



# **ORR GUIDANCE ON THE ASSESSMENT OF NEW INTERNATIONAL PASSENGER SERVICES**

**June 2009**



OFFICE OF RAIL REGULATION



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# 1. Introduction

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- 1.1 Directive 2007/58/EC<sup>1</sup> (the Directive) of 23 October 2007 on the liberalisation of passenger services was published in the Official Journal of the European Union on 3 December 2007 and entered into force in Great Britain (GB) on 4 June 2009. The Directive imposes new duties on rail regulatory bodies in relation to access to the infrastructure for the purpose of operating international rail passenger services. The Directive has been implemented in GB through the Railways Infrastructure (Access & Management) Regulations 2005 (as amended)<sup>2</sup> (the Regulations).
- 1.2 The Directive grants to providers of international rail passenger services the right of access to the infrastructure subject to certain restrictions. One of these restrictions is where the international passenger service would compromise the economic equilibrium of a public service contract.
- 1.3 An international rail passenger service is one that operates through at least two EU Member States and has the principal purpose of carrying passengers from one Member State to another (or others).
- 1.4 The Directive provides that at the request of a relevant party,<sup>3</sup> the regulatory body (the Office of Rail Regulation (ORR) in GB) is responsible for determining whether the new passenger service is an international passenger service, i.e. whether the principal purpose of the service is to carry passengers between stations located in different Member States. The regulatory body is also responsible for assessing whether the new service would compromise the economic equilibrium of a public service contract.
- 1.5 This guidance document explains how we intend to assess new international rail passenger services. We set out how we intend to determine whether the principal purpose of a new passenger service is to carry passengers between stations

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<sup>1</sup> Directive 2007/58/EC of the European Parliament and of the Council of 23 October 2007 amending Council Directive 91/440/EEC on the development of the Community's railways and Directive 2001/14/EC on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure. The text of the Directive can be found at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:315:0044:0050:EN:PDF>

<sup>2</sup> The amendments which were necessary in order to implement the Directive were made by The Railways Infrastructure (Access & Management) (Amendment) Regulations 2009.

<sup>3</sup> See paragraphs 3.3 and 3.7 for explanation of what constitutes a 'relevant party'.

located in different Member States (see chapter 3). We also set out the issues we consider relevant to assessing whether, based on evidence, we expect the new international passenger service competing with a public service contract to compromise that public service contract's economic equilibrium (chapter 4).

- 1.6 We then set out the methodology that we will use in this assessment (chapter 5). We will carry out a seven-stage test which is based on the criteria suggested in the Recitals of the Directive. We believe that using these criteria will give us the information we require to carry out our assessment.
- 1.7 The assessment process will be carried out on a case-by-case basis, based on the criteria explained in this document, and may develop over time and through experience. However, if there were to be a significant amendment to the criteria used or to our interpretation of economic equilibrium, we would carry out a consultation of relevant industry stakeholders on revisions to this guidance, and publish an updated version accordingly.
- 1.8 This guidance document was produced following consultation with stakeholders in November 2008.

## 2. Context

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### Directive requirements

- 2.1 The Directive, part of the Third Railway Package adopted in December 2007, requires the regulatory body, i.e. ORR, to determine whether the principal purpose of a passenger service is to carry passengers between stations located in different Member States, i.e. whether the service is an international passenger service. The Directive also requires the regulatory body to assess whether the economic equilibrium of a public service contract would be compromised by granting access to a new international passenger service, on the basis of objective economic analysis<sup>4</sup> founded on pre-determined criteria.
- 2.2 Railway undertakings, in the course of operating an international passenger service, have the right to pick up passengers at any station located on the international route and set them down at another, including stations located within the same Member State (i.e. cabotage).<sup>5</sup>
- 2.3 Recital 8 of the Directive states that new, open-access, international services with intermediate stops should not be used to bring about the opening of the market for domestic passenger services but should be focused on stops ancillary to the international route. Their introduction should concern services whose principal purpose is to carry passengers travelling on an international journey. It suggests that this should be determined by considering criteria such as the proportion of turnover and of volume expected to be derived from the transport of domestic and international passengers, and the length of the service.
- 2.4 Recital 12 of the Directive provides that the assessment of economic equilibrium should take into account pre-determined criteria such as the impact on profitability of any services which are included in a public service contract, including but not limited to consequential impacts on the net cost to the competent public authority that awarded the public service contract (e.g. in GB, Department for Transport (DfT), Transport Scotland, or Transport for London), passenger demand, ticket

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<sup>4</sup> Recital 10 and Article 1(8) (3b).

