at an early stage, prior to submission to us for our substantive comments.

### Step 3 - Submission of application

- 3.111 Both parties must ensure that they would be content to enter into the contract as submitted.

- 3.112 It is the responsibility of Network Rail and the beneficiary to submit a competent application. We will not, as a matter of routine, look for drafting errors or scrutinise the robustness of the proposed contract. Should we identify significant problems or drafting errors, we will inform the applicants and may decide, depending on their extent and significance, to reject the application.
- 3.113 Where a section 18 application is for renewal or replacement of rights held under an existing contract, the parties must supply a track-changes mark-up of the existing contract (other than where the changes reflect the adoption of the relevant model access contract, in which case our concern will be to identify all departures from or additions to the model). For the access rights themselves, a separate schedule or mark-up should also be supplied.

### Step 4 - Consideration

- 3.114 We will confirm receipt of the application and provide the name of the ORR case officer assigned to deal with it. In addition to any issues we have raised during the consultation process, we will then:
- (a) check that the application form has been completed properly and any relevant documentation has been included (incomplete applications may be rejected);
  - (b) review any outstanding objections or concerns raised through the consultation;
  - (c) review the application to establish whether any aspects of the contract meet the criteria for focused regulatory scrutiny (see below); and
  - (d) carry out a high-level check to ensure that the contract does not do anything material which is not described in the application form.
- 3.115 We would then expect in principle to approve an application where we are satisfied it does not meet any of the criteria for focused regulatory scrutiny. However, as our ultimate criteria for approval of track access applications are our statutory duties, where a significant issue arises in an application that does not meet any of the criteria, but which we consider merits focused scrutiny, we will review it in more detail to ensure the decision we reach is consistent with our duties and any relevant legislation. Accordingly, we reserve the right to review an application in more detail even if the criteria suggest we would not.
- 3.116 Where we consider that an application meets one or more of the criteria, or if we consider that we need to review it in more detail, we will scrutinise it and, where

necessary, discuss the proposed contract with the parties, and may write seeking formal responses on matters of significance.

- 3.117 If we identify any key issues on which we would appreciate the specific comments of other industry parties, or which we wish to draw to the attention of those who were consulted on the application, we will send a letter or email detailing those issues.

### Step 5 - Conclusions and directions

- 3.118 Once we have reached our conclusions on a proposed contract we may either:

- (a) issue directions to Network Rail to enter into it within a specified period;
- (b) issue directions to Network Rail to enter into it, within a specified period, subject to specified modifications (under section 18(7) of the Act); or
- (c) reject the application.

- 3.119 If we require modifications to the draft agreement submitted we must first consult the parties. When directing that the contract be entered into subject to modification, we must allow Network Rail 14 days to give notice of any objections. If Network Rail gives a notice of objection during that 14-day period and does not sign the contract, the operator may make an application under section 17 for directions, which would be binding. In such circumstances, we would need to adhere to the process set out in Schedule 4 to the Act, but would still expect to be able to complete the process more quickly because the proposed contract would be similar to, or the same as, the one on which we had just issued directions under section 18.

- 3.120 If Network Rail does not give a notice of objection during the 14-day period, our directions are binding and enforceable through civil proceedings by us or by the applicant. The directions do not apply to the beneficiary of the contract, who may decide not to sign the directed contract.

- 3.121 We will give the parties a decision letter explaining the reasons for our decision. Subject to section 71(2) confidentiality exclusions, we will promptly publish this on our website.

- 3.122 New contracts may only be entered into by the parties once ORR has issued directions. If the beneficiary fails to enter into the contract within the specified period, the obligation on the facility owner lapses. The facility owner can still enter

into the contract if it wishes. The parties may also ask ORR to vary the directions (Section 144(3) of the Act) to extend the date for compliance.

- 3.123 Within 14 days of the contract being made, Network Rail has a contractual obligation to send a copy to ORR for the public register (clause 18.2.4 of the relevant model contract). Failure to do so is an offence under sections 72(5) and (6) of the Act.

### Applications under section 22

- 3.124 The process we expect to follow for applications under section 22 of the Act is set out below. It generally follows that for section 18 applications, but there are two key differences:
- 3.125 Under section 18 ORR has the ability to approve a proposed contract, reject it, or approve it subject to specified modifications being made, whereas under section 22 we may only approve or reject an application. In order for the parties to take account of any modifications we may require to an agreement before approving it we have established a process whereby the parties submit a draft agreement informally for our comments in advance of the formal submission. After reviewing the draft agreement we will advise the parties whether we will require any amendments to the proposed supplemental agreement and invite formal submission under section 22. This avoids us having to formally reject an application where we are generally content but want some amendments made before giving our approval.
- 3.126 Under section 22 we do not issue directions to Network Rail to enter into the approved supplemental agreement; we may only approve or reject the agreement. Therefore, Network Rail and the beneficiary formally submit the supplemental agreement, signed and dated by both parties, for our approval.
- 3.127 Copies of our approval notice and the supplemental agreement will be placed on our public register and published on our website (subject to any section 71(2) confidentiality exclusions).
- 3.128 Within 28 days of our decision being issued, Network Rail is required to provide a consolidated version of the full contract as amended, which we will publish on our website.

## The processes for ‘non-agreed’ applications – sections 17 and 22A

- 3.129 Sections 17 and 22A of the Act provide for beneficiaries to apply directly to ORR for access to the network where they have been unable to reach agreement with the facility owner. Section 17 provides for a beneficiary to make an application to ORR for it to direct the facility owner to enter into a new contract. Section 22A applies where a beneficiary with an existing contract is seeking amendments to that contract to permit “more extensive use” of the network.
- 3.130 “More extensive use” is defined in Section 22A (2) of the Act in relation to track access agreements as increased use for the purpose for which the applicant is permitted by the access agreement to use the railway facility. This may include changes to a contract to include additional services on existing routes, extensions to existing services, or new services on new routes.
- 3.131 Section 22A cannot be used to extend the duration of an existing contract. In such circumstances, a new contract under section 17 would be required to take effect on the expiry of the existing contract.
- 3.132 We must not give directions under section 17 or 22A where:
- (a) the railway facility in question has been exempted from the provisions of section 17 of the Act (under section 20 of the Act, including by virtue of the CME0);
  - (b) performance of an access contract as contemplated by the proposed directions would necessarily involve the facility owner in being in breach of an existing access contract; or
  - (c) as a result of an obligation or duty owed by the facility owner which arose before 2 April 1994, the consent of some other person is required by the facility owner before the facility owner can enter into the proposed contract.
- 3.133 We are also unable to issue directions under section 17 in relation to access to the network where that access is for the provision of network services (such as maintenance work) to that network.
- 3.134 Schedule 4 to the Act establishes certain mandatory elements of the processes for applications under sections 17 and 22A, including some minimum fixed timescales. The overall processes we expect to follow are, nevertheless, the same

in most respects to those for applications under sections 18 and 22, consisting of the five key steps described below.

### Step 1 - Development

- 3.135 We recognise that the extent of development work to address any issues arising out of the operation of services may be limited where a beneficiary has not reached agreement with Network Rail. On the other hand, the beneficiary's use of section 17 or 22A may reflect disagreement on only a few specific aspects of a proposed contract. In order to process an application swiftly, we will therefore wish to see the product of such development work as has been possible, including capacity and performance modelling and timetabling and consultation with other parties.
- 3.136 Beneficiaries should negotiate and agree terms with Network Rail where possible, to promote the most effective working relationship in the delivery of services. If a beneficiary considers it likely that agreement will not be reached, we strongly encourage early consideration of submitting a section 17 or 22A application, rather than regarding such an application as a last resort, given the timing considerations that apply.
- 3.137 The submission of a section 17 or 22A application need not mark the end of negotiations. After such applications have been submitted, beneficiaries should continue to negotiate with Network Rail. If agreement can be reached, the disputed application can be withdrawn and an agreed application under section 18 or 22 submitted. It may be more expedient to continue the section 17 or 22A process whilst having regard to the fact that the disagreement between the parties has been resolved.
- 3.138 Where a beneficiary reaches agreement with Network Rail on certain aspects of a proposed contract, we will take into account any joint representation they make alongside any other representations we receive through our wider consultation. We strongly encourage beneficiaries to discuss their requirements with ORR at an early stage.

### Step 2 – Discussion with other operators and industry consultation (where applicable)

- 3.139 Where a beneficiary intends to make a section 17 or 22A application, we recommend that it discusses informally at an early stage its plans with those parties likely to be most affected by its proposals. This will help to identify the main concerns that other parties are likely to have and enable the applicant to attempt to resolve those concerns sooner rather than later.

3.140 While a beneficiary can submit an application under section 17 or 22A directly to ORR and ask us to conduct the industry consultation, we strongly suggest the beneficiary asks Network Rail to host the consultation as there are established processes with which consultees are familiar and a dedicated page on Network Rail's website. This does not include the statutory consultation that ORR must carry out in accordance with Schedule 4 to the Act for section 17 and 22A applications.

### Step 3 - Submission of application to ORR

3.141 Any application for directions under section 17 or section 22A must be made in writing to ORR (this can be done by email) and must:

- (a) contain particulars of the required rights;
- (b) specify the terms which the applicant proposes should be contained in the proposed contract; and
- (c) include any representations that the applicant wishes to make with regard to the required rights or the terms to be contained in the proposed contract.

3.142 Our application forms set out the information we need in order to consider an application and to facilitate the process of consulting other bodies. The forms also seek information on the extent to which the rights sought differ from those already held in any existing contract. This information is helpful in assisting us (and consultees) to gain a swift understanding of the practical implications of the rights sought in comparison to the current position. In particular, we will wish to understand exactly what is in dispute between the applicant and Network Rail, and what, if anything, has been agreed. Our scrutiny of a proposed application will not be limited to areas of disagreement.

