



**ORR's Decision on
an appeal by DB
Schenker Rail (UK)
Limited regarding
access and services
at Freightliner
Southampton
Maritime Terminal**

30 October 2015

DECISION: *ORR dismisses this appeal and determines that Freightliner Limited's refusal to grant DB Schenker Rail (UK) Limited access and services on the terms sought was justified.*

Introduction

1. This is the Decision of the Office of Rail and Road (**ORR**)¹ regarding an appeal made by DB Schenker Rail (UK) Limited (**DBS**) on 9 January 2015 under regulation 29 of The Railways Infrastructure (Access and Management) Regulations 2005 (the **Regulations**).
2. The appeal concerns the refusal by Freightliner Limited (**Freightliner**) of DBS's request for access to, and services at, Freightliner Southampton Maritime Terminal (**Maritime Terminal**).
3. DBS's appeal concerns not being able to agree terms with Freightliner to enable it to have access to Maritime Terminal for up to four regular pairs of train services per day and for associated services including loading and unloading containers (the **request**).
4. Freightliner refused DBS's request for access on the basis that there is insufficient capacity at Maritime Terminal. The issue in this appeal is therefore whether sufficient capacity exists or could exist at Maritime Terminal to accommodate the request. In cases where access has been refused, we would expect a facility owner to provide a fully reasoned and objectively justified argument for refusing access.
5. This Decision includes references to Freightliner's and DBS's (the **parties**') respective positions and representations. The parties' representations and supporting documents are published alongside this Decision² and should be referred to for the parties' detailed arguments and evidence.
6. In this Decision, words and definitions have the same meaning as under the Regulations unless expressly stated otherwise or the context requires otherwise.
7. This Decision considers the legal framework and preliminary issues raised by this appeal first before setting out the background to this appeal, the issues raised by the parties and then ORR's analysis and conclusion.
8. The appeal also raised issues about disclosure of commercially sensitive information, in particular which elements of each party's representations should or should not be disclosed to the other party. We have addressed this issue separately below.

¹ Pursuant to the *Infrastructure Act 2015* new functions were conferred on ORR in respect of monitoring how Highways England exercises its functions in relation to the strategic road network in England. *The Office of Rail Regulation (Change of Name) Regulations 2015* changed the name to the 'Office of Rail and Road' from the 'Office of Rail Regulation' with effect from 16 October 2015.

² <http://orr.gov.uk/what-and-how-we-regulate/track-access/policies> Note: certain information is redacted.

The legal framework

9. The Regulations provide the right for an applicant to apply for access to a range of services and facilities. DBS has brought its appeal under regulation 29 of the Regulations on the basis that it has not been able to agree terms with Freightliner for access to, and services at, Maritime Terminal pursuant to regulation 6 of the Regulations. It is not disputed by either party that the matter of the appeal is one to which the Regulations apply, as it is outside the scope of the Railway Act 1993³ (the **1993 Act**). We summarise the relevant regulations in this section. Regulations 6 and 29 are reproduced in full at Annex 2.
10. ORR published its Guidance on Appeals to ORR under the Railways Infrastructure (Access and Management) Regulations 2005 in March 2006⁴ (the **Guidance**). This Guidance sets out the high level principles we adopt when considering appeals as well as setting out the circumstances and basis on which access could be refused.
11. We have taken into account the Guidance in determining how this regulation 29 appeal is to be treated. It is worth noting that while the Guidance sets out the circumstances in which access could be refused, this is in the context of a refusal of access to services pursuant to regulation 7. However, it is clear that the same considerations that should be taken into account when refusing access under regulation 7 would apply equally to a refusal of access under regulation 6. We have therefore interpreted and applied the Guidance accordingly.
12. As stated in our Guidance⁵, while the Regulations create a presumption of access, we do not consider that the Regulations create an obligation on a facility owner to substitute the applicant's services for its own. Nor do we consider that the Regulations generally create an obligation on the facility owner to provide a service facility which would impose disproportionate cost on it. Non-availability of capacity can therefore be an objective justification which may justify a refusal to grant access⁶. However, given the presumption for access under the Regulations, where a facility owner refuses access on the basis of a lack of capacity, we expect the facility owner to provide a fully reasoned case explaining the nature of the capacity constraints and demonstrating that it has examined all options for accommodating the applicant's request. Where a facility owner justifies objectively why access has been refused, we would be unlikely to determine that access should be granted in these circumstances.

³ Regulation 29(4) requires an appeal to be made by way of an application under regulation 29 where regulation 29(3), which requires an application to be made pursuant to the Railways Act 1993, does not apply.

⁴ [Guidance on Appeals to ORR under the Railways Infrastructure \(Access and Management\) Regulations 2005 March 2006](#).

⁵ Paragraph 2.16 of ORR's Guidance.

⁶ Paragraph 2.14 of ORR's Guidance.

Regulation 6 – Access to terminals and ports

13. Regulation 6 deals with access to terminals and ports. Pursuant to regulation 6 a railway undertaking is entitled to track access to, and the supply of services in, terminals and ports linked to the rail network which serve, or potentially serve, more than one final customer for the purpose of rail activities⁷.
14. Where a railway undertaking has requested track access to and the supply of services in terminals linked to the rail network, regulation 6(3) places a requirement on the service provider to ensure that the entitlements conferred by regulation 6 are honoured, and that access to, and the supply of, services is granted in a transparent and non-discriminatory manner.
15. Where access is granted, a service provider can make access subject to restrictions but only where viable alternatives under rail exist⁸. However, where a railway undertaking is either denied the entitlements conferred on it by regulation 6 or the entitlements are made subject to restrictions other than in accordance with regulation 6(2), it has a right of appeal to ORR in accordance with regulation 29⁹.
16. In relation to services at terminals, in line with our Guidance¹⁰, we consider appeals in relation to such services under regulation 6 only, even where the service is specified in regulation 7 or in Schedule 2 of the Regulations, as regulation 6 provides specifically for access to services in terminals.

Regulation 29 – Appeals to the regulatory body

17. Regulation 29(1) provides a right of appeal to ORR if an applicant “...believes that it has been unfairly treated, discriminated against or is in any other way aggrieved...” in relation to certain matters as further described in Regulation 29(2), which includes circumstances where it has been denied access to a facility or service. Those matters include the arrangements in connection with the entitlements to access granted under Part 2 of the Regulations, of which regulation 6 forms part.
18. While the Regulations create a presumption of access, we are required to have regard to our section 4 duties under the 1993 Act in considering any appeal. Section 4 of the 1993 Act requires us to balance a number of public interest duties and we consider these duties, to the extent they are relevant and consistent with the underlying EU directives, in making a determination on appeal.
19. The duties placed on ORR under section 4 are not in any order of priority and it is for ORR to give appropriate weight to its relevant duties in each individual case.

⁷ Regulation 6(1) of the Regulations.

