Making an application

March 2015

Introduction

1. This module explains the procedures we expect to follow in considering applications for track access contracts granting access to the network for freight customers, freight operators and passenger operators, and applications to amend existing contracts (known as supplemental agreements). Our aim is to ensure that our consideration of applications is undertaken in a timely manner consistent with our statutory duties, EU legislation and transposing regulations, and the obligations they impose.

2. For further information on this, and on ORR, see our Starting Mainline Rail Operations[1] booklet. This guidance document provides summaries of the relationship between the regulatory and contractual requirements that govern the economic and health and safety regulation of the mainline network in Great Britain. Applicants are strongly advised to familiarise themselves with this document before making an application.

3. We will consider every application on its merits. Nothing in this guidance should be interpreted as committing us to making any particular decision.

4. We will have regard to, but will not be constrained by, what the parties have agreed. Before making an application it is important that the parties have, as far as reasonably practicable, considered all the issues so that we and consultees have a proper understanding of the proposed capacity allocation. Industry consultation is covered briefly in this module and in more detail in our module *The Industry code of practice for track access application consultations*[2].

5. ORR will determine the fair and efficient allocation of capacity, whether or not the parties have reached agreement on all points. Our decision will be based on the public interest as defined by our statutory duties. We are required, if appropriate, to put the public interest above the private commercial interests of the

[1] http://orr.gov.uk/__data/assets/pdf_file/0015/4434/starting-mainline-operations.pdf

[2] http://orr.gov.uk/what-and-how-we-regulate/track-access/guidance

facility owner and the applicant. We may need to take into account considerations that may be of little or no concern to the parties, but which affect the interests of third parties, for example rail users, funders or other potential users of facilities.

6. We expect:

(a) beneficiaries (passenger and freight train operators, freight customers and any other holders of an access contract who have their services operated by someone else), Network Rail, and other relevant facility owners, to follow the procedures outlined here when negotiating and submitting new track access contracts or amendments to existing track access contracts for directions or approval;

(b) applications to be accompanied by a completed application form[3] and comprehensive and specific information in support of the submission;

(c) parties should use the relevant model contract as published by ORR under section 21 of the Act;

(d) any party seeking a new track access contract or an amendment to an existing track access contract to first discuss and try to agree its access rights with Network Rail;

(e) where confidentiality is not an issue, any party seeking a new track access contract or an amendment to an existing track access contract, to first discuss this with relevant stakeholders including, but not limited to, beneficiaries who may be affected by changes to the timetable, prior to the formal consultation; and

(f) parties to note the expected timescales for processing applications set out later in this module. However, where the procedures referred to in (a) to (e) above are not complied with, or late applications are received, our approval may not be obtained in the desired timescales.

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

8. This module is divided into the following sections:

(a) general matters (concerning the submission of applications and the need for ORR's approval);

(b) the model track access contracts;

(c) the form and content of applications;

(d) significant projects and programmes;

(e) consultations and timescales;

[3] Application forms, templates and general approvals can be downloaded from our website http://orr.gov.uk/what-and-how-we-regulate/track-access/track-access-process/forms-model-contracts-and-general-approvals .

(f) hearings;

(g) the processes for agreed applications (where we are being asked either to issue directions to the parties to enter into a new contract under section 18 of the Act, or to approve amendments to an existing approved contract under section 22 of the Act);

(h) the processes for non-agreed applications (where beneficiaries have not been able to agree terms with Network Rail, and we are asked either to direct Network Rail to enter into a new contract under section 17 of the Act, or to direct under section 22A that an amendment be made to an existing approved contract in order to permit more extensive use of the network or facility to which the existing contract applies);

(i) track access options and enhancements;

(j) the process for applying for a facility access exemption under section 20 of the Act; and

(k) our criteria for focused scrutiny of agreed applications.

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

General matters

Validity of contracts

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

(a) it does so pursuant to directions we have made under sections 17 or 18 of the Act;

(b) we have issued a general approval permitting contracts of that type to be entered into; or

(c) the facility in question is exempt from sections 17 and 18 of the Act.

10. Any access contract which is entered into other than as detailed in the preceding paragraph is void (has no effect in law).

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

(a) we have approved the amendment under section 22 of the Act;

(b) we have issued a general approval permitting amendments of that type to be made;

(c) it is made pursuant to directions that we have given under section 22A; or

(d) the amendment is made under a specific modification provision contained in the access contract;

Signing and dating contracts

12. For a contract or supplemental agreement to be valid, the document itself must be signed in the appropriate place and dated in the appropriate place. The date normally appears at the top of page one. Note: it is not sufficient just to date the front cover as this is not legally part of the contract or supplemental agreement.

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

Counterparts

14. For contracts executed under the laws of England and Wales, it is legally valid to sign contracts in counterparts. This means the parties independently signing separate but identical copies. The two copies (counterparts) taken together form the contract and must be kept together. It is not acceptable to have one contract signed by one party and just the signature page from the other party. Given the risk of non-identical contracts being signed by mistake, or one of the counterparts being mislaid or discarded in the belief that the second is just a copy of the first, we would suggest that contracts are only executed in counterparts if absolutely necessary when time is limited and it is not possible for both parties to sign a single copy of the contract. Counterparts are not permitted under Scottish law.

Number of copies of documents to be submitted to ORR

15. The number of copies of documents that should be submitted to us depends on the type of application or submission:

(a) for an application for directions for a new contract under section 17 or 18, or an application for directions to amend an existing contract under section 22A, we require **one copy** of the relevant application form, the draft contract or amendment and any associated documentation;

(b) for informal submission of an amendment to an existing contract under section 22, we require **one copy** of the relevant application form, the draft supplemental agreement and any associated documentation;

(c) for formal submission of an amendment to an existing contract under section 22, we require **three copies** of the signed and dated supplemental agreement. When we issue the approval notice we will retain one copy for our records and send a copy to each of the parties along with a copy of the approval notice; and

(d) for submission of a contract or supplemental agreement which has been entered into under a general approval we require **one copy** of the signed and dated document**.**

16. Please also submit editable electronic versions of contracts and supplemental agreements in either MS-Word format or Open Document format. This is so that we can make redacted copies (when required) and make copies that meet our website accessibility guidelines.

17. We list details of all current applications and recent decisions on our website, where we also maintain copies of the current versions of every track access contract. These are known as consolidated contracts. Network Rail has a contractual obligation to provide ORR and the relevant beneficiary with an updated consolidated version of the contract within 28 days of any amendment or modification being made to it. This should be in MS-Word format or Open Document format. Hard copies are not required.

General approvals

18. We are able under sections 18 and 22 of the Act to grant general approvals. Under these, we may give our approval prospectively, without the need for specific submission and approval, to:

(a) the making of access contracts of a specified class or description;

(b) amendments of a specified description to a particular access contract; and

(c) amendments of a specified description to access contracts generally or to access contracts of a particular class or description.

19. In considering the case for issuing a general approval, we would expect to consider the potential impact of future changes which the general approval would permit, and whether they are likely to be so material as to require regulatory scrutiny at the time.

20. There are several general approvals currently in place (the use of which is subject to the conditions within them) permitting parties to enter into a track access contract or amend their existing track access contract without needing to apply to ORR for our specific approval:

(a) the Passenger Access (Short Term Timetable and Miscellaneous Changes) General Approval 2009[4]. This provides, amongst other things, for access rights to run additional or amended services for up to 90 days without an industry consultation, or up to one timetable period[5] following industry consultation;

(b) the Passenger Access (Model Charter Track Access Contract) General Approval 2009[6]. This permits the making of contracts for charter services based on the model charter contract[7]. It also permits the amendment of the expiry date and the update of contractual terms where the equivalent provisions in the model charter contract have been revised;

[4] See footnote 3.

[5] This is defined in the general approval as the period between one Principal Change Date and the Subsidiary Change Date subsequent to it, or the period between one Subsidiary Change Date and the Principal Change Date subsequent to it.

[6] See footnote 3.

[7] See footnote 3.

(c) the General Approval for connection contracts (effective 17 April 2014)[8]. This permits the making of connection contracts between Network Rail and another facility owner, provided that certain conditions are met;

(d) the Freight Access (Track Access Contracts) General Approval 2012[9] enables:

(i) Network Rail and a freight operator to enter into a track access contract which may contain certain types of firm access rights for a limited two year period;

(ii) Network Rail and a freight operator to amend their track access contract without our specific approval, subject to certain conditions. Any amendments beyond those permitted will require our specific approval under section 22 or directions under section 22A of the Act;

(iii) Network Rail and freight customers to enter into a freight customer track access contract which may contain certain firm access rights for a limited two year period;

(iv) Network Rail and a freight operator (nominated by a freight customer) to enter into a freight customer specific track access contract for freight operators; and

(v) Network Rail and a freight operator to make certain changes to the freight operator's existing track access contract relating to liability necessary where the freight operator has entered into a freight customer specific track access contract for freight operators; and

(e) the Freight Facility (Ports and Terminals) General Approval 2011[10]. This permits ports and terminals facility owners and their beneficiaries to enter into access contracts (Facility Access Agreements) at those facilities, for up to five years' duration, and to extend existing generally and specifically approved agreements provided they do not exceed five years from the original commencement date.

21. The general approvals contain more information on what amendments are permitted and the associated conditions. Some of the amendments permitted first require a Network Rail-led industry consultation of potentially affected parties. Changes beyond those permitted by these general approvals, or continuation of additional or amended rights beyond the periods permitted, need our specific approval.

22. We may also revoke and issue new general approvals from time to time. New general approvals will be published on our website.

Non-Network Rail networks

23. These criteria and procedures refer commonly to contracts entered into where Network Rail is the facility owner. Where the facility owner is not Network Rail, we would expect the parties to the proposed contract to use the model contract as the starting point and to follow the application procedures outlined in this module. We recognise that the provisions of the model contract may not be appropriate in their entirety in all cases – in such instances we would be prepared to consider adaptations to the model provisions

[8] See footnote 3.
[9] See footnote 3.
[10] See footnote 3.

where the parties feel they do not meet their commercial requirements. We would, however, need to be satisfied with the reasons for any such bespoke approach.

Licensed operators

24. Operators of railway assets must either hold a licence to operate or have a licence exemption[11]. Licences and licence exemptions may be granted by the Secretary of State or ORR (but are generally granted by ORR). Licences to operate passenger or freight trains granted by the licensing authority of another European Economic Area state are normally valid in Great Britain.

25. Operators under a European licence will need to hold an appropriate Statement of National Regulatory Provisions (SNRP) issued by ORR. See our website[12] for more information.

26. Holding a licence is a condition precedent to the exercise of rights to operate on the network in the passenger and freight model contracts. In practice, the vast majority of access rights are held by licensed passenger and freight train operators. We would therefore generally expect the intended operator of the services covered by an application for an access contract to hold, or be well advanced in an application for, a licence to operate trains on the network.

27. For potential holders of freight customer track access contracts there is no requirement to hold a licence but any operator appointed under this contract, holding a model freight operating company customer contract, must be a licensed operator.

28. It is not necessary to hold a licence or be a train operator in order to obtain access rights. Individuals and undertakings may obtain rights to be exercised on their behalf by a licensed operator. However, in considering whether to approve those rights, we need to know the identity of that operator and the existing arrangements which will enable it to operate the rights for which the applicant is applying.

29. Applicants seeking further guidance on licensing are advised to check our website or contact us[13].

Safety certificate

30. We would not expect to issue directions in respect of a proposed passenger or freight track access contract until:

(a) for a new operator, where necessary, it either holds a safety certificate covering the scope of the operation in question, or it is sufficiently advanced in the process of obtaining a safety certificate and there is a condition precedent in the contract making the exercise of rights conditional on having obtained a safety certificate); or

[11] Section 6 of the Railways Act 1993 and regulation 5 of the Railway (Licensing of Railway Undertakings) Regulations 2005. See http://orr.gov.uk/what-and-how-we-regulate/licensing.

