



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

**Access to infrastructure and service
facilities, infrastructure managers,
and making an appeal**

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Contents



1. Overview	3
Introduction	3
The Implementing Regulation on service facilities	6
Equivalent regulations	7
Interpretation	7
Key changes	7
Other ORR guidance	8
2. Access to infrastructure	9
Introduction	9
Regulation 5: access rights	9
Regulation 6(1): Minimum access package	10
3. Infrastructure managers	11
Introduction	11
Infrastructure management and independence of undertakings	11
Network statements	11
Infrastructure charges	13
Allocation of infrastructure capacity	15
4. Access to service facilities	16
Introduction	16
Provision of information	16
Service facility charges	31
Unused service facilities	32
6. Appeals	34
Introduction	34
Appeals to ORR	34
The appeals process	38
Annex: Key Definitions	43

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)¹. It focuses on these key areas:
 - Access to infrastructure and service facilities.
 - Infrastructure managers' responsibilities.
 - Appeals to ORR.
2. The 2016 Regulations transpose *Directive 2012/34/EU establishing a single European railway area* (the Recast Directive²) into GB law. To implement *Directive (EU) 2016/2370 amending Directive 2012/34/EU as regards the opening of the market for domestic passenger transport services by rail and the governance of the railway infrastructure*, the 2016 Regulations were amended by *The Railways (Access, Management and Licensing of Railway Undertakings) (Amendment) Regulations 2019* (the 2019 Regulations)³. Certain amendments only apply until the end of 2020.
3. This guidance also reflects the provisions of the Commission Implementing Regulation (EU) 2017/2177 of 22 November 2017 on access to service facilities and rail-related services (the **Implementing Regulation**)⁴, which supplements a number of obligations set out in the 2016 Regulations (relating to service facilities).
4. This guidance reflects significant elements of the legislation 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.
5. In particular, while this guidance covers changes to existing provisions of the 2016 Regulations made by the 2019 Regulations, it does not cover all the new provisions introduced by the 2019 Regulations. You should read the 2016 Regulations in full and as amended.

¹ <http://www.legislation.gov.uk/ukxi/2016/645/made>

² The Recast Directive:

<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32012L0034&from=EN>

³ <http://www.legislation.gov.uk/ukxi/2019/82/contents/made>

⁴ The Implementing Regulation:

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

6. The chapters in this module are structured as follows:
- 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 6: [Appeals](#).
 - Annex: [Definitions](#).

The 2016 Regulations

7. When the Recast Directive was adopted in November 2012, it was intended to simplify and consolidate the previous directives into a single text. In addition it clarified certain provisions and tackled certain problem areas identified in the market over the years, including access to rail-related facilities. The changes made by the Recast were designed to address issues in the EU railway market such as low levels of competition within rail, low levels of public and private investment in railways and inadequate market supervision and regulatory oversight within some EU Member States.
8. The Recast Directive was updated in 2016 as part of the ‘market pillar’ of the fourth railway package, which consists of a set of legislative instruments⁵ aimed at completing the process of liberalisation of the rail passenger market. The 2016 Regulations were amended by the 2019 Regulations, which were laid before Parliament on 21 January 2019 and came into force on 11 February 2019, to implement the changes to the Recast Directive. As said above, certain amendments apply until the end of 31 December 2020.
9. The 2016 Regulations and the Implementing Regulation apply alongside the Railways Act 1993 (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.

⁵ - Directive 2016/2370/EU amending Directive 2012/34/EU, which deals with the opening of the market of domestic passenger transport services by rail and the governance of the railway infrastructure ('Governance Directive').

- Regulation (EU) 2016/2338 amending Regulation (EU) 1370/2007, which deals with the award of public service contracts for domestic passenger transport services by rail ('PSO Regulation').

- Regulation (EU) 2016/2337 repealing Regulation (EEC) 1192/69 on the normalisation of the accounts of railway undertakings.

Application of the 2016 Regulations

10. The 2016 Regulations describe entitlements and obligations in respect of access and governance for railway undertakings (as well as service providers and infrastructure managers).
11. 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. 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.
12. 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
 - 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,

do not apply to the following networks⁶:

- 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;

⁶ Please note that this list was added to by the 2019 Regulations, for a transitional period. See the 2019 Regulations for these additions.

- used solely in connection with the carrying out of any building works;
- within a military establishment.

13. The Department for Transport has produced separate guidance on the scope of the 2016 Regulations⁷.

The Implementing Regulation on service facilities

14. The Recast Directive envisaged the use of secondary legislation, including implementing regulations, in some areas to set out particular detailed requirements. The Implementing Regulation⁸ sets out new rules relating to service facilities. It was adopted in November 2017 and most provisions apply from 1 June 2019⁹.
15. The Implementing Regulation is directly applicable in the UK and EU Member States.
16. The Implementing Regulation applies to all service providers covered by the Regulations 2016. As noted above, the Recast Directive allowed Member States to exempt certain railway undertakings and networks from certain provisions relating to the access regime and these exemptions are reflected in GB through the 2016 Regulations. Where a service facility is not subject to the requirements in the 2016 Regulations, the Implementing Regulation will not apply to it.
17. Even where the 2016 Regulations do apply to the service facility, it is possible for certain service facilities to apply to ORR for exemptions from certain provisions. The procedures for doing this are explained below.
18. Article 2(2) of the Implementing Regulation allows ORR to exempt service providers¹⁰ from all or some of its provisions, with some exceptions¹¹. Article 2(1) states that operators of service facilities that exist solely for use by heritage railway operators for their own purposes may request exemption from the whole of the Implementing Regulation. ORR will consider any applications received on a case by

⁷ DfT guidance on scope: <https://www.gov.uk/government/publications/recast-first-railway-package-guidance-on-scope-of-2016-transposition-regulations>

⁸ The Implementing Regulation: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32017R2177>

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

¹⁰ According to Art. 2(2), the operators of service facilities that operate the following service facilities or provide the following services: service facilities or services which do not have any strategic importance for the functioning of the rail transport services market, in particular as regards level of use of the facility, the type and volume of traffic potentially impacted and the type of services offered in the facility; service facilities or services which are operated or provided in a competitive market environment with a variety of competitors providing comparable services; service facilities or services where the application of this Regulation could negatively impact the functioning of the service facility market.

¹¹ According to Art. 2(1), these service providers may request to be exempted from the application of all or some of the provisions of the Implementing Regulation, with the exception of Articles 4(2)(a) to (d) and (m) and 5.

case basis. We will have regard to the criteria set out in the Implementing Regulation and the Independent Regulators' Group (Rail)'s (IRG-Rail) paper on exemptions¹².

19. Exemption from the Implementing Regulation **does not** provide exemption from any of the obligations under the 2016 Regulations or the Act.

Equivalent regulations

20. The 2016 Regulations do not extend to Northern Ireland and separate regulations apply. Please see our separate guidance¹³.
21. 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.