<sup>5</sup> Article 1(8) (3a).

pricing, ticketing arrangements, location and number of stops on both sides of the border, and timing and frequency of the proposed new service.

- 2.5 Recital 17 of the Directive suggests that regulatory bodies should progressively develop guidelines on this issue, based on their experience.

## Definitions

- 2.6 The term ‘international passenger service’ is defined in the Directive<sup>6</sup> as ‘a passenger service where the train crosses at least one border of a Member State and where the principal purpose of the service is to carry passengers between stations located in different Member States; the train may be joined and/or split, and the different sections may have different origins and destinations, provided that all carriages cross at least one border’.
- 2.7 The term ‘public service contract’ is defined in Regulation EC 1370/2007<sup>7</sup> as ‘one or more legally binding acts confirming the agreement between a competent authority and a public service operator to entrust to that public service operator the management and operation of public passenger transport services subject to public service obligations’. In the context of the GB rail industry, we consider that this definition would generally encompass franchise agreements and concession agreements (such as Merseyrail and London Overground).
- 2.8 ‘Public service obligation’ is defined<sup>8</sup> as ‘a requirement defined or determined by a competent authority in order to ensure public passenger transport services in the general interest that an operator, if it were considering its own commercial interests, would not assume or would not assume to the same extent or under the same conditions without reward’.
- 2.9 ‘Public service operator’ is defined<sup>9</sup> as ‘any public or private undertaking or group of such undertakings which operates public passenger transport services or any public body which provides public passenger transport services’.

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<sup>6</sup> Article 1(3).

<sup>7</sup> Article 2(i). The text of Regulation EC 1370/2007 can be found at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:315:0001:0013:EN:PDF>.

<sup>8</sup> Regulation EC 1370/2007, Article 2(e).

<sup>9</sup> Regulation EC 1370/2007, Article 2(d).

- 2.10 The term ‘economic equilibrium’ is not defined in the Directive or in the Regulations. Our interpretation of ‘economic equilibrium’ is explained in chapter 4 of this guidance.

## Track access regime

- 2.11 The assessment of ‘economic equilibrium’ may only be one of several factors ORR considers before approving access rights for an international rail passenger service. The track access regime in GB requires ORR to carry out an assessment of access applications prior to approving track access contracts under the Railways Act 1993 (as amended), for passenger train services using the national railway network, except the High Speed 1 (HS1) network.<sup>10</sup> Our scrutiny of these applications is based on published criteria and procedures<sup>11</sup> which reflect our statutory duties. It therefore includes consideration of a range of issues including, for example, economic and efficient use of capacity; and operational performance.
- 2.12 The Regulations provide that before entering into a track access contract for the HS1 network, the infrastructure manager and the applicant must obtain the approval of ORR. Here, again, our decision on approval must be consistent with our statutory duties.
- 2.13 We envisage that, in practice, the assessment of ‘principal purpose’ and the impact on ‘economic equilibrium’ will take place at the same time as our consideration of a track access application.

## ‘Not primarily abstractive’ test

- 2.14 For domestic rail passenger services, we have a long-standing policy of not approving rights to new competing services that are primarily abstractive of incumbents’ revenue without compensating economic benefits beyond proposed or potential lower prices for existing passengers. This is known as the ‘not primarily abstractive’ test. This test has some parallels with the ‘economic equilibrium’ test, in particular in the information that both tests seek.

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<sup>10</sup> The High Speed 1 network is the railway infrastructure running from London St Pancras to the British end of the Channel Tunnel. It is also known as the Channel Tunnel Rail Link.

<sup>11</sup> *Criteria and procedures for the approval of track access contracts*, available at <http://www.rail-reg.gov.uk/upload/pdf/386.pdf>. This sets out the criteria and procedures we expect to follow in processing applications for track access contracts, exercising our functions under sections 17 to 22A of the Railways Act 1993, as amended.

