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

August 2017

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)

1.2 This chapter provides an introduction to the NI Regulations; an explanation of ORR's role; and defines some key terms. The other chapters are:

- Chapter 2 *Access:* an overview of the regulations that concern access to infrastructure and service facilities.
- Chapter 3 *Charges*: an overview of the regulations on charging principles for access to services, and the requirements around publication of information on charges.
- Chapter 4 *Infrastructure*: an overview of the regulations affecting infrastructure managers, (excluding those regulations covered in chapter 2 *Access*).
- Chapter 5 *Appeals*: an explanation of how to appeal to ORR.

1.3 This guidance does not cover the provisions in the NI Regulations relating to:

- access to training facilities for railway undertakings applying for a safety certificate in accordance with the requirements of Council Directive 2004/49/EC[1]; and
- European licences[2].

  These provisions are administered by the Department for Infrastructure Northern Ireland (DFINI). Queries relating to these provisions should be directed to DFINI.

1.4 The terms used throughout the guidance have the same meanings as in the NI Regulations and *Directive 2012/34/EU establishing a single European railway area (recast)*[3] (the **Recast Directive**), unless the context requires otherwise. 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.

[1] See regulation 6

[2] See Part 8

[3] http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32012L0034

Background to the Regulations

1.5 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.

1.6 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).

1.7 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

1.8 Key changes made by the NI Regulations, compared to the 2005 NI Regulations, include:

- 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 facilities[4] 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)).

[4] 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.*"

- 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).

Other relevant ORR guidance

Market Guidance

1.9 Regulation 34(1) requires us to monitor the competitive situation in the rail services market.[5] Guidance on the discharge of these functions is covered separately in our *Market Guidance*[6].

Economic Enforcement

1.10 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.

1.11 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.

1.12 The NI Regulations require us, in consultation with DFINI, to prepare and publish a statement of policy with respect to the imposition of penalties and the determination of their amount[7]. ORR's Economic Enforcement Policy and Penalty Statement fulfils this requirement and is available on our website[8].

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

[6] http://orr.gov.uk/consultations/closed-consultations/competition-consultations/orrs-approach-to-monitoring-and-reviewing-markets

[7] See regulation 39

[8] http://orr.gov.uk/consultations/closed-consultations/policy-consultations/economic-enforcement-policy-consultation

International Passenger Services

1.13 For any matters relating to international passenger services under regulation 33, please see our guidance on *International Passenger Services*[9].

Framework Agreements

1.14 We have published separate guidance on the duration of framework agreements parties may enter into under regulation 22 (*Application for infrastructure capacity)*[10].

Key definitions

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

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

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

1.17 **'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;.*

1.18 As of 23 January 2017 we consider NIR Networks Limited 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"[11] for the purposes of the NI Regulations.

1.19 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 which consists of, or is comprised in, the provision or operation of railway infrastructure.

[9] http://orr.gov.uk/__data/assets/pdf_file/0014/2192/399.pdf
[10] http://orr.gov.uk/what-and-how-we-regulate/track-access/guidance
[11] Service provider is defined in Part 1 of the NI Regulations

1.20 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.

1.21 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.

1.22 '**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.

1.23 '**railway infrastructure**' is defined in the NI Regulations as *all the items listed in Annex 1 to the Directive*.

1.24 '**network**' is defined in the NI Regulations as *the entire railways structure managed by an infrastructure manager*.

Network is therefore a broad concept under the 2016 Regulations.

1.25 '**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.

1.26 '**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.

1.27 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.

1.28 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.

Application of the NI Regulations

1.29 The NI Regulations[12] describe entitlements and obligations in respect of access and governance for railway undertakings, service providers and infrastructure managers.

1.30 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 services[13]. At present, we consider that no railway undertaking falls within this provision in NI. However, 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), the provisions on management independence, separation of accounts and business plans would still apply[14].

1.31 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 request[15],

do not apply to the following networks[16]:

- local and regional stand-alone networks for passenger services on railway infrastructure;
- networks intended only for the operation of urban or suburban rail passenger services;
- regional networks used for regional freight services solely by a railway undertaking already excluded from the scope of the 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.

[12] 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.
[13] See regulation 3(3).
[14] See regulations 8, 9 and 12(4) to (7).
[15] See regulations 5, 10, 11, 12, 13, Parts 4 to 6 and Schedules 2, 3 and 5.
[16] See regulation 4(6).

