



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

December 2016

1. Overview

Introduction

- 1.1 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 (the 2016 Regulations)
- 1.2 This chapter provides an introduction to the 2016 Regulations; an explanation of ORR's role; and defines some key terms. The other chapters are:
 - Chapter 2 [Access](#): an overview of the regulations that concern access to infrastructure and service facilities.
 - Chapter 3 [Charges](#): an overview of the regulations on charging principles for access to services, and the requirements around publication of information on charges.
 - Chapter 4 [Infrastructure](#): an overview of the regulations affecting infrastructure managers, (excluding those regulations covered in chapter 2 [Access](#)).
 - Chapter 5 [Appeals](#): an explanation of how to appeal to ORR.
- 1.3 The terms used throughout the guidance have the same meanings as in the 2016 Regulations and the Railways Act 1993 (the **Act**), unless the context requires otherwise. All the regulations referred to are those in the 2016 Regulations unless otherwise specified.

Background to the Regulations

- 1.4 The 2016 Regulations were laid before Parliament on 7 July 2016 and came into effect on 29 July 2016. They implement *Directive 2012/34/EU establishing a single European railway area (recast)*¹ (the **Recast Directive**). The Recast Directive repeals and consolidates previous EU legislation and makes some substantive changes to the law.
- 1.5 The changes in the Recast Directive are designed to address issues in the EU railway market such as low levels of competition within rail, low levels of public and private investment in railways and inadequate market supervision and regulatory oversight within some EU Member States.
- 1.6 The 2016 Regulations revoke and replace The Railways Infrastructure (Access and Management) Regulations 2005 (the **2005 Regulations**) and amend The Railway (Licensing of Railway Undertakings) Regulations 2005.

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

Key Changes

1.7 Key changes made by the 2016 Regulations, compared to the 2005 Regulations, include:

- More services are now included in the minimum access package and list of service facilities (Schedule 2).
- There is now more clarity on the meaning and application of ‘viable alternative’ (regulation 3).
- There is no longer a separate provision dealing with access to terminals and ports. Access to terminals and ports is now dealt with as part of the general provisions relating to access rights and access to services.
- The right to be supplied the minimum access package and access to service facilities and the supply of services now only extends to railway undertakings and not applicants more generally (regulation 6).
- Service facilities² are now subject to a ‘use it or lease it’ obligation if they have not been used for at least two consecutive years (regulation 6(9)).
- Charges for access to a service facility are subject to certain charging principles (Schedule 3(1) and (2)).
- Service providers under direct or indirect control of a dominant body or firm must satisfy specific independence requirements, including separate accounting arrangements (regulation 10).
- We must control certain matters relating to access, charging, capacity allocation and the network statement (regulation 34).
- We have the power to make a direction on our own initiative to correct discrimination against applicants, market distortion or undesirable developments in the competitive situation in the rail services market (regulation 34(3)).
- We can impose a financial penalty if a party contravenes a relevant decision, direction or notice (regulation 38).

² Service facility is defined in the 2016 Regulations as meaning “*the installation, including ground area, building and equipment, which has been specially arranged, as a whole or in part, to allow the supply of one or more of the services listed in paragraph 2, 3 or 4 of Schedule 2.*”

Other relevant ORR guidance

Market Guidance

1.8 Regulation 34(1) requires 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 on the discharge of these functions is covered separately in our *Market Guidance*³.

Economic Enforcement

1.9 We now also have the power to fine a ‘relevant operator’ who has contravened or is contravening a decision, direction or notice issued by us under the 2016 Regulations⁴.

1.10 A relevant operator means:

- A person issued with a decision or direction under regulation 31, 32, 33, or 34 of the 2016 Regulations;
- A person who has been given a direction under section 17 or 22A of the Act, where the direction relates to a matter referred to in regulation 32(c) to (g) and was applied for as a result of regulation 32(3); or
- A person who has been served with a notice under section 80 of the Act.

1.11 The 2016 Regulations utilise aspects of the framework in section 57 of the Act, which requires ORR to have a policy regarding the imposition of penalties and the determination of their amount. ORR’s Economic Enforcement Policy and Penalty Statement fulfils this requirement and is available on our website⁵.

International Passenger Services

1.12 For any matters relating to international passenger services under regulation 33, please see our guidance on *International Passenger Services*⁶.

Framework Agreements

1.13 We have published separate guidance on the duration of framework agreements parties may enter into under regulation 22 (*Application for infrastructure capacity*)⁷.

³ <http://orr.gov.uk/consultations/closed-consultations/competition-consultations/orr-approach-to-monitoring-and-reviewing-markets>

⁴ See regulation 38.

⁵ <http://orr.gov.uk/consultations/closed-consultations/policy-consultations/economic-enforcement-policy-consultation>

⁶ http://orr.gov.uk/data/assets/pdf_file/0014/2192/399.pdf

⁷ <http://orr.gov.uk/what-and-how-we-regulate/track-access/guidance>

Key definitions

1.14 The Department for Transport has produced guidance on the scope of the 2016 Regulations⁸. This guidance should be the starting point in assessing whether the 2016 Regulations affect you.

1.15 The definitions used in the 2016 Regulations, Recast Directive and the Act are important in understanding the application of the 2016 Regulations. We have set out the key definitions below, with explanation where required.

1.16 ‘**infrastructure manager**’ is defined in the 2016 Regulations⁹ as:

any body or undertaking that is responsible in particular for:

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

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

1.17 ‘**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.

1.18 As of July 2016, we consider the bodies listed below to be infrastructure managers for the purposes of the 2016 Regulations:

- 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 (also known as ‘the Crossrail Tunnel’).

⁸ <https://www.gov.uk/government/publications/recast-first-railway-package-guidance-on-scope-of-2016-transposition-regulations> Note footnote [below](#).

⁹ See regulation 3 (Interpretation) for the full definition of infrastructure manager.

- The Channel Tunnel Group Limited and France-Manche S.A. (jointly “Eurotunnel”) in respect of the Channel Tunnel (but [see below](#)).

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

1.20 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.

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

1.22 It is possible for an infrastructure manager to also 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.

1.23 ‘**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.

1.24 ‘**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.

1.25 **'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.

1.26 **'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.

1.27 **'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.

1.28 **'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.

1.29 **'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.

1.30 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 are intended to apply more broadly, the term *'applicant'* is used.

1.31 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.

1.32 **'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.

Chapter 2 [Access](#): sets out our interpretation of *'dominant body or firm'*, which is relevant to regulations 6 and 10.

