



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

December 2019

1. Overview

Introduction

- 1.1 This guidance sets out the Office of Rail and Road's (**ORR's**) interpretation of *The Railways Infrastructure (Access, Management and Licensing of Railway Undertakings) Regulations (Northern Ireland) 2016* (the **NI Regulations**). The NI Regulations transpose *Directive 2012/34/EU establishing a single European railway area* (the Recast Directive)¹ into NI law. In 2019 they were amended by *The Railways Infrastructure (Access, Management and Licensing of Railway Undertakings) (Amendment) Regulations (Northern Ireland) 2019* (the 2019 Regulations)². Hereafter, references in this document to the NI Regulations means the NI Regulations as amended by the 2019 Regulations.
- 1.2 We updated the guidance in 2019 to reflect the additional requirements of *The Commission Implementing Regulation (EU) 2017/2177 of 22 November 2017 on access to service facilities and rail-related services* (the **Implementing Regulation**)³, which supplements a number of obligations set out in the NI Regulations (relating to service facilities). We also updated the guidance to reflect the 2019 Regulations.
- 1.3 This chapter provides an introduction to the legislation; an explanation of ORR's role; and defines some key terms. The other chapters are:
 - Chapter 2 [Provision of information](#): a description of the information that service providers must provide.
 - Chapter 3 [Access](#): an overview of the regulations that concern access to infrastructure and service facilities, including the provisions relating to unused service facilities.
 - Chapter 4 [Charges](#): an overview of the regulations on charging principles for access to services, and the requirements around publication of information on charges.
 - Chapter 5 [Infrastructure](#): an overview of the regulations affecting infrastructure managers, (excluding those regulations covered in chapter 2 Access).
 - Chapter 6 [Appeals](#): an explanation of how to appeal to ORR.
- 1.4 This guidance does not cover the provisions in the NI Regulations relating to:
 - access to training facilities for railway undertakings applying for a safety

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

² <http://www.legislation.gov.uk/nisr/2019/15/made>

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

certificate in accordance with the requirements of Council Directive 2004/49/EC⁴; and

- European licences⁵.

The Department for Infrastructure Northern Ireland (DFINI) administers these provisions. Queries relating to these provisions should be directed to DFINI.

- 1.5 The terms used throughout the guidance have the same meanings as in the NI Regulations, the Implementing Regulation and the Recast Directive, unless the context requires otherwise. Generally a reference to a regulation, paragraph, Schedule or Part in this guidance is a reference to a regulation, paragraph, Schedule or Part in the NI Regulations unless otherwise specified. A reference to an Article in this guidance is a reference to an Article in the Implementing Regulation unless otherwise specified.
- 1.6 Please note that through the different legislation there is 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.

The Legislation

- 1.7 The NI Regulations were made on 1 December 2016 and laid before the Northern Ireland Assembly on 6 December. They came into operation on 23 January 2017. They implement the Recast Directive. The Recast Directive repeals and consolidates previous EU legislation and makes some substantive changes to the law. Similar regulations apply in GB.
- 1.8 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. The Recast Directive also requires each Member State to have a single national regulatory body for the railway sector. To ensure that the UK fulfils its obligations under EU law, ORR has become responsible for the economic regulation of railways in Northern Ireland (NI).
- 1.9 The NI Regulations revoke and replace The Railways Infrastructure Railways Infrastructure (Access, Management and Licensing of Railway Undertakings) Regulations (Northern Ireland) 2005 (the **2005 NI Regulations**). Key changes made by the NI Regulations, compared to the 2005 NI Regulations, include:

⁴ See regulation 6.

⁵ See Part 8.

- More services are now included in the minimum access package and list of service facilities (Schedule 1).
- There is now more clarity on the meaning and application of ‘viable alternative’ (regulation 2).
- 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 5).
- Service facilities⁶ are now subject to a ‘use it or lease it’ obligation if they have not been used for at least two consecutive years (regulation 5(8)).
- Charges for access to a service facility are subject to certain charging principles (Schedule 2(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).

1.10 The Recast also envisaged the use of secondary legislation, including implementing regulations, in some areas to set out particular detailed requirements. The Implementing Regulation⁷ relevant to this guidance sets out new rules for service providers⁸. It was adopted in November 2017 and most provisions apply from 1 June 2019⁹.

1.11 The Implementing Regulation is directly applicable in the UK and EU Member States and applies alongside the NI Regulations.

1.12 This guidance reflects significant elements of the legislation about which

⁶ Service facility is defined in the Recast Directive 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 referred to in points 2 to 4 of Annex II.*”

⁷ The Implementing Regulation: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32017R2177>

⁸ Referred to in the Implementing Regulation as operators of service facilities.

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

infrastructure managers, railway undertakings and service providers should be aware. It also explains ORR's policy and processes. However, we do not cover every aspect of the legislation and it is the responsibility of individual businesses to ensure that they are compliant with the law.

1.13 In particular, while this guidance reflects some of the changes to provisions in the NI Regulations introduced by the 2019 Regulations, it does not cover every change introduced. We recommend that you should read the NI Regulations in full and as amended.

Key Changes made by the Implementing Regulation and 2019 Regulations

1.14 Key changes made by the Implementing Regulation include (this list is not exhaustive):

- Service providers must prepare a service facility description (SFD) for the facility and services for which they are responsible (Article 4). The SFD must be published on a website or a link be provided to the Infrastructure Manager to be included in its network statement (Article 5).
- Infrastructure managers and service providers must co-operate to ensure consistent allocation of capacity where necessary (Article 7).
- There are further refinements and clarifications for the handling of access requests (Articles 8, 9, 10, 11, 12 and 13). These complement and apply alongside the access provisions in the NI Regulations.
- There are further details around the process where service facilities, which have not been in use for two consecutive years may have to be leased or rented to other parties (Article 15). These sit alongside regulation 5(8) of the NI Regulations.
- Certain exemptions are possible in accordance with Article 2 of the Implementing Regulation (see the section on Exemptions below for further detail).

1.15 Key changes made by the 2019 Regulations include (this list is not exhaustive):

- Interpretation and definitions – a number of definitions in regulation 2 of the NI Regulations have been added.
- Scope – a number of amendments have been made to regulation 3 of the NI Regulations.
- Access rights – regulation 4 of the NI Regulations has been amended. In

particular to remove reference to international passenger services.

- Infrastructure management – new regulations have been added to cover additional requirements on independence (regulation 8A); outsourcing and sharing the infrastructure manager’s functions (regulation 8B); impartiality of the infrastructure manager in respect of traffic management and maintenance planning (regulation 8C); financial transparency (regulation 9A).
- Appeals – regulation 32 of the NI Regulations has been amended to include additional matters that can be the subject of an appeal to the regulatory body.