⁸ Regulation 6(2) of the Regulations.

⁹ Regulation 6(4) of the Regulations.

¹⁰ Paragraph 2.10 of ORR's Guidance.

Our section 4 duties are set out in Annex 3. Those duties that are of particular relevance to this appeal include the duty to:

- promote improvements in railway service performance,
- to promote the use of the railway network in Great Britain for the carriage of goods and the development of that railway network, to the greatest extent that ORR considers economically practicable,
- to promote efficiency and economy on the part of persons providing railway services,
- to promote competition in the provision of railway services for the benefit of users of railway services, and
- to enable persons providing railway services to plan the future of their businesses with a reasonable degree of assurance.

ORR's handling of the appeal

20. We have followed our Guidance as regards the process for an appeal made under regulation 29. Paragraph 4.5 of the Guidance states that all appeals under the Regulations will be dealt with using the same process as set out for applications made under sections 17 or 22A of the 1993 Act. In particular the Guidance provides that we will follow the procedures set out in Schedule 4 of the 1993 Act (**Schedule 4**), which sets out the framework for access applications made to ORR.
21. It is for each of the parties to make their case in relation to the appeal and, as set out in our Guidance¹¹, we will rely on the representations made by both parties to provide all the relevant information on which we base our determination. In addition we can request further information from the parties and we may, where we consider it pertinent to the appeal, carry out site visits to ensure ORR has sufficient information to determine the appeal.
22. In accordance with the procedure set out in Schedule 4, we invited written representations from both parties. The following set of representations were received in respect of the substance of DBS's appeal:
 - DBS's appeal documentation of 9 January 2015, as outlined above.
 - Freightliner's response, with supporting annexes, dated 4 February 2015:
 - Timeline and copy of correspondence with DBS (Appendix 1).
 - Maritime Terminal Plan (Appendix 2).
 - Freightliner Southampton terminals summary (Appendix 3).
 - Copy of a DPW email (Appendix 4).

¹¹ Paragraph 4.12 of ORR's Guidance.

- Loading plan of Maritime Terminal (Appendix 5).
 - Southampton Maritime on-time statistics for period 10 in 2014/15 (Appendix 6).
 - Detail of Strategic Freight Network plans (Appendix 7).
 - DBS's further representations dated 21 August 2015.
 - Email from Freightliner dated 10 September 2015 in response to our request for further information about the service designated 4O17.
23. In addition, we obtained further information during our site visit to Maritime Terminal on 16 June 2015. The site visit also enabled us to gain an understanding of day-to-day operations and to see how Freightliner managed Maritime Terminal.
24. Representations and submissions were also made in relation to ORR's approach to handling the disclosure of information. These are detailed separately [below](#).
25. We note that in its representations of 21 August 2015, DBS posed some 'key questions' it considered should be evaluated independently by relevant experts with specialist knowledge of rail mounted cranes and large intermodal terminal operations who have access to all of the relevant information in determining the question of availability of capacity¹². While ORR has taken into consideration all the representations that have been made in considering the question of capacity at Maritime Terminal, we have not commissioned relevant experts to consider these issues. We have decided against this on the basis that we consider we already have sufficient information, in this case, to enable us to make a determination on this appeal.
26. In reaching the Decision, we have taken into account the representations made by both parties, the observations following the site visit to Maritime Terminal, our Guidance and our section 4 duties.

Disclosure

27. The issue of disclosure and the scope of such disclosure in these appeals was raised by both parties, in particular which parts of the parties' representations should or should not be disclosed to the other party or made public.

Background

28. The scope of disclosure of information was first raised by Freightliner when providing its representations on DBS's appeal. Freightliner emphasised its representations contained a significant volume of confidential and business sensitive information the disclosure of which in its view would "*seriously and prejudicially affect the interests of [Freightliner]*" as per the test set out in section

¹² See sections 3.4 and 3.28 of DBS's representations dated 21 August 2015.

71 of the 1993 Act, which applies when ORR is considering the publication of information. Freightliner therefore requested that a non-confidential version of its representations, with certain information redacted, be disclosed to DBS.

29. Section 71 of the 1993 Act provides that ORR “...*may arrange for the publication, in such form and in such manner as [it] considers appropriate, of such information and advice as it may appear to [it] expedient to give to users or potential users of railway services in Great Britain*”.
30. In arranging for the publication of any such information or advice, pursuant to section 71(2) of the 1993 Act we must have regard to the need for excluding, so far as is reasonably practicable, any matter which relates to the affairs of an individual or specifically to the affairs of a particular body where publication would or might “...*in the opinion of [ORR] seriously and prejudicially affect the interests...*” of that individual or body.
31. Publication and the application of section 71 and in particular the test under section 71(2) only becomes relevant where ORR is seeking to make public the representations, for example during the consultation process or following determination of the appeal when ORR publishes the decision on its website. The sharing of a party’s representations with the other party to the appeal as part of the determination process does not amount to publication. Rather it is an issue of disclosure. While section 145 of the 1993 Act permits ORR to disclose information without a party’s consent for the purpose of facilitating its functions under the Regulations, it does not provide for any account to be taken of information that is confidential or commercially sensitive, which a party may not wish to be disclosed. ORR considers that disclosing such information without regard to any representations made by a party on confidentiality would be disproportionate and not reasonable in the circumstances and therefore it is appropriate to consider the issue of scope of disclosure in such circumstances. It is also noted that Schedule 4 is silent on whether any information should be redacted from representations that are made.
32. In considering the scope of disclosure of information during an appeals process, ORR’s starting principle is that there should be as full disclosure as possible between the parties. ORR is an accountable, open and transparent regulator and therefore it is important that there is transparency and openness in the interests of fairness to all parties during the appeals process. However, we recognise that it is appropriate for a balance to be struck between this and protecting a party’s genuinely commercially sensitive information, particularly if disclosure is to a direct competitor.
33. We consider information to be disclosed should include information relevant to the appeal; information that it is fair and proper for a party to be given the opportunity to see and comment on in connection with the appeal; information a party needs to know in order to be able to make properly informed

representations; and information relied on and taken into account by us in reaching our decision.