Application of the 2016 Regulations

1.33 The 2016 Regulations¹⁰ describe entitlements and obligations in respect of access and governance for railway undertakings (as well as service providers and infrastructure managers).

1.34 These entitlements and obligations do not apply to railway undertakings whose activity is 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 services¹¹. 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

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

¹¹ See regulation 4(3).

on management independence, separation of accounts and business plans will still apply¹².

1.35 The requirements 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 request¹³,

do not apply to the following networks¹⁴:

- local and regional stand-alone networks for passenger services on railway infrastructure;
- networks intended only for the operation of urban or suburban rail passenger services;
- regional networks used for regional freight services solely by a railway undertaking already excluded from the scope of the 2016 Regulations (until such time as capacity is requested by another applicant);
- networks that are used only by the person responsible for that network for the purposes of freight operations connected with the premises or building works, which are:
 - situated within a factory, nuclear site, or site housing electrical plant;
 - within a mine or quarry;
 - used solely in connection with the carrying out of any building works;
 - within a military establishment¹⁵.

Equivalent regulations

1.36 The 2016 Regulations do not extend to Northern Ireland and separate regulations will apply.

¹² See regulations 8, 9 and 12(4) to (7).

¹³ See regulations 6, 10, 11, 12(1) to 12(3), 13, Parts 4 to 6 and Schedules 2 to 5.

¹⁴ See regulation 4(6).

¹⁵ At paragraph 26 of DfT's Guidance on the scope of the 2016 Regulations, there is a reference to "freight services using privately owned infrastructure dedicated for the owner's use". This wording refers to an early draft of regulation 4(7)(d) which was subsequently revised. This reference is therefore incorrect. ORR's Guidance reflects the published version of the 2016 Regulations.

1.37 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 apply in respect of the UK section of the Channel Tunnel.

2. Access arrangements

Introduction

- 2.1 The entitlement of railway undertakings to access railway infrastructure, and service facilities, are set out in regulations 5 and 6 of the 2016 Regulations.
- 2.2 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).

Regulation 5: Access Rights

- 2.3 Regulation 5(1) applies to railway undertakings operating all types of rail freight services or international passenger services. It gives these railway undertakings access rights¹⁶ to the railway infrastructure (network, station and track) necessary to operate these types of services.
- 2.4 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.
- 2.5 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.
- 2.6 ORR may limit the access rights granted by regulation 5 on international services between a place of departure and a destination which are covered by one or more public service contracts (cabotage)¹⁷. We will not limit these rights except where the exercise of such rights would compromise the economic equilibrium of a public service contract. We have published separate guidance on the meaning of 'economic equilibrium'¹⁸.
- 2.7 Infrastructure managers must ensure that the entitlements to access provided by regulation 5 are honoured¹⁹. There is no provision in regulation 5 which enables an infrastructure manager to refuse a request for access made under that regulation.
- 2.8 Access rights in respect of railway undertakings operating international passenger services are also subject to regulation 33 (*Regulatory decisions concerning international passenger services*).

¹⁶ 'access rights' is defined in regulation 3 as meaning rights of access to railway infrastructure for the purpose of operating a service for the transport of goods or passengers.

¹⁷ See regulation 5(6).

¹⁸ http://orr.gov.uk/data/assets/pdf_file/0014/2192/399.pdf

¹⁹ See regulation 5(8).

- 2.9 Where requested by a competent authority or interested railway undertaking, we must determine whether the principal purpose of a service is to carry passengers between stations located in different member states in accordance with the process set out in regulation 33. An ORR decision on the 'principal purpose' is binding on all parties affected by that decision²⁰.
- 2.10 A railway undertaking has a right to appeal to ORR under regulation 32²¹ if it is denied the entitlements conferred on it under regulation 5²².

Regulation 6(1): Minimum access package

- 2.11 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.
- 2.12 To clarify the interaction between regulation 5(1) and regulation 6(1), we have set out below our view on the application of these regulations.
- 2.13 While regulation 5(1) and regulation 6(1) both give rights of access to railway undertakings, regulation 5(1) applies only to railway undertakings seeking access for the purpose of operating international passenger services and freight services. Regulation 6(1) applies to all railway undertakings, including those seeking access for the purpose of operating domestic passenger services.
- 2.14 We would therefore expect railway undertakings seeking access rights for international passenger services and freight services to rely on regulation 5(1) for access to railway infrastructure while all railway undertakings that are seeking rights of access in accordance with the minimum access package should rely on regulation 6(1).
- 2.15 A railway undertaking has a right to appeal to ORR under regulation 32 if it is denied the entitlement conferred on it under regulation 6(1).

Regulation 6: Access to services

- 2.16 Regulations 6(2) to 6(12) 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, sidings and freight terminals.

²⁰ See regulation 33(12).

²¹ See regulation 5(9).

²² There is no right of appeal where a railway undertaking is denied access under regulation 5 pursuant to a decision of ORR under regulation 5(6) or regulation 33 (Regulatory decisions concerning international passenger services).

- 2.17 Service providers must supply access to services to all railway undertakings (including railway undertakings operating freight and international passenger services) who are seeking access to service facilities and the supply of services (including the supply of services at ports and terminals)²³.
- 2.18 Requests for access to, and the supply of, services must be answered within a reasonable time limit as set by ORR²⁴. In our view a reasonable time limit is, as a general rule, 10 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.
- 2.19 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.

Non-conflicting requests for access to services

- 2.20 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.
- 2.21 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, services²⁵. In those circumstances we consider that a service provider may refuse a request without having to consider if a viable alternative exists.
- 2.22 The 2016 Regulations only require a service provider to justify, in writing, a decision to refuse a request for access to, and the supply of, services where a request relates to those services referred to in paragraph 2(a), (b), (c), (d), (e), (f) and (i) of Schedule 2 and the service provider is under the direct or indirect control of a dominant body or firm²⁶.
- 2.23 However, we expect all service providers (whether or not they are under the direct or indirect control of a dominant body or firm) to ensure refusals for any of the services referred to in paragraph 2 of Schedule 2 are in writing and fully reasoned and

²³ See regulation 6(2).

²⁴ See regulation 6(3).

²⁵ See regulation 6(6).

²⁶ See regulation 6(5).

objectively justified. Therefore, whenever a service provider is refusing access under regulation 6(4), we expect the service provider to explain why it is refusing access and why it considers the alternative facility it has identified is a viable alternative for the railway undertaking, where applicable.