2. Access arrangements

Introduction

2.1 The entitlement of railway undertakings to access railway infrastructure, and service facilities, are set out in regulations 4 and 5.

2.2 We expect infrastructure managers and service providers to have regard to the principles of transparency, non-discrimination and fair competition in the application of regulations 4 and 5 (as applicable).

Regulation 4: Access and transit rights

2.3 Regulation 4(1) applies to railway undertakings operating all types of rail freight services or international passenger services. It gives these railway undertakings access rights[17] to the railway infrastructure (network, station and track) necessary to operate these types of services.

2.4 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 rights[18] as may be necessary for the provision of international transport services between EEA States where the undertakings constituting the grouping are established.

2.5 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.

2.6 Regulation 4(4) provides that the access rights described in regulation 4(1) for the purpose of operating rail freight services include the right of access to railway infrastructure serving, or potentially serving, more than one final customer.

2.7 Regulation 4(5) provides that the access rights of a railway undertaking for the purpose of the operation of an international passenger service include the right to pick up passengers at any station located on the international route and set them down at another, including stations located in the same Member State.

2.8 ORR may limit the access rights granted by regulation 4 on international services between a place of departure and a destination which are covered by one or more

[17] '*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"*.
[18] '*transit rights*' is defined as "*rights of transit through a Member State using the railway infrastructure located in the Member State*"

public service contracts (cabotage)[19]. We will not limit these rights except where the exercise of such rights would compromise the economic equilibrium of a public service contract. We have published separate guidance on the meaning of 'economic equilibrium'[20].

2.9 Infrastructure managers must ensure that the entitlements to access provided by regulation 4 are honoured[21]. There is no provision in regulation 4 which enables an infrastructure manager to refuse a request for access made under that regulation.

2.10 Access rights in respect of railway undertakings operating international passenger services are also subject to regulation 33 (*Regulatory decisions concerning international passenger services*).

2.11 Where requested by a competent authority or interested railway undertaking, we must determine whether the principal purpose of a service is to carry passengers between stations located in different member states in accordance with the process set out in regulation 33. An ORR decision on the 'principal purpose' is binding on all parties affected by that decision[22].

2.12 A railway undertaking has a right to appeal to ORR under regulation 32[23] if it is denied the entitlements conferred on it under regulation 4[24].

Regulation 5: Access to services

Minimum access package

2.13 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.

2.14 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

[19] See regulation 4(6).
[20] http://orr.gov.uk/__data/assets/pdf_file/0014/2192/399.pdf
[21] See regulation 4(9).
[22] See regulation 33(10).
[23] See regulation 4(10).
[24] 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 international passenger services).

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.

2.15 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.

2.16 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 for the purpose of operating international passenger services and freight services. Regulation 5(1) applies to all railway undertakings, including those seeking access for the purpose of operating domestic passenger services.

2.17 We would therefore expect railway undertakings seeking access rights for international passenger services and freight services to rely on regulation 4(1) for access to railway infrastructure while all railway undertakings that are seeking rights of access in accordance with the minimum access package should rely on regulation 5(1).

2.18 Requests for access to, and the supply of, services must be answered within a reasonable time limit as set by ORR[25]. In our view a reasonable time limit is, as a general rule, 10 working days, commencing on the first working day after the request has been made. However, where there is a short-notice request (such as ad hoc requests for unplanned access), we would expect service providers to deal with such requests within a shorter timescale where it is reasonable to do so. We do not, however, intend to set a separate time limit for short-notice requests at this point in time.

2.19 Under regulation 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

2.20 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.

2.21 The provisions of regulation 5(4) do not, however, require the service provider to make investments in resources or facilities in order to accommodate all requests by railway undertakings for access to, and the supply of, services[26]. In those

25 See regulation 5(3).
26 See regulation 5(6).

circumstances we consider that a service provider may refuse a request without having to consider if a viable alternative exists.

2.22 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 firm[27].

2.23 However, we expect all service providers (whether or not they are under the direct or indirect control of a dominant body or firm) to ensure refusals for any of the services referred to in paragraph 2 of Schedule 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.

2.24 The flowchart at Annex A sets out the indicative process and steps a service provider should follow when considering non-conflicting requests for access to services. It does not, however, cover every eventuality or circumstance and it is for the service provider to ensure it complies with the legal requirements under the NI Regulations when considering requests for access.