Interpretation

22. In this guidance, except where specifically indicated otherwise, a reference to a regulation is to the 2016 Regulations and a reference to an article is to the Implementing Regulation. Some key definitions are set out in the [annex](#) to this module for ease of reference.
23. Please note that through the different legislation there are now a variety of different terms covering the operators, managers and owners of service facilities and sites. For convenience, we generally refer simply to **service providers** and **service facilities** in this guidance. If you are in any doubt as to whether a provision applies to you, please refer directly to the legislation.

Key changes

24. Key changes made by the Implementing Regulation and the 2019 Regulations, as reflected in this guidance, include:

Implementing Regulation

- Service providers must provide Service Facility Descriptions containing specific information about their service facilities.
- Infrastructure managers, like Network Rail, must provide a template, facilitate collection of Service Facility Descriptions and publish them through their network statements.

¹² Independent Regulators' Group – Rail Subgroup on Access to Service Facilities Common Principles on granting exemptions under Article 2 (2) of Commission Implementing Regulation (EU) 2017/2177 <https://www.irg-rail.eu/>

¹³ <http://orr.gov.uk/rail/economic-regulation/northern-ireland-regulation>.

- Certain exemptions are possible.
- Details are added for the process for considering access requests.
- Clarification is added for unused service facilities.

The 2019 Regulations

- Until the end of 31 December 2020, modifications are made by the 2019 Regulations to the 2016 Regulations, affecting a number of areas, including:
 - Interpretation and definitions.
 - Scope.
 - Access rights.
 - Infrastructure management: independence; outsourcing and sharing functions; impartiality in respect of traffic management and maintenance planning.
 - Appeals.

25. Whilst we have endeavoured to flag relevant changes in this guidance, we recommend that you also refer in detail to the legislation. It is the responsibility of individual businesses to ensure that they are compliant with the law.

Other ORR guidance

26. ORR has also published other guidance that may be relevant and of interest. This section sets out some of them.
27. The 2016 Regulations require us to monitor the competitive situation in the rail services market. This duty sits alongside our monitoring responsibilities under the Act and competition law. Guidance, '*ORR's approach to monitoring and reviewing markets*', is available on our website¹⁴.
28. ORR has the power to fine a 'relevant operator' who has contravened or is contravening a decision, direction or notice issued by us under the 2016 Regulations. ORR's policy regarding the imposition of penalties, '*ORR's economic enforcement policy and penalties statement - Great Britain*', is available on our website¹⁵.
29. We have published a suite of separate guidance modules on access contracts and our approach to regulating track access on our website¹⁶.

¹⁴ https://orr.gov.uk/_data/assets/pdf_file/0007/23974/orr-approach-to-monitoring-and-reviewing-markets.pdf

¹⁵ https://orr.gov.uk/_data/assets/pdf_file/0018/4716/economic-enforcement-statement.pdf

¹⁶ <https://orr.gov.uk/rail/access-to-the-network/track-access/guidance>

2. Access to infrastructure

Introduction

1. The entitlement of railway undertakings to access railway infrastructure and service facilities are 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)¹⁷ applies to railway undertakings operating all types of rail freight services or passenger services. It gives these railway undertakings rights to access 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 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, and the exercise of such access rights would compromise the economic equilibrium of the public service contract or contracts in question. This is referred to as the Economic Equilibrium Test on which we have published separate guidance¹⁸.
8. Infrastructure managers must ensure that the entitlements to access provided by regulation 5 are honoured. There is no provision in regulation 5 which enables an infrastructure manager to refuse a request for access made under that regulation.

¹⁷ Regulation 5(1) as amended by the 2019 Regulations

¹⁸ <https://orr.gov.uk/rail/access-to-the-network/track-access/guidance>

9. A railway undertaking has a right to appeal to ORR under regulation 32 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. 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).

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 Regulations¹⁹. The 2019 Regulations introduced further requirements to ensure the independence of the infrastructure manager, in particular as regards the essential functions, traffic management and maintenance planning and financial transparency²⁰.

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). We expect each infrastructure manager to ensure this information is included. We also expect each infrastructure manager to publish annually its network statement.
4. Where a charging body²¹ or an allocation body²² is responsible for the functions of the infrastructure manager, that charging body or allocation body must provide the

¹⁹ 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.

²⁰ See new Regulation 8A on independence of the infrastructure manager, Regulation 8B on outsourcing and sharing the infrastructure manager's functions; Regulation 8C on impartiality of the infrastructure manager in respect of traffic management and maintenance planning; Regulation 9A on financial transparency and amendments made to Regulation 14 on independence in establishing, determining and collecting charges; and to Regulation 19 on independence for capacity allocation. Compliance with the requirements, including those regarding conflicts of interest, set out in regulation 8A, 8B, 8C, 9A, 14(9) and 19(4) can be the subject of an appeal to ORR under regulation 32.

²¹ 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.

²² 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

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
- keep the network statement up to date²³.

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 information²⁴ 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 date²⁵.

They may use the template developed for service providers to do this²⁶.

6. 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 supplied²⁷. 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.

7. 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 32²⁸. An appeal brought in relation to a network statement will be dealt with in accordance with the process set out in Appeals chapter of this guidance²⁹.

²³ See regulation 13(2).

²⁴ 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.

²⁵ See regulation 13(3).

²⁶ Contact Network Rail or the relevant IM for details.

²⁷ See regulation 13(13).

²⁸ See regulation 32(2)(a)(b).

²⁹ <https://orr.gov.uk/rail/access-to-the-network/track-access/guidance>.

Infrastructure charges

8. 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 charges³⁰.
9. ORR is responsible for establishing the charging framework and the specific charging rules governing the determination of the charges to be set by infrastructure managers³¹ except for HS1 and Eurotunnel, to which separate provisions apply³². For Network Rail, ORR fulfils this obligation through the Network Rail periodic review³³.
10. 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 charges³⁴.
11. 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 service³⁵. However, with the appropriate approval, an infrastructure manager may levy mark-ups on the basis of efficient, transparent and non-discriminatory principles³⁶.
12. *The European Commission Implementing Regulation (EU) 2015/909*³⁷ sets out the methodology for calculating costs directly incurred and includes a list of non-eligible costs. Infrastructure managers should familiarise themselves with the detail of this legislation when determining its charges.

Infrastructure costs and accounts

13. For railway infrastructure other than HS1, ORR must ensure that, under normal business conditions and over a reasonable time period (not exceeding 5 years), the accounts of the infrastructure manager at least balance income from railway infrastructure charges, surpluses from other commercial activities, non-refundable

³⁰ 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.

³¹ See regulation 14(1) and 14(6).

³² See regulation 14(3).

³³ <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>.

³⁴ Regulation 14(2)

³⁵ Para 1(4) of Schedule 3.

³⁶ Para 2(1) of Schedule 3.

³⁷ http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2015.148.01.0017.01.ENG

incomes from private sources and state funding, with railway infrastructure expenditure³⁸.

