



# MetroWest+

## Portishead Branch Line (MetroWest Phase 1)

TR040011

Applicant: North Somerset District Council

9.23 ExA.ISH2.D4.V1 – Appendix 4 to Applicant's Oral Case and response to Representations at the Issue Specific Hearing 2 (ISH2)

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# The regulation of access

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## Purpose

1. This module sets out the criteria and procedures we expect to follow in dealing with applications for new track access contracts or amendments to existing track access contracts under sections 17 to 22A of *The Railways Act 1993*<sup>1</sup> (the Act). We have sought to make them as straightforward as possible.

## Introduction

2. This module explains the framework which applies to the regulation of access to the rail network including the Act, *The Railways Infrastructure (Access and Management) Regulations 2005 as amended in 2009*<sup>2</sup> (the Regulations) and any parallel application of *The Competition Act 1998*<sup>3</sup>. It also sets out the relationship with the Network Code ([see below](#)).

3. The vast majority of the rail network in Great Britain is owned and operated by a single 'facility owner' - Network Rail Infrastructure Limited (Network Rail) - with train services run by passenger and freight train operators (referred to as 'beneficiaries') under regulated track access contracts. There are other facility owners to whom the statutory access regime applies, but this document generally refers to Network Rail as the facility owner. Clearly, responsibilities attributed to Network Rail only apply where it is the facility owner. Other facility owners will be responsible for their own facilities.

4. The general arrangements for Crossrail and Heathrow Airport Limited are mentioned in our module *Other Networks* which provides more information<sup>4</sup>.

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<sup>1</sup> <http://www.legislation.gov.uk/ukpga/1993/43/contents>

<sup>2</sup> <http://www.legislation.gov.uk/2005?title> and <http://www.legislation.gov.uk/2009?title>

<sup>3</sup> <http://www.legislation.gov.uk/ukpga/1998/41/contents>

<sup>4</sup> <http://orr.gov.uk/what-and-how-we-regulate/track-access/guidance>

## The regulation of access

5. The regulatory framework applying to the use of rail network capacity was established by the Act. This sits within a framework of European Union legislation.

### The Railways Act 1993

6. Under the Act, a person (usually, a train operator) may only enter into a contract with a facility owner (such as Network Rail) for the use of that facility (whether track, a station or a light maintenance depot) following ORR's approval and direction.

7. Proposed contracts that have been agreed by the parties require our approval and direction under section 18 of the Act. Where the parties have not been able to reach agreement on the terms of a contract, the beneficiary can apply to ORR for determination and to issue directions requiring the facility owner to enter into a contract under section 17 of the Act.

8. Any subsequent agreed amendments to a contract entered into under either section 17 or section 18 require our approval under section 22 of the Act. If the parties have not been able to reach agreement on the terms of a proposed amendment to an existing contract which permits the beneficiary to make "more extensive use" of the facility, the beneficiary may apply to us for determination and to direct the parties to amend the contract under section 22A.

9. The statutory regulated access regime does not apply to all access contracts. For further information on exemptions from the statutory regulated access regime, please see our module *Other networks*<sup>5</sup> for more information.

10. The access regime also applies to railway facilities which are either planned or are under construction. It can also apply to a person before they become a facility owner. This ensures that regulatory oversight of capacity use and regulatory protections apply equally across facilities, regardless of their status.

### The Regulations

11. The Regulations transposed certain EU rail directives into domestic law. They apply to the allocation of capacity and levying of charges, and provide for open access for all types of rail freight services and international passenger services. They provide for appeals to ORR where applicants are unable to agree what they consider to be fair terms with an infrastructure manager ([see below](#)).

12. The Regulations prohibit track access contracts from specifying any train path in detail and prohibit the facility owner (the Regulations use the term "infrastructure manager") allocating capacity in the form of specific train paths for longer than a working timetable period (one timetable year). Set against a train

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<sup>5</sup> <http://orr.gov.uk/what-and-how-we-regulate/track-access/guidance>

operator's desire for certainty to meet its commercial needs, there is a statutory requirement for sufficient contractual flexibility to optimise timetabling potential (regulations 16(9) and 18(3)). This is to ensure that the infrastructure manager can make best use of the railway infrastructure over the life of the contract.

13. The Regulations require a track access contract to be concluded before the capacity is used (regulation 16(10)). They also prohibit the trading of access rights between beneficiaries (regulation 16(6)).

14. The Regulations also require that all track access contracts contain terms permitting amendment of the contract if that amendment would enable better use to be made of the infrastructure (regulation 18(5)). This will be reflected in Part J of the Network Code. Any sponsor will have to set out the reasons why all the relevant criteria have been met before initiating this procedure, such as none of the other pre-existing processes being applicable<sup>6</sup>.

