

Rail Delivery Group



National Rail



Title	Implementing Act on new passenger services – economic equilibrium test
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The Economic Equilibrium Test

1 About Rail Delivery Group

The Rail Delivery Group (RDG) brings together passenger train operators, freight train operators, as well as Network Rail; and together with the rail supply industry, the rail industry – a partnership of the public and private sectors - is working with a plan [In Partnership for Britain's Prosperity](#) to change, improve and secure prosperity in Britain now and in the future. The RDG provides services to enable its members to succeed in transforming and delivering a successful railway to the benefit of customers, the taxpayer and the UK's economy.

In addition, the RDG provides support and gives a voice to passenger and freight operators, as well as delivering important national ticketing, information and reservation services for passengers and staff.

2 The British experience

The rail industry in Great Britain (GB) was liberalised in the mid-1990s, with a separated infrastructure manager (IM), private freight operators, passenger operators running under a franchise contract system (Public Service Contract, PSC) and passenger operators accessing the market via open access agreements. In this context, over the past 20 years, the number of passenger journeys have more than doubled. The total distance travelled by passengers has also gone up by 36%.

In the context of a competitive market that runs both open access and public service contracts the British independent regulator, the ORR, introduced the 'not primarily abstractive' test, to ensure that operators' new service proposals were not primarily abstractive of other operators' revenue.

It is with the experience of operating in a competitive environment and balancing open access with franchises that the RDG offers its opinion on the Commission's proposals. RDG would also like to note that the European Commission has undertaken significant consultation with the industry via the 'RU Dialogue' leading up to the issuing of this draft and we have welcomed the opportunity to input thus far.

3 Summary Position

RDG believes in an open and competitive rail sector where the independent IM is able to operate and develop the network in the interests of all its RU customers and, ultimately, passengers and freight users. As such, RDG welcomes the Fourth Railway Package and has actively supported its passage through the legislative process. RDG wishes to continue to use its members' experiences of operating in a competitive market to support the Commission in developing the implementing acts of the Fourth Railway Package. To set out the details of the procedure and criteria to be followed by relevant parties using the economic equilibrium test, the Commission has the right to adopt an Implementing Act (IA) which we broadly support subject to some specific amendments.

RDG highlights the following articles as a priority for the Commission to review.

- **Article 3(5):** The term "financial balance" is unclear. The EET looks at the impact the new open access operator has on an existing PSC. Therefore, it should also look at the estimated financial impact on the financial balance.
- **Article 7(2)(c):** The requirements for the business strategy to be disclosed compromise the principle of commercial confidentiality. The requirements in the list should be sufficient without the overarching strategy.

- **Article 10(3)(d):** Deletion of “in particular rolling stock” – other investments by an operator are just as important. The focus should not lie purely on rolling stock.
- **Article 12:** There is no logical reason for there to be any difference between conventional and high-speed services. The role of the EET is not to segment markets, and any asymmetrical provisions between markets should be avoided.

4 Specific proposed amendments

Below, RDG propose some specific amendments to the Commission text. Many are for clarity rather than suggesting a substantive policy change.

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area¹, and in particular the second subparagraph of Article 11(4) thereof,

Whereas:

(1) Directive 2012/34/EU as amended by Directive (EU) 2016/2370 of the European Parliament and of the Council² has opened up the market for domestic rail passenger services with a view to completing the single European railway area. This may have implications for the organisation and financing of rail passenger services provided under a public service contract. It is important to ensure that the economic equilibrium of such contracts is protected if necessary by limiting the right of access to the market.

(2) On the other hand, new open-access rail passenger services, depending on their specific features, such as quality characteristics, timing, destinations served and prospective customers targeted, may not be in head-on competition with public services, and thus cause only limited impact on the economic equilibrium of a public service contract. Furthermore, there may be positive network effects for public service operators, net benefits to passengers or wider social benefits that should be taken into account.

(3) It is therefore necessary to balance the legitimate interests of operators performing a public service contract and competent authorities, on the one hand, with the overarching objectives of completing the single European railway area and reaping its wider social benefits, on the other hand. The economic equilibrium test should achieve a balance between those competing interests.