14. For HS1, the Secretary of State must ensure that HS1's infrastructure costs and accounts balance³⁹.
15. ORR is responsible for ensuring the balance of infrastructure accounts for Network Rail through the access charges review⁴⁰. 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 balance⁴¹.
16. 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 charges⁴².

Performance scheme

17. Infrastructure managers must establish a performance scheme as part of the charging system to encourage the minimisation of disruption and to improve overall performance of the network⁴³.
18. This performance scheme may include penalties for actions which disrupt the operation of the network, compensation arrangements for undertakings which suffer from disruption and bonuses that reward better than planned performance⁴⁴.
19. 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 relates⁴⁵.
20. We approve the performance regime for Network Rail as part of the periodic review process.

Reservation charges

21. Infrastructure managers may levy a reservation charge for capacity that is requested but is not used⁴⁶. Where the infrastructure manager chooses to make provision for a reservation charge, that charge must provide incentives for efficient use of capacity

³⁸ Reg 15(1).

³⁹ Reg 15(3).

⁴⁰ Reg 15(2).

⁴¹ Reg 15(4).

⁴² Reg 15(7) and (8).

⁴³ Reg 16(1).

⁴⁴ Reg 16(2).

⁴⁵ Reg 16(3).

⁴⁶ Reg 17(1).

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 them⁴⁷.

22. 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 paths⁴⁸. ORR must also, where such a provision has been made, control such criteria in accordance with regulations 32 and 34⁴⁹.
23. 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 32⁵⁰.

Allocation of infrastructure capacity

24. Part 5 and Schedule 4 (as amended)⁵¹ concern the allocation of infrastructure capacity⁵². 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 caught by any of these provisions.
25. Infrastructure managers are responsible for the establishment of specific capacity allocation rules and for the allocation of infrastructure capacity⁵³. Pursuant to regulation 19(1), there is an established framework⁵⁴ for the allocation of infrastructure capacity.
26. The European Commission adopted new rules in April 2016⁵⁵ regarding the procedures and criteria concerning framework agreements for the allocation of rail infrastructure capacity. These applied from December 2016. Infrastructure managers should ensure they are familiar with, and understand, the requirements.
27. Matters relating to the allocation process and its results can be the subject of an appeal to ORR under regulation 32⁵⁶.

⁴⁷ Reg 17(2).

⁴⁸ Reg 17(3)(a).

⁴⁹ Reg 17(3)(b).

⁵⁰ Reg 32(2)(d) and (e).

⁵¹ The Schedule substantially reproduces the provisions of Annex VII to the Recast Directive (the text of which was replaced by Commission Delegated Decision (EU) 2017/2075).

⁵² 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.

⁵³ Regulation 19(3) and our track access guidance.

⁵⁴ The framework does not apply to HS1. For HS1 it is for the Secretary of State to establish a framework if so required.

⁵⁵ https://ec.europa.eu/transport/modes/rail/news/2016-04-07-new-rules-access-to-rail-infrastructure_en, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32016R0545>

⁵⁶ See reg 32(2)(c).

4. Access to service facilities

Introduction

1. This chapter focuses on access to service facilities. Legislation has permitted railway undertakings to obtain access to other operators' service facilities in Great Britain. This was extended by regulations derived from European directives since 2005 and more recently to the position that access will be granted, unless an exception applies. This chapter sets out how that access regime works and in particular certain key changes introduced by the Implementing Regulation, which include:
 - The introduction of further details regarding the information to be published on the service facility and/or rail related services and the obligation to produce a Service Facility Description.
 - The establishment of timescales for responding to requests.
 - Rules applying when a service provider receives a request that is in conflict with another request and in particular additional provisions relating to the process for considering viable alternatives.
2. Please note that, 'privately owned' facilities do fall within the scope of the legislative requirements.

Provision of information

Summary

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. The Implementing Regulation sets out further detail on information that must be made available, in the form of a Service Facility Description, and on requirements to make this information publicly available.

Service Facility Description

4. Article 4 of the Implementing Regulation provides that service providers must make available a 'Service Facility Description' for the service facilities and services for which they are responsible. The Service Facility Description must include at least the following information:
 - List of all the relevant installations including their locations and opening hours.
 - Key contact details of the service provider.
 - A description of the technical characteristics.

- A description of all rail-related services supplied in the facility and of their type (basic, additional or ancillary).
- The possibility of self-supply and the conditions to be met for self-supply.
- Information on the procedures for requesting access, with any deadlines for submitting the requests and time limits for handling them.
- Information on whether separate requests are needed where there is more than one provider of services.
- Information on the minimum content and format of an access request or a template.
- Model access contracts and general terms and conditions, in particular where service facilities are operated by operators under the direct or indirect control of a controlling entity⁵⁷.
- Information on the terms of use of IT systems, where access to these systems is required, and the rules concerning the protection of sensitive and commercial data.
- A description of the coordination procedure and measures which may be adopted to maximise capacity and any priority criteria.
- Information on changes in technical characteristics and temporary capacity restrictions which could have a major impact on operation.
- Information on charges.
- Information on principles of discount schemes offered, respecting commercial confidentiality requirements.

Publication

5. Article 5 of the Implementing Regulation provides that service providers must make the Service Facility Descriptions available free of charge through the infrastructure manager's network statement⁵⁸. The service provider can supply the Service Facility Description to the infrastructure manager or provide the infrastructure manager with a link to the service provider's Service Facility Description on its own website. The information must be kept up to date as necessary.

⁵⁷ Defined in Article 3 of the Implementing Regulation.

⁵⁸ Network Rail's network statement and service provider information is available here: <https://www.networkrail.co.uk/industry-commercial-partners/information-operating-companies/network-statement/>.

6. EU infrastructure managers⁵⁹ have developed a common template that service providers may use⁶⁰. Although not compulsory, we encourage service providers to use the common template.

Regulation 6: Access to services

7. 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.
8. 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).
9. Requests for access to, and the supply of, services must be answered within a reasonable time limit as set by ORR⁶¹. 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, however, intend to set a separate time limit for short-notice requests at this point in time.
10. 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.
11. The 2016 Regulations⁶² and Article 13(3) of the Implementing Regulation 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. As well as this, Article 13(4) of the Implementing Regulation requires a service provider to demonstrate reasons at the request of an applicant. However, 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.

⁵⁹ Through the Rail Net Europe (RNE) network <http://www.rne.eu/>

⁶⁰ <https://www.networkrail.co.uk/industry-and-commercial/information-for-operators/network-statement/>

⁶¹ Regulation 6(3).

⁶² Regulation 6(5).

Non-conflicting requests for access to services

12. A non-conflicting request is one where the request does not conflict either with requests from other railway undertakings or with capacity at the facility which has already been allocated to another railway undertaking. Regulation 6(4) provides that a request for access to, and the supply of, any of the services described in paragraph 2 of Schedule 2, may only be refused if a viable alternative exists, which would enable the railway undertaking to operate the freight or passenger service concerned on the same or an alternative route under economically acceptable conditions.
13. When considering viable alternatives, the process we would generally expect to be followed (in article 12 of the Implementing Regulation) is set out below.
14. The provisions of regulation 6(4) do not, however, require the service provider to make investments in resources or facilities in order to accommodate all requests by railway undertakings for access to, and the supply of, services. 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.
15. The flowchart at diagram A sets out the indicative process and steps a service provider should follow when considering non-conflicting requests for access to services. It does not, however, cover every eventuality or circumstance and it is for the service provider to ensure it complies with the legal requirements under the 2016 Regulations and the Implementing Regulation.