2.24 The flowchart at [Annex 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 when considering requests for access.

Conflicting requests for access to services

2.25 Regulations 6(7) and 6(8) set out the process that should be followed where a service provider receives conflicting requests for access to, and the supply of, services described in paragraph 2 of Schedule 2. The service provider should go through this process before any requests are granted, granted with restrictions or refused:

- In the first instance an attempt must be made to meet all requests, on the basis of demonstrated needs, in so far as possible.
- If it is not possible to meet all of the requests, the service provider should consider whether it can meet some of the requests on the basis of demonstrated needs.
- Where it can meet some of those requests, the service provider should grant those requests it can accommodate (likely to be granted subject to restrictions).
- Where the service provider can meet some but not all of the requests or cannot meet any of the requests, it will only be able to refuse those requests if a viable alternative exists requests unless it is refusing those requests on the basis that it would only be possible to accommodate all the requests if it made investments in its resources or facilities. If that is the case the service provider can refuse the requests without having to consider viable alternatives.
- Where the service provider could, however, accommodate the requests without having to make investments in its resources or facilities, it will only be able to refuse a request if a viable alternative exists. If there is no viable alternative the service provider must, under the 2016 Regulations, grant the request.

2.26 As with regulation 6(4), we do not consider that regulation 6(7) requires 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. As such it

is our view that a service provider may, in those circumstances, refuse a request without having to consider whether a viable alternative exists.

- 2.27 When considering conflicting requests, we would expect the service provider to consider evidence from the railway undertakings on the reasons for the requests and the consequences of a refusal.
- 2.28 While regulation 6(7) does not expressly provide that a request may be granted subject to restrictions, regulation 32(9) recognises that, where there are conflicting requests as described in regulation 6(7), the provision of services may be refused or restricted. We therefore consider that where a service provider can grant all or some of the conflicting requests subject to restrictions, it may do so without having to consider whether a viable alternative exists.
- 2.29 Where the service provider refuses a request we expect the decision to be in writing and fully reasoned and objectively justified. The service provider should explain its decision to refuse the request and why it considers the alternative facility it has identified is a viable alternative for the railway undertaking, where applicable.
- 2.30 Where the service provider is granting requests but subject to restrictions, we would also expect those decisions to be in writing and fully reasoned and objectively justified.
- 2.31 A railway undertaking whose request has been refused or been granted subject to restrictions may appeal to ORR²⁷.
- 2.32 The flowchart at [Annex B](#) sets out the indicative process and steps 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 when considering requests for access.

Constrained capacity

- 2.33 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 argues that it has constrained capacity we would expect it to:
- provide a fully reasoned and objectively justified case explaining the nature of the capacity constraints;

²⁷ See regulation 6(8) and regulation 32(9).

- demonstrate that it has organised its business in a manner that maximises the capacity of its service facilities available; and
- demonstrate that it has examined all options for accommodating the requests.

Viable alternative

2.34 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.

2.35 ‘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.

2.36 We expect the service provider to carry out an assessment of the existence of a viable alternative for the railway undertaking prior to refusing a request for access to, or supply of, services. The service provider should be able to explain (in writing) when refusing the request why it considers the alternative facility it has identified is a viable alternative for the railway undertaking.

2.37 We set out in detail our interpretation of ‘viable alternative’ at [Annex C](#).

Dominant body or firm

2.38 Regulation 6(5) provides that where there is a request for any of the services listed at paragraphs 2(a)²⁸, (b)²⁹, (c)³⁰, (d)³¹, (e)³², (f)³³ and (i)³⁴ of Schedule 2, which is made to a service provider under the direct or indirect control of a dominant body or firm, the service provider must justify, in writing, any decision to refuse such a request and indicate any viable alternative.

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

Use it or lease it

2.40 Under regulation 6(9), where a service facility described in paragraph 2 of Schedule 2:

- has not been in use for at least two consecutive years, and

²⁸ Refuelling facilities, and supply of fuel in in these facilities.

²⁹ Passenger stations, including buildings and other facilities.

³⁰ Freight terminals.

³¹ Marshalling yards.

³² Train formation facilities including shunting facilities.

³³ Storage sidings.

³⁴ Maritime and inland port facilities which are linked to rail activities.

- 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.

2.41 The obligation under regulation 6(9) does not, however, arise if the service provider can demonstrate that on-going redevelopment work prevents the use of the service facility by any railway undertaking³⁵.

2.42 We recognise that it may not always be obvious to railway undertakings that a service facility has not been in use for two consecutive years. If interest has been expressed to the service provider by a railway undertaking (whether or not on the basis of demonstrated need), then we would expect the service provider to inform the railway undertaking that the service facility has not been in use, including for how long, and give the railway undertaking an opportunity to express interest on the basis of demonstrated need.

2.43 Where a railway undertaking expresses an interest in such a service facility, it should make an application for track access in parallel with its request for access to service facilities. This is to ensure that where access has been granted to service facilities, railway vehicles can be accepted on and off the network promptly³⁶.

Provision of information

2.44 Transparency of access arrangements and procedures is key to ensuring the basis for non-discriminatory access to service facilities for all railway undertakings. In line with the position paper of the Independent Regulators Group for Rail³⁷ our view is that service providers should publish at a minimum:

- list of all installations, their locations and a precise description of the facility and the services offered in it;
- key contact details, such as the service provider's phone numbers and e-mail addresses;
- all relevant information and documents for access and use of the service facility. For example, model access contracts, specific contractual conditions and timescales for dealing with requests;

³⁵ See regulation 6(10).

³⁶ See clause 6.4 of ORR's Model Freight Track Access Contract: <http://orr.gov.uk/what-and-how-we-regulate/track-access/track-access-process/forms-model-contracts-and-general-approvals>

³⁷ <http://www.irg-rail.eu/public-documents/>

- if applicable, the terms of use of the service provider's necessary IT-systems and the rules concerning the protection of sensitive and commercial data;
- details of the access coordination process;
- details of the dispute resolution system;
- any planned changes to the service facility which could impact on the capability or capacity of the facility.

2.45 All this information should be made publicly available on a website, and in writing on request. ORR's preference is for this information to be available through the relevant infrastructure manager's Network Statement.

Access appeals

2.46 A railway undertaking may bring an appeal concerning the entitlements to access conferred on it by regulation 5 and/or regulation 6. The process and procedure 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.