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

15. When determining access to the network, we must have regard to our *statutory duties*<sup>7</sup>, most of which are set out in section 4 of the Act. We must exercise our functions in a way that we consider best achieves those duties.

16. When considering proposed contracts or amendments, we expect to focus on:

- (a) the implications for the efficient use of network capacity over time;
- (b) actual and potential impacts on third parties;
- (c) any areas of disagreement;
- (d) the extent to which agreed applications require assessment in line with our criteria in Chapter 3; and
- (e) consistency with our access charges determination for the relevant period.

17. Taking account of our duties, we may identify amendments we would wish to see made to a proposed contract before we would be happy to approve it. In the case of section 17 and 22A applications, we can determine the amendments as in these cases we are deciding the overall content of the contract.

## **Track access contracts**

18. A track access contract is a contract between a beneficiary (usually a train operator) and the facility owner. Network Rail's track access contracts generally capture:

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<sup>6</sup> <http://www.networkrail.co.uk/browseDirectory.aspx?root=&dir=%5cnetwork%20code%5cChanges%20to%20Access%20Rights>

<sup>7</sup> <http://orr.gov.uk/about-orr/what-we-do/the-law/our-duties>

(a) the access rights held by the beneficiary: generally expressed in terms of an entitlement to have train slots incorporated in the working timetable in order to operate a train service over a defined part of the network;

(a) conditions and obligations attached to those rights: including, charges; the performance regime; compensation for restrictions of use (for example, for engineering possessions); the rolling stock to be used; confidentiality provisions; and the liability of the parties to each other if things go wrong.

## Access rights

19. An access right is any right conferred on a beneficiary by its track access contract with Network Rail.

Access rights will represent a balance between:

(a) the beneficiary's need to ensure that it can meet its key commercial requirements (including franchise<sup>8</sup> or commercial obligations) over the period of the contract;

(b) Network Rail's need for flexibility to optimise the use of network capacity in compiling a robust and reliable timetable reflecting the requirements of all beneficiaries; and

(c) Network Rail's need to reserve access to the network in order to maintain, renew and enhance it.

20. Access rights set out in track access contracts are converted into the working timetable by the process set out in Part D of the Network Code<sup>9</sup> (Part D).

21. Although changes to the working timetable can be made at any time, significant changes in the passenger timetable will normally be made only twice per year, the Principal Change Date in December and the Subsidiary Change Date in May.

## The Network Code

22. The Network Code is a common set of contractual provisions incorporated by reference into every regulated track access contract between Network Rail and a beneficiary. It concerns areas where common processes are necessary or preferred, such as delay attribution (Part B), timetable change (Part D), vehicle change (Part F) network change (Part G), operational disruption (Part H), changes to access rights (Part J), performance (Part L) and appeals (Part M). The Access Dispute Resolution Rules are in the annex.

23. The Network Code does not create direct contractual relationships between beneficiaries. ORR does not have any direct enforcement powers under the Network Code, except where we are determining an appeal.

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<sup>8</sup> In this document, references to a "franchise" may, where appropriate, also be taken to mean references to a "concession".

<sup>9</sup> <http://www.networkrail.co.uk/browsedirectory.aspx?dir=/network%20code&root>

## Appeals and disputes

### Network Code appeals

24. The Network Code contains the Access Dispute Resolution Rules (the ADRR), which set out the process for dispute resolution to be used by the parties. Under the ADRR, beneficiaries can either refer a dispute through mediation and early neutral evaluation, or through determinative processes such as the timetabling panel (TTP), access disputes adjudication (ADA), expert determination and arbitration. These are all in addition to the option of referring the dispute to court. For more information see our module *Network Code appeals*<sup>10</sup>.

### Appeals under the Regulations

25. Regulation 29 provides applicants (a term defined in the Regulations) with a general right of appeal to ORR if they feel they have been unfairly treated or discriminated against. In particular, this will be against a decision by an infrastructure manager (a facility owner), a terminal or port owner, a service provider or a train operator. The appeal may be in relation to facilities that are otherwise exempt from the Act under section 20, or by virtue of *The Railways (Class and Miscellaneous Exemptions) Order 1994*<sup>11</sup> (“CMEO”), provided that these facilities have not themselves been excluded from the scope of the Regulations. See our module *Appeals for access to facilities and services*<sup>12</sup> on the approach we will adopt in considering appeals under the Regulations.

26. Where the matter of an appeal is one for which directions may be sought under sections 17 or 22A of the Act, an application should be made under these provisions, rather than the appeal mechanisms available under the Regulations.

## Consistency with competition law

27. Agreements which are restrictive of, or which distort, competition, or which could amount to an abuse of a dominant position, may fall for consideration under the Chapter I or Chapter II prohibitions, respectively, of the Competition Act 1998 (and, in so far as they may affect trade between EU Member States, Articles 81 and 82 of the EC Treaty).