Conflicting requests for access to services (including conflict with allocated capacity)

16. Regulations 6(7) and 6(8) and articles 10 to 11 of the Implementing Regulation set out the process that must be followed where a service provider receives a request for access to a service facility (or supply of a service), described in paragraph 2 of Schedule 2, which conflicts with another request or with service facility capacity which is already allocated. We refer to these as 'conflicting requests'.
17. Regulations 6(4) and 6(5) apply to conflicting requests as well as non-conflicting requests. In other words, requests may only be refused where there is a viable alternative, but this does not require the service provider to make investments in resources or facilities in order to accommodate all requests. However, for conflicting requests, there are also a number of other provisions to consider.
18. Regulation 6(7) provides that where there are conflicting requests, the service provider must attempt to meet all requests in so far as possible. Article 10 of the Implementing Regulation builds on this by requiring the service provider to complete a coordination procedure as a first step, to attempt to remove the conflict through agreement with affected parties.

Stage 1 - The Coordination Procedure

19. The Coordination Procedure set out in the Implementing Regulation is described in this text box:

Stage 1 - The Coordination Procedure:

- The service provider must attempt to ensure the best possible matching of all requests and meet all requests in so far as possible⁶³. This should be achieved through discussion and coordination with the relevant railway undertakings.
- Where the request conflicts with capacity that has already been allocated at the service facility and would involve modifying access rights which have already been granted, the service provider must get agreement of the railway undertaking affected before making any modifications (and obtain any required regulatory approval).⁶⁴
- Where the railway undertaking has requested access to, or the supply of, services set out in paragraphs 3 and 4 of Schedule 2 and those services are offered in the service facility, the Coordination Procedure must also include the providers of those services.⁶⁵
- The Coordination Procedure must include consideration by the service provider of different options enabling it to accommodate the conflicting requests. These options must, when necessary, include measures to maximise the capacity available in the service facility to the extent they do not require additional investment in resources or facilities, such as:
 - proposing alternative timing;
 - changing opening hours or shift patterns, where possible; and
 - allowing access to the facility for self-supply of services, where self-supply is legally and technically feasible.
- If additional investment is required, but the railway undertaking guarantees to cover the cost of that investment, the service provider should consider this⁶⁶.

⁶³ See article 10(1) of the Implementing Regulation, which requires the service provider to ensure the best possible matching of all requests and regulations 6(7) and 6(8) of the 2016 Regulations, which requires a service provider to attempt to meet all requests in so far as possible and to seek to accommodate all requests for capacity on the basis of demonstrated needs.

⁶⁴ See regulations 6(7) and 6(8) of the 2016 Regulations and article 10(1) of the Implementing Regulation.

⁶⁵ See article 10(1) of the Implementing Regulation.

⁶⁶ Recital 14 of the Implementing Regulation.

20. Article 10(2) of the Implementing Regulation provides that if capacity is available that matches the needs of the railway undertaking or the service provider expects such capacity to become available during or following the Coordination Procedure, the service provider must not reject those requests for access nor indicate to the railway undertaking viable alternatives⁶⁷. This means that, where capacity is expected to be available within this timeframe which will meet an undertaking's needs, the service provider must not pre-empt the outcome of the Coordination Procedure but must complete the Coordination Procedure to attempt to resolve any conflict with affected parties.

Stage 2 – Deciding upon the request(s):

21. If the Coordination Procedure does not lead to a resolution which accommodates all requests in a manner agreed with all parties, the service provider must consider the process for the rejection of requests (or restricting access requested) without the agreement of the undertaking.
22. This would include where the conflict remains between two or more requests or between a request and capacity allocated (where all requests could not be accommodated without additional investment in resources of facilities). It would also include where railway undertakings agree on changes which would resolve the conflict, but where the service provider nevertheless considers that there might be a viable alternative (which would entitle it to reject the request).
23. In considering which requests it might reject from different railway undertakings, the service provider must take into account the demonstrated needs of the railway undertakings.
24. Article 11 of the Implementing Regulation provides that where requests cannot be accommodated after the coordination procedure, the service provider may determine priority criteria to allocate capacity between conflicting requests; although the adoption of priority criteria is not mandatory.

⁶⁷ See article 10(2) of the Implementing Regulation.

Priority Criteria:

- (i) Any priority criteria must be non-discriminatory and objective and published in the Service Facility Description. In addition, such priority criteria must also take into account:
 - (1) the purpose of the service facility;
 - (2) the purpose and nature of the railway transport services concerned; and
 - (3) the objective of securing an efficient use of available capacity.
- (ii) Priority criteria may also take into account the following aspects, as determined by the service provider:
 - (1) existing contracts;
 - (2) the intention and ability to use the capacity requested, including previous failure, if any, to use all or part of allocated capacity and the reasons for that failure;
 - (3) already allocated train paths linked to the requested services;
 - (4) priority criteria for allocation of train paths;
 - (5) timely submission of requests.

25. Where, having been through the Coordination Procedure and, having considered demonstrated needs (and, where applicable, through the application of priority criteria) the service provider proposes to reject a request, the service provider must inform the railway undertaking without undue delay before going on to consider viable alternatives. If requested by ORR, it must also promptly inform ORR of its intention⁶⁸.
26. The Implementing Regulation has broadened the requirements for a service provider to consider viable alternatives. Article 12(2) of the Implementing Regulation requires the service provider to consider whether there is a viable alternative facility whenever the service provider proposes to refuse a request, even where the basis for a refusal is a conflict and the need to make additional investment. However, in such cases the Implementing Regulation does provide that the service provider is not required to indicate viable alternatives or proceed to a joint assessment where the railway undertaking in question has asked it not to⁶⁹.
27. The process for considering viable alternatives is set out [below](#).

⁶⁸ See article 12(1) of the Implementing Regulation.

⁶⁹ See article 12(5) of the Implementing Regulation.

28. Where the service provider refuses a request, or grants a request subject to restrictions, as noted above we expect the decision to be in writing and fully reasoned and objectively justified.
29. We note that the Implementing Regulation provides that where a railway undertaking has requested the service provider not to indicate viable alternatives or proceed to the joint assessment, the service provider may refuse the request and does not have to provide its decision in writing. However, even where the railway undertaking has made such a request, we would generally expect the service provider to still explain its decision in writing. The decision should set out why the request has not been accommodated following the Coordination Procedure, including setting out any viable alternatives which are considered to exist (if this is the basis for the request not being accommodated). This is because the decision may still be subject to an appeal.
30. The flowchart at diagram B sets out the indicative process and steps that a service provider should follow when considering conflicting requests for access to services. It does not, however, cover every eventuality or circumstance and it is for the service provider to ensure it complies with the legal requirements under the 2016 Regulations and the Implementing Regulation.

