



ORR's guidance on The Railways Infrastructure (Access, Management and Licensing of Railway Undertakings) Regulations (Northern Ireland) 2016

December 2019

1. Overview

Introduction

- 1.1 This guidance sets out the Office of Rail and Road's (**ORR's**) interpretation of *The Railways Infrastructure (Access, Management and Licensing of Railway Undertakings) Regulations (Northern Ireland) 2016* (the **NI Regulations**). The NI Regulations transpose *Directive 2012/34/EU establishing a single European railway area* (the Recast Directive)¹ into NI law. In 2019 they were amended by *The Railways Infrastructure (Access, Management and Licensing of Railway Undertakings) (Amendment) Regulations (Northern Ireland) 2019* (the 2019 Regulations)². Hereafter, references in this document to the NI Regulations means the NI Regulations as amended by the 2019 Regulations.
- 1.2 We updated the guidance in 2019 to reflect the additional requirements of *The Commission Implementing Regulation (EU) 2017/2177 of 22 November 2017 on access to service facilities and rail-related services* (the **Implementing Regulation**)³, which supplements a number of obligations set out in the NI Regulations (relating to service facilities). We also updated the guidance to reflect the 2019 Regulations.
- 1.3 This chapter provides an introduction to the legislation; an explanation of ORR's role; and defines some key terms. The other chapters are:
 - Chapter 2 [Provision of information](#): a description of the information that service providers must provide.
 - Chapter 3 [Access](#): an overview of the regulations that concern access to infrastructure and service facilities, including the provisions relating to unused service facilities.
 - Chapter 4 [Charges](#): an overview of the regulations on charging principles for access to services, and the requirements around publication of information on charges.
 - Chapter 5 [Infrastructure](#): an overview of the regulations affecting infrastructure managers, (excluding those regulations covered in chapter 2 Access).
 - Chapter 6 [Appeals](#): an explanation of how to appeal to ORR.
- 1.4 This guidance does not cover the provisions in the NI Regulations relating to:
 - access to training facilities for railway undertakings applying for a safety

¹ <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32012L0034>

² <http://www.legislation.gov.uk/nisr/2019/15/made>

³ <https://eur-lex.europa.eu/legalcontent/EN/TXT/?uri=CELEX%3A32017R2177>

certificate in accordance with the requirements of Council Directive 2004/49/EC⁴; and

- European licences⁵.

The Department for Infrastructure Northern Ireland (DFINI) administers these provisions. Queries relating to these provisions should be directed to DFINI.

- 1.5 The terms used throughout the guidance have the same meanings as in the NI Regulations, the Implementing Regulation and the Recast Directive, unless the context requires otherwise. Generally a reference to a regulation, paragraph, Schedule or Part in this guidance is a reference to a regulation, paragraph, Schedule or Part in the NI Regulations unless otherwise specified. A reference to an Article in this guidance is a reference to an Article in the Implementing Regulation unless otherwise specified.
- 1.6 Please note that through the different legislation there is now a variety of different terms covering the operators, managers and owners of service facilities and sites. For convenience, we generally refer simply to **service providers** and **service facilities** in this guidance. If you are in any doubt as to whether a provision applies to you, please refer directly to the legislation.

The Legislation

- 1.7 The NI Regulations were made on 1 December 2016 and laid before the Northern Ireland Assembly on 6 December. They came into operation on 23 January 2017. They implement the Recast Directive. The Recast Directive repeals and consolidates previous EU legislation and makes some substantive changes to the law. Similar regulations apply in GB.
- 1.8 The changes in the Recast Directive are designed to address issues in the EU railway market such as low levels of competition within rail, low levels of public and private investment in railways and inadequate market supervision and regulatory oversight within some EU Member States. The Recast Directive also requires each Member State to have a single national regulatory body for the railway sector. To ensure that the UK fulfils its obligations under EU law, ORR has become responsible for the economic regulation of railways in Northern Ireland (NI).
- 1.9 The NI Regulations revoke and replace The Railways Infrastructure Railways Infrastructure (Access, Management and Licensing of Railway Undertakings) Regulations (Northern Ireland) 2005 (the **2005 NI Regulations**). Key changes made by the NI Regulations, compared to the 2005 NI Regulations, include:

⁴ See regulation 6.

⁵ See Part 8.

- More services are now included in the minimum access package and list of service facilities (Schedule 1).
- There is now more clarity on the meaning and application of ‘viable alternative’ (regulation 2).
- The right to be supplied the minimum access package and access to service facilities and the supply of services now only extends to railway undertakings and not applicants more generally (regulation 5).
- Service facilities⁶ are now subject to a ‘use it or lease it’ obligation if they have not been used for at least two consecutive years (regulation 5(8)).
- Charges for access to a service facility are subject to certain charging principles (Schedule 2(1) and (2)).
- Service providers under direct or indirect control of a dominant body or firm must satisfy specific independence requirements, including separate accounting arrangements (regulation 10).
- We must control certain matters relating to access, charging, capacity allocation and the network statement (regulation 34).
- We have the power to make a direction on our own initiative to correct discrimination against applicants, market distortion or undesirable developments in the competitive situation in the rail services market (regulation 34(3)).
- We can impose a financial penalty if a party contravenes a relevant decision, direction or notice (regulation 38).

1.10 The Recast also envisaged the use of secondary legislation, including implementing regulations, in some areas to set out particular detailed requirements. The Implementing Regulation⁷ relevant to this guidance sets out new rules for service providers⁸. It was adopted in November 2017 and most provisions apply from 1 June 2019⁹.

1.11 The Implementing Regulation is directly applicable in the UK and EU Member States and applies alongside the NI Regulations.

1.12 This guidance reflects significant elements of the legislation about which

⁶ Service facility is defined in the Recast Directive as meaning “*the installation, including ground area, building and equipment, which has been specially arranged, as a whole or in part, to allow the supply of one or more of the services referred to in points 2 to 4 of Annex II.*”

⁷ The Implementing Regulation: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32017R2177>

⁸ Referred to in the Implementing Regulation as operators of service facilities.

⁹ The provisions concerning applying for exemption applied from 1 January 2019.

infrastructure managers, railway undertakings and service providers should be aware. It also explains ORR's policy and processes. However, we do not cover every aspect of the legislation and it is the responsibility of individual businesses to ensure that they are compliant with the law.

1.13 In particular, while this guidance reflects some of the changes to provisions in the NI Regulations introduced by the 2019 Regulations, it does not cover every change introduced. We recommend that you should read the NI Regulations in full and as amended.

Key Changes made by the Implementing Regulation and 2019 Regulations

1.14 Key changes made by the Implementing Regulation include (this list is not exhaustive):

- Service providers must prepare a service facility description (SFD) for the facility and services for which they are responsible (Article 4). The SFD must be published on a website or a link be provided to the Infrastructure Manager to be included in its network statement (Article 5).
- Infrastructure managers and service providers must co-operate to ensure consistent allocation of capacity where necessary (Article 7).
- There are further refinements and clarifications for the handling of access requests (Articles 8, 9, 10, 11, 12 and 13). These complement and apply alongside the access provisions in the NI Regulations.
- There are further details around the process where service facilities, which have not been in use for two consecutive years may have to be leased or rented to other parties (Article 15). These sit alongside regulation 5(8) of the NI Regulations.
- Certain exemptions are possible in accordance with Article 2 of the Implementing Regulation (see the section on Exemptions below for further detail).

