

# Update on planned approach to reviewing the Access & Management Regulations

**Commission to deliver a simpler and more integrated railway**

**Information paper**

*26/05/2023*

## Background

In June 2022 the DfT (Department for Transport) commissioned GBRTT (Great British Railways Transition Team) to lead work ('the Commission') in developing reforms to the framework that governs access and key joint processes across the multi-user railway and to identify simplifications and efficiencies to industry processes, codes and supporting architecture.

GBRTT has previously produced initial discussion papers which have been shared with industry partners for review and comment with the intention of incorporating this feedback into an update to the DfT later this year.

This paper is to update stakeholders on the Commission's planned work in Phase 2 of our work.

This will include developing recommendations for future changes to access-related regulations – principally the Railways (Access, Management and Licensing of Railway Undertakings) Regulations 2016 ("A&MR"). This paper is produced as part of that wider Commission.

Any recommendations developed in respect of The A&MR will be tested to ensure they support the goals set by the Secretary of State for Transport for simplifying and improving industry processes. In line with our earlier discussion papers, the goals include retaining important protections for non-GBR operators and ensuring a continuing role for ORR in critical aspects of railway access – the principles for which are already set out in the Introductory note which GBRTT shared with the sector in March 2023.

## The need for change

In June 2022 the government announced legislation "to modernise rail services and improve reliability for passengers". Guidance on the areas that need to be addressed were pointed to in its Consultation on Legislation to Implement Rail Transformation, where the DfT noted that:

*"Many of the benefits of transformation can be delivered without legislation, but primary legislation will be needed to drive key elements of the structural reforms to the rail industry that were announced in the Plan for Rail. This includes underpinning legislation to enable Great British Railways to deliver its guiding mind function and to be held to account for delivering a safe, reliable, and efficient railway."*

*"Legislation will amend regulations to enable Great British Railways to function as a guiding mind and introduce a power to amend EU derived rail markets legislation in the future with secondary legislation, following consultation."*

GBRTT was subsequently commissioned to lead work in developing reforms to the framework that governs access and key joint processes across the multi-user railway and to identify simplifications and efficiencies to industry processes, codes, and supporting architecture.

In response, GBRTT is developing advice on simplification and reform of industry processes. These will be able to inform any requirements for legislative changes to A&MR, and identify other, wider changes to rules and contracts "to modernise rail services and improve reliability for passengers".

Consideration of the A&MR in Phase 2 will aid in the delivery of a coherent set of proposals for relevant access & management regulations to help deliver a revised, simpler and efficient access rights framework. This work excludes secondary regulation relating to safety, technical and interoperability matters.

## The landscape of access regulations

The Access and Management Regulations 2016 (A&MR) are a domestic transposition of EU Regulations that were themselves partially modelled on our own industry framework around 10 years ago.

The 2016 version of the A&MR implemented into UK law EU Directive 2012/34/EC 'Directive establishing a single European railway area' - more commonly known as the 'Recast'. This directive sought to simplify and consolidate existing rules by merging three directives from the First Railway Package<sup>1</sup> (2001) and their amendments into a single text.

In addition, the Recast aimed to clarify existing provisions and tackle key problem areas that had been identified in the EU rail market over the preceding ten years, including:

- Clear rules for the charging, accounting and management of infrastructure
- Fundamental activities of access to railway infrastructure and services and allocation of capacity
- Access to rail-related facilities (depots, maintenance etc.)
- Independence and competence of regulatory bodies

While the regulations designed for EU (and adjoining networks) may have largely mirrored former UK domestic arrangements at that time, the industry and the socio-economic environment has evolved. The tightly drafted language and prescribed activities intended to limit the freedom of interpretation by member states is now a fixed text as a result of EU withdrawal arrangements and will no longer be updated should the EU amend the underlying directives for its own member states.

Over time this ossification of the A&MR is likely to pose an increasing constraint on reforms of the industry. This will become a more significant issue as the reforms progress and may constrain GBR's (Great British Railways) activities from day one if not addressed.

The DfT therefore [consulted](#), between June and August 2022, on a legislative proposal to create a new Secretary of State power to amend and bring forward new secondary legislation in this area. Any decisions on legislation will be for government - including which vehicle might be used to make changes.