- 2.15 Our policy on competing domestic services is set out in our final conclusions on moderation of competition, which were published on 18 May 2004.<sup>12</sup> Our policy is only to approve domestic services that pass the ‘not primarily abstractive’ test. If we concluded that the primary impact of a new service would be to abstract revenue from incumbent operators without compensating benefits, we would reject the application.
- 2.16 Our final conclusions on moderation of competition explained that the expression ‘primarily abstractive’ is not intended to imply a rigid benchmark. Such a test would be unrealistic given the uncertainty about forecasting future revenue effects and this test alone would not allow all relevant factors to be taken into consideration. Instead we consider whether the overall effect of approving the rights requested is likely to attract sufficient new patronage/revenue to rail such that abstraction from other operators could not be considered the primary impact of the proposal.
- 2.17 The ‘not primarily abstractive’ test and the ‘economic equilibrium’ test apply to different types of services and have to follow different rules. The ‘not primarily abstractive’ test is different from the ‘economic equilibrium’ test as the former refers to the revenue gained by the new entrant and the sources of that revenue, whereas the focus of the ‘economic equilibrium’ test is the effect on the existing public service contract. Therefore we have reached a view that it would not be appropriate to use the ‘not primarily abstractive’ test as a proxy for the ‘economic equilibrium’ test. However, the type of information we need for both of these tests will, in many respects, be similar.

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<sup>12</sup> *Moderation of Competition: Final Conclusions*, ORR, London, May 2004.

### **3. Circumstances for applying the tests**

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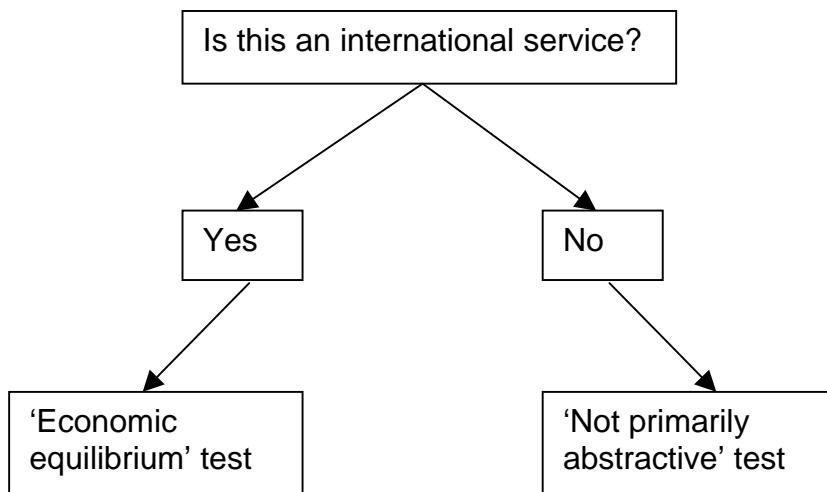
- 3.1 The Regulations provide for two tests to be carried out: one for determining the principal purpose of a new service, and one for assessing whether the new service would compromise the economic equilibrium of an existing public service contract.

#### **Circumstances when the ‘principal purpose’ test could be triggered**

- 3.2 The Regulations state that ORR must determine whether the principal purpose of the new passenger service is to carry passengers between stations located in different Member States, i.e. is international in nature.
- 3.3 This test can be carried out at the request of relevant competent authorities and/or an interested railway undertaking. The Regulations also provide for ORR to carry out this test on its own initiative.
- 3.4 Recital 8 of the Directive suggests the following criteria for considering the principal purpose of a new international service:
- (a) the proportion of turnover derived from the transport of domestic or international passengers;
  - (b) the proportion of volume derived from the transport of domestic or international passengers; and
  - (c) the length of the service.
- 3.5 Due to the similarities and overlaps between these criteria and those for the ‘economic equilibrium’ test explained in chapter 4 (e.g. in terms of revenue, stopping patterns and passenger demand), we intend to carry out both these assessments simultaneously, as explained in more detail in chapter 5 of this guidance.
- 3.6 However, if an interested party has asked us only to determine the principal purpose of a new service and has not requested that we assess whether the economic equilibrium of a public service contract would be compromised, we will only carry out the ‘principal purpose’ element of the test detailed in chapter 5.