(4) Regulation (EC) No 1370/2007 of the European Parliament and of the Council³ lays down that, as a reward for discharging public service obligations in the provision of rail passenger services, operators may be granted financial compensation or exclusive rights, or both. However, the grant of exclusive rights to railway operators should not result in the foreclosure of domestic rail passenger markets.

(5) Such exclusive rights should not preclude the right of access of other railway undertakings, unless the economic equilibrium test shows that, taking into account the value of the exclusive rights, the new **rail passenger** service would have a substantial negative impact on the profitability of services operated under the public service contract or the net cost of their provision for the competent authority, or both. The focus of the analysis should depend, in particular, on risk-sharing arrangements stipulated in the public service contract.

(6) An economic equilibrium test should be requested only in respect of passenger rail services which are not provided under a public service contract and which are either entirely new or entail a substantial

¹ OJ L 343, 14.12.2012, p. 32.

² Directive (EU) 2016/2370 of the European Parliament and of the Council of 14 December 2016 amending Directive 2012/34/EU as regards the opening of the market for domestic passenger transport services by rail and the governance of the railway infrastructure (OJ L 352, 23.12.2016, p. 1).

³ Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70 (OJ L 315, 3.12.2007, p. 1).

modification of an existing service. It should be for the regulatory body to assess whether a proposed modification of a rail passenger service should be considered substantial. An increase in frequencies or number of stops could be considered a substantial modification. On the other hand, a variation in prices should not be considered a substantial modification, provided it is reasonable and consistent with normal market behaviour, and where relevant, with the business plan submitted to the regulatory body at the time the previous economic equilibrium test was carried out.

(7) The regulatory body's decision should include an assessment of net benefits to customers arising from the new rail passenger service in the short and medium term, and should take into account the technical information provided by the infrastructure manager on relevant infrastructure requirements and on expected impacts on network performance and on optimal capacity utilisation by all applicants.

(8) The regulatory body should be entitled both to assess the likely impact of the new passenger service, and to assess whether such impact would be substantial and thus compromise the economic equilibrium of the existing public service contract.

(9) In order to avoid the interruption of a new rail passenger service that has already started, and to give legal certainty to this new service about its possibility to operate, the period during which an economic equilibrium test can be requested should be limited and linked to the time of the applicant's notification of its interest in operating a new rail passenger service.

(10) To be admissible, a request for an economic equilibrium test should include substantiation that the economic equilibrium of the public service contract would be compromised by the proposed new service.

(11) In order to ensure legal certainty for all parties involved and to enable the infrastructure manager to process requests for capacity according to the procedure set out in Section 3 of Chapter IV of Directive 2012/34/EU, the regulatory body should take a decision on economic equilibrium within a pre-determined time frame, and in any event before the deadline for receipt of requests of capacity, set by the infrastructure manager in accordance with point 3 of Annex VII to Directive 2012/34/EU.

(12) However, if at the time the applicant's notification is received, a public service contract is in the process of being competitively tendered, there may be a need to align the time-frame of the economic equilibrium test to that of the tender process. In such circumstances, the regulatory body should carry out the economic equilibrium test according to the principles and criteria set out in this Regulation as soon as the data required becomes available. The regulatory body's decision should be adopted at the same time as the tender results are announced, or within 18 months from receipt of the notification, whichever is earlier.

(13) The economic equilibrium of a public service contract should be regarded as compromised if the proposed new service would have a substantial negative impact on the level of profit for the public service operator and/or their operation would imply a substantial increase in net cost for the competent authority.

(14) When assessing whether an impact is substantial, the regulatory body should take into account criteria such as whether the new service would jeopardise the viability and endanger the continuity of the public service, either because performance of the public contract would not be economically sustainable for the public service operator, or because it would entail an increase in net cost for the competent authority which the latter would not be able to bear.

(15) Beyond the economic analysis, the regulatory body should also assess and take into account the net benefits to customers in the short and medium term and any impacts in network performance and capacity use. The regulatory body should take into account the technical information provided by the infrastructure manager on relevant infrastructure requirements, on expected impacts on network performance and on optimal capacity utilisation by all applicants.