Constrained capacity

31. 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. However, where a service provider considers that it has constrained capacity we would expect it to:
 - (i) provide a fully reasoned and objectively justified case explaining the nature of the capacity constraints;
 - (ii) demonstrate that it has organised its business in a manner that maximises the available capacity of its service facilities; and
 - (iii) demonstrate that it has examined all options for accommodating the requests.
32. We note that where, following the Coordination Procedure described above, requests cannot be accommodated and the service facility is close to congestion, ORR may request that the service provider takes measures aimed at enabling the accommodation of additional requests for access⁷⁰. Such measures shall be transparent and non-discriminatory. ORR will only make requests that are reasonable in all the circumstances, normally after consultation with the service provider.

⁷⁰ See article 10(5) of the Implementing Regulation.

Viable alternative

33. 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.

The definition of ‘viable alternative’

34. ‘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 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.
35. 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 services⁷¹.
 - (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.
36. The second limb is that the service facility must allow the railway undertaking to operate the freight or passenger services concerned:
- (i) 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.
 - (ii) 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

⁷¹ See Recital 16 of the Implementing Regulation

hours, capacity, driver training requirements and the type of services offered) and the attractiveness and competitiveness of the services (such as routing, transport connections and transportation time)⁷².

- (iii) 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.
- (iv) 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.

37. It is important to note that a service provider will require a robust rationale for stating that another facility is a viable alternative, having considered the above issues in detail. The Implementing Regulation⁷³ recognises that many service facilities cannot be easily duplicated, given the significant investment involved and the limitations on where such facilities can be constructed.

The process for considering viable alternatives

38. The Implementing Regulation sets out a process for the railway undertaking and the service provider to jointly assess whether there are viable alternatives. This process is explained below. Although the process is set out to apply wherever the service provider proposes to reject a request or restrict access following the Coordination Procedure (applicable to conflicting requests), we expect the service provider to take all reasonable steps to conduct a joint assessment wherever it is required to consider viable alternatives (including where there is a non-conflicting request).
39. The viable alternative assessment will involve the service provider indicating possible alternatives (which may include possible alternatives in other Member States where relevant) on the basis of:
- (i) other Service Facility Descriptions;
 - (ii) information published on a common web portal; and
 - (iii) any information provided by the railway undertaking.
40. We expect the railway undertaking to provide a detailed and precise description of its needs when making a request for access, including detailing requirements for access

⁷² See Recital 16 of the Implementing Regulation.

⁷³ See Recital 17 of the Implementing Regulation.

and for the supply of services (including around operational characteristics) and any geographical requirements. However, the railway undertaking is not required to disclose its business strategy and the service provider must respect the commercial confidentiality of the information provided.

41. When proposing possible alternatives the service provider must take into account, as a minimum, the following criteria, to the extent that they can be assessed by the service provider:
 - (i) substitutability of operational characteristics of the alternative service facility;
 - (ii) substitutability of physical and technical characteristics of the alternative service facility;
 - (iii) clear impact on attractiveness and competitiveness of the railway transport service envisaged by the railway undertaking;
 - (iv) estimated additional cost for the railway undertaking.⁷⁴
42. Where information on the capacity of the proposed alternative is not publicly available, the railway undertaking must verify it⁷⁵. [NB. The Implementing Regulation requires service providers⁷⁶ to answer requests for information about available capacity⁷⁷.]
43. Once it has been provided with the possible alternatives, it is then the railway undertaking's role to assess whether using the proposed alternatives will allow it to operate the envisaged transport service under economically acceptable conditions. It must then inform the service provider of the outcome of its assessment within a jointly agreed deadline.
44. Following the joint assessment:
 - (i) It may be that the service provider and railway undertaking have jointly identified viable alternatives, in which case this provides a reason for refusing the request.
 - (ii) Where the service provider and railway undertaking conclude that no viable alternative exists, provided it is not possible for the request to be accommodated without additional investment, the service provider may refuse the request. Whether or not additional investment would be required could be the subject of an appeal to ORR.
 - (iii) If the service provider and railway undertaking do not agree on a viable alternative, the service provider may refuse the request indicating the

⁷⁴ Article 12(3) of the Implementing Regulation.

⁷⁵ Article 12(4) of the Implementing Regulation.

⁷⁶ Of service facilities listed in Schedule 2, par. 2, (b), (c), (d), (f), (g), (h), (i).

⁷⁷ Article 6(2) of the Implementing Regulation.

alternatives it considers to be viable. Whether or not there is actually a viable alternative could be the subject of an appeal to ORR.

45. If the railway undertaking requests the service provider not to proceed to joint assessment and the service provider is rejecting a request on the basis that there is a viable alternative, we expect the service provider to have made a robust assessment with the information it has from the railway undertaking and other information which is available. However, we would not expect a railway undertaking to make such a request if this is a likely basis for rejection. If the issue of whether or not there is a viable alternative is to determine whether or not a request is accepted or rejected, we would expect the railway undertaking to engage fully with any joint assessment and to cooperate with the service provider as the issue of viable alternatives is considered. (A failure to do so might prejudice the railway undertaking's position in any subsequent appeal.)
46. The flowchart at diagram C sets out the indicative process and steps in considering the assessment of viable alternatives. It does not, however, cover every eventuality or circumstance and it is for the service provider to ensure it complies with the legal requirements under the 2016 Regulations and the Implementing Regulation.
47. A railway undertaking may bring an appeal concerning the entitlements to access conferred on it by regulation 5 and/or regulation 6. See the chapter on [Appeals](#).