### Step 4 - Consideration and consultation

3.143 We will then follow the statutory process for dealing with such applications as set out in Schedule 4 to the Act. On receipt of an application under section 17 or 22A, we must:

- (a) send a copy of the application to the facility owner and invite it to make written representations to us, allowing it at least 21 days for this;
- (b) send the applicant a copy of the facility owner's representations, allowing it at least ten days to submit further representations;

- (c) direct the facility owner to provide us with a list of “interested persons” – allowing at least 14 days for the facility owner to respond;
- (d) on receipt of the list, invite any ‘interested persons’ to make written representations, allowing them at least 14 days to respond; and
- (e) copy any representations received from any “interested persons” to the applicant and the facility owner seeking any representations they wish to make, allowing them at least ten days to respond.

3.144 Where an adequate industry consultation has not been conducted by the applicant or Network Rail, we will consult widely so as to ensure that we have a well-informed basis for coming to our conclusions. We would generally expect to allow four to six weeks for submission of written representations depending on the nature of the application. If we identify any key issues on which we would appreciate consultees’ specific comments, or which we wish to draw to consultees’ attention, we will send an email detailing those issues.

### Step 5 - Conclusions and directions

3.145 In line with the provisions of Schedule 4 to the Act, we must inform the applicant, the facility owner and “interested persons” (if any) of our decision. If we decide to give directions under section 17 to the facility owner requiring it to enter into an access contract or directions under section 22A for amendments to an existing contract, the directions must specify:

- (a) the terms of the access contract or the amendments to be made; and
- (b) the date by which the access contract must be entered into, or amended, as the case may be. Subject to section 71(2) confidentiality exclusions, we will publish our decision and the reasons for it.

3.146 As with a section 18 application, for directions issued under section 17 the facility owner is released from its duty to comply with the direction if the applicant fails to enter into the access contract on the terms as directed by the date specified (it is open to us to vary our directions to provide more time). This situation does not extend to directions issued under section 22A. Any direction issued under section 22A applies to both the facility owner and the applicant (i.e. both parties must enter into the supplemental agreement).

3.147 Once the contract or supplemental agreement is entered into, the facility owner must send a copy to us within 14 days, after which a copy, less any section 71(2) confidentiality exclusions, will be placed on our public register.

## Track access options

- 3.148 A Track Access Option (TAO) is a special type of TAC, as defined in section 17(6) of the Act. With a TAO, the infrastructure manager confers an option, exercisable by the holder or its agent, to use its network at a specific time in the future. TAOs can be held directly by train operators, or by other parties who can designate a train operator to draw the rights from the TAO into a TAC at the appropriate time to utilise them on behalf of the TAO holder.
- 3.149 We envisage that access options for track access will be proposed where an applicant wishes to secure future access to a network on the basis of a focused and dedicated financial investment in a railway facility. Further information on TAOs is available in our separate guidance [“Investing in the railway: securing access”](#). If you intend to make an application to ORR for an access option, please contact us (as well as Network Rail) to discuss your plans, and the likely timing of the application.

## ORR’s powers under section 16A-I

- 3.150 In October 2005 sections 16A – I of the Act were brought into force. The mechanism in these sections allows an applicant to apply to the ORR to direct the improvement or construction of a new railway facility. The Department for Transport (“DfT”) has said that the power is intended for use when it is clearly in the interests of the railway generally for the improvement to be made, but an individual railway operator may have no commercial incentive to make it unless a direction is given. We have published a [code of practice](#) for dealing with any such applications. To date, this power has not been exercised.

## Facility access exemptions

- 3.151 Our approval of a contract providing access to a network is not required where the network in question has an access exemption. A network facility owner may apply to us or the Secretary of State for an exemption, under section 20(3) of the Act. Exemption can be in respect of the whole or part of the network and conditions can be attached which, if broken, may lead to revocation of the exemption.
- 3.152 The Secretary of State exempted certain classes of railway facility from the access (and licensing) provisions of the Act under the terms of the CME0. This exemption applies to certain railway assets that were already privately operated in the period before the Act took effect and for facilities (including networks) for which the regulatory regime established by the Act was considered inappropriate.

- 3.153 We have also approved network exemptions in specific instances, such as for extensions to the Docklands Light Railway. Applicants seeking access to a network should check with the facility owner whether the network in question is exempted from the access provisions of the Act. Such networks do not require agreements to be directed by ORR, and neither can applications be made in respect of them under section 17 of the Act. For such facilities, however, appeal mechanisms may be available under the Regulations.
- 3.154 We will only grant an exemption where we are satisfied that doing so would be consistent with our statutory duties. Facility owners wishing to make an application for an exemption under section 20 should follow the process set out below. We are happy to provide further information where required on the making of such an application and, if necessary, to hold a pre-application meeting.
- 3.155 Exemptions under section 20(3) apply only to the provisions of sections 17, 18 and 22A of the Act; they do not provide exemption from the appeal mechanisms provided by Regulation 32 of the Regulations.

### Making an application

- 3.156 Where a facility owner wishes to obtain an exemption for all or part of its network, it should write to us stating that it is applying under section 20 of the Act for an exemption from sections 17, 18 and 22A of the Act and include the following details:
- (a) (a) the location of the network and any other facilities such as stations or light maintenance depots along the network that the facility owner would also wish to be exempted;
  - (b) the type of network;
  - (c) a description of what the network is used for, including the type(s) of services that operate over it or are planned to operate over it;
  - (d) what, if any, connections there are to other networks, with a map (whether hand drawn or printed) illustrating these connections;
  - (e) a description of any infrastructure constraint that could prevent third parties using the network, such as non-standard electrification systems; and
  - (f) the reasons why it is seeking the proposed exemption (including the benefits to the facility owner and other users that would accrue if the facility was excluded from the access regime of the Act).

- 3.157 If we require any further information or clarification on the application, we will write to the applicant.
- 3.158 After we have received the application and any supporting information, we will make an initial decision on whether to approve or reject it. If our initial view is that the application should be rejected, we would normally give the applicant at least four weeks to make further representations and to hold discussions, after which period we will reach a final view. If we are minded to grant the access exemption applied for, we will proceed to statutory consultation.

### Consultation

- 3.159 Where we are minded to grant an access exemption, section 20 of the Act requires us to consult the Secretary of State and to publish a notice setting out our intention, giving our reasons and specifying a period of at least 28 days for representations to be made. This notice would be published on our website and we would also expect to inform those parties whom we consider might be affected by the proposed exemption. We would normally expect to give the minimum 28 days for the making of representations, but if we consider that a longer period is appropriate we will inform the applicant in advance.
- 3.160 Where we are minded to grant the facility access exemption and proceed to statutory consultation, the applicant will be asked to review a draft of the statutory notice. This is to ensure that the details on the notice, particularly the description of the facility, are accurate.
- 3.161 Once the statutory consultation period has ended, we will consider any representations received and not withdrawn, and have any necessary discussions with the applicant. Where representations raise significant regulatory or other issues, we may hold discussions jointly with the applicant and relevant third parties, or give third parties the opportunity to respond to the applicant's comments on their representations.

### Decision

- 3.162 In making our final decision we will have regard to any material issues arising from our consultation, our statutory duties and any specific criteria on access exemptions that we may publish in due course.

### Timescales

- 3.163 The timescales for an access exemption application would depend on the nature of the network in question. As a minimum, we would expect an application to take

at least eight weeks from the date of receipt. Applications are likely to require more time where we require further information in order to complete our review or where there are significant representations arising from the statutory consultation.

## Criteria for focused scrutiny of section 18 and 22 applications

- 3.164 The following section sets out the criteria we take into account when considering whether agreed applications under sections 18 or 22 should receive focused regulatory scrutiny. All applications under sections 17 or 22A will naturally be contentious and will require more detailed scrutiny.
- 3.165 In addition to these criteria, ORR reserves the right to review any issue in an application where it considers it necessary in order to ensure that its decisions are consistent with its statutory duties.

## Disputes

- 3.166 Any application involving a dispute between the applicants and a third party (arising from the pre-application industry consultation) will require focused scrutiny. We will review the representations of each party and may then require further work or information.

## Economic and Efficient use of capacity

- 3.167 This category relates to applications that may raise concerns about the efficient allocation of capacity. Access rights must be allocated efficiently and in line with our statutory duties. Therefore, we will wish to scrutinise applications which relate to access rights that could or would be inconsistent with either a route study produced under the Long Term Planning Process, or a relevant ORR decision; or where proposed rights would involve the use of ‘congested infrastructure’ or network with multiple operators that is particularly busy.
- 3.168 Where there is a potential inconsistency between proposed access rights and a route study we will wish to understand the implications for the plans set out in that document and the justifications for the inconsistency. For those cases we consider particularly significant, we may conduct, or require, economic assessments of the different uses of the capacity.
- 3.169 For “congested infrastructure” (as defined in the Regulations) or other particularly busy parts of the network that have not been declared congested, we will want to ensure that scarce capacity is allocated in the most beneficial manner. This means

that, even if no disputes are lodged by third parties in the consultation, we may give more scrutiny to an application to ensure that our decision on whether to approve access rights would be consistent with our duties.

### Performance

- 3.170 Poor operational performance caused by one operator or Network Rail is very likely to impact other operators and users of railway services. As this can lead to changes in customer demand or reduce available capacity, we have a duty to ensure that proposed services would not unduly lead to materially adverse impacts on performance.
- 3.171 While for all agreed applications we would expect Network Rail to have considered and addressed potential operational performance issues arising from an application for access rights, we would expect to give greater scrutiny where applications involve new or significantly amended services, or where there is insufficient operational performance experience. In such cases, we may want to review the expected performance impact to ensure that any approval would be consistent with our statutory duties. The applicants should therefore take steps to demonstrate that the impact of the services would not adversely affect operational performance.