(16) The economic analysis should focus on the impact of the proposed new service on the public service contract as a whole, including the services specifically affected, for its entire time-scale, taking into account the monetary value of any existing exclusive rights that may have been granted. No predefined quantified threshold regarding the damage should be applied strictly or in isolation, and no such thresholds should be set in national legislation. The assessment should be based on an objective methodology adopted by the regulatory body having regard to the specificities of rail transport in the Member State concerned.

(17) When the regulatory body comes to the conclusion that the new rail passenger service would compromise the economic equilibrium of the public service contract, in its decision it should indicate, if relevant, possible changes to the new rail passenger service which would enable access to be granted. The regulatory body should also be able to issue recommendations to the competent authority as regards other possible conditions that would enable access to be granted, in particular in the light of its analysis of net benefits to customers arising from the new rail passenger service.

(18) If the application for access concerns a new high speed passenger service as defined in Article 3(36) of Directive 2012/34/EU and the objective economic analysis of the regulatory body shows that the new passenger service would have a substantial negative impact on the economic equilibrium of a public service contract, the regulatory body should indicate possible conditions which would enable access to be granted, which may include a mechanism for financial compensation by the applicant seeking access. Such compensation should be limited to the minimum necessary to ensure that the impact on the public service contract is not substantial. Where accepted by the applicant, the regulatory body's decision should be binding on all parties.

(19) In all its activities related to the economic equilibrium test, the regulatory body should not disclose confidential or commercially sensitive information received from the parties. In particular, it should redact such information from the decision to be published. Any dispute on the confidential nature of the information should be settled in accordance with national law. Pending the relevant legal proceedings, the regulatory body should refrain from disclosing information which could cause irretrievable or manifestly excessive damage to the entity concerned.

(20) Where the economic equilibrium test is carried out in respect of a new international passenger service, without prejudice to the principle of independence of regulatory bodies in decision-making referred to in Article 55(1) of Directive 2012/34/EU, the regulatory bodies concerned should exchange information and cooperate with a view to aligning the impact of their decisions.

(21) Regulatory bodies should exchange best practices in applying the economic equilibrium test with a view to adapting their methodology over time and developing a consistent methodology across Member States, which may be covered by Article 57(8) of Directive 2012/34/EU.

(22) Commission Implementing Regulation (EU) No 869/2014⁴ establishes criteria and procedures for the application of the principal purpose test and the economic equilibrium test in respect of new international rail passenger services. However, with the opening of the market for domestic rail passenger services, the principal purpose test has become obsolete and the same criteria and procedures should apply to all new rail passenger services, regardless of whether they are domestic or international. Commission Implementing Regulation (EU) No 869/2014 should therefore be repealed.

(23) The measures provided for in this Regulation are in accordance with the opinion of the Committee established by Article 62(1) of Directive 2012/34/EU,

Justification: *Minor amendments made for clarity.*

HAS ADOPTED THIS REGULATION:

Article 1
Subject matter

This Regulation sets out the details of the procedure and criteria to be followed when determining whether the economic equilibrium of a public service contract for rail transport would be compromised by a new rail passenger service.

Article 2
Scope

⁴ Commission Implementing Regulation (EU) No 869/2014 of 11 August 2014 on new rail passenger services (OJ L 239, 12.8.2014, p. 1).

This Regulation applies to situations where a Member State has decided to limit the right of access referred to in Article 10(2) Directive 2012/34/EU for new rail passenger services between a given place of departure and a given destination when one or more public service contracts cover the same route or an alternative route, as provided for in Article 11(1) of that Directive.