ORR's approach to disclosure

34. For the purposes of this appeal we considered that section 71 provided an appropriate starting point for determining the scope of disclosure and whether to permit all or some of Freightliner's redactions. In a letter dated 1 May 2015 sent to both parties we confirmed we would apply the section 71 publication test to the issue of disclosure and consider whether, in our opinion, disclosure of the proposed redacted information to DBS would seriously and prejudicially affect Freightliner's interests. On 22 June 2015 DBS confirmed that it was content with the approach we were taking to the disclosure of information deemed to be commercially sensitive.
35. Pursuant to further discussions and meetings with Freightliner to discuss the nature of the information it identified as commercially sensitive, Freightliner agreed to the disclosure of certain of the information it had previously requested be redacted as well as agreeing to provide an outline summary of other parts of the redacted information, where appropriate, which could be disclosed to DBS.
36. On 15 June 2015 an updated version of Freightliner's representations was sent to DBS. This contained fewer redactions and where information was still redacted, Freightliner provided a general summary of this material. The only outstanding matter on disclosure related to Appendix 5 of Freightliner's representations, being the terminal loading plan. Freightliner asked that this was not disclosed to DBS on the grounds it contained highly confidential information.
37. In considering whether Appendix 5 should remain redacted we balanced Freightliner's arguments concerning the impact on its business against the need for DBS to have the opportunity to make informed representations in relation to matters that are relevant to the appeal as well as having the opportunity to comment on any possible inaccuracies or incomplete information. On the basis that DBS asserts in its appeal that there is capacity at the Maritime Terminal and has presented a consultant's report supporting this contention and a large part of Freightliner's rebuttal concerns its response to that report and DBS's representations on capacity, in particular as set out in Appendix 5, we were of the view that Appendix 5 should be disclosed to DBS for the purposes of this appeal.
38. Freightliner made further representations as to why Appendix 5 should not be disclosed in full on the grounds of confidentiality and provided a revised version of the Appendix which set out the track occupancy and timings but with the detailed information on the terminal's workings included in the previous version removed. Freightliner argued that the detailed information had a commercial value and should not be shared.
39. Having considered all the information in the two versions of Appendix 5, in our view the revised Appendix 5 contained sufficient information, along with all the

other information disclosed to DBS, to enable DBS to provide proper and informed representations. On 7 July 2015 we advised both parties that we were sending DBS the revised version of Appendix 5.

40. On 21 August 2015 DBS provided its further representations and stated that these contained confidential information, which should not be disclosed to Freightliner or more widely. DBS had not, however, set out its rationale for this claim. We therefore had to ask DBS to provide representations as to why it considered disclosure of certain of its information met the section 71 test. DBS replied on 2 September 2015. We considered the arguments put forward and accepted DBS's argument that the information was commercially sensitive and would seriously and prejudicially affect DBS's interests if disclosed. We asked for the redactions to be presented in the same format as Freightliner's and this was subsequently provided.
41. Only the redacted versions of each party's representations will appear on ORR's website. Although we do reference the party's original representations in this Decision, we do not include any of the commercially sensitive information so no redactions were needed from this Decision. Our Decision is therefore presented in full.

Scope of the appeal

Refusal of access

42. This appeal concerns the refusal by Freightliner to provide DBS access to, and services at, Maritime Terminal. Freightliner has refused access on the basis that it states there is insufficient capacity to accommodate DBS's access request at this time.

Commercially viable alternative

43. We note that both parties have made representations regarding whether or not there was a commercially viable alternative for Maritime Terminal. ORR is only under a duty to determine whether, in respect of the access to which the appeal relates, viable alternatives under market conditions exist when the appeal contests that such viable alternatives do not exist so as to justify a request under regulation 6(2) being subject to restrictions¹³.
44. As this appeal concerns a *refusal of access* as opposed to a granting of *access subject to restrictions*, it is not necessary, for the purposes of determining this appeal, to consider whether viable alternatives by rail under market conditions exist.
45. While we note that Freightliner did offer DBS a slot at its Millbrook Terminal for one service, we do not consider the offer of a slot at an alternative terminal,

¹³ Regulations 29(5) and 29(6).

outside the port, equates to a grant of access with restrictions within the meaning of regulation 6(2). We consider the offer of a slot at Millbrook Terminal as incidental and separate to the refusal to grant access at Maritime Terminal. In this regard we note that DBS had specifically requested access to Maritime Terminal. Millbrook Terminal is geographically separate from Maritime Terminal with Maritime Terminal located within the boundary of the Port of Southampton while Millbrook Terminal is located outside the port boundary.

46. As the issue of whether there is a commercially viable alternative to Maritime Terminal is not relevant for the purposes of this appeal, this is not an issue which requires determination. We have not therefore considered this issue and the parties representations in this respect any further for the purposes of determining this appeal.

Background

Terminals at the Port of Southampton

47. Southampton Port is the UK's second largest container terminal. It is owned by Associated British Ports (**ABP**) and operated by DP World (**DPW**)¹⁴.
48. Within the port area there are two separate rail freight terminals: Maritime Terminal and Western Docks¹⁵. Maritime Terminal is operated by Freightliner. Part of the land is owned by Freightliner and part is leased from ABP. DBS operates Western Docks. A map provided by DBS is at Annex 1. Freightliner also operates Millbrook Terminal, located close to the port area. Millbrook Terminal is outside the port's boundary and is accessed by the public road network, rather than by the port's private roads.
49. DBS is the largest rail freight haulier in the UK. It moves various types of freight, including intermodal containers, metals, coal, biomass and aggregate, operating over 5,000 trains each month, including services to and from mainland Europe¹⁶. DBS operates trains out of Western Docks with some container services provided by Pentalver (part of the AP Moeller-Maersk group). Western Docks is on Herbert Walker Avenue within the port area.
50. Freightliner is the UK's largest hauler of maritime containers. It handles over 290,000 containers per year at Southampton alone¹⁷. Demand for rail freight traffic to and from the port is increasing but terminal capacity is limited. Most of Freightliner's wagons and locomotives at some time pass through Maritime Terminal and so it is also used by Freightliner as a maintenance depot for servicing its fleet of wagons and locomotives.

¹⁴ <http://www.dpworldsouthampton.com/>

¹⁵ Also known as **Herbert Walker Avenue Terminal** and the **DBSR Terminal** (as named on the map in Annex 1).

¹⁶ https://www.rail.dbschenker.co.uk/rail-uk-en/ourcompany/About_DB_Schenker_Rail_UK/profile.html

¹⁷ <https://www.freightliner.co.uk/location/southampton-millbrook/>

51. There has been significant new infrastructure investment at Maritime Terminal in contrast to the other rail terminals. In 2012 a £9 million enhancement scheme was implemented at Maritime Terminal. Two Liebherr rail-mounted gantry cranes were erected and groundwork improvements made to create a 14 lane span compared to the previous seven lanes¹⁸.

