Consultation: a more focused approach to stations and depots access

October 2008

OFFICE OF **RAIL REGULATION**

Contents

Summary

1. This is a consultation on some proposed changes to the way we deal with our approval of contracts for access to stations and depots. We are keen to hear your views.

2. Please respond **by 9 January 2009**. Details of where to send your response are in the introduction (see chapter 1).

3. S.17 to s.22 of the Railways Act 1993 ("the Act") created a system that regulates contracts for access to railway stations, and some railway maintenance depots (This does not apply if the facility is subject to an access exemption). The Act says that, at facilities covered by this part of the Act, an access contract must be approved by us if it is to be valid. If we do not approve it, in one of the ways described by the Act, the contract is void (not legally enforceable).

4. We have carried out a fundamental review of the way we approve access contracts for stations and depots. As a result we are making several proposals. We think these will lighten the regulatory burden on the rail industry. It should also help us focus our resources better, and make us more effective as a regulator.

5. Our proposals relate only to contracts for station and depot access, where these have been agreed by the parties. They do not affect the system for resolving disputes over access to stations and depots. This will stay the same.

6. We are proposing the following:

- That nearly all contracts for access to depots be automatically approved – as long as they follow our standard templates. The same would apply to amendments to the contracts. This would be under the general approval system that we already apply to other matters;

- That, at the same time as greatly extending our general approvals, we reserve the option to suspend partly the right of some parties to use the general approvals for a period;

- That we start, in most circumstances, to publish on our public register full details of each depot access contract. We would no longer automatically exclude certain details. This is in accordance with our previously announced decision. This will mean that, in most cases, any member of the public (including members of the rail industry) can see the full details of a contract. We will still consider requests by companies to keep details confidential for particular contracts. There will have to be a very good reason for this;

- That we will require facility owners to send us a document that brings together all the elements of a contract, reflecting any amendments. This reference document would be required whenever there was a fresh amendment to a contract. This is to avoid confusion when several amendments happen over time;

- That we create a new standard clause in our contract templates that would mean that new access contracts, and amendments to contracts, would not come into force unless they are signed by the parties and sent to us. This will make sure that full information about contractual relationships is available for all concerned;

- That we will neither check contracts for errors, nor check whether they are covered by general approvals. The parties to the contract should take full responsibility for making sure their contracts are correct and enforceable;

- That we seek opportunities to align our stations and depots access processes with those we have introduced for track access contracts;

- That we bring into one document all our general approvals for depot and station access contracts – this is in addition to extending the scope of general approvals. We will write them in a way that is clear and easier to understand. We also intend to publish a document describing the criteria we will apply when considering stations and depots access contracts, and the procedures we would require parties to follow when dealing with us. This will be similar to the *Criteria and Procedures* document we have published on track access matters.

1. Introduction

Background

1.1 The Railways Act 1993 ("the Act") created a system for the regulation of contracts for access to railway stations, and some railway maintenance depots. (This does not apply if the facility is subject to an access exemption). The Act says that an access contract must be approved by us if it is to be valid. If we do not approve it, in one of the ways described by the Act, the contract is void (not legally enforceable). These access contracts are agreements between the facility owner of a station or depot, and those other companies wishing to call at the station, or make use of the depot facilities. "Facility owner" is defined at s.83 of the Act – however in broad terms it is normally the company running the facility, whose permission is needed to use it.

1.2 This system has been in place for nearly 15 years. In this time there has been no fundamental review of the way we carry out our duties in approving contracts for stations and depots access. In the meantime, the railway industry has developed. Also the role of regulators in the UK is changing, with a drive to remove unnecessary regulation.

1.3 The duties we apply, when carrying out our station and depot access approval functions, are described in s.4 of the Railways Act 1993 (as amended): we must balance all of these duties. In carrying out our review, we have endeavoured to make sure that we make a contribution to the railway industry that is effective and in the public interest. As part of this, we have fundamentally reviewed how we approve access contracts. Our proposals, arising from this review, are covered in more detail in the rest of this document.

1.4 During our review, we assessed what would happen if we took no active role in regulating access contracts. This "zero" approach has helped us to indentify where we believe we most add value to the process.

1.5 A particular area, where we can add value, is facilitating a contract regime that enables partnership working between all sectors of the rail industry for the benefit of each other and wider stakeholders, including passengers.

1.6 Also, when parties cannot reach agreement, we have powers to direct facility owners of most stations and depots to grant access to other companies. In certain circumstances, we can also require amendments to existing contracts. These powers arise from s.17 and s.22A of the Railways Act 1993 and from the Railways Infrastructure (Access and Management) Regulations 2005. None of the proposals in this document would change how we deal with those kinds of disputes.