[12] http://orr.gov.uk/what-and-how-we-regulate/licensing/licensing-railway-operators/background-to-operator-licensing.

[13] licensing.enquiries@orr.gsi.gov.uk.

(b) where an operator already holds a safety certificate, if the contract represents a substantial change to the type or extent of the operation specified in the safety certificate, we have issued a notice amending the safety certificate. (Where necessary, operators should ensure that they have applied for an amended certificate in sufficient time before they wish to commence their substantially changed services).

31. Applicants should ensure that they, or their nominated party, have obtained the necessary safety certification in respect of their application[14].

Railway Industry Emergency Access Code

32. If, in an emergency, a train operator needs to use facilities it does not hold access rights to (such as network, stations or light maintenance depots), the Railway Industry Emergency Access Code (the Emergency Access Code) exists to provide train operators with access to those facilities for the period required. A new operator becomes a party to the Emergency Access Code by signing an accession agreement with Network Rail (contained in Schedule 2 of the Emergency Access Code).

33. Being a party to the Emergency Access Code is a condition precedent to the exercise of access rights in the model passenger and freight contracts. Failure to sign up to this code before the required date in the access contract may result in that contract lapsing. We encourage applicants to take steps to ensure that they become a party to the Emergency Access Code within the relevant timeframe by liaising with Network Rail.

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

34. When seeking access to the network, train operators will need to ensure that they are developing parallel applications for the access they may need to stations, light maintenance depots and other railway facilities. Stations and light maintenance depots will generally also be covered by the regulatory regime established by the Act; these access contracts will also need to be approved or directed by us. Before approving track access rights, we would wish to be satisfied that arrangements for access to other relevant facilities have been made, or will be in place by the time the contract came into effect. Applicants seeking guidance on station or depot access should contact us[15].

35. For some other facilities, including some ports and freight terminals, access is *not* covered by the access regime established by the Act, as the facilities are exempted by The Railways (Class and Miscellaneous Exemptions) Order 1994 (the CMEO). Exempt facilities, and the effect of the The Railways Infrastructure (Access and Management) Regulations 2005 (the Regulations) on them, are also discussed later in this module. Whether access to another railway facility is regulated or exempt, we expect operators to ensure that they have all the necessary access contracts in place by the date they intend to start their operations, and operators are advised to check the regulatory status of facilities with the facility owner.

[14] http://orr.gov.uk/what-and-how-we-regulate/health-and-safety.
[15] stations.depots@orr.gsi.gov.uk.

Informal discussions

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

37. We are happy to provide guidance to prospective users and facility owners in relation to the criteria and procedures that will apply to applications, although we will not become drawn into the negotiating process. Where negotiations relate to the level of infrastructure charges, the Regulations state that these are only permitted if carried out under our supervision (see regulation 28(3)). If parties are uncertain or encounter disagreements over regulatory issues, they should contact ORR rather than proceed under what may be misapprehensions. In giving guidance, we will not fetter our discretion for when we consider the application formally.

Multilateral provisions

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

Unfinished business

39. Applicants may wish to include provisions in their access contracts for certain matters to be agreed between the parties later (for example, where the parties may need to seek ORR's approval of new access rights as part of a timetable change but consequential issues, such as a revised performance regime - as discussed in our module *Performance*[16]) have still to be resolved. To ensure there are no loose ends in the contractual provisions that would allow matters to drift unresolved, we expect the contract to make clear provision:

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

(b) for the issue to be resolved in a timely manner should the parties fail to reach agreement;

(c) if the parties fail to agree within the specified time, for the matter to be referred for determination under the Access Dispute Resolution Rules (ADRR), which is required to apply clear, adequate and appropriate criteria (including current regulatory policy where appropriate). It is very important that the criteria are specified in the contract or arrived at through an objectively justifiable process; we will refuse

[16] See footnote 2.

to approve cases where the parties merely ask the third party to make a contract for them as it is not part of the role of ADRR;

(d) in matters of regulatory importance, for the agreed/determined matters to be referred for ORR's approval;

(e) where we do not give our approval, the parties and the expert should take account of our reasons when revising the proposal, and resubmitting it; and

(f) for including the result of the process in the contract.

40. As mentioned on the application form, we need to see a flow chart illustrating the process to ensure that it is robust, has no steps missing and leaves no loose ends.

Incorporation of other documents by reference

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

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

43. Certain external documents are already subject to regulatory protections. Railway Group Standards, the Engineering Access Statement, the Timetable Planning Rules and the ADRR are examples of external documents where all parties have regulatory protections against possible abuse of power or changes that may be objectionable and harmful to the interests of others.

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

45. For these reasons we will wish to:

(a) see and review any documents referred to in proposed access contracts at the time the application is made (or before);

(b) be satisfied that the references and any obligations imported are appropriate and justified (as part of which we will also need to take into account the potential and mechanisms for later amendment of these documents), including flow-through; and

(c) ensure that the documents are publicly available, or publish them ourselves, subject to any confidentiality exclusions.

The model track access contracts

46. We have published model contracts, available on our website[17], for:

(a) freight services;

(b) passenger services;

(c) freight customers who wish to hold their own access rights;

(d) freight operators to operate services where those rights are held by a freight customer;

(e) charter passenger services; and

(f) connections between two separate networks.

47. The model contracts should be used as the basis for all submissions made to us. The passenger, freight and freight customer contracts are explored in more detail in the module *Model track access contracts*[18] which contains a guide to completing these model contracts. The other types of model contract are briefly explained below.

Model contract for charter passenger services

48. The charter passenger services model contract does not need customisation, except for the insertion of certain dates, the completion of company information and the deletion or completion of clause 19 as appropriate. It contains a standard charging and performance regime and allows an operator to use Network Rail's network to operate services for which it has made an access proposal through the timetabling process. We have issued a general approval[19] permitting the making of contracts based on the model charter contract without the need to make an application to us. However, if an operator wanted to customise the model contract it would need to seek our approval and use the passenger application form as the basis for its application.

[17] See footnote 3.

[18] See footnote 2.

[19] See footnote 3.

Model connection contract

49. We have published a model contract for connections[20]. This is based on the provisions in the model passenger and freight track access contracts, but adapted to address the special issues that arise in a connection contract. Connection contracts set out the rights and obligations of the parties for the on-going maintenance of connections between two railway networks. We have issued a general approval[21] which permits the making of connection contracts between Network Rail and another facility owner without the need for our specific approval, provided that certain conditions are met. See our module *Connection contracts*[22].

Model freight operating company customer contract

50. We have published a model freight operating company customer track access contract which forms part of the contractual structure for holders of freight customer access contracts. A freight operator enters into the freight operating company customer track access contract with Network Rail once it has received a drawdown notice from the freight customer. A more detailed description of the mechanism to enter into this contract is described earlier in this module and the contract itself and the mechanisms for drawing down and revoking access rights are set out in more detail in the module *Model track access contracts*[23]. This contract is largely based on the model contract for freight services.

Other access contracts

51. For applications relating to intermediate traffic (such as movements of infrastructure maintenance vehicles, known as “yellow plant”, when not undertaking network services), we expect applicants to use, as far as possible, the model freight contract and our application form. Where certain provisions in the model contract and sections of the application form are not appropriate to such operators we will consider bespoke arrangements on their merits.

Bespoking and innovative provisions

52. Model contracts include those matters we expect to see covered in that particular type of track access contract. Although we have the power under section 21 of the Act to require the use of model clauses, we are willing to consider bespoke departures from the published model, for example where some bespoke elements are desirable to meet the particular commercial circumstances of a particular train operator, network operator or other beneficiary. We will consider applications for access contracts with bespoke provisions on their individual merits, and will publish the reasons for our decisions.

53. The model contracts contain draft templates for certain optional provisions which beneficiaries may wish to exercise.

[20] See footnote 3.
[21] See footnote 3.
[22] See footnote 2.
[23] See footnote 2.

54. Whilst we are keen to promote innovation and best practice in the further refinement of access contracts over time, when considering new or novel approaches in proposed access contracts we will have in mind the provisions in Network Rail's network licence[24] prohibiting undue discrimination (Condition 10), which counters the risk of new provisions in access contracts incentivising Network Rail to favour one beneficiary over another.

Self-modification provisions

55. We expect access contracts to include provisions to enable changes of an administrative or minor detail to be made without our approval.

56. In some cases contracts may contain provisions for the determination of the value of a particular parameter by a clearly defined process and within a defined range. Any in-built flexibility should not be such as to enable provisions of the contract to be varied in a material way such as might have an adverse or detrimental impact on other beneficiaries, or cut across regulatory policy. Consequently, we expect that provisions establishing a process for significant variation of the contract terms should ensure that these can only be made subject to our specific approval. However, provision should be made for ORR to be notified of *all* changes before the changes in question become effective.

The form and content of applications

The application forms

57. Our application forms streamline and simplify the process of making, consulting on and reviewing applications for passenger, freight and freight customer contracts and amendments to existing contracts. These invite applicants to provide specified information in support of their applications.

58. Copies of the application forms can be downloaded from our website[25]. They are largely self-explanatory, particularly when read in conjunction with this document. The information required on the forms relates to the specific areas of regulatory concern discussed in this and the other modules, with the forms cross-referring to individual paragraphs in the modules.

59. The forms require the applicant(s) to provide an appropriate summary of the proposed contract. This summary is an important component of the application, both for our own scrutiny of the proposed contract, and to facilitate the process of wider consultation. The summary should cover all material parts of the proposed contract or amendment.

60. The form must make clear which services are affected, and demonstrate the likely impact of this, so that other operators may make informed representations on the application.

[24] http://www.rail-reg.gov.uk/upload/pdf/netwrk_licence.pdf.

[25] See footnote 3.

61. For those applications that will undergo an industry consultation, sections 1-7 of the application form should be completed prior to the consultation to inform consultees of the proposal. After completing the consultation, sections 8 and 9 should be completed before the application is submitted to us. For applications where there is no industry consultation (see later in this module), the form should be completed (with “not applicable” entered, where appropriate, into the unused parts of the form and an explanation of why consultation was not carried out) and signed before being submitted to us.

62. For agreed applications under section 18 or 22, Network Rail should complete section 9, confirming that both parties are prepared to enter into the contract or supplemental agreement in the terms submitted. Except for exceptional circumstances, parties should not continue to negotiate the contract after it has been submitted to us. Parties to the contract should also not attempt to persuade ORR to require modifications under section 18(7) which are inconsistent with that confirmation. In such cases, we may decide to suspend our consideration of the application or to reject it on the grounds that the confirmation has been wrongly given and the parties are not agreed on the terms.

63. This contrasts with applications under sections 17 and 22A where an applicant may need to proceed under one of those sections because negotiations with the facility owner appear to be unpromising and it must ensure it does not run out of time to invoke appropriate regulatory protection. In these cases, the applicant should complete the required information in section 9 of the application form.

64. All bespoke departures from the model contract should be clearly identified by supplying a track-changes mark-up of the contract from the model contract template. Wherever provisions would incorporate new processes we will wish to see evidence that the process is robust, internally consistent (with no steps missing), and leaves no loose ends.

65. If you are unclear about any question posed on the forms, or on any aspect of the application process, please contact us[26].

Confidentiality, consultation and ORR’s public register

66. Section 72 of the Act requires us to maintain a public register and sets out what we must enter in it - including every direction to enter into an access contract, every access contract, every amendment of an access contract and every facility exemption granted under section 20(3) of the Act.