The events leading up to the appeal

52. DBS operates an intermodal rail freight terminal at Western Docks. This has a single loading siding only which DBS says lacks the flexibility of a multi-siding terminal. Loading and unloading is done with side-lifters. Furthermore it is some distance from the port's main container holding area (marked as Victor Stack on the map at Annex 1). DBS stated in its representations that the cramped nature of the site at Western Docks and the volume of traffic meant that investment in new equipment would not be viable.
53. According to DBS, Maritime Terminal is conveniently located '*within the extended dock estate*' and has the necessary infrastructure and handling equipment that DBS needs for the train services subject to its request. DBS further stated that there is "*...no other facility within the immediate Southampton area, and particularly in close proximity to [ABP's] container berths, which has the necessary facilities to accommodate the train service specification on a commercially-viable basis.*"¹⁹.
54. DBS initiated its request for access and services with an email to Freightliner on 26 February 2014. There were subsequent telephone discussions and emails. Freightliner provided a quote for access at Millbrook Terminal on 3 April 2014. Freightliner also advised that further capacity at Millbrook Terminal might be available if it could obtain access at Eastleigh Yard, which is operated by DBS.
55. On 9 June 2014 DBS emailed a letter to Freightliner formally requesting rail access to and container handling services at Maritime Terminal for four specified train services. DBS cited the Regulations and the Rail Freight Industry Code of Practice (the **Code**)²⁰. All these services had train slots agreed with Network Rail for its network (reflecting that the services currently run to and from Western Docks). DBS said that it was willing to consider alternative terminal slots or other solutions to enable the services to fit around existing commitments at Maritime Terminal.
56. Further emails and telephone calls followed where Freightliner referred back to the quotation for the proposed alternative access arrangements at Millbrook Terminal provided on 3 April 2014 as the outcome of the discussions on access. In its appeal application DBS highlighted that, as of the time of making its

¹⁸ <http://www.freightliner.co.uk/location/southampton-millbrook/>

¹⁹ Section 3.4 of Form R29.

²⁰ http://orr.gov.uk/data/assets/pdf_file/0015/6414/freight-access-code-of-practice.pdf

application, it had received no written substantive response to its letter of 9 June 2014. We comment on how the appeal came to us [below](#).

The appeal

DBS's application

57. DBS asked ORR for advice on the process of making an appeal under regulation 29 in August 2014. We provided DBS with that information and subsequently provided DBS with the relevant ORR appeal form (R29) to complete²¹.
58. DBS sent its appeal to ORR on 9 January 2015. The appeal consisted of:
- Form R29 – application to ORR²².
 - A Capacity Evaluation Report prepared by Geldard Consulting Ltd dated 16 November 2014 providing an assessment of the capacity of Maritime Terminal (the **Capacity Report**).
 - A proposed facility access contract.
 - Exchanges of correspondence between DBS and Freightliner.
 - Copy of a DBS letter to Freightliner requesting access to the Maritime Terminal dated 9 June 2014.
59. DBS said it was seeking access to Maritime Terminal for up to four pairs of intermodal train services per day²³. The details of the train services that DBS wanted are:
- Wakefield 1243 – 1640 (Inward 4B53MO and 4052 MSX, Outward 4E70).
 - Trafford Park 1713 – 2130SX (Inward 4O21, Outward 4M78).
 - B.I.F.T. 2228SX – 0239MSX, 0252SO (Inward 4O76, Outward 4M69).
60. DBS also wanted the package to include the loading and unloading of containers. The appeal included a proposed access agreement based on one already used by DBS (at the Port of Immingham) for a five year period.

²¹ We note that in its representations of 21 August 2015, DBS made brief reference to Freightliner having a *monopoly* position at Maritime Terminal and to Article 102 of the Treaty on the Functioning of the European Union and Chapter II of the Competition Act 1998 in respect of the 'essential facilities' doctrine. However, we note that the current appeal is an appeal relating to access under regulation 29 and the appeal and DBS' accompanying representations have been made in relation to issues concerning the entitlement to access arrangements under regulation 6 being denied. DBS has not submitted a complaint to ORR relating to competition in the rail freight transport market rail pursuant to regulation 30(2) of the Regulations (*Competition in the rail services market*). Consequently we have solely considered the issue of access to, and services at, Maritime Terminal in relation to Regulation 29 only.

²² DBS noted that Maritime Terminal was exempt from the access provisions set out in section 17 of the 1993 Act because it is exempted from the 1993 Act by The Railways (Class and Miscellaneous Exemptions) Order 1994. DBS was therefore relying on regulation 29 of the Regulations as the basis for its appeal to ORR.

²³ One of these was coded Inward as Mondays Only (MO) and another similar but coded Tuesday to Friday (MSX).

61. The Capacity Report claimed that Maritime Terminal was operating below its current capacity and the expected increase in capacity from the recent investment had not been realised²⁴.

Freightliner's representations

62. Freightliner has refused DBS access to Maritime Terminal because of the non-availability of capacity. In its representations, Freightliner set out arguments explaining the interaction of various factors within a terminal that impact on its capacity, utilisation and performance to demonstrate why there was no available capacity to grant DBS's request²⁵. These are summarised below.

Capacity

Availability of slots

63. Freightliner provided a copy of its terminal loading plan²⁶ which details that there are no available slots at Maritime Terminal for an additional train of up to 31 wagons at the times requested by DBS, as trains are already being loaded at these times²⁷. It also showed there was some space available but it was limited.

Performance of services arriving at Maritime Terminal off the rail network

64. Freightliner noted the importance of performance of services and how its plans need to be able to absorb shocks to the services it is running: that is a performance buffer. It was noted that trains do not always arrive on time and where there are delays this can have a significant impact on terminal performance. Freightliner commented that the performance of terminals and the number of trains operated are intrinsically linked making it important to achieve an optimal balance between the two so that performance across the network does not deteriorate.

Track capacity

65. Freightliner further noted that the slots requested by DBS could not be accommodated for the following reasons:
- Slot 1243 – 1640: track capacity only existed between 1415 and 1630 which meant there was insufficient time available to strip and reload 30 wagons;
 - Slot 1713 – 2130: no spare track capacity at these times;
 - Slot 2228 – 0239: while there was track capacity between 2245 and 0445. Freightliner had run an additional service of its own at a similar time for a trial period (arriving as 4O17 at 2154 and departing as 4E01 at 0215).

²⁴ Section 6 of the Capacity Report.

²⁵ Page 7 of Freightliner's letter of 4 February 2015.

²⁶ Appendix 5 of Freightliner's letter of 4 February 2015.

²⁷ Availability of slots in the terminal, page 6 of Freightliner's letter of 4 February 2015.

However, this service was withdrawn from Maritime Terminal after approximately two weeks as according to Freightliner the trial was not successful for three key reasons:

- The reach-stacker was required to lift non-port containers to road vehicles.
- There was insufficient terminal capacity to handle the wagons to/from the maintenance depot.
- Maritime Terminal lost its ability to respond to late arriving/departing services²⁸.

Engineering access on the rail network

66. Freightliner stated that due to engineering access on the rail network, trains to and from Southampton frequently have to be diverted over longer routes. The result is that Maritime Terminal must be able to accommodate trains that have to leave early or arrive late within its overall resilient operational capacity and capability, which therefore impacts on the available capacity.