Structure of this document

1.7 Each chapter covers a separate proposal. In each chapter we ask you questions, which are numbered and highlighted. Appendix 1 repeats all the questions in one place. At appendix 2 we comment on certain related competition maters. Appendix 3 lists the organisations we are sending this document to. (The consultation will also be on our website.)

Responses

1.8 We are keen to hear your views on all our proposals.

1.9 We welcome your comments on the questions we ask throughout this document, and which we repeat all together in appendix 1. You should send these to stations.depots@orr.gsi.gov.uk **by 9 January 2009.**

We would prefer you to send your comments by email. However you can also post your comments to:

Stations and depots team
Office of Rail Regulation
One Kemble Street
London
WC2B 4AN.

1.10 We would like to put your response on our website, and we may also want to quote from it. Please indicate clearly if you wish all or part of your response to remain confidential to ORR. Where you want to make a response in confidence, please attach a summary that excludes the confidential information and which we can use as outlined above. We may also publish the names of respondents in future documents or on our website, unless a respondent says they wish their name to be withheld. We will assume we may publish all responses and names unless you tell us otherwise.

1.11 If you want to discuss any of the issues raised in this document, phone Tim Bailey, manager of the stations and depots team, on 020 7282 0113.

Next steps

1.12 We will carefully consider all the responses we receive. When we have decided what changes to make, we will publish our conclusions. We plan to carry out any change to our processes in early 2009. At chapter 10 we give further details of steps we may take, leading from this consultation.

Question 1:	**Can we publish your reply and details? If not, what may we publish?**

2. Light Maintenance Depots – New and amended access contracts

Current arrangements

2.1 In this document, when we speak of “depots” we mean “Light Maintenance Depots” as defined in s.83 of the Railways Act 1993. If parties agree a contract for access to such depots, the contracts need our approval under s.18 of the Railways Act 1993 – otherwise they are void (not legally enforceable). Changes to such contracts also need our approval under s.22 of the Act, for the same reason. Some of these amendments are already automatically approved by one of our general approvals.

2.2 When we receive new contracts we look in detail at the contents. We compare the submitted contract against our standard template and we look for departures from the standard template, and for inaccuracies and drafting errors. Where necessary, we seek our own specialist advice – for example on the proposed level of charges. And we often ask the depot facility owner to explain its charges. Or we ask the company benefitting from the access contract whether they are happy with the charges. We try to anticipate whether the proposed contract would cause unfairness to other parties. We may ask the companies involved to explain certain aspects of their proposed contract.

Why make changes?

2.3 In our experience, our involvement rarely leads to any significant changes. And, in practice, we nearly always conclude that the contract should be approved. Usually this is because we are satisfied that the parties are still happy with the terms of the contract even though, for example, we have drawn their attention to unusual levels of charging. We consider that they are doing this willingly for valid commercial reasons. And the issues raised from our scrutiny do not raise wider regulatory concerns.

2.4 We do not consider that this is an efficient use of our time, or that of the companies involved.

Our proposals

2.5 We propose creating a general approval that would mean that almost all new depot access contracts, and amendments to existing depot access contracts, would be automatically approved. We would not need to specifically approve these contracts. The exact wording and scope of the general approval will depend on the response to this consultation.

2.6 We propose that the new general approval could only be used when certain conditions apply. The conditions we propose are:

Condition 1 – strictly following the standard templates

2.7 The general approval would only apply if the contracts strictly follow our standard templates. These would need to be the standard templates that are current on our website on the day the contract is signed.

(a) *The standard template depot access conditions (DACs).* The DACs are standard rules that govern the relationship between all the contracting parties at a depot. They cover matters such as the process for agreeing changes at the depot, and the remedies available when things go wrong. We propose that these must be used without any deletions or insertions.

(b) *The standard template depot specific annexes.* These are the annexes to the DACs. They have sections that can be adapted to describe a specific depot – such as a depot plan and a description of the depot's contents. In certain situations it gives rights to compel Network Rail to carry out certain duties. We propose that this standard template is used without deletions (apart from where it is necessary to delete one or more options such as "yes/no"). The only additions allowed (for the general approval to apply) would be the filling in of details required by the annexes and appendices. Parts of the annexes that are irrelevant may be marked "not used".

(c) *The standard template depot access agreement.* This document is the overarching agreement which brings together the DACs and the depot specific annexes. It brings in further definitions and provisions and it has sections for the details of the parties. We propose that this standard template is used in full with no deletions or additions to the

terms of the contract (other than those clearly required by the wording – for example for the purpose of saying whether the law of Scotland or England applies).