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

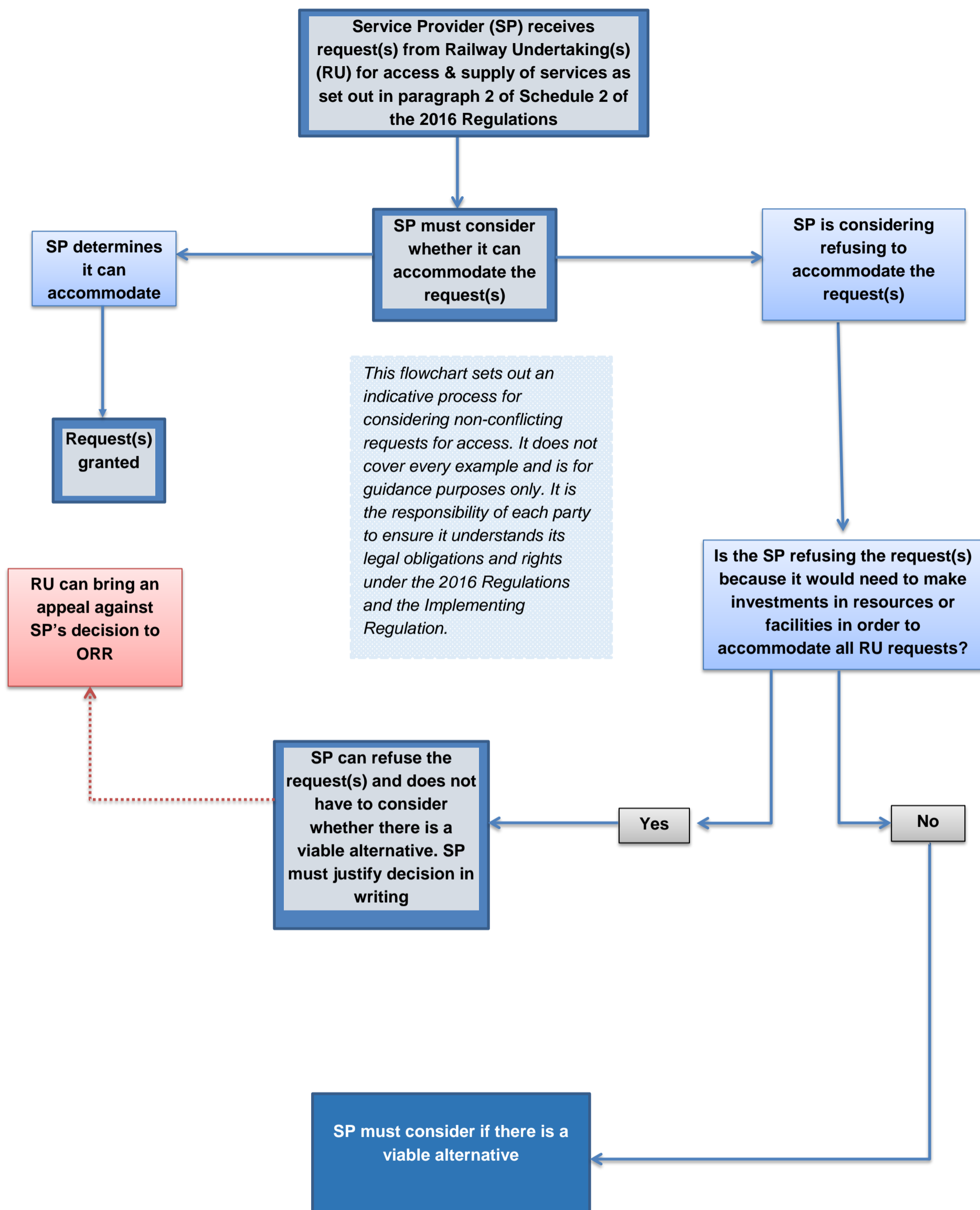
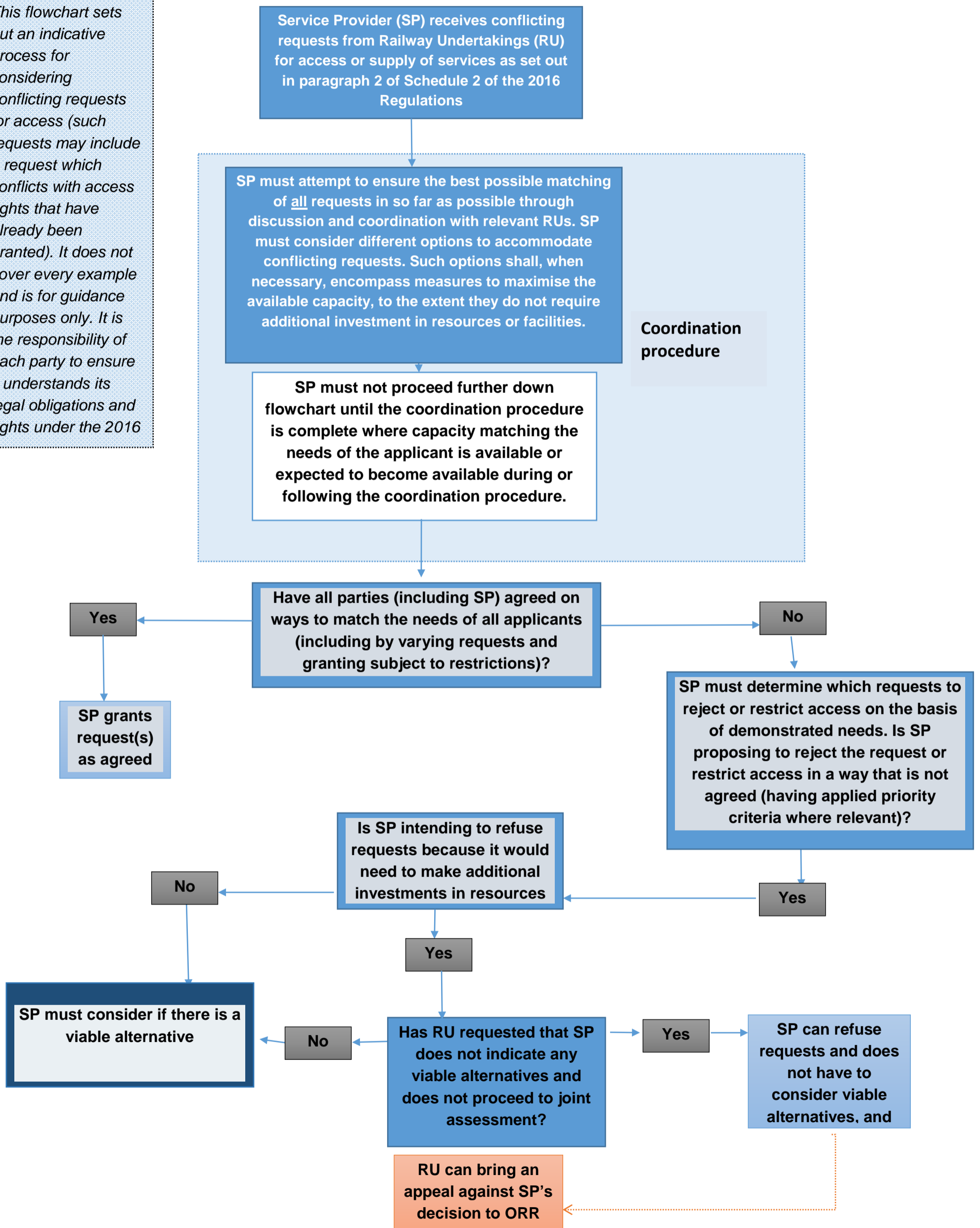