2.47 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 Regulations³⁸. We have separate guidance on making an appeal pursuant to section 17 or 22A of the Act and railway undertakings should refer to that guidance as appropriate³⁹.

2.48 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:

- 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 Act⁴⁰.

2.49 Further general guidance on regulation 32 and the process and procedure for an appeal under the 2016 Regulations is provided in chapter 5 [Appeals](#)⁴¹.

³⁸ See regulation 32(3).

³⁹ See our guidance module [Making an Application](#).

⁴⁰ See regulation 32(4).

2.50 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:

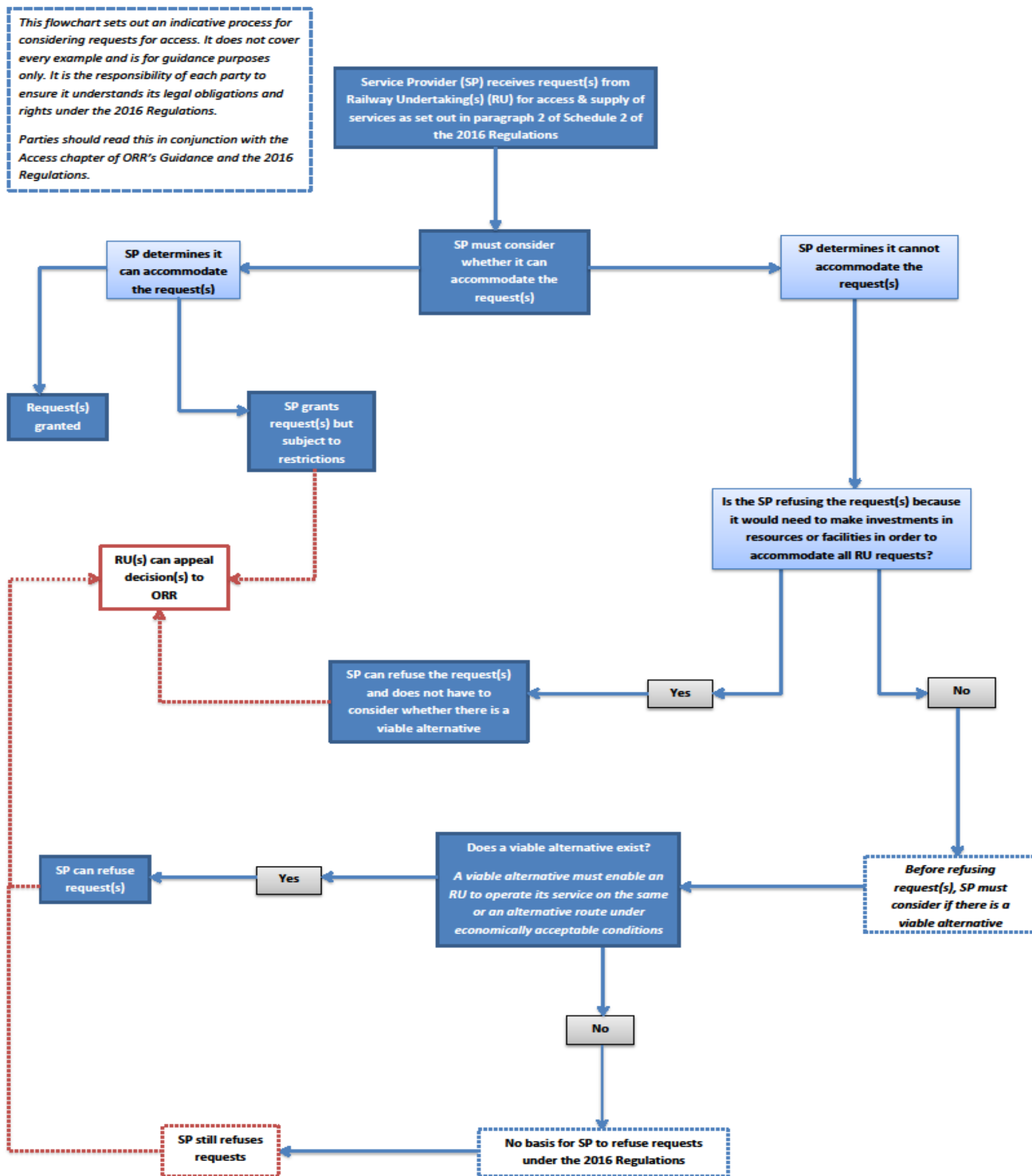
- A detailed list of the access being sought (for example time slots, name of the terminal, port or service to which access is sought, duration, type of rolling stock, commercial terms, if any).
- An explanation as to why access is needed.
- Confirmation that the railway undertaking holds, or is likely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

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

- Detailed reasons as to why access has been refused or granted subject to restrictions.
- Detailed reasons as to why it considers it would have to make investments in resources or facilities or any relevant capacity issues (including known capacity constraints on connecting networks) it considers might affect its ability to accommodate requests.
- Details of any viable alternatives that could be used to supply the required services with an explanation as to why they are considered suitable along with supporting evidence, where applicable.
- Any restrictions on access it has proposed (where applicable), with an explanation as to why they are fair, reasonable, proportionate and objectively justifiable.
- Whether there are any other affected parties and the impact on them of the request for access.