Additional levers for government to make changes to existing secondary legislation are likely to be provided by powers in the Retained EU Law (Revocation and Reform) Bill which is currently being considered by Parliament. The Department issued a discussion document in April 2023 which sought views on the Government's intention to use powers in the Bill to

---

<sup>1</sup> The First Railway Package, adopted by the European Commission in 2001, was designed to:

- open the international rail freight market;
- establish a general framework for the development of European railways, and clarify the formal relationship between the State and the infrastructure manager on the one hand, and between the infrastructure manager and railway undertakings (train operators) on the other hand (Directive 2001/12/EC);
- set out the conditions that freight operators must meet in order to be granted a licence to operate services on the European rail network (Directive 2001/13/EC);
- introduce a defined policy for capacity allocation and infrastructure charging (Directive 2001/14/EC)

remove duplication and prescription found in five pieces of rail markets REUL<sup>2</sup> while highlighting that any longer-term more detailed changes to the 2016 A&MR would be dependent on the results of the GBRTT commission and will be subject to further engagement with industry before a decision is taken whether regulatory changes are necessary.

## Developing access regulations in the Commission's work

The detailed work to develop recommendations for secondary legislation will be a critical task during Phase 2 of the Commission.

At this stage we anticipate that immediate recommendations arising from the Commission in respect of secondary legislation are likely to be incremental – aimed at removing red tape, delivering simplifications, or making requirements less onerous for the sector.

In making our recommendations later this year we will want to ensure changes to secondary legislation are deliverable, and that proposals are able to gain industry support.

The current regulations are not structured in a way that fits neatly and understandably with the processes we use in this country, which can make them confusing and complex for the sector to navigate. Our work may therefore identify some changes in the body of regulation, where these have the potential to offer significant benefits of simplification and would be widely welcomed. However, any fundamental simplifications or restructuring may benefit from further work as the new industry model matures and may therefore not be suitable for immediate implementation as GBR is set up. These issues of timing will be considered further as our recommendations are developed.

## Assumptions

When considering potential future changes to access-related regulations, we will start with key assumptions based on the Government's Bill consultation. These may need to be revisited as policy evolves, GBR develops plans, or as work is undertaken with industry and stakeholders. The assumptions include that:

- ORR retains its role in deciding access and directing agreements (Railways Act 1993 s.17-22A)
- Freight and open access passenger operators should have regulatory protections that at least reflect those in the current regime
- Existing regulations are updated in the new Act where this is necessary to allow transfer of the franchising authority powers current held by the SoS to GBR
- GBR will have a licence setting out obligations, issued by the SoS
- GBR will have an Access and Use Policy that is approved by the SoS, and the Act will require the ORR to take it into account in ORR's decisions

---

<sup>2</sup> Commission Implementing Regulation (EU) 2017/2177 on access to service facilities and rail-related services.  
Commission Implementing Regulation 2018/1795 laying down procedure and criteria for the application of the economic equilibrium test pursuant to Article 11 of Directive 2012/34/EU.  
Commission Implementing Regulation (EU) 2015/10 of 6 January 2015 on criteria for applicants for rail infrastructure capacity and repealing Implementing Regulation (EU) No 870/2014  
Commission Implementing Regulation (EU) 2015/909 of 12 June 2015 on the modalities for the calculation of the cost that is directly incurred as a result of operating the train service  
Commission Implementing Regulation (EU) 2016/545 of 7 April 2016 on procedures and criteria concerning framework agreements for the allocation of rail infrastructure capacity

## Identifying a choice of regulatory detail

The current Regulations take a varied approach, with some things governed through the prescription of lower-level detail, but with other provisions pitched at a much higher-principle level. This may still be the right outcome - but requires further consideration.