Other relevant ORR guidance

1.16 ORR has also published other guidance that may be relevant and of interest. This section sets out some of them.

Market Guidance

1.17 Regulation 34(1) requires us to monitor the competitive situation in the rail services market.¹⁰ Guidance on the discharge of these functions is covered separately in our *Market Guidance*¹¹.

Economic Enforcement

1.18 Regulation 38 provides us with the power to impose a penalty on a ‘relevant operator’ who has contravened or is contravening a decision, direction or notice issued by us under the NI Regulations.

1.19 A relevant operator means:

- A person issued with a decision or direction under regulation 31, 32, 33, or 34; or
- A person on whom a notice has been served under regulation 36.

1.20 The NI Regulations require us, in consultation with DFNI, to prepare and publish a statement of policy with respect to the imposition of penalties and the determination of their amount¹². A Northern Ireland Economic Enforcement Policy and Penalties Statement is available on our website [here](#)¹³.

¹⁰ The Competition Act 1998 also applies to Northern Ireland however ORR is not the enforcing body.

¹¹ <http://orr.gov.uk/consultations/closed-consultations/competition-consultations/ors-approach-to-monitoring-and-reviewing-markets>

¹² See regulation 39.

¹³ <http://orr.gov.uk/rail/rail-enforcement-powers>

Framework Agreements

1.21 We have published separate guidance on the duration of framework agreements parties may enter into under regulation 22 (*Application for infrastructure capacity*)¹⁴.

Key definitions

1.22 The definitions used in the NI Regulations, the Implementing Regulation and in the Recast Directive are important in understanding the application of the NI Regulations and the Implementing Regulation. We have set out the key definitions below, with explanation where required.

Definitions in the NI Regulations

1.23 The 2019 Regulations amended a number of the definitions in the NI Regulations and added a number of new definitions. We recommend that you refer to the 2019 Regulations¹⁵ to ensure that you are using the correct definitions.

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

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

'infrastructure manager' is defined in the NI Regulations as:

any body or undertaking that is responsible in particular for establishing and maintaining railway infrastructure;

'International Grouping' is defined in the NI Regulations as *any association of at least two railway undertakings established in different Member States for the purpose of providing international transport between Member states;*

We would consider this definition to include the Enterprise cross-border rail service.

¹⁴ <http://orr.gov.uk/what-and-how-we-regulate/track-access/guidance>

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

‘network’ is defined in the NI Regulations as *the entire railway infrastructure managed by an infrastructure manager.*

Network is therefore a broad concept under the 2016 Regulations.

‘railway infrastructure’ is defined in the NI Regulations as *all the items listed in Annex 1 to the [Recast Directive].*

‘railway undertaking’ is defined in the NI Regulations as *any public or private undertaking licensed according to the [Recast Directive].*

In practice railway undertakings will be licensed train operators.

‘service provider’ is defined in the NI Regulations as:
a body or undertaking that supplies any of the services-

(a) to which access is granted by virtue of regulation 5; or

(b) listed in paragraph 2, 3 or 4 of Schedule 1;

or which manages a service facility used for this supply, whether or not that body or undertaking is also an infrastructure manager;.

As of 23 January 2017, we consider NIR Networks Limited to be an infrastructure manager for the purposes of the NI Regulations. We would consider NIR Operations Limited (the railway undertaking in NI) to be a “service provider”¹⁶ for the purposes of the NI Regulations.

Our view is that an owner of a heritage railway would not be an infrastructure manager for the purposes of the NI Regulations. Similarly, an owner of a private station would not be an infrastructure manager if it does not provide any service that consists of, or is comprised in, the provision or operation of railway infrastructure.

If it were to become relevant, our expectation is that we would consider owners of freight terminals to be service providers within the meaning of the NI Regulations.

It is possible for an infrastructure manager to also be a service provider for the purposes of the NI 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.

Definitions in the Implementing Regulation

1.24 The following definitions are set out in the Implementing Regulation:

¹⁶ Service provider is defined in Part 1 of the NI Regulations.

‘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 NI Regulations;

‘basic service’ is defined as any service listed in paragraph 2 of Schedule 2 of the NI 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 needs 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 paragraphs 2, 3 and 4 of Schedule 1 to the NI 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;

‘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 possibility;

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

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

Scope of the NI Regulations

Scope as it applies to railway undertakings

- 1.25 The NI Regulations¹⁷ describe entitlements and obligations in respect of access and governance for railway undertakings, service providers and infrastructure managers.
- 1.26 These entitlements and obligations would not apply to a railway undertaking 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 services¹⁸. At present, we consider that no railway undertaking falls within this provision in NI.
- 1.27 However, as an exception to the above paragraph, in the event that there was to be such a railway undertaking in NI and it was 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), certain provisions of the NI Regulations relating to management independence, separation of accounts and business plans would still apply¹⁹.

Scope as it applies to networks

1.28 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 request²⁰,

do not apply to the following networks²¹:

- 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;

¹⁷ Subject to regulations 3(3) and 3(6), these are Parts 2 and 3 (save for regulation 13), regulations 14(6) and (7), 15, 19(3), 33 and Schedule 1.

¹⁸ See regulation 3(3).

¹⁹ See regulations 3(4), 8, 9 and 12(4) to (7).

²⁰ See regulations 3(6), 5, 10, 11, 12, 13, Parts 4 to 6 and Schedules 2, 3 and 5.

²¹ See regulation 3(7). Please note that the 2019 Regulations extended this list. Please refer to the 2019 Regulations for these additions.

- regional networks used for regional freight services solely by a railway undertaking already excluded from the scope of the NI Regulations (until such time as capacity is requested by another applicant);
- privately owned railway infrastructure that exists solely for use by the infrastructure manager for its own freight operations.

Scope – general

1.29 The Implementing Regulation applies to all service providers, infrastructure managers and applicants covered by the NI Regulations. However, it is possible for certain service providers to apply to ORR for exemptions from certain provisions (see section below about Exemptions).

1.30 Please note that facilities that are not owned by an infrastructure manager or public body are still subject to the legislative requirements set out in this guidance.

Exemptions

1.31 Article 2(2) of the Implementing Regulation allows ORR to exempt service providers²² from all or some of its provisions, with some exceptions²³. 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-case basis. We will have regard to the criteria set out in the Implementing Regulation and the International Regulators' Group (Rail)'s paper on exemptions.²⁴

1.32 Exemption from the Implementing Regulation **does not** provide exemption from any of the requirements and obligations under the NI Regulations.

²² According to Article 2(2), 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.

²³ According to Article 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.