## Circumstances when the ‘economic equilibrium’ test could be triggered

- 3.7 The Regulations provide that whether the economic equilibrium would be compromised must be determined by ORR following a request from:
- (a) the competent authority that awarded the public service contract;
  - (b) any other competent authority with the right to limit access along the route of the international passenger service notified under Regulation 16(4A) of the Regulations;
  - (c) the railway undertaking which is a public service operator; or
  - (d) the infrastructure manager concerned.
- The Regulations also provide for ORR to carry out this test on its own initiative.
- 3.8 This test would apply when an international passenger operator requests access to the network to run a scheduled passenger service which would compete with an existing passenger operator which is operating a public service contract.
- 3.9 This would include instances where the new international operator wants to call at stations within the same Member State to pick up and set down domestic passengers on its international journey. This is known as cabotage.
- 3.10 This could also include instances where the new international operator wants to use infrastructure parallel to the infrastructure used by an existing passenger operator which is operating under a public service contract.
- 3.11 The following flowchart shows how we intend to apply the tests:



- 3.12 Based on our decision using the ‘economic equilibrium’ test, the right of access for the international passenger service sought will be granted, modified or denied.
- 3.13 To date, international passenger services between GB and continental Europe are provided by Eurostar which operates trains on the HS1 network. We regard Eurostar as an operator of international rail passenger services, therefore a new international applicant on the HS1 network would not face the ‘economic equilibrium’ test if it wanted to run services on the HS1 network in competition with Eurostar, but might face the test if it competed with the franchised operator, currently Southeastern.



## 4. Criteria for assessing the impact on economic equilibrium

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### Introduction

- 4.1 This chapter provides more detail of how we intend to interpret what it means to compromise the economic equilibrium of a public service contract. Chapter 5 then details the specific methodology that we propose to use to judge whether a particular case of such entry is likely to compromise such equilibrium.
- 4.2 The ‘economic equilibrium’ test focuses on the impact on the public service contract from the new entry of competing international rail services. In this regard, it differs from our ‘not primarily abstractive’ test because it is the impact on the incumbent’s public service contract instead of the revenue gained by the new entrant and the sources of that revenue that is at issue. However, as shown in chapter 5, much of the information that we need to review is the same as in our ‘not primarily abstractive’ test.
- 4.3 The rest of this chapter addresses:
  - what is meant by an economic equilibrium?
  - what is the impact on the public service contract that we are trying to assess? and
  - what does this imply for our assessment of the type of change that is likely to be sufficient to compromise the economic equilibrium of a public service contract?

### Economic equilibrium

- 4.4 The term ‘economic equilibrium’ is not defined in the Directive or in the Regulations. A dictionary definition of equilibrium is a situation in which the forces that determine the behaviour of some variables are in balance. We consider that the economic equilibrium of a public service contract relates to the value of the public service contract, i.e. that a change in the value of the public service contract could indicate a change in its economic equilibrium. This can be the value to the bidder of the public service contract (i.e. the profitability of the public service contract) and/or the value of the public service contract to the public authority (the subsidy paid to or the

premium paid by the franchisee/concession operator for the public service contract).

- 4.5 In the context of GB franchises and concessions, the public service contract is generally a result of a competitive bidding process. The winning bidder will have made a series of assumptions about its expected revenues and costs when assessing the level of subsidy (or premium) to bid to operate the group of rail services covered in the public service contract. In doing this it will have taken account of its expectations on a number of variables including:
- input costs, e.g. fuel costs;
  - general economic outlook (and its likely impact on revenue);
  - potential impact of competition; and
  - any protections from change in its public service contract, e.g. arrangements holding the public service contract free from harm from regulatory changes to access charges and any revenue gain or loss sharing mechanism with the promoter of the public service contract.
- In these cases, we would also need to assess the impact of such protections on the relevant competent authority, e.g. a requirement for increased subsidy.
- 4.6 In reality the successful franchisee or concession operator would have expected the value of the public service contract to fluctuate around the assumptions made at the time of bidding so that both revenues and costs associated with the public service contract are within a range of possible outcomes rather than a specific level. If the specific subsidy profile was referred to as the centre of the equilibrium of the public service contract, in reality there would be a range around that level for each year to which the outcomes could vary without moving away from the range of assumptions applied by the successful bidder.<sup>13</sup>
- 4.7 We consider that in order to compromise the equilibrium of a public service contract there needs to be a material impact on that public service contract (moving outside the expected range). This takes account of the expected range of movement in the value of a public service contract over time, and also recognises the intention of the Directive to encourage competition in the market for international passenger

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<sup>13</sup> We will need to adapt this test where the public sector takes the revenue risk.

services, subject to certain restrictions. Almost any new international train services applying cabotage would have some impact on public service contracts, certainly in GB, given the geography of its network. We do not believe that the intention of the Directive would be to prevent competition if there was only a relatively small impact on a public service contract.

