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BY EMAIL ONLY

To: Northern Ireland Railways Company Limited
NIR Networks Limited
NIR Operations Limited
Department for Infrastructure, Northern Ireland
Consumer Council, Northern Ireland

Implementing Regulation on Service Facilities: ORR consultation

Introduction

1. Access to service facilities and transparency are key to the efficient working of the rail services market for both passenger and freight traffic. In November 2017 a new EU regulation was made concerning access to such facilities. The Office of Rail and Road (“ORR”) now intends to update the published guidance on the law in this area. The purpose of this consultation is to seek your views on a revised draft of our guidance.
2. The proposed revised guidance is attached. We have provided a copy tracking the changes we have made. In addition, the proposed changes are outlined below.

Responses

3. I would welcome your feedback on our proposals. Please send your response to this consultation to me at StationsandDepots@orr.gov.uk by 2 August 2019.

The Implementing Regulation

4. *Commission Implementing Regulation (EU) 2017/2177 of 22 November 2017 on access to service facilities and rail-related services* (the “Implementing Regulation”) was made by the European Commission under Directive 2012/34/EU (the “Recast Directive”). It is directly applicable in the UK and does not need further transposition into UK law. It applies in full from 1 June 2019. Some provisions relating to applications for exemptions have applied since 1 January 2019.
5. The UK, like other EU member states, has already transposed the Recast Directive through *the Railways (Access, Management and Licensing of Railway Undertakings) Regulations 2016 (as amended)* (the “GB Regulations”) in Great Britain and *The Railways Infrastructure (Access, Management and Licensing of*



*Railway Undertakings) Regulations (Northern Ireland) 2016 (as amended)*¹ (the “NI Regulations”) in Northern Ireland. This consultation focuses on the NI Regulations. The Implementing Regulation lays down new and additional rules for service providers² in particular. These apply alongside the NI Regulations and add further detail.

6. You may also be aware of other recent changes to the law in this area. This consultation is confined to Implementing Regulation 2017/2177.

ORR guidance

7. We have already consulted on and published guidance on the NI Regulations³. We need to update the guidance to reflect the Implementing Regulation. We intend to publish the updated guidance following the conclusion of this consultation.
8. We have also consulted on equivalent changes to the GB Regulations as the Implementing Regulation applies equally to GB and NI⁴.
9. In the revised draft of our guidance, we focus on the most significant requirements added by the Implementing Regulation rather than commenting on every detail. There are also some elements that are unchanged. For example, the Implementing Regulation does not materially affect ORR’s procedures for considering appeals. We therefore leave those sections of our guidance unchanged. The matters that can be appealed are affected by the Implementing Regulation and are discussed below.
10. It is important to note that ORR guidance is made in general terms and intended to help interpret what is required and provide consistency of approach. It is the responsibility of infrastructure managers and service providers to ensure that they comply with all the relevant legislation. If there are any matters that you consider we should clarify further or outline in more detail then please include this in your response. In particular, is it clear how the Implementing Regulation affects you and what you need to do?

Consultation

11. We have worked through the requirements of the Implementing Regulation. For some provisions we have also worked with other European regulatory bodies through the Independent Regulators Group (IRG). We have prepared a revised draft of our guidance for the NI Regulations, which is marked up to show the changes from the existing guidance. This is attached. However, this is for consultation and is not necessarily the final version. We would appreciate your

¹ The NI regulations were amended in 2019 following implementation of the Fourth Railway Package.

² Technically referred to in the Implementing Regulation as *operators of service facilities*.

³ https://orr.gov.uk/_data/assets/pdf_file/0004/25933/northern-ireland-access-and-management-2016-regulations-guidance.pdf

⁴ The content and structure of the two guidance documents is different but we will endeavour to make equivalent changes and adopt a consistent approach.

comments. We will then consider any responses we receive before finalising and publishing a revised guidance document.

12. The Implementing Regulation already has legal force. Our guidance is intended to help interpret what is required and provide consistency of approach, but these are not ORR requirements. When commenting on the guidance please bear in mind that we have no discretion to deviate from the Implementing Regulation's legal requirements. We note that in Northern Ireland there is currently a limited number of operators in this area.
13. This letter invites your comments on the draft guidance. It also sets out and explains the changes we are proposing and the reasons for them.
14. Any reference below to a *regulation* refers to a regulation in the NI Regulations. Any reference to an *article* refers to an article in the Implementing Regulation.

Information provision

15. Under the NI Regulations, service providers must already make available information about their service facilities. Under regulation 13 of the NI Regulations service providers must provide the infrastructure manager (the "IM") for the infrastructure to which it is connected with certain specified information to be included in the relevant network statement.
16. The information covers a range of issues including access, charges and disputes resolution processes. Service providers may provide the information on their own websites and, where they do, provide the infrastructure manager with a link to be included in the network statement. Or they may provide the infrastructure manager with the information for publication in the network statement.
17. This is not new but we take this opportunity to remind service providers of the requirements that are already in place. If you are not currently making this information available, you should review this.

Main changes

Service facility descriptions (article 4 of the Implementing Regulation)

18. Article 4 of the Implementing Regulation requires service providers to draft and publish a 'service facility description' for the service facilities and services for which they are responsible. The requirement builds on information requirements in the NI Regulations. Our revised guidance reflects this requirement.

Publication and common template (article 5 of the Implementing Regulation)

19. Under article 5 service facility descriptions must be published on a website or through a network statement. IMs⁵ have developed a common template for use across the EU that service providers may use. Our guidance emphasises that this template is not mandatory, although we encourage its use.

