

Response to ORR consultation

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

Freightliner Group

October 2016

Q1. Is there value in ORR providing guidance on these regulations; is there an alternative to ORR providing guidance?

Freightliner welcomes the ORR guidance on these regulations. Although the Directive (2012/34/EU) largely recasts and consolidates existing legislation there are some changes to the law and therefore there is value in updating the guidance. The previous *Guidance on Appeals to ORR under the Railways Infrastructure (Access and Management) Regulations 2005* was an important document for the industry. By setting out the high level principles which ORR adopts in considering appeals it brought greater clarity to the Regulations. We expect this guidance to bring similar clarity.

Freightliner does suggest that there would be value in delaying the publication of the Guidance. The European Commission Implementing Regulation on Access to Service Facilities is expected to be concluded in 2017, with a draft recently issued, and as a result some of the obligations on service facility owners and applicants are likely to change.

Notwithstanding that the implementing act remains in draft form, it is likely that some elements of this act will alter or even contradict parts of the draft guidance. It appears that the implementing act could be quite broad and therefore would require a number of areas of the guidance to be reworked. This includes, but is not limited to, the timescales for responding to ad-hoc access requests, the content of the service facility statement (to include in the Network Statement), how to consider viable alternatives and the process for coordinating conflicting access requests.

The clarity and extra detail that the implementing act will provide is likely to require all modules within the Guidance to be revisited. In light of this it would be preferable to delay issuing this guidance until after the new legislation is published. This would avoid the potential confusion created by needing to reissue guidance soon after the updated guidance is published.

Q2. Does the guidance help you understand the impact of the 2016 Regulations?

Although the guidance is helpful at establishing 1) the broad high-level principles of the legislation and 2) the ORR's interpretation of the obligations created by the regulations, it does not include an impact assessment. However there has already been a substantial amount of work done by the DfT to quantify the impact of this legislation and we expect that the guidance is consistent, and should be read in conjunction, with the Department for Transport (DfT) documentation.

As part of the transposition of 2012/34/EU, the DfT produced a very detailed impact assessment¹ to understand the possible effect of the legislative changes on industry stakeholders. This has been very helpful for stakeholders such as ourselves to be able to understand the impact of the legislation.

Q3. Is it clear what your rights and obligations are?

Notwithstanding that stakeholders' rights and obligations may change following the forthcoming publication of the implementing act on access to service facilities, we do welcome the clarity that the guidance provides in some areas. It is important though that the rights and obligations are consistent across Member States in order to ensure that legislation applies consistently across borders.

In the Netherlands, Europe Economics responded to a request from the Dutch Authority for Consumers and Markets to identify possible railway markets in anticipation of the requirements of

¹ Annex W: impact assessment on the Railways Infrastructure (Access and Management) Regulations 2015, Department for Transport, 2015
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/416368/annex-w-ia-recast-1st-rail-package.pdf

2012/34/EU². In order to identify potential rail markets they considered the competitive environment and the substitutability between modes allowing an assessment to be made of the likelihood of a rail only market.

We support this approach as it clearly sets out the process for markets to be reviewed in order to understand whether a market can be considered to be a rail transport market and therefore whether the provisions of the regulations are applicable. Currently the guidance does not address how the market assessment will be made.

Q4. Is it clear how and when to appeal to ORR?

Yes, the appeal process is clear. It is helpful that the information on appeals is all contained within a separate module and the accompanying appeal template is helpful.

Q5. How can we improve the guidance? What areas need to be developed, if any?

Freightliner notes that the Access and Management guidance now consists of a number of individual modules. While this may make it more straightforward to keep the guidance up-to-date, we are keen that the entire guidance continues to be published in a single document. Practically this will help users by allowing the complete document to be able to be searched by a key word search, as it is not always obvious which module contains the relevant information. In addition managing the document as a whole, rather than updating sections piecemeal, will ensure that the holistic document is kept consistent.

We also note that the footnotes in some cases are unclear and there are instances where the reference numbers in the footnotes do not correspond with the references in the text (e.g. see pages 26-27). This has made it difficult to cross-reference the draft guidance with the documents it is referencing.

² Public - Research Study: Dominant Positions in National Railway Transport Services Markets, Europe Economics, September 2015 <https://www.acm.nl/nl/download/publicatie/?id=14752>