Article 3 Definitions

For the purposes of this Regulation, the following definitions shall apply:

- (1) 'new rail passenger service' means a rail passenger service designed to be operated as a regular time-tabled service, that is either entirely new, or that implies a substantial modification of an existing rail passenger service, in particular in terms of increased frequencies of services or increased number of stops, and which is not provided under a public service contract;
- (2) 'economic equilibrium test' means the assessment process described in Article 10 and carried out by a regulatory body at the request of an entity referred to in Article 5 in order to determine whether the economic equilibrium of a public service contract would be compromised by the proposed new rail passenger service;
- (3) 'public service contract' means a public service contract as defined in point (i) of Article 2 of Regulation (EC) No 1370/2007 in the area of rail transport;
- (4) 'competent authority' means a competent authority as defined in point (b) of Article 2 of Regulation (EC) No 1370/2007;
- (5) '~~net financial balance impact~~' means the financial impact on the net balance of costs and revenues arising from the discharge of the public service obligations operator stipulated in a public service contract;
- (6) 'exclusive right' means a right as defined in point (f) of Article 2 of Regulation (EC) No 1370/2007.

Justification: The term "net financial balance" was thoroughly discussed with the Commission in the RU Dialogue meetings. It was agreed that "impact" was a more fitting word. Therefore, both, the term and definition should be changed to reflect this. The term "financial balance" is unclear. The EET looks at the impact the new operator has on an existing PSO. Therefore, it should also look at the estimated financial impact on the financial balance. Other changes have been proposed throughout to reflect this amendment.

Article 4 Notification of a planned new rail passenger service

1. The applicant shall notify the infrastructure managers and the regulatory bodies concerned of its intention to operate a new rail passenger service at least 18 months before the entry into force of the working timetable to which the request for capacity refers, in accordance with Article 38(4) of Directive 2012/34/EU.
2. Regulatory bodies shall develop and publish on their website a standard notification form to be used by applicants, which shall contain exclusively the following information:
 - (a) the applicant's name, address, legal entity, registration number (if appropriate);
 - (b) contact data of the person responsible for queries;
 - (c) data of licence and safety certificate of the applicant or indication of the stage of the procedure to obtain them;
 - (d) detailed route indicating location of departure and destination stations as well as all intermediate stops;
 - (e) planned starting date for the operation of the proposed new rail passenger service;

(f) indicative timing, frequency and capacity of the proposed new rail passenger service, including proposed departure times, arrival times and connections as well as any deviations in frequency or in stops from the standard timetable, in each direction;

(g) indicative information on the rolling stock the applicant plans to use.

3. The information regarding the planned operation of the new rail passenger service shall cover at least the first three years and, as far as possible, the first five years of operation. The regulatory body may, however, agree to a shorter period.

4. The regulatory body shall publish on its website the standard notification form submitted by the applicant and shall notify the following **parties** without undue delay and at the latest within 10 days of receiving a complete notification form:

(a) any competent authority that has awarded a public service contract for a rail passenger service on that route or an alternative route;

(b) any other interested competent authority with the right to limit access under Article 11 of Directive 2012/34/EU;

(c) any railway undertaking operating services under public service contract on the route of the new rail passenger service or an alternative route.

5. All information provided by the applicant via the standard notification form and any supporting documents shall be sent to the regulatory bodies and infrastructure managers in electronic form. However, the regulatory body may, in duly justified cases, accept that documents be submitted in paper format.

6. If the notification is incomplete, the regulatory body shall inform the applicant that incomplete requests will not be considered and shall give the applicant the possibility to complete its request within a reasonable time not exceeding two weeks.

Justification: *Minor amendments made for clarity.*

Article 5

Deadline for requesting the economic equilibrium test

1. Any request for an economic equilibrium test shall be made to the regulatory body by the entities referred to in Article 11(2) of Directive 2012/34/EU within the deadline set out in that provision.

2. If no request for an economic equilibrium test is made within the deadline referred to in paragraph 1, the regulatory body shall inform the applicant and the infrastructure manager without delay. The infrastructure manager shall process the access request in accordance with Section 3 of Chapter IV of Directive 2012/34/EU.

Article 6

Public service contracts with exclusive rights

Where a competent authority has granted exclusive rights to the railway undertaking performing a public service contract in accordance with Article 3 of Regulation (EC) No 1370/2007, the existence of such rights shall not preclude access being granted to an applicant for the purpose of operating a new rail passenger service, provided that access would not compromise the economic equilibrium of the public service contract.