1.15 Key changes made by the 2019 Regulations include (this list is not exhaustive):

- Interpretation and definitions – a number of definitions in regulation 2 of the NI Regulations have been added.
- Scope – a number of amendments have been made to regulation 3 of the NI Regulations.
- Access rights – regulation 4 of the NI Regulations has been amended. In

particular to remove reference to international passenger services.

- Infrastructure management – new regulations have been added to cover additional requirements on independence (regulation 8A); outsourcing and sharing the infrastructure manager’s functions (regulation 8B); impartiality of the infrastructure manager in respect of traffic management and maintenance planning (regulation 8C); financial transparency (regulation 9A).
- Appeals – regulation 32 of the NI Regulations has been amended to include additional matters that can be the subject of an appeal to the regulatory body.

Other relevant ORR guidance

1.16 ORR has also published other guidance that may be relevant and of interest. This section sets out some of them.

Market Guidance

1.17 Regulation 34(1) requires us to monitor the competitive situation in the rail services market.¹⁰ Guidance on the discharge of these functions is covered separately in our *Market Guidance*¹¹.

Economic Enforcement

1.18 Regulation 38 provides us with the power to impose a penalty on a ‘relevant operator’ who has contravened or is contravening a decision, direction or notice issued by us under the NI Regulations.

1.19 A relevant operator means:

- A person issued with a decision or direction under regulation 31, 32, 33, or 34; or
- A person on whom a notice has been served under regulation 36.

1.20 The NI Regulations require us, in consultation with DFNI, to prepare and publish a statement of policy with respect to the imposition of penalties and the determination of their amount¹². A Northern Ireland Economic Enforcement Policy and Penalties Statement is available on our website [here](#)¹³.

¹⁰ The Competition Act 1998 also applies to Northern Ireland however ORR is not the enforcing body.

¹¹ <http://orr.gov.uk/consultations/closed-consultations/competition-consultations/orr-approach-to-monitoring-and-reviewing-markets>

¹² See regulation 39.

¹³ <http://orr.gov.uk/rail/rail-enforcement-powers>

Framework Agreements

1.21 We have published separate guidance on the duration of framework agreements parties may enter into under regulation 22 (*Application for infrastructure capacity*)¹⁴.

Key definitions

1.22 The definitions used in the NI Regulations, the Implementing Regulation and in the Recast Directive are important in understanding the application of the NI Regulations and the Implementing Regulation. We have set out the key definitions below, with explanation where required.

Definitions in the NI Regulations

1.23 The 2019 Regulations amended a number of the definitions in the NI Regulations and added a number of new definitions. We recommend that you refer to the 2019 Regulations¹⁵ to ensure that you are using the correct definitions.

'applicant' is defined in the NI Regulations as:

a railway undertaking or an international grouping of railway undertakings or other persons or legal entities, such as competent authorities under Regulation (EC) No 1370/2007... and shippers, freight forwarders and combined transport operators, with a public service or commercial interest in procuring infrastructure capacity.

While certain provisions in the NI Regulations only confer entitlements and obligations on railway undertakings, some provisions apply more widely to bodies such as shippers and freight forwarders. Where the NI Regulations are intended to apply more broadly, the term *'applicant'* is used.

Where a party that is not a railway undertaking is considering whether the NI Regulations confer any entitlements or obligations on it, it will need to look at whether the relevant provision applies to *'applicants'* and whether it falls within that definition.

'infrastructure manager' is defined in the NI Regulations as:

any body or undertaking that is responsible in particular for establishing and maintaining railway infrastructure;

'International Grouping' is defined in the NI Regulations as *any association of at least two railway undertakings established in different Member States for the purpose of providing international transport between Member states;*

We would consider this definition to include the Enterprise cross-border rail service.

¹⁴ <http://orr.gov.uk/what-and-how-we-regulate/track-access/guidance>

¹⁵ <http://www.legislation.gov.uk/nisr/2019/15/made>

‘ad hoc request’ means a request for access to a service facility or a rail-related service that is linked to an ad hoc path request for an individual train path referred to in regulation 24 of the NI Regulations;

‘basic service’ is defined as any service listed in paragraph 2 of Schedule 2 of the NI Regulations;

‘controlling entity’ means a body or firm, which exercises direct or indirect control over an operator of a service facility and is also active and holds a dominant position in national railway transport services markets for which the facility is used or exercises direct or indirect control over an operator of a service facility and a railway undertaking holding such a position;

‘coordination procedure’ means a procedure through which the operator of a service facility and applicants attempt to resolve situations in which needs for access to a service facility or rail-related services concern the same service facility capacity and are in conflict;

‘late request’ means a request for access to a service facility or a rail related service submitted after the expiry of a deadline for submitting requests defined by the operator of the facility in question;

‘linked service facilities’ means service facilities which are adjacent to one another and require passage through one to reach the other;

‘rail-related service’ means a basic, additional or ancillary service listed in paragraphs 2, 3 and 4 of Schedule 1 to the NI Regulations;

‘reconversion’ means a formal process by which the purpose of the service facility is changed to a use other than for the supply of rail related services;

‘self-supply of services’ means a situation where a railway undertaking performs itself a rail-related service on the premises of a service facility operator, provided that access to and the use of the facility by that railway undertaking for self-supply of services is legally and technically feasible, does not endanger the safety of the operations and the operator of the service facility concerned offers such possibility;

‘service facility capacity’ means the potential to use a service facility and supply a service over a given period of time, taking into account the time needed to access and leave the service facility;

‘service facility description’ or **‘SFD’** means a document which lays down detailed information necessary for access to service facilities and rail-related services.

2. Provision of information

2.1 Transparency of access arrangements and procedures is key to ensuring the basis for non-discriminatory access to service facilities for all railway undertakings. This is a requirement under the NI Regulations and the Implementing Regulation sets out further detail on information that is required to be made available (in the form of a SFD), and on requirements to make this information publicly available.

Service facility description

2.2 Article 4 of the Implementing Regulation provides that service providers shall make available a 'service facility description' (SFD) for the service facilities and services for which they are responsible. The SFD must include at least the following information:

- a) A list of all the relevant installations including their locations and opening hours;
- b) Key contact details of the service provider;
- c) A description of the technical characteristics;
- d) A description of all rail-related services supplied in the facility and of their type (basic, additional or ancillary);
- e) The possibility for self-supply (where this is technically and legally feasible) and the conditions to be met for self-supply;
- f) Information on the procedures for requesting access, with deadlines for submitting the requests and time limits for handling them;
- g) Information on whether separate requests are needed where there is more than one provider of services;
- h) Information on the minimum content and format of an access request or a template;
- i) Model access contracts and general terms and conditions where service facilities are operated by operators under the direct or indirect control of a controlling entity²⁵;
- j) Information on the terms of use of IT systems, where access to these systems is required, and the rules concerning the protection of sensitive and commercial data;

²⁵ Defined in Article 3 of the Implementing Regulation.