- 4.8 The assessment of whether a new international passenger service would compromise the economic equilibrium of a public service contract, i.e. has a sufficiently material impact on a public service contract, will need to consider in detail the precise interaction between the competing services and how this impacts on the public service contract. We propose to take into account a number of criteria in assessing the general impact on the public service contract, including:
  - profitability of incumbent franchised passenger operator or concession operator;
  - likely scope for competitive responses by franchised passenger operator or concession operator;
  - to the extent relevant, likely impact on the future value of the public service contract when next retendered;
  - impact on the long-term profitability of the most profitable routes within the public service contract;
  - specific new costs likely to arise within the operation of the public service contract; and
  - likely impact on performance costs of the public service contract as a result of the new international passenger service.
- 4.9 The economic equilibrium of a public service contract may be compromised in circumstances even where the overall impact on the profitability of the incumbent operator is relatively small (e.g. where the viability of the public service contract is marginal). However, in other cases, the economic equilibrium may only be compromised where there is a relatively large amount of revenue abstraction.
- 4.10 As set out in chapter 5, the assessment will involve a more detailed review of how the public service contract would be affected by the new international passenger service.



## 5. Procedure

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### Introduction

- 5.1 The Directive<sup>14</sup> provides a useful checklist of information that we would normally expect to take into account when determining the principal purpose of a new service and considering whether the economic equilibrium of a public service contract would be compromised, namely:
- proportion of turnover and of volume derived from domestic or international passengers;
  - length of service;
  - impact on the profitability of any services which are included in a public service contract;
  - consequential impact on the net cost to the competent authority letting the public service contract;
  - passenger demand;
  - ticket pricing;
  - ticketing arrangements;
  - location and number of stops; and
  - timing and frequency of the proposed service.

### Seven-stage test

- 5.2 We will undertake our assessment in a seven-stage test. The first stage will consider the principal purpose of the new service. The remaining parts of the test focus on the impact on the economic equilibrium of the public service contract. When making decisions on whether a service has passed the test we will first consider stage one of the test, the principal purpose; if it passes this test then we will consider the other six stages of the test. These six stages will help us to identify

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<sup>14</sup> Recitals 8 and 12 of the Directive.

the overall impact on the economic equilibrium of the public service contract, taking into account the six criteria listed in paragraph 4.8.

- 5.3 Our seven-stage test is conceptually similar to our ‘not primarily abstractive’ test and involves many of the same stages of analysis. However, our application of the results of our analysis differs in one main respect from that which we would apply under the ‘not primarily abstractive’ test.
- 5.4 Unlike the ‘not primarily abstractive’ test, where we take into account the revenue generative benefits and other impacts of the new service, the ‘economic equilibrium’ test is concerned only with the level of abstraction and its impact on the public service contract.

*Stage 1: assessment of principal purpose*

- 5.5 In this first stage we will consider the principal purpose, i.e. whether or not the new services are international in nature, based for example on the proportion of revenue on international and domestic flows. We will also take into account other factors such as stopping patterns and rolling-stock type.
- 5.6 Although we will not set out a strict predetermined threshold, where our results show a disproportionate amount of revenues and/or passenger volumes will arise from domestic traffic we are likely to conclude that the service fails the ‘principal purpose’ test, i.e. is not an international passenger service. However, before reaching a final conclusion we will also take into account other factors such as the length of service in terms of distance and how the service is marketed.
- 5.7 If we consider the principal purpose of the new service is a domestic service, then we will treat this new service as a domestic open access application; where relevant, we will assess the service using the ‘not primarily abstractive’ test, and will not carry out the ‘economic equilibrium’ test outlined in the stages below.