2.8 This will ensure that the essential provisions and information, in the standard templates, are still included in the contract. It will also enable us to make realistic comparisons should there be a future disputed claim for access (such as those covered by s.17 and s.22A of the Railways Act 1993). It would also lessen the risk of the basic rules in the DACs being accidentally modified.

2.9 There may be a situation when the parties will want to depart from the wording of the standard templates. In such a situation, the general approval would not apply, and the contract would need to be specifically approved by us. We would only give specific approval if there were a very good reason for the changes to the standard templates.

Condition 2 – including a new standard clause to protect the DACs

2.10 We also propose to add a new clause to the standard template station access agreement, saying that the terms of the DACs will always take precedence over any other part of the contract. This is in case a new term, elsewhere in the contract, has the effect of inadvertently changing the effect of provisions in the DACs. The general approval would not apply if this new clause were left out. If this proposal goes ahead we will change our standard template to include this new clause.

Effects of the proposal

2.11 As long as they comply with the requirements of our general approval, companies will not need to wait for us to approve depot access contracts and amendments to them. They will not need to spend time with us over the contents of their contracts. There will be less time spent on administration by all involved.

2.12 Companies will still need to send us a copy of their depot access contracts. We will then put them on our public register.

2.13 Please read appendix 2 for information regarding compliance with competition law.

Question 2: Do you think we should, through a general approval, automatically approve all new and amended depot access contracts that follow our standard templates?

Question 3: Do you think our proposal will succeed in removing nearly all depot access contracts from the need for specific approval by us?

3. New S.18 station access contracts – extending general approvals

Current arrangements

3.1 When a station facility owner agrees to allow another train company to use its station, the parties enter into an agreement. This agreement takes the form of a station access agreement. These agreed access contracts need our approval under s.18 of the Railways Act 1993 – otherwise they are void (not legally enforceable).

3.2 When we receive new contracts we look in detail at the contents. We look for departures from our standard templates, and for inaccuracies and apparent drafting errors. Sometimes we seek our own economic and legal specialist advice – we may ask whether parts of proposed contracts are reasonable. We try to anticipate whether the proposed contract would cause unfairness to other parties. We may ask the companies involved to explain certain aspects of their proposed contract.

3.3 When we are satisfied, we approve the terms of the new contract and direct the facility owner to enter into the contract. We refer to this as “specific approval”.

Why make changes?

3.4 In our experience, our close scrutiny of new station access contracts rarely reveals issues of significant regulatory concern. We have had greater concerns sometimes when a proposal departs from the wording of the station access conditions (SACs). The SACs are a set of standard provisions and rules, approved by us many years ago, which govern the contract. We do not consider that our scrutiny of most new station access contracts is an effective use of our time or that of the companies involved. It does not assist us significantly in exercising our functions as an economic and safety regulator.

Our proposal

3.5 Our proposal is broadly the same as our proposal for dealing with new depot access contracts. We have listed the proposals for stations separately here

for ease of explanation of the slight differences. But also because we would like you to keep separate any responses to our questions about depots and stations. This will make it easier to consider and respond to comments on the different issues.

3.6 We propose creating a general approval that would mean that almost all new station access contracts will automatically be approved. We would not need to specifically approve these contracts. The exact wording and scope of the general approval will depend on the response to this consultation. [1]

3.7 We propose that the new general approval could only be used when certain conditions apply. The conditions we propose are:

Condition 1 – strictly following the standard templates

3.8 The general approval would only apply if the contracts strictly follow our standard templates. These would need to be the standard templates that are current on our website on the day the contract is signed.

(a) *The standard template station access conditions (SACs)*[2]*.* The SACs are standard rules which govern the relationship between all the contracting parties at a station. They cover matters such as the process for agreeing changes to the station, and the remedies available when things go wrong. We propose that these must be used without any deletions or insertions.

(b) *The standard template station specific annexes.* These are the annexes to the SACs. They have sections that can be adapted to describe a specific station – such as a station plan and a description of the station facilities; and to include other details relevant to the station, such as collateral agreements between Network Rail and certain users of the station, and certain information relating to charges. We propose that this standard template is used without deletions (apart from where

[1] These changes to the scope of our general approvals would apply in an equivalent manner to the Stations Code, if and when it is adopted by the rail industry. The Stations Code is a proposed change to the contractual relationships at stations, and involves the use of different contractual documents.

[2] Please note that stations managed directly by Network Rail are covered by the Independent Station Access Conditions. These ISACs are broadly similar to the SACs and our reference here and elsewhere to SACs should be taken to include ISACs as well.

it is necessary to delete one or more options such as “yes/no”). Parts of the annexes that are irrelevant may be marked “not used”.