### ORR policy issue

- 3.172 This category relates to applications containing an issue which is not covered by the established policy framework set out in our guidance, or where there is a proposal to disapply any part of the Network Code.
- 3.173 We usually need to be satisfied that contracts are consistent with our policies and guidance. If they are not, we need to understand the merits of the departure from our policy before deciding whether to approve the contract. Applicants should approach us at an early stage to discuss any such proposals. Equally, where a new policy issue arises as a result of an application, we need time to consider and develop our view on it.
- 3.174 Where a particular policy applies to a proposal, the applicants should have regard to that policy in developing their proposal and provide any necessary explanations in their application form.

### Charging and commercial terms

- 3.175 We need to ensure that the proposed charging and compensation provisions or terms are fair, consistent with our policies and otherwise consistent with the

law. Therefore, applications that contain non-standard charging provisions, or any change to existing charging provisions, may be subject to increased scrutiny. For example:

- additional or revised charges (such as for new vehicles, or to reflect an additional charge for an investment); or
- any changes to the commercial terms (e.g. to the liability caps).

3.176 Where a non-standard charge (e.g. an additional charge) is proposed in a contract, we expect:

- Network Rail to confirm and demonstrate that the charge reflects the incremental direct costs it incurs;
- Network Rail to confirm that the charge would not be recovered through the charging framework established at the last periodic review settlement; and
- any additional charge to be explicit in the contract.

### Model clauses

3.177 It is important that the robustness of industry contracts and the commercial balance that is reflected within them is retained. We will only approve non-model clause provisions where we consider these are necessary and appropriate to the circumstances. We also need to be satisfied that the provision would not lead to Network Rail acting in an unduly discriminatory manner in contravention of its network licence or the Regulations.

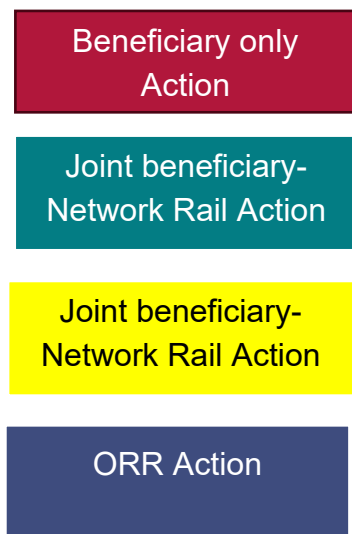
3.178 If we have approved a non-model clause arrangement within a particular access contract, we would not normally expect to scrutinise in detail that same departure in subsequent amendments to that contract.

3.179 As set out above, this criteria is not an exhaustive list and ORR reserves the right to review any issue in an application where it considers it necessary in order to ensure that its decisions are consistent with its statutory duties.

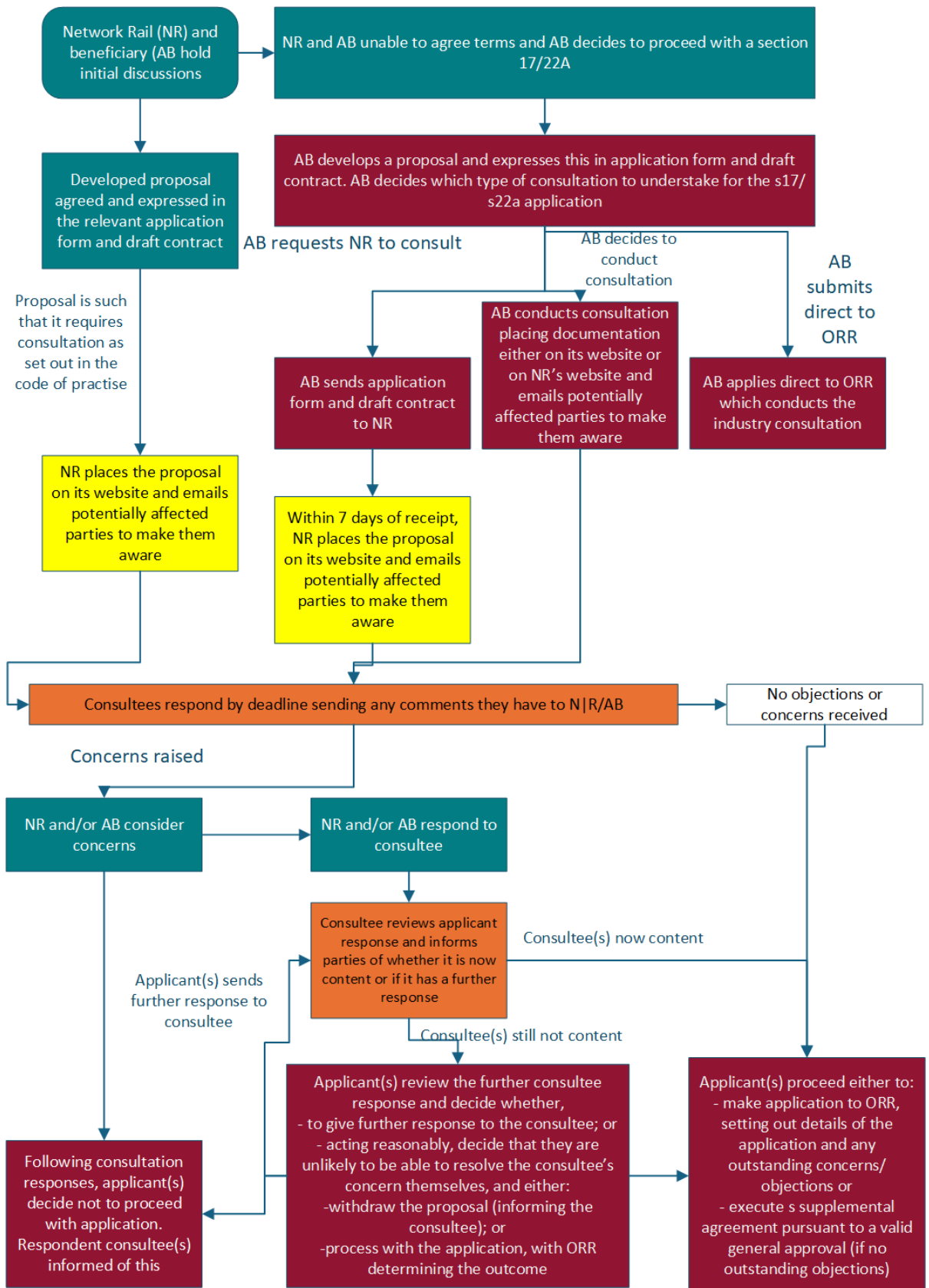
## Flowcharts

3.180 The following pages set out the process flowcharts for the pre-application consultation process and applications submitted under sections 17, 18, 20, 22 and 22A of the Act. The purpose of these is to provide a high-level guide. They should be read alongside the written guidance provided elsewhere in this document.

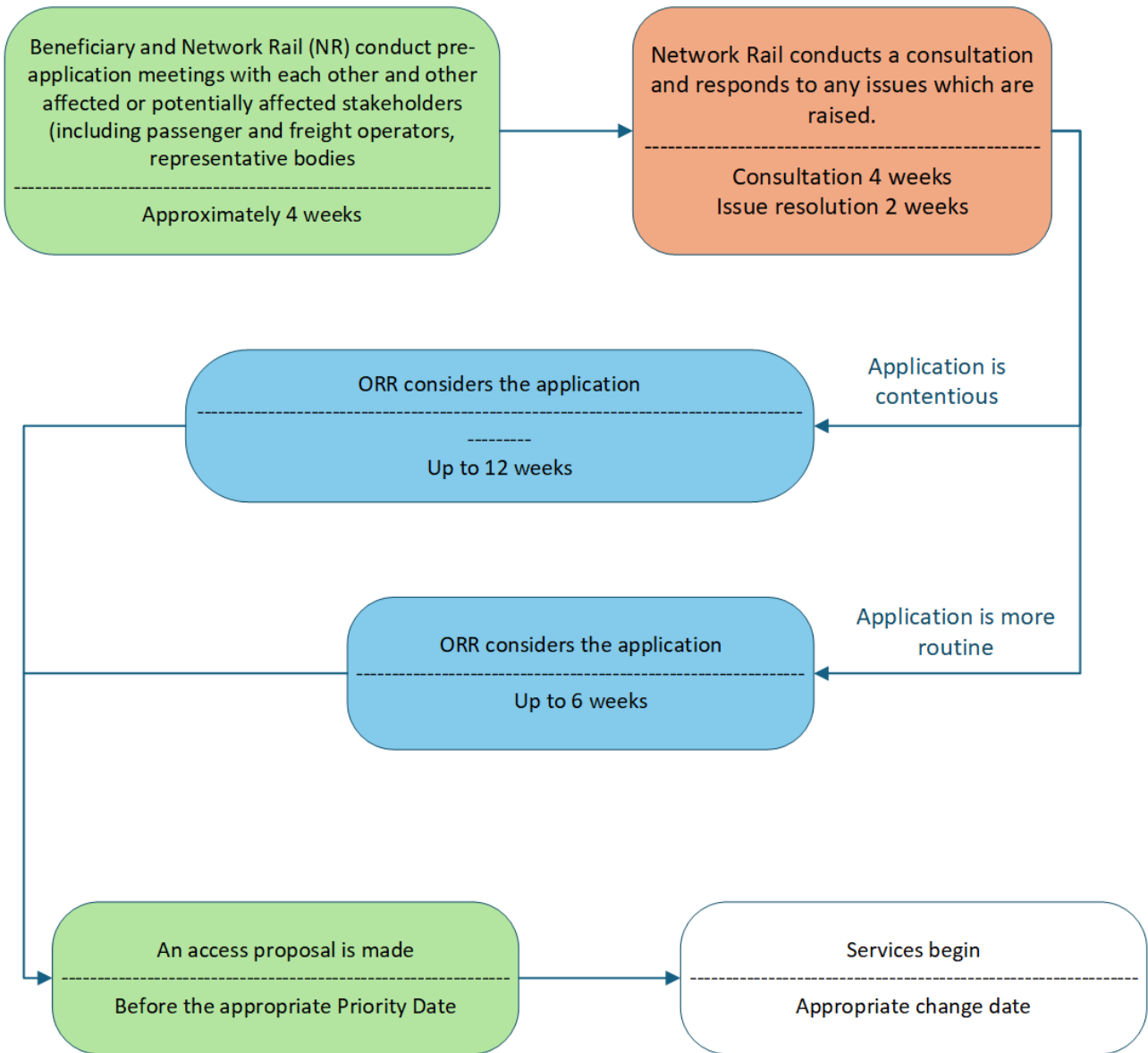
### Key for section 17-22A application process