²⁴ 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/>

2. Provision of information

2.1 Transparency of access arrangements and procedures is key to ensuring the basis for non-discriminatory access to service facilities for all railway undertakings. This is a requirement under the NI Regulations and the Implementing Regulation sets out further detail on information that is required to be made available (in the form of a SFD), and on requirements to make this information publicly available.

Service facility description

2.2 Article 4 of the Implementing Regulation provides that service providers shall make available a 'service facility description' (SFD) for the service facilities and services for which they are responsible. The SFD must include at least the following information:

- a) A list of all the relevant installations including their locations and opening hours;
- b) Key contact details of the service provider;
- c) A description of the technical characteristics;
- d) A description of all rail-related services supplied in the facility and of their type (basic, additional or ancillary);
- e) The possibility for self-supply (where this is technically and legally feasible) and the conditions to be met for self-supply;
- f) Information on the procedures for requesting access, with deadlines for submitting the requests and time limits for handling them;
- g) Information on whether separate requests are needed where there is more than one provider of services;
- h) Information on the minimum content and format of an access request or a template;
- i) Model access contracts and general terms and conditions where service facilities are operated by operators under the direct or indirect control of a controlling entity²⁵;
- j) 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;

²⁵ Defined in Article 3 of the Implementing Regulation.

- k) A description of the coordination procedure and measures which may be adopted to maximise capacity and any priority criteria²⁶;
- l) Information on changes in technical characteristics and temporary capacity restrictions which could have a major impact on operation;
- m) Information on charges;
- n) Information on principles of discount schemes offered, respecting commercial confidentiality requirements.

Publication

- 2.3 Article 5 of the Implementing Regulation provides that service providers must make the SFD available free of charge through the infrastructure manager's network statement²⁷. The service provider can supply the SFD to the infrastructure manager or provide the infrastructure manager with a link to the service provider's own website. The information must be kept up to date as necessary.
- 2.4 EU Infrastructure managers ²⁸ have developed a common template that service providers may use. Although not compulsory, we encourage service providers to use the common template.

²⁶ See Chapter 3.

²⁷ Which can be found on the Translink website [here](#)

²⁸ Through the Rail Net Europe (RNE) network <http://www.me.eu/>

3. Access arrangements

Introduction

- 3.1 The entitlement of railway undertakings to access railway infrastructure, and service facilities, are set out in regulations 4 and 5 of the NI Regulations.
- 3.2 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 4 and 5 (as applicable).

Regulation 4: Access and transit rights

- 3.3 Regulation 4(1)²⁹ applies to railway undertakings operating all types of rail freight services or passenger services. It gives these railway undertakings access rights³⁰ to the railway infrastructure (network, station and track) necessary to operate these types of services.
- 3.4 Regulation 4(2) provides that an international grouping, which includes a railway undertaking established in Northern Ireland, for the purposes of operating all types of rail freight or international passenger services, is entitled to such access or transit rights³¹ as may be necessary for the provision of international transport services between EEA States where the undertakings constituting the grouping are established.
- 3.5 Regulation 4(3) provides that the access rights described in regulation 4(1) include access to railway infrastructure (usually track) connecting the service facilities referred to in paragraph 2 of Schedule 1, which includes refuelling facilities, passenger stations, freight terminals and maintenance facilities.
- 3.6 Regulation 4(4) provides that the access rights described in regulation 4(1) for the purposes of operating rail freight services include the right of access to railway infrastructure serving, or potentially serving, more than one final customer.
- 3.7 Regulation 4(5) provides that the access rights of a railway undertaking for the purpose of the operation of a passenger service include the right to pick up passengers at any station located on the route and set them down at another.
- 3.8 ORR may, in accordance with regulation 33, where requested by a relevant party, limit the access rights granted by regulation 4 to passenger services between a place of departure and a destination where one or more public service contracts cover the

²⁹ Regulation 4(1) as amended by the 2019 Regulations.

³⁰ 'access rights' is defined as "rights of access to railway infrastructure for the purpose of operating a service for the transport of goods or passengers".

³¹ 'transit rights' is defined as "rights of transit through a Member State using the railway infrastructure located in the Member State".

same route or an alternative route if the exercise of any such right would compromise the economic equilibrium of a public service contract or contracts in question³². This is referred to as the Economic Equilibrium Test on which we have published separate guidance³³.

- 3.9 Infrastructure managers must ensure that the entitlements to access provided by regulation 4 are honoured³⁴. There is no provision in regulation 4 which enables an infrastructure manager to refuse a request for access made under that regulation.
- 3.10 A railway undertaking has a right to appeal to ORR under regulation 32³⁵ if it is denied the entitlements conferred on it under regulation 4³⁶.

Regulation 5: Access to services

Minimum access package

3.11 Under regulation 5(1) all railway undertakings are entitled to services comprising:

(a) the minimum access package; and

(b) the track access to service facilities and the supply of services (this includes refuelling, stations, marshalling yards, sidings and freight terminals),

as described in paragraphs 1 and 2 of Schedule 1.

3.12 Regulation 5(2) requires the infrastructure manager or service provider to provide the services described in regulation 5(1) in an equitable, non-discriminatory and transparent manner. In line with the wording of Article 13 of the Recast Directive, our view is that it is the responsibility of infrastructure managers to supply the minimum access package referred to in regulation 5(1)(a), while it is the responsibility of service providers to supply the track access to service facilities and the supply of services referred to in regulation 5(1)(b). This distinction is reflected in the following paragraphs on regulation 5.

3.13 To clarify the interaction between regulation 4(1) and regulation 5(1), we have set out below our view on the application of these regulations.

3.14 While regulation 4(1) and regulation 5(1) both give rights of access to railway undertakings, regulation 4(1) applies only to railway undertakings seeking access to infrastructure for the purpose of operating passenger services and freight services. Regulation 5(1) applies to all railway undertakings seeking access to services,

³² See regulations 4(6) and 4(7).

³³ <https://orr.gov.uk/rail/access-to-the-network/track-access/guidance>

³⁴ See regulation 4(9).

³⁵ See regulation 4(10).

³⁶ There is no right of appeal where a railway undertaking is denied access under regulation 4 pursuant to a decision of ORR under regulation 4(7) or regulation 33 (Regulatory decisions concerning passenger services).

comprising the minimum access package and the track access to service facilities and the supply of services.

- 3.15 We would therefore expect railway undertakings seeking access rights for access to railway infrastructure to rely on regulation 4(1) while all railway undertakings that are seeking rights of access in accordance with the minimum access package should rely on regulation 5(1).
- 3.16 Requests for access to, and the supply of, services must be answered within a reasonable time limit as set by ORR³⁷. 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.
- 3.17 Under regulation 5, 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 paragraphs 1 and 2 of Schedule 1.

