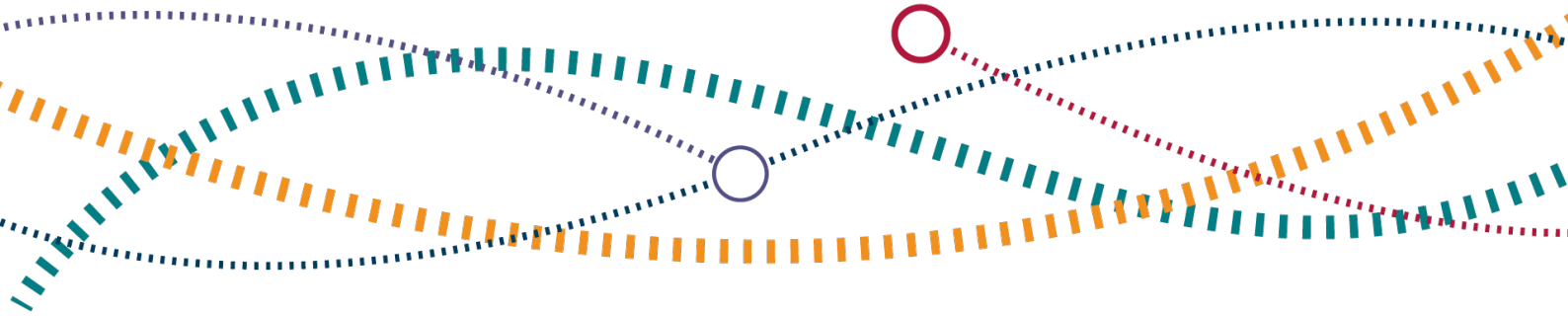
The Railways (Access, Management and Licensing of Railway Undertakings) Regulations 2016, as amended

Access to the rail network and service facilities, infrastructure management and appeals

01 December 2023



Contents

1. Overview

Introduction

1 This guidance sets out the Office of Rail and Road's (ORR's) interpretation of *The Railways (Access, Management and Licensing of Railway Undertakings) Regulations 2016, as amended* (the 2016 Regulations). It has been updated in [December 2023] following the revocation of four Commission Implementing Regulations[1].

2 The focus is on these key areas:

- Access to infrastructure and service facilities.
- Infrastructure managers' responsibilities.
- Appeals to ORR.

3 This guidance covers significant elements of the 2016 Regulations that infrastructure managers, railway undertakings and service providers should be aware of and explains ORR's policy and processes. However, we do not seek to cover every aspect of the legislation. It is the responsibility of individual businesses to ensure that they are compliant with the law.

4 Please note that the 2016 Regulations and the Railways Act 1993 (the Act) use 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. Some key definitions are set out in the annex to this module. If you are in any doubt as to whether a provision applies to you, please refer directly to the legislation.

[1] SI[XXXXXXX] revoked the following Commission Implementing Regulations on [DD] December 2023: 2017/2177 of 22 November 2017 on access to service facilities and rail-related services; 2018/1795 of 20 November 2018 laying down procedure and criteria for the application of the economic equilibrium test pursuant to Article 11 of Directive 2012/34/EU of the European Parliament and of the Council; 2015/10 of 6 January 2015 on criteria for applicants for rail infrastructure capacity and repealing Implementing Regulation (EU) No 870/2014; and, 2016/545 of 7 April 2016 on procedures and criteria concerning framework agreements for the allocation of rail infrastructure capacity.

5 The structure of this module is:

- Chapter 1: An overview of this guidance and the legislation.
- Chapter 2: Access to infrastructure.
- Chapter 3: Infrastructure managers.
- Chapter 4: Access to service facilities.
- Chapter 5: Appeals.
- Annex: Definitions.

Application of the 2016 Regulations

6 The 2016 Regulations apply alongside the Act. Where the Act applies, service providers should follow the established ORR procedures, such as for contesting access to a rail facility under section 17 of the Act.

7 The 2016 Regulations[2] describe entitlements and obligations in respect of access and governance for railway undertakings (as well as service providers and infrastructure managers).

8 These entitlements and obligations do not apply to railway undertakings whose activities are limited to the provision of solely urban, suburban or regional services on local and regional stand-alone networks for transport services on railway infrastructure, or on networks intended only for the operation of urban or suburban rail services[3]. However, where such a railway undertaking is under the direct or indirect control of an undertaking or another entity performing or integrating rail transport services (other than urban, suburban or regional services), the provisions on management independence, separation of accounts and business plans will still apply[4].

9 Further, the provisions of the 2016 Regulations relating to:

- access to services, independence of service providers, indicative railway infrastructure strategy, business plans, network statement, infrastructure charges, allocation of infrastructure capacity, regulation and appeals; and

[2] Subject to regulations 4(3) and 4(6), these are Parts 2 and 3 (save for regulation 13), regulations 14(9) and (10), 15(1) to (6), 19(4), 33 and Schedule 2.
[3] See regulation 4(3).
[4] See regulations 8, 9 and 12(4) to (7).