Conflicting requests for access to services

2.25 Regulation 5(7) sets out the process that should be followed where a service provider encounters a conflict between different requests. The service provider should go through this process before any requests are granted, granted with restrictions or refused:

- In the first instance an attempt must be made to meet all requests, on the basis of demonstrated needs, in so far as possible.
- If it is not possible to meet all of the requests, the service provider should consider whether it can meet some of the requests on the basis of demonstrated needs.
- Where it can meet some of those requests, the service provider should grant those requests it can accommodate (likely to be granted subject to restrictions).
- Where the service provider can meet some but not all of the requests or cannot meet any of the requests, it will only be able to refuse those requests if a viable alternative exists unless it is refusing those requests on the basis that it would

27 See regulation 5(5).

only be possible to accommodate all the requests if it made investments in its resources or facilities. If that is the case the service provider can refuse the requests without having to consider viable alternatives.

- Where the service provider could, however, accommodate the requests without having to make investments in its resources or facilities, it will only be able to refuse a request if a viable alternative exists. If there is no viable alternative the service provider must, under the NI Regulations, grant the request.

2.26 As with regulation 5(4), we do not consider that regulation 5(7) requires the service provider to make investments in resources or facilities in order to accommodate all requests by railway undertakings for access to, and the supply of, services. As such it is our view that a service provider may, in those circumstances, refuse a request without having to consider whether a viable alternative exists.

2.27 When considering conflicting requests, we would expect the service provider to consider evidence from the railway undertakings on the reasons for the requests and the consequences of a refusal.

2.28 While regulation 5(7) does not expressly provide that a request may be granted subject to restrictions, regulation 32(5) recognises that, where there are conflicting requests as described in regulation 5(7), the provision of services may be refused or restricted. We therefore consider that where a service provider can grant all or some of the conflicting requests subject to restrictions, it may do so without having to consider whether a viable alternative exists.

2.29 Where the service provider refuses a request we expect the decision to be in writing and fully reasoned and objectively justified. The service provider should explain its decision to refuse the request and why it considers the alternative facility it has identified is a viable alternative for the railway undertaking, where applicable.

2.30 Where the service provider is granting requests but subject to restrictions, we would also expect those decisions to be in writing and fully reasoned and objectively justified.

2.31 A railway undertaking has a right to appeal to ORR under regulation 32 if it is denied the entitlement conferred on it under regulation 5. A railway undertaking whose request has been refused or been granted subject to restrictions may appeal to ORR[28].

2.32 The flowchart at Annex B sets out the indicative process and steps a service provider should follow when considering conflicting requests for access to services. It does not, however, cover every eventuality or circumstance and it is for the service

[28] See regulation 5(12) and regulation 32(5).

provider to ensure it complies with the legal requirements under the NI Regulations when considering requests for access.

Constrained capacity

2.33 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 argues that it has constrained capacity we would expect it to:

- provide a fully reasoned and objectively justified case explaining the nature of the capacity constraints;
- demonstrate that it has organised its business in a manner that maximises the capacity of its service facilities available; and
- demonstrate that it has examined all options for accommodating the requests.

Viable alternative

2.34 The requirement to consider whether there is a 'viable alternative' when refusing a request for access only applies to requests for access to, and the supply of, services described in paragraph 2 of Schedule 1.

2.35 '**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 therefore be available to rail.

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

2.37 We set out in detail our interpretation of 'viable alternative' at Annex C.

Dominant body or firm

2.38 Regulation 5(5) provides that where there is a request for any of the services listed at paragraphs 2(a)[29], (b)[30], (c)[31], (d)[32], (e)[33], and (f)[34] 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.

2.39 Detailed guidance on what is meant by a dominant body or firm is at Annex D.

Use it or lease it

2.40 Under regulation 5(8), where a service facility described in paragraph 2 of Schedule 1:

- has not been in use for at least two consecutive years, and
- interest by a railway undertaking for access to this facility has been expressed to the service provider on the basis of demonstrated need,

the service provider must offer the operation of the service facility, or part of it, for lease as a rail service facility, and publicise this offer.

2.41 The obligation under regulation 5(8) does not, however, arise if the service provider can demonstrate that on-going redevelopment work reasonably prevents the use of the service facility by any railway undertaking[35].

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

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

[29] Refuelling facilities, and supply of fuel in in these facilities.
[30] Passenger stations, including buildings and other facilities.
[31] Freight terminals.
[32] Marshalling yards.
[33] Train formation facilities including shunting facilities.
[34] Storage sidings.
[35] See regulation 5(9).