Restricted siding length

67. Freightliner pointed out that the current length of its trains is generally much longer than the sidings at Maritime Terminal. This means that every service has to be shunted under the cranes and around Maritime Terminal. Longer trains have to be split over two tracks, which involves extra shunts and takes longer to undertake train preparation, which therefore impacts on capacity.

Number of lifts per hour that can be achieved safely by cranes

68. Freightliner stated that even if track capacity existed to allow additional services, the crane capacity did not. To demonstrate this point Freightliner explained that DBS had requested slots four hours long. In practice, after safety checks, Freightliner said this would leave 2.5 hours to unload and load the train. This process would require 124 crane lifts on and off the train. That would equate to 49.6 lifts per hour on and off each train, based on two containers per platform. However, Freightliner said that the shortest unloading/loading time at Maritime Terminal is 4.75 hours which is for a service with just 24 wagons, an equivalent lift rate of 29.5 lifts per hour. [DBS is requesting slots for up to 31 wagons.]

69. Freightliner said that DBS's requested slots would necessitate both cranes working solely on DBS's trains for the time that they were at Maritime Terminal. However, at the times DBS wanted, there were already at least four Freightliner trains needing to be stripped and reloaded²⁹.

²⁸ Page 6 of Freightliner's letter of 4 February 2015 and its email of 10 September 2015.

²⁹ Page 7 of Freightliner's letter of 4 February 2015.

70. Freightliner also noted that if there was spare capacity at Maritime Terminal it would itself be utilising it rather than sending some of its own services to Millbrook Terminal. Further, Freightliner stated that if there were spare capacity, it would genuinely welcome business from other operators as their fees would contribute to the running costs of Maritime Terminal.

Flexing rights

71. Freightliner stated that sufficient capacity needs to be left in the terminal loading plan to accommodate flexing rights in the timetable as all access rights associated with slots at Maritime Terminal can be flexed +/- 30 minutes by Network Rail at timetable changes.

Site conditions

72. Freightliner noted that Maritime Terminal is built on reclaimed land and includes a culvert that restricts use. As a result, according to Freightliner, the concrete roadways suffer more than other Freightliner sites. The weight of the straddle carriers used to move the containers between Maritime Terminal and the port means the concrete roadways need to be maintained with Freightliner carrying out an investment programme. As such Freightliner stated that this investment creates a strong incentive to operate Maritime Terminal at maximum capacity as the higher the throughput of containers, the lower the unit cost.

Efficiency of operations

Straddle carrier efficiencies

73. Freightliner stated that Maritime Terminal is served by 4–5 straddle carriers which are supplied and operated by DP World. As the port has to manage demand and supply of straddle carriers to feed the rail terminal, Freightliner noted this meant there was not a steady flow of movements between the rail terminal and the port. Further, due to crossing requirements, the free movement of the straddle carriers to and from Maritime Terminal was restricted which is outside Freightliner's control.

Shunting

74. Freightliner noted that Maritime Terminal incorporated its national wagon maintenance centre which was a "24/6 facility" with a constant throughput of wagons³⁰.
75. The location of the wagon maintenance centre means that wagons need to be shunted from roads 9 and 10 to and from the wagon maintenance centre. Freightliner stated that shunting impacts on the operation of the cranes at Maritime Terminal and therefore impacts on crane lift productivity as it can mean that while shunting is taking place the cranes cannot work on the same road or lift

³⁰ Page 10 of Freightliner's letter of 4 February 2015.

containers off adjacent roads. The 'excessive amount of shunting' needed at Maritime Terminal was mentioned by Freightliner as one of the reasons why the theoretical capacity of the new cranes has not been achieved in practice³¹.

Response to Capacity Report

76. Freightliner commented that the Capacity Report submitted by DBS was generic with no specific analysis of the capacity available at Maritime Terminal and did not include any analysis of whether the slots requested by DBS could be accommodated at the times requested or at any other time of day.
77. Freightliner further stated that statements on crane performance were incorrect. Freightliner said that there had been a 30% increase in the number of pairs of services using the new cranes (13 now as against 10 before), but as train lengths had increased there had been a 41% increase in the number of wagons in the terminal loading plan.
78. Freightliner refuted allegations that it was operating Maritime Terminal inefficiently. For example, it defended chevron stacking as more efficient and safer than parallel stacking for this site. If parallel stacking were used the cranes would have to stop far more often as the machines carrying the containers would have to run in at one end of the stack, move along under both cranes, and then exit at the other end.
79. Freightliner presented detailed explanations of how it seeks to maximise efficiency of its operations at Maritime Terminal with existing resources based on actual experience.

DBS's further representations

80. ORR asked DBS to respond with its further representations by 22 July 2015. DBS requested an extension of time to enable it to employ specialist analysts. We granted DBS an extension to 21 August 2015. DBS's submission of 21 August 2015 noted that DBS had only been given a redacted version of Freightliner's representations.
81. In its representations of 21 August 2015, DBS elected not to provide a line by line critique on Freightliner's representatives but instead focused on two key issues which it considered have a significant impact on its appeal. These are 'capacity' and 'viable alternative'. For the reasons set out above, ORR does not consider the question of viable alternative is relevant to this appeal.
82. As regards the issue of capacity, DBS stated it was difficult to formulate a case to support its appeal without access to further information relating to Maritime Terminal. As such, it set out a number of questions it considered should be evaluated independently by relevant experts with specialist knowledge of rail

³¹ Page 7 of Freightliner's letter of 4 February 2015.

mounted cranes and large intermodal terminal operations who have access to all the relevant information, as discussed [above](#).

ORR's consideration of the appeal

83. In reaching our Decision, we have had regard to the fact that the Regulations create a presumption of access while recognising that there is a need to strike a balance between the applicant's right of access and opening up existing available capacity to fair competition, the legitimate commercial interests of the facility owner and the maintenance of a long-term investment incentive for new capacity.
84. ORR has carefully considered the issues involved in this appeal, in particular the representations from both parties, and our observations from the site visit. ORR considers the key issues relating to capacity concern whether available track and/or crane capacity exists or could reasonably be created to accommodate DBS's request. For example, whether efficiencies could be made to operations at Maritime Terminal to create the required capacity. These issues are considered in more detail below.

Capacity

85. In relation to the question of capacity at a terminal more generally, ORR would comment that, pursuant to the presumption as to access under the Regulations, new requests for access and services should be accommodated if that can be done by reasonable adjustments to a terminal's operations. Before refusing a request for access and services the facility owner should therefore consider the available options for accommodating that request. However, where capacity is constrained, ORR considers that a facility owner can reasonably refuse to grant access and is not under an obligation to substitute the applicant's services for its own³² or to seek to force in services if it can be shown it would impose a disproportionate cost on the facility owner or create an adverse impact on operational performance such as creating detrimental consequential effects on the terminal's overall operational performance.
86. In considering the question of capacity we accept that there is a difference between theoretical maximum capacity at a terminal and how capacity is effectively utilised in practice. In particular, we agree that there is a need for a performance buffer as planners face the real possibility of trains running late or ships not arriving at ports on time or even on the day scheduled. We note that it is industry practice for planners to allow for some white space to enable a facility owner to allow for recovery from perturbations and to deal with unplanned events so as to ensure efficient day-to-day operations, particularly as delays can cause congestion or loss of reputation, or customers can invoke penalty clauses under their contracts.