We will continue to progress thinking on how to make the key processes simpler and better for all users and identify the implications for Regulations as this work matures. At this stage we anticipate that proposals may identify similar levels of choice in different areas of detail when developing future regulations:

<b>Level of detail</b>	<b>Opportunity</b>	<b>Consideration</b>
<p><b>Low-level</b></p> <p>Regulations could provide for outcomes, overarching rules, and system principles – but without setting out detailed requirements or processes in law.</p>	<p>More likely to be stable over time, may allow access framework to be managed more flexibly through policies, regulated contracts and ORR policies.</p>	<p>Level of plannable certainty sought by operators and investors; increased scope for divergence between different infrastructure managers affecting cross-network operators.</p>
<p><b>Mid-level</b></p> <p>Regulations might specify the need for key protections and requirements to be included in policies, directions and/or contracts. Elsewhere might identify policies / details to be consulted, approved, and published.</p>	<p>A more flexible arrangement in areas where regulations today set out detailed processes. Could provide a route for protections to be detailed in key areas where reassurances sought by customers, operators, and investors.</p>	<p>Would still require statutory processes to evolve / change. Balances clarity and stability while still permitting the managed evolution of processes &amp; rules.</p>
<p><b>High-level</b></p> <p>Regulations might alternatively set out a wider range of procedures, decision making processes, and rules to a greater level of detail than above.</p>	<p>Opportunity to reflect where this level of detail is playing a specific and valuable role. Provides clarity and assurance to stakeholders.</p>	<p>Would still require statutory processes to evolve / change. Likely to be the most difficult to evolve and change, risks associated with lack of change would remain.</p>

The Commission will consider what level of detail and prescription to adopt in developing recommendations. The determination will be subject to a range of factors including the principles of effective regulation<sup>3</sup> which include clarity, economy, proportionality, transparency, and the likely need and ability to make future changes.

<sup>3</sup> [Good practice guidance Principles of effective regulation \(nao.org.uk\)](https://www.nao.org.uk/publications/2017/06/good-practice-guidance-principles-of-effective-regulation/)

## Identifying key outcomes

Regardless of scope or detail of recommendations for the A&MR, the likely outcomes from making any changes are set out below. These are based on the more comprehensive principles we have been using to steer our work so far, which are set out in the [Introductory note to discussion papers Spring 2023](#)].

- **Operator and industry-wide confidence:** Regulations are part of the framework that provides ongoing legal assurance to open access (passenger and freight) operators and applicants by maintaining safeguard effected by the current framework. This goes beyond embodying non-discrimination, to seeking to invoke confidence in freight & open access, applicants, concessionary bodies, funders and investors in the decisions that are taken and the governance in place.
- **Support a ‘guiding mind’:** Regulations will also need to reflect the proposed remit for GBR to act as a ‘guiding mind’ in planning and allocating the overall use of the railway network, delivering public interest goals, and balancing the different uses of the network - with limitations, checks and balances.
- **Serving Customers:** Ultimately, arrangements must allow for the optimisation of services to passengers and freight, recognising there will be difficult decisions and trade-offs
- **Be integrated:** Regulations should work in concert with other elements of the industry framework including the role of the regulator, the GBR Access and Use Policy, the GBR / Network Code and access contracts.
- **Simpler:** Regulations should also support the Government’s goals for a simpler and more efficient access rights framework as set out by the DfT when setting up this Commission.
- **Transparency:** New A&MRs provide an opportunity to move from generic language copied out from EU Directives to a tailored and clearer description of the domestic regime that is more accessible to industry audiences - and therefore should be more informative in areas such as priority criteria for infrastructure use.

## Next steps: bringing ideas together

Going forward, our approach will therefore consider the regulatory framework to be clarified in terms of; the level of regulatory detail sought, principles and target outcomes.

This will inform the development of recommendations during Phase 2 of the Commission, referencing wider areas of reform, such as BTPF (Better Timetables for Passengers and Freight) and the Commission’s ongoing work.

It will also reference points for noting in terms of any Regulatory impacts, requirements or propositions that may need to be taken into account. This will include preservation of the non-discriminatory principle and protections for non-GBR contracted operators - including the role of the ORR as an independent and impartial arbitrator.

It will also consider the requirements of different users of the network, contracting and other transport bodies, neighbouring infrastructures and the relationship between the specification and planned use of infrastructure and the access required to maintain it.

Recommendations that require regulatory change will be subject to further engagement with industry by Government before a decision is taken whether changes are necessary.