- the provisions relating to services to be supplied to railway undertakings, access charging, timetable for the allocation process and accounting information to be supplied to ORR upon request[5],

do not apply to these networks[6]:

- local and regional stand-alone networks for passenger services on railway infrastructure;
- networks intended only for the operation of urban or suburban rail passenger services;
- regional networks used for regional freight services solely by a railway undertaking already excluded from the scope of the 2016 Regulations (until such time as capacity is requested by another applicant);
- networks that are used only by the person responsible for that network for the purposes of freight operations connected with the premises or building works, which are:
  - situated within a factory, nuclear site, or site housing electrical plant;
  - within a mine or quarry;
  - used solely in connection with the carrying out of any building works;
  - within a military establishment.

Equivalent regulations

10 The 2016 Regulations do not extend to Northern Ireland; separate regulations apply. Please see our separate guidance[7].

11 There are additional bi-national regulations set out in the schedule to the *Channel Tunnel (International Arrangements) (Charging Framework and Transfer of Economic Regulation Functions) Order 2015* that apply in respect of the UK section of the Channel Tunnel.

[5] See regulations 6, 10, 11, 12(1) to 12(3), 13, Parts 4 to 6 and Schedules 2 to 5.
[6] See regulation 4(6).
[7] http://orr.gov.uk/rail/economic-regulation/northern-ireland-regulation.

2. Access to infrastructure

Introduction

1 The entitlement of railway undertakings to access railway infrastructure and service facilities is set out in regulations 5 and 6 of the 2016 Regulations.

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 5 and 6 (as applicable).

3 We cover regulation 6 and access to service facilities and the supply of services in Chapter 4.

Regulation 5: access rights

4 Regulation 5(1) applies to railway undertakings operating all types of rail freight services or international passenger services. It gives these railway undertakings access rights[8] to the railway infrastructure (network, station and track) necessary to operate these types of services.

5 Regulation 5(2) provides that the access rights described in regulation 5(1) include access to railway infrastructure (usually track) connecting the service facilities referred to in paragraph 2 of Schedule 2, which includes refuelling facilities, passenger stations and freight terminals.

6 Regulation 5(3) provides that the access rights described in regulation 5(1) for the purpose of operating rail freight services include the right of access to railway infrastructure serving, or potentially serving, more than one final customer.

7 ORR may in accordance with regulation 33, where requested by a relevant party, limit the access rights granted by regulation 5 in relation to the operation of international passenger services between a place of departure and a destination where one or more public service contracts cover the same route or an alternative route (cabotage)[9], and the exercise of such access rights would compromise the economic equilibrium of the public service contract or contracts in question. This is

[8] 'access rights' is defined in regulation 3 as meaning rights of access to railway infrastructure for the purpose of operating a service for the transport of goods or passengers.
[9] See regulation 5(6).

referred to as the Economic Equilibrium Test on which we have published separate guidance[10].

8 Infrastructure managers must ensure that the entitlements to access provided by regulation 5 are honoured[11]. There is no provision in regulation 5 which enables an infrastructure manager to refuse a request for access made under that regulation.

9 A railway undertaking has a right to appeal to ORR under regulation 32[12] if it is denied the entitlements conferred on it under regulation 5.

Regulation 6(1): Minimum access package

10 Regulation 6(1) requires infrastructure managers to supply to all railway undertakings the minimum access package in a non-discriminatory manner. The minimum access package is set out in paragraph 1 of Schedule 2. It is primarily concerned with access to track and the infrastructure around track, including power supplies and signalling.

11 To clarify the interaction between regulation 5(1) and regulation 6(1), we have set out below our view on the application of these regulations.

12 While regulation 5(1) and regulation 6(1) both give rights of access to railway undertakings, regulation 5(1) applies only to railway undertakings seeking access for the purpose of operating international passenger services and freight services. Regulation 6(1) applies to all railway undertakings, including those seeking access for the purpose of operating domestic passenger services.

13 We would therefore expect railway undertakings seeking access rights for international passenger services and freight services to rely on regulation 5(1) for access to railway infrastructure while all railway undertakings that are seeking rights of access in accordance with the minimum access package should rely on regulation 6(1).

14 A railway undertaking has a right to appeal to ORR under regulation 32 if it is denied the entitlements conferred on it under regulation 6(1).

[10] https://orr.gov.uk/rail/access-to-the-network/track-access/guidance.
[11] See regulation 5(8).
[12] See regulation 5(9).

3. Infrastructure managers

Introduction

1 This chapter covers the 2016 Regulations with regards to infrastructure, in particular in relation to infrastructure management, infrastructure charges and allocation of infrastructure capacity.

Infrastructure management and independence of undertakings

2 The requirements relating to infrastructure management and the independence of undertakings for railway undertakings, infrastructure managers and service providers are set out in Part 3 of the 2016 Regulations[13].

Network statements

3 Under regulation 13(1) infrastructure managers must, after consultation with all interested parties, develop and publish a network statement no less than four months before the deadline for applications for infrastructure capacity (the Priority Date). The information the network statement must contain is set out in regulation 13(4). The network statement should be published annually.