*Stage 2: initial assessment of revenue impact*

- 5.8 In stage two, we will use a computer model software called MOIRA<sup>15</sup> to make an initial estimate of both the revenue earnings and passenger numbers the new services are likely to abstract from existing domestic services.
- 5.9 However, we will not use the output of MOIRA alone in assessing the level of abstraction. This is because there are several factors that may cause MOIRA to under- or overestimate the level of abstraction, for example, fares/ticketing policy and the quality and type of rolling stock.
- 5.10 The next two stages demonstrate how we will extend our analysis of our MOIRA results using a variety of techniques in order to address any limitations identified in the initial results.

*Stage 3: modifications to initial MOIRA assessment – fares/ticketing/customs and security arrangements.*

- 5.11 In stage three we will address specifically the impact of the entrant's proposed fares and ticketing structure and the additional impact of custom and security arrangements associated with international rail services. MOIRA's estimation of abstraction is relevant and informative where the operator accepts mainly inter-available fares (i.e. walk-on tickets that are accepted by all operators). Where the new operator proposes to introduce dedicated fares (and particularly where it expects that a high proportion of its revenue will be achieved from the sale of dedicated tickets or where there is a large differential between the price of inter-available and dedicated fares) MOIRA may not accurately predict the level of revenue abstraction.
- 5.12 Passengers wishing to use international services for travel between UK destinations will still be subject to the same customs and security procedures as international passengers. This can require passengers to arrive at least 30 minutes before departure, imposing a significant time penalty on users, and may act to deter many passengers from opting to use these services for domestic travel. As a result actual levels of revenue abstraction by international services offering cabotage may be low.

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<sup>15</sup> MOIRA is a computer model which models the effect of timetable changes on passenger demand and passenger train operator revenue, taking into account factors such as timing and frequency of the proposed services and the location of stops.

- 5.13 In cases where any of the above applies, the MOIRA results will need to be adapted to reflect these impacts. For example, we would expect operators to provide their own details or estimates of the expected levels of dedicated ticket sales and price differentials and their impact on base MOIRA forecasts. We would then assess and validate these results by, for example, benchmarking forecast dedicated ticket sales levels against those on existing comparable services.

*Stage 4: other modifications to initial assessment of revenue impact*

- 5.14 In stage four, we will take account of other factors that may have an effect on the level of revenue abstraction. These include *inter alia*:
- impact on rail service performance;
  - the quality of rolling stock;
  - rail heading;<sup>16</sup>
  - levels of crowding;
  - marketing initiatives; and
  - service quality.
- 5.15 We will need to take into account the impact new services could have on performance. In general, consistent with our current track access policy, we would not approve new services that are likely to lead to a significant deterioration in performance. However, as any new service has the potential to have an effect on current performance, we will extend our MOIRA analysis to account for the impact any change in performance might have on revenues earned by existing operators.
- 5.16 It is not possible for MOIRA to model the impacts of different types of rolling-stock. This may be particularly pertinent for international services where the rolling stock tends to be a) configured with a different passenger experience in mind; and b) may be of a type not usually used on the UK network. We

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<sup>16</sup> ‘Rail heading’ occurs where passengers who could use a station close to the origin of their journey choose to travel to another, more remote station in order to benefit from, for example, direct, faster and/or more services to their planned destinations, better quality services, lower fares etc.

therefore may need to undertake bespoke analysis of the impact of rolling stock on revenue abstraction.

- 5.17 Another potential significant impact that MOIRA does not take into account is rail heading, which can lead to an underestimate of the level of abstraction. We would expect applicants to assess the impact of rail heading and we may also undertake our own estimates if required.
- 5.18 We will also undertake an assessment of the new entrant's business plan, as this can provide an indication of the level of abstraction that may be required to provide profitable new entry. This will also enable us to test other assumptions that underlie the entrant's revenue forecasts, such as the impact of marketing.

*Stage 5: impact on public service contract*

- 5.19 In this stage of the analysis we will need to understand the nature of the public service contract and how its characteristics influence the nature and level of impact of the new international passenger service. This will include consideration of:
  - current operator's performance to date - can we expect the operator to have significant brand loyalty which would be able to reduce the extent of any competitive effects; or can we expect poor performance or other factors to magnify the impact?;
  - provisions in a public service contract that might limit the effect of new competing services; also, what expectations were made about on-rail competition at the time of tendering?; and
  - impact on the profitability of the routes affected and their relative profitability compared to the overall public service contract; this will also include an estimate of the extent of revenues and costs which would be affected by the new international passenger service.
- 5.20 The onus will be on the existing train operator to provide evidence that the new entrant would compromise the economic equilibrium of the public service contract.