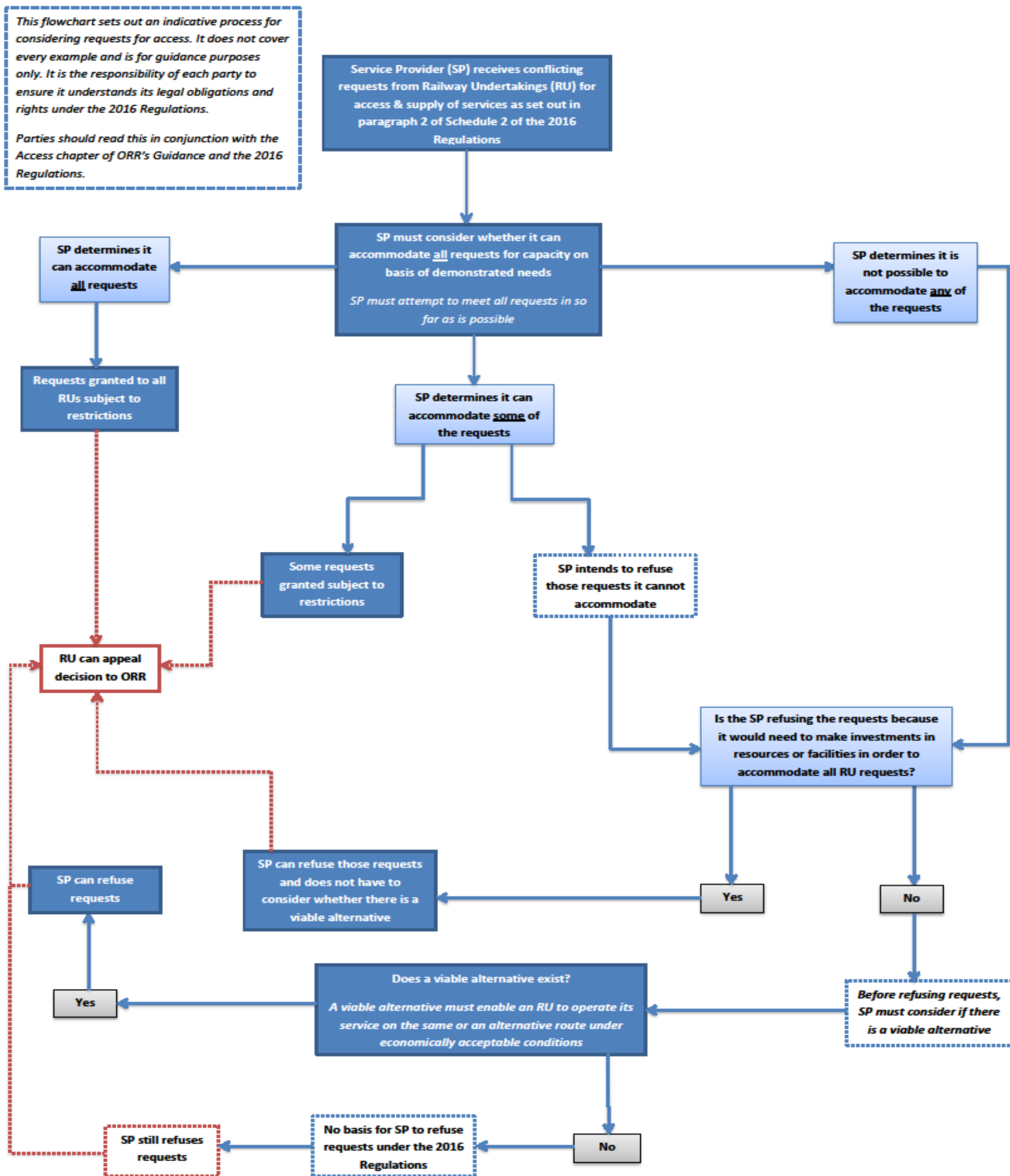
⁴¹ <http://orr.gov.uk/what-and-how-we-regulate/track-access/guidance>

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



Key - SP: service provider
 RU: railway undertaking

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



Key - SP: service provider
RU: railway undertaking

Annex C: Viable alternatives

A request for access to, and the supply of, services described in paragraph 2 of Schedule 2 of the 2016 Regulations may generally 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 conditions⁴².

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”.

This annex outlines our understanding of this definition, which we have split into two limbs – the service provider must be able to satisfy both limbs in order to conclude that a viable alternative exists.

Limb 1: Economically acceptable to the railway undertaking

C1. We will expect a railway undertaking, in making a request for access to, and the supply of, services pursuant to regulation 6, 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.

C2. The onus and burden of proof to demonstrate whether there is a viable alternative is on the service provider. 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. For example, an alternative location might, due to the distances involved, incur additional track access charges. There may be route availability issues which require modification to the equipment used (for example, certain routes may require sub-optimal use of wagon capacity) or an alternative service facility might impose additional handling costs on the customer, making the railway undertaking’s proposed service uncompetitive.

C3. We consider that if use of another service facility was certain to impose a material increase in its 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.

C4. We would expect a railway undertaking challenging the viability of an alternative service facility to have supplied details showing the source of such costs and to demonstrate that this would make the proposed alternative unviable.

⁴² If, however, a service provider would be required to make investments in resources or facilities in order to accommodate the requests, it may refuse those requests even if there is no viable alternative.

Limb 2: Allows the railway undertaking to operate the freight or passenger services concerned

C5. This part of the definition can be broken down into three parts:

- Physical viability;
- Availability; and
- Self-supply.

Physical viability

C6. An important starting point for a service provider making the case for a viable alternative will be for it to consider whether any alternative sites are operationally or logistically capable of replicating the amenity offered by the service facility to which access is being refused. This will, however, require railway undertakings to have explained to the service provider:

- the precise operational characteristics it seeks, for example if specialist handling equipment is required or if access for road vehicles for loading and unloading is needed;
- the geographical requirements of the service facility, for example a terminal's proximity to a particular port where the customer's cargo is being unloaded, or the requirement of a customer that a terminal is located in a particular region for its final distribution; and
- any other relevant factors.

C7. We will expect the railway undertaking to have provided such an explanation to the service provider when making a request for access.

C8. Where a service provider considers that a viable alternative exists, we will expect it to have identified the viable alternative and provided to the railway undertaking a detailed explanation as to the extent to which the alternative(s) meets the railway undertaking's requirements and matches the characteristics of the services required in terms of operational capabilities, geography and any other relevant factors that have been identified.

C9. We will expect the railway undertaking to have given detailed consideration to the potential alternative sites put forward by the service provider to assess whether they are viable alternatives before making an appeal to ORR under regulation 32.

C10. Where the railway undertaking does bring an appeal under regulation 32, we would expect it to submit its detailed analysis as to why the alternatives suggested by the service provider are not viable alternatives.

Availability

C11. 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 the service provider has refused access either successively or simultaneously to the various alternative service facilities. This would create an unsatisfactory position for the railway undertaking and could introduce significant delay in the resolution of the access request.

C12. In each case, previous refusals of access could be taken as an indication that this option may not be a viable alternative. If, in these circumstances, the railway undertaking appeals to us it should nominate its preferred facility.

Self-supply

C13. Under some circumstances self-supply could be regarded as a viable alternative. This would need to be considered relative to the scale of the access requested.

C14. In most cases access requests will be at the margin of a service facility's capacity, and so could never justify the construction of a new service facility. In addition, the scarcity of suitable land for rail-related facilities might make this unfeasible. However, where either the capital costs for self-supply were low or the scale of access requested represented a significant proportion of the total capacity at the service facility in question, the service provider may make the case that the railway undertaking could itself invest in new capacity.