Non-conflicting requests for access to services

- 3.18 A non-conflicting request is one where the request does not conflict either with requests from other railway undertakings or with capacity at the service facility that has already been allocated to another railway undertaking. Regulation 5(4) provides that a request for access to, and the supply of, any of the services described in paragraph 2 of Schedule 1, 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.
- 3.19 When considering viable alternatives, the process we would generally expect to be followed (in accordance with Article 12 of the Implementing Regulation) is set out below.
- 3.20 However, the provisions of regulation 5(4) do not 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, services³⁸. 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.

³⁷ See regulation 5(3).

³⁸ See regulation 5(6).

- 3.21 The NI Regulations only require a service provider to justify, in writing, a decision to refuse a request for access to, and the supply of, services, and to provide information about viable alternatives, where a request relates to those services referred to in paragraph 2(a), (b), (c), (d), (e) and (f) of Schedule 1 and the service provider is under the direct or indirect control of a dominant body or firm³⁹.
- 3.22 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 1 are in writing and fully reasoned and objectively justified. Therefore, whenever a service provider is refusing access under regulation 5(4), we expect it 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. This is because all such decisions are appealable and may be subject to ORR scrutiny in due course.
- 3.23 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. However, it does not cover every eventuality or circumstance and it is for the service provider to ensure it complies with the legal requirements under the NI Regulations and the Implementing Regulation when considering requests for access.

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

- 3.24 Regulation 5(7) of the NI Regulations and articles 10 and 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 1, which conflicts with another request or with service facility capacity which is already allocated. We refer to these as 'conflicting requests'.
- 3.25 Regulations 5(4) and 5(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, although 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.
- 3.26 Regulation 5(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; the purpose of the coordination procedure is to attempt to remove the conflict through agreement with affected parties.

³⁹ See regulation 5(5).

Stage 1

3.27 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 possible⁴⁰. 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).⁴¹
- Where the railway undertaking has requested access to, or the supply of, services set out in paragraphs 3 and 4 of Schedule 1 and those services are offered in the service facility, the Coordination Procedure must also include the providers of those services.⁴²
- 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 and the railway undertaking guarantees to cover the cost of that investment, the service provider should consider this⁴³.

⁴⁰ See Article 10(1) of the Implementing Regulation, which requires the service provider to ensure the best possible matching of all requests and regulation 5(7) of the NI 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 need.

⁴¹ See regulation 5(7) of the NI Regulations and Article 10(1) of the Implementing Regulation.

⁴² See Article 10(1) of the Implementing Regulation.

⁴³ Recital 14 of the Implementing Regulation.

3.28 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 alternatives⁴⁴. 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):

3.29 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.

3.30 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).

3.31 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.

3.32 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.

Priority Criteria:

- Any priority criteria must be non-discriminatory and objective and published in the SFD. In addition, such priority criteria must also take into account:
 - the purpose of the service facility;
 - the purpose and nature of the railway transport services concerned; and
 - the objective of securing an efficient use of available capacity.

⁴⁴ See Article 10(2) of the Implementing Regulation.

- Priority criteria may also take into account the following aspects, as determined by the service provider:
 - existing contracts;
 - 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;
 - already allocated train paths linked to the requested services;
 - priority criteria for allocation of train paths;
 - timely submission of requests.

3.33 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 intention.⁴⁵

3.34 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 requested it not to.⁴⁶

3.35 The process for considering viable alternatives is set out [below](#).

3.36 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.

3.37 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 the viable

⁴⁵ See Article 12(1) of the Implementing Regulation.

⁴⁶ See Article 12(5) of the Implementing Regulation.

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.

3.38 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 NI Regulations and the Implementing Regulation.

Constrained capacity

3.39 Where capacity at a service facility is constrained, we do not consider that the NI 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:

- provide a fully reasoned and objectively justified case explaining the nature of the capacity constraints;
- 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.

3.40 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 access.⁴⁷ 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.

Viable alternative

3.41 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 1.

Definition of 'viable alternative'

3.42 'Viable alternative' is defined in the NI 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

⁴⁷ See article 10(5) of the Implementing Regulation.

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

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

- 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.
- The commercial assessment for determining whether a service facility is a viable alternative needs to include consideration of all relevant costs and not just the price for accessing the alternative service facility. Wherever possible, it should include an assessment of the impact on the railway undertaking's operational costs and the profitability of the envisaged services.⁴⁸
- 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.

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

- 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 should involve consideration of the physical and technical characteristics of the facility (such as location, means of access, length of track and electrification), the operational characteristics of the facility (such as opening hours, capacity, driver training requirements and the type of services offered) and the attractiveness and competitiveness of the services (such as routing, transport connections and transportation time)⁴⁹.
- 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.

⁴⁸ See Recital 16 of the Implementing Regulation.

⁴⁹ See Recital 16 of the Implementing Regulation.

- 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.

3.45 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 Regulation⁵⁰ 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

3.46 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).

3.47 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:

- other SFDs;
- information published on a common web portal; and
- any information provided by the railway undertaking.

3.48 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 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.

⁵⁰ See Recital 17 of the Implementing Regulation.

3.49 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:

- substitutability of operational characteristics of the alternative service facility;
- substitutability of physical and technical characteristics of the alternative facility;
- clear impact on attractiveness and competitiveness of the railway transport service envisaged by the railway undertaking;
- estimated additional cost for the railway undertaking⁵¹.

3.50 Where information on the capacity of the proposed alternative is not publicly available, the railway undertaking must verify it⁵². [NB – the Implementing Regulation requires service providers⁵³ to answer requests for information about available capacity⁵⁴.

3.51 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 should then inform the service provider of the outcome of its assessment within a jointly agreed deadline.

3.52 Following the joint assessment:

- 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.
- 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.
- If the service provider and railway undertaking do not agree on a viable alternative, the service provider may refuse the request indicating the alternatives it considers to be viable. Whether or not there is actually a viable alternative could be the subject of an appeal to ORR.

3.53 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

⁵¹ Article 12(3) of the Implementing Regulation.

⁵² Article 12(4) of the Implementing Regulation.

⁵³ Of service facilities listed in points 2(a) to (g) of Annex II to Directive 2012/34/EU.

⁵⁴ Article 6(2) of the Implementing Regulation.

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.)

3.54 The flowchart at Annex 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 NI Regulations and the Implementing Regulation.

3.55 A railway undertaking may bring an appeal concerning the entitlements to access conferred on it by regulation 4 and/or regulation 5. See the chapter on [Appeals](#).

Dominant body or firm

3.56 Regulation 5(5) provides that where there is a request for any of the services listed at paragraphs 2(a)⁵⁵, (b)⁵⁶, (c)⁵⁷, (d)⁵⁸, (e)⁵⁹, and (f)⁶⁰ of Schedule 1, 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 provide information about any viable alternative.