³² Paragraph 2.16 of ORR's Guidance.

87. While contingency planning should be objectively justified and not overly cautious, ORR is satisfied, particularly having regard to Freightliner's trial of running an additional service, that the current contingency planning margins adopted by Freightliner at Maritime Terminal are reasonable. Further, having witnessed operations at Maritime Terminal and having reviewed the terminal loading plan provided by Freightliner, ORR accepts that there is insufficient track capacity to accommodate DBS's request, given the incumbent services and the legitimate need to have some white space to manage operational performance and resilience at Maritime Terminal.
88. We note that the unsuccessful trial of the additional service by Freightliner led it to conclude that there was insufficient track capacity to run additional services at Maritime Terminal as it was not possible to manage shunts to and from the maintenance facilities and to provide operational contingency, i.e. a performance buffer. We also note that Freightliner is running three services from Millbrook Terminal as there is no capacity at Maritime Terminal to accommodate such services. We find these factors compelling in supporting Freightliner's contention that there is no available capacity. We do not consider that, as a commercial operator, Freightliner would allow for unreasonable contingency planning margins or would fail to utilise any spare capacity for its existing operations if available at Maritime Terminal as to do so would be to disadvantage its commercial operations for no discernible reason.
89. ORR accepts that track capacity is also affected by the physical constraints of Maritime Terminal. In particular we note that freight trains have generally increased in length (wagon numbers) in recent years as this is more economic, as more containers can be carried on each train. We note that in the past Freightliner was apparently able to accommodate some DBS train services before they returned to Western Docks. However, that was some time ago and for a limited period when there were fewer and shorter trains being operated at Maritime Terminal.
90. From the site visit, we observed that the layout of Maritime Terminal along with the increase in wagon lengths results in the need for a great deal of shunting of the wagons around Maritime Terminal. DBS considers shunting to be unproductive use of the track occupancy. However, we are satisfied that given the constrained size and shape of Maritime Terminal, the amount of shunting carried out is a necessary and unavoidable part of the day-to-day operations of Maritime Terminal. We saw for ourselves how the restrictions at the western end of Maritime Terminal further complicate shunting moves because of the reliance on Network Rail's mainline signals, which Freightliner does not control. Work by Network Rail, at Redbridge Sidings, funded by the Strategic Freight Network Fund, should alleviate this problem. However we understand that this work will not be completed until the end of 2017.

91. We accept that track capacity is also affected by the use of Maritime Terminal by Freightliner for its wagon maintenance operations. DBS contends it is inefficient to use Maritime Terminal for these purposes as it effectively put Roads 9 and 10 out of use for 'revenue potential'³³ and is a further example of unproductive use of track occupancy. We do not agree. We note that all of Freightliner's wagon fleet is scheduled to pass through Maritime Terminal at some time so it is therefore operationally efficient for Freightliner to service them at Maritime Terminal. If wagons were diagrammed to pass through an alternative terminal this would not be the optimal arrangement and potentially would result in reduced efficiencies compared to the current arrangement.
92. While we accept that moving these maintenance facilities might create additional capacity at Maritime Terminal, we do not consider it would be proportionate in the circumstances of this appeal to require Freightliner to do so. In this respect we note that Freightliner has considered this issue but decided against moving the maintenance facilities to another terminal on grounds of cost and the loss of opportunities to service wagons as and when they visit Maritime Terminal.
93. As set out in our Guidance, significant alterations are not expected if they involve disproportionate cost³⁴. While such changes may create some capacity the costs of moving the maintenance facilities and acquiring another site would obviously be considerable under any reasonable estimate as well as potentially impacting on Freightliner's operations while such a transition was underway. ORR does not consider that a facility owner should be required to make changes to its facilities, which would involve the wholesale relocation of maintenance and servicing facilities, in order to accommodate another operator's services. Taking all of this into account, ORR does not consider this would be proportionate in the circumstances both in relation to costs and as regards disruption to Freightliner's operations.
94. While ORR considers some of the capacity problems could be resolved if the sidings were lengthened within Maritime Terminal, we accept that there are physical constraints that impact on the ability to lengthen the sidings. A culvert and industrial use at the east end restricts expansion beyond the boundary fence on the eastern side. Maritime Terminal is also bounded on other sides by the port road and the railway mainline. While there potentially appears to be room for some extension to the sidings to the west, a low road bridge would prevent the use of the cranes as it is too low for cranes to move under. This effectively obstructs the use of the cranes at that point and therefore blocks the efficient use of any extension of the sidings.

³³ Paragraph 3.33 of DBS's representations of 21 August 2015.

³⁴ Paragraph 2.16 of ORR's Guidance.

Efficient operations

95. ORR has also considered whether Maritime Terminal could be operated more efficiently so as to create additional capacity.
96. We are not persuaded by DBS's arguments that the use of parallel stacking instead of chevron stacking, or better use of the cranes, could be relied upon to significantly increase capacity. Indeed we note that DBS acknowledges that the "*...debate regarding in-line or herringbone positioning of containers under the crane has clearly been considered at length by Freightliner.*" Having regard to the operational requirements of Maritime Terminal, we have no reason to believe that the cranes are not being efficiently utilised by Freightliner.
97. DBS in its further representations has made a number of assertions as to how Maritime Terminal could be operated more efficiently in order to improve capacity to the extent necessary to accommodate its request. ORR did not observe obvious inefficiencies during its site visit. We are also persuaded in this regard by Freightliner's argument that if there were extra capacity at Maritime Terminal, this would be being used either by it, rather than running trains through Millbrook, or by third parties who would then be contributing to the cost of running Maritime Terminal and reducing Freightliner's operational costs.

Further investment

98. It is possible that further investment at Maritime Terminal could increase capacity, as suggested in the Capacity Report. However, while The Regulations create a presumption of access, as stated in our Guidance³⁵ we do not consider that the Regulations generally create an obligation on a facility owner to provide a service facility which does not already exist and/or which would impose a disproportionate cost on the facility owner. In the context of this case, investing in infrastructure on the scale necessary to create additional capacity or buying new cranes would involve significant commitment and expenditure.
99. We would not expect a facility owner to have to substantially change its facilities for the benefit of others, which it would not otherwise choose to do. Our view is that Freightliner cannot be compelled to make significant investment at Maritime Terminal on the scale involved in an attempt to increase capacity for the purpose of seeking to accommodate DBS's request.