Annex D: Dominance

Introduction

D1. Additional obligations apply to service providers that are under the direct or indirect control of a body or firm that *'holds a dominant position in the national railway transport services markets'*. These obligations only apply to facilities that are used, either exclusively or in part, to support the provision of services in the same downstream markets in which a dominant position exists. They do not apply to facilities that are exclusively used to support the provision of services characterised by effective competition, even where facilities are owned by a company that holds a dominant position in unrelated downstream markets.

D2. We expect service providers who are controlled by a railway transport services provider to self-assess whether that railway transport services provider is active and has a dominant position in any downstream railway transport services market served by its facilities or services. We may, however, undertake an assessment of dominance on our own initiative⁴³ or in the context of considering an appeal⁴⁴.

Assessment of dominance in the national railway transport services markets

D3. A dominant position means that a body or firm is large and powerful enough to substantially influence a defined market. Market power arises when the competitive constraints that firms face are weak⁴⁵.

D4. Market definition is often a key step in identifying the competitive constraints acting on suppliers of a product or service. It is usually the first step in the assessment of market power. When defining markets we will follow the approach set out in our Competition Act 1998 guidance⁴⁶ and in OFT403, Market definition, (December 2004)⁴⁷. When defining markets (and therefore assessing dominance) for the purposes of the 2016 Regulations we will only consider the competitive constraints that arise from other suppliers of railway transport services. Other modes including transport by road, air, and water will not be considered to be part of any national railway transport services market and will not form part of our assessment.

D5. Market power generally arises when an undertaking does not face sufficiently strong competitive pressures. In assessing market power we will have regard to OFT415, Assessment of market power, (December 2004)⁴⁸. We would expect analysis of market shares to play an important role in measuring market power under the 2016 Regulations. It

⁴³ See regulation 34.

⁴⁴ See regulation 32.

⁴⁵ In case law, a dominant market position is defined as a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition from being maintained in the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately its consumers.

⁴⁶ http://orr.gov.uk/_data/assets/pdf_file/0019/21367/competition-act-guidance.pdf

⁴⁷ This guidance was published by the UK's Office of Fair Trading (OFT) and subsequently adopted by the OFT's successor body, the Competition and Markets Authority (CMA) <https://www.gov.uk/government/publications/market-definition>.

⁴⁸ Published by the OFT and adopted by the CMA <https://www.gov.uk/government/publications/assessment-of-market-power>.

is unlikely that any railway transport services provider will be considered to be dominant in a market in which its share is persistently less than 40%. Higher shares than this may be suggestive of dominance. Dominance will be presumed, in the absence of contradictory evidence, where a firm's market share is persistently higher than 50%. This presumption can be challenged of course; in assessing dominance we will consider the strength of all the constraints imposed on a firm.

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

3. Service charges

Introduction

- 3.1 This chapter 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 charges.
- 3.2 A description of the framework that applies to infrastructure access charges is set out in the chapter below on [Infrastructure](#).

Charges for services

- 3.3 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.
- 3.4 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.
- 3.5 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 profit⁴⁹.
- 3.6 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 charges⁵⁰. 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 Regulations⁵¹ and to reflect the breakdown of services provided as set out in Schedule 2.

⁴⁹ See paragraph 1(7) of Schedule 3.

⁵⁰ Note that Network Rail has invited service providers on its network to complete a 'Service Provider Information Form'.

⁵¹ See regulation 14 and Schedule 3.

- 3.7 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.
- 3.8 In all circumstances we expect service providers to be clear about what criteria may affect the calculation of charges. For example, the following features of a request for access to, and the supply of, services are likely to impact on the calculation of the charge:
- type of facility needed;
 - length of stay;
 - time of day;
 - refuelling;
 - cleaning or other light maintenance services required;
 - any charges for electricity and other items such as telecommunications which are required; and
 - technical inspections and specialised maintenance which may become necessary.
- 3.9 The service provider must be able to demonstrate to a railway undertaking that any fees invoiced to it for the use of the service facility comply with the published criteria⁵² and, where applicable, tariffs. We expect service providers to answer all reasonable requests for access or charging information.

⁵² See regulation 14(11).

4. Infrastructure

Introduction

4.1 This chapter covers the impact of 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

4.2 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 Regulations⁵³.

Network statements

4.3 Under regulation 13(1) infrastructure managers must, after consultation with all interested parties, develop and publish a network statement. 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.

4.4 Where a charging body⁵⁴ or an allocation body⁵⁵ is responsible for the functions of the infrastructure manager, that charging body or allocation body must provide the infrastructure manager with such information as is necessary to enable the infrastructure manager to:

- include the information set out in regulation 13(4) in the network statement; and
- keep the network statement up to date⁵⁶.

4.5 Service providers (where they are not the infrastructure manager) must provide the infrastructure manager of the infrastructure to which their relevant service facility is connected with sufficient information to enable the infrastructure manager to:

⁵³ 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.

⁵⁴ 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.

⁵⁵ An allocation body means a body, other than the infrastructure manager, which is responsible for the functions and obligations of the infrastructure manager under Part 5 and Schedule 4 because the infrastructure manager is not independent of any railway undertaking. Refer to regulation 3 for the full definition.

⁵⁶ See regulation 13(2).

- include information⁵⁷ in its network statement on access to and charges for the supply of service facilities 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 date⁵⁸.

4.6 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 supplied⁵⁹. 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.

4.7 Network statements, in their provisional and final versions, can be the subject of an appeal to ORR under regulation 32⁶⁰. An appeal brought in relation to a network statement will be dealt with in accordance with the process set out in the [Appeals](#) chapter of this guidance.

Infrastructure charges

4.8 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 charges⁶¹.

4.9 ORR is responsible for establishing the charging framework and the specific charging rules governing the determination of the charges to be set by infrastructure managers⁶² except for HS1 and Eurotunnel, to which separate provisions apply⁶³. For Network Rail, ORR fulfils this obligation through the Network Rail periodic review⁶⁴.

4.10 Each infrastructure manager is responsible for determining the charges to be charged for the use of its railway infrastructure in accordance with the applicable

⁵⁷ 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.

⁵⁸ See regulation 13(3).

⁵⁹ See regulation 14(13).

⁶⁰ See regulation 32(2)(a).

⁶¹ Please see the chapter on [Charges](#) for guidance on charges for services. This will be applicable for service providers and infrastructure managers who also own or operate service facilities.

⁶² See regulation 14(1) and 14(6).

⁶³ See regulation 14(3).