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

Unused service facilities

3.58 Regulation 5(8) of the NI Regulations sets requirements for unused facilities to be made available for lease or rent. Article 15 of the Implementing Regulation adds detail.

3.59 Under regulation 5(8) of the NI Regulations, where a relevant service facility⁶¹:

- has not been in use for at least two consecutive years⁶², 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

⁵⁵ Refuelling facilities, and supply of fuel in in these facilities.

⁵⁶ Passenger stations, including buildings and other facilities.

⁵⁷ Freight terminals.

⁵⁸ Marshalling yards.

⁵⁹ Train formation facilities including shunting facilities.

⁶⁰ Storage sidings.

⁶¹ Service facilities described in paragraph 2 of Schedule 1 of the NI Regulations.

⁶² 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.

lease as a rail service facility, and publicise this offer.

- 3.60 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 is unsatisfactory, ORR may require that the facility, either in whole or in part, is available for lease or rent.
- 3.61 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 ORR⁶³ and the relevant infrastructure manager.
- 3.62 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.
- 3.63 In particular, any railway undertaking interested in using a service facility which has not been in use for two years must express its interest in writing, and inform ORR, demonstrating the needs of the railway undertaking concerned.
- 3.64 Article 15(3) 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.
- 3.65 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 procedure⁶⁴, selection criteria, the main characteristics of the technical equipment of the service facility and the address and time limit for the submission of tenders⁶⁵.
- 3.66 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 provider⁶⁶.

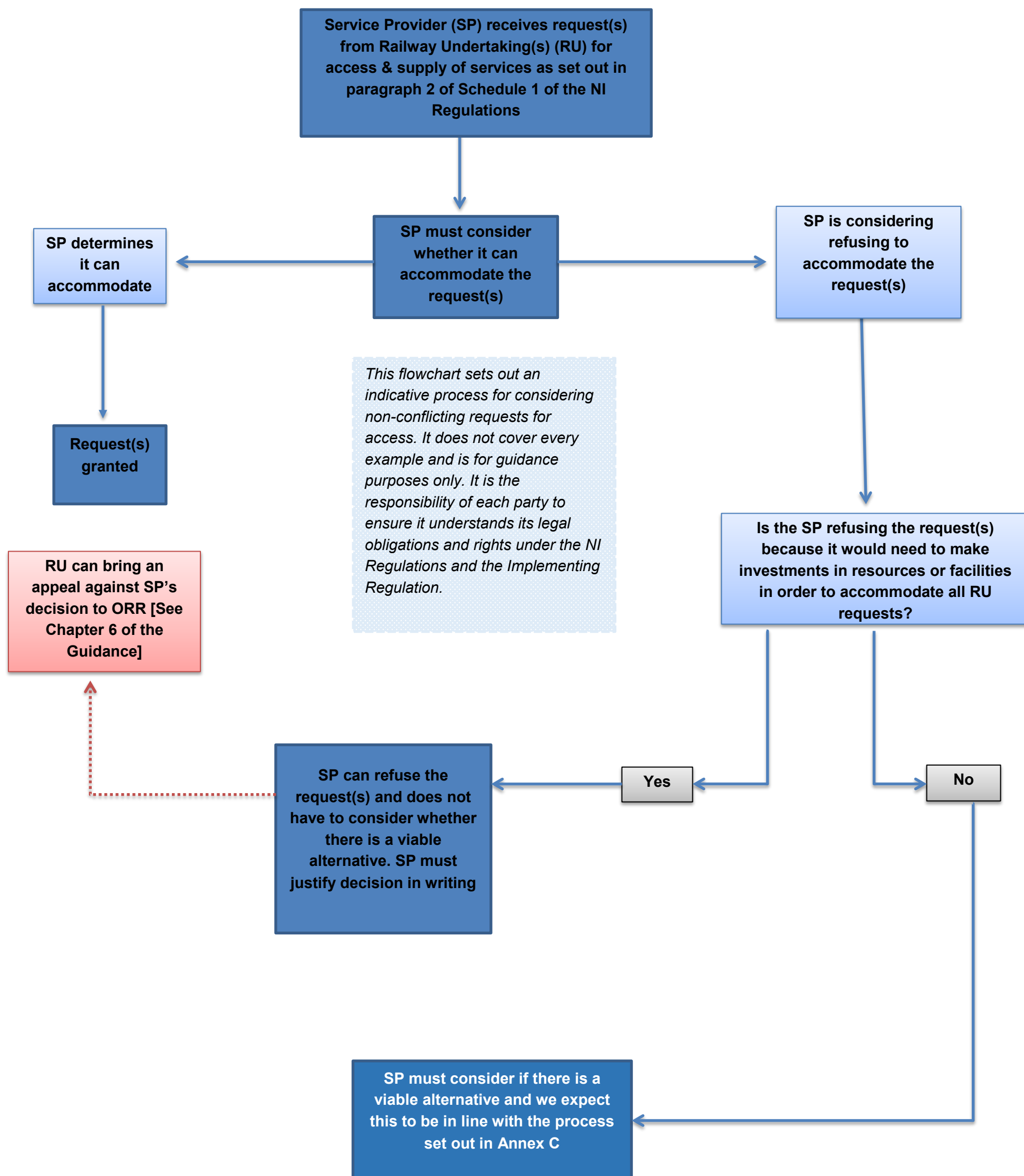
⁶³ Track.access@orr.gov.uk

⁶⁴ 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.

⁶⁵ The time limit must be at least 30 days after publication of the notice.

⁶⁶ Articles 15(4) – 15(6).