(c) *The standard template station access agreement*. This document is the overarching agreement which brings together the SACs and the station specific annexes. It brings in further definitions and provisions and it has sections for the details of the parties. We propose that this standard template is used in full with no deletions or additions to the terms of the contracts (other than those clearly required by the wording – for example for the purpose of saying whether the law of Scotland or England applies).

3.9 This will ensure that the essential provisions and information, in the standard templates, are still included in the contract. It will also enable us to make realistic comparisons should there be a future disputed claim for access (such as those covered by s.17 and s.22A of the Railways Act 1993). It would also lessen the risk of the basic rules in the SACs being accidentally modified.

3.10 There may be a situation when the parties will want to depart from the wording of the standard templates. In such a situation, the general approval would not apply, and the contract would need to be specifically approved by us. We would only give specific approval if there were a very good reason for the changes to the standard templates.

Condition 2 – including a new standard clause to protect the SACs

3.11 We also propose to add a new clause to the standard template station access agreement, saying that the terms of the SACs will always take precedence over any other part of the contract. This is in case a new term, elsewhere in the contract, has the effect of inadvertently changing the effect of provisions in the SACs. The general approval would not apply if this new clause were left out. If this proposal goes ahead we will change our standard template to include this new clause.

Condition 3 – limit of time on diversionary access agreements

3.12 Diversionary access agreements allow a train company to stop at stations where they would not normally stop. Typically the agreements are used when there is engineering work affecting a company’s normal route. We wish to create a system where the majority of these may be approved automatically,

as long as they are not used where a full station access agreement is appropriate. We propose that new diversionary station access agreements will be automatically approved by general approval as long as:

- the station in question is on a diversionary route already listed on the train operator's track access contract; and that
- the agreement is not for any longer than either of the parties' franchises.

Or, where the above two factors do not apply:

- the agreement is not for more than six months, and there has been no other such agreement between the same parties in the previous year.

3.13 Any other diversionary agreement would need to be specifically approved by us in advance.

Effects of the proposal

3.14 As long as they comply with the requirements of our general approval, companies will not need to wait for us to approve station access contracts and amendments. They will not need to spend time with us over the contents of their contracts. There will be less time spent on administration by all involved.

3.15 Please read appendix 2 for information regarding compliance with competition law.

Question 4: Do you think we should automatically approve, through a general approval, all new station access contracts that follow our standard templates?

Question 5: Are there risks in approving most new station access contracts by general approval? If so, what are they?

Question 6: Are our proposals, on generally approving certain diversionary access agreements, sensible and reasonable?

4. S.22 amendments to station access contracts – extending general approvals

Current arrangements

4.1 Section 22 of the Railways Act 1993 says that amendments to existing station access contracts must be approved by us. Otherwise they are void (not legally enforceable). There are two ways we can approve amendments. The amendments can be specifically approved by us directing the parties to change a contract. Or they can be approved automatically – this happens when the amendments are within the scope of a published general approval.

4.2 Companies must send us details of amendments to contracts that have been automatically approved by a general approval. (They must also send us copies of signed new contracts that we have specifically approved.) We then add them to our public register.

4.3 We pay close attention to contract amendments that are not covered by a general approval. Currently we look for drafting errors (we are proposing elsewhere in this document that we will no longer provide this level of checking – see chapter 9). We also look for changes that may raise regulatory concerns.

Why make changes?

4.4 We often find that companies send us contract amendments that they wrongly think are covered by a general approval. We think this is partly because our general approvals appear in several documents.

4.5 Also some proposed amendments to contracts only just fall outside the scope of the general approval. This causes confusion. It also means that we have to specifically approve amendments that are very similar to other amendments covered by general approvals.

4.6 Our experience is that we spend considerable time helping companies through the administrative process, even though we rarely require significant changes to the proposed contract amendments.

4.7 All of these factors contribute to additional work for us and for the companies involved. The work does not significantly help us fulfil our functions as a regulator.

Our proposal

4.8 We propose to bring into one document all our general approvals about station access contracts. We will write them in a way that is clear and easier to understand.

4.9 We propose to extend the scope of what is covered by general approvals. Our proposal is to allow all station access contract amendments to be generally approved, as long as they do not change the standard templates – this is the same as we are proposing for new station access contracts (see chapter 3). Companies would still need to follow the current consultation process laid out in the Station Access Conditions.

4.10 However, we are keen for you to give us your views on what amendments should, or should not, be allowed to station access contracts under the general approvals. Because stations are very different to other assets in the rail industry, we think there may different factors to consider.

Effects of the proposal

4.11 The general approval process will have fewer technical limits, and should be easier to understand. It will mean that more amendments come into force immediately, with less administrative work for railway companies and for us.