Provision of information

2.44 Transparency of information is key to ensuring the basis for non-discriminatory access to service facilities for all railway undertakings. In line with the position paper of the Independent Regulators Group for Rail[36] our view is that service providers should publish at a minimum:

- list of all installations, their locations and a precise description of the facility and the services offered in it;
- key contact details, such as the service provider's phone numbers and e-mail addresses;
- all relevant information and documents for access and use of the service facility. For example, model access contracts, specific contractual conditions and timescales for dealing with requests;
- if applicable, the terms of use of the service provider's necessary IT-systems and the rules concerning the protection of sensitive and commercial data;
- details of the access coordination process;
- details of the dispute resolution system;
- any planned changes to the service facility which could impact on the capability or capacity of the facility.

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

Access appeals

2.46 A railway undertaking may bring an appeal concerning the entitlements to access conferred on it by regulation 4 and/or regulation 5. The railway undertaking must lodge its appeal under the NI Regulations and further general guidance on regulation 32 and the process and procedure for an appeal under the NI Regulations is provided in chapter 5 *Appeals*.

2.47 Where a railway undertaking brings an appeal concerning its entitlements to access under regulation 4 and/or regulation 5, we would expect the appeal application to include, at a minimum, the following information:

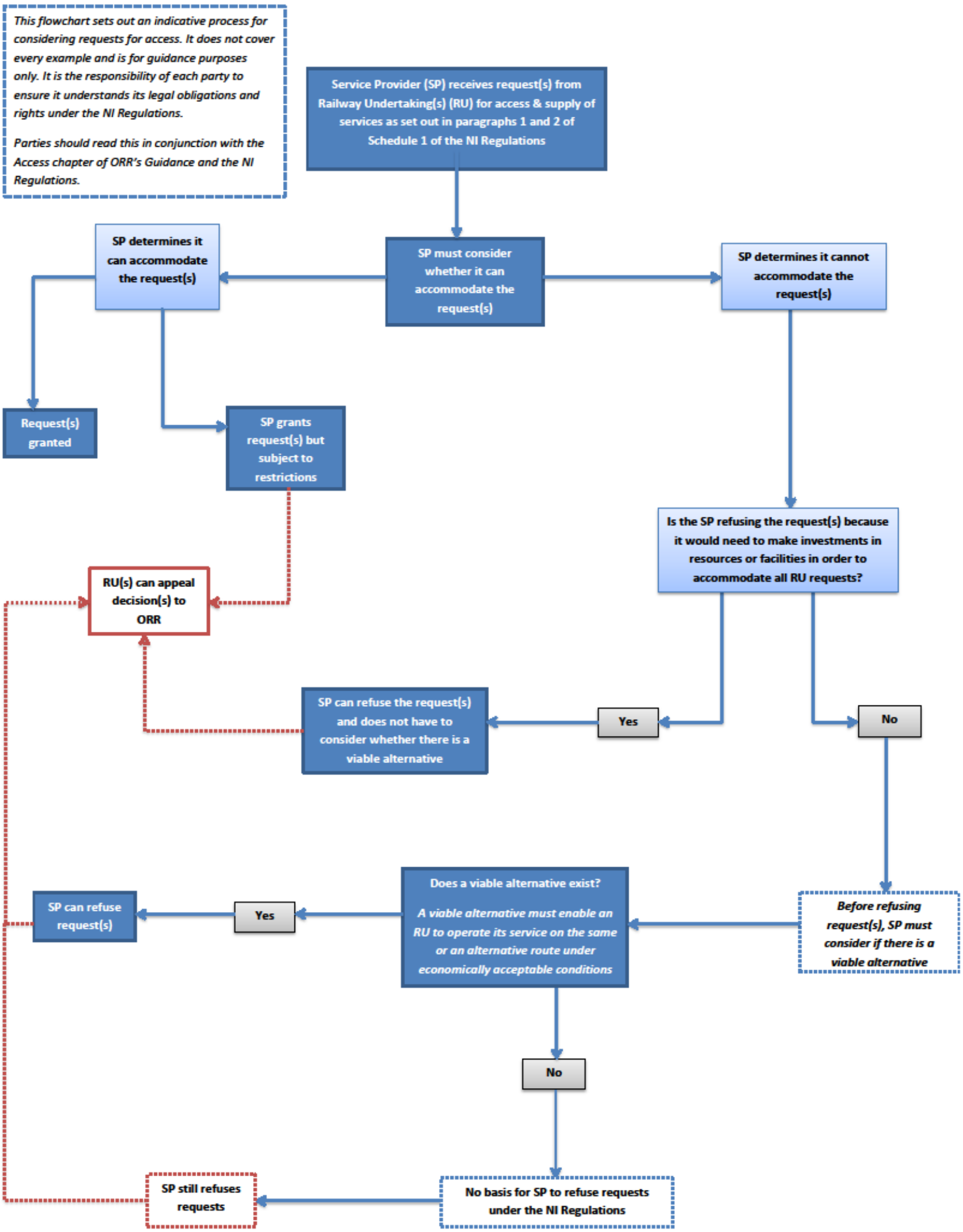
[36] http://www.irg-rail.eu/public-documents/