3. Access arrangements

Introduction

- 3.1 The entitlement of railway undertakings to access railway infrastructure, and service facilities, are set out in regulations 4 and 5 of the NI Regulations.
- 3.2 We expect infrastructure managers and service providers to have regard to the principles of transparency, non-discrimination and fair competition in the application of regulations 4 and 5 (as applicable).

Regulation 4: Access and transit rights

- 3.3 Regulation 4(1)²⁹ applies to railway undertakings operating all types of rail freight services or passenger services. It gives these railway undertakings access rights³⁰ to the railway infrastructure (network, station and track) necessary to operate these types of services.
- 3.4 Regulation 4(2) provides that an international grouping, which includes a railway undertaking established in Northern Ireland, for the purposes of operating all types of rail freight or international passenger services, is entitled to such access or transit rights³¹ as may be necessary for the provision of international transport services between EEA States where the undertakings constituting the grouping are established.
- 3.5 Regulation 4(3) provides that the access rights described in regulation 4(1) include access to railway infrastructure (usually track) connecting the service facilities referred to in paragraph 2 of Schedule 1, which includes refuelling facilities, passenger stations, freight terminals and maintenance facilities.
- 3.6 Regulation 4(4) provides that the access rights described in regulation 4(1) for the purposes of operating rail freight services include the right of access to railway infrastructure serving, or potentially serving, more than one final customer.
- 3.7 Regulation 4(5) provides that the access rights of a railway undertaking for the purpose of the operation of a passenger service include the right to pick up passengers at any station located on the route and set them down at another.
- 3.8 ORR may, in accordance with regulation 33, where requested by a relevant party, limit the access rights granted by regulation 4 to passenger services between a place of departure and a destination where one or more public service contracts cover the

²⁹ Regulation 4(1) as amended by the 2019 Regulations.

³⁰ 'access rights' is defined as "rights of access to railway infrastructure for the purpose of operating a service for the transport of goods or passengers".

³¹ 'transit rights' is defined as "rights of transit through a Member State using the railway infrastructure located in the Member State".

same route or an alternative route if the exercise of any such right would compromise the economic equilibrium of a public service contract or contracts in question³². This is referred to as the Economic Equilibrium Test on which we have published separate guidance³³.

- 3.9 Infrastructure managers must ensure that the entitlements to access provided by regulation 4 are honoured³⁴. There is no provision in regulation 4 which enables an infrastructure manager to refuse a request for access made under that regulation.
- 3.10 A railway undertaking has a right to appeal to ORR under regulation 32³⁵ if it is denied the entitlements conferred on it under regulation 4³⁶.

Regulation 5: Access to services

Minimum access package

3.11 Under regulation 5(1) all railway undertakings are entitled to services comprising:

(a) the minimum access package; and

(b) the track access to service facilities and the supply of services (this includes refuelling, stations, marshalling yards, sidings and freight terminals),

as described in paragraphs 1 and 2 of Schedule 1.

3.12 Regulation 5(2) requires the infrastructure manager or service provider to provide the services described in regulation 5(1) in an equitable, non-discriminatory and transparent manner. In line with the wording of Article 13 of the Recast Directive, our view is that it is the responsibility of infrastructure managers to supply the minimum access package referred to in regulation 5(1)(a), while it is the responsibility of service providers to supply the track access to service facilities and the supply of services referred to in regulation 5(1)(b). This distinction is reflected in the following paragraphs on regulation 5.

3.13 To clarify the interaction between regulation 4(1) and regulation 5(1), we have set out below our view on the application of these regulations.

3.14 While regulation 4(1) and regulation 5(1) both give rights of access to railway undertakings, regulation 4(1) applies only to railway undertakings seeking access to infrastructure for the purpose of operating passenger services and freight services. Regulation 5(1) applies to all railway undertakings seeking access to services,

³² See regulations 4(6) and 4(7).

³³ <https://orr.gov.uk/rail/access-to-the-network/track-access/guidance>

³⁴ See regulation 4(9).

³⁵ See regulation 4(10).

³⁶ There is no right of appeal where a railway undertaking is denied access under regulation 4 pursuant to a decision of ORR under regulation 4(7) or regulation 33 (Regulatory decisions concerning passenger services).

therefore be available to rail. There are two limbs to the definition and an alternative will only be a viable alternative where both limbs are satisfied.

3.43 The first limb is that the service facility must be economically acceptable to the railway undertaking:

- We will expect a railway undertaking to have specified precisely its requirements for access into a particular facility and the supply of services it requires. This information will enable the service provider to take a view on the relevant downstream service against which services of viable alternative facilities can be tested.
- The commercial assessment for determining whether a service facility is a viable alternative needs to include consideration of all relevant costs and not just the price for accessing the alternative service facility. Wherever possible, it should include an assessment of the impact on the railway undertaking's operational costs and the profitability of the envisaged services.⁴⁸
- If use of another service facility was certain to impose a material increase in the railway undertaking's costs, such that the railway undertaking could no longer operate the traffic at a competitive price, then that service facility would not be a viable alternative.

3.44 The second limb is that the service facility must allow the railway undertaking to operate the freight or passenger services concerned:

- An important starting point for a service provider making the case for a viable alternative will be for it to consider whether any alternative sites are operationally or logistically capable of replicating the amenity offered by the service facility to which access is being refused.
- This should involve consideration of the physical and technical characteristics of the facility (such as location, means of access, length of track and electrification), the operational characteristics of the facility (such as opening hours, capacity, driver training requirements and the type of services offered) and the attractiveness and competitiveness of the services (such as routing, transport connections and transportation time)⁴⁹.
- We recognise that there may be instances where there are alternative service facilities that meet all the criteria required by the railway undertaking but where a request for access at those facilities may nevertheless not be granted. Previous refusals of access could be taken as an indication that this option may not be a viable alternative.

⁴⁸ See Recital 16 of the Implementing Regulation.

⁴⁹ See Recital 16 of the Implementing Regulation.

3.49 When proposing possible alternatives, the service provider must take into account, as a minimum, the following criteria to the extent that they can be assessed by the service provider:

- substitutability of operational characteristics of the alternative service facility;
- substitutability of physical and technical characteristics of the alternative facility;
- clear impact on attractiveness and competitiveness of the railway transport service envisaged by the railway undertaking;
- estimated additional cost for the railway undertaking⁵¹.

3.50 Where information on the capacity of the proposed alternative is not publicly available, the railway undertaking must verify it⁵². [NB – the Implementing Regulation requires service providers⁵³ to answer requests for information about available capacity⁵⁴.

3.51 Once it has been provided with the possible alternatives, it is then the railway undertaking's role to assess whether using the proposed alternatives will allow it to operate the envisaged transport service under economically acceptable conditions. It should then inform the service provider of the outcome of its assessment within a jointly agreed deadline.

3.52 Following the joint assessment:

- It may be that the service provider and railway undertaking have jointly identified viable alternatives, in which case this provides a reason for refusing the request.
- Where the service provider and railway undertaking conclude that no viable alternative exists, provided it is not possible for the request to be accommodated without additional investment, the service provider may refuse the request. Whether or not additional investment would be required could be the subject of an appeal to ORR.
- If the service provider and railway undertaking do not agree on a viable alternative, the service provider may refuse the request indicating the alternatives it considers to be viable. Whether or not there is actually a viable alternative could be the subject of an appeal to ORR.