4 Where a charging body[14] or an allocation body[15] is responsible for the functions of the infrastructure manager, that charging body or allocation body must provide the infrastructure manager with such information as is necessary to enable the infrastructure manager to:

- include the information set out in regulation 13(4) in the network statement; and

[13] Regulations 8 to 13: these set out provisions dealing with management independence; separation of accounts; independence of service providers from dominant bodies and firms; indicative railway infrastructure strategy; business plans; and network statements.
[14] A charging body means a body, other than the infrastructure manager, which is responsible for the functions and obligations of the infrastructure manager under Part 4 and Schedule 3 because the infrastructure manager is not independent of any railway undertaking. Refer to regulation 3 for the full definition.
[15] An allocation body means a body, other than the infrastructure manager, which is responsible for the functions and obligations of the infrastructure manager under Part 5 and Schedule 4 because the infrastructure manager is not independent of any railway undertaking. Refer to regulation 3 for the full definition.

- keep the network statement up to date[16].

5 Service providers (where they are not the infrastructure manager) must provide the infrastructure manager of the railway infrastructure to which their relevant service facility is connected with sufficient information (covering technical, access and charging arrangements) to enable the infrastructure manager to:

- include in its network statement information[17] on access to and charges for services facilities and supply of rail-related services listed in Schedule 2, including information on technical access conditions, or details of a website where such information is available; and

- keep the network statement up to date[18].

6 They may use the template developed by service providers to do this[19].

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 supplied[20]. 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 parties.

8 Network statements, in their provisional and final versions and the information which must be included, can be the subject of an appeal to ORR under regulation 32[21]. 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.

[16] See regulation 13(2).
[17] 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 2 which are provided by only one supplier.
[18] See regulation 13(3).
[19] Contact Network Rail or the relevant IM for details.
[20] See regulation 13(13).
[21] See regulation 32(2)(a)(b).

Infrastructure charges

9 Part 4 of the 2016 Regulations concerns charges for access to infrastructure. In particular, regulation 14 sets out the provisions concerning the establishment, determination and collection of infrastructure charges[22].

10 ORR is responsible for establishing the charging framework and the specific charging rules governing the determination of the charges to be set by infrastructure managers[23] except for HS1 and Eurotunnel, to which separate provisions apply[24]. For Network Rail, ORR fulfils this obligation through the Network Rail periodic review[25].

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 3. Infrastructure managers must also collect these charges[26].

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 2, must be set at the cost that is directly incurred as a result of operating the train service[27]. However, with the appropriate approval, an infrastructure manager may levy mark-ups on the basis of efficient, transparent and non-discriminatory principles[28].

13 The Implementing Regulation 2015/909 as amended [29] 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 their charges.

Infrastructure costs and accounts

14 For railway infrastructure other than HS1, ORR must ensure that, under normal business conditions and over a reasonable time period (not exceeding five years), the accounts of the infrastructure manager at least balance income from railway

[22] Please see the section on service facilities charges. This will be applicable for service providers and infrastructure managers who also own or operate service facilities.
[23] See regulation 14(1) and 14(6).
[24] See regulation 14(3).
[25] http://orr.gov.uk/what-and-how-we-regulate/regulation-of-network-rail/how-we-regulate-networkrail/periodic-review-2018 and https://orr.gov.uk/rail/economic-regulation/regulation-of-network-rail/price-controls/periodic-review-2018.
[26] Regulation 14(2).
[27] Para 1(4) of Schedule 3.
[28] Para 2(1) of Schedule 3.
[29] http://www.legislation.gov.uk/uksi/2019/518/pdfs/uksi_20190518_en.pdf.

infrastructure charges, surpluses from other commercial activities, non-refundable incomes from private sources and state funding, with railway infrastructure expenditure[30].

15 For HS1, the Secretary of State must ensure that HS1's infrastructure costs and accounts balance[31].

16 ORR is responsible for ensuring the balance of infrastructure accounts for Network Rail through the access charges review[32]. For other infrastructure managers (not including HS1), we have the power to issue directions limiting, to any extent necessary, an infrastructure manager's ability to finance infrastructure expenditure out of borrowed funds in order to ensure this balance[33].

17 ORR is responsible for providing all infrastructure managers (including HS1) with incentives to reduce the costs of provision of railway infrastructure and the level of access charges[34].

Performance scheme

18 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 network[35].

19 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 performance[36].

20 The performance scheme must be based on the principles listed in paragraph 7 of Schedule 3 of the 2016 Regulations and must apply in a non-discriminatory manner throughout the network to which the scheme relates[37].

21 We approve the performance regime for Network Rail and other infrastructure managers as part of their periodic review processes.

[30] Reg 15(1).
[31] Reg 15(3).
[32] Reg 15(2).
[33] Reg 15(4).
[34] Reg 15(7) and (8).
[35] Reg 16(1).
[36] Reg 16(2).
[37] Reg 16(3).

Reservation charges

22 Infrastructure managers may levy a reservation charge for capacity that is requested but is not used[38]. 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 them[39].

23 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 paths[40]. ORR must also, where such a provision has been made, control such criteria in accordance with regulations 32 and 34[41].

24 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 32[42].