In carrying out the test pursuant to Article 11, the regulatory body shall take due account of the monetary value of any such exclusive rights.

Article 7

Information requirements for the economic equilibrium test

1. The entity requesting the economic equilibrium test shall provide the following information:
 - (a) the requesting entity's name, address, legal entity, registration number (if appropriate);
 - (b) contact information of the person responsible for queries;
 - (c) substantiation that the economic equilibrium of the contract risks being compromised by the new rail passenger service;
 - (d) if the requesting entity is a competent authority or the railway undertaking performing the public service contract, a copy of the public service contract.
2. The regulatory body may request any necessary information, including, as the case may be:
 - (a) from the competent authority:
 - (1) relevant traffic, demand and revenue forecasts, including forecast methodology,
 - (2) where appropriate, the methodology and data used to calculate the net financial effect pursuant to Article 6(1) of Regulation (EC) No 1370/2007 and the Annex to that Regulation, substantiating compliance of the contract with Union law;
 - (b) from the railway undertaking performing the public service contract:
 - (1) copy of the public service contract, if not provided under point (d) of paragraph 1,
 - (2) the undertaking's business plan,
 - (3) information on revenues and profit margins gained by the undertaking,
 - (4) timetable information for the services, including departure times, intermediate stops, arrival times and connections,
 - (5) estimated elasticities of the services (e.g. price elasticity, elasticity with respect to quality characteristics of the services),
 - (6) possible competitive responses to the new rail passenger service,
 - (7) cost of capital and operating costs for services provided under the public service contract, as well as variations in costs and demand induced by the new rail passenger service;
 - (c) from the applicant, information-concerning its plans and business strategy, including:
 - (1) the business plan for the new rail passenger service concerned,
 - (2) forecast of passenger traffic and revenues, including forecast methodology,
 - (3) pricing strategies,
 - (4) ticketing arrangements,
 - (5) rolling stock specifications (e.g. load factor, number of seats, vehicle configuration),
 - (6) marketing strategy;
 - (d) from the infrastructure manager:
 - (1) information regarding the relevant lines or sections, in order to ensure that the new rail passenger service can be run on the infrastructure concerned,
 - (2) information on potential performance and resilience impacts of the proposed new rail passenger service,
 - (3) assessment of impacts on capacity use,

- (4) plans for developing infrastructure as regards routes covered by the proposed new rail passenger service, including an indication of the time when any such plans will be implemented,
- (5) information on framework agreements concluded or under discussion with the undertaking performing the public service contract.

The information obligations of the infrastructure manager set out in point (d) of the first subparagraph of this paragraph shall be without prejudice to its obligations under the allocation procedure referred to in Section 3 of Chapter IV of Directive 2012/34/EU.

3. All information shall be sent to the regulatory body in electronic form. The regulatory body may, however, in duly justified cases, accept that documents be submitted in paper format.

Justification: *It is essential that any sharing of the business strategy is done so on a confidential basis (subject to Article 8 below).*

Article 8 **Confidentiality**

1. The regulatory body shall not disclose commercially sensitive information received from the parties in connection with the economic equilibrium test.
2. The entity requesting the economic equilibrium test and the applicant shall substantiate any proposed non-disclosure of commercially sensitive information at the time the information is provided to the regulatory body. Such information may include, in particular, technical or financial information relating to an undertaking's know-how, business plan, cost structures, marketing and pricing strategies, supply sources and market shares. The regulatory body shall redact any commercially sensitive information from its decision to be notified and published in accordance with Article 11(3).
3. If the regulatory body finds that the reasons for non-disclosure provided under paragraph 2 cannot be accepted, that decision shall be communicated **and justified in writing** to the party requesting confidentiality.
4. Where so provided for in national law, the regulatory body's decision on confidentiality may be subject to judicial review, which may have suspensive effect on the disclosure of information.

