



# Facility access agreements

## Freight terminals, ports and stabling yards

May 2019

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### Introduction

1. This module sets out the role of ORR in respect of access agreements for facilities and networks. The focus of this module is on freight terminals, ports and stabling points owned by private operators. It is not about facilities owned by Network Rail or other railway infrastructure managers<sup>1</sup>. This module sets out how we will deal with applications for new agreements and amendments to existing agreements.
2. For network owned and operated by Network Rail or other infrastructure managers, you should see our other guidance modules on our track access guidance webpage<sup>2</sup>. For access agreements at light maintenance depots and stations see the guidance on our stations and depots webpages<sup>3</sup>.

### The legislation

3. The Railways Act 1993 (**the Act**) sets out the regulatory framework for access agreements. Sections 17, 18, 22 and 22A of the Act set out an approval role for ORR in relation to access to railway facilities. This covers all of Network Rail's mainline network, other infrastructure managers' networks as well as the facilities like ports and terminals connected to them. If access agreements covered by the Act are not approved by ORR, they will be void, meaning that they are not enforceable in the courts.
4. Under The Railways (Class and Miscellaneous) Exemptions Order 1994, some broad types of facilities and some specified facilities are exempted from the Act's access provisions. ORR approval is not needed for access agreements at those facilities. ORR may grant individual exemptions from the Act's access provisions under section 20. Instances where this will be appropriate in today's mature rail network are limited<sup>4</sup>.
5. Even where the access provisions of the Act do not apply, The Railways (Access, Management and Licensing of Railway Undertakings) Regulations 2016 (**the 2016 Regulations**) provide an appeal process where access has been denied or the applicant seeking access considers that it has been unfairly treated<sup>5</sup>.

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<sup>1</sup> as defined by The Railways (Access, Management and Licensing of Railway Undertakings) Regulations 2016.

<sup>2</sup> <http://www.orr.gov.uk/rail/access-to-the-network/track-access/guidance>

<sup>3</sup> <http://www.orr.gov.uk/rail/access-to-the-network/station-and-depot-access>

<sup>4</sup> <http://www.orr.gov.uk/rail/access-to-the-network/track-access/how-to-apply-for-track-access/access-exemptions>

<sup>5</sup> See ORR guidance on Appeals <http://www.orr.gov.uk/rail/access-to-the-network/track-access/guidance>

## Access agreements

6. Access agreements are generally between the facility owner and an access beneficiary. The facility owner is the person whose permission is normally required to use the facility, for example a rail freight terminal owner or a tenant who operates a rail freight terminal. The access beneficiary is the person who has access to the site, typically a Freight Operating Company (**FOC**). For the purposes of this module a person who wants to become an access beneficiary is **'the applicant'**.
7. An access agreement will cover the essential elements of the agreement, and include:
  - Duration of the agreement, the start and end dates;
  - Type of access provided and timings;
  - Services provided (such as loading and un-loading);
  - Charges;
  - Performance regime;
  - Termination provisions;
  - Dispute mechanisms; and
  - Provisions for amendments.
8. We do not produce a model agreement for access agreements between a facility owner and an applicant, so that parties have discretion to draft agreements that match their needs. However, you will find copies of agreements that we have specifically approved on our decisions webpage<sup>6</sup> and our public register<sup>7</sup>. It also contains agreements submitted under the general approval.
9. However, all access agreements will need to be compliant with the relevant legislation, including the 2016 Regulations. In particular, they will need to include a charging mechanism and obligations in terms of capacity allocation<sup>8</sup>.
10. Further, we expect facility owners to consider a mechanism for allowing the amendment or limitation of capacity at its facility. Such clauses are often termed 'use-it-or-lose-it'. If capacity is not being used, there should be scope for it to be re-allocated. We will also expect facility owners to offer similar terms to applicants or to have objective and justifiable reasons for offering different access terms.
11. Operators are advised to enter into ORR approved facility access agreements, where appropriate, because otherwise their access rights might be void and not enforceable. Further, if another applicant seeks access to a facility or use of its services, under either section 17 of the Act or under the 2016 Regulations, we are unlikely to give priority weighting to any void agreement.
12. If the site is providing or intends to provide light maintenance services, within the

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<sup>6</sup> <http://www.orr.gov.uk/rail/access-to-the-network/track-access/track-access-decisions>

<sup>7</sup> <http://www.orr.gov.uk/rail/publications/public-register>

<sup>8</sup> <http://www.orr.gov.uk/rail/access-to-the-network/track-access/guidance> "ORR's guidance on the Railways (Access, Management and Licensing of Railway Undertakings) Regulations 2016"

meaning of the Act<sup>9</sup>, including refuelling, cleaning and/or other maintenance work, then the site will be regarded as a light maintenance depot. In that instance, parties should enter into a depot access agreement based on our model templates<sup>10</sup>.