Allocation of infrastructure capacity

25 Part 5 and Schedule 4 of the 2016 Regulations set out the framework and timetable for the allocation of infrastructure capacity[43]. The trading of capacity between applicants is prohibited and allocation in the form of fixed train paths cannot be granted for longer than one timetable period. Regulations 26 to 28 set out the procedure that must be followed where an element of the railway infrastructure is congested, and regulation 29 provides a "use it or lose it" provision in respect of allocated capacity. Part 5 only applies to infrastructure managers. Undertakings that are only service providers for the purpose of the 2016 Regulations (such as port or terminal owners) will therefore not be covered by these provisions.

26 Infrastructure managers are responsible for the establishment of specific capacity allocation rules and for the allocation of infrastructure capacity[44]. Pursuant to

[38] Reg 17(1).
[39] Reg 17(2).
[40] Reg 17(3)(a).
[41] Reg 17(3)(b).
[42] Reg 32(2)(d) and (e).
[43] 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 4 sets out the timetable for the allocation process.
[44] Regulation 19(3) and our track access guidance.

regulation 19(1), there is an established framework[45] for the allocation of infrastructure capacity.

27 Matters relating to the allocation process and its results can be the subject of an appeal to ORR under regulation 32[46].

[45] The framework does not apply to HS1. For HS1 it is for the Secretary of State to establish a framework if so required.
[46] See reg 32(2)(c).

4. Access to service facilities

Introduction

1 This chapter focuses on access to service facilities. The 2016 Regulations permit railway undertakings to obtain access to other operators' service facilities in Great Britain. This chapter sets out how that access regime works.

2 Please note that, '*privately owned*' facilities do fall within the scope of the UK's legislative requirements.

Provision of information

3 Transparency of access arrangements and procedures is key to ensuring the basis for non-discriminatory access to service facilities for all railway undertakings, as required by the 2016 Regulations.

4 Service providers must provide the infrastructure manager with information to be included in the infrastructure manager's Network Statement[47]. This information must include: information on access to and charges for the supply of service facilities listed in Schedule 2 of the 2016 Regulations, including those services which are provided by only one supplier, and including information on technical access conditions, or details of a website where such information is available free of charge in electronic format. We would expect this information to be sufficiently detailed to allow an applicant to understand whether a service (or facility or any rail related services within that facility) is suitable to meet its needs. Facility owners may find it helpful to use the template provided by infrastructure managers when compiling this information.

Regulation 6: Access to services

5 Regulations 6(2) to 6(12) of the 2016 Regulations deal with access to, and the supply of, services for railway undertakings. Service providers are required to supply access to all railway undertakings. This includes track access, and access to service facilities and the supply of services described in paragraph 2 of Schedule 2. This includes refuelling, stations, marshalling yards, storage sidings and freight terminals.

[47] Regulation 13(3)

6 Service providers must supply access to services to all railway undertakings who are seeking access to service facilities and the supply of services (including the supply of services at ports and terminals).

7 Requests for access to, and the supply of, services must be answered within a reasonable time limit as set by ORR[48]. In our view a reasonable time limit is, as a general rule, ten working days, commencing on the first working day after the request has been made. However, where there is a short-notice request (such as ad hoc requests for unplanned access), we would expect service providers to deal with such requests within a shorter timescale where it is reasonable to do so. We do not intend to set a separate time limit for short-notice requests as matters stand.

8 Under regulation 6, only railway undertakings (and not applicants more widely) are entitled to be supplied the minimum access package and to request access to, and supply of, services described in paragraph 2 of Schedule 2.

9 For the reasons set out below, in most cases we would expect that service providers provide access where they are able to accommodate requests for their services[49]. This reflects the underlying market opening principles and purpose of the 2016 Regulations. Specifically, in the case of conflicting requests, service facility owners must attempt to meet all requests as far as possible[50]. This means that, for example, we would expect that service providers consider whether retiming services would enable both requests to be met.

10 Service providers are not obligated to invest in their facilities in order to meet all requests[51]. Accordingly, where there is a non-conflicting request which would require such investment, we consider that a service provider may refuse a request without having to consider if a viable alternative exists.

11 The 2016 Regulations also provide that service facility owners may only refuse access to a service facility where a viable alternative exists[52]. The definition of a viable alternative is “access to another service facility which is economically acceptable to the railway undertaking, and allows it operate the freight or passenger services concerned”. Viable alternatives are discussed further, below. We consider

[48] Regulation 6(3).

[49] Regulation 6(2) provides that a service provider must supply to all railway undertakings, in a non-discriminatory manner, access, including track access, to service facilities and the supply of services described in paragraph 2 of Schedule 2. This is subject to regulation 6(4).

[50] Regulation 6(7).

[51] Regulation 6(6).

[52] Regulation 6(4).

that there are likely to be limited circumstances in which this arises, and that in most cases our expectation would be that service facility operators provide access to their facilities if they are able to accommodate the request.

12 Where capacity at a service facility is constrained, we do not consider that the 2016 Regulations create an obligation on the service provider to substitute the railway undertaking's services for its own or for those of an existing or planned future user.