Diagram B: Conflicting requests for access to, and the supply of, services

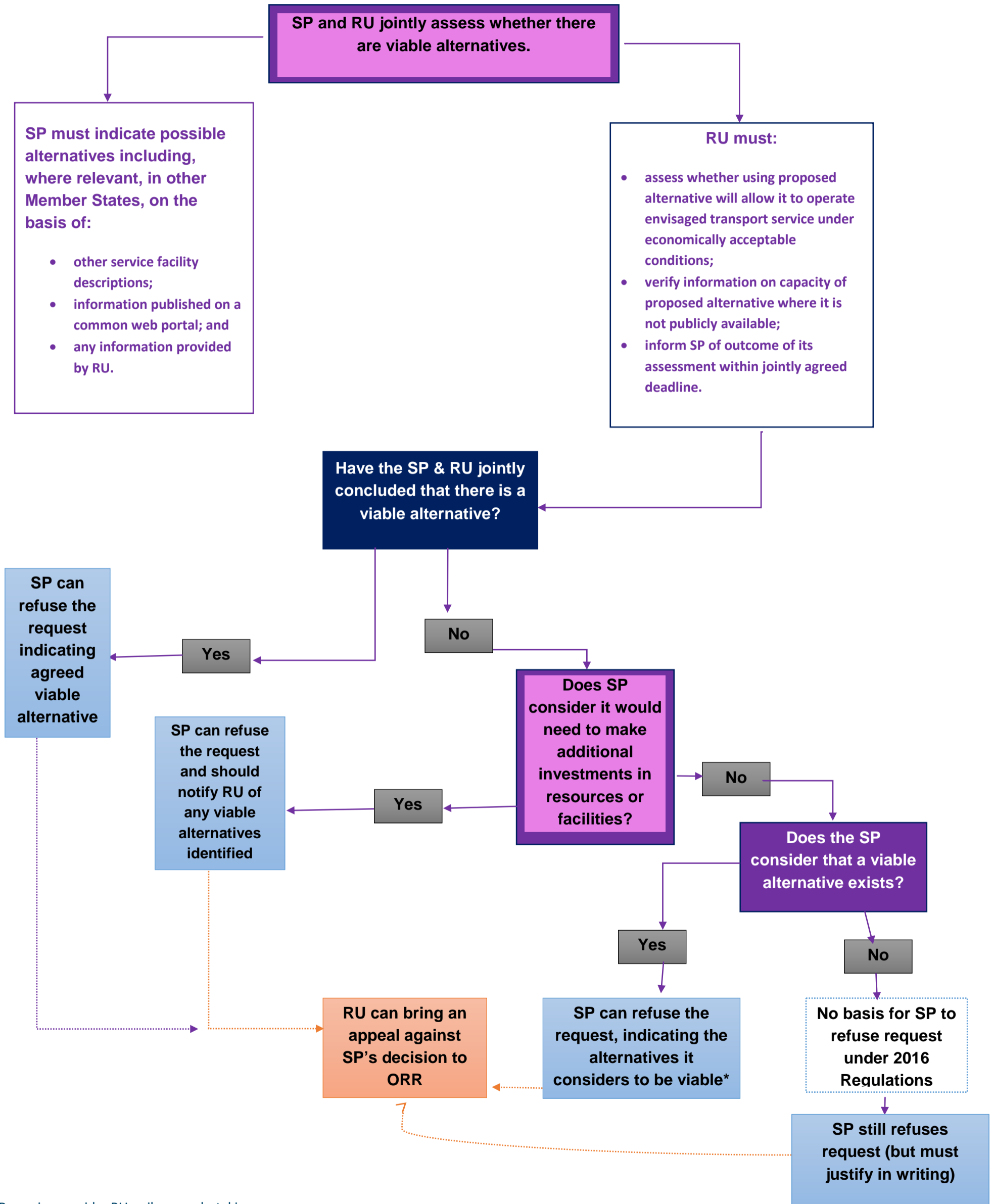
This flowchart sets out an indicative process for considering conflicting requests for access (such requests may include a request which conflicts with access rights that have already been granted). It does not cover every example and is for guidance purposes only. It is the responsibility of each party to ensure it understands its legal obligations and rights under the 2016



Key - SP: service provider RU: railway undertaking

Diagram C: Viable Alternatives

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



Key - SP: service provider RU: railway undertaking

Service facility charges

Introduction

48. 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 paragraph 2 of Schedule 2. It also covers performance schemes and reservation charges⁷⁸.

Charges for services

49. The charging requirements at service facilities for services 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.
50. 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.
51. 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 profit⁷⁹.
52. 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 Regulations⁸⁰ and to reflect the breakdown of services provided as set out in Schedule 2.
53. 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.

⁷⁸ For IM charges see the section on that [here](#).

⁷⁹ See paragraph 1(7) of Schedule 3.

⁸⁰ See regulation 14 and Schedule 3.

54. In all circumstances we expect service providers to be clear about what criteria may affect the calculation of charges. For example, the following features of a request for access to, and the supply of, services are likely to impact on the calculation of the charge:
- (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.
55. 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 criteria⁸¹ and, where applicable, tariffs. We expect service providers to answer all reasonable requests for access or charging information.

Unused service facilities

56. Regulation 6 of the 2016 Regulations sets requirements for unused facilities to be made available for lease or rent. Article 15 of the Implementing Regulation adds detail.
57. Under regulation 6(9) of the 2016 Regulations, where a service facility⁸²:
- has not been in use for at least two consecutive years⁸³, 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.
58. The obligation does not, however, arise if the service provider can demonstrate that on-going redevelopment work ('a reconversion process') reasonably prevents the use of the service facility by any railway undertaking. Under article 15(6) the owner must inform ORR of the reconversion process. ORR may request substantiation and if that

⁸¹ See regulation 14(11).

⁸² Service facilities described in paragraph 2 of Schedule 2 of the 2016 Regulations.

⁸³ According to article 15(2) of the Implementing Regulation, the 2 year period shall start on the day following the day on which a rail-related service was supplied in the service facility concerned for the last time.

is unsatisfactory, ORR may require that the facility, either in whole or in part, is available for lease or rent.

59. Under article 15(7) the owner of the service facility must publicise on its website a notice on the availability of that facility for lease or rent. The notice must contain all the necessary information to enable interested undertakings to submit an offer to take over operation of the facility in whole, or in part. That information must include certain information as specified in article 15(7). It must also inform ORR⁸⁴ and the relevant infrastructure manager.
60. 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.
61. In particular, any railway undertaking interested in using a service facility which has not been in use for at least two consecutive years must express its interest in writing, and inform ORR, demonstrating the needs of the railway undertaking concerned.
62. Article 15 states that the service provider may then decide to resume operations in the facility, in a way that satisfies the railway undertaking's demonstrated needs.
63. Where the service provider is required to offer the operation of the facility for lease, a notice of the offer (including all necessary information) must be published on the website and sent to the relevant infrastructure manager and ORR. The notice must in particular include details of the selection procedure⁸⁵, selection criteria, the main characteristics of the technical equipment of the service facility and the address and time limit for the submission of tenders⁸⁶.
64. The Implementing Regulation also sets out some specific requirements which will apply where an expression of interest is received where the owner of the facility is not also the service provider⁸⁷.

⁸⁴ Track.access@orr.gov.uk

⁸⁵ The selection procedure must be transparent, non-discriminatory and take into account the objective of ensuring an optimum effective use of the capacity at the facility.

⁸⁶ The time limit must be at least 30 days after publication of the notice.