67. Section 72(5) of the Act requires the facility owner to send to ORR within 14 days a copy of every new access contract and any amendment to an existing contract.

68. Beyond the public register, we believe it important that our consideration of applications for access rights should be as open, transparent and well informed a process as possible. We wish to ensure that the substance and basis of regulatory decisions is clear and well understood throughout the industry and the

[26] Track.access@orr.gsi.gov.uk.

consultation of potentially affected industry parties will help to support this. The consultation process is described in the Industry code of practice for track access applications.

69. In deciding whether to exclude information from the public register or from wider circulation, we must have regard to the criteria under section 71(2) of the Act; so we must consider whether publication of any information relating to the affairs of an individual or body of persons would or might, in our opinion, seriously and prejudicially affect the interests of that individual or body of persons.

70. In line with this, we have considered what information normally found in track access contracts meets this requirement. On this basis ORR normally only redacts the following from passenger contracts:

(a) the figures in the column headed "Total Train Cost per Mile (Pence)" in Annex C to Part 3 of Schedule 4 (Payment Rate per train mile);

(b) where it exists within contracts (those approved from 1 April 2014 onwards) the figures in the column headed “Defined Service Group Revenue” in Annex D to Part 3 of Schedule 4;

(c) the Performance Points, Payment Rates and Monitoring Point Weightings in Appendix 1 of Schedule 8; and

(d) the Sustained Poor Performance Thresholds in Appendix 3 of Schedule 8.

71. From freight, freight customer and freight operating company contracts, ORR normally only redacts the following:

(a) the customer details in the table in Schedule 5; and

(b) the train operator and Network Rail caps in Appendix 1 of Schedule 8.

72. If either party wants any other information to be redacted from the public register or publication generally they must explain why publication of the information would seriously and prejudicially affect their interests.

73. It should be made clear in the consultation documentation where something has been redacted (for example, by using the “✂” symbol). When ORR receives an application, we need to be satisfied that the redaction of confidential information did not undermine the consultation that was conducted. Furthermore, as mentioned above, we will make the final decision on what information is redacted from the public register and documents placed on our website.

74. Beneficiaries making applications under sections 17 or 22A of the Act should note that under the process established by Schedule 4 to the Act, we are obliged to send a copy of the application in full to the facility owner. We are also obliged to consult any “interested person” identified by the facility owner on the application and invite written representations from them.

75. The Act defines “interested person” as any person whose consent is required by the facility owner, as a result of an obligation or duty owed by the facility owner which arose after the coming into force of section 17 of the Act, before the facility owner may enter into the required access contract (Schedule 4, paragraph 1). It is unusual for anyone to meet this definition.

76. Once an access contract has been entered into, the parties will, if necessary, be invited again to identify which parts of the contract, if any (in addition to the information specified earlier in this module) they want us to redact from the copy to be entered into the public register.

Electronic copies

77. Applications, including proposed access contracts and supporting documentation, should be submitted to us by email in electronic format (as well as in hard copy) and must exclude any macros or other auto-formatting. Paragraph numbering should follow the convention in the relevant published model contract and should be typed in, not self-generated. We strongly recommend that applicants begin with the relevant model contract.

Complete submissions

78. To help the timely processing of applications it is important that submissions are complete and accurate. If they are not, they may be rejected. Applicants should note the following:

(a) for agreed submissions under sections 18 and 22, we expect to consider complete contracts or supplemental agreements. The statement at section 9 of the application form is required because experience has shown that consideration and consultation based on incomplete contracts/supplemental agreements is inefficient, given the risk of the parties agreeing material changes at a later stage; and

(b) for submissions under sections 17 and 22A, the proposed contract or supplemental agreement sought by the applicant must form part of the application and must be complete at the time of submission. This is a requirement of paragraph 2(1) of Schedule 4 to the Act.

False information

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

Significant projects and programmes

80. Periodically, significant concurrent changes will be made to timetables which will impact a number of operators and stakeholders. This section clarifies ORR's role in such timetable re-casts and other comparable programmes of work.

Stakeholder engagement in significant projects

81. We continuously review our efforts to improve stakeholder engagement with both Network Rail and the industry as a whole. Engagement is, and will continue to be, particularly important where major capacity projects are concerned.

82. Part D of the network code provides for the publication of a Calendar of Events (CoE) and the establishment of an Events Steering Group (ESG) for major projects. The CoE allows the industry to have clear, timely and transparent visibility of significant future events and likely timescales.

83. The industry has already agreed that an ESG should routinely be established for substantial timetable workstreams, particularly those affecting a significant number of industry parties. Each ESG will be made up of all affected operators, Network Rail and, where appropriate (and agreed by members) funders. Its first task upon establishment will be to ensure that all relevant parties are properly represented. The ESG will help Network Rail manage the process for the associated timetable change.

Project management

84. It is important that major timetabling projects proceed at an appropriate pace so that milestones are met and the provision of improved services is realised on time. ORR, alongside Network Rail, will continue to ensure that rigorous project planning disciplines are applied to all significant programmes and projects. This will include the early publication of a project plan, detailing timescales, milestones and resources, and the putting in place of efficient and transparent processes which involve all interested stakeholders. It is already customary for ORR to have a sole point of contact for each and every project and workstream. We will ensure that this contact is clearly detailed at the outset.

Deadlines

85. To overcome the problems created by last minute applications from both new aspirants and existing operators trying to 'block' a rival's bid we may, as part of the project plan milestones, include cut-off dates for applications related to significant projects. When requesting applications, we will typically specify a cut-off period of eight weeks, by which time we *must* receive applications if they are to be considered. We will only publish applications received once the closing date has passed. All applications will be published simultaneously on our website.

ORR attendance at industry meetings

86. ORR does not usually attend industry meetings such as ESGs due to potential conflicts with our role in approving applications and/or acting as the appeal body in the event of any subsequent timetabling dispute. When we attend, it is purely as an observer.

87. Further, we believe that the role of managing significant projects should fall to Network Rail, which is responsible for both undertaking an appraisal of network capacity and coming to a conclusion on how that capacity could be used. It is then our role to ensure that the allocation of that capacity is fair and efficient, and to determine that allocation if there is any dispute.

Consultations and timescales

Consultations

88. The full nature of a consultation will depend on the section of the Act under which the application is being made, whether it is an agreed application under section 18 or 22 or a disputed application under section 17 or 22A. Please see the Industry code of practice for track access application consultations[27] for full details of when and how consultations should be undertaken.

89. The application forms require applicants to confirm that they have completed, where necessary, a consultation in line with this code of practice. Therefore, compliance with it is an important and integral part of the track access application process, and we will expect to see that applicants have had due regard to the content of the code of practice, when making an application.

90. We would expect all agreed applications to have been subject to a Network Rail led industry consultation before they are submitted to us. For section 17 and 22A applications, the applicant may either conduct the industry consultation itself, or, for applications where Network Rail is the facility owner, request Network Rail to carry out the consultation. Alternatively, if the applicant would like ORR to carry out the consultation, we will do so following receipt of the application. Where necessary, we will also conduct the consultation for applications where Network Rail is not the facility owner.

91. We would not expect a consultation to be necessary in the case of a section 22 application where the changes proposed are of a financial nature only (and therefore commercially confidential). For applications by franchised or concession operators, we would expect to ensure that any relevant franchising/ concessionary authorities have had the opportunity to review that application. Such operators, where appropriate, should have consulted the authority concerned before making an application to us.

92. In all cases, it is important that the information made available to consultees is as full and clear as possible and that consultees have adequate time in which to consider and make representations on an

[27] See footnote 2.

application. For agreed applications under sections 18 and 22 where there is likely to be an impact on other operators, we would expect Network Rail and the operator to have discussed the implications of proposed contracts with those operators before consulting more formally on the proposed application. For section 17 and 22A applications, we would expect the applicant to discuss its plans with other operators before making an application. This will assist the applicant(s) in understanding how to best mitigate/resolve any issues at an early stage.

93. To ensure that we give due regard to our statutory duties, it is important that certain bodies have the opportunity to comment on proposed contracts before we reach our decisions. These bodies would normally include the Department for Transport (DfT), Transport Scotland where a contract affects Scotland, the Welsh Assembly Government for contracts affecting Wales, and, for matters relating to London, the Mayor of London and Transport for London (TfL). Schedule 4 to the Act also requires ORR to seek representations from a defined category of “interested persons” for applications made under sections 17 and 22A (see earlier in this module).

94. We also consider it important that other potentially affected parties have the opportunity to comment on proposed contracts so their views can be taken into account. This lets us obtain a complete picture of the implications of a proposed contract throughout its duration, including the implications for the plans of other operators to introduce new or varied services. Depending on where the services in a proposed contract would run and the nature of those services, we will routinely expect to ensure that the parties listed in the code of practice have had the opportunity to comment on a proposed contract.

95. Network Rail will make us aware of all consultations which it issues, so that we can carry out an initial review and identify any potential issues or concerns. If we identify any issues at this stage, we raise them with the parties, allowing them to be addressed prior to submission of the application to us for approval. However, we would only expect to make detailed comments on an application following submission to us, and not at the consultation stage.

96. Involving ORR in this way at an earlier stage should:

(a) enable us to reduce the time we take for our initial review of any formal application (although, in the case of more contentious applications, our consideration is still likely to take longer than our advertised timescales);

(b) avoid the need for an extended or new consultation where material issues have been identified;

(c) allow us to identify at an earlier stage contentious issues and plan accordingly;

(d) reduce the need for the level of ‘back and forth’ between ORR and the parties, to the benefit of all; and

(e) overall, allow decisions on applications to be reached more quickly.

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

Timescales

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

(a) the time required for the pre-application industry consultation (if required);

(b) our need for sufficient time to come to a properly-informed decision on each application; and

(c) the point at which the beneficiary will need rights to be approved in order for access proposals to be accepted into the working timetable.

99. We suggest at least six weeks be allocated for applications where Network Rail conducts the industry consultation (four weeks consultation period, with two weeks to address issues). For applications where consultees are likely to raise significant concerns, additional time should be factored in.

100. The time we require to consider an application will depend on its impact on the network and other operators, its complexity and the extent to which it departs from the relevant model contract. Even a supplemental agreement concerning relatively few services submitted under section 22 can raise significant issues where, for example, network capacity is constrained.

101. Where Network Rail conducts the industry consultation on an application, to allow time for our full consideration we would expect our review to take up to:

(a) *twelve weeks from receipt* to reach and publish our conclusions on an application for a contentious contract (including those submitted under sections 17 or 22A and those meeting any of our criteria for focused regulatory scrutiny); and

(b) *six weeks from receipt* for a more straightforward application (one that does not meet any of our criteria for focused regulatory scrutiny).

102. Where we are dealing with major applications from multiple applicants which potentially compete for the same capacity, our review may take significantly longer.

103. We may be able to complete our review and come to a decision sooner than the timescales mentioned above. There may also be applications that require longer than these indicative timescales, particularly if a hearing is required (see later in this module).

104. For applications under sections 17 and 22A, we have a statutory requirement under Regulation 29(7) of the Regulations to make our decision within two months of receipt of the final piece of relevant information.

Advice on timescales for submitting an application

105. When considering the timing for making an application to ORR, beneficiaries should be aware that there are significant lead times in the compilation of the working timetable. Beneficiaries can make an access proposal into the timetable for services for which they do not already hold access rights. Where there is insufficient capacity to accommodate all rights for which access proposals have been made, the way in which rights will be accommodated is set out in Condition D4.2.2 of the Network Code.