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

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

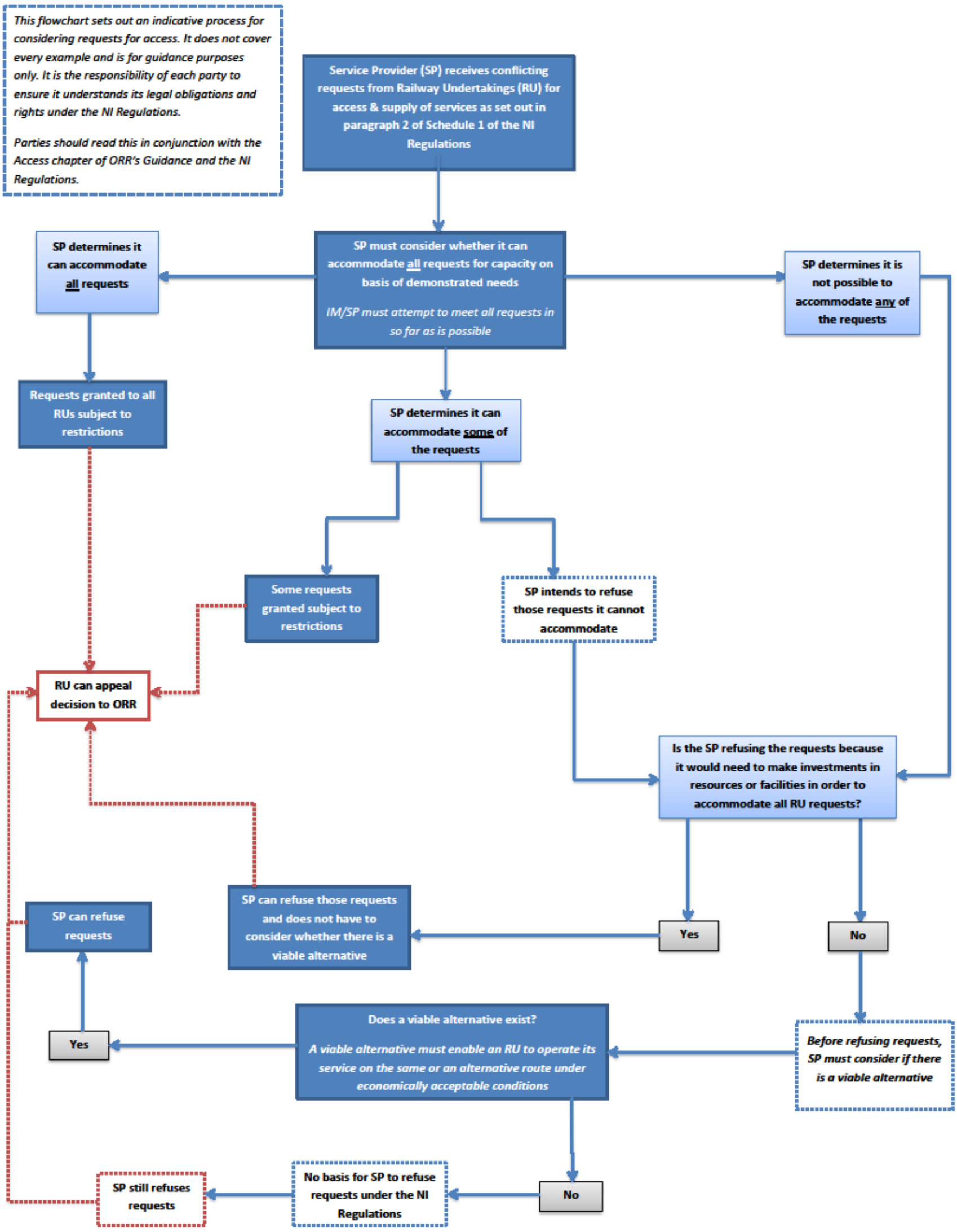
- Detailed reasons as to why access has been refused or granted subject to restrictions.
- Detailed reasons as to why it considers it would have to make investments in resources or facilities or any relevant capacity issues (including known capacity constraints on connecting networks) it considers might 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.