*Stage 6: understanding of dynamic effects*

- 5.21 Stages 2-5 provide a static analysis of the expected impact of the new international passenger service. However, in reality, the competitive process is a dynamic one where the entrant and incumbent operators will respond to each other, affecting the value of the public service contract.
- 5.22 Our test will generally try to assess the impact not just in the year that the new services start to operate but over the longer term. It will take account of information such as the franchise/concession plans, revenue impacts of changes in performance levels, relevant route utilisation strategy(s) and forecasts in the business plan of the new international passenger operator. To the extent relevant, the likely impact on the future value of the public service contract when next retendered may also be considered. However, the onus will be on the public service contract funder to make the case about the impact new services would have on the economic equilibrium over the long term.

*Stage 7: other relevant factors*

- 5.23 Stage seven allows us to consider any other factors that we judge relevant to the specific case and as such is difficult to define in a general guidance. However, an example of such factors is the incremental addition of international services – is the overall impact of these services likely to compromise the economic equilibrium of the public service contract?

**Information required: evidence from international passenger operator and parties to public service contract**

- 5.24 As part of this process, we may require information from the railway undertaking seeking access, the existing operator of the public service contract and possibly other relevant stakeholders. We would aim to keep the information requested to a minimum to avoid undue burden on them whilst ensuring we are in receipt of all the information we consider necessary to reach a decision.
- 5.25 Examples of the type of information we may require from the railway undertaking seeking access are:
- forecasts of revenue generation and abstraction;

- business plan containing forecast benefits of services and demand forecasts;
- percentage of revenue and journeys from international and domestic passengers;
- timetable information for the planned service, including departure times, intermediate station stops, and arrival times;
- type of rolling stock; and
- benchmarking of proposed services against comparators.

5.26 Examples of the information we may request from the existing operator of a public service contract are:

- revenue information;
- business plan;
- timetable information for the services, including departure times, intermediate station stops, and arrival times; and
- evidence that the new entrant would compromise the economic equilibrium of the public service contract.

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

## Timescales

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

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

- 5.30 We envisage that the ‘principal purpose’ and ‘economic equilibrium’ tests will be carried out at the same time as ORR’s consideration of a track access application.<sup>17</sup>

## Reconsideration of decision

- 5.31 As set out in Regulation 29A of the Regulations, the following parties can request the regulatory body’s decision to be reconsidered:
- any competent authority which awarded a relevant public service contract;
  - the infrastructure manager;
  - a railway undertaking operating a relevant public service contract; or
  - the railway undertaking seeking access.
- 5.32 When making a decision, we will specify a reasonable time period within which, and the conditions under which, the relevant parties may request a reconsideration of the decision made. We envisage this period to be around four weeks, and in any event will not be less than two weeks; but it will depend on the circumstances, facts and complexity of the particular case.
- 5.33 Where we have received a properly made and evidenced request for reconsideration of our decision, any decision previously indicated will be suspended or will not take effect pending reconsideration. We intend to issue our final reconsidered decision within two months of the date of receipt of all relevant information.

## Cooperation with other regulatory bodies

- 5.34 We would seek to cooperate with rail regulatory bodies in other Member States where appropriate. This is in accordance with our obligation under Article 31 of Directive 2001/14/EC to exchange information with other regulatory bodies about our work and decision-making principles and practice.
- 5.35 Recital 17 of the Directive states that national regulatory bodies should, on the basis of the cooperation duty outlined above, exchange information and,

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<sup>17</sup> See paragraphs 2.11, 2.12, and 2.13 for further explanation of the track access regime.

where relevant in individual cases, coordinate the principles and practice of assessing whether the economic equilibrium of a public service contract is compromised, and should progressively develop guidelines based on their experience.

- 5.36 We will coordinate our assessment of economic equilibrium with other national regulatory bodies and will share experience with them to ensure a consistent approach is taken across the European Union.
- 5.37 However, our ultimate decision in respect of both the ‘principal purpose’ test and the ‘economic equilibrium’ test will only relate to the impact of the proposed new service on an existing service operating under a public service contract in GB.