## Duration

13. The 2016 Regulations impose limits on the duration of framework agreements with infrastructure managers<sup>11</sup>. Our interpretation is that these limits do not apply to access agreements with other facility owners. However, we apply a consistent policy to duration of access agreements, which is available on our webpage<sup>12</sup>.
14. We recommend that agreements are of a reasonable duration, normally five years, and that the expiry date is clear. The agreement may allow for renewal. We also recommend that there are explicit provisions for amendments to be made and for termination. See also the section on the General Approval below.

## Disputes

15. Access agreements should usually contain terms about how disputes will be resolved. Where the agreements provide for disputes to be referred to the industry's Access Disputes Committee (**ADC**), the parties should obtain prior authorisation for that service. The ADC routinely levies an annual charge on all operators it provides services for. See the ADC website for more details<sup>13</sup> or contact them directly.

## Movements on to and off the mainline

16. FOCs operating trains on Network Rail's network do so under the provisions of our model track access agreements. These agreements require access beneficiaries to acquire any access rights they need to enter adjoining facilities before using Network Rail's network, to ensure a smooth movement of trains on and off the network. Therefore we expect operators to have the necessary access rights in place at those facilities, or to be in an advanced state of negotiation, before we will approve a track access agreement with Network Rail.

## General approval

17. We have issued a general approval for freight facility access. Where its terms are met, the general approval can be used instead of seeking specific approval from ORR. You must send any agreements covered by a general approval to us electronically within 14 days of signature. Subject to the requirement in section 72(3) of the Act that ORR has regard to the need to exclude certain information, ORR will enter such copies into the public register.

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<sup>9</sup> see section 82(2) of the Railways Act 1993.

<sup>10</sup> <http://www.orr.gov.uk/rail/access-to-the-network/station-and-depot-access>

<sup>11</sup> regulation 21

<sup>12</sup> <http://www.orr.gov.uk/rail/access-to-the-network/track-access/guidance> "Duration of Framework Agreements"

<sup>13</sup> <http://accessdisputesrail.org/>

18. Please note that you cannot use the General Approval to extend the duration of an agreement to more than five years. Parties should enter into a new contract or apply to ORR for specific approval.

### **Failure to agree**

19. If the facility owner and an applicant cannot agree terms, an application can often be made to ORR for directions under section 17 or section 22A of the Act, depending on whether it is for a new agreement or an amendment to an existing one. We will follow a similar processes to those explained in our track access guidance module *Making an application*<sup>14</sup>. As we will need time to consider the representations made and draft directions, you should allow time for this. Even if you have made an application under section 17 or 22A, we will expect both parties to continue negotiations to try to reach agreement.
20. Where the Act does not apply and the parties cannot agree terms, the applicant may appeal to ORR under the 2016 Regulations. This is explained in our guidance module for the 2016 Regulations<sup>15</sup>.

### **New facilities**

21. If you are planning to construct a new rail facility, such as a terminal, port or stabling point connected to the national network then we would advise early contact with us to discuss any access issues. We also have a dedicated webpage for new freight facilities<sup>16</sup>. You should also liaise with Network Rail.
22. Under sections 16A-16I of the Act, we may, under certain circumstances, direct a network operator to provide a new railway facility, or improve or develop an existing facility. This could extend to the types of network covered by this module. We have issued a separate code of practice and this is available on our website<sup>17</sup>.

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<sup>14</sup> <http://www.orr.gov.uk/rail/access-to-the-network/track-access/guidance>

<sup>15</sup> <http://www.orr.gov.uk/rail/access-to-the-network/track-access/guidance> "ORR's guidance on the Railways (Access, Management and Licensing of Railway Undertakings) Regulations 2016"

<sup>16</sup> <http://orr.gov.uk/rail/access-to-the-network/track-access/how-to-apply-for-track-access/freight-terminals>

<sup>17</sup> <http://www.orr.gov.uk/rail/access-to-the-network/track-access/guidance> "ORR's Code of Practice for the application of Sections 16A to I of the Railways Act 1993".