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



Key – IM: Infrastructure Manager
SP: service provider
RU: railway undertaking

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



Key – IM: Infrastructure Manager
SP: service provider
RU: railway undertaking

Annex C: Viable alternatives

A request for access to, and the supply of, services described in paragraph 2 of Schedule 1 may generally only be refused if a viable alternative exists, which would enable the railway undertaking to operate the freight or passenger service concerned on the same or an alternative route under economically acceptable conditions[37].

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".

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

Limb 1: Economically acceptable to the railway undertaking

C1. We will expect a railway undertaking, in making a request for access to, and the supply of, services pursuant to regulation 5, to have specified precisely its requirements for access into a particular facility and the supply of services it requires. This information will enable the service provider to take a view on the relevant downstream service against which services of viable alternative facilities can be tested.

C2. The onus and burden of proof to demonstrate whether there is a viable alternative is on the service provider. The commercial assessment for determining whether a service facility is a viable alternative needs to include consideration of all relevant costs and not just the price for accessing the alternative service facility. For example, an alternative location might, due to the distances involved, incur additional track access charges. There may be route availability issues which require modification to the equipment used (for example, certain routes may require sub-optimal use of wagon capacity) or an alternative service facility might impose additional handling costs on the customer, making the railway undertaking's proposed service uncompetitive.

C3. We consider that if use of another service facility was certain to impose a material increase in its costs, such that the railway undertaking could no longer operate the traffic at a competitive price, then that service facility would not be a viable alternative.

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

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

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

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

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

Physical viability

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

- the precise operational characteristics it seeks, for example if specialist handling equipment is required or if access for road vehicles for loading and unloading is needed;
- the geographical requirements of the service facility; and
- any other relevant factors.

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

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

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

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

Availability

C11. We recognise that there may be instances where there are alternative service facilities that meet all the criteria required by the railway undertaking but where the service provider has refused access either successively or simultaneously to the various alternative service facilities. This would create an unsatisfactory position for the railway undertaking and could introduce significant delay in the resolution of the access request.

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

Self-supply

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

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

Annex D: Dominance

Introduction

D1. Additional obligations apply to service providers that are under the direct or indirect control of a 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 initiative[38] or in the context of considering an appeal[39].

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 weak[40].

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 guidance[41] and in OFT403, Market definition, (December 2004)[42]. 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.

[38] See regulation 34.
[39] See regulation 32.
[40] 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.
[41] http://orr.gov.uk/__data/assets/pdf_file/0019/21367/competition-act-guidance.pdf
[42] 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)[43]. 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.

[43] Published by the OFT and adopted by the CMA https://www.gov.uk/government/publications/assessment-of-market-power.

3. Service charges

Introduction

3.1 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 paragraphs 1 and 2 of Schedule 1. It also covers performance schemes and reservation charges.

3.2 A description of the framework that applies to infrastructure access charges is set out in the chapter below on Infrastructure.

Charges for services

3.3 The charging requirements at service facilities for services referred to in paragraph 2 of Schedule 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.

3.4 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.

3.5 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 profit[44].

3.6 Service providers may publish their charges in different ways, but we expect them to be open and transparent about charges for services. Service providers should list the services provided and include their charges methodology either as a set rate of tariffs (where appropriate) or as a list of the criteria that may affect the 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 Regulations[45] and to reflect the breakdown of services provided as set out in Schedule 1.

3.7 If a service provider publishes a set of charging criteria, it is not necessary for the service provider to publish detailed figures used to calculate the charges themselves. However, should a railway undertaking seek clarification around charges then it is the

44 See paragraph 1(7) of Schedule 2.
45 See regulation 14 and Schedule 2.

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

3.8 In all circumstances we expect service providers to be clear about what criteria may affect the calculation of charges. For example, the following features of a request for access to, and the supply of, services are likely to impact on the calculation of the charge:

- type of facility needed;
- length of stay;
- time of day;
- refuelling;
- cleaning or other light maintenance services required;
- any charges for electricity and other items such as telecommunications which are required; and
- technical inspections and specialised maintenance which may become necessary.

3.9 The service provider must be able to demonstrate to a railway undertaking that any fees invoiced to it for the use of the service facility comply with the published criteria[46] and, where applicable, tariffs. We expect service providers to answer all reasonable requests for access or charging information.