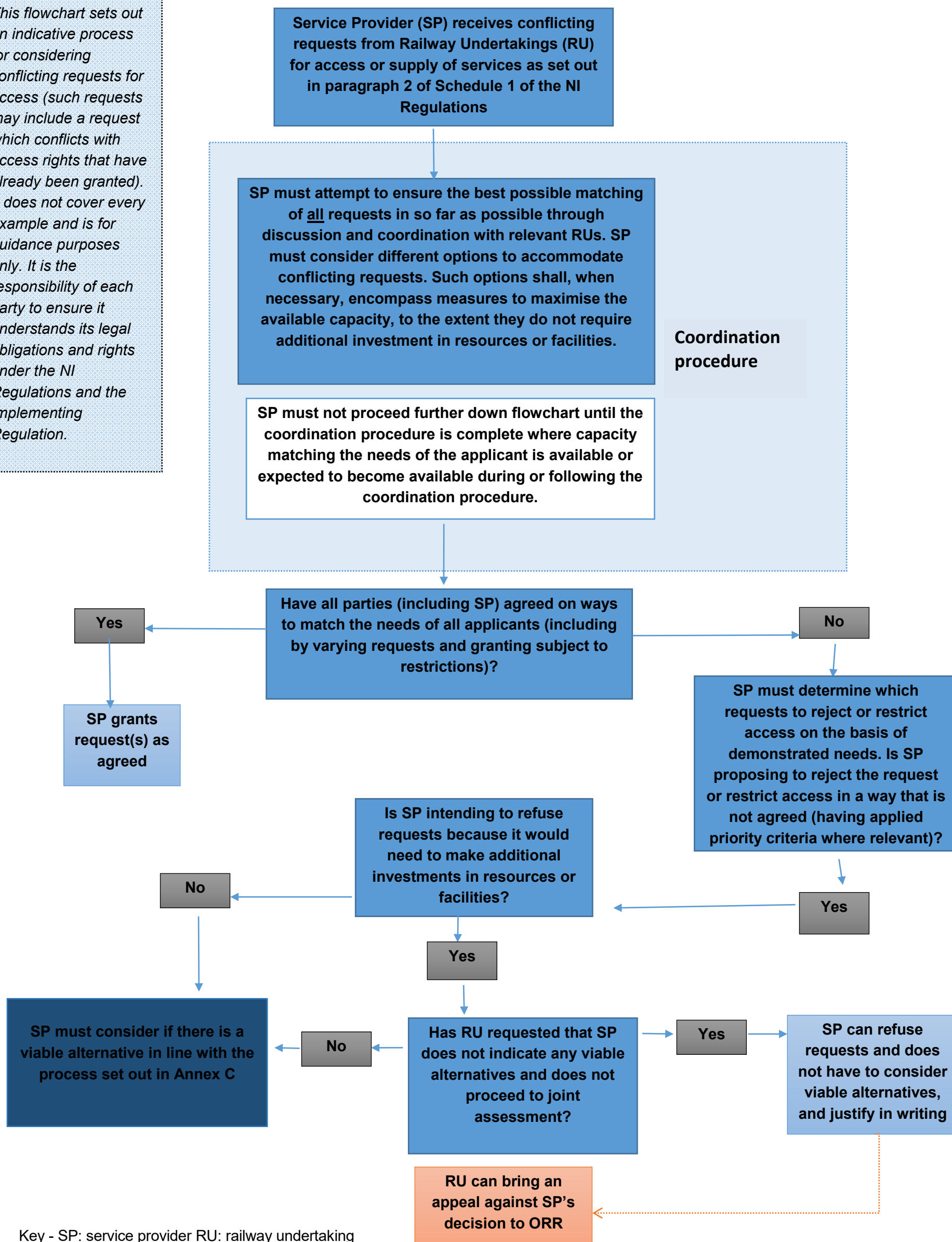
Annex A: Non-conflicting requests for access to, and the supply of, services



Key - SP: service provider RU: railway undertaking

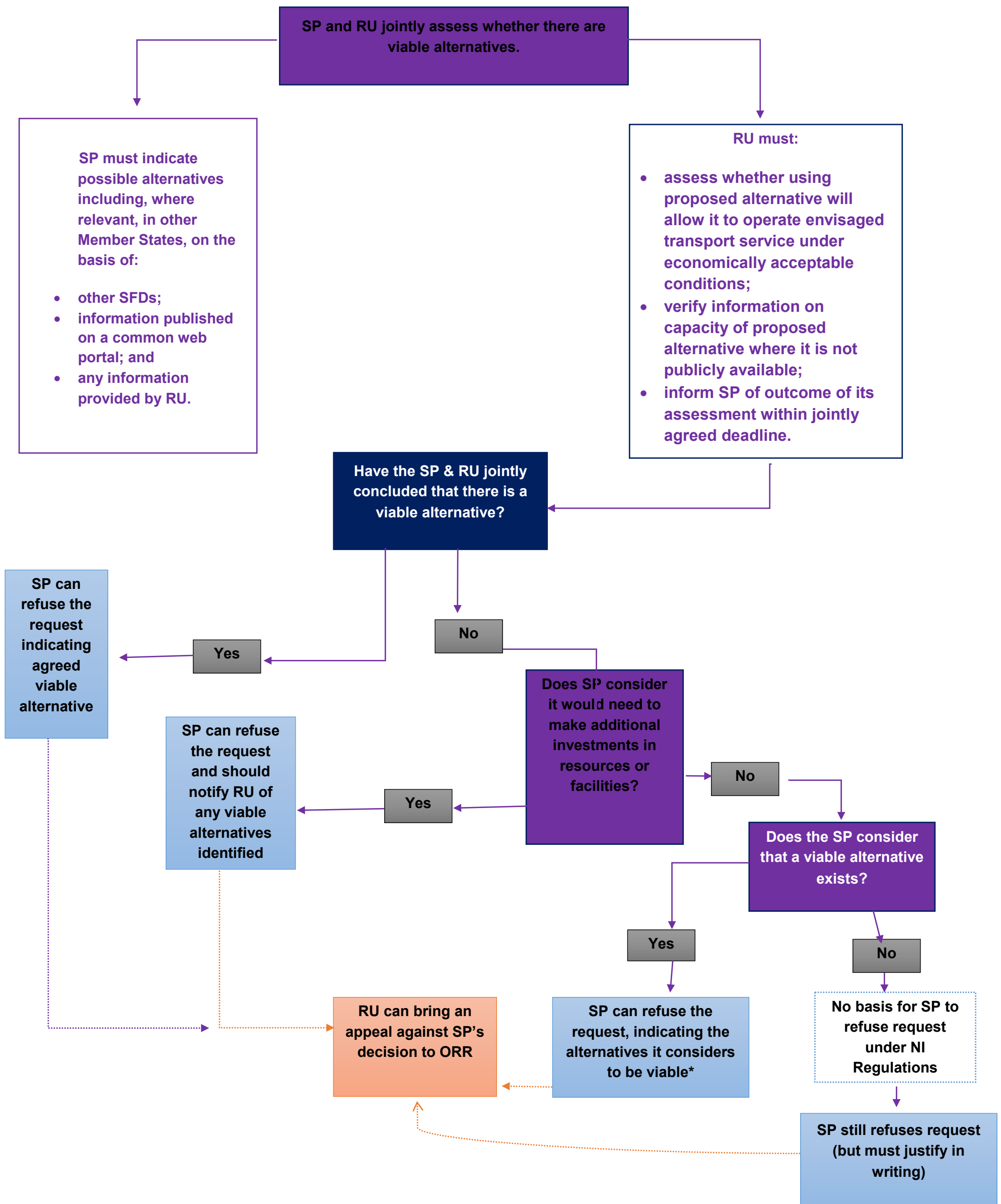
Annex B: Conflicting requests for access to, and the supply of, services

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 NI Regulations and the Implementing Regulation.