Charges and contractual issues

100. This appeal has resulted from Freightliner's refusal to grant access to, and services at, Maritime Terminal. As such the issues concerning the charges that would apply are secondary. DBS's appeal included a draft access contract which it wanted ORR to approve. Given our Decision is to dismiss this appeal, it is not necessary for us to address the proposed terms of access in this case.

³⁵ Paragraph 2.16 of ORR's Guidance.

Conclusion

101. In determining this appeal, ORR has started from the position that the Regulations create a presumption of access but recognising that ORR is also required to have regard to its section 4 duties, in particular those set out in paragraph 19 above. We have also taken into account the representations made by both parties, the observations following the site visit to Maritime Terminal and the Guidance.
102. ORR is satisfied that Freightliner has provided a fully reasoned and objectively justified case for refusing DBS's request for access to Maritime Terminal and that there is insufficient spare capacity for extra train services to enable it to agree to DBS's request.
103. DBS argued that the slots could be found if Maritime Terminal was operated more efficiently. However, we find that Freightliner has provided objective reasons justifying why it operates Maritime Terminal the way it does. We have not been persuaded that Maritime Terminal's operations are being run in an inefficient manner such that it is limiting available capacity at Maritime Terminal.
104. Moreover, ORR considers that requiring Freightliner to make further investment at Maritime Terminal to create additional capacity for the purpose of accommodating DBS's request would be disproportionate in the circumstances.
105. Overall, ORR finds that Freightliner is therefore justified, in the specific circumstances of this appeal, in denying DBS access to Maritime Terminal on the grounds of non-availability of capacity and that in refusing access on this basis DBS has not been unfairly treated or discriminated against.

Observations

Conduct prior to the appeal

106. This has been a long and complex case. Both parties have indicated at various stages that the appeal has required the input of considerable management time and resources. We appreciate the efforts made by both parties in substantiating their representations.
107. We also note that DBS started its engagement with Freightliner in early 2014. It would appear that there was a breakdown in communications at some stage. As already [described](#), DBS formally wrote to Freightliner on 9 June 2014 requesting access to Maritime Terminal citing the Code. DBS and Freightliner are both parties to the Code. The objective is to set out a process for granting access to freight sites. Under it, Freightliner was required, in the event of refusal of access, to detail its grounds for refusal.
108. We expect parties to make use of the Code and to fully explore the ways of resolving an issue before appealing to ORR. It seems clear here that there was a fundamental disagreement between Freightliner and DBS. However, if

Freightliner had provided DBS with its reasons for refusal of the request more clearly at an early stage, or if DBS had requested these before launching its appeal, then possibly this matter could have been resolved between the parties. In the event it could not be resolved, it would, alternatively have meant that the key arguments and issues would have been clearly set out at the start of the appeal and therefore readily available to ORR. ORR would consequently have been able to process the appeal much more promptly.

Transparency

109. We would also observe that it may assist third parties who are interested in obtaining access to Maritime Terminal, if Freightliner provided greater clarity on, and was more transparent as to, the operational capacity of Maritime Terminal and likelihood of access. If third parties were aware of what capacity was available or could become available in the near future it could assist such parties in understanding access availability and may help to avoid issues of access becoming subject to an appeal.

Disclosure

110. With regard to disclosure and the scope of redactions, we have clarified the approach at some length as set out above. It is our intention to provide guidance on redactions.

ORR Decision

111. ORR's decision, made on 23 October 2015, is:

ORR dismisses this appeal and determines that Freightliner Limited's refusal to grant DB Schenker Rail (UK) Limited access and services on the terms sought was justified.