⁶⁴ <http://orr.gov.uk/what-and-how-we-regulate/regulation-of-network-rail/how-we-regulate-network-rail/periodic-review-2018>

charging framework, the specific charging rules and the principles and exceptions set out in Schedule 3. Infrastructure managers must also collect these charges⁶⁵.

4.11 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 service⁶⁶. However, with the approval of ORR (or in the case of HS1, the Secretary of State), an infrastructure manager may levy mark-ups on the basis of efficient, transparent and non-discriminatory principles⁶⁷.

4.12 The European Commission Implementing Regulation (EU) 2015/909⁶⁸ 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

4.13 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 incomes from private sources and state funding, with railway infrastructure expenditure⁶⁹.

4.14 For HS1, the Secretary of State must ensure that HS1's infrastructure costs and accounts balance⁷⁰.

4.15 ORR is responsible for ensuring the balance of infrastructure accounts for Network Rail through the access charges review⁷¹. For all other infrastructure managers (except 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 balance⁷².

4.16 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 charges⁷³.

⁶⁵ See regulation 14(2).

⁶⁶ See paragraph 1(4) of Schedule 3.

⁶⁷ See paragraph 2(1) of Schedule 3.

⁶⁸ http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2015.148.01.0017.01.ENG

⁶⁹ See regulation 15(1).

⁷⁰ See regulation 15(3).

⁷¹ See regulation 15(2).

⁷² See regulation 15(4).

⁷³ See regulation 15(7) and (8).

Performance scheme

- 4.17 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 network⁷⁴.
- 4.18 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 performance⁷⁵.
- 4.19 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 relates⁷⁶.
- 4.20 We approve the performance regime for Network Rail as part of the periodic review process.

Reservation charges

- 4.21 Infrastructure managers may levy a reservation charge for capacity that is requested but is not used⁷⁷. Where the infrastructure manager chooses to make provision for a reservation charge, that charge must provide incentives for efficient use of capacity and will be mandatory in the case of a regular failure by an applicant to use the paths, or part of the paths, allocated to them.
- 4.22 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 paths⁷⁸. ORR must also, where such a provision has been made, control such criteria in accordance with regulations 32 and 34⁷⁹.
- 4.23 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 32⁸⁰.

Allocation of infrastructure capacity

- 4.24 Part 5 and Schedule 4 concern the allocation of infrastructure capacity⁸¹. Part 5 only applies to infrastructure managers. Undertakings that are only service providers for

⁷⁴ See regulation 16(1).

⁷⁵ See regulation 16(2).

⁷⁶ See regulation 16(3).

⁷⁷ See regulation 17(1).

⁷⁸ See regulation 17(3)(a).

⁷⁹ See regulation 17(3)(b).

⁸⁰ See regulation 32(2)(d) and (e).

⁸¹ 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

the purpose of the 2016 Regulations (such as port or terminal owners) will therefore not be caught by any of these provisions.

4.25 Infrastructure managers are responsible for the establishment of specific capacity allocation rules and for the allocation of infrastructure capacity⁸². Pursuant to regulation 19(1), we have established a framework⁸³ for the allocation of infrastructure capacity⁸⁴.

4.26 The European Commission adopted new rules in April 2016 regarding the procedures and criteria concerning agreements for the allocation of rail infrastructure capacity. These rules will apply from December 2016 and infrastructure managers should ensure they are familiar with, and understand, the requirements⁸⁵.

4.27 Matters relating to the allocation process and its results can be the subject of an appeal to ORR under regulation 32⁸⁶.

and special measures to be taken in the event of disruption. Schedule 4 sets out the timetable for the allocation process.

⁸² See regulation 19(3) and <http://orr.gov.uk/what-and-how-we-regulate/track-access/guidance>

⁸³ <http://orr.gov.uk/what-and-how-we-regulate/track-access/guidance>

⁸⁴ This framework does not apply to HS1. For HS1 it is for the Secretary of State to establish a framework, if so required.

⁸⁵ [http://ec.europa.eu/transport/modes/rail/news/doc/2016-04-07-new-rules-access-to-rail-infrastructure/c\(2016\)1954-draft.pdf](http://ec.europa.eu/transport/modes/rail/news/doc/2016-04-07-new-rules-access-to-rail-infrastructure/c(2016)1954-draft.pdf)

⁸⁶ See regulation 32(2)(c).

5. Appeals

Introduction

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

Appeals to the Regulatory Body

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

5.3 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 matters⁸⁷:

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

Who can appeal?

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

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

⁸⁷ See regulation 32(1) and 32(2).

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

Scope

5.7 An applicant must lodge its appeal by way of an application under regulation 32 where the matter under appeal does not come within the scope of section 17 or 22A of the Act. An appeal will fall outside the scope of section 17 or 22A of the Act where⁸⁸:

- 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.

5.8 Where the matter of an appeal under regulation 32(1) is a matter in relation to which directions may be sought from ORR under section 17 or 22A of the Act, the applicant must lodge its appeal by way of an application under the relevant section of the Act, rather than by way of an application under regulation 32⁸⁹.

5.9 We have separate published guidance on making an appeal under section 17 or 22A of the Act, which applicants should refer to as applicable⁹⁰.

5.10 There will also be separate guidance on the appeals process under regulation 32 in relation to the Fixed Link (the Channel Tunnel) in due course. If your appeal relates to the Fixed Link, please speak to us in the first instance.

5.11 If an appeal is made under regulation 32, the affected parties are still free to seek an agreement on the issue under appeal.

⁸⁸ See regulation 32(4).

⁸⁹ See regulation 32(3).

⁹⁰ See our guidance module [Making an Application](#).

5.12 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.

How to make an appeal under regulation 32

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

5.14 An applicant should use Form R32 to make its appeal⁹¹. The application should include:

- the applicant's details;
- the matter under appeal and/or an explanation as to how the applicant has been unfairly treated, discriminated against or is in any other way aggrieved;
- an explanation as to why sections 17 and 22A of the Act do not apply;
- the details of the respondent and of any interested third parties;
- the grounds on which the appeal is being made, which should include reference to the applicable regulation(s),
- details of the negotiations/discussions undertaken to date between the parties to resolve the issue,
- any terms agreed between the parties;
- supporting analysis and evidence;
- any proposed draft agreement (where appropriate);
- any documents incorporated by reference (other than established standard industry codes or other instruments); and
- any other relevant information to the matter under appeal.