4.12 Companies would still need to send us a copy of their amended access contracts for us to put on our public register.

4.13 Please read appendix 2 for information regarding compliance with competition law.

Question 7: Do you think we should extend general approvals so that we automatically approve all amendments to station access contracts (as long as they follow our standard templates)?

Question 8: Are there risks in approving most amendments to station access contracts by general approval? If so, what are these?

Question 9: Are there any s.22 amendments you think should <u>not</u> be approved by general approval? If so, what are these and why?

5. General approvals – right to suspend partly

Current arrangements

5.1 Currently our general approvals may be used by anyone who wishes to amend an access contract. If the change is of the category covered by the general approval, they do not need us to specifically approve the change to make it valid.

Why make changes?

5.2 In this consultation document, we have proposed extending the scope of general approvals significantly. We have proposed that they now apply to most new access contracts, and to most access contract amendments. This amounts to a major stepping back in our regulation of contracts where both parties are in agreement. Instead we will change the focus of our activities to reviewing a sample of contracts so that we can research the effectiveness of our regulation, and look into further areas of policy development. When we do this review, it is possible that we will discover difficulties in the processing of some contracts, and that this may arise from poor contract management processes by a limited number of companies. In such a situation we may want to take corrective action. This may mean reframing the terms of a general approval. But it may also mean withdrawing the right of particular companies to use general approvals for a time.

Our proposal

5.3 We propose a new provision in the general approvals for stations and depots. This would allow us to suspend the right of certain parties to use all or some general approvals. We would hope not to need to use this provision. However if we did, it would mean that any access contract that involved a “suspended” company would need to be specifically approved by us until we had evidence that contract administration (or other matters of concern) had improved. It would not be retrospective – that is, it would not affect the validity of any contracts that were approved before we announced the suspension. If we confirm this proposal, we will publish our policy in advance.

Effects of the proposal

5.4 This will mean that we can take a more focused risk-based approach to difficulties that arise in the access contract system. It will mean that we can focus our efforts on improving the quality of contract management, without holding back the activities of the majority of the rail industry.

Question 10:	**Do you agree that we should have the option to suspend for a period the right of certain parties to use general approvals for stations and depot access?**

6. Light Maintenance Depots – publishing full contract details on our public register

Current arrangements

6.1 We are required by s.72 of the Railways Act 1993 to place copies of all access agreements, and amendments to those agreements, on our "public register". This is part of our store of documents that are available for inspection by members of the public (which includes anyone in the rail industry).

6.2 Under s.71 of the Act, we must "have regard to the need for excluding" matters that might "seriously or prejudicially" affect the interests of a person or body. With depot access contracts we currently exclude much of the information relating to charges and service levels.

Issue

6.3 In February 2006 we published our document "Depots Code: Final Conclusions". (The document can be found on our website at http://www.rail-reg.gov.uk/upload/pdf/274.pdf.) At chapter 6 of that document, we said we intended to change our practice relating to the information that goes onto our public register. We considered that there would be benefits from greater transparency. Following a consultation, we said we would not exclude information unless parties to a contract satisfied us that it was justified. We would take account of the fact that information, considered commercially sensitive by one party, may still not meet the s.71 test. If we decided it did not meet this test, we would not exclude it from the public register.

6.4 Responsibility for deciding whether, and how, to implement the depots code now rests with the rail industry. However, we consider that the issues about transparency of information on our public register remain relevant. We said in February 2006 that the matter should be considered separately from the depots code.

Our decision

6.5 We will implement the previously announced change in our practice on exclusion of information from depot access contracts. We will start to do this at the same time as we bring in the other main changes arising from this consultation.

Effects of the decision

6.6 There will be greater transparency of information. We consider that this is important to the proper functioning of markets generally, because this enables "purchasers" to make effective and efficient decisions.

7. Document management – describing the up-to-date contract

Current arrangements

7.1 When a party to an access contract wants us to approve an amendment, it must send us a document describing the amendment. If appropriate, we approve the amendment. We then put a copy, of the document describing the amendment, on our public register.

Why make changes?

7.2 The current system of amending contracts can mean that several documents, dating over many years, have to be read to understand the contract in full. Sometimes administrative oversights mean that companies have not told us about certain amendments. This can make it difficult to work out the current full terms of a contract. With around 2500 stations in England, Scotland and Wales, the chances of errors occurring are high.

7.3 The Stations Code is a proposed change to the contractual relationships at stations. It will also change the way contract details are recorded for each station. This change will stop most of the difficulties in working out the true contractual situation for each station. The rail industry is still deciding how best to deal with the proposed Station Code. However, until it is adopted and put into practice, we believe we need to take action to improve the current system of document management.