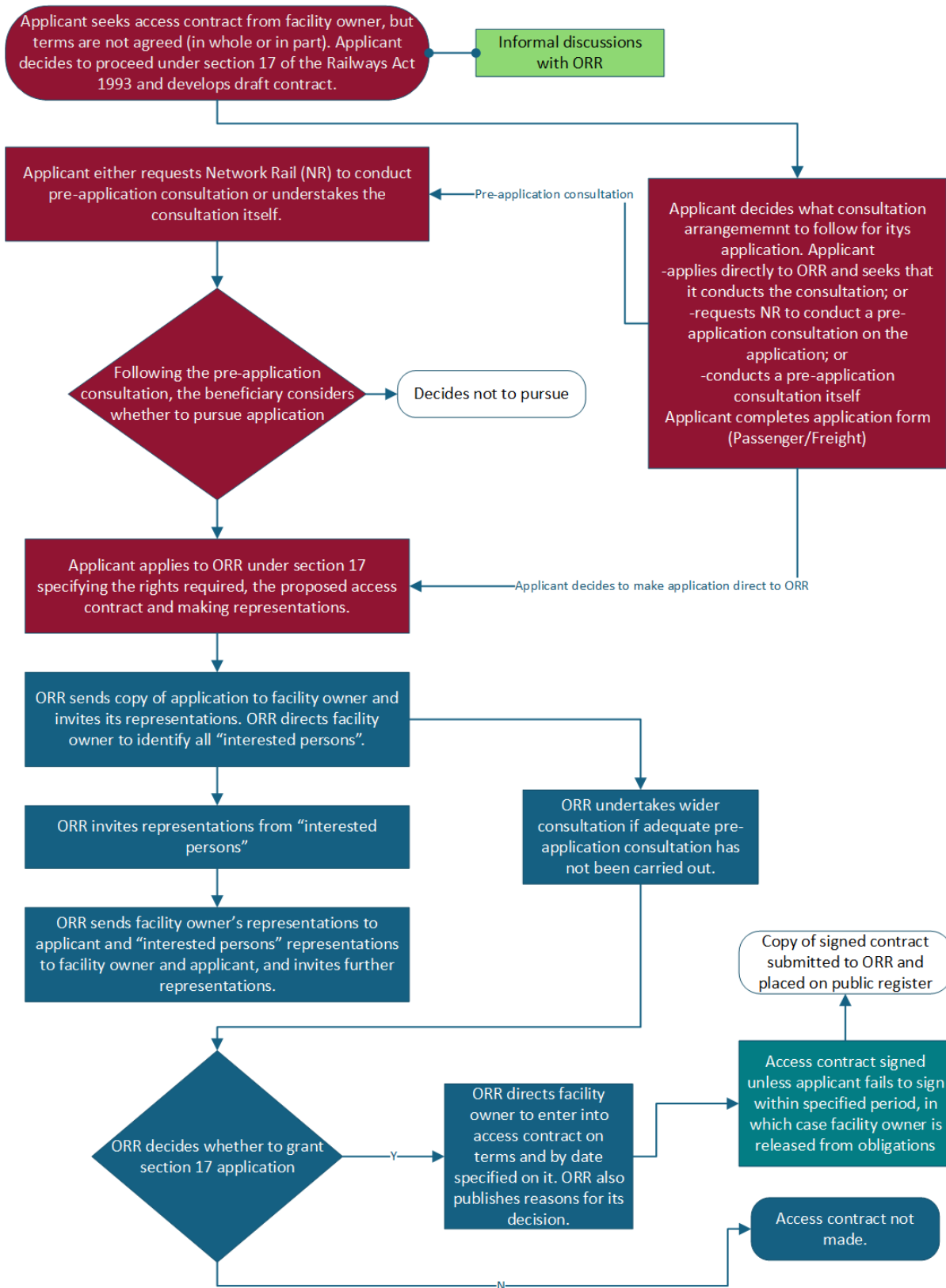
## Industry consultation process flowchart