106. For example, if it is important for a beneficiary to have first priority in respect of new services it wishes to operate in a timetable starting in December, it will need to be in a position to make an access proposal for the necessary train slots by the corresponding Priority Date, which would be at the beginning of March in the same year. This means it will need to have had the corresponding rights approved by then. Working back, that suggests making an application to us by late November/early December of the previous year where the new rights are likely to raise issues of regulatory significance or complexity, and by mid-January for a less significant application (these dates include some additional time to cover the holiday period).

107. Beneficiaries may not always require particular priority in the timetable development process, e.g. where new or revised services would be on a part of the network where capacity constraints are not an issue. For passenger operators, the ultimate constraint for submitting an application would be to have the new rights approved by ORR and in place so that the services to which they apply can be reflected in the public timetable at least 12 weeks before the services are due to run (T-12) so that passengers can buy advance purchase tickets. This means submission of an application no later than 18 weeks in advance of the timetable change date for minor variations and 24 weeks for more significant or complex changes.

108. The processes and timescales for compilation of the timetable established under Part D may be changed over time, through the network code's own change procedures in Part C. Applicants are strongly advised to check at an early stage that they are working to the latest processes and timescales.

109. We will make every effort to deal with applications in a timely manner, but we can give no guarantee that applications allowing less time for our consideration will be processed by the date sought (nor, indeed, that the rights sought and/or commercial terms attaching will necessarily be approved). Applicants should therefore make applications in good time.

110. Where applicants believe that they will not be able to meet the timescales set out above, they should contact ORR as soon as possible in order to discuss whether and how it might be possible to manage the application to facilitate approval by the desired date.

Hearings

111. A hearing enables us to probe and test issues of particular and wide-ranging regulatory concern together with relevant interested parties. Being able to air issues with several parties at once allows interested parties to raise issues of concern and clarification as the hearing progresses. A hearing can be a useful and efficient opportunity to test the issues raised in written representations, and to test the recommendation that ORR staff might be minded to make, before final decisions are taken. A hearing may be held in addition to the specific meetings which we may offer, or require one or both parties to attend, to discuss specific aspects of an application.

112. Given the time and resources required for hearings, we only hold them where we consider that they will add value to our decision making process. We will consider on a case by case basis whether a hearing is appropriate. If we decide to hold a hearing, we will invite all parties we consider likely to be directly and materially affected by, or to have a substantial interest in, the application. We will generally expect to put questions to the person seeking access rights, Network Rail and any relevant franchising authorities. We may also invite others to present their concerns, and may also allow cross-questioning (through the chair). We will not expect those present to repeat material that has already been supplied in written representations, but may invite examples to be given.

113. We will usually give attendees advanced notice of the agenda of issues we expect to follow and its timing. For significant new contracts, a hearing may run for more than one day, and it may be appropriate to hold separate hearings to consider separate issues. It will always be open to those attending to arrange to be represented or assisted by legal advisers. A transcript will be taken of the hearing. A draft will be available to those attendees who have spoken, to give them the opportunity to propose corrections to their own words, using Hansard Rules[28], before the hearing transcript is published on the ORR website (with any necessary confidentiality redactions).

114. For matters we consider confidential, in line with the test in section 71 of the Act, we may arrange for a hearing to be closed, in whole or part, and attended only by the relevant parties. We will not accept further material or representations after the hearing has concluded, other than in response to any further questions we may pose, or request or permit before or during the hearing.

[28] The transcript will be substantially verbatim, but with repetitions and redundancies omitted and with obvious mistakes (including grammatical mistakes) corrected. The transcript will leave out nothing that adds to the meaning of the speech or illustrates the discussion.

The processes for agreed applications – sections 18 and 22

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

Applications under section 18

116. We have established criteria to enable us to adopt a more proportionate approach to our review of agreed applications under sections 18 and 22. These criteria for focused regulatory scrutiny are set out later in this module.

117. The section 18 approval process comprises the five key steps described below (and illustrated in a flow chart in the annex to this module):

Step 1 - Development

118. In developing a new contract, we will expect the parties to have had discussions with other potentially or actually affected persons, including other freight customers and freight and passenger train operators. We also expect franchised/concession passenger operators to have discussed the application with their franchising/concession authority. Where capacity is constrained, we expect Network Rail to have undertaken the appropriate modelling or other analysis necessary to ensure that the rights being sought are capable of being accommodated. We also expect any additional risks arising from the rights being sought, including the wider performance implications, to have been fully assessed and appropriate control measures developed.

119. Once Network Rail has satisfied itself that the capacity is available and the parties have agreed on contractual terms, and have completed the relevant sections of the application form, they will be in a position to start a formal consultation of relevant industry parties.

Step 2 – Industry consultation

120. A pre-application consultation led by Network Rail should be undertaken for all section 18 applications where it is the facility owner. This should be conducted in line with the *Industry code of practice for track access application consultations*[29], which sets out the timescales and procedure for how the consultation should be conducted and how all the parties involved should behave. Where consultees raise issues, the applicants should use all reasonable endeavours to resolve those issues before submitting an application to us. Note: Network Rail will also send us a copy of the consultation so that we can raise issues and concerns at an early stage, prior to submission to us for our substantive comments.

[29] http://orr.gov.uk/what-and-how-we-regulate/track-access/guidance

Step 3 - Submission of application

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

122. It is the responsibility of Network Rail and the beneficiary to submit a competent application. We will not, as a matter of routine, look for drafting errors or scrutinise the robustness of the proposed contract. Should we identify significant problems or drafting errors, we will inform the applicants and may decide, depending on their extent and significance, to reject the application.

123. Where a section 18 application is for renewal or replacement of rights held under an existing contract, the parties must supply a track-changes mark-up of the existing contract (other than where the changes reflect the adoption of the relevant model access contract, in which case our concern will be to identify all departures from or additions to the model). For the access rights themselves, a separate schedule or mark-up should also be supplied.

Step 4 - Consideration

124. We will confirm receipt of the application and provide the name of the ORR case officer assigned to deal with it. In addition to any issues we have raised during the consultation process, we will then:

(a) check that the application form has been completed properly and any relevant documentation has been included (incomplete applications will be rejected);

(b) review any outstanding objections or concerns raised through the consultation;

(c) review the application to establish whether any aspects of the contract meet the criteria for focused regulatory scrutiny; and

(d) carry out a high level check to ensure that the contract does not do anything material which is not described in the application form.

125. We would then expect in principle to approve an application where we are satisfied it does not meet any of the criteria for focused regulatory scrutiny. However, as our ultimate criteria for approval of track access applications are our statutory duties, where a significant issue arises in an application that does not meet any of the criteria, but which we consider merits focused scrutiny, we will review it in more detail to ensure the decision we reach is consistent with our duties and any relevant legislation. Accordingly, we reserve the right to review an application in more detail even if the criteria suggest we would not.

126. Where we consider that an application meets one or more of the criteria, or if we consider that we need to review it in more detail, we will scrutinise it and, where necessary, discuss the proposed contract with the parties, and may write seeking formal responses on matters of significance.

127. If we identify any key issues on which we would appreciate the specific comments of other industry parties, or which we wish to draw to the attention of those who were consulted on the application, we will

send a letter or email detailing those issues. We would usually send this within three weeks of receipt of an application.

128. As mentioned above, our consideration may involve a hearing.

Step 5 - Conclusions and directions

129. Once we have reached our conclusions on a proposed contract we may either:

(a) issue directions to Network Rail to enter into it within a specified period;

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

(c) reject the application.

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

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

132. We will always give the parties a full written statement of the reasons for our decision. Subject to section 71(2) confidentiality exclusions, we will promptly publish our decision, and the reasons for it, on the ORR website.

133. New contracts may only be entered into by the parties once ORR has issued directions. If the beneficiary fails to enter into the contract within the specified period, the obligation on the facility owner lapses. The facility owner can still enter into the contract if it wishes. The parties may also ask ORR to vary the directions (Section 144(3) of the Act) to extend the date for compliance.

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

Applications under section 22

135. The process we expect to follow for applications under section 22 is set out below. It generally follows that for section 18 applications, but there are two key differences:

(a) under section 18 ORR has the ability to approve a proposed contract, reject it, or approve it subject to specified modifications being made, whereas under section 22 we may only approve or reject an application. This means that an informal application under section 22 should normally be made for our *provisional* approval. Only after our review and consideration will we be able to indicate to the parties whether we will require the proposed supplemental agreement to be amended before we would be willing to approve it, and to say what those amendments are. For this reason, a subsequent formal application under section 22 will also be required; and

(b) under section 22 we do not issue directions to Network Rail to enter into the approved supplemental agreement; we may only approve or reject it. Hence, Network Rail and the beneficiary formally submit a supplemental agreement, signed by both parties, for our approval.

136. Copies of ORR's approval notice and the supplemental agreement will be placed on the public register and published on the ORR website (subject to any section 71(2) confidentiality exclusions).

137. Within 28 days of our decision being issued, Network Rail is required to provide a consolidated version of the full contract as amended (see earlier in this module).

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

138. Sections 17 and 22A of the Act provide for beneficiaries to apply directly to ORR for access to the network where they have been unable to reach agreement with Network Rail. Section 17 provides for a beneficiary to make an application to ORR for it to direct Network Rail to enter into a new contract. Section 22A only applies where a beneficiary with an existing contract is seeking amendments to that contract to permit “more extensive use” of the network.

139. “More extensive use” is defined in Section 22A (2) of the Act, and may include changes to a contract, for example additional services on existing routes.

140. Section 22A cannot be used to extend the duration of an existing contract (see s22A (2) (b) of the Act). In such circumstances, a new contract under section 17 would be required to take effect on the expiry of the existing contract.

141. We must not give directions under section 17 or 22A where:

(a) the railway facility in question has been exempted from the provisions of section 17 of the Act (under section 20 of the Railways Act 1993, including by virtue of the CMEO);

(b) performance of an access contract as contemplated by the proposed directions would necessarily involve the facility owner in being in breach of an existing access contract; or

(c) as a result of an obligation or duty owed by the facility owner which arose before 2 April 1994, the consent of some other person is required by the facility owner before the facility owner can enter into the proposed contract.

142. We are also unable to issue directions under section 17 in relation to access to the network where that access is for the provision of network services (such as maintenance work) to that network.

143. Schedule 4 to the Act establishes certain mandatory elements of the processes for applications under sections 17 and 22A, including some minimum fixed timescales. The overall processes we expect to follow are, nevertheless, the same in most respects to those for applications under sections 18 and 22, consisting of the five key steps described below.

Step 1 - Development

144. We recognise that the extent of development work to address any issues arising out of the operation of services may be limited where a beneficiary has not reached agreement with Network Rail. On the other hand, the beneficiary's use of section 17 or 22A may reflect disagreement on only a few specific aspects of a proposed contract. In order to process an application swiftly, we will therefore wish to see the product of such development work as has been possible, including capacity and performance modelling and timetabling and consultation with other parties.

145. Beneficiaries should negotiate and agree terms with Network Rail where possible, to promote the most effective working relationship in the delivery of services. If a beneficiary considers it likely that agreement will not be reached, we strongly encourage early consideration of submitting a section 17 or 22A application, rather than regarding such an application as a last resort, given the timing considerations that apply.

146. The submission of a section 17 or 22A application need not mark the end of negotiations. It would be possible for the application to be withdrawn and an agreed application under section 18 or 22 submitted. It may be more expedient to continue the section 17 or 22A process whilst having regard to the fact that the disagreement between the parties has been resolved.

147. Where a beneficiary reaches agreement with Network Rail on certain aspects of a proposed contract, we will take into account any joint representation they make alongside any other representations we receive through our wider consultation. We strongly encourage beneficiaries to discuss their requirements with ORR at an early stage.