⁸⁷ Article 15(4)-15(6).

6. 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 matters⁸⁸:
 - 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.
4. These matters were added, as a transitional measure, by the 2019 Regulations⁸⁹:
 - traffic management;
 - renewal planning and scheduled or unscheduled maintenance; and
 - compliance with the requirements, including those regarding conflicts of interest, set out in regulations 8A, 8B, 8C, 9A, 14(9) and 19(4)⁹⁰.

Who can appeal?

5. 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.

⁸⁸ See regulation 32(1) and 32(2).

⁸⁹ As a transitional measure until 31 December 2020.

⁹⁰ Regulations 8A, 8B, 8C, 9A were inserted and regulations 14 and 19 were amended by the 2019 Regulations.

6. While an applicant has the right to bring an appeal on one of the matters set out in regulation 32(2)(a) to (j), not all of these provisions confer rights on an applicant. For 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.
7. 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

8. 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 where⁹¹:
 - 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.
9. 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 32⁹².
10. We have separate published guidance on making an appeal under section 17 or 22A of the Act, which applicants should refer to as applicable⁹³. If an appeal is made under regulation 32, the affected parties are still free to seek agreement with each other.

⁹¹ See regulation 32(4).

⁹² See regulation 32(3).

⁹³ See our guidance on '*Making an Application*'.

11. The applicant can withdraw its appeal at any time by writing to us stating it wishes to withdraw its appeal with a short explanation as to why it is withdrawing its appeal. We will inform all other relevant parties that the appeal has been withdrawn.

Where the Act applies

12. The process and procedure that the railway undertaking must follow for bringing an access appeal will depend on whether or not the matter of the appeal is one in relation to which directions may be sought from ORR under section 17 or 22A of the Act.
13. If the matter is one to which the Act applies, a railway undertaking must lodge its appeal by way of an application under the Act and not the 2016 Regulations. We have separate guidance on making an appeal pursuant to section 17 or 22A of the Act *Making an application*⁹⁴. For other appeals under the 2016 Regulations see our module *Access and Management Regulations: appeals*.
14. If the matter is one to which the Act does not apply then the railway undertaking must lodge its appeal under the 2016 Regulations. An appeal will fall outside the scope of section 17 or 22A of the Act where:
 - (i) the railway facility to which the appeal relates has been exempted under section 20 of the Act;
 - (ii) the appeal relates to a rail link facility (as defined under the 2016 Regulations);
or
 - (iii) the subject matter of the appeal is not within scope of directions which may be sought under sections 17 or 22A of the Act.

How to make an appeal under regulation 32

15. The applicant should have regard to the relevant chapters of this guidance as applicable before submitting an application for appeal.
16. An applicant should use Form R32 to make its appeal⁹⁵. 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 respondent⁹⁶ and of any interested third parties;
 - the grounds on which the appeal is being made, which should include

⁹⁴ <http://orr.gov.uk/rail/access-to-the-network/track-access/guidance> *Making an application*.

⁹⁵ <https://orr.gov.uk/rail/access-to-the-network/track-access/forms-model-contracts-and-general-approvals>

⁹⁶ The respondent is the party against whom the appeal is made.

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.

17. Further, where a railway undertaking brings an appeal concerning its entitlements to access under regulation 5 and/or regulation 6, 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.
18. 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

- 19. 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

- 20. 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 appeal⁹⁷. 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.
- 21. 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).
- 22. 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.
- 23. 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.
- 24. 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

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

⁹⁷ Regulation 32(5)(a) and below.

26. 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.
27. In some instances it may also be appropriate or necessary for us to conduct site visits or speak directly with the parties involved.
28. In complex cases involving several parties we may decide it is necessary to hold a hearing.
29. We may, from time to time, request or invite further information, clarification or representations from the parties involved, at our discretion.
30. We may also publish any representations and other responses on our website.

Stage 3: Making the decision

31. 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 Act⁹⁸ when we make our decision on the appeal.
32. 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 decision⁹⁹.
33. 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.
34. 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

⁹⁸ Section 4 of the Act requires us to balance a number of public interest duties.

⁹⁹ See regulation 32(5)(b).

respondent and any other relevant parties. We will then publish a copy of our decision on our website and (where applicable) our public register.

35. Our decision on a regulation 32 appeal is binding on all parties affected by that decision¹⁰⁰.
36. 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 direction¹⁰¹. 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

37. 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.
38. 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 Regulations¹⁰². 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.
39. We can impose a financial penalty on a party that fails or refuses to comply with such a request for information¹⁰³.

Scope of disclosure in an appeal

40. 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.
41. 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 Regulations¹⁰⁴. However, we will give consideration to requests for non-disclosure.

¹⁰⁰ See regulation 32(11)(a).

¹⁰¹ See regulation 32(11)(b).

¹⁰² Please note that timescales can be different though, as specified by the legislation.

¹⁰³ See regulation 38.

¹⁰⁴ Regulation 44 and section 145(2)(ga) of the Railways Act 1993.

42. 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.
43. 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.
44. 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.
45. 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.
46. 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

47. 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

48. 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 consultation¹⁰⁵.

¹⁰⁵ See regulation 32(6).

49. 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 representations¹⁰⁶.

Access – viable alternatives

50. 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 exists¹⁰⁷.
51. 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
 - whether, and if so what, part of the service capacity must be granted to the applicant¹⁰⁸.

Infrastructure capacity

52. 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.

¹⁰⁶ Regulation 32(7).

¹⁰⁷ Regulation 32(8).

¹⁰⁸ Regulation 32(9) and Article 14.

Annex: Key Definitions

Some common definitions

The terms used throughout the guidance have the same meanings as in the 2016 Regulations, the Implementing Regulation 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*¹⁰⁹.

‘infrastructure manager’ is defined in the 2019 Regulations as:

“any body or undertaking that is responsible for the operation, maintenance and renewal¹¹⁰ of railway infrastructure on a network and participating in its development;”

This definition of “infrastructure manager” was set by the 2019 Regulations, and will apply until 31 December 2020¹¹¹. We do not consider that the revised definition substantially alters ORR’s views as to which bodies are infrastructure managers for the

¹⁰⁹ http://orr.gov.uk/data/assets/pdf_file/0019/21367/competition-act-guidance.pdf

¹¹⁰ As defined in the 2019 Regulations.

¹¹¹ Regulation 6 and Schedule 2 of the 2019 Regulations.

purposes of the 2016 Regulations, which include:

- 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.

Definitions in the Implementing Regulation

The following definitions are set out and specific to the Implementing Regulation:

'ad hoc request' means a request for access to a service facility or a rail-related service that is linked to an ad hoc path request for an individual train path referred to in regulation 24 of the 2016 Regulations.

'basic service' means a service supplied in any of the service facilities listed in paragraph 2 of Schedule 2 of the 2016 Regulations.

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

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

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

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

‘rail-related service’ means a basic, additional or ancillary service listed in points 2, 3 and 4 of Schedule 2 of the 2016 Regulations.

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

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

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

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



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