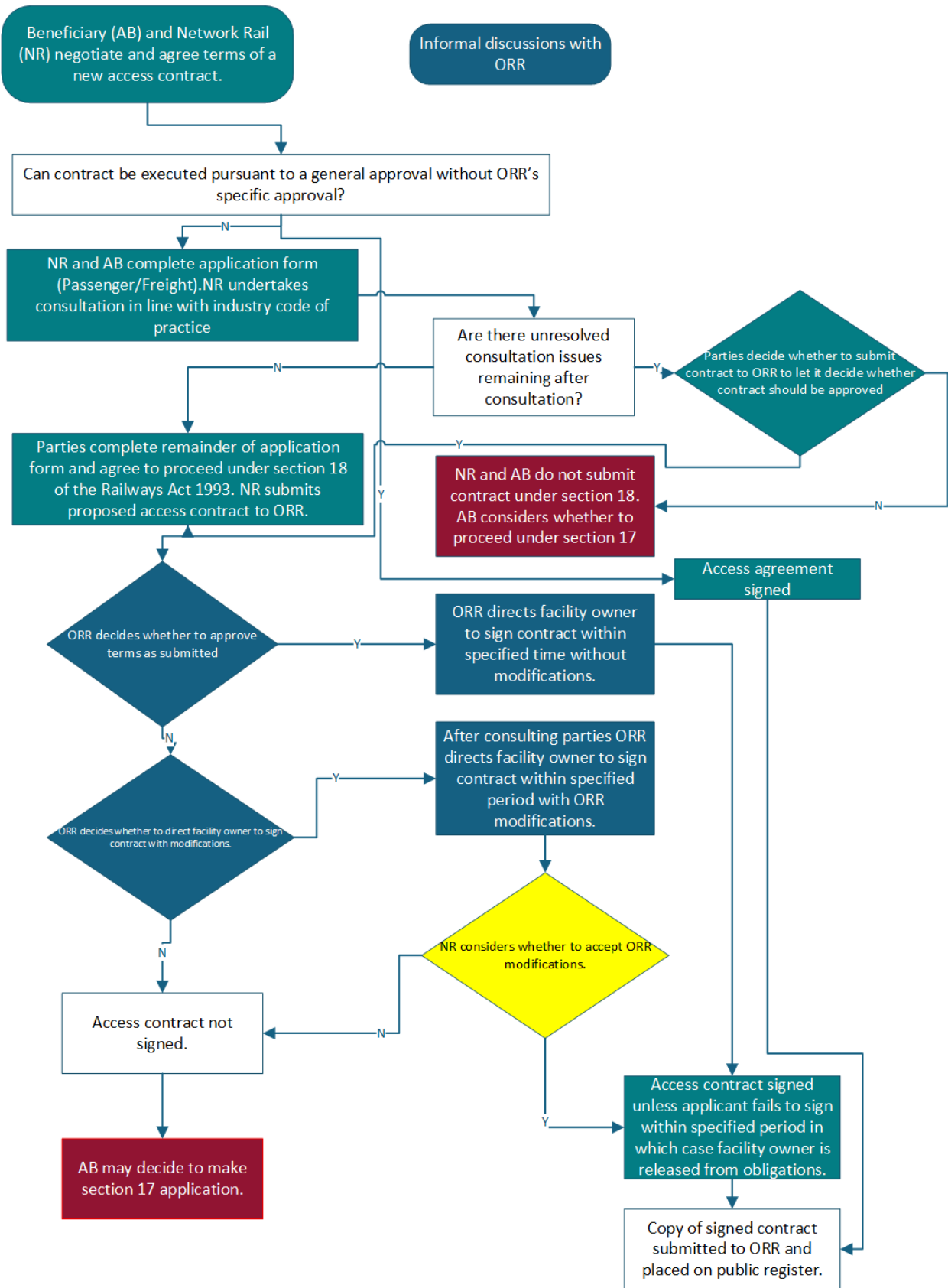
## Application process timescales



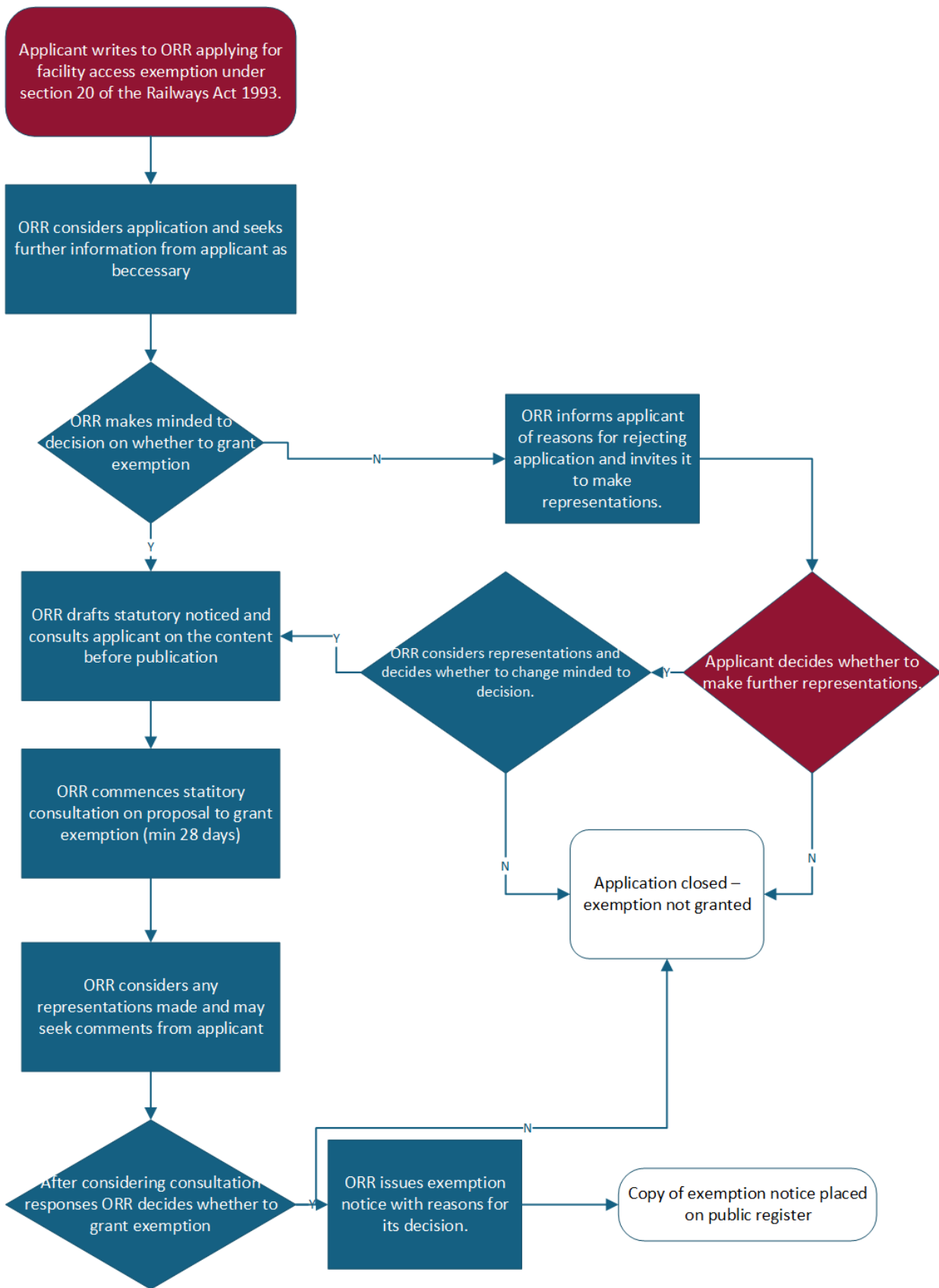
## Section 17 process flowchart



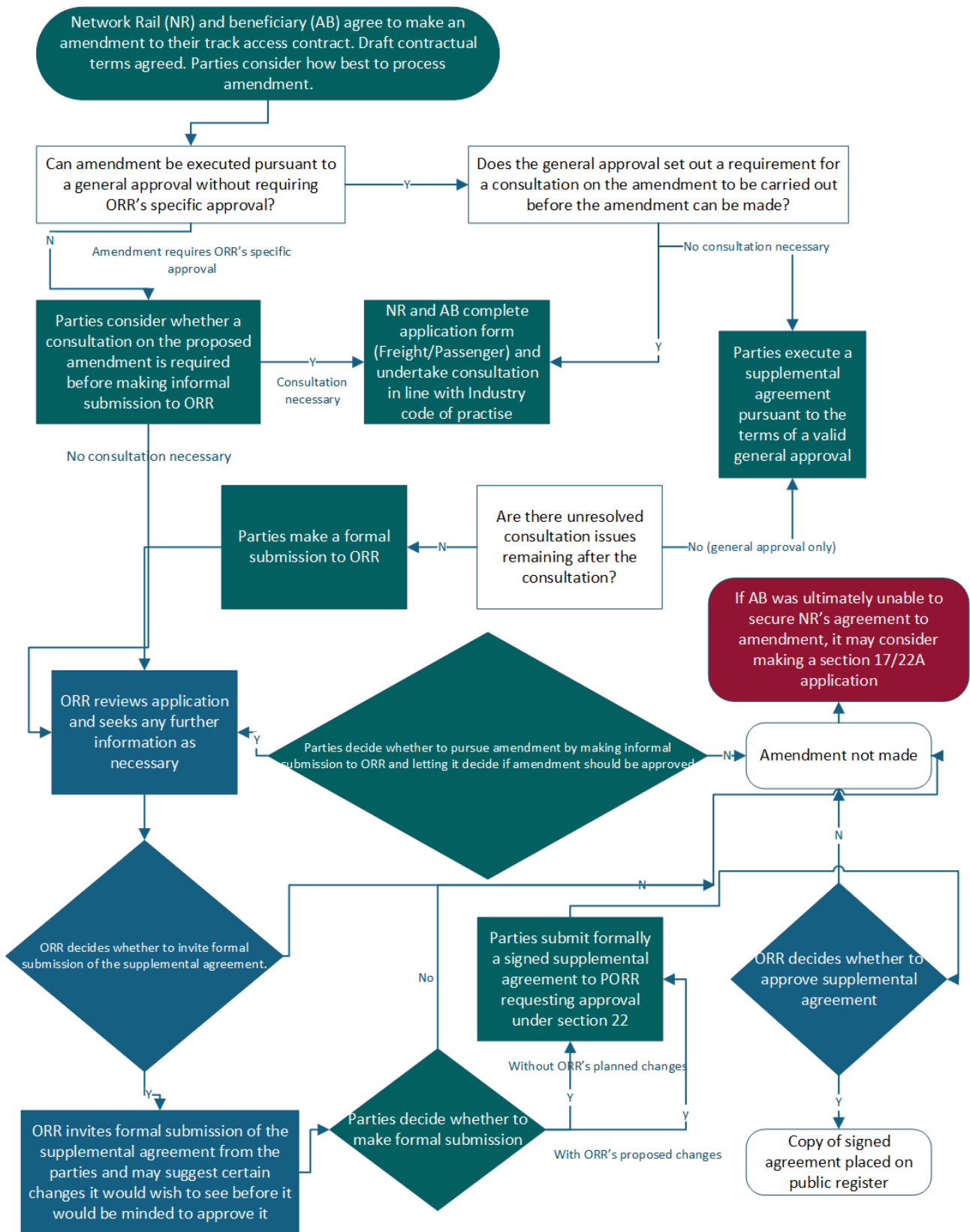
## Section 18 process flowchart



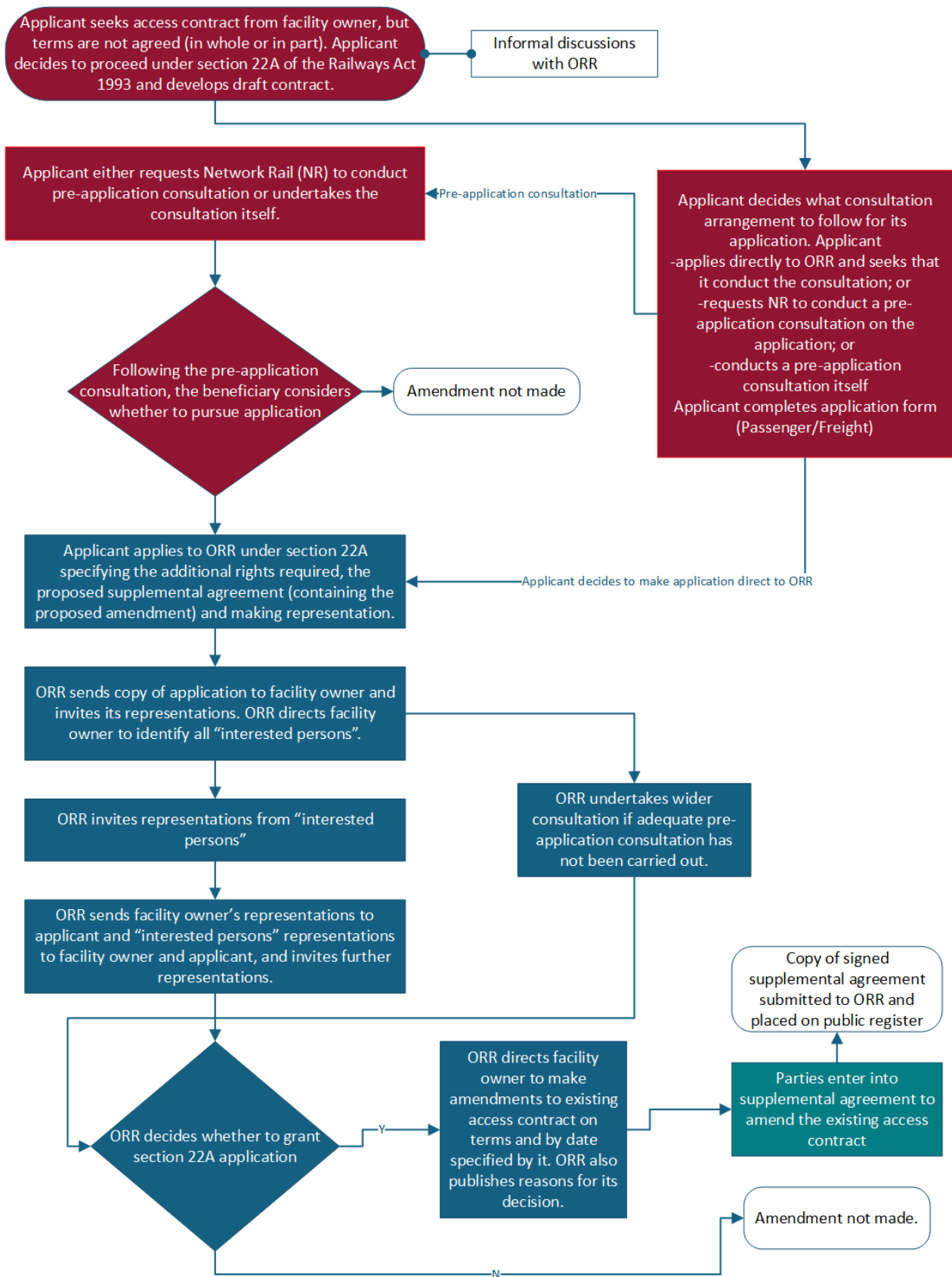
### Section 20 process flowchart



## Section 22 process flowchart



## Section 22A process flowchart



# 4. How we make decisions on the use of network capacity

## Introduction

- 4.1 When directing or approving new or amended access rights, we must ensure the fair and efficient allocation of network capacity. That entails making judgements about:
- (a) the realistic extent of spare capacity and the allocation of limited capacity between different requirements; and
  - (b) the operational integrity of the services in a proposed contract and their wider implications for network performance.
- 4.2 This section discusses the issues we expect to consider when in making these judgements. It addresses in turn:
- (a) capacity allocation and utilisation;
  - (b) the Long Term Planning Process;
  - (c) safety;
  - (d) operational integrity;
  - (e) defeasance;
  - (f) capacity choices;
  - (g) rights must be used;
  - (h) enhancement;
  - (i) congested infrastructure; and
  - (j) ancillary movements.

## Capacity allocation and utilisation

- 4.3 Our role is to oversee the fair and efficient allocation of network capacity by the infrastructure manager, and determine that allocation in certain circumstances, for

example, where an operator has been unable to reach agreement with the infrastructure manager.

- 4.4 In order to do this we need to understand the views of other train operators, potential train operators, and funders whose services or potential services may be affected by an application for access rights. Please refer to the [‘industry code of practice for track access application consultations’](#) which was, in itself, developed in consultation with the industry.
- 4.5 We are obliged by our statutory duties to have regard to the funds available to the Secretary of State for the purposes of his functions relating to railways and railway services, and any general guidance from the Secretary of State, Scottish Ministers or Welsh Ministers. The Department for Transport (DfT), Scottish and Welsh Ministers, Combined Authorities, Integrated Transport Authorities (ITAs) and Passenger Transport Executives (PTEs) (which are accountable to ITAs) will also be interested in any application which has a potential impact on securing value for money, given their respective budgets.
- 4.6 We will ensure that these organisations have the opportunity to make representations, where relevant, on individual applications for track access contracts. Their views of network capacity should be informed by the work that Network Rail is undertaking on the Long Term Planning Process, which will also help to inform our decisions on the allocation of capacity for specific applications, particularly when we are considering likely changes to the pattern of services over time.

## Long Term Planning Process (LTPP)

- 4.7 Condition 2.6 of Network Rail's [network licence](#) requires it to “establish and maintain long term plans to promote the long term planning objective”. As part of our ongoing holding Network Rail to account we require it to produce an annual narrative report, produced in quarter 1 of each year of control period 7, covering how the licence condition was addressed in the previous year.
- 4.8 We consider that the determination of what long term plans should be made for the network (and therefore, whether or not a LTPP study is fit for purpose) is a decision best managed between Network Rail (via the long term planning objective under the licence) and funders directly. We do not expect to comment on the proposals in any draft or final documents, nor contribute to individual studies, except where these reflect particular areas of regulatory focus. We will, however,

continue to manage any situation in which a party is concerned that they have not been treated fairly under the LTPP.

- 4.9 The LTPP includes an extensive consultation process, after which Network Rail publishes the completed proposed long term plan. If a party considers it has been unfairly treated or its views have not been given due consideration during the development of a LTPP study it can make representations to ORR within 30 days of publication. If we receive no representations we take no further action and Network Rail, having taken into account the views of funders, may establish the study. If we receive any representations we will consider them along with Network Rail's response before deciding (within 60 days of publication) whether to issue a notice of objection together with an explanation of why we have objected. In this situation Network Rail should publish and provide ORR with a revised proposal which addresses any deficiencies previously identified.
- 4.10 Network Rail has established long term plans for all the various regions of the country, as well as a freight long term plan and a network long term plan. These long term plans will be reviewed periodically. See Network Rail's website for further information on the LTPP.
- 4.11 We will expect to take into account the strategies described within long term plans when making access decisions, and whether proposed new rights are consistent with the long term plans. Long term plans should not assume that existing rights can be overridden: indeed, they should reflect existing rights. But neither would we expect to reject an application for proposed additional rights solely on the basis that those rights are not explicitly mentioned in relevant long term plans.
- 4.12 In their application form, applicants should state how the proposed access rights relate to relevant long term plans (including the freight long term plan). If proposed access rights are not consistent with a long term plan, the application form should explain the reasons for this and describe any benefits that this divergence might have, as we would need to understand and agree the public interest reason for this.