3.53 If the railway undertaking requests the service provider not to proceed to joint assessment and the service provider is rejecting a request on the basis that there is

⁵¹ Article 12(3) of the Implementing Regulation.

⁵² Article 12(4) of the Implementing Regulation.

⁵³ Of service facilities listed in points 2(a) to (g) of Annex II to Directive 2012/34/EU.

⁵⁴ Article 6(2) of the Implementing Regulation.

a viable alternative, we expect the service provider to have made a robust assessment with the information it has from the railway undertaking and other information, which is available. However, we would not expect a railway undertaking to make such a request if this is a likely basis for rejection. If the issue of whether or not there is a viable alternative is to determine whether or not a request is accepted or rejected, we would expect the railway undertaking to engage fully with any joint assessment and to cooperate with the service provider as the issue of viable alternatives is considered. (A failure to do so might prejudice the railway undertaking's position in any subsequent appeal.)

3.54 The flowchart at Annex C sets out the indicative process and steps in considering the assessment of viable alternatives. It does not, however, cover every eventuality or circumstance and it is for the service provider to ensure it complies with the legal requirements under the NI Regulations and the Implementing Regulation.

3.55 A railway undertaking may bring an appeal concerning the entitlements to access conferred on it by regulation 4 and/or regulation 5. See the chapter on [Appeals](#).

Dominant body or firm

3.56 Regulation 5(5) provides that where there is a request for any of the services listed at paragraphs 2(a)⁵⁵, (b)⁵⁶, (c)⁵⁷, (d)⁵⁸, (e)⁵⁹, and (f)⁶⁰ of Schedule 1, which is made to a service provider under the direct or indirect control of a dominant body or firm, the service provider must justify, in writing, any decision to refuse such a request and provide information about any viable alternative.

3.57 Detailed guidance on what is meant by a dominant body or firm is at [Annex D](#).

Unused service facilities

3.58 Regulation 5(8) of the NI Regulations sets requirements for unused facilities to be made available for lease or rent. Article 15 of the Implementing Regulation adds detail.

3.59 Under regulation 5(8) of the NI Regulations, where a relevant service facility⁶¹:

- has not been in use for at least two consecutive years⁶², and
- interest by a railway undertaking for access to this facility has been expressed to the service provider on the basis of demonstrated need,

the service provider must offer the operation of the service facility, or part of it, for

⁵⁵ Refuelling facilities, and supply of fuel in in these facilities.

⁵⁶ Passenger stations, including buildings and other facilities.

⁵⁷ Freight terminals.

⁵⁸ Marshalling yards.

⁵⁹ Train formation facilities including shunting facilities.

⁶⁰ Storage sidings.

⁶¹ Service facilities described in paragraph 2 of Schedule 1 of the NI Regulations.

⁶² According to Article 15(2) of the Implementing Regulation, the 2 year period shall start on the day following the day on which a rail-related service was supplied in the service facility concerned for the last time.

lease as a rail service facility, and publicise this offer.

- 3.60 The obligation does not, however, arise if the service provider can demonstrate that on-going redevelopment work ('a reconversion process') reasonably prevents the use of the service facility by any railway undertaking. Under article 15(6) the owner must inform ORR of the reconversion process. ORR may request substantiation and if that is unsatisfactory, ORR may require that the facility, either in whole or in part, is available for lease or rent.
- 3.61 Under Article 15(7) the owner of the service facility must publicise on its website a notice on the availability of that facility for lease or rent. The notice must contain all the necessary information to enable interested undertakings to submit an offer to take over operation of the facility in whole, or in part. That information must include certain information as specified in Article 15(7). It must also inform ORR⁶³ and the relevant infrastructure manager.
- 3.62 Where a railway undertaking expresses an interest in such a service facility, we recommend that it makes an application for track access in parallel. This is to ensure that where access has been granted to the service facility, railway vehicles can be accepted on and off the network promptly.
- 3.63 In particular, any railway undertaking interested in using a service facility which has not been in use for two years must express its interest in writing, and inform ORR, demonstrating the needs of the railway undertaking concerned.
- 3.64 Article 15(3) states that the service provider may then decide to resume operations in the facility, in a way that satisfies the railway undertaking's demonstrated needs.
- 3.65 Where the service provider is required to offer the operation of the facility for lease, a notice of the offer (including all necessary information) must be published on the website and sent to the relevant infrastructure manager and ORR. The notice must in particular include details of the selection procedure⁶⁴, selection criteria, the main characteristics of the technical equipment of the service facility and the address and time limit for the submission of tenders⁶⁵.
- 3.66 The Implementing Regulation also sets out some specific requirements which will apply where an expression of interest is received where the owner of the facility is not also the service provider⁶⁶.