13 The 2016 Regulations[53] require a service provider to justify, in writing, a decision to refuse a request for access to, and the supply of, services in specified situations. We expect all service providers to ensure refusals for any of the services referred to in paragraph 2 of Schedule 2 are in writing and fully reasoned and objectively justified. Therefore, whenever a service provider is refusing access, we expect the service provider to explain why it is refusing access and, where applicable, why it considers the alternative facility it has identified is a viable alternative for the railway undertaking. This is because all such decisions are appealable and may be subject to ORR scrutiny in due course.

Viable alternative

14 The requirement to consider whether there is a 'viable alternative' when refusing a request for access only applies to requests for access to, and the supply of, services described in paragraph 2 of Schedule 2.

15 The regulations make provision for a service provider to refuse a non-conflicting application on the basis of a viable alternative[54]. We consider that there are likely to be limited circumstances in which this arises due to the definition of the viable alternative (see below). It would therefore be our expectation that in most cases service providers provide the requested services where they are able to do so.

16 In cases where there are conflicting requests for services, the service facility provider must attempt to meet all requests prior to providing information about a viable alternative[55].

The definition of 'viable alternative'

17 'Viable alternative' is defined in the 2016 Regulations as "…access to another service facility which is economically acceptable to the railway undertaking, and allows it to operate the freight or passenger services concerned". The viable alternative must

[53] Regulation 6(5).
[54] Regulation 6(4).
[55] Regulation 6(7).

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

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

(i) 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.

(ii) 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.

(iii) 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.

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

(iv) 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.

(v) 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, connections to other modes and transportation time).

(vi) 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.

(vii) Under some circumstances self-supply by the railway undertaking could be regarded as a viable alternative. This would need to be considered relative to the scale of the access requested and the capital costs involved for self-supply. We expect that it would only be where the costs were low or the scale of access represented a significant proportion of the total capacity at the service facility in question that self-supply is likely to be a viable alternative.

36. Service providers would require a robust rationale for stating that another facility is a viable alternative, having considered the above issues in detail.

Right to appeal

37. Railway undertakings and service providers should comply with the 2016 Regulations and we would expect them to make reasonable attempts to find mutually agreeable solutions. This is likely to be preferable and faster than regulatory intervention.

38. Railway undertakings (applicants) have a broad right of appeal to ORR under the 2016 Regulations[56]. The regulations on access to service facilities additionally make specific reference to an appeal in the event that there is no viable alternative and that a request for access cannot be accommodated[57], and more generally in the event that "a railway undertaking is denied the entitlements conferred on it by this regulation[58]".

Service Facility Charges

Introduction

19 This section covers the requirements of the 2016 Regulations with regard to charges made by service providers for access to, and the supply of, services referred to in

[56] Regulation 32.

[57] Regulation 6(8).

[58] Regulation 6(13).

paragraph 2 of Schedule 2. It also covers performance schemes and reservation charges[59].

Charges for services

20 The charging requirements for services at service facilities referred to in paragraph 2 of Schedule 2 apply to 'service providers'. This could include infrastructure managers in respect of their role as operators of service facilities, as well as those who only provide services and are not also infrastructure managers.

21 Paragraph 1(6) of Schedule 3 of the 2016 Regulations requires that the charge imposed for track access and the supply of services within these service facilities must not exceed the cost of providing it, plus '*a reasonable profit*'. We expect the service provider to be able to demonstrate how charges reflect the cost of providing access to its service facilities and/or the supply of services within those facilities, if requested.

22 If the additional or ancillary services referred to in paragraphs 3 and 4 of Schedule 2 are offered by only one service provider, the charge for the supply of those services must also not exceed the cost of providing the service, plus a reasonable profit[60].

23 Service providers may publish their charges in different ways, but we expect them to be open and transparent about charges for services. Service providers should list the services provided and include their charges methodology either as a set rate of tariffs (where appropriate) or as a list of the criteria that may affect the charges. Where services are provided using a list of charges, that list should be easily accessible on a website (usually the service provider's website or in the infrastructure manager's network statement). We expect the list of charges, or charging criteria, to follow the principles set out in the 2016 Regulations[61] and to reflect the breakdown of services provided as set out in Schedule 2.

24 If a service provider publishes a set of charging criteria, it is not necessary for the service provider to publish detailed figures used to calculate the charges themselves. However, should a railway undertaking seek clarification around charges then it is the responsibility of the service provider to make available the breakdown of charges in a transparent manner.

25 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

[59] For IM charges see the section on that here.
[60] See paragraph 1(7) of Schedule 3.
[61] See regulation 14 and Schedule 3.

access to, and the supply of, services are likely to impact on the calculation of the charge:

(i) type of facility needed;

(ii) length of stay;

(iii) time of day;

(iv) refuelling;

(v) cleaning or other light maintenance services required;

(vi) any charges for electricity and other items such as telecommunications which are required; and

(vii) technical inspections and specialised maintenance which may be necessary.

26 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 criteria[62] and, where applicable, tariffs. We expect service providers to answer all reasonable requests for access or charging information.

Unused service facilities

27 Regulation 6 (9) of the 2016 Regulations sets requirements for unused facilities to be made available for lease or rent.

28 Under regulation 6(9) of the 2016 Regulations, where a service facility[63]:

- has not been in use for at least two consecutive years, 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 lease as a rail service facility, and publicise this offer.