## Safety

- 4.13 We are unlikely to approve a track access contract or amendment to an existing contract if we believe it would give rise to safety issues that could not be properly addressed in time for the planned start date of services.

- 4.14 Our approval of access rights in no way lessens the responsibilities of the parties to ensure that the risks arising from their activities remain as low as is reasonably practicable. It is their responsibility to ensure that all appropriate risk control or mitigation measures have been taken and that they comply with relevant statutory regulations.
- 4.15 We expect that the operational rules for the network are designed to ensure that the timetable can be operated safely and that changes to access contracts in respect of the pattern and quantum of services can be accommodated safely. Changes to pattern and quantum may have wider effects, for example on Network Rail's ability to obtain access to the network for inspection and maintenance activity, and increasing the number of trains that pass over level crossings. Changes to the types of rolling stock which operators are permitted by their contracts to use on the network may also affect the risks arising from the operation of trains. Where changes to an access contract may generate such material changes to risk, we expect that the parties will have assessed these risks, identified adequate control or mitigation measures and progressed any necessary actions, including reporting the matter to ORR if necessary.

## Operational integrity

- 4.16 In considering the operational integrity of the access rights sought, we will want to be satisfied that:
- (a) the rights sought can be exercised in a way that means that a beneficiary's own services and those of any other beneficiary using the same routes operate reliably, and that they would not preclude Network Rail having adequate access to the infrastructure for efficient maintenance and renewal;
  - (b) the applicant intends and will be in a position to operate the services or have the services operated on its behalf; and
  - (c) their operation would not necessarily conflict with the exercise of rights held under another access contract. We will not intentionally approve rights that cannot be met without Network Rail thereby failing to meet its obligations in track access contracts with other beneficiaries. For applications made under sections 17 and 22A of the Act, the Act expressly states that we may not direct the facility owner to enter into such contracts.

## Defeasance

- 4.17 As mentioned above we are forbidden from directing new (under section 17(1) (b) of the Act) or revised (under section 22A (4) (b) of the Act) access rights that, if exercised, will necessarily clash with the exercise of a right held under an existing access contract, and we would never knowingly do this. However, in exceptional cases where there has been a risk that there might be such a clash, we have previously included a defeasance clause in the contract. The defeasance clause defeases (i.e. nullifies) any right in the new contract (rather than the whole contract) that is subsequently found to conflict with the exercise of a right held in another pre-existing contract to the extent and for the timetable periods necessary to avoid the conflict. A defeasance provision can also provide for appropriate compensation to be payable to the beneficiary by Network Rail.
- 4.18 We will only expect to consider directing the inclusion of a defeasance provision in an access contract where it has not been possible to be certain about the adequacy of capacity. In most circumstances Network Rail should be in a position to know what capacity exists and what it has sold. We would not expect a defeasance provision to be included in any access contract submitted to ORR under section 18 of the Act, as Network Rail should have agreed all aspects of the proposed access contract with the beneficiary, including the extent of the access rights within it.

## Capacity choices

- 4.19 We consider that there are certain key choices which need to be made in the allocation of network capacity between:
- (a) alternative uses of scarce capacity (i.e. whether for passenger or freight);
  - (b) different passenger and freight train operators (and funders) wishing to use the same scarce capacity;
  - (c) more trains and network performance; and
  - (d) the time required for safe, effective and adequate maintenance and renewal of the network.
- 4.20 These choices need to be well informed by analysis and quantification of the physical and economic trade-offs involved.

## Capacity choices: Consideration of alternative access rights

4.21 The access rights sought may need the timing of other beneficiaries' services to be changed (within their existing rights), or constrain the aspirations of other beneficiaries to amend their access rights and/or seek new access rights in future. In these cases, we expect to have regard to the firmness of any other beneficiaries' alternative plans for the capacity being sought (e.g. the extent to which they are backed up by availability of suitable rolling stock, the state of negotiations with the facility owner etc.). In comparing alternatives to the rights sought, we will expect to consider:

- (a) the relative benefits to the users of railway services of the different service patterns, including the implications for performance and reliability;
- (b) the extent to which the allocation of the rights would impact on the funds available to the Secretary of State for the purposes of his or her functions relating to railways and railway services, and the extent to which rights sought and the plans of other operators reflect a contractual commitment to a relevant funder;
- (c) the likelihood of more efficient capacity utilisation resulting (e.g. where there are proposals to run longer trains or trains with improved specified equipment); and
- (d) the extent to which an increase in the capacity available might be involved, as a result of associated funding of network enhancement.