Our proposal

7.4 We propose that, in future when there is an amendment to a contract, there should be a document drawn up that brings together the full provisions of the contract, including any amendments. We propose to require the facility owners of each station and depot to send us an updated version of this document, every time they send us an amendment. This document would be for reference purposes only. The underlying contracts and amendments would still be current and would take precedence if there were any inconsistency in the text.

7.5 We propose adding these documents to our public library which also contains our public register (required under s.72 of the Railways Act 1993).

7.6 We propose making these available on our website, in due course. We currently make available on our website similar consolidating documents relating to track access.

Effects of the proposal

7.7 This will make much clearer the terms of each contract. This will help the parties to the contract, cutting down costs arising from doubts and potential disputes. It will also help other people (including in the rail industry) who have the right to view the contract on our public register. It will also mean that we have accurate information when carrying out our role as regulator.

Question 11:	**Do you agree with the proposal that all amendments to contracts should be accompanied by a reference document which brings together all the current elements of a contract?**
Question 12:	**Do you have any comments on the proposal to make these documents available on our website and in our public library alongside our public register documents?**

8. Document management – duty to send access contracts to us

Current arrangements

8.1 A facility owner must send us a copy of any station or depot access agreement within 14 days of that agreement being entered into: the same applies to amendments to access agreements. This is a requirement of s.72(5) of the Railways Act 1993.

Why make changes?

8.2 We believe that not all contracts or amendments to contracts have been sent to us in the past. We consider that this is most likely to happen when amendments fall under a general approval. As we are proposing that general approvals be widened in scope significantly, there will be a risk that the problem will increase.

8.3 This means that information on our public register is incomplete and is not available for the public (including other rail companies). It can be difficult for all concerned to establish the full contractual arrangements at a facility.

Our proposal

8.4 To help make sure our public information is as complete as possible, we propose adding a new clause to the standard template for depot and station access agreements. The clause would mean that the operative provisions, of any contract or amendment to a contract, would not come into effect unless a copy of the signed contract is sent to us within a certain time.

8.5 A way to achieve this might be to include an additional condition in the “Conditions Precedent” section of the standard template station access agreement (or some similar contractual mechanism in standard template agreements).

Effects of the proposal

8.6 This will make sure that our public register is complete and accurate. It will improve the information available to the rail industry and to us. And it will help

ensure that all access contracts comply with the regulatory regime created by the Railways Act 1993.

Question 13:	**Do you agree with the proposal to make ineffective any contracts, or amendments, that are not sent to us within a certain time limit?**
Question 14:	**Do you have any comments on how this may work in practice?**

9. Our approach to checking contracts

Current arrangements

9.1 When companies enter into new station or depot access contracts, or they decide to make amendments to their existing contracts, they must send us the relevant documents. Over the years we have made available a set of standard contract templates for companies to use when creating contracts. In most cases we expect these to be used. We intend to review these templates in due course and may issue them as model contracts in accordance with s.21 of the Railways Act 1993.

9.2 The Railways Act 1993 says that a contract for access to a station or depot must be approved by us to be valid. We may approve these in one of two ways:

- By specific approval. This means we look at the proposed contract, or amendments to a contract, in advance. If we are happy with the proposal, we approve it; and the parties may enter into the contract, or implement the amendments.

- By general approval. This means that a contract, or amendment to a contract, falls within a “class or description” that we have previously specified in a general approval. When this happens it is automatically approved and does not need our specific approval.

9.3 Currently our general approvals cover only certain limited categories of amendments. Entirely new contracts are not covered by general approvals. (We propose in this document that this should change – see chapters 2 and 3). Where the companies consider that a contract change is covered by a general approval, we check that the general approval does apply. We do not check the accuracy or sense of any of the detail in the documents sent to us.

9.4 When a general approval does not apply, we look in much greater detail at the documents. Nearly all contracts use our standard templates. We look especially at any variations from the standard template. And we check for any errors in the details, including drafting errors. We often ask the parties to the

contract to consider changing minor errors, or to confirm that the contract properly reflects their intentions.

Why make changes?

9.5 Our experience is that this approach rarely leads to significant changes to the contracts. However, in working in the way we do, we use up our time and resources and those of the railway companies involved. We do not consider it an efficient use of resources to check the effectiveness or validity of commercial companies' contracts.

9.6 We consider that the access regime, created by the Railways Act 1993, is now well established – and that the railway industry is capable of making sure that its contracts are valid and accurate, taking legal and other advice where necessary. As independent commercial enterprises they should be responsible for any risks that arise from errors in their contracts.

Our proposal

9.7 We propose that in future we will not actively check:

- the accuracy or legal effectiveness of contracts, or amendments to contracts.
- whether contracts are covered by general approvals.