Justification: *The burden of proof should be on the regulatory body.*

*Article 9***Procedure for the economic equilibrium test**

1. The regulatory body may request the entity requesting the economic equilibrium test to provide it with any additional information it deems necessary in accordance with Article 8(2) within one month of receiving the request. The requesting entity shall provide such information within a reasonable deadline set by the regulatory body. The regulatory body may request further information if it considers that the additional information received is not sufficient.
2. In the event that six weeks before the final date for receipt of requests for capacity set in accordance with point 3 of Annex VII to Directive 2012/34/EU the information provided by the requesting entity is still incomplete, the regulatory body shall perform the test on the basis of available information. If, however, the regulatory body considers that the information is insufficient to perform the test, it **shall** may reject the request.
3. Within one month of receiving the request for the economic equilibrium test, the regulatory body shall also ask other parties referred to in Article 8(2) to provide it with the information necessary to perform the test in accordance with that provision, to the extent that such information can reasonably be provided by the party concerned. Where the information thus provided is incomplete, the regulatory body may request further clarifications, setting reasonable deadlines.
4. In the event that six weeks before the final date for receipt of requests for capacity set in accordance with point 3 of Annex VII to Directive 2012/34/EU the information provided by the applicant seeking access is still incomplete the regulatory body shall perform the test on the basis of available information. If, however, the regulatory body considers that the information provided by the applicant is insufficient to perform the test, it shall adopt a decision resulting in access being denied.
5. The regulatory body shall adopt a decision within six weeks from the receipt of all relevant information, and in any event before the final date for receipt of requests for capacity set in accordance with point 3 of Annex VII to Directive 2012/34/EU. The regulatory body shall inform the infrastructure manager of its decision without delay.
6. If, at the time the applicant's notification referred to in Article 4 is received, a public service contract covering the same route or an alternative route is being competitively tendered and the tender documents have already been published by the competent authority, the regulatory body shall carry out the economic equilibrium test as soon as possible having regard to the state of advancement of the tender and the availability of the information required. It shall adopt a decision at the latest when the tender results are announced or 18 months from receipt of the applicant's notification, whichever is earlier.

*Article 10***Contents of the economic equilibrium test and assessment criteria**

1. The regulatory body shall assess whether the economic equilibrium of a public service contract would be compromised by the proposed new rail passenger service. Economic equilibrium shall be considered as compromised where the new rail passenger service would have a substantial negative impact on at least one of the following elements:
 - (a) the profitability of services that the railway undertaking operates under the public service contract;
 - (b) the net cost for the competent authority awarding the public service contract.
2. The analysis shall refer to the public service contract as a whole, not to individual services operated under it, over its entire duration. Predetermined thresholds or specific criteria may be applied but not strictly or in isolation from other criteria.
3. The regulatory body shall assess ~~the variation in the net financial balance~~ **impact of the proposed new rail passenger service on** ~~of~~ the public service contract. The analysis of costs and revenues generated in operating the services covered by the public service contract after the market entry of the new rail passenger service shall include the following elements:

- (a) variation in costs incurred by the railway undertaking performing the public service contract (including as appropriate any cost savings, such as those arising from the non-replacement of rolling stock reaching the end of its useful life or staff whose contract ends);
- (b) positive financial effects generated within the network under public service contract by the proposed new rail passenger service (such as bringing passengers who might be interested in a connection with a regional service covered by the public service contract);
- (c) possible competitive responses by the railway undertaking performing the public service contract;
- (d) impact on investments by railway undertakings, or by competent authorities, if appropriate, **in particular in rolling stock**;
- (e) the monetary value of any existing exclusive rights.

4. The regulatory body shall assess the significance of the impact taking into account, in particular, the contractual arrangements between the competent authority and the railway undertaking operating the public services, including where applicable the level of compensation determined in accordance with the Annex to Regulation (EC) No 1370/2007 or resulting from competitive award and any mechanisms for sharing risks such as traffic and revenue risks.

5. The regulatory body shall also assess:

- (a) the net benefits to customers arising from the new rail passenger service in the short and medium term;
- (b) the impact of the new rail passenger service on the performance and quality of railway services;
- (c) the impact of the new rail passenger service on timetable planning for railway services.