4.22 To encourage the right balance between accommodating additional services and Network Rail's requirements for network access for maintenance and renewal, the variable cost element of the access charge is designed to reflect additional maintenance and renewal costs arising from additional traffic. Furthermore, the arrangements for establishing the Engineering Access Statement (EAS) under Part D should enable the facility owner to restrict access to permit efficient maintenance and renewal. All access rights, including firm rights, are subject to the EAS and Timetable Planning Rules (TPR). Where new or amended access rights materially increase the costs of efficient maintenance and renewal, there would need to be appropriate compensation for Network Rail. (Charging is discussed further in our guidance on Charging and Performance).

## Capacity choices: capacity vs. performance

- 4.23 As more trains run on the network, there comes a point where the disbenefits of extra services in terms of poorer train service performance outweigh the benefits of the additional services to passengers or freight customers. Given the need to use track capacity efficiently, we carefully examine any proposals for new services that would run over parts of the network that are already heavily used.
- 4.24 The charging arrangements in the current charging structure are designed to incentivise Network Rail to identify and pursue the most appropriate solution when considering the trade-off between accommodating additional services and sustaining operational performance.
- 4.25 It may sometimes be desirable to reserve some unused capacity to maintain or improve performance. We expect to take this requirement into account, and would not expect to approve or direct new rights where there is a material risk that performance disbenefits (both at the particular location and across the network) outweigh the benefits of the new service. In reaching such a conclusion we would take into account the available performance modelling, and also the views and information provided by affected operators and other interested parties.
- 4.26 In some cases, services may be discontinued because the adverse performance effect outweighs the benefits to users of passenger and freight rail services. The removal of such services could arise from a decision by a beneficiary, by Network Rail, or through ORR's not approving the continuation of some existing rights when a track access contract comes up for renewal. In circumstances where improving performance is the reason for a service being withdrawn, we would not expect to approve rights for another operator to use the released capacity unless there had been a material change (e.g. an enhancement to the relevant part of the network that increased its capacity and its ability to recover from disruptions). In such circumstances, our usual procedures would give all relevant operators, and any affected freight customers, an opportunity to comment.
- 4.27 In approving or directing new access rights which could affect performance, we expect to have regard to:
- (a) the impact on the overall resilience and integrity of the network or parts of it, particularly insofar as these may not be adequately reflected in the charging arrangements; and
  - (b) the impact on delivery of specific national, regional or route performance objectives.

- 4.28 We will require supporting performance information as part of an application particularly where:
- (a) there is disagreement between the parties;
  - (b) there are unresolved issues arising from Network Rail's consultation of potentially affected beneficiaries regarding the likely operational performance impact;
  - (c) the application is complex and the associated changes to access rights may have a significant effect on performance; or
  - (d) any other circumstances where we consider this necessary in order to satisfy our statutory duties.
- 4.29 Such further information might include:
- (a) specimen timetables demonstrating that the required capacity is available;
  - (b) reports on performance modelling;
  - (c) a statement of any access rights that are being surrendered;
  - (d) details of the anticipated impact that the rights will have on the industry's operational performance (including, where appropriate, the achievement of performance targets, Train Punctuality at Station Stops and Passenger's Charter and any specific actions being taken to mitigate this impact;
  - (e) details of how the changes will affect contingency planning and traffic management arrangements in the relevant area once the new services are operating;
  - (f) details of any specific actions being taken by the parties to ensure an effective implementation of the changes;
  - (g) a statement of how the new rights will affect maintenance and renewal requirements on the route and the availability of access for safe, effective and adequate maintenance and renewal; and
  - (h) a statement explaining the consistency of the rights sought with any relevant LTPP.
- 4.30 We would normally expect Network Rail to carry out performance modelling or any performance analysis on behalf of the beneficiary, although it may charge for this

work. If the beneficiary considers that its performance modelling requirements are not being met, it should contact us.

- 4.31 We will have regard to the benefits and costs of proposals for new or modified access rights, compared with alternative uses of the capacity. We may take into account cost-benefit analysis of the proposals and alternatives in order to facilitate this and, if such evidence is presented, any difference in assumptions compared with the appraisal criteria in [WebTAG](#) (Transport Analysis Guidance), [Scottish Transport Analysis Guidance](#) (STAG) or [Welsh transport appraisal guidance](#) (WeITAG), as appropriate, should be highlighted.
- 4.32 We will also use the following approach to assess applications for their impact on network performance:
- (a) any performance modelling completed in support of a new access application for access rights over congested network should factor in any perturbation that may occur on associated routes and compliance with the TPR;
  - (b) the level of current performance before the rights to any additional capacity are approved;
  - (c) use of appropriate timetabling and performance modelling;
  - (d) use of any performance improvement plans to develop robust mitigation for a decline in performance;
  - (e) use and combination of rolling stock for any new services; and
  - (f) where a proving period is included, the mechanism should include an obligation on the train operator to remedy any significant deterioration as soon as reasonably practicable rather than at the end of the proving period. In the case of minor deterioration, the provision must oblige the parties to meet promptly to take remedial action.
- 4.33 The above criteria have been developed from previous decisions where the performance implications of a track access application have been a factor.
- 4.34 We recognise that in some cases it may be appropriate to give additional weighting to certain factors such as:
- (a) the benefits of providing completely new services as against an increase in the frequency of existing services. This is likely to be particularly important where certain passenger markets have particularly poor services;

- (b) specific requirements in competitive markets, such as availability of paths at short notice for freight;
  - (c) the existence of direct funding support for a service or an associated network enhancement provided by a PTE, ITA or other public body; and
  - (d) the efficient use of scarce or expensive resources.
- 4.35 As noted above, we will ensure that any relevant funder has been consulted on all applications, as it will be concerned with the implementation of:
- (a) its long-term plans for the development of the railway as set out in the High Level Output Specification (HLOS); and
  - (b) any LTPPs published by Network Rail.
- 4.36 We will also have regard to the funds available to the Secretary of State for the purposes of his or her functions in relation to railways and railway services and any constraints on his or her ability to fund enhancements, as well as any general guidance from the Secretary of State, Scottish or Welsh Ministers (and indeed our other statutory duties).
- 4.37 We will also consult and have regard to the views of other beneficiaries and known potential beneficiaries, Transport Focus and, depending on where the services are to run, Scottish and Welsh Ministers, the Mayor of London, TfL, London TravelWatch and any PTE or ITA likely to have an interest.

### Capacity choices: competing passenger services

- 4.38 Where a passenger operator is seeking to introduce a new service that competes with the existing services of one or more other such operators, we will consider the extent to which such additional services would benefit passengers and not be primarily abstractive of the existing operator's revenue. The application should therefore specify what benefits passengers are likely to gain and the extent to which service volume growth is expected to lead to passenger volume growth.
- 4.39 Where a beneficiary is seeking to make a significant investment and seeks to protect this investment, we would not approve any 'moderation of competition' provisions which would in effect restrict competition over that route. Protection for such investment can be achieved through other contractual mechanisms that we have developed such as long term track access contracts and the rebate mechanism for investment in infrastructure.

4.40 ORR's policy on rebate mechanisms for network investments provides for train operators and others who invest significantly in on-network enhancements to be paid a rebate where a third party competing train operator benefits from that enhancement. A competing third party operator would need ORR approval of specific access rights to run such services and a condition of this would be the inclusion of a rebate mechanism in their contract.

### Capacity choices: competing applications for limited capacity

4.41 In cases where two or more applicants apply for alternative uses of the same capacity, we may conduct both the NPA test and an economic cost-benefit analysis (CBA) to inform our decision. The results of the CBA will be included when weighing our public interest duties under section 4 of the Act.

4.42 Where we have competing applications, we will aim to set clear criteria (including deadlines) for how we will group competing applications. Generally, applications for limited capacity on the same infrastructure, received within specified timeframes, will be considered alongside one another. Aspirations for alternative uses of the capacity, either by TOCs, funders or others, where no application has been received, will generally not be considered as part of our process.

### The 'not primarily abstractive' test

4.43 We would not expect to approve competing services that would be primarily abstractive of an incumbent's revenue; that is to say, abstractive without providing sufficient compensating economic benefits. To enable us to consider whether the proposed rights are primarily abstractive in nature we have established a five-stage test which we would apply when:

- (a) a new open access service would compete with public service operator (PSO) services and so impact on the public sector funder's budget;
- (b) a new PSO service which would compete with an existing PSO service, where we would expect to focus the test on areas where the competing PSO services are operated on behalf of different funders or where for some other reason there are particular concerns over the impact on a funder's budget; and
- (c) a new service, which might be open access or PSO, which would compete with an existing open access service and which, if it caused the existing open access operator to withdraw from the market, could reduce overall competition on the network.

- 4.44 In addition to applying the five-stage test we also consider our statutory duties, but generally we would not expect to approve applications with ratios of generation to abstraction below 0.3 to 1. Our experience is that net economic benefits are likely to diminish or not arise when the ratio is below that level.
- 4.45 Further information is provided in the separate [Open access guidance](#) which contains information on the not primarily abstractive test.

### Capacity choices: competing passenger and freight services

- 4.46 When assessing competing passenger and freight applications for the same capacity we will use transport appraisal methodology (such as WebTAG) to estimate freight user benefits in any cost benefit analysis where freight may be materially affected as well as in complex cases with alternative uses of capacity. We will calculate freight user benefits using generic values of time and reliability. We will also have regard to trade-off between passenger and freight where this has already been assessed and appraised in the LTPP and any context-specific values of passenger or freight time.

### Complex or competing applications: further information required

- 4.47 In some cases we will require applicants to share with us, other applicants or wider industry, further information. This could be in complex cases, or in cases with competing applications. Examples of the types of additional information we may require include:
- (a) Business cases which highlight key uncertainties and details of how and when applicants intend to close these issues down;
  - (b) Details of what internal approvals applicants have secured for their plans and what approvals remain to be given by whom in the event we approve access;
  - (c) In the case of competing applications, indicative timetables to be shared as part of the industry consultation; and economic modelling undertaken by the applicant based on the methodology in our NPA test.