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

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

149. Whilst a beneficiary can submit an application under section 17 or 22A directly to ORR, leaving it for us to conduct the industry consultation, the beneficiary may opt either to conduct the industry consultation itself or to request that Network Rail carry out the consultation. This does not include the statutory consultation that ORR must carry out in accordance with Schedule 4 to the Act for section 17 and 22A applications (see later in this module).

Step 3 - Submission of application to ORR

150. Any application for directions under section 17 or section 22A must be made in writing to ORR and must:

(a) contain particulars of the required rights;

(b) specify the terms which the applicant proposes should be contained in the proposed contract; and

(c) include any representations that the applicant wishes to make with regard to the required rights or the terms to be contained in the proposed contract.

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

Step 4 - Consideration and consultation

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

(a) send a copy of the application to the facility owner and invite it to make written representations to us, allowing it at least 21 days for this;

(b) send the applicant a copy of the facility owner’s representations, allowing it at least ten days to submit further representations;

(c) direct the facility owner to provide us with a list of "interested persons" – allowing at least 14 days for the facility owner to respond;

(d) on receipt of the list, invite the 'interested persons' to make written representations, allowing them at least 14 days to respond; and

(e) copy any representations received from "interested persons" to the applicant and the facility owner seeking any representations they wish to make, allowing them at least ten days to respond.

153. Where an adequate industry consultation has not been conducted by the applicant or Network Rail, we will consult widely so as to ensure that we have a well-informed basis for coming to our conclusions. We will expect to start a wider consultation at the same point as we invite representations from "interested persons", generally expecting to allow four to six weeks for submission of written representations depending on the nature of the application. If we identify any key issues on which we would appreciate consultees' specific comments, or which we wish to draw to consultees' attention, we will send an email or letter detailing those issues. We would usually send this no later than three weeks before the close of the consultation period.

154. As mentioned above, our consideration may involve a hearing.

Step 5 - Conclusions and directions

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

(a) the terms of the access contract or the amendments to be made; and

(b) the date by which the access contract must be entered into, or amended, as the case may be.

156. They may also specify any compensation we have decided the facility owner should pay to any "interested person", where commercial considerations have formed part of the parties' submissions to us. Subject to section 71(2) confidentiality exclusions, we will publish our decision and the reasons for it.

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

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

Track access options and enhancements

Track access options

159. Under sections 17 and 18 of the Act we may direct a facility owner to enter into an access option (Section 17(6), under the definition (b) of "access contract") granting future access to its facility. We envisage that access options for track access will be proposed where an applicant wishes to secure future access to a network on the basis of a focused and dedicated financial investment in a railway facility. Prospective applicants for an access option should read our Track Access Options[30] module which sets out the procedure for applying for access options as well as our approach for considering such applications.

160. If you intend to make an application to ORR for an access option, please contact us[31] (as well as Network Rail) to discuss your plans and aspirations, and the likely timing of the application.

Enhancements

161. Section 16A of the Act gives ORR the power, on application by either the Secretary of State (for facilities in England and Wales) or the Scottish Ministers (for facilities in Scotland), or by others with the consent of the Secretary of State or the Scottish Ministers as applicable, to direct a person to deliver a new railway facility or upgrade a current railway facility whilst ensuring that they are adequately rewarded for doing so. Section 16A came into force on 15 October 2005 albeit with exemptions for certain facilities and facility owners. In November 2006, we published a code of practice setting out how we will conduct our review of applications submitted under section 16A, see ORR's code of practice for the application of sections 16A to I of the Railways Act 1993[32].

Facility access exemptions

162. Our approval of a contract providing access to a network is not required where the network in question has been exempted from needing our approval. A network facility owner may apply to us or the Secretary of State for an exemption, under section 20(3) of the Act. Exemption can be in respect of the whole or part of the network and conditions can be attached which, if broken, may lead to revocation of the exemption.

163. The Secretary of State exempted certain classes of railway facility from the access (and licensing) provisions of the Act under the terms of the CMEO. This exemption applies to certain railway assets that

[30] See footnote 2.

[31] Track.access@orr.gsi.gov.uk.

[32] See footnote 2.

were already privately operated in the period prior to the coming into force of the Act and for facilities (including networks) for which the regulatory regime established by the Act was considered inappropriate.

164. We have also approved network exemptions in specific instances, such as for extensions to the Docklands Light Railway. Applicants seeking access to a network should check with the facility owner whether the network in question is exempted from the access provisions contained in sections 17 and 18 of the Act. Such networks do not require agreements to be directed by ORR, and neither can applications be made in respect of them under section 17 of the Act. For such facilities, however, appeal mechanisms may be available under the Regulations.

165. We will only grant an exemption where we are satisfied that doing so would be consistent with our statutory duties. Facility owners wishing to make an application for an exemption under section 20 should follow the process set out below. We are happy to provide further information where required on the making of such an application and, if necessary, to hold a pre-application meeting.

166. Exemptions under section 20(3) apply only to the provisions of sections 17, 18 and 22A of the Act; they do not provide exemption from the appeal mechanisms provided by Regulation 29 of the Regulations.

Making an application

167. Where a facility owner wishes to obtain an exemption for all or part of its network, it should write to us stating that it is applying under section 20 of the Act for an exemption from sections 17, 18 and 22A of the Act and include the following details:

(a) the location of the network and any other facilities such as stations or light maintenance depots along the network that the facility owner would also wish to be exempted;

(b) the type of network;

(c) a description of what the network is used for, including the type(s) of services that operate over it or are planned to operate over it;

(d) what, if any, connections there are to other networks, with a map (whether hand drawn or printed) illustrating these connections;

(e) a description of any infrastructure constraint that could prevent third parties using the network, such as non-standard electrification systems; and

(f) the reasons why it is seeking the proposed exemption (including the benefits to the facility owner and other users that would accrue if the facility was excluded from the access regime of the Act).

168. If we require any further information or clarification on the application, we will write to the applicant.

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

Consultation

170. Where we are minded to grant an access exemption, section 20 of the Act requires us to consult the Secretary of State and to publish a notice setting out our intention, giving our reasons and specifying a period of at least 28 days for representations to be made. This notice would be published on our website[33] and we would also expect to inform those parties whom we consider might be affected by the proposed exemption. We would normally expect to give the minimum 28 days for the making of representations, but if we consider that a longer period is appropriate we will inform the applicant in advance.

171. Where we are minded to grant the facility access exemption and proceed to statutory consultation, the applicant will be asked to review a draft of the statutory notice. This is to ensure that the details on the notice, particularly the description of the facility, are accurate.

172. Once the statutory consultation period has ended, we will consider any representations received and not withdrawn, and have any necessary discussions with the applicant. Where representations raise significant regulatory or other issues, we may hold discussions jointly with the applicant and relevant third parties, or give third parties the opportunity to respond to the applicant's comments on their representations.

Decision

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

Timescales

174. The timescales for an access exemption application would depend on the nature of the network in question. As a minimum, we would expect an application to take at least eight weeks from the date of receipt. Applications are likely to require more time where we require further information in order to complete our review or where there are significant representations arising from the statutory consultation.

Criteria for focused scrutiny of section 18 and 22 applications

175. The table below sets out the focused criteria we take into account when considering whether agreed applications under sections 18 or 22 should receive focused regulatory scrutiny as mentioned earlier in this

[33] http://www.rail-reg.gov.uk/server/show/nav.2023.

module. All applications under sections 17 or 22A will naturally be contentious and will require more detailed scrutiny.

176. ORR reserves the right to review any issue in an application where it considers it necessary in order to ensure that its decisions are consistent with its statutory duties.

	Issue	Further guidance

Criterion A
 	
References:
 	
See earlier in this module and in the following modules:
Charging
Liability framework
Performance
Possessions
	Charging and commercial terms
	
	Applications involving:
	
	• non-standard charging provisions, or any change to existing charging provisions, e.g.:
	  • additional or revised charges (such as for new vehicles, or to reflect an additional charge for an investment); or
	  • where a franchise has been remapped.
	• any changes to the commercial terms (e.g. to the liability caps).
		We need to ensure that the proposed charging and compensation provisions or terms are fair, consistent with our policies and otherwise consistent with the law.
		
		Where a non-standard charge (e.g. an additional charge) is proposed in a contract, we expect:
		
		• Network Rail to confirm and demonstrate that the charge reflects the incremental direct costs it incurs;
		• Network Rail to confirm that the charge would not be recovered through the charging framework established at the last periodic review settlement; and
		• any additional charge to be explicit in the contract.
		
		If a franchise has been remapped we want to know how the charges have been reallocated or, if they have not, the reasons why the parties felt it unnecessary.

Criterion B	**Model clauses** Applications involving departures from model clauses or the use of any of the tables in paragraph 8 of Schedule 5 in the model passenger contract. (The filling in of the 'blanks' in the model contract (e.g. names, and the tables in Schedule 5) do not constitute departures from model clauses.)	It is important that the robustness of industry contracts and the commercial balance that is reflected within them is retained. We will only approve non-model clause provisions where we consider these are necessary and appropriate to the circumstances. We also need to be satisfied that the provision would not lead to Network Rail acting in an unduly discriminatory manner in contravention of its network licence or the Regulations. If we have approved a non-model clause arrangement within a particular access contract, we would not normally expect to scrutinise in detail that same departure in subsequent amendments to that contract. For example, if we approved a bespoke table structure in Schedule 5 of the track access contract, where from time-to-time amendments are made to the information in the tables, we would not expect to scrutinise each time whether that bespoke table was still appropriate (unless there was a very good reason for doing so). The tables in paragraph 8 of Schedule 5 are for use in exceptional circumstances only. We will scrutinise any proposed use of these tables to ensure that such use is appropriate to the circumstances.

Criterion C **References** *Industry code of practice for consultations*	**Disputes** Any application involving a dispute between the applicants and a third party arising from the pre-application industry consultation.	For disputes arising from the Network Rail led consultation, we will need to review the representations of each party. We may then require further work or information.
Criterion D **References:** See earlier in this module and in the following modules: *Charging* *Liability framework* *Performance* *Possessions*	**ORR policy issue** Any application containing an issue which is not covered by the established policy framework set out in these criteria and procedures, or where there is a proposal to disapply any part of the network code.	We normally need to be satisfied that contracts are consistent with our criteria and procedures. If they are not, we need to understand the merits of the departure from our policy before deciding whether to approve the contract. (Where applicants wish to make an application that would not be consistent with our criteria and procedures, they should approach us at an early stage to discuss their proposals.) Equally, where a new policy issue arises as a result of an application, we need time to consider and develop our view on it. Where a particular policy applies to a proposal, the applicants should have regard to that policy in developing their proposal and provide any necessary explanations in their application form.
Criterion E **References:** See earlier in this module	**Economic and efficient use of capacity** Any application that may raise concerns about the efficient allocation of capacity. Access rights must be allocated efficiently and in line with our statutory duties. Therefore, we will wish to scrutinise applications: • which relate to access rights that could or would be inconsistent with either a Route study produced under the Long Term Planning Process, a still-relevant Route Utilisation Strategy (RUS) or a relevant ORR decision; or • where proposed rights would involve the use of 'congested infrastructure'[34] or network with multiple operators that is particularly busy.	Where there is a potential inconsistency between proposed access rights and a Route study/still-relevant RUS, we will wish to understand the implications for the plans set out in that document and the justifications for the inconsistency. For those cases we consider particularly significant, we may conduct, or require, economic assessments of the different uses of the capacity. For 'congested infrastructure' or particularly busy parts of network that have not been declared congested, we will want to ensure that scarce capacity is allocated in the most beneficial manner. This means that, even if no disputes are lodged by third parties in the consultation, we may give more scrutiny to an application to ensure that our decision on whether to approve access rights would be consistent with our duties.