Annex 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

Annex D: Dominance

Introduction

D1. Additional obligations apply to service providers that are under the direct or indirect control of a dominant body or firm. We would consider a body or firm to be dominant if it is active and holds a dominant position in the national railway transport services market in which the relevant service facility is used. 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 initiative⁶⁷ or in the context of considering an appeal⁶⁸.

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 weak⁶⁹.

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. Unlike in Great Britain, we do not exercise competition powers under the Competition Act 1998 in NI concurrently with the Competition and Markets Authority (CMA). There are however some general aspects of our approach in Great Britain that we would apply in NI. When defining markets we will follow the approach set out in our Competition Act 1998 guidance⁷⁰ and in OFT403, Market definition, (December 2004)⁷¹. When defining markets (and therefore assessing dominance) for the purposes of the NI 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.

⁶⁷ See regulation 34.

⁶⁸ See regulation 32.

⁶⁹ 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.

⁷⁰ http://orr.gov.uk/_data/assets/pdf_file/0019/21367/competition-act-guidance.pdf

⁷¹ This guidance was published by the UK's Office of Fair Trading (OFT) and subsequently adopted by the OFT's successor body, the CMA <https://www.gov.uk/government/publications/market-definition>

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)⁷². We would expect analysis of market shares to play an important role in measuring market power under the NI Regulations. It 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.

⁷² Published by the OFT and adopted by the CMA <https://www.gov.uk/government/publications/assessment-of-market-power>

4. Service charges

Introduction

- 4.1 This chapter covers the requirements of the NI Regulations with regard to charges made by service providers for access to, and the supply of, services referred to in paragraph 2 of Schedule 1. It also covers performance schemes and reservation charges.
- 4.2 A description of the framework that applies to infrastructure access charges is set out in the chapter below on [Infrastructure](#).

Charges for services

- 4.3 The charging requirements at service facilities for services referred to in paragraph 2 of Schedule 1 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.
- 4.4 Paragraph 1(6) of Schedule 2 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.
- 4.5 If the additional or ancillary services referred to in paragraphs 3 and 4 of Schedule 1 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 profit⁷³.
- 4.6 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 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 NI Regulations⁷⁴ and to reflect the breakdown of services provided as set out in Schedule 1.
- 4.7 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

⁷³ See paragraph 1(7) of Schedule 2.

⁷⁴ See regulation 14 and Schedule 2.

responsibility of the service provider to make available the breakdown of charges in a transparent manner.

4.8 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.

4.9 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 criteria⁷⁵ and, where applicable, tariffs. We expect service providers to answer all reasonable requests for access or charging information.

⁷⁵ See regulation 14(8).

5. Infrastructure

Introduction

5.1 This chapter covers the impact of the NI 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

5.2 The requirements relating to infrastructure management and the independence of undertakings for railway undertakings, infrastructure managers and service providers are set out in Part 3⁷⁶ of the NI Regulations. 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 transparency⁷⁷.

Network statements

5.3 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.

5.4 Where a charging body⁷⁸ or an allocation body⁷⁹ 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 date⁸⁰.

⁷⁶ 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.

⁷⁷ 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 regulations 8A, 8B, 8C, 9A, 14(6) and 19(3) can be the subject of an appeal to ORR under regulation 32.

⁷⁸ A charging body means a body or undertaking, other than the infrastructure manager, which is responsible for the functions and obligations of the infrastructure manager under Part 4 and Schedule 2 because the infrastructure manager is not independent of any railway undertaking. Refer to regulation 2 for the full definition.

⁷⁹ An allocation body means a body or undertaking, other than the infrastructure manager, which is responsible for the functions and obligations of the infrastructure manager under Part 5 and Schedule 3 because the infrastructure manager is not independent of any railway undertaking. Refer to regulation 2 for the full definition.

⁸⁰ See regulation 13(2).

- 5.5 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:
- include information⁸¹ in its network statement on access to and charges for the supply of service facilities listed in Schedule 1, including information on technical access conditions, or details of a website where such information is available; and
 - keep the network statement up to date⁸².
- 5.6 They may do this by using the template developed for service providers by RailNet Europe (RNE).⁸³
- 5.7 Where information which a charging body, allocation body or service provider is required to provide to an infrastructure manager under regulation 13(2) or 13(3) is not provided to the satisfaction of that infrastructure manager, the infrastructure manager may refer the matter to ORR for a determination as to whether additional information must be supplied⁸⁴. 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 parties⁸⁵.
- 5.8 Network statements, in their provisional and final versions, can be the subject of an appeal to ORR under regulation 32⁸⁶. 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

- 5.9 Part 4 concerns charges for access to infrastructure. In particular, regulation 14 sets out the provisions concerning the establishment, determination and collection of infrastructure charges⁸⁷.
- 5.10 DFINI is responsible for establishing the charging framework and the specific charging rules governing the determination of the charges to be set by infrastructure managers⁸⁸.

⁸¹ 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 1 which are provided by only one supplier.

⁸² See regulation 13(3).

⁸³ http://www.rne.eu/rneinhalt/uploads/Common_template_for_service_facility_information_clean.pdf

⁸⁴ See regulation 13(13).

⁸⁵ See regulation 13(14).

⁸⁶ See regulation 32(2)(a)(b).

⁸⁷ 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.

⁸⁸ See regulation 14(1) and 14(6).

- 5.11 Each infrastructure manager is responsible for determining the charges to be charged for the use of its railway infrastructure in accordance with the applicable charging framework, the specific charging rules and the principles and exceptions set out in Schedule 2. Infrastructure managers must also collect these charges⁸⁹.
- 5.12 Charges for use of the railway infrastructure by way of charges for the minimum access package and track access to the service facilities referred to in paragraphs 1 and 2 of Schedule 1, must be set at the cost that is directly incurred as a result of operating the train service⁹⁰. However, with the approval of DFINI, an infrastructure manager may levy mark-ups on the basis of efficient, transparent and non-discriminatory principles⁹¹.
- 5.13 The European Commission Implementing Regulation (EU) 2015/909⁹² 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

- 5.14 DFINI must ensure that, under normal business conditions and over a reasonable time period (not exceeding 5 years), the accounts of the infrastructure manager shall at least balance income from infrastructure charges, surpluses from other commercial activities, non-refundable incomes from private sources and state funding, with railway infrastructure expenditure⁹³.
- 5.15 The infrastructure manager must enter into an agreement with DFINI covering a period of no less than five years, which fulfils the parameters of Annex V of Directive 2012/34/EU⁹⁴. The infrastructure manager must also be provided with incentives to reduce the costs of providing infrastructure and the level of access charges. It must do this with due regard to safety and to maintaining and improving the quality of the infrastructure service⁹⁵.
- 5.16 In fulfilling its obligations under the agreement referred to in paragraph 5.15, DFINI must base its decision on an analysis of the achievable cost reductions⁹⁶.