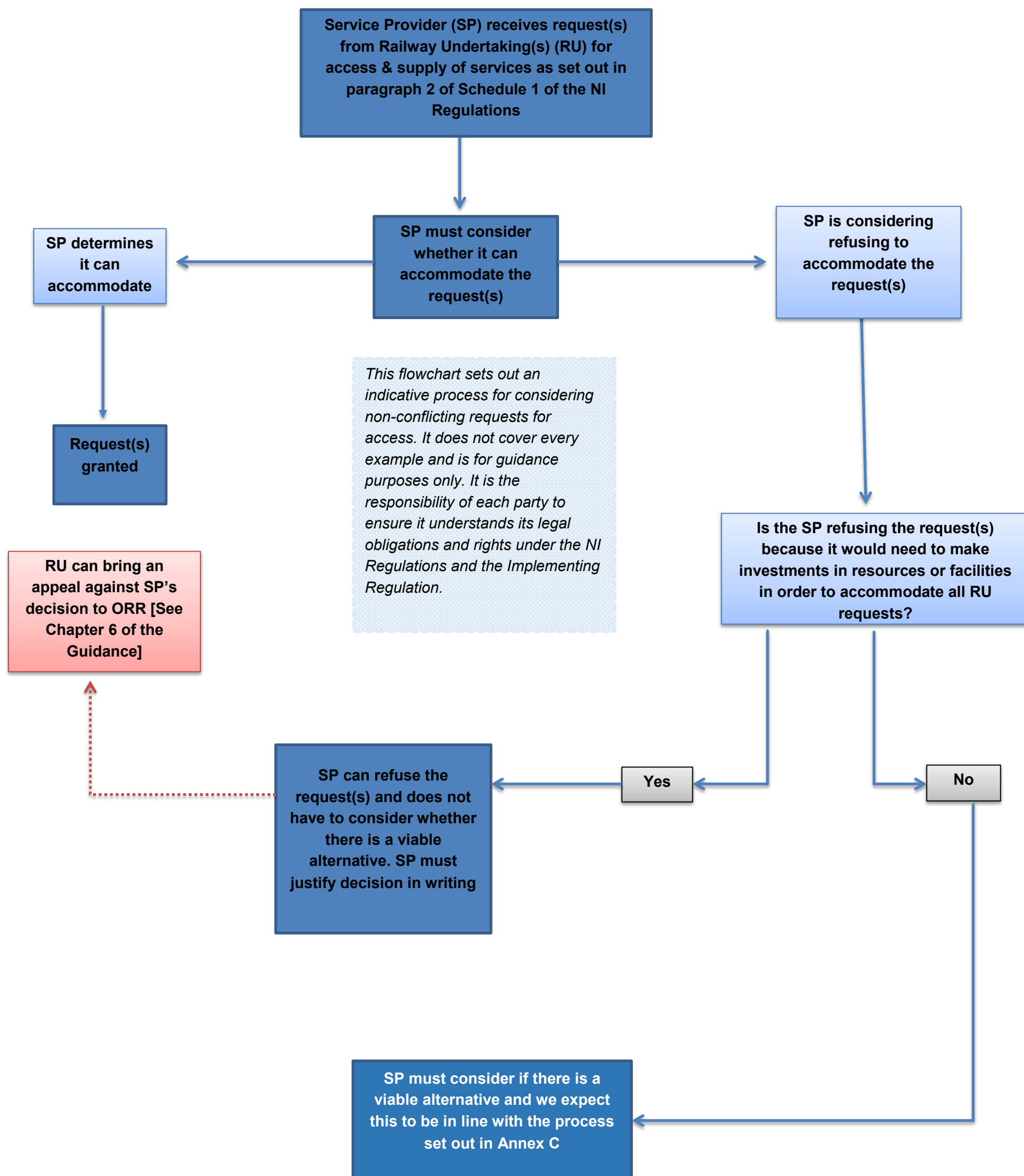
⁶³ Track.access@orr.gov.uk

⁶⁴ The selection procedure must be transparent, non-discriminatory and take into account the objective of ensuring an optimum effective use of the capacity at the facility.

⁶⁵ The time limit must be at least 30 days after publication of the notice.

⁶⁶ Articles 15(4) – 15(6).

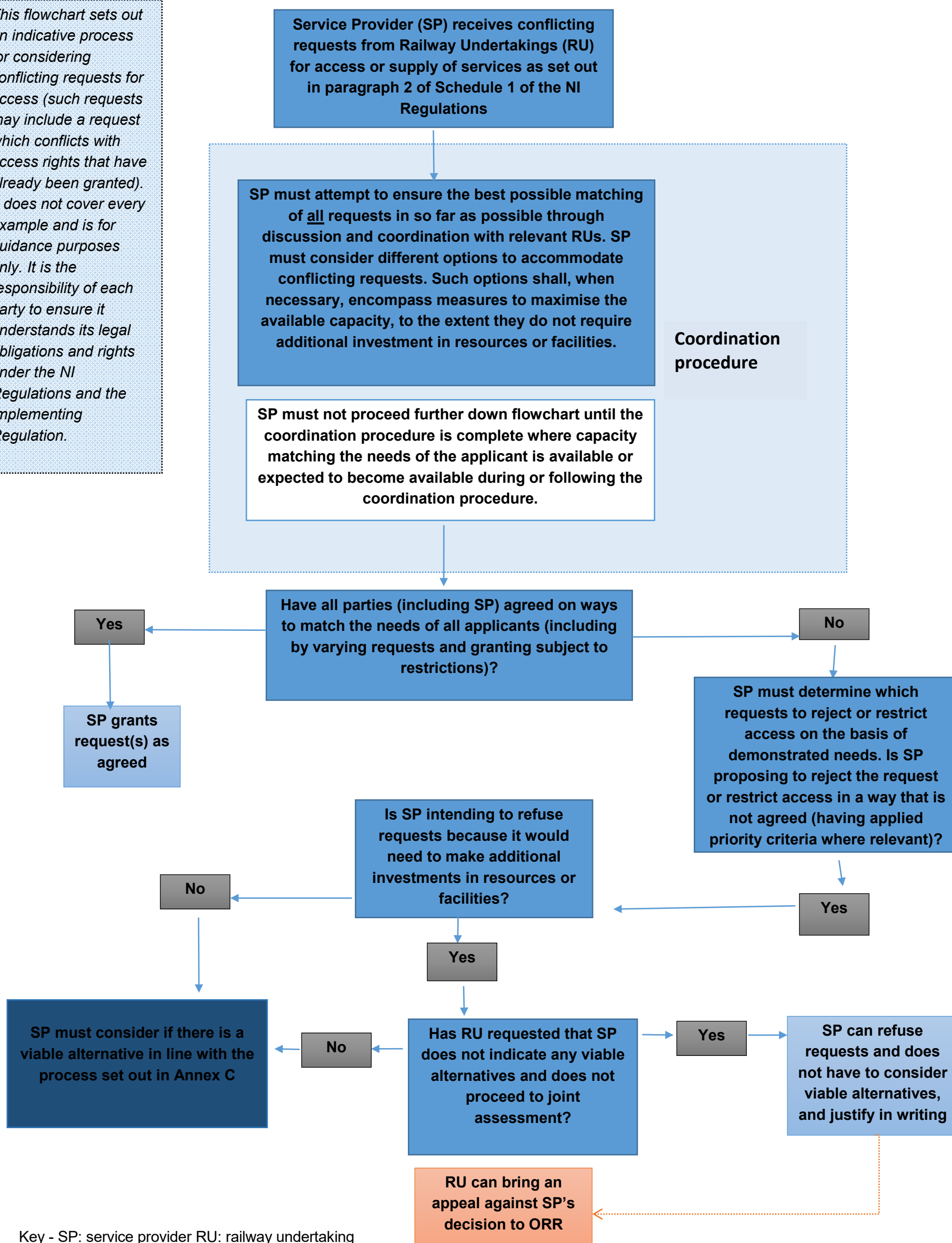
Annex A: Non-conflicting requests for access to, and the supply of, services