29 The obligation does not, however, arise if the service provider can demonstrate that on-going redevelopment work reasonably prevents the use of the service facility by any railway undertaking.

[62] See regulation 14(11).
[63] Service facilities described in paragraph 2 of Schedule 2 of the 2016 Regulations.

30 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.

5. Appeals

Introduction

1 This chapter is about the appeals process under regulation 32 of the 2016 Regulations.

Appeals to ORR

2 Regulation 32(1) provides applicants (as defined under the 2016 Regulations) with a right of appeal to ORR.

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 or a railway undertaking concerning any of the following matters[64]:

- 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, the charging system and the Channel Tunnel charging framework;
- 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.

Who can appeal?

4 Anyone who comes within the definition of an 'applicant' has a right of appeal pursuant to regulation 32(1) and can bring an appeal on the basis that it has been unfairly treated, discriminated against or is in any other way aggrieved.

5 While an applicant has the right to bring an appeal on one of the matters set out in regulation 32(2)(a) to (g), not all of these provisions confer rights on an applicant. For

[64] See regulation 32(1) and 32(2).

example, the right to be granted access to service facilities and the supply of services pursuant to regulation 6(2) only applies to those who are railway undertakings for the purpose of the 2016 Regulations.

6 However, in practice, the breadth of the general right of appeal under regulation 32(1) means that if an applicant believes it has been unfairly treated or discriminated against or is in any other way aggrieved, it is not precluded from bringing an appeal in relation to any aspect of the 2016 Regulations, even where the provisions of a regulation do not extend to applicants more widely. For example, although an applicant does not have the same entitlement to access as a railway undertaking under regulation 5 or 6, it should still be treated fairly in relation to any access allowed by the infrastructure manager or service provider, however limited. Where it is not, the applicant would be entitled to bring an appeal in this regard.

Scope

7 An applicant must lodge its appeal by way of an application under regulation 32 where the matter under appeal does not come within the scope of section 17 or 22A of the Railways Act 1993 (the Act). An appeal will fall outside the scope of section 17 or 22A of the Act where[65]:

- the railway facility to which the appeal relates has been exempted under section 20 of the Act;
- the appeal relates to a rail link facility (as defined under the 2016 Regulations); or
- the subject matter of the appeal is not within scope of directions which may be sought under sections 17 or 22A of the Act.

8 Where the matter of an appeal under regulation 32(1) is a matter in relation to which directions may be sought from ORR under section 17 or 22A of the Act, the applicant must lodge its appeal by way of an application under the relevant section of the Act, rather than by way of an application under regulation 32[66].

9 We have separate published guidance on making an appeal under section 17 or 22A of the Act, which applicants should refer to as applicable[67]. If an appeal is made

[65] See regulation 32(4).
[66] See regulation 32(3).
[67] See our guidance on '*Making an Application*'.

under regulation 32, the affected parties are still free to seek agreement with each other.

10 The applicant can withdraw its appeal at any time by writing to us with a short explanation. We will inform all other relevant parties that the appeal has been withdrawn.

How to make an appeal under regulation 32

11 The applicant should have regard to the relevant chapters of this guidance as applicable before submitting an application for appeal.

12 An applicant should use Form R32 to make its appeal[68]. The application should include:

- the applicant's details;
- the matter under appeal and/or an explanation as to how the applicant has been unfairly treated, discriminated against or is in any other way aggrieved;
- an explanation as to why sections 17 and 22A of the Act do not apply;
- the details of the respondent[69] and of any interested third parties;
- the grounds on which the appeal is being made, which should include reference to the applicable regulation(s);
- details of the negotiations/discussions undertaken to date between the parties to resolve the issue;
- 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.

[68] https://orr.gov.uk/rail/access-to-the-network/track-access/forms-model-contracts-and-general-approvals.
[69] The respondent is the party against whom the appeal is made.

13 Further, where a railway undertaking brings an appeal concerning its entitlements to access under regulation 5 to infrastructure and/or regulation 6 to services, we would expect the appeal application to include, at a minimum, the following information:

(i) 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).

(ii) An explanation as to why access is needed.

(iii) Confirmation that the railway undertaking holds, or is likely to obtain, access rights on the connecting network.

(iv) An explanation of why the service provider is competent to supply the level of access or type of services being sought.

(v) Where applicable, why it considers that an alternative facility suggested by the service provider is not a viable alternative.

14 We would expect the service provider to provide relevant information in its written response to the appeal (see below), for example:

(i) Detailed reasons as to why access has been refused or granted subject to restrictions.

(ii) 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.

(iii) Details of any viable alternatives that could be used to supply the required services, with an explanation as to why they are considered suitable and supporting evidence, where applicable.

(iv) Any restrictions on access it has proposed (where applicable), with an explanation as to why they are fair, reasonable, proportionate and objectively justifiable.

(v) Whether there are any other affected parties and the impact on them of the request for access.

The appeals process

15 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

16 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 appeal[70]. 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.

17 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 franchising bodies, concession awarding bodies, other regulators and funders. 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).

18 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.

19 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.

20 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

21 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

[70] Regulation 32(5)(a) and below.

written representations in response. Any further response must be provided within the timeframe specified by us, which will normally be 10 days.