6. Where the regulatory body receives more than one application for access, it may take different decisions on the applications received, based on the analysis of their respective impacts on the economic equilibrium of the public service contract, net benefits to customers and network impacts.

7. The assessment carried out in accordance with this Article is without prejudice to the regulatory body's obligation to report State aid issues to the national authorities in accordance with the second subparagraph of Article 56(12) of Directive 2012/34/EU.

Justification: *Changes above made to ensure clarity of provisions.*

Change term "net balance" to "impact" as discussed under Article 3 (definition of net financial impact, rather than balance) to ensure coherence.

Deletion of "in particular rolling stock" – other investments are just as important. The focus should not lie purely on rolling stock.

Article 11

Result of the economic equilibrium test

1. As a result of the economic equilibrium test carried out in accordance with Article 11, the regulatory body shall take a decision provided for in Article 11(2) of Directive 2012/34/EU, on the basis of which the right of access to the rail infrastructure shall be granted, modified, granted only under conditions or denied.

2. Where the economic equilibrium of a public service contract would be compromised by the new rail passenger service, the regulatory body:

- (a) shall, as appropriate, indicate possible changes to that new rail passenger service, such as a modification of frequencies, paths, intermediate stops or schedule, which would ensure that

the conditions for granting the right of access provided for in Article 10(2) of Directive 2012/34/EU are met; and/or

(b) may recommend to the competent authorities, where relevant in the light of net benefits to customers referred to in point (a) of Article 10(5) of this Regulation, other changes not related to the new passenger service that would ensure that the conditions for granting the right of access are met.

3. The regulatory body shall notify a non-confidential version of its decision to the entities listed in Article 11(3) of Directive 2012/34/EU and publish it on its website.

Article 12

Result of the economic equilibrium test for high speed passenger services

1. Where the request for access concerns the operation of a new high speed passenger service, following the procedure laid down in Article 9 of this Regulation and as a result of the economic equilibrium test conducted in accordance with Article 10 of this Regulation, the regulatory body shall take a decision under Article 11a(2) of Directive 2012/34/EU.

2. Where any changes indicated in the decision of the regulatory body have been accepted by the applicant seeking access, they shall be binding on all the parties concerned. Where the regulatory body indicates a financial compensation, that compensation shall be set at the minimum necessary to conclude that the impact of the new high-speed rail passenger service would not be substantial. The decision of the regulatory body shall be notified and published in accordance with Article 11(3).

Justification: *The whole of Article 11(2) should be applicable to high-speed services who should have the same rules and remedies applied as conventional services.*

Article 13

Cooperation between regulatory bodies competent for a proposed new international passenger service

1. Upon receipt of an applicant's notification of its intention to start a new international passenger service, the regulatory body shall inform the other regulatory bodies having competence for the route of the proposed new service. The regulatory bodies concerned shall check the information received and inform each other of any inconsistencies.

2. Upon receipt of a request from the entities referred to in Article 11(2) of Directive 2012/34/EU for an economic equilibrium test, the regulatory body shall inform thereof the other competent regulatory bodies.

3. Regulatory bodies shall provide each other with the results of their respective economic equilibrium tests in order to give the other regulatory bodies sufficient opportunity to comment on the results of those tests. They shall cooperate in order to bring about a coherent resolution of the matter, in accordance with Article 57(3a) of Directive 2012/34/EU.

4. During any exchange of information regarding the tests, regulatory bodies shall respect the confidentiality of commercially sensitive information received from the parties involved in the tests. They may only use the information for the case concerned.

Article 14

Fees

A Member State or the regulatory body may decide that a fee be paid for the economic equilibrium test resulting from an economic equilibrium test by the entity requesting the test. In such a case, the fee shall be non-discriminatory, reasonable, transparent, and shall not exceed the cost of the assessment.

Article 15

Methodology

1. The methodology used by the regulatory body to perform the test shall be clear, transparent and non-discriminatory and shall be published on its website.
2. Regulatory bodies shall exchange best practices in applying their respective methodologies in the network established in Article 57(1) of Directive 2012/34/EU.

Article 16

Repeal

Implementing Regulation (EU) No 869/2014 is repealed with effect from 1 January 2019.