[34] Under regulation 23 of the Railways (Infrastructure) Access and Management Regulations, where (after the co-ordination of requests for capacity and the consultation with applicants/bidders) an infrastructure manager is unable to satisfy requests for infrastructure adequately, the infrastructure manager must declare that element of the infrastructure to be congested.

Criterion F	**Performance** Whilst for all agreed applications we would expect Network Rail to have considered and addressed potential operational performance issues arising from an application for access rights, we would expect to give greater scrutiny where: • an application would involve services not being monitored throughout their journey whilst being inconsistent with our policy on this issue; or • changes are proposed to Appendices 1 and/or 3 of Schedule 8.	Poor operational performance caused by one operator or Network Rail is very likely to impact other operators and users of railway services. As this can lead to changes in customer demand or reduce available capacity, we have a duty to ensure that proposed services would not unduly lead to materially adverse impacts on performance. This is particularly the case for new or significantly amended services where there is insufficient operational performance experience. We may want to review the expected performance impact to ensure that any approval would be consistent with our statutory duties. The applicants should therefore take steps to demonstrate that the impact of the services would not adversely affect operational performance.

Annex A: Flowcharts

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

Key for section 17-22A application processes

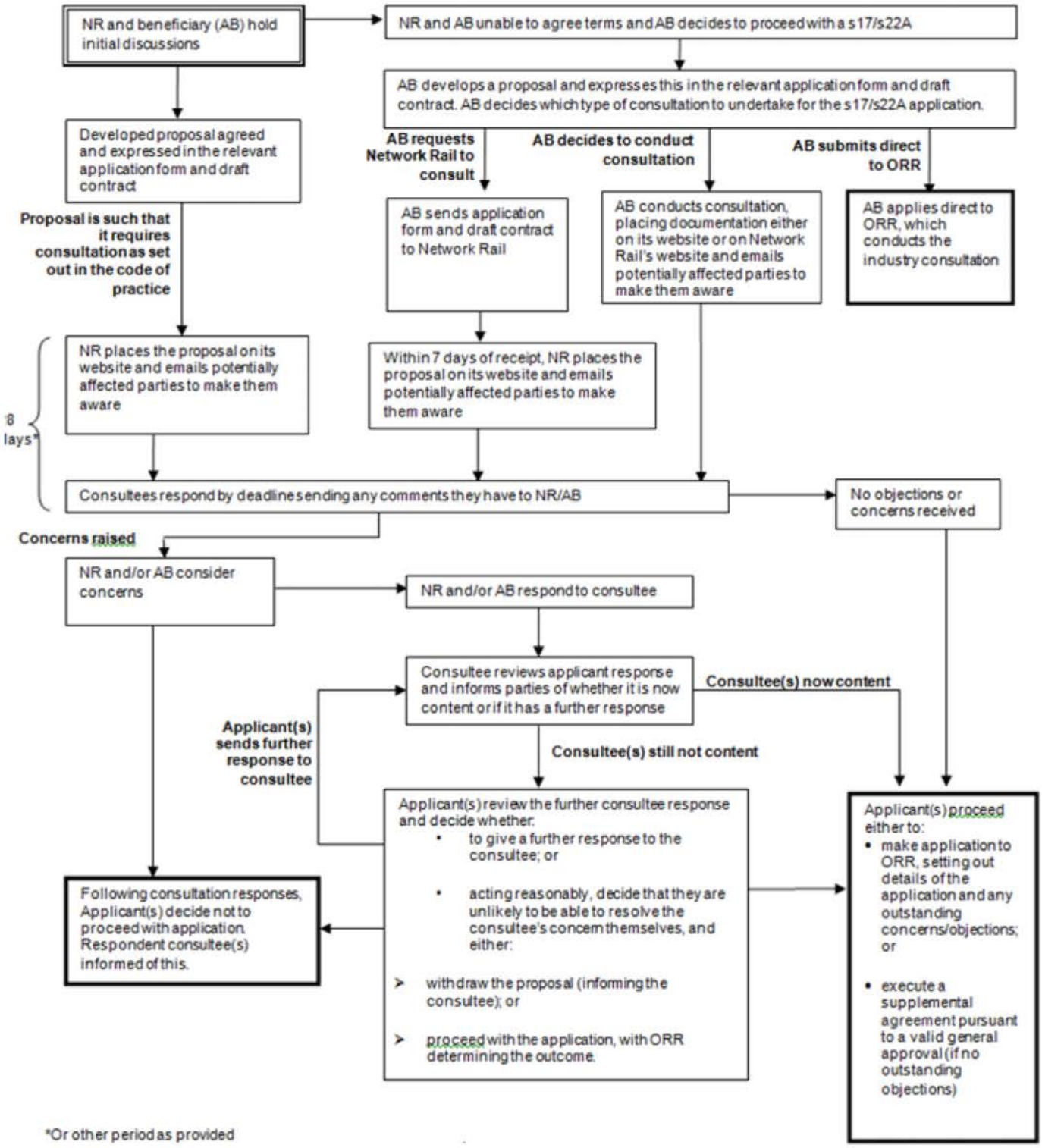
Beneficiary only action

Joint beneficiary-Network Rail action

Network Rail only action

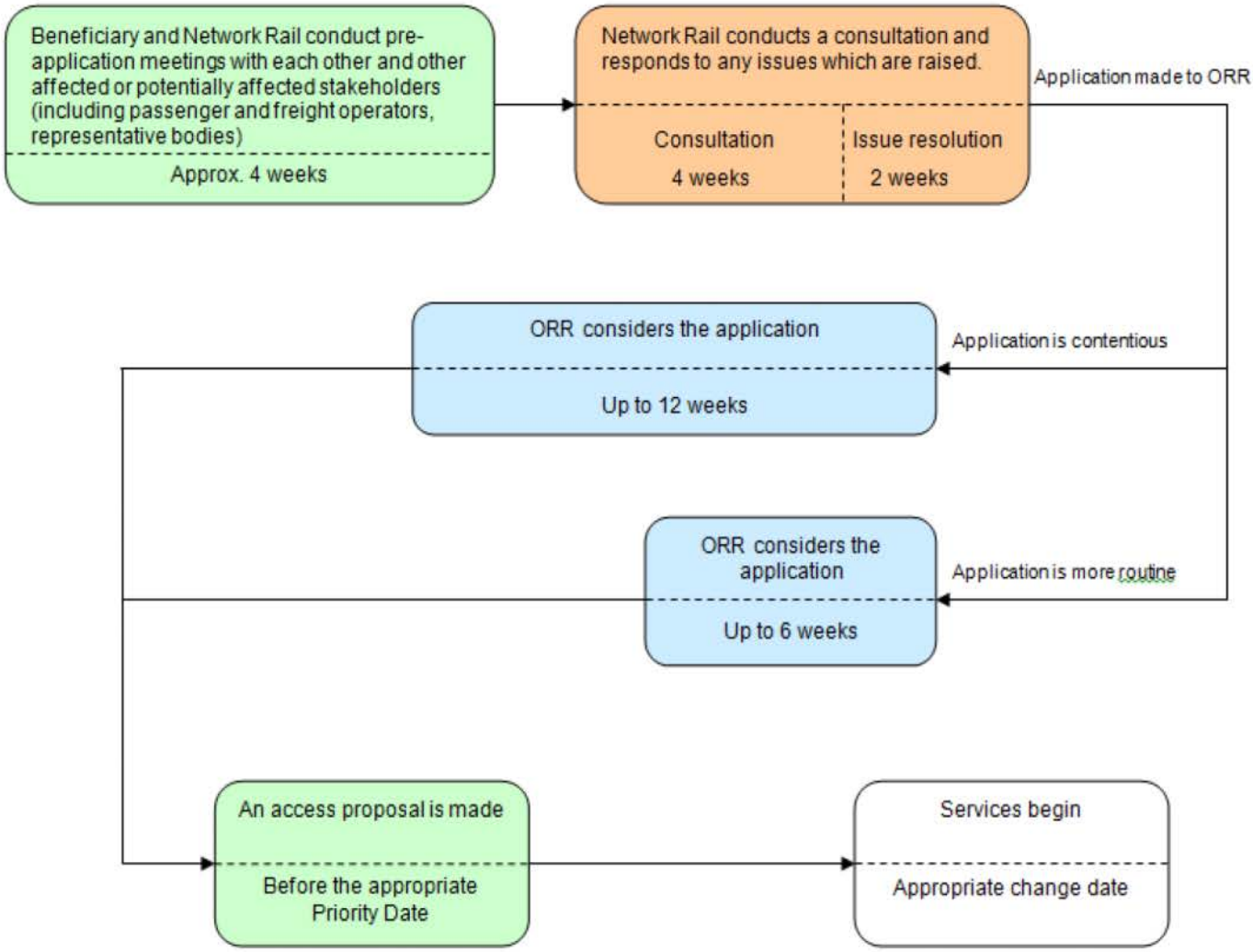
ORR action

Industry consultation process flowchart

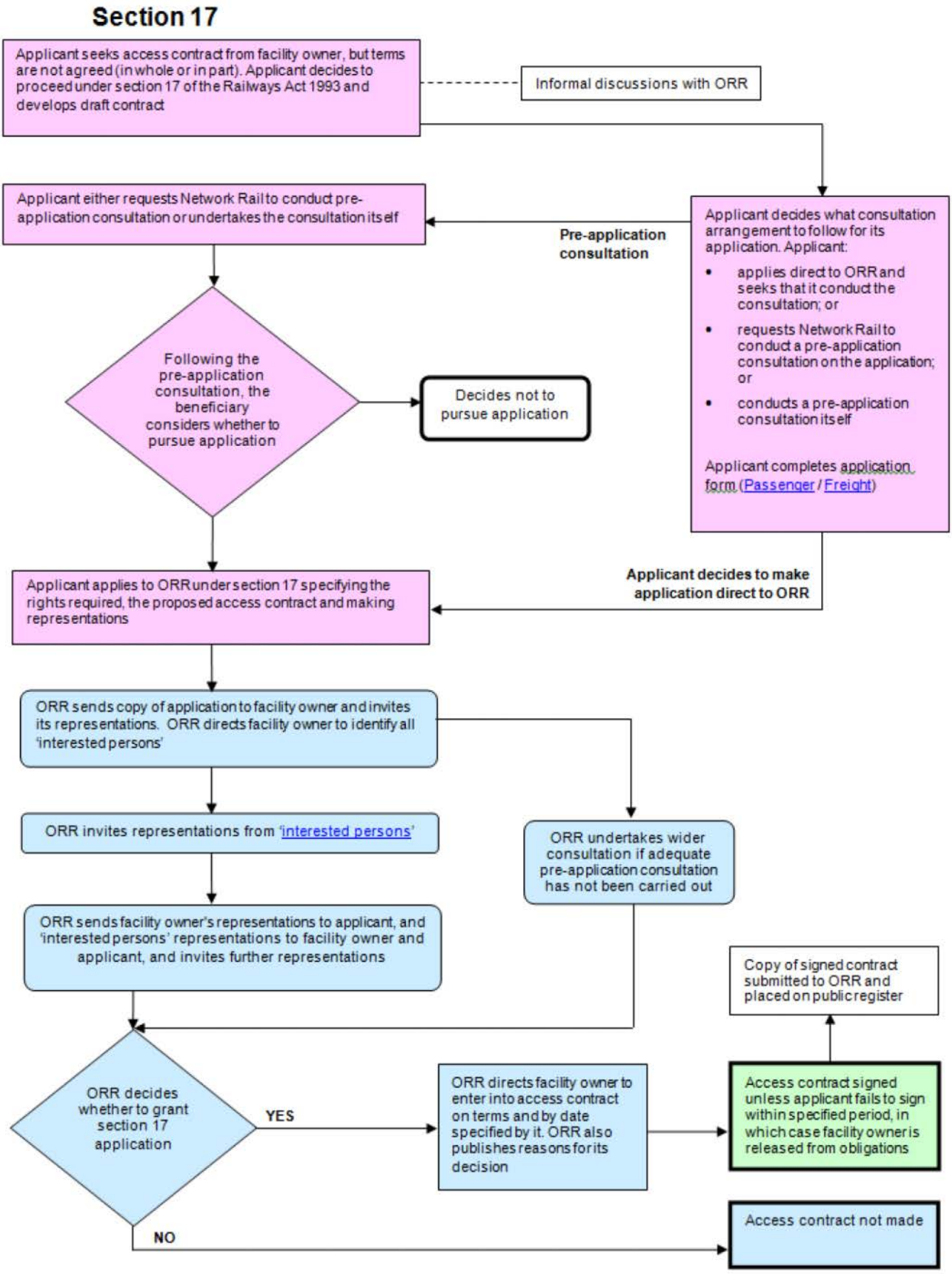


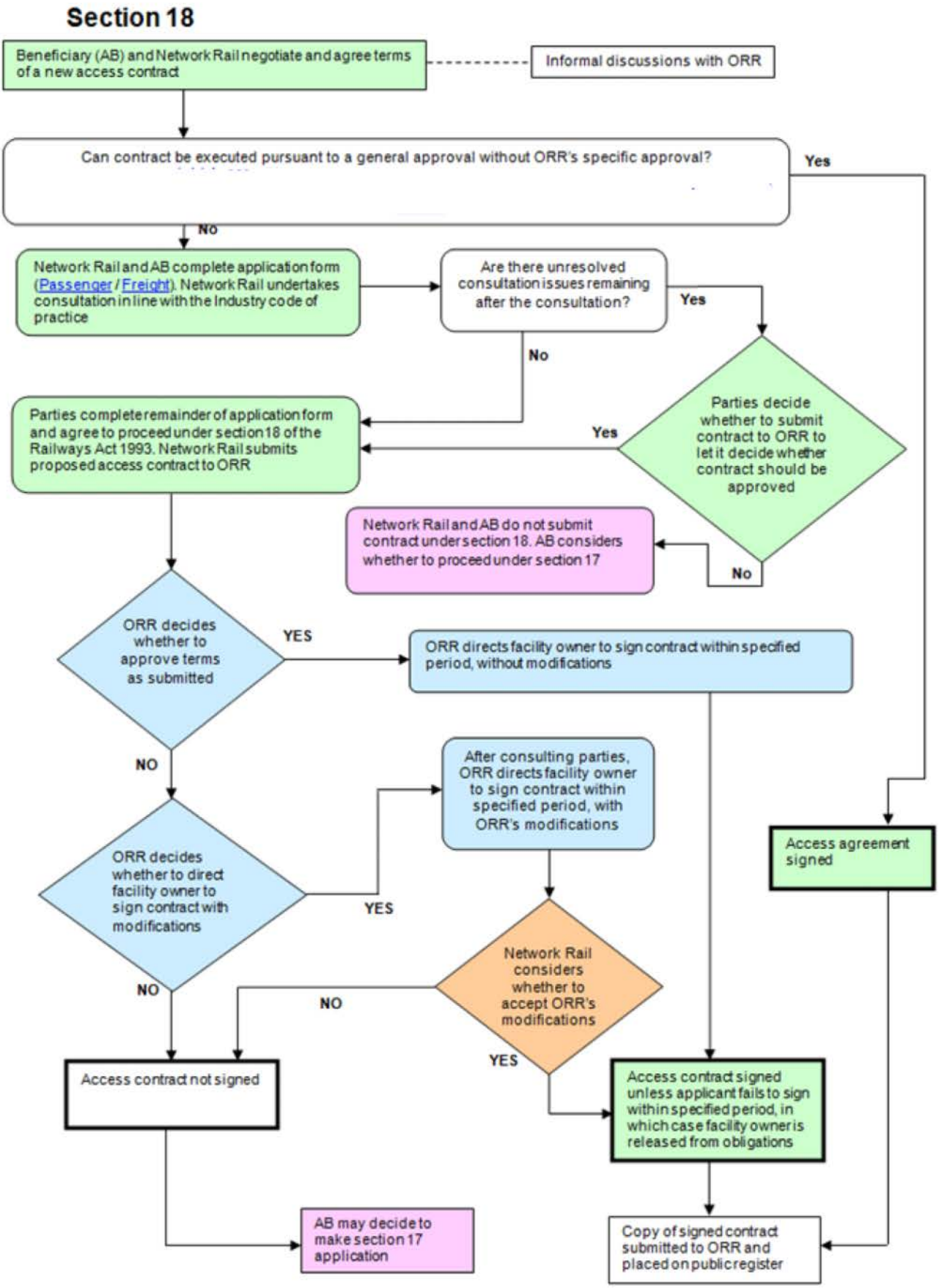
*Or other period as provided

Application process timescales

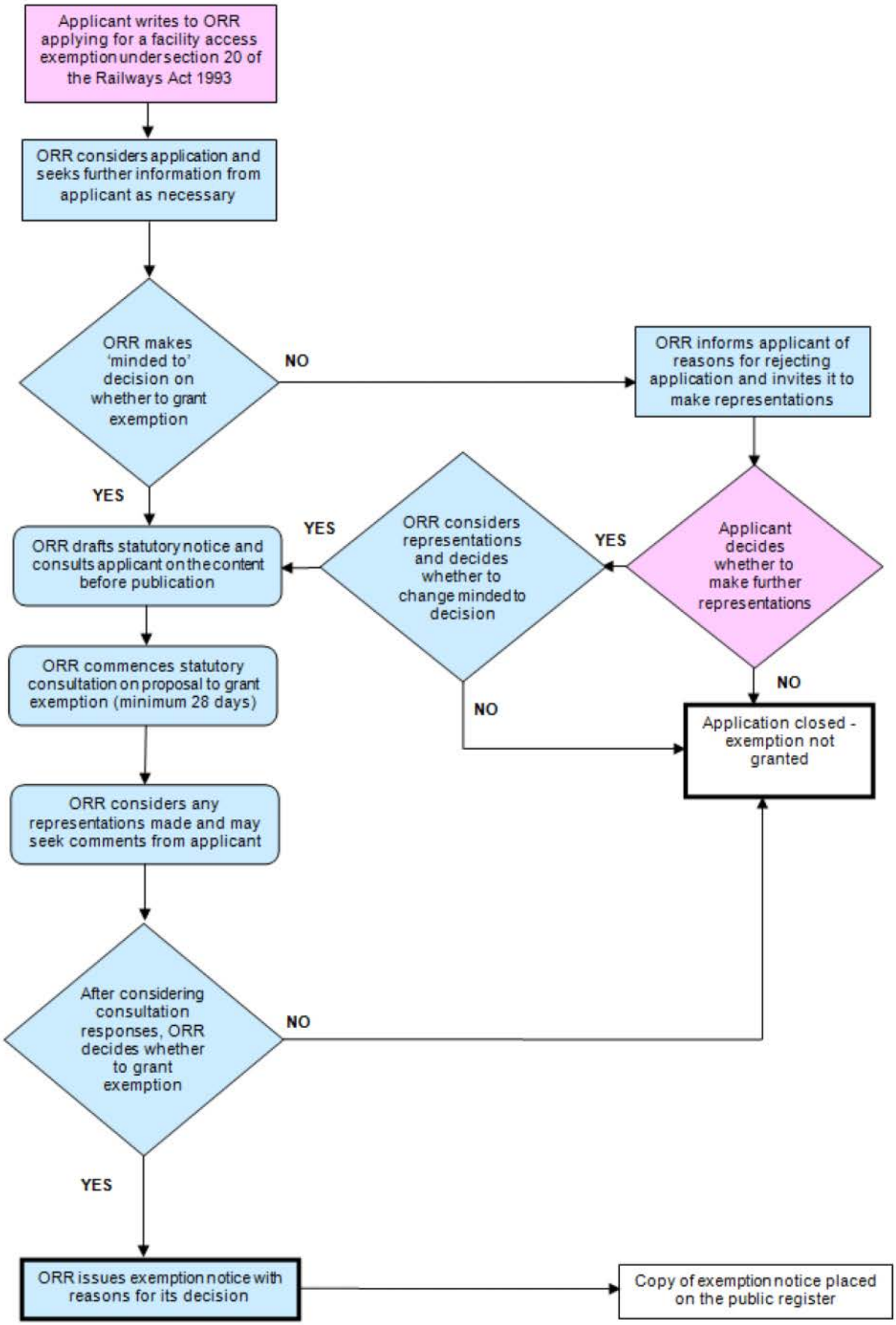


N.B timescales are based on Network Rail conducting the consultation. Timescales may vary where ORR is asked to conduct the consultation, and if the consultation raises a significant number of issues.