22 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.

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

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

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

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

Stage 3: Making the decision

27 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 2016 Regulations, we will consider our section 4 duties under the Act[71] when we make our decision on the appeal.

28 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 decision[72].

[71] Section 4 of the Act requires us to balance a number of public interest duties.
[72] See regulation 32(5)(b).

29 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.

30 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.

31 Our decision on a regulation 32 appeal is binding on all parties affected by that decision[73].

32 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 direction[74]. 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

33 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.

34 Regulation 36 provides that the provisions of section 80 of the Act (*duty of certain persons to furnish information on request*) will apply if we request information in connection with our functions under the 2016 Regulations[75]. Section 80 places a duty on parties to provide us with such information, in such form and manner as we request, for the purpose of facilitating the performance of our functions under the 2016 Regulations.

35 We can impose a financial penalty on a party that fails or refuses to comply with such a request for information[76].

[73] See regulation 32(11)(a).
[74] See regulation 32(11)(b).
[75] Please note that timescales can be different though, as specified by the legislation.
[76] See regulation 38.

Scope of disclosure in an appeal

36 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.

37 ORR is able to disclose information which has been obtained under or by virtue of any provision of the 2016 Regulations without restriction where disclosure is made for the purpose of facilitating our functions under the 2016 Regulations[77]. However, we will give consideration to requests for non-disclosure.

38 In considering a request for non-disclosure, we will generally apply the test set out in section 71(2) of the Act. This requires us to have regard to the need for excluding from publication, so far as that is practicable, any matter which relates to the affairs of an individual or specifically to the affairs of a particular body where publication of that matter would or might *"…in the opinion of [ORR], seriously and prejudicially affect the interests..."* of that individual or body. We consider that this is also an appropriate test to apply when considering the scope of disclosure.

39 Where a party does not want all its information disclosed, it must make a request to ORR for redactions at the same time the information is first provided to us. The request for redactions should be supported by reasons, including how disclosure of that information would seriously and prejudicially affect the disclosing party's interests. The disclosing party should consider whether it can provide such information in a more generalised format that can be disclosed.

40 Where a request for non-disclosure of information is made, it will be a matter for ORR to determine, in our sole discretion, whether to restrict disclosure of that information. We recognise that there may be circumstances where information a party provides contains commercially sensitive or confidential information or where the parties are competitors and disclosure could raise concerns from a competition law perspective. We will therefore aim to strike a balance between complete transparency and protecting genuinely commercially sensitive information.

[77] Regulation 44 and section 145(2)(ga) of the Railways Act 1993.

41 In determining the issue of disclosure we will expect all parties to comply with such process and timeframes as we may specify to ensure we are able to progress the appeal in a timely way and in accordance with statutory timeframes.

42 Where an applicant submits an appeal and requests redactions to its application, we will not consider the application to be complete, and therefore received by ORR for the purpose of regulation 32(5)(a), until the disclosure issues have been resolved to our satisfaction.

Appeal-specific issues

43 We have set out below additional procedures we expect applicants to follow in relation to appeals on certain matters, in accordance with the 2016 Regulations.

Rail link facility and development agreements

44 Where a decision or direction in connection with the determination of an appeal under regulation 32 would affect a rail link facility or the operation of the development agreement, we are required to carry out a consultation[78].

45 Where the Secretary of State makes representations, before making or issuing a decision or direction, we must consult such interested parties as we consider appropriate on the Secretary of State's representations[79].

Access – viable alternatives

46 When an appeal under regulation 32(1) contests a decision under regulation 6(4) to refuse a request for access to and the supply of services, our decision must include a determination as to whether, in respect of the access and provision of services to which the appeal relates, a viable alternative exists[80].

47 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 6(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 6(4) exists;
- whether it is possible to accommodate the conflicting requests on the basis of demonstrated need; and

[78] See regulation 32(6).
[79] Regulation 32(7).
[80] Regulation 32(8).

- whether, and if so what, part of the service capacity must be granted to the applicant[81].

Infrastructure capacity

48 Pursuant to regulation 32(10), 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.

[81] Regulation 32(9).

Annex: Key Definitions

Some common definitions

The terms used throughout the guidance have the same meanings as in the 2016 Regulations and the Act unless the context requires otherwise. Some key definitions used in this guidance are set out below:

Definitions in the 2016 Regulations (as amended) and in the Act

'**Applicant**' is defined in the 2016 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 2016 Regulations only confer entitlements and obligations on railway undertakings, some provisions apply more widely to bodies such as shippers and freight forwarders. Where the 2016 Regulations apply more broadly, the term '*applicant*' is used.

Where a party that is not a railway undertaking is considering whether the 2016 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.

'**dominant body or firm**' is defined in the 2016 Regulations as:

a body or firm which is active and holds a dominant position in the national railway transport services market in which the relevant service facility is used.

For an overview of what is a dominant position in the GB national railway transport services market see ORR's publication *Guidance on ORR's approach to the enforcement of the Competition Act 1998 in relation to the supply of services relating to railways 2016*[82].