The appeals process

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

⁹¹ <http://orr.gov.uk/what-and-how-we-regulate/track-access/track-access-process/forms-model-contracts-and-general-approvals>

Stage 1: Liaising with the relevant parties

- 5.16 We will, as appropriate, ask for relevant information and initiate a consultation with the relevant parties within one month of the date of receipt of the appeal⁹². 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.
- 5.17 Who the relevant parties are will depend on the issue under appeal. It may be just the applicant and the respondent⁹³, 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).
- 5.18 We will send the application for appeal to the respondent within one month of the date of our receipt of the application and request that the respondent provides written representations in response to the specific issues raised by the applicant. We will normally allow 21 days for the respondent to provide its response along with a list of any interested persons.
- 5.19 If there are any interested persons, we will send a copy of the application to such persons as well as all other relevant parties we have specifically identified and invite them to make representations within 21 days.
- 5.20 We will publish the appeal on our website at the same time or shortly after we send it to the respondent and invite comments from other third parties. We will usually set a deadline of 21 days from the date of publication for receipt of any comments.

Stage 2: Requesting further information

- 5.21 Where we receive written representations from the respondent, we will send the applicant a copy of these representations inviting the applicant to make any further written representations in response. Any further response must be provided within the timeframe specified by us, which will normally be 10 days.
- 5.22 Where we receive written representations from other relevant parties we will send a copy to the applicant and the respondent. We will invite each of them to provide any comments, normally, within 10 days.
- 5.23 In some instances it may also be appropriate or necessary for us to conduct site visits or speak directly with the parties involved.

⁹² See regulation 32(5)(a) and also paragraph 5.42 below.

⁹³ The respondent is the party against whom the appeal is made.

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

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

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

Stage 3: Making the decision

5.27 Once we have all the information we need we will make a decision on the appeal based upon the evidence and information provided by the parties, and any information or evidence gathered by ORR. To the extent relevant and consistent with the Recast Directive we will consider our section 4 duties under the Act⁹⁴ when we make our decision on the appeal.

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

- make a decision;
- inform the relevant parties of our decision and our reasons for that decision;
- where appropriate, issue a direction to the infrastructure manager, allocation body, charging body, service provider or, as the case may be, railway undertaking, to remedy the situation from which the appeal arose; and
- publish the decision⁹⁵.

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

5.30 Once the decision is finalised:

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

⁹⁴ Section 4 of the Act requires us to balance a number of public interest duties.

⁹⁵ See regulation 32(5)(b).

5.31 Our decision on a regulation 32 appeal is binding on all parties affected by that decision⁹⁶.

5.32 Where a person is given a direction pursuant to an appeal under regulation 32, they are under a duty to comply with and give effect to that direction⁹⁷. 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

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

5.34 Regulation 36 provides that the provisions of section 80 of the Act (*duty of certain persons to furnish information on request*) will apply if we request information in connection with our functions under the 2016 Regulations. 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.

5.35 We can impose a financial penalty on a party that fails or refuses to comply with such a request for information⁹⁸.

Scope of disclosure in an appeal

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

5.37 ORR is able to disclose information which has been obtained under or by virtue of any provision of the 2016 Regulations without restriction where disclosure is made for the purpose of facilitating our functions under the 2016 Regulations⁹⁹. However, we will give consideration to requests for non-disclosure.

⁹⁶ See regulation 32(11)(a).

⁹⁷ See regulation 32(11)(b).

⁹⁸ See regulation 38 and paragraphs 1.9-1.11 of Chapter 1 of this guidance.

⁹⁹ See regulation 44 of the 2016 Regulations and section 145(2)(ga) of the Railways Act 1993.

- 5.38 In considering a request for non-disclosure, we will generally apply the test set out in section 71(2) of the Act. This requires us to have regard to the need for excluding from publication, so far as that is practicable, any matter which relates to the affairs of an individual or specifically to the affairs of a particular body where publication of that matter would or might “...*in the opinion of [ORR], seriously and prejudicially affect the interests...*” of that individual or body. We consider that this is also an appropriate test to apply when considering the scope of disclosure.
- 5.39 Where a party does not want all its information disclosed, it must make a request to ORR for redactions at the same time the information is first provided to us. The request for redactions should be supported by reasons, including how disclosure of that information would seriously and prejudicially affect the disclosing party’s interests. The disclosing party should consider whether it can provide such information in a more generalised format that can be disclosed.
- 5.40 Where a request for non-disclosure of information is made, it will be a matter for ORR to determine, in our sole discretion, whether to restrict disclosure of that information. We recognise that there may be circumstances where information a party provides contains commercially sensitive or confidential information or where the parties are competitors and disclosure could raise concerns from a competition law perspective. We will therefore aim to strike a balance between complete transparency and protecting genuinely commercially sensitive information.
- 5.41 In determining the issue of disclosure we will expect all parties to comply with such process and timeframes as we may specify to ensure we are able to progress the appeal in a timely way and in accordance with statutory timeframes.
- 5.42 Where an applicant submits an appeal and requests redactions to its application, we will not consider the application to be complete, and therefore received by ORR for the purpose of regulation 32(5)(a), until the disclosure issues have been resolved to our satisfaction.

Appeal-specific issues

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

Rail link facility and development agreements

- 5.44 Where a decision or direction in connection with the determination of an appeal under regulation 32 would affect a rail link facility or the operation of the development agreement, we are required to carry out a consultation¹⁰⁰.

¹⁰⁰ See regulation 32(6).

5.45 Where the Secretary of State makes representations, before making or issuing a decision or direction, we must consult such interested parties as we consider appropriate on the Secretary of State's representations¹⁰¹.

Access – viable alternatives

5.46 When an appeal under regulation 32(1) contests a decision under regulation 6(4) to refuse a request for access to and the supply of services, our decision must include a determination as to whether, in respect of the access and provision of services to which the appeal relates, a viable alternative exists¹⁰².

5.47 When an appeal under regulation 32(1) contests a decision to refuse or restrict the provision of services in circumstances where there are conflicting requests as described in regulation 6(7), our decision must include a determination, as appropriate and in respect of 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 applicant¹⁰³.

Infrastructure capacity

5.48 Pursuant to regulation 32(10), where an appeal under regulation 32(1) concerns a refusal by an infrastructure manager or allocation body to allocate infrastructure capacity, or concerns an appeal against the terms of an offer of infrastructure capacity, in our decision we must either:

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

¹⁰¹ See regulation 32(7).

¹⁰² See regulation 32(8).

¹⁰³ See regulation 32(9).



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