Key - SP: service provider RU: railway undertaking

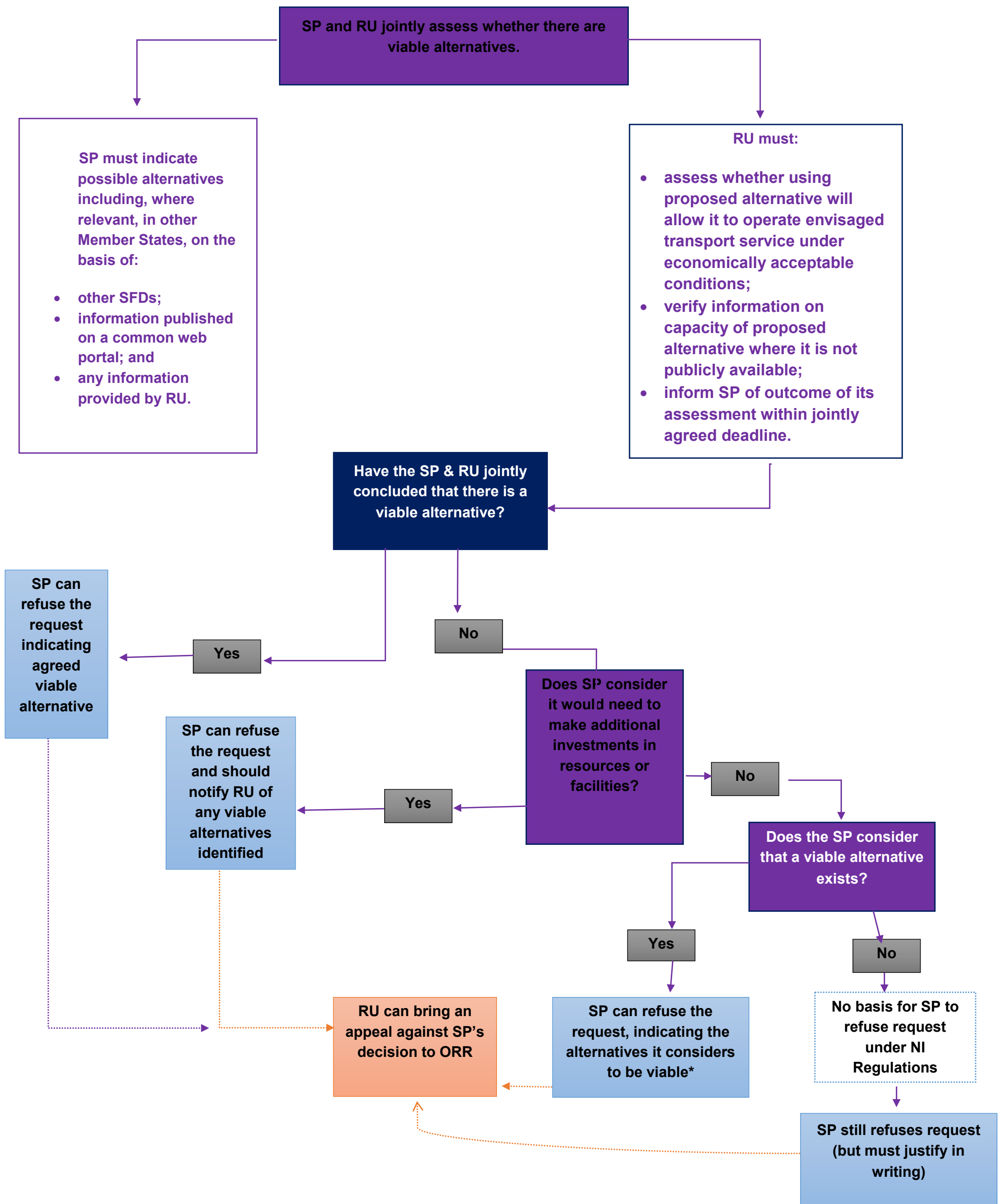
Annex B: Conflicting requests for access to, and the supply of, services

This flowchart sets out an indicative process for considering conflicting requests for access (such requests may include a request which conflicts with access rights that have already been granted). It does not cover every example and is for guidance purposes only. It is the responsibility of each party to ensure it understands its legal obligations and rights under the NI Regulations and the Implementing Regulation.



Annex C: Viable Alternatives

Note: Viable alternative must allow the RU(s) to operate the relevant freight or passenger service on the same or alternative routes under economically acceptable conditions.



Key - SP: service provider RU: railway undertaking

D5. Market power generally arises when an undertaking does not face sufficiently strong competitive pressures. In assessing market power we will have regard to OFT415, Assessment of market power, (December 2004)⁷². We would expect analysis of market shares to play an important role in measuring market power under the NI Regulations. It is unlikely that any railway transport services provider will be considered to be dominant in a market in which its share is persistently less than 40%. Higher shares than this may be suggestive of dominance. Dominance will be presumed, in the absence of contradictory evidence, where a firm's market share is persistently higher than 50%. This presumption can be challenged of course; in assessing dominance we will consider the strength of all the constraints imposed on a firm.

D6. We may also consider, in our assessment, other factors including: the existence (or absence) of entry barriers; the bargaining strength of buyers; evidence on firm behaviour, and/or, financial performance.

⁷² Published by the OFT and adopted by the CMA <https://www.gov.uk/government/publications/assessment-of-market-power>

responsibility of the service provider to make available the breakdown of charges in a transparent manner.

4.8 In all circumstances we expect service providers to be clear about what criteria may affect the calculation of charges. For example, the following features of a request for access to, and the supply of, services are likely to impact on the calculation of the charge:

- type of facility needed;
- length of stay;
- time of day;
- refuelling;
- cleaning or other light maintenance services required;
- any charges for electricity and other items such as telecommunications which are required; and
- technical inspections and specialised maintenance which may become necessary.

4.9 The service provider must be able to demonstrate to a railway undertaking that any fees invoiced to it for the use of the service facility comply with the published criteria⁷⁵ and, where applicable, tariffs. We expect service providers to answer all reasonable requests for access or charging information.

⁷⁵ See regulation 14(8).

- 5.5 Service providers (where they are not the infrastructure manager) must provide the infrastructure manager of the infrastructure to which their relevant service facility is connected with sufficient information to enable the infrastructure manager to:
- include information⁸¹ in its network statement on access to and charges for the supply of service facilities listed in Schedule 1, including information on technical access conditions, or details of a website where such information is available; and
 - keep the network statement up to date⁸².
- 5.6 They may do this by using the template developed for service providers by RailNet Europe (RNE).⁸³
- 5.7 Where information which a charging body, allocation body or service provider is required to provide to an infrastructure manager under regulation 13(2) or 13(3) is not provided to the satisfaction of that infrastructure manager, the infrastructure manager may refer the matter to ORR for a determination as to whether additional information must be supplied⁸⁴. Where such a matter is referred to ORR, we will make the determination within such period as is reasonable in the circumstances. This determination will be binding on all parties⁸⁵.
- 5.8 Network statements, in their provisional and final versions, can be the subject of an appeal to ORR under regulation 32⁸⁶. An appeal brought in relation to a network statement will be dealt with in accordance with the process set out in the [Appeals](#) chapter of this guidance.

Infrastructure charges

- 5.9 Part 4 concerns charges for access to infrastructure. In particular, regulation 14 sets out the provisions concerning the establishment, determination and collection of infrastructure charges⁸⁷.
- 5.10 DFINI is responsible for establishing the charging framework and the specific charging rules governing the determination of the charges to be set by infrastructure managers⁸⁸.

⁸¹ As required by regulation 13(6), this information must include information on changes to charges for the supply of service facilities already decided upon or foreseen in the next five years, if available, and information on charges as well as other relevant information on access applying to services listed in Schedule 1 which are provided by only one supplier.

⁸² See regulation 13(3).

⁸³ http://www.rne.eu/rneinhalt/uploads/Common_template_for_service_facility_information_clean.pdf

⁸⁴ See regulation 13(13).

⁸⁵ See regulation 13(14).

⁸⁶ See regulation 32(2)(a)(b).

⁸⁷ Please see the chapter on [Charges](#) for guidance on charges for services. This will be applicable for service providers and infrastructure managers who also own or operate service facilities.

⁸⁸ See regulation 14(1) and 14(6).