'infrastructure manager' is defined in the 2016 Regulations as: "*infrastructure manager" means any body or undertaking that is responsible in particular for—*

(a) the establishment, management and maintenance of railway infrastructure, including traffic management and control-command and signalling; and

(b) the provision with respect to that infrastructure of network services as defined in section 82 of the Act,

[82] http://orr.gov.uk/__data/assets/pdf_file/0019/21367/competition-act-guidance.pdf.

but, notwithstanding that some or all of the functions of the infrastructure manager on a network or part of a network may be allocated to different bodies or undertakings, the obligations in respect of those functions remain with the infrastructure manager except where the functions and obligations pass to an allocation or charging body by virtue of regulations 19(4) and 14(9) respectively;

For the purposes of the 2016 Regulations, ORR considers that infrastructure managers include in particular:

- Network Rail Infrastructure Limited.
- HS1 Limited, in respect of High Speed 1.
- Heathrow Airport Ltd, in respect of the Heathrow Spur.
- Rail for London (Infrastructure) Ltd, in respect of Crossrail's Central Operating Section ('the Crossrail Tunnel').
- Core Valley Lines.
- The Channel Tunnel Group Limited and France-Manche S.A. (jointly "Eurotunnel"), in respect of the Channel Tunnel (but see below).

Our view is that operators of heritage railways are not infrastructure managers for the purposes of the 2016 Regulations. Similarly, operators of private stations are not infrastructure managers if they do not provide network services (as defined in section 82 of the Act).

The definition of railway infrastructure does not include infrastructure in ports or freight terminals. In our view, while track leading to a service facility in a port or freight terminal is part of the rail network and therefore constitutes railway infrastructure, track within such a service facility is part of the operation of the service facility and therefore does not constitute '*railway infrastructure*'. This is because the main operation of ports and freight terminals is concerned with the supply of services, rather than the provision of train paths.

Consequently, it follows that the operators of ports and terminals are not infrastructure managers and are therefore not bound by the requirements applicable to infrastructure managers under the 2016 Regulations. Rather, we consider operators of ports and terminals to be service providers within the meaning of the 2016 Regulations.

It is possible for an infrastructure manager also to be a service provider, for the purposes of the 2016 Regulations, where that infrastructure manager also supplies services. However, it is not possible for a service provider that only supplies services to be

regarded as an infrastructure manager.

'**network**' is defined in the Act as:

(a) any railway line, or combination of two or more railway lines, and

(b) any installations associated with any of the track comprised in that line or those lines,

together constituting a system of track and other installations which is used for and in connection with the support, guidance and operation of trains.

'**network**' is defined in the 2016 Regulations as meaning:

except in those cases where the context otherwise requires, the entire railway infrastructure managed by an infrastructure manager.

The effect of this definition is to capture for the purposes of the 2016 Regulations:

- All of the items included in the definition of '*network*' under the Act (as set out above); and
- Every other item included in the definition of '*railway infrastructure*'. Network is therefore a broad concept under the 2016 Regulations.

'**railway infrastructure**' is defined in the 2016 Regulations as consisting of:

…the items described as "network", "station" and "track" in section 83 of the Act but excludes such items-:

(a) which consist of, or are situated on, branch lines and sidings whose main operation is not directly connected to the provision of train paths;
(b) within a maintenance or goods depot, or a marshalling yard;
(c) within a railway terminal, port, factory, mine, quarry, nuclear site or site housing electrical plant;
(d) which consist of, or are situated on, networks reserved mainly for local, historical or touristic use; and
(e) within a military establishment.

'**railway undertaking**' is defined in the 2016 Regulations as:

any public or private undertaking licensed according to [the Recast Directive], the principal business of which is to provide services for the transport of goods and/or passengers by rail with a requirement that the undertaking ensure traction; this also includes undertakings which provide traction only.

In practice railway undertakings will be licensed freight and passenger train operators.

'service facility' is defined in the 2016 Regulations as: *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 listed in paragraph 2, 3 or 4 of Schedule 2;*

'service provider' is defined in the 2016 Regulations as:

a body or undertaking that supplies any of the services:
(a) to which access is granted by virtue of regulation 6; or
(b) listed in paragraphs 2, 3 or 4 of Schedule 2,
or which manages a service facility used for this supply, whether or not that body or undertaking is also an infrastructure manager.

It is also the generic term ORR uses in this guidance for the person responsible for providing access and services at a service facility.

'**station**' is defined in the Act as:

any land or other property which consists of premises used as, or for the purposes of, or otherwise in connection with, a railway passenger station or railway passenger terminal (including any approaches, forecourt, cycle store or car park), whether or not the land or other property is, or the premises are, also used for other purposes.

'**track**' is defined in the Act as:
any land or other property comprising the permanent way of any railway, taken together with the ballast, sleepers and metals laid thereon, whether or not the land or other property is also used for other purposes; and any reference to track includes a reference to:
(a) any level crossings, bridges, viaducts, tunnels, culverts, retaining walls, or other structures used or to be used for the support of, or otherwise in connection with, track; and
(b) any walls, fences or other structures bounding the railway or bounding any adjacent or adjoining property.

This publication is available at orr.gov.uk

Any enquiries regarding this publication should be sent to us at orr.gov.uk/contact-us