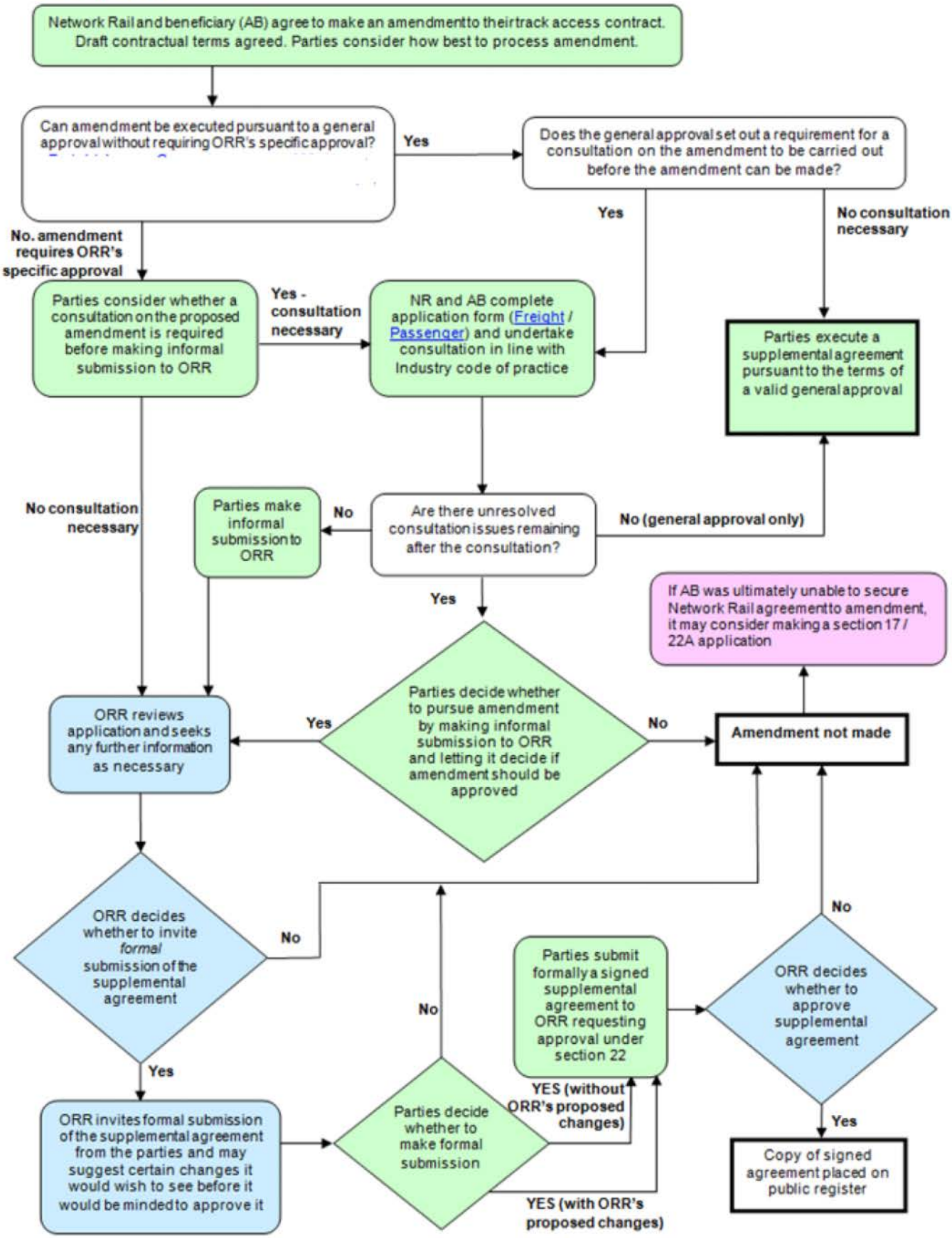

Section 17
Applicant seeks access contract from facility owner, but terms are not agreed (in whole or in part). Applicant decides to proceed under section 17 of the Railways Act 1993 and develops draft contract
Informal discussions with ORR
Applicant either requests Network Rail to conduct pre-application consultation or undertakes the consultation itself
Pre-application consultation
Applicant decides what consultation arrangement to follow for its application. Applicant:
applies direct to ORR and seeks that it conduct the consultation; or
requests Network Rail to conduct a pre-application consultation on the application; or
conducts a pre-application consultation itself
Applicant completes application form (Passenger / Freight)
Following the pre-application consultation, the beneficiary considers whether to pursue application
Decides not to pursue application
Applicant decides to make application direct to ORR
Applicant applies to ORR under section 17 specifying the rights required, the proposed access contract and making representations
ORR sends copy of application to facility owner and invites its representations. ORR directs facility owner to identify all 'interested persons'
ORR invites representations from 'interested persons'
ORR undertakes wider consultation if adequate pre-application consultation has not been carried out
ORR sends facility owner's representations to applicant, and 'interested persons' representations to facility owner and applicant, and invites further representations
Copy of signed contract submitted to ORR and placed on public register
ORR decides whether to grant section 17 application
YES
ORR directs facility owner to enter into access contract on terms and by date specified by it. ORR also publishes reasons for its decision
Access contract signed unless applicant fails to sign within specified period, in which case facility owner is released from obligations
NO
Access contract not made


Section 18
Beneficiary (AB) and Network Rail negotiate and agree terms of a new access contract
Informal discussions with ORR
Can contract be executed pursuant to a general approval without ORR's specific approval?
Yes
No
Network Rail and AB complete application form (Passenger / Freight). Network Rail undertakes consultation in line with the Industry code of practice
Are there unresolved consultation issues remaining after the consultation?
Yes
No
Parties decide whether to submit contract to ORR to let it decide whether contract should be approved
Yes
No
Parties complete remainder of application form and agree to proceed under section 18 of the Railways Act 1993. Network Rail submits proposed access contract to ORR
Network Rail and AB do not submit contract under section 18. AB considers whether to proceed under section 17
ORR decides whether to approve terms as submitted
YES
NO
ORR directs facility owner to sign contract within specified period, without modifications
After consulting parties, ORR directs facility owner to sign contract within specified period, with ORR's modifications
ORR decides whether to direct facility owner to sign contract with modifications
YES
NO
Network Rail considers whether to accept ORR's modifications
NO
YES
Access agreement signed
Access contract not signed
Access contract signed unless applicant fails to sign within specified period, in which case facility owner is released from obligations
AB may decide to make section 17 application
Copy of signed contract submitted to ORR and placed on public register

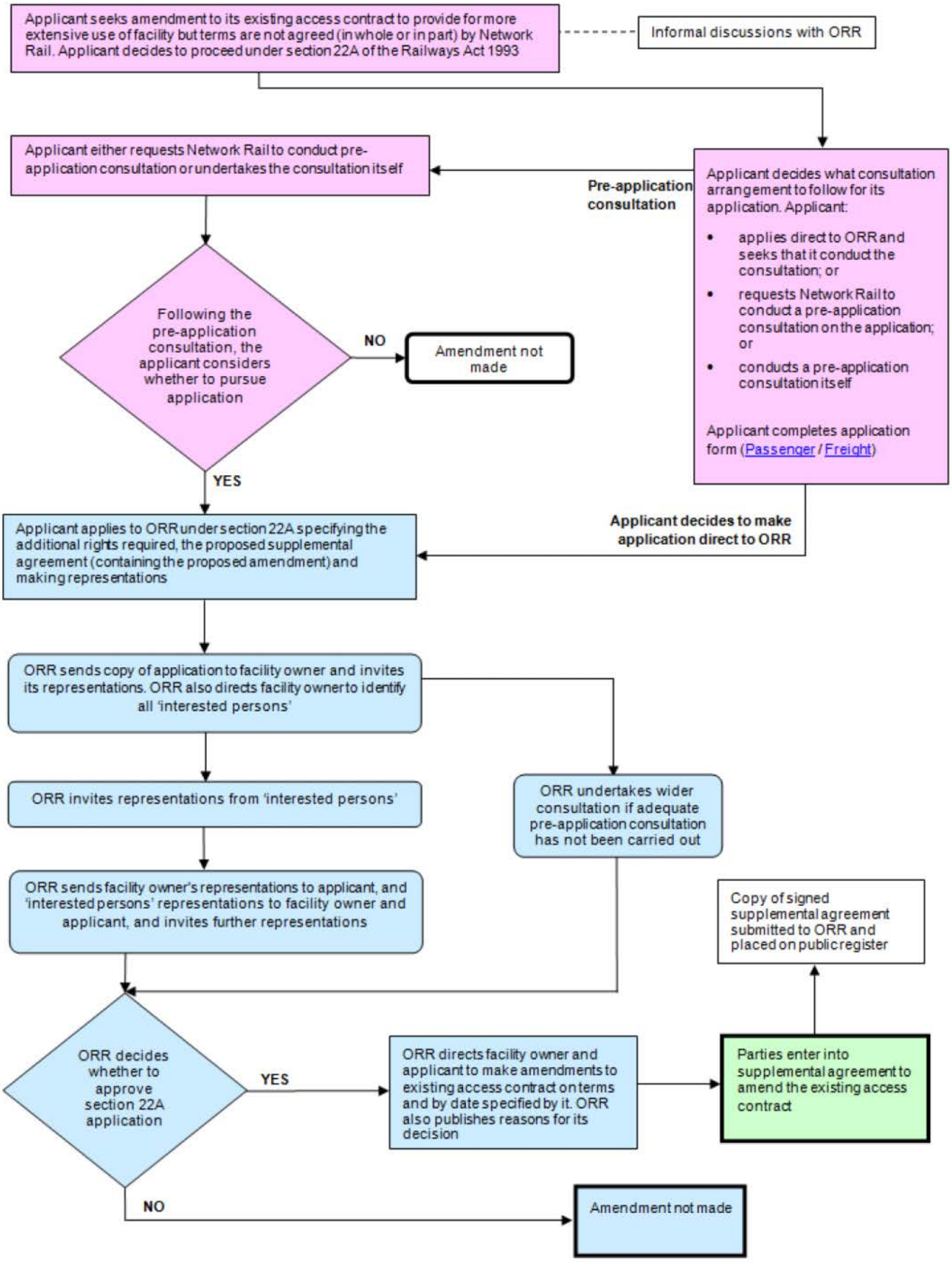
Section 20


Applicant writes to ORR applying for a facility access exemption under section 20 of the Railways Act 1993
ORR considers application and seeks further information from applicant as necessary
ORR makes 'minded to' decision on whether to grant exemption
NO
ORR informs applicant of reasons for rejecting application and invites it to make representations
YES
ORR drafts statutory notice and consults applicant on the content before publication
YES
ORR considers representations and decides whether to change minded to decision
YES
Applicant decides whether to make further representations
ORR commences statutory consultation on proposal to grant exemption (minimum 28 days)
NO
NO
Application closed - exemption not granted
ORR considers any representations made and may seek comments from applicant
After considering consultation responses, ORR decides whether to grant exemption
NO
YES
ORR issues exemption notice with reasons for its decision
Copy of exemption notice placed on the public register

Section 22


Network Rail and beneficiary (AB) agree to make an amendment to their track access contract. Draft contractual terms agreed. Parties consider how best to process amendment.
Can amendment be executed pursuant to a general approval without requiring ORR's specific approval?
Yes
Does the general approval set out a requirement for a consultation on the amendment to be carried out before the amendment can be made?
Yes
No consultation necessary
No. amendment requires ORR's specific approval
Parties consider whether a consultation on the proposed amendment is required before making informal submission to ORR
Yes - consultation necessary
NR and AB complete application form (Freight / Passenger) and undertake consultation in line with Industry code of practice
Parties execute a supplemental agreement pursuant to the terms of a valid general approval
No consultation necessary
Parties make informal submission to ORR
No
Are there unresolved consultation issues remaining after the consultation?
No (general approval only)
Yes
If AB was ultimately unable to secure Network Rail agreement to amendment, it may consider making a section 17 / 22A application
ORR reviews application and seeks any further information as necessary
Yes
Parties decide whether to pursue amendment by making informal submission to ORR and letting it decide if amendment should be approved
No
Amendment not made
ORR decides whether to invite formal submission of the supplemental agreement
No
No
Parties submit formally a signed supplemental agreement to ORR requesting approval under section 22
ORR decides whether to approve supplemental agreement
No
Yes
ORR invites formal submission of the supplemental agreement from the parties and may suggest certain changes it would wish to see before it would be minded to approve it
Parties decide whether to make formal submission
YES (without ORR's proposed changes)
YES (with ORR's proposed changes)
Yes
Copy of signed agreement placed on public register

Section 22A


Applicant seeks amendment to its existing access contract to provide for more extensive use of facility but terms are not agreed (in whole or in part) by Network Rail. Applicant decides to proceed under section 22A of the Railways Act 1993
Informal discussions with ORR
Applicant either requests Network Rail to conduct pre-application consultation or undertakes the consultation itself
Pre-application consultation
Applicant decides what consultation arrangement to follow for its application. Applicant:
applies direct to ORR and seeks that it conduct the consultation; or
requests Network Rail to conduct a pre-application consultation on the application; or
conducts a pre-application consultation itself
Applicant completes application form (Passenger / Freight)
Following the pre-application consultation, the applicant considers whether to pursue application
NO
Amendment not made
YES
Applicant decides to make application direct to ORR
Applicant applies to ORR under section 22A specifying the additional rights required, the proposed supplemental agreement (containing the proposed amendment) and making representations
ORR sends copy of application to facility owner and invites its representations. ORR also directs facility owner to identify all 'interested persons'
ORR invites representations from 'interested persons'
ORR undertakes wider consultation if adequate pre-application consultation has not been carried out
ORR sends facility owner's representations to applicant, and 'interested persons' representations to facility owner and applicant, and invites further representations
Copy of signed supplemental agreement submitted to ORR and placed on public register
ORR decides whether to approve section 22A application
YES
ORR directs facility owner and applicant to make amendments to existing access contract on terms and by date specified by it. ORR also publishes reasons for its decision
Parties enter into supplemental agreement to amend the existing access contract
NO
Amendment not made