### Rights must be used

- 4.48 We would not normally expect to approve access rights unless the beneficiary satisfies us as to its clear intention and ability to use the capacity in question in order to ensure capacity is not reserved for services which have little prospect of

being operated. We would therefore want to see evidence supporting an operator's intention and ability to use that capacity.

- 4.49 For a public service operator or concession passenger operator, such information might include details of their public service contract or concession requirements. For an open access passenger operator, we would look at business case information, including details of resourcing plans.
- 4.50 For a freight operator, this might include confirmation of a contract, or negotiation of a contract, with the proposed customer, details of resourcing arrangements for the proposed services and evidence of any other relevant preparations. However, we would make allowance for prospective new freight flows, where the operator may need to have demonstrated that it had firm rights approved by ORR before the potential customers would enter into haulage contracts with it. In such cases we would want to see clear evidence of the operator's prospects of winning sufficient business before approving or directing the rights sought. For a freight customer this might include a commitment to use rail to transport its goods.
- 4.51 A beneficiary may seek to increase the quantity of rights exercisable over time, for example where the availability of an increased number of train slots is dependent upon improvements to the infrastructure over a number of years. In such cases we will expect to see the step-up in rights expressed in separate entries (or perhaps, separate tables) within Schedule 5, indicating the dates from which each is to apply (or the stage of infrastructure improvements that have to be in place before the rights may apply), so that the actual extent of rights exercisable by operators at any one time is clear.

### Consideration of a freight beneficiary's past usage of access rights

- 4.52 When considering applications from freight beneficiaries for new rights, especially over busy parts of the network, we may take into account the past usage of its access rights. We will do so if:
- (a) there is some doubt about whether the beneficiary needs the rights sought or whether it is likely to use the associated paths for a very high proportion of the time; or
  - (b) two or more beneficiaries are seeking rights to the same limited capacity (either with applications being considered simultaneously or where we believe that one or more other applications for use of the same capacity are likely to be made within a short time).

- 4.53 Past usage will be looked at by reference to the best available information on the use of paths for the traffic for which the applicant is seeking rights.

### Part J of the Network Code

- 4.54 Part J enables the relinquishing of access rights which are not being used, or are being significantly under-used. This enables Network Rail to sell access to other network users or to transfer access rights between freight operators where the commercial contract for the movement of goods also transfers from one freight operator to another. Part J applies to all track access contracts incorporating the Network Code and provides:
- (a) a requirement for regular reviews of operators' access rights;
  - (b) 'use it or lose it' (UIOLI) arrangements;
  - (c) a freight transfer mechanism; and
  - (d) provisions for the voluntary adjustment or surrender of access rights.

### Enhancement

- 4.55 When considering an application based on enhancement works, our key concern will be to establish the certainty of those works proceeding, for example whether: the relevant processes for network and vehicle change have been completed; the facility owner or a third party is contractually committed to deliver the project; or full modelling has been undertaken to check that the capacity increase is viable and adequate etc. Where an enhancement project is covered by the terms of an access contract, we will wish to be satisfied that it has been agreed in compliance with our [Investment Framework](#).

### Congested infrastructure

- 4.56 [The Railways \(Access and Management and Licensing of Railways Undertakings\) Regulations 2016](#) (the Regulations) require that where an infrastructure manager cannot adequately accommodate a request for capacity, it must declare the relevant section of infrastructure to be congested (regulation 26). Within 6 months of the declaration it must then undertake and publish a capacity analysis identifying the reasons for the congestion and the measures which might be taken in the short and medium term to ease the congestion. Within 6 months of publication of the capacity analysis the infrastructure manager must publish a capacity enhancement plan detailing, amongst other things, the reasons for the

congestion; likely future development of traffic; constraints on infrastructure development; and the options for and costs of capacity enhancement, and the potential effect on access charges. The plan must also include details of the action to be taken to enhance capacity and a timetable for the completion of the measures identified within it to resolve the congestion. However, the infrastructure manager is not required by the regulations to implement the plan. More information on Network Rail's management of congested infrastructure is available on its [website](#).

- 4.57 Where an application is made which relates to a part of the network that has been declared congested by Network Rail, this will not affect the process we undertake in considering that application.

### Ancillary movements

- 4.58 Clause 5.2(c) of the model contract gives the train operator the right to make ancillary movements. An ancillary movement is defined in Part D of the Network Code as “a train movement which is not an express part of any Service but which is necessary or reasonably required for giving full effect to the train movements which are an express part of a Service and shall include any such train movement as is referred to in paragraph (c) of the definition of “Services” to the extent that it is not expressly provided for in an Access Agreement”. Paragraph (c) of the definition of “Services” in Part A is “any other train movement for the purposes of testing the physical or operational characteristics or capabilities of any railway asset.” The definition of “railway asset” in section 6(2) of the Act includes “any train”.
- 4.59 The definition of an ancillary movement is quite wide and covers most types of train movement which are not part of a service, including movements to stabling points and depots, driver training, mileage accumulation and train testing.
- 4.60 In addition to the general right to make ancillary movements, paragraph 2.6 of Schedule 5 of the passenger model contract and 2.4.2 of Schedule 5 of the freight model contract gives the train operator firm rights to make ancillary movements to the extent necessary or reasonably required to give full effect to the other firm rights of the train operator.
- 4.61 When a passenger operator adds new rolling stock to the specified equipment listed in paragraph 5.1(a) of Schedule 5 and it is included in the timing load for any service in Table 2.1 of Schedule 5, it will then have a firm right to any ancillary movements associated with that service.

- 4.62 As under paragraph 5.1(b) of Schedule 5, the train operator has a contingent right to operate any railway vehicles registered with Network Rail's rolling stock library in order to provide the services, it follows that it also has a contingent right to ancillary movements for such services.
- 4.63 Most ancillary movements are commonplace, occur on parts of the network where the train operator normally operates services, represent no additional inherent risk or consequences to Network Rail, and the standard performance regime should apply. Under Schedule 8, if a train performing an ancillary movement causes an incident which leads to delay, that incident is attributed to the train operator and it will compensate Network Rail under Schedule 8 in the normal way. No compensation is payable to the train operator in respect of delays or cancellations caused to ancillary movements.
- 4.64 However, there may be circumstances where there are increased risks to Network Rail over and above those modelled and reflected in Schedule 8 which would not adequately deal with the consequences. For example, if a train operator wanted to carry out mileage accumulation or train testing on a part of the network over which it did not normally operate services, it could cause a delay to other operators' services without affecting any of its own services. In such a scenario, the train operator would not make any payments to Network Rail under Schedule 8 while Network Rail would be compensating other operators. In such circumstances, Network Rail may require an amendment of the contract to include specific rights to mileage accumulation or train testing and a TOC-on-TOC indemnity regime in order to recover the cost of any payments to other operators as a result of delays caused the by train operator.
- 4.65 It is not necessary to disapply either Schedule 4 of the access contract or Part G of the Network Code as no compensation will be payable to the train operator for delays or cancellations caused to such movements.

## 5. Duration of track access agreements (framework agreements)

- 5.1 The law relating to the duration of track access agreements is contained in the Regulations which uses the term 'Framework Agreement'. A Framework Agreement is a legally binding agreement setting out the rights and obligations of a beneficiary and the infrastructure manager over a period in excess of one year. 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 section we refer to 'track access agreements' notwithstanding that the Regulations refers to 'Framework Agreements'.
- 5.2 Our policy and decisions on duration of track access agreements are made 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.

### Duration of up to five years

- 5.3 Regulation 21(7) of the 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. As a starting point we would therefore expect applicants to consider the suitability of a TAC with a duration of five years.

- 5.4 There are a small number of track access agreements which do not meet the definition of a Framework Agreement. For example, we do not consider heritage railways to be Infrastructure Managers under the 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.

### Duration of more than five years

- 5.5 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 set out in Regulation 21(8).
- 5.6 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.

- 5.7 Regulation 21(8) of the Regulations 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.

- 5.8 When applying for agreements with a duration of longer than five years, it is for the applicant to demonstrate in its application that the requirements of Regulation 21(8) are met. We encourage you to discuss your application with the relevant infrastructure manager and ORR at an early stage. You should also carefully consider the timescales for applying to ORR as the consideration of such applications often takes more time than a standard application. 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.
- 5.9 Commercial contracts might include:
- PSO or concession arrangements.
  - Contracts with suppliers.
  - Contracts with customers.
- 5.10 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.
- 5.11 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.
- 5.12 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.
- 5.13 We discuss below potential scenarios faced by different train operator types.

### **PSO/concession operators**

- 5.14 We consider it would be consistent with the 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 PSO or concession agreement. The total

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

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

5.15 We will consider applications for extensions to an operator's existing agreement, including where a PSO/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

5.16 Open access passenger and freight operators do not have PSO 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.

### Flexibility in long-term agreements

5.17 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. 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

5.18 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.

5.19 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

- 5.20 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.
- 5.21 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. Where this is the case, it will be specified in a decision letter at the time of the approval or direction of access rights. 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.
- 5.22 Although the 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.
- 5.23 For renewals and extensions, for the purpose of considering whether the resulting TAC would have a duration of more than five years, and 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.
- 5.24 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.

## Early Termination of track access contracts

- 5.25 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 PSO/concession agreements for freight beneficiaries.
- 5.26 For passenger and freight operators, where both parties to a TAC are in agreement that they wish to terminate it in advance of the contractual expiry date, they may do so by amending the Expiry Date of the contract. This must be done via an agreement under section 22 of the Act. This type of agreement is included in the relevant ORR General Approval, which gives approval prospectively, without the need for specific submission and approval.

## Track access options

- 5.27 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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