Article 17

Entry into force and application

This Regulation shall enter into force on the twentieth day following that of its publication the *Official Journal of the European Union*.

It shall apply from 1 January 2019, in time for the working timetable starting on 12 December 2020.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,
For the Commission
The President Jean-Claude JUNCKER

5 Appendix I: How the ORR makes decisions about track access

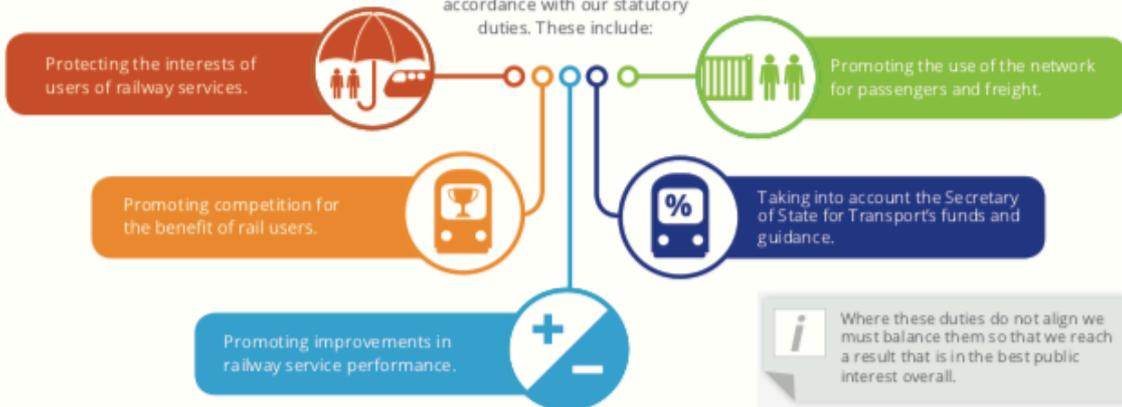
How We Make Decisions On Track Access?

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.



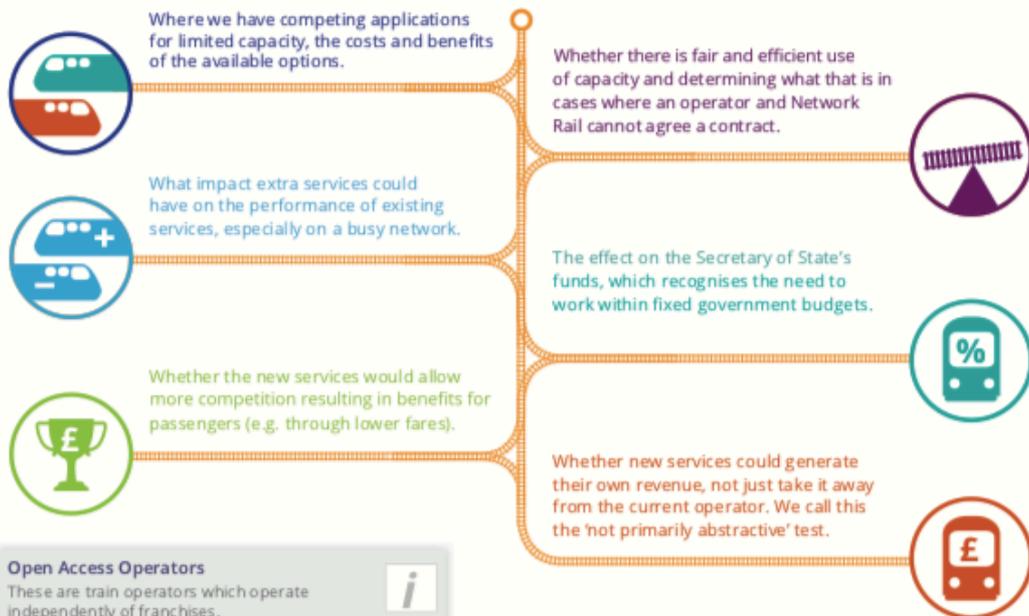
How do we make our decisions on track access?

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



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.