9.8 We will instead assume that those submitting the documents have carried out these checks. We will expect the parties agreeing a contract, or contract amendment, to get their own legal advice where necessary – in particular to ensure that the contract reflects their intentions and is legally enforceable.

9.9 Parties to contracts should, in any case, remember that they must make their own assessment of whether their agreements comply with the Competition Act 1998. Please read appendix 2 for further information regarding compliance with competition law.

9.10 We will occasionally review samples of contracts. But this will be for our own purposes of quality assurance and for developing the regulatory system.

Effects of the proposal

9.11 We think this change will make it clearer who is responsible for checking that contracts are properly worded and enforceable. We think that this will lead to an improvement in the quality of contracts.

Question 15:	**Do you agree that we should not check the detail or validity of contracts (including whether a general approval applies) and do you agree that this should instead be the responsibility of the parties to the contract?**

10. Bringing our processes together – and next steps

10.1 In 2007 we consulted on changes to the way we deal with and approve contracts for track access. Where possible and sensible, we want to make any station and depot approval processes similar to the ones we follow for track access. We think this will make our internal processes more efficient, and that it will be easier for the railway industry to follow.

10.2 We welcome suggestions on how we can do this, and what would be most useful. The following are some of the changes we are considering:

(a) We have proposed in chapter 7 that we should require facility owners to send us a document that brings together all the elements of a contract, for reference purposes – and that we make these available in our public library and on our website in due course. This would be in line with our current practice with track access contracts. We will also consider publishing on the website summary information about charges at different facilities.

(b) We will consider whether we can align the format in which we require companies to submit their stations and depots contracts, and amendments to contracts. For instance:

- Our track access processes require parties to submit information on a standard application form. This makes it easier for the parties to ensure they give us the right information first time.
- Amendments to track access contracts requiring specific approval are normally submitted to us “informally” as an unsigned draft. Where appropriate, we give comments and indicate changes we would require. We then invite parties to submit formally the re-drafted and signed agreement which we formally approve. This has the advantage of ensuring that copies of amendments are immediately available on our public register.

(c) During 2009, we intend to issue a criteria and procedures document, to make available the same level of guidance that we currently give for track access applications. This will explain the criteria we will apply when approving new and amended contracts, and the procedures we want contract parties to follow when dealing with us.

(d) We have already issued model contracts for track access agreements. During 2009, we will consider whether we should formally publish model contracts in relation to stations and depots matters. These would update the current standard template documents on which most contracts are based. We will consult industry colleagues if it appears that we will need to make significant changes to our current standard templates. However the need and extent of this redrafting may depend on progress towards the proposed new Stations Code. The Stations Code would replace many of the currently used standard templates.

10.3 When we have considered responses to this consultation, we will publish our conclusions on how we will change our handling of stations and depots contracts. We will, soon after, publish any necessary amendments to our general approvals to take account of changes arising from this consultation.

Question 16:	**In what way should we make our processes for stations and depots similar to those we follow for track access?**
Question 17:	**Are there other changes to our stations and depots processes that would be helpful?**
Question 18:	**Do you have any views on whether we should publish stations and depots contract details on our website.**
Question 19:	**Is there any other information about stations and depots matters that you would like to see on our website.**

11. Effect on your operations – and any other comments

11.1 We are committed to making our work as a regulator more focused and effective. It would be helpful if you would tell us whether or not you consider that these proposals would be beneficial to your operations. Please also send us any other comments not covered by our precise questions.

Question 20:	**Do you have any comments on whether or not, overall, these proposals will benefit your operations?**
Question 21:	**Do you have other comments on what we say in this document? And do you have any other suggestions?**

Appendix 1 – list of questions

Here is a list of all the questions we have asked in this document. As well as giving us your direct answers, we would like you to give us the reasons for your answers.

Question 1: **Can we publish your reply and details? If not, what may we publish?**

Question 2: **Do you think we should, through a general approval, automatically approve all new and amended depot access contracts that follow our standard templates?**

Question 3: **Do you think our proposal will succeed in removing nearly all depot access contracts from the need for specific approval by us?**

Question 4: **Do you think we should automatically approve, through a general approval, all new station access contracts that follow our standard templates?**

Question 5: **Are there risks in approving most new station access contracts by general approval? If so, what are they?**

Question 6: **Are our proposals, on generally approving certain diversionary access agreements, sensible and reasonable?**

Question 7: **Do you think we should extend general approvals so that we automatically approve all amendments to station access contracts (as long as they follow our standard templates)?**

Question 8: **Are there risks in approving most amendments to station access contracts by general approval? If so, what are these?**