Robert M Plaskitt

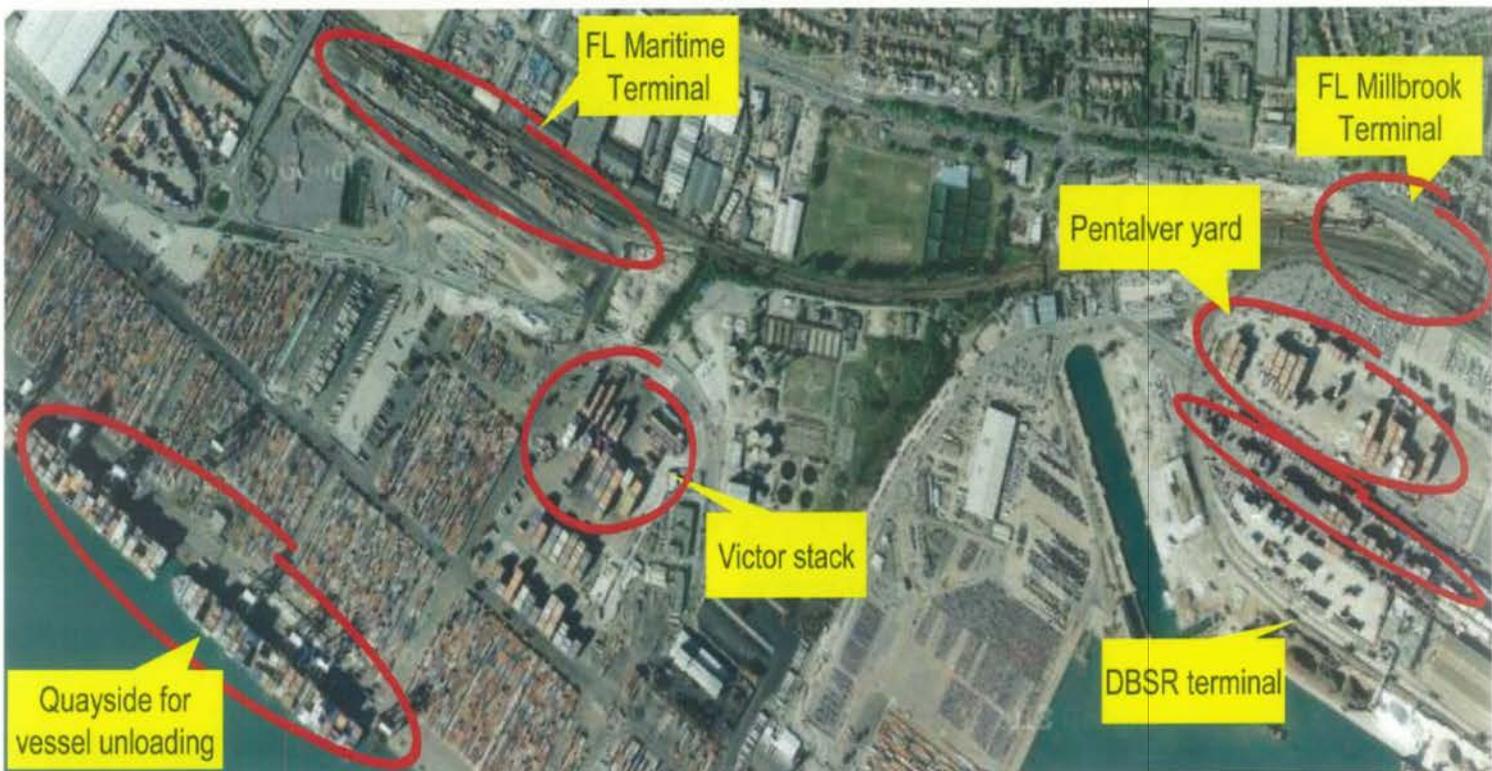


Robert Plaskitt
Duly authorised by the Office of Rail and Road

Annex 1 – Map of Southampton Port and the terminals



Overview of Southampton Port and Rail Infrastructure



Annex 2 – Regulation 6 and 29 of the Regulations

Regulation 6: Access to terminals and ports

- 6.— (1) Subject to paragraph (2), an international grouping or railway undertaking is entitled, for the purposes of the rail activities referred to in regulation 5, to track access to and the supply of services in terminals and ports linked to the rail network which serve, or potentially serve, more than one final customer.
- (2) Requests by international groupings and railway undertakings, in accordance with the entitlements conferred by paragraph (1), may be subject to restrictions only if viable alternatives by rail under market conditions exist.
- (3) The infrastructure manager or, as the case may be, service provider must ensure that the entitlements conferred by this regulation are honoured, and that access to, and the supply of, services is granted in a transparent and non-discriminatory manner.
- (4) Without prejudice to the generality of regulation 29, if an international grouping or railway undertaking is denied the entitlements conferred on it by this regulation, or if the entitlements are made subject to restrictions other than in accordance with paragraph (2), that international grouping or railway undertaking has a right of appeal to the Office of Rail Regulation in accordance with regulation 29.

Regulation 29 of the Regulations: Appeals to the regulatory body

29. - (1) An applicant has a right of appeal to the Office of Rail Regulation if it believes that it has been unfairly treated, discriminated against or is in any other way aggrieved, and in particular against decisions adopted by the infrastructure manager, an allocation body, a charging body, a service provider or, as the case may be, a railway undertaking, concerning any of the matters described in paragraph (2).
- (2) Those matters are--
- (a) the network statement produced in accordance with regulation 11;
 - (b) the information which, by virtue of regulation 11(4), must be included in that network statement;
 - (c) the allocation process and its result as prescribed in Part 5 and Schedule 4;
 - (d) the charging scheme and charging system established in accordance with regulation 12;
 - (e) the level or structure of infrastructure fees, the principles of which are prescribed in Part 4 and Schedule 3, which it is, or may be, required to pay; and
 - (f) the arrangements in connection with the entitlements to access granted under Part 2 and Schedule 2.
- (3) Where the matter of an appeal under this regulation is one in relation to which directions may be sought from the Office of Rail Regulation under sections 17 or 22A of the Act, the applicant must lodge the appeal by way of an application under the relevant section and, subject to any applicable provisions of these Regulations, the appropriate provisions of that Act shall apply to the consideration of that application.
- (4) Where the matter of an appeal under this regulation is one to which paragraph (3) does not apply because--
- (a) the railway facility to which the appeal relates is, by virtue of section 20 of the Act, an exempt facility;
 - (b) the appeal relates to a rail link facility; or
 - (c) the subject matter of the appeal is not within the scope of directions which may be sought under sections 17 or 22A of the Act, the applicant must lodge the appeal by way of an application under this regulation, in such form and manner as the Office of Rail Regulation may from time to time prescribe.
- (5) When considering an appeal in respect of circumstances described in paragraph (6), the Office of Rail Regulation is under a duty to determine whether, in respect of the access to which the appeal relates, viable alternatives under market conditions exist.
- (6) Those circumstances are when the appeal contests that--
- (a) viable alternatives by rail under market conditions do not exist so as to justify a request under regulation 6(2) being subject to restrictions; or
 - (b) viable alternative means of the service being provided under market conditions do not exist so as to justify the refusal of a request for the supply of services under regulation 7(4).
- (7) Subject to paragraph (8), the Office of Rail Regulation must, within two months of the date of receipt of all relevant information (including information provided pursuant to regulation 31)--

- (a) make a decision on; and
 - (b) 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 arising out of, an appeal brought under this regulation.
- (8) Where a decision or direction under paragraph (7) would affect a rail link facility or, as the case may be, the operation of the development agreement, the Office of Rail Regulation must consult and, subject to paragraph (9), take into account any representations made by, the Secretary of State before making or issuing such a decision or direction.
- (9) Where paragraph (8) applies and, following consultation, the Secretary of State submits representations, the Office of Rail Regulation must, before making or issuing a decision or direction, consult such interested parties as it considers appropriate on the representations submitted by the Secretary of State.
- (10) In making a decision on an appeal brought under this regulation against refusal by an infrastructure manager or allocation body to allocate infrastructure capacity, or against the terms of an offer of infrastructure capacity, the Office of Rail Regulation must either--
- (a) confirm that no modification of the infrastructure manager or allocation body's decision is required; or
 - (b) require modification of that decision in accordance with directions issued by that Office.
- (11) Without prejudice to the right of any person to make an application to the court under Part 54 of the Civil Procedure Rules 1998--
- (a) a decision by the Office of Rail Regulation on an appeal brought under this regulation is binding on all parties affected by that decision; and
 - (b) it is the duty of any person to whom a direction is given under this regulation to comply with and give effect to that direction.
- (12) Where the subject matter of an appeal relates to the allocation of capacity crossing more than one network and, in particular, the procedures described in regulation 17, the Office of Rail Regulation may, where the decision of an infrastructure manager in another Member State is a material fact, refer that appeal to the Commission for a decision.

Annex 3 – Section 4 General duties of the Secretary of State and [the Office of Rail Regulation] Railways Act 1993

4. (1) [The Office of Rail Regulation] [shall] have a duty to exercise the functions assigned or transferred to [it] under or by virtue of this Part [or the Railways Act 2005 that are not safety functions] in the manner which [it] considers best calculated—

[(zb) to promote improvements in railway service performance;

(a) otherwise to protect the interests of users of railway services;]

(b) to promote the use of the railway network in Great Britain for the carriage of passengers and goods, and the development of that railway network, to the greatest extent that [it] considers economically practicable;

[(ba) to contribute to the development of an integrated system of transport of passengers and goods;

(bb) to contribute to the achievement of sustainable development;]

(c) to promote efficiency and economy on the part of persons providing railway services;

(d) to promote competition in the provision of railway services [for the benefit of users of railway services];

(e) to promote measures designed to facilitate the making by passengers of journeys which involve use of the services of more than one passenger service operator;

(f) to impose on the operators of railway services the minimum restrictions which are consistent with the performance of [its] functions under this Part [or the Railways Act 2005 that are not safety functions];

(g) to enable persons providing railway services to plan the future of their businesses with a reasonable degree of assurance.