⁵ Through the Rail Net Europe (RNE) network

Access requests (articles 8 - 13 of the Implementing Regulation)

20. Service providers must allow railway undertakings access to service facilities on an equitable, non-discriminatory and transparent basis, subject to specified exceptions. Regulation 5 of the NI Regulations provides that a request for access may only be refused if there is another service facility, which is a viable alternative (provided that this does not require the service provider to make investments in resources or facilities in order to accommodate all requests). It also provides that, where there is a conflict between requests, the service provider must attempt to meet all requests in so far as possible.
21. The Implementing Regulation sets out further detail about how requests for access should be considered. This includes setting out a coordination procedure, which should be followed where there is a conflict between two requests for access or between a request for access and capacity already allocated. The Implementing Regulation also sets out further detail around determining whether there is a viable alternative and broadens the circumstances in which service providers need to consider whether there is a viable alternative.
22. We propose to state in our guidance that we encourage the assessment of viable alternatives to be conducted jointly by the service provider and the railway undertaking in all cases, while noting that the Implementing Regulation only requires this for conflicting requests. This is because we consider that such an assessment is likely to be much more robust if the service provider and the railway undertaking work together to produce it.
23. We also propose to state in our guidance that we expect service providers to set out any decision to refuse an access request in writing, together with its justification and any assessment that there is a viable alternative. While the NI Regulations and the Implementing Regulation only require this in specified cases, the railway undertaking has a right to appeal such a refusal to ORR and we consider that all parties will be in a better position if the refusal decision is in writing and properly reasoned.

Unused facilities (article 15 of the Implementing Regulation)

24. Our guidance on the NI Regulations explained the so-called 'use it or lease it' provisions. The NI Regulations oblige service providers to lease service facilities if they have not been used for at least two consecutive years and there has been an expression of interest to use them. Article 15 of the Implementing Regulation adds further details.
25. These provisions are separate to the other access provisions in the Implementing Regulation so we propose covering the additional requirements for unused facilities in our revised guidance in a separate Chapter.

Access appeals

26. In our opinion the Implementing Regulation does not materially affect ORR procedures for considering appeals. We therefore leave those sections of our

guidance unchanged. That said, the matters that can be appealed are affected by the Implementing Regulation, as discussed in the rest of the guidance.

27. The Railways Infrastructure (Access, Management and Licensing of Railway Undertakings) (Amendment) Regulations (Northern Ireland) 2019⁶ provide additional matters that can be appealed. For completeness we reflect those in the revised guidance document.

Exemptions (article 2 of the Implementing Regulation)

28. Article 2 allows service providers to request exemption from the Implementing Regulation.
29. Operators of heritage railways can be exempted from the whole of the Implementing Regulation. Most heritage railways in the UK will not be covered by the Recast Directive and therefore will not need to apply to ORR for an exemption. However, there may be some that are covered. European regulatory bodies (IRG)⁷ have produced a position paper on definitions of heritage railways in this context⁸. ORR will take this paper into account when making relevant decisions for any applications made to us.
30. Under article 2(2) other service providers may apply for limited exemptions if they meet certain criteria related to their circumstances. IRG has developed a set of common principles for exemptions. Service providers who believe that this exemption is warranted should apply to ORR in writing. We will consider applications on a case by case basis in the light of IRG's common principles⁹.

Responses and publication

31. I would be grateful for any comments on the issues raised above or on our proposed draft guidance. Please send your comments to me at StationsandDepots@orr.gov.uk by 2 August 2019.
32. We plan to publish all responses to this consultation on our website. This may include your personal data such as your name and job title.
33. Should you wish any information that you provide, including personal data, to be treated as confidential, please be aware that this may be subject to publication, or release to other parties or to disclosure, in accordance with the access to information regimes. These regimes are primarily the Freedom of Information Act 2000 (FOIA), the General Data Protection Regulation (GDPR,) the Data Protection Act 2018 (DPA) and the Environmental Information Regulations 2004.
34. Under the FOIA, there is a statutory code of practice with which public authorities must comply and which deals, amongst other things, with obligations of

⁶ <http://www.legislation.gov.uk/nisr/2019/15/made>

⁷ Independent Regulators Group: IRG-Rail, Subgroup Access to Service Facilities

⁸ [file:///C:/Users/gherbert/Downloads/IRG-Rail_18_8_-_Compilation_of_national_definitions_of_heritage_railways%20\(2\).pdf](file:///C:/Users/gherbert/Downloads/IRG-Rail_18_8_-_Compilation_of_national_definitions_of_heritage_railways%20(2).pdf)

⁹ <https://www.irg-rail.eu/irg/documents/position-papers/199,2018.html> Common Principles on granting exemptions under Article 2 (2) of Commission Implementing Regulation (EU) 2017/2177

confidence. In view of this, if you are seeking confidentiality for information you are providing, please explain why. If we receive a request for disclosure of the information, we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on ORR.

35. If you are seeking to make a response in confidence, we would also be grateful if you would annex any confidential information, or provide a non-confidential summary, so that we can publish the non-confidential aspects of your response.
36. Any personal data you provide to us will be used for the purposes of this consultation and will be handled in accordance with our [privacy notice](#), which sets out how we comply with the General Data Protection Regulation and Data Protection Act 2018.
37. As stated above, we will consider any responses we receive before finalising and publishing our revised guidance.

Yours faithfully

A handwritten signature in blue ink, appearing to read 'Gerry', with a stylized flourish at the end.

Gerry Leighton