- 5.11 Each infrastructure manager is responsible for determining the charges to be charged for the use of its railway infrastructure in accordance with the applicable charging framework, the specific charging rules and the principles and exceptions set out in Schedule 2. Infrastructure managers must also collect these charges⁸⁹.
- 5.12 Charges for use of the railway infrastructure by way of charges for the minimum access package and track access to the service facilities referred to in paragraphs 1 and 2 of Schedule 1, must be set at the cost that is directly incurred as a result of operating the train service⁹⁰. However, with the approval of DFINI, an infrastructure manager may levy mark-ups on the basis of efficient, transparent and non-discriminatory principles⁹¹.
- 5.13 The European Commission Implementing Regulation (EU) 2015/909⁹² sets out the methodology for calculating costs directly incurred and includes a list of non-eligible costs. Infrastructure managers should familiarise themselves with the detail of this legislation when determining its charges.

Infrastructure costs and accounts

- 5.14 DFINI must ensure that, under normal business conditions and over a reasonable time period (not exceeding 5 years), the accounts of the infrastructure manager shall at least balance income from infrastructure charges, surpluses from other commercial activities, non-refundable incomes from private sources and state funding, with railway infrastructure expenditure⁹³.
- 5.15 The infrastructure manager must enter into an agreement with DFINI covering a period of no less than five years, which fulfils the parameters of Annex V of Directive 2012/34/EU⁹⁴. The infrastructure manager must also be provided with incentives to reduce the costs of providing infrastructure and the level of access charges. It must do this with due regard to safety and to maintaining and improving the quality of the infrastructure service⁹⁵.
- 5.16 In fulfilling its obligations under the agreement referred to in paragraph 5.15, DFINI must base its decision on an analysis of the achievable cost reductions⁹⁶.

⁸⁹ See regulation 14(2).

⁹⁰ See paragraph 1(4) of Schedule 2.

⁹¹ See paragraph 2(1) of Schedule 2.

⁹² http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2015.148.01.0017.01.ENG

⁹³ See regulation 15(1).

⁹⁴ See regulation 15(2).

⁹⁵ See regulation 15(3).

⁹⁶ See regulation 15(4).

Performance scheme

- 5.17 Infrastructure managers must establish a performance scheme as part of the charging system to encourage the minimisation of disruption and to improve overall performance of the network⁹⁷.
- 5.18 This performance scheme may include penalties for actions which disrupt the operation of the network, compensation arrangements for undertakings which suffer from disruption and bonuses that reward better than planned performance⁹⁸.
- 5.19 The performance scheme must be based on the principles listed in paragraph 7 of Schedule 2 and must apply in a non-discriminatory manner throughout the network to which the scheme relates⁹⁹.

Reservation charges

- 5.20 Infrastructure managers may levy a reservation charge for capacity that is requested but is not used¹⁰⁰. Where the infrastructure manager chooses to make provision for a reservation charge, that charge must provide incentives for efficient use of capacity and will be mandatory in the case of a regular failure by an applicant to use the paths, or part of the paths, allocated to them¹⁰¹.
- 5.21 Where provision for a reservation charge has been made, the infrastructure manager must publish in its network statement the criteria used to determine the failure to use allocated train paths¹⁰². ORR must also, where such a provision has been made, control such criteria in accordance with regulations 32 and 34¹⁰³.
- 5.22 The charging scheme and charging system and the level or structure of infrastructure charges can be the subject of an appeal to us under regulation 32¹⁰⁴.

Allocation of infrastructure capacity

- 5.23 Part 5 and Schedule 3 (as amended)¹⁰⁵ concern the allocation of infrastructure capacity¹⁰⁶. Part 5 only applies to infrastructure managers. Undertakings that are only

⁹⁷ See regulation 16(1).

⁹⁸ See regulation 16(2).

⁹⁹ See regulation 16(3).

¹⁰⁰ See regulation 18(1).

¹⁰¹ See regulation 18(2).

¹⁰² See regulation 18(3)(a).

¹⁰³ See regulation 18(3)(b).

¹⁰⁴ See regulation 32(2)(d) and (e).

¹⁰⁵ The Schedule for the Allocation Process set out in Annex 7 to the Directive (the text of which was replaced by the text annexed to Commission delegated Decision (EU) 2017 replacing Annex 7 to Directive 2012/34/EU) applies for the purposes of Schedule 3.

¹⁰⁶ Regulations 19 to 30 set out provisions dealing with capacity allocation, cooperation in the allocation of infrastructure capacity crossing more than one network, framework agreements, applications for infrastructure capacity, scheduling and co-ordination, ad hoc requests, declarations of specialised infrastructure, congested infrastructure, capacity analysis, capacity enhancement plans, use of train paths and special measures to be taken in the event of disruption. Schedule 3 sets out the timetable for the allocation process.

service providers for the purpose of the NI Regulations (such as port or terminal owners) will therefore not be caught by any of these provisions.

5.24 Infrastructure managers are responsible for the establishment of specific capacity allocation rules and for the allocation of infrastructure capacity¹⁰⁷. Pursuant to regulation 19(1), we have established a framework¹⁰⁸ for the allocation of infrastructure capacity.

5.25 The European Commission adopted new rules in April 2016 regarding the procedures and criteria concerning framework agreements for the allocation of rail infrastructure capacity. These rules now apply and infrastructure managers should ensure they are familiar with, and understand, the requirements¹⁰⁹.

5.26 Matters relating to the allocation process and its results can be the subject of an appeal to ORR under regulation 32¹¹⁰.

¹⁰⁷ See regulation 19(2) and <http://orr.gov.uk/what-and-how-we-regulate/track-access/guidance>

¹⁰⁸ <http://orr.gov.uk/what-and-how-we-regulate/track-access/guidance>

¹⁰⁹ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0545&from=EN>

¹¹⁰ See regulation 32(2)(c).

6. Appeals

Introduction

6.1 This chapter is about the appeals process under regulation 32.

Appeals to ORR

6.2 Regulation 32(1) provides applicants (as defined under the NI Regulations) with a right of appeal to ORR.

6.3 An applicant can appeal to us if it believes it has been unfairly treated, discriminated against or is in any other way aggrieved. In particular, an applicant can appeal against decisions of an infrastructure manager, allocation body, charging body, service provider, a railway undertaking or any interested party concerning any of the following matters¹¹¹:

- the network statement in its provisional and final versions;
- the information that must be included in the network statement;
- the allocation process and its results;
- the charging scheme and the charging system;
- the level or structure of railway infrastructure charges which the applicant is, or may be, required to pay;
- the arrangements for access; and
- access to and charging for services.

The following matters were added by the 2019 Regulations:

- traffic management;
- renewal planning and scheduled or unscheduled maintenance; and
- compliance with the requirements, including those regarding conflicts of interest as set out in the regulations 8A, 8B, 8C, 9A, 14(6) and 19(3)¹¹².

¹¹¹ See regulation 32(1) and 32(2).

¹¹² Regulations 8A, 8B, 8C and 9A were inserted and regulations 14 and 19 were amended by the 2019 Regulations.

- any terms agreed between the parties;
- supporting analysis and evidence;
- any proposed draft agreement (where appropriate);
- any documents incorporated by reference (other than established standard industry codes or other instruments); and
- any other relevant information to the matter under appeal.

The appeals process

6.9 Once we have accepted an application for appeal under regulation 32 we will, as applicable, follow the process set out below:

Stage 1: Liaising with the relevant parties

6.10 We will, as appropriate, ask for relevant information and initiate a consultation with the relevant parties within one month of the date of receipt of the appeal¹¹⁵. In determining whether to ask for relevant information and initiate a consultation, we will take into account the particular circumstances of the appeal, the issues raised and the information already provided.