[46] See regulation 14(8).

4. Infrastructure

Introduction

4.1 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

4.2 The requirements relating to infrastructure management and the independence of undertakings for railway undertakings, infrastructure managers and service providers are set out in Part 3[47].

Network statements

4.3 Under regulation 13(1) infrastructure managers must, after consultation with all interested parties, develop and publish a network statement. The information the network statement must contain is set out in regulation 13(4). We expect each infrastructure manager to ensure this information is included. We also expect each infrastructure manager to publish annually its network statement.

4.4 Where a charging body[48] or an allocation body[49] 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 date[50].

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

[47] 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.
[48] 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.
[49] 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.
[50] See regulation 13(2).

- include information[51] 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 date[52].

4.6 Where information which a charging body, allocation body or service provider is required to provide to an infrastructure manager under regulation 13(2) or 13(3) is not provided to the satisfaction of that infrastructure manager, the infrastructure manager may refer the matter to ORR for a determination as to whether additional information must be supplied[53]. Where such a matter is referred to ORR, we will make the determination within such period as is reasonable in the circumstances. This determination will be binding on all parties[54].

4.7 Network statements, in their provisional and final versions, can be the subject of an appeal to ORR under regulation 32[55]. An appeal brought in relation to a network statement will be dealt with in accordance with the process set out in the Appeals chapter of this guidance.

Infrastructure charges

4.8 Part 4 concerns charges for access to infrastructure. In particular, regulation 14 sets out the provisions concerning the establishment, determination and collection of infrastructure charges[56].

4.9 DFINI is responsible for establishing the charging framework and the specific charging rules governing the determination of the charges to be set by infrastructure managers[57].

4.10 Each infrastructure manager is responsible for determining the charges to be charged for the use of its railway infrastructure in accordance with the applicable charging framework, the specific charging rules and the principles and exceptions set out in Schedule 2. Infrastructure managers must also collect these charges[58].

[51] 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.
[52] See regulation 13(3).
[53] See regulation 13(13).
[54] See regulation 13(14).

[55] See regulation 32(2)(a).
[56] 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.
[57] See regulation 14(1) and 14(6).

[58] See regulation 14(2).

4.11 Charges for use of the railway infrastructure by way of charges for the minimum access package and track access to the service facilities referred to in paragraphs 1 and 2 of Schedule 1, must be set at the cost that is directly incurred as a result of operating the train service[59]. However, with the approval of DFINI, an infrastructure manager may levy mark-ups on the basis of efficient, transparent and non-discriminatory principles[60].

4.12 The European Commission Implementing Regulation (EU) 2015/909[61] sets out the methodology for calculating costs directly incurred and includes a list of non-eligible costs. Infrastructure managers should familiarise themselves with the detail of this legislation when determining its charges.

Infrastructure costs and accounts

4.13 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 expenditure[62].

4.14 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/EU[63]. 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 service[64].

4.15 In fulfilling its obligations under the agreement referred to in paragraph 4.14, DFINI must base its decision on an analysis of the achievable cost reductions[65].

Performance scheme

4.16 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 network[66].

[59] See paragraph 1(4) of Schedule 2.
[60] See paragraph 2(1) of Schedule 2.
[61] http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2015.148.01.0017.01.ENG
[62] See regulation 15(1).
[63] See regulation 15(2).
[64] See regulation 15(3).
[65] See regulation 15(4).
[66] See regulation 16(1).

4.17 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 performance[67].

4.18 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 relates[68].

Reservation charges

4.19 Infrastructure managers may levy a reservation charge for capacity that is requested but is not used[69]. Where the infrastructure manager chooses to make provision for a reservation charge, that charge must provide incentives for efficient use of capacity and will be mandatory in the case of a regular failure by an applicant to use the paths, or part of the paths, allocated to them[70].

4.20 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 paths[71]. ORR must also, where such a provision has been made, control such criteria in accordance with regulations 32 and 34[72].

4.21 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 32[73].

Allocation of infrastructure capacity

4.22 Part 5 and Schedule 3 concern the allocation of infrastructure capacity[74]. Part 5 only applies to infrastructure managers. Undertakings that are only service providers for the purpose of the NI Regulations (such as terminal owners) will therefore not be caught by any of these provisions.