28. When exercising our powers under the Act we will have regard to our statutory duties, including the duty to promote competition in the provision of railway services for the benefit of users. We will need to be satisfied that proposed contracts do not unduly limit competition in the provision of railway services but we will not undertake a full competition assessment as would be required under competition law.

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<sup>10</sup> <http://orr.gov.uk/what-and-how-we-regulate/track-access/guidance>

<sup>11</sup> <http://www.legislation.gov.uk/uksi/1994/606/contents/made>

<sup>12</sup> [http://orr.gov.uk/\\_data/assets/pdf\\_file/0018/1692/275.pdf](http://orr.gov.uk/_data/assets/pdf_file/0018/1692/275.pdf)

29. The EC Modernisation Regulation, which came into force on 1 May 2004, abolished the system of notifying agreements for exemption (under Article 81(3)). Consistent with this in domestic law, the Competition and Markets Authority (CMA) and ORR are no longer able to grant an individual exemption from the Chapter I prohibition. It is the responsibility of undertakings to ensure that any contract that they enter into is compliant with competition law. For further information on the application of competition law in the railway sector please refer to our *guideline*<sup>13</sup>.

30. Contracts may be challenged under competition law by third parties: either by private litigation through the courts or by a complaint to the competition authorities: the CMA and ORR<sup>14</sup>. To the extent that access contracts are compliant with ORR's directions made under section 17-22A of the Act, the parties may claim that they are excluded from the scope of the prohibitions. However, rulings of the European Court indicate that such a claim will only be upheld in very limited circumstances. If a challenge were to be investigated, parties would have to take advice on the individual circumstances of their case. In general terms, it would be necessary to demonstrate that the legislative regime of the Act required them to act in the way complained of and would have prevented the parties from making a contract that would not have contravened competition rules.

31. Access contracts entered into under section 18, in reliance of a general approval given by ORR (as opposed to a contract *directed* by ORR under section 18), are not the subject of ORR directions and can therefore be subject to action under the Competition Act 1998 as can agreed amendments to access contracts entered into under section 22 of the Act, or any amendment provisions contained in access contracts themselves.

32. Finally, section 22(6A) of the Act prevents either the CMA or ORR issuing enforcement directions or interim directions under the Competition Act 1998 in relation to access contracts, although interim directions may be issued over matters of conduct related to an access contract where there is a reasonable suspicion that an abuse of dominance under Chapter II has occurred.

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<sup>13</sup> See our webpage: <http://orr.gov.uk/what-and-how-we-regulate/competition/competition-issues>

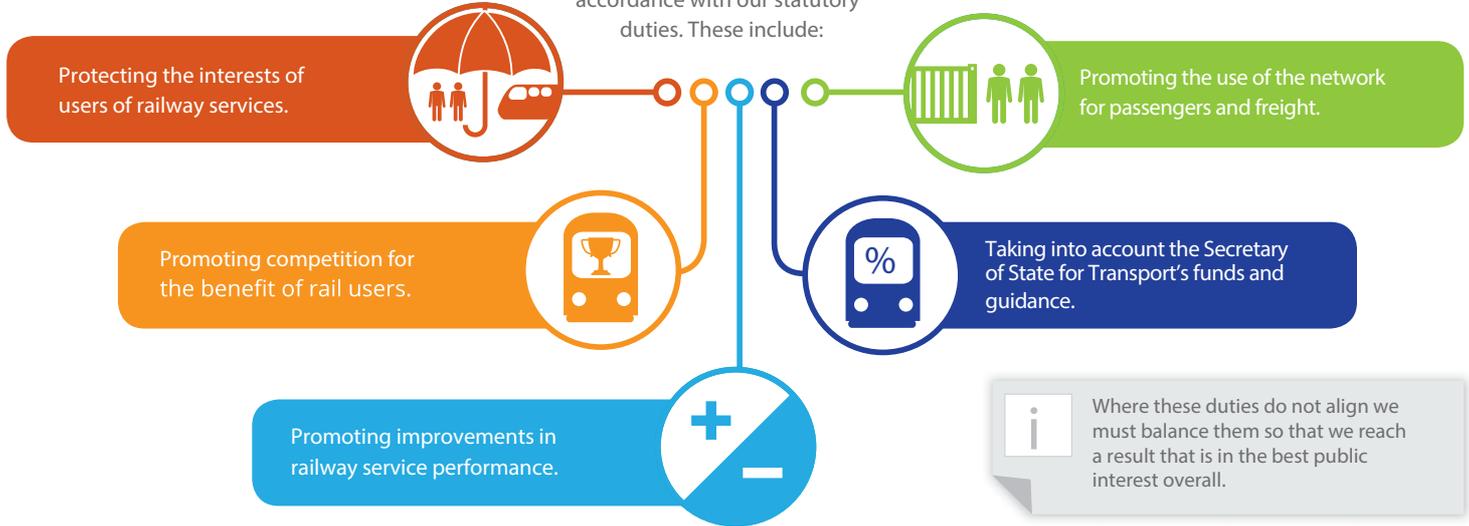
<sup>14</sup> CMA and ORR have concurrent jurisdiction as competition authorities to examine claims under the Competition Act 1998 and Articles 81 and 82 of the EC Treaty regarding the supply of services relating to railways.