6.11 Who the relevant parties are will depend on the issue under appeal. It may be just the applicant and the respondent, but it could also include stakeholders and/or other parties such as funders or other regulators. We will consider who the relevant parties are on a case-by-case basis. We will also usually ask the respondent to provide a list of any interested persons (which should at least include those persons whose consent is needed before the respondent may enter into an agreement with the applicant).

6.12 We will send the application for appeal to the respondent within one month of the date of our receipt of the application and request that the respondent provides written representations in response to the specific issues raised by the applicant. We will normally allow 21 days for the respondent to provide its response along with a list of any interested persons.

6.13 If there are any interested persons, we will send a copy of the application to such persons as well as all other relevant parties we have specifically identified and invite them to make representations within 21 days.

¹¹⁵ See regulation 32(3)(a).

6.14 We will publish the appeal on our website at the same time or shortly after we send it to the respondent and invite comments from other third parties. We will usually set a deadline of 21 days from the date of publication for receipt of any comments.

Stage 2: Requesting further information

6.15 Where we receive written representations from the respondent, we will send the applicant a copy of these representations inviting the applicant to make any further written representations in response. Any further response must be provided within the timeframe specified by us, which will normally be 10 days.

6.16 Where we receive written representations from other relevant parties we will send a copy to the applicant and the respondent. We will invite each of them to provide any comments, normally, within 10 days.

6.17 In some instances it may also be appropriate or necessary for us to conduct site visits or speak directly with the parties involved.

6.18 In complex cases involving several parties we may decide it is necessary to hold a hearing.

6.19 We may, from time to time, request or invite further information, clarification or representations from the parties involved, at our discretion.

6.20 We may also publish any representations and other responses on our website.

Stage 3: Making the decision

6.21 Once we have all the information we need we will make a decision on the appeal based upon the evidence and information provided by the parties, and any information or evidence gathered by ORR. To the extent relevant and consistent with the NI Regulations we will consider our duties as set out in regulation 31(1) when we make our decision on the appeal.

6.22 Once we are satisfied that we have received all relevant information, we will, within a predetermined and reasonable time, and, in any case within six weeks of the date of receipt of all relevant information:

- make a decision;
- inform the relevant parties of our decision and our reasons for that decision;
- where appropriate, issue a direction to the infrastructure manager, allocation body, charging body, service provider or, as the case may be, railway undertaking, to remedy the situation from which the appeal arose; and

- publish the decision¹¹⁶

6.23 Depending on the nature of the appeal, we may share a draft of the final decision with the applicant and the respondent for the purpose of verifying certain facts. The timeframe for this will depend on factors such as market sensitivity.

6.24 Once the decision is finalised:

- Where we consider that the decision is, or is potentially, market sensitive, we will normally publish it through an approved Regulatory Information Services provider.
- Otherwise, we will send a copy of our decision to the applicant, the respondent and any other relevant parties. We will then publish a copy of our decision on our website and (where applicable) our public register.

6.25 Our decision on a regulation 32 appeal is binding on all parties affected by that decision¹¹⁷.

6.26 Where a person is given a direction pursuant to an appeal under regulation 32, they are under a duty to comply with and give effect to that direction¹¹⁸. We expect parties to comply with a direction within the timeframe specified in the directions notice. If a party fails to do so we may take enforcement action under regulation 38, which could result in a financial penalty against the breaching party.

Provision of information to ORR

6.27 We expect parties to provide to us all information that we have requested in connection with the appeal. However, we can, if necessary, exercise our formal powers under regulation 36 to request information.

6.28 Regulation 36 provides that the infrastructure manager, service provider, allocation body, charging body or any other party shall be under a duty to furnish to ORR such information, in such form and manner as we request, for the purpose of facilitating the performance of our functions under the NI Regulations. This regulation applies also to the provision of information to DFINI.

6.29 We can impose a financial penalty on a party that fails or refuses to comply with such a request for information¹¹⁹.

¹¹⁶ See regulation 32(3)(b).

¹¹⁷ See regulation 32(7)(a).

¹¹⁸ See regulation 32(7)(b).

¹¹⁹ See regulation 38.

Scope of disclosure in an appeal

6.30 Our starting point is that there should be as full disclosure as possible between the parties to an appeal. This ensures that parties are able to properly understand the content of the appeal, the nature of the representations that are being made and are given a full and fair opportunity to comment on all representations. We will therefore disclose all relevant information we receive from a party as a matter of course unless the disclosing party requests otherwise.

Appeal-specific issues

6.31 We have set out below additional procedures we expect applicants to follow in relation to appeals on certain matters, in accordance with the NI Regulations.

Access – viable alternatives

6.32 Where a railway undertaking brings an appeal concerning its entitlements to access to services under regulation 5, we would expect the appeal application to include, at a minimum, the following information:

- A detailed list of the access being sought (for example time slots, name of the terminal, port or service to which access is sought, duration, type of rolling stock, commercial terms, if any).
- An explanation as to why access is needed.
- Confirmation that the railway undertaking holds, or is likely to obtain, access rights on the connecting network.
- An explanation of why the service provider is competent to supply the level of access or type of services being sought.
- Where applicable, why it considers the alternative facility suggested by the service provider is not a viable alternative.

6.33 We would expect the service provider to provide relevant information in its written response to the appeal, for example:

- Detailed reasons as to why access has been refused or granted subject to restrictions.
- Detailed reasons as to why it considers it would have to make investments in resources or facilities or any relevant capacity issues (including known capacity constraints on connecting networks) it considers might affect its ability to accommodate requests.
- Details of any viable alternatives that could be used to supply the required services with an explanation as to why they are considered suitable along with supporting evidence, where applicable.

- Any restrictions on access it has proposed (where applicable), with an explanation as to why they are fair, reasonable, proportionate and objectively justifiable.
- Whether there are any other affected parties and the impact on them of the request for access.

6.34 When an appeal under regulation 32(1) contests a decision under regulation 5(4) to refuse a request for access to and the supply of services, our decision must include a determination as to whether a viable alternative exists in respect of the access and provision of services to which the appeal relates¹²⁰.

6.35 When an appeal under regulation 32(1) contests a decision to refuse or restrict the provision of services in circumstances where there are conflicting requests as described in regulation 5(7), our decision must include a determination, as appropriate and in respect of the circumstances to which the appeal relates, of:

- whether a viable alternative as described in regulation 5(4) exists;
- whether it is possible to accommodate the conflicting requests on the basis of demonstrated need; and
- whether, and if so, what part of the service capacity must be granted to the applicant¹²¹.

Infrastructure capacity

6.36 Pursuant to regulation 32(6), where an appeal under regulation 32(1) concerns a refusal by an infrastructure manager or allocation body to allocate infrastructure capacity, or concerns an appeal against the terms of an offer of infrastructure capacity, in our decision we must either:

- confirm that no modification of the infrastructure manager or allocation body's decision is required; or
- require modification of that decision and issue directions to that effect.

¹²⁰ See regulation 32(4).

¹²¹ See regulation 32(5).



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