Question 9: **Are there any s.22 amendments you think should not be approved by general approval? If so, what are these and why?**

Question 10: **Do you agree that we should have the option to suspend for a period the right of certain parties to use general approvals for stations and depot access?**

Question 11: **Do you agree with the proposal that all amendments to contracts should be accompanied by a reference document which brings together all the current elements of a contract?**

Question 12: **Do you have any comments on the proposal to make these documents available on our website and in our public library alongside our public register documents?**

Question 13: **Do you agree with the proposal to make ineffective any contracts, or amendments, that are not sent to us within a certain time limit?**

Question 14: **Do you have any comments on how this may work in practice?**

Question 15: **Do you agree that we should not check the detail or validity of contracts (including whether a general approval applies) and do you agree that this should instead be the responsibility of the parties to the contract?**

Question 16: **In what way should we make our processes for stations and depots similar to those we follow for track access?**

Question 17: **Are there other changes to our stations and depots processes that would be helpful?**

Question 18: **Do you have any views on whether we should publish stations and depots contract details on our website.**

Question 19: **Is there any other information about stations and depots matters that you would like to see on our website.**

Question 20: **Do you have any comments on whether or not, overall, these proposals will benefit your operations?**

Question 21: **Do you have other comments on what we say in this document? And do you have any other suggestions?**

Appendix 2 – compliance with competition law

1. When exercising our powers under the Railways Act 1993, in directing access agreements, we will have regard to our statutory duties in s.4 of the Act including the duty to promote competition in the provision of railway services for the benefit of users of railway services. In doing so we will need to be satisfied that proposed contracts are not framed in such a way as may unduly limit competition in the provision of railway services. It is important to note, however, that when balancing those duties in the fulfilment of our regulatory obligations under the Act, the duty to promote competition is one of a number of duties which need to be balanced against each other and we are not undertaking a full competition assessment as would be required should the agreement come under competition law srutiny.

2. It is the responsibility of undertakings to ensure that any contract that they enter into is compliant with competition law, including the Competition Act 1998.[3]

3. To the extent that access agreements are entered into in compliance with ORR's directions made under s.17-22A of the Railways Act 1993, it may be open to parties to such agreements to argue that they are excluded from the scope of the prohibitions in the Competition Act 1998. However, parties should be aware that the rulings of the European Court indicate that such a defence will only be available in very limited circumstances. In general terms, it would be necessary to demonstrate that the legislative regime of the Act required the parties to the agreement to act in the way they did.

4. Agreed amendments to access contracts entered into under s.22 of the Railways Act 1993, or any amendment provisions contained in access agreements themselves, cannot be considered subject to legal direction and can therefore be subject to investigation or enforcement action under the Competition Act 1998. Similarly, access agreements entered into under s.18 of the Railways Act 1993, under a general approval given by ORR (as opposed to an agreement *directed* by ORR under section 18), are not the subject of ORR directions and can also therefore be subject to action under the Competition Act.

[3] Application to services relating to railways – understanding competition law - OFT430, available at http://www.rail-reg.gov.uk/upload/pdf/OFT430.pdf

Appendix 3 – list of consultees

We have sent this consultation by email to the following organisations:

Advenza Freight Ltd
Alstom Transport
Arriva
Arriva Trains Wales
Associated British Ports
Association of Train Operating Companies
Balfour Beatty plc
Bombardier Transportation
Carillion plc
Chiltern Railways
CrossCountry Trains
Department for Transport
Direct Rail Services Ltd
East Midlands Trains Ltd
English Welsh and Scottish Railway Company Ltd
Eurostar (UK) Ltd
First Capital Connect
First Great Western
First Group plc
First ScotRail
First TransPennine Express
Freightliner Ltd
Glasgow Prestwick International Airport
Grand Central Railway Company Ltd
Heathrow Express
Hitachi Europe Ltd
Hull Trains
Jarvis Rail
Laing O'Rourke
London and Birmingham Railway Company
London and North Western Railway Company Ltd
London Midland
London Overground Rail Operations Ltd
London Underground Ltd
Merseyrail Electrics 2002 Ltd
National Express Group plc
Network Rail Infrastructure Ltd
Northern Rail Ltd
Pre Metro Operations Ltd
Rail Freight Group
Serco Ltd
Siemens Transportation Systems Ltd
Southeastern Railway

Southern Railway
Stagecoach South Western Trains Ltd
The Go-Ahead Group plc
Transport for London
Transport Scotland
Victa Westlink
Virgin Trains Ltd
Welsh Assembly Government
West Coast Railway Company Ltd
West Coast Traincare Ltd
Wrexham, Shropshire and Marylebone Railway
XC Trains