⁸⁹ See regulation 14(2).

⁹⁰ See paragraph 1(4) of Schedule 2.

⁹¹ See paragraph 2(1) of Schedule 2.

⁹² http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2015.148.01.0017.01.ENG

⁹³ See regulation 15(1).

⁹⁴ See regulation 15(2).

⁹⁵ See regulation 15(3).

⁹⁶ See regulation 15(4).

Performance scheme

- 5.17 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 network⁹⁷.
- 5.18 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 performance⁹⁸.
- 5.19 The performance scheme must be based on the principles listed in paragraph 7 of Schedule 2 and must apply in a non-discriminatory manner throughout the network to which the scheme relates⁹⁹.

Reservation charges

- 5.20 Infrastructure managers may levy a reservation charge for capacity that is requested but is not used¹⁰⁰. 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 them¹⁰¹.
- 5.21 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 paths¹⁰². ORR must also, where such a provision has been made, control such criteria in accordance with regulations 32 and 34¹⁰³.
- 5.22 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 32¹⁰⁴.

Allocation of infrastructure capacity

- 5.23 Part 5 and Schedule 3 (as amended)¹⁰⁵ concern the allocation of infrastructure capacity¹⁰⁶. Part 5 only applies to infrastructure managers. Undertakings that are only

⁹⁷ See regulation 16(1).

⁹⁸ See regulation 16(2).

⁹⁹ See regulation 16(3).

¹⁰⁰ See regulation 18(1).

¹⁰¹ See regulation 18(2).

¹⁰² See regulation 18(3)(a).

¹⁰³ See regulation 18(3)(b).

¹⁰⁴ See regulation 32(2)(d) and (e).

¹⁰⁵ The Schedule for the Allocation Process set out in Annex 7 to the Directive (the text of which was replaced by the text annexed to Commission delegated Decision (EU) 2017 replacing Annex 7 to Directive 2012/34/EU) applies for the purposes of Schedule 3.

¹⁰⁶ 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 3 sets out the timetable for the allocation process.

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

5.24 Infrastructure managers are responsible for the establishment of specific capacity allocation rules and for the allocation of infrastructure capacity¹⁰⁷. Pursuant to regulation 19(1), we have established a framework¹⁰⁸ for the allocation of infrastructure capacity.

5.25 The European Commission adopted new rules in April 2016 regarding the procedures and criteria concerning framework agreements for the allocation of rail infrastructure capacity. These rules now apply and infrastructure managers should ensure they are familiar with, and understand, the requirements¹⁰⁹.

5.26 Matters relating to the allocation process and its results can be the subject of an appeal to ORR under regulation 32¹¹⁰.

¹⁰⁷ See regulation 19(2) and <http://orr.gov.uk/what-and-how-we-regulate/track-access/guidance>

¹⁰⁸ <http://orr.gov.uk/what-and-how-we-regulate/track-access/guidance>

¹⁰⁹ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0545&from=EN>

¹¹⁰ See regulation 32(2)(c).

6. Appeals

Introduction

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

Appeals to ORR

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

6.3 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, a railway undertaking or any interested party concerning any of the following matters¹¹¹:

- 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 and the charging system;
- 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.

The following matters were added by the 2019 Regulations:

- traffic management;
- renewal planning and scheduled or unscheduled maintenance; and
- compliance with the requirements, including those regarding conflicts of interest as set out in the regulations 8A, 8B, 8C, 9A, 14(6) and 19(3)¹¹².

¹¹¹ See regulation 32(1) and 32(2).

¹¹² Regulations 8A, 8B, 8C and 9A were inserted and regulations 14 and 19 were amended by the 2019 Regulations.

Who can appeal?

- 6.4 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.
- 6.5 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 5(1)(b) only applies to those who are railway undertakings for the purpose of the NI Regulations.
- 6.6 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 NI 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 4 or 5, 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.

How to make an appeal under regulation 32

- 6.7 The applicant should have regard to the relevant chapters of this guidance as applicable before submitting an application for appeal.
- 6.8 An applicant should use Form R32 to make its appeal¹¹³. 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;
 - the details of the respondent¹¹⁴ 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,

¹¹³ <http://orr.gov.uk/what-and-how-we-regulate/track-access/track-access-process/forms-model-contracts-and-general-approvals>

¹¹⁴ The respondent is the party against whom the appeal is made.

- 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

6.9 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

6.10 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 appeal¹¹⁵. 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.

6.11 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 funders or other regulators. 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).

6.12 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.

6.13 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.

¹¹⁵ See regulation 32(3)(a).

6.14 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

6.15 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.

6.16 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.

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

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

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

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

Stage 3: Making the decision

6.21 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 NI Regulations we will consider our duties as set out in regulation 31(1) when we make our decision on the appeal.

6.22 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 decision¹¹⁶

6.23 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.

6.24 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.

6.25 Our decision on a regulation 32 appeal is binding on all parties affected by that decision¹¹⁷.

6.26 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 direction¹¹⁸. 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

6.27 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.

6.28 Regulation 36 provides that the infrastructure manager, service provider, allocation body, charging body or any other party shall be under a duty to furnish to ORR such information, in such form and manner as we request, for the purpose of facilitating the performance of our functions under the NI Regulations. This regulation applies also to the provision of information to DFINI.

6.29 We can impose a financial penalty on a party that fails or refuses to comply with such a request for information¹¹⁹.

¹¹⁶ See regulation 32(3)(b).

¹¹⁷ See regulation 32(7)(a).

¹¹⁸ See regulation 32(7)(b).

¹¹⁹ See regulation 38.

Scope of disclosure in an appeal

6.30 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.

Appeal-specific issues

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

Access – viable alternatives

6.32 Where a railway undertaking brings an appeal concerning its entitlements to access to services under regulation 5, 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.

6.33 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.

6.34 When an appeal under regulation 32(1) contests a decision under regulation 5(4) to refuse a request for access to and the supply of services, our decision must include a determination as to whether a viable alternative exists in respect of the access and provision of services to which the appeal relates¹²⁰.

6.35 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 5(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 5(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 applicant¹²¹.

Infrastructure capacity

6.36 Pursuant to regulation 32(6), 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.

¹²⁰ See regulation 32(4).

¹²¹ See regulation 32(5).



© Crown copyright 2019

This publication is licensed under the terms of the Open Government Licence v3.0 except where otherwise stated. To view this licence, visit nationalarchives.gov.uk/doc/open-government-licence/version/3.

Where we have identified any third party copyright information you will need to obtain permission from the copyright holders concerned.

This publication is available at orr.gov.uk

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