# How We Make Decisions On Track Access

If a railway operator wants to run trains on the rail network, it must seek the Office of Rail and Road's approval for a track access agreement with Network Rail.

## How do we make our decisions on track access?

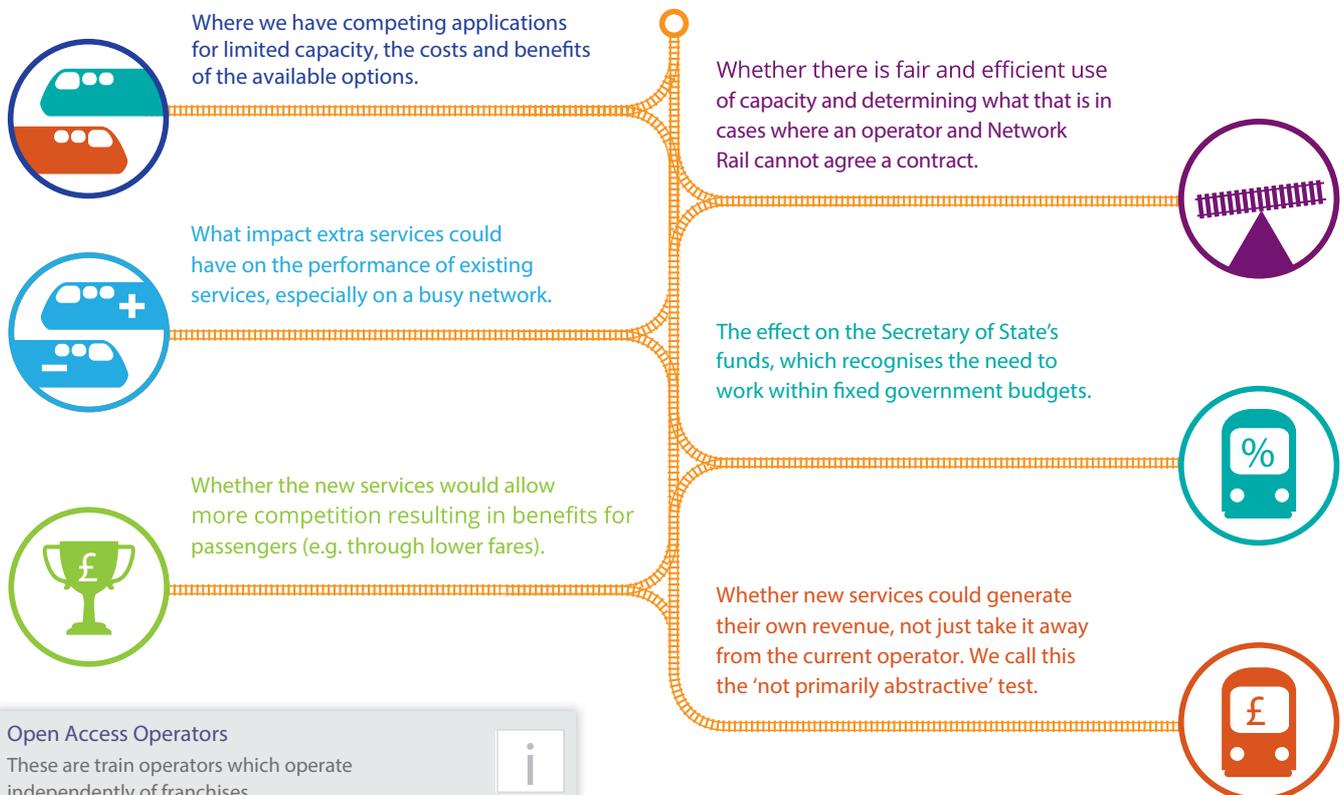
When we consider track access applications, we must do so in accordance with our statutory duties. These include:



Where these duties do not align we must balance them so that we reach a result that is in the best public interest overall.

## What factors do we consider when making track access decisions?

We look at the following things before we grant approval:



**Open Access Operators**  
 These are train operators which operate independently of franchises.  
 The Office of Rail and Road (ORR) values the benefits of competition and supports the introduction of new 'open access' services, or the continuation of existing services, where they meet our published criteria and bring real benefits to passengers.

**Economic Equilibrium Test**  
 We will also undertake the Economic Equilibrium Test on new open access services where the test is requested by a relevant party. This test looks at the overall impact of proposals on existing franchises.