4.23 Infrastructure managers are responsible for the establishment of specific capacity allocation rules and for the allocation of infrastructure capacity[75]. Pursuant to

[67] See regulation 16(2).
[68] See regulation 16(3).
[69] See regulation 18(1).
[70] See regulation 18(2).
[71] See regulation 18(3)(a).
[72] See regulation 18(3)(b).
[73] See regulation 32(2)(d) and (e).
[74] 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.
[75] See regulation 19(2) and http://orr.gov.uk/what-and-how-we-regulate/track-access/guidance

regulation 19(1), we have established a framework[76] for the allocation of infrastructure capacity.

4.24 The European Commission adopted new rules in April 2016 regarding the procedures and criteria concerning agreements for the allocation of rail infrastructure capacity. These rules now apply and infrastructure managers should ensure they are familiar with, and understand, the requirements[77].

4.25 Matters relating to the allocation process and its results can be the subject of an appeal to ORR under regulation 32[78].

[76] http://orr.gov.uk/what-and-how-we-regulate/track-access/guidance
[77] http://ec.europa.eu/transport/modes/rail/news/doc/2016-04-07-new-rules-access-to-rail-infrastructure/c(2016)1954-draft.pdf
[78] See regulation 32(2)(c).

5. Appeals

Introduction

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

Appeals to the Regulatory Body

5.2 Regulation 32(1) provides applicants with a right of appeal to ORR.

5.3 An applicant can appeal to us if it believes it has been unfairly treated, discriminated against or is in any other way aggrieved. In particular, an applicant can appeal against decisions of an infrastructure manager, allocation body, charging body, service provider, a railway undertaking or any interested party concerning any of the following matters[79]:

- 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.

Who can appeal?

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

5.5 While an applicant has the right to bring an appeal on one of the matters set out in regulation 32(2)(a) to (g), not all of these provisions confer rights on an applicant. For example, the right to be granted access to service facilities and the supply of services pursuant to regulation 5(1)(b) only applies to those who are railway undertakings for the purpose of the NI Regulations.

5.6 However, in practice, the breadth of the general right of appeal under regulation 32(1) means that if an applicant believes it has been unfairly treated or discriminated

[79] See regulation 32(1) and 32(2).

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

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

5.8 An applicant should use Form R32 to make its appeal[80]. 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 respondent and of any interested third parties;
- the grounds on which the appeal is being made, which should include reference to the applicable regulation(s),
- details of the negotiations/discussions undertaken to date between the parties to resolve the issue,
- any terms agreed between the parties;
- supporting analysis and evidence;
- any proposed draft agreement (where appropriate);
- any documents incorporated by reference (other than established standard industry codes or other instruments); and
- any other relevant information to the matter under appeal.

The appeals process

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

[80] http://orr.gov.uk/what-and-how-we-regulate/track-access/track-access-process/forms-model-contracts-and-general-approvals

Stage 1: Liaising with the relevant parties

5.10 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 appeal[81]. In determining whether to ask for relevant information and initiate a consultation, we will take into account the particular circumstances of the appeal, the issues raised and the information already provided.

5.11 Who the relevant parties are will depend on the issue under appeal. It may be just the applicant and the respondent[82], 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).

5.12 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.

5.13 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.

5.14 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

5.15 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.

5.16 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.

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

[81] See regulation 32(3)(a) and also paragraph 5.42 below.
[82] The respondent is the party against whom the appeal is made.

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

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

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

Stage 3: Making the decision

5.21 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 Recast Directive we will consider our duties as set out in regulation 31(1) when we make our decision on the appeal.

5.22 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 decision[83].

5.23 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.

5.24 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.

[83] See regulation 32(3)(b).

5.25 Our decision on a regulation 32 appeal is binding on all parties affected by that decision[84].

5.26 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 direction[85]. We expect parties to comply with a direction within the timeframe specified in the directions notice. If a party fails to do so we may take enforcement action under regulation 38, which could result in a financial penalty against the breaching party.

Provision of information to ORR

5.27 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.

5.28 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.

5.29 We can impose a financial penalty on a party that fails or refuses to comply with such a request for information[86].

Scope of disclosure in an appeal

5.30 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

5.31 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

5.32 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

84 See regulation 32(7)(a).
85 See regulation 32(7)(b)
86 See regulation 38 and paragraphs 1.9-1.11 of Chapter 1 of this guidance.

determination as to whether, in respect of the access and provision of services to which the appeal relates, a viable alternative exists[87].

5.33 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 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 applicant[88].

Infrastructure capacity

5.34 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.

87 See regulation 32(4).
88 See regulation 32(5).

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