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21 December 2016

Dear stakeholder

Guidance on new access and management regulations

1. Thank you for the responses to the consultation on our draft guidance on *The Railways (Access, Management and Licensing of Railway Undertakings) Regulations 2016* (the 2016 Regulations). The consultation began on 26 July 2016 and closed on 13 October 2016. This letter sets out our conclusions. The guidance has now been finalised and is available on our website¹.

The responses

2. We received responses from²:
- Transport for London (TfL);
 - Freightliner Ltd;
 - WH Malcolm Ltd; and
 - Eurostar International Ltd (Eurostar).
3. Our conclusions on the main issues are set out below.

ORR's new guidance

4. The respondents welcomed our revision of the guidance and were broadly supportive of the objectives and proposed content. Freightliner noted that the European Commission is preparing an Implementing Act (IA) on service facilities, and suggested delaying publication of our guidance until the IA had been implemented. Eurostar suggested that the guidance is kept under review and consulted on in light of experience.

5. There will be an IA on service facilities³ but the timescale is uncertain. The 2016 Regulations are already law in Great Britain and it is important there is guidance on the 2016 Regulations now for industry and stakeholders. We will, however, reflect the IA in our guidance and also review it in the light of wider experience. We will consult on further changes as needed.

Format

6. We intended to publish the guidance in a series of short modules. However, the feedback was that it would be better to issue the guidance in a single document. We have therefore packaged the guidance as a single volume.

¹ <http://orr.gov.uk/what-and-how-we-regulate/track-access/guidance>

² See <http://orr.gov.uk/consultations/closed-consultations/policy-consultations/guidance-on-the-railways-access-management-and-licensing-of-railway-undertakings-regulations-2016>

³ This piece of secondary legislation was mandated in 2012/34 EU. There is a provisional target for adoption by July 2017

7. TfL said that a flowchart would assist in understanding the process around requests for access. We agree. Indicative flowcharts are now included.

Scope (regulation 4)

8. TfL regarded specific sections of its infrastructure as exempt. WH Malcolm asked if the list of exempt networks in our guidance could be extended, in particular to include terminals in areas of strong competition⁴.

9. The scope section in our guidance is based on regulation 4, on which the Department for Transport has already issued guidance⁵. ORR is not able to alter the scope of the 2016 Regulations. Further, we do not intend to prepare exhaustive lists of infrastructure. It is for all infrastructure managers and service providers to check the extent to which the 2016 Regulations apply to them.

10. Separate to this consultation, some service providers questioned whether the 2016 Regulations apply to them if they currently only accommodate their own train services. This question may reflect an early draft of the 2016 Regulations which had an exemption for 'privately-owned' service facilities. This was amended in the final version. We are clear that the 2016 Regulations apply to all service providers, subject to a few limited exemptions set out in regulation 4.

Who can apply for access? (regulation 6)

11. WH Malcolm highlighted the issue that regulation 6(1) only requires infrastructure managers to supply the minimum access package to railway undertakings, that is, not holders of freight customer track access contracts and others.

12. Under the 2016 Regulations, only railway undertakings are entitled to the minimum access package. In practice, although another party may be negotiating access arrangements, only a railway undertaking will be using that access. In any event, our expectation is that service providers will continue to deal with parties other than railway undertakings as a matter of routine and in good faith. Under regulation 32 any applicant has the right to appeal to ORR if it feels unfairly treated, discriminated against or aggrieved, including by service providers.

13. If an appeal is made we will consider the facts and issues raised by the parties. For now, we do not intend to amend our guidance beyond citing the wording of regulation 6(1).

Time limits for answering requests (regulation 6)

14. Respondents noted that the 'reasonable time limit' should explicitly be in working days. Respondents also noted that, while it would usually be possible to respond within the specified time limit, the guidance should allow for the exercise of discretion in individual cases where extenuating circumstances applied.

⁴ We understood this to mean areas where several viable alternatives might be automatically assumed.

⁵ <https://www.gov.uk/government/publications/recast-first-railway-package-guidance-on-scope-of-2016-transposition-regulations>

15. We need to balance the competing demands on service providers with the needs of those seeking access. Our view is that ten working days is a reasonable time limit. Service providers should ensure that they have appropriate procedures in place now to deal with access requests within the specified limit. We have clarified the time limit as being ten *working days* for answering an access request. However, provided that the railway undertaking agrees, the service provider can respond within a longer timescale.

16. We have further considered ad hoc access requests made at short notice. Ten working days in such instances might not match the railway undertaking's needs nor be necessary for the service provider. We expect that service providers can deal with any reasonable ad hoc requests within much shorter timescales and in good faith. However, for the time being, we will not prescribe a different time limit. We may do so however in the light of experience or if required to by the IA.

Access decisions (regulation 6)

17. Eurostar said that the requirement for responses to be 'fully reasoned and objectively justified' risked the imposition of an excessive administrative burden and might not always be relevant. Eurostar also said that allocated capacity should include capacity that the service provider has provided in the facility which is not yet in service.

18. The 2016 Regulations say service providers may refuse access under certain conditions and that the service provider refusing access must provide appropriate evidence to show that these conditions have been met. Where access is refused the railway undertaking may consider an appeal to ORR. In such cases we will expect to see that proper consideration was given to an application. Our view is that a 'fully reasoned and objectively justified' decision is a proportionate requirement, to mitigate the risk of superficial assessments, uncertainty and/or unduly drawn-out appeals.

19. We agree with Eurostar on capacity not in service and we have amended the guidance accordingly.

Viable alternatives (regulation 6)

20. Respondents said the guidance did not provide sufficient clarity on how a service provider should assess and review viable alternatives. It was suggested that there could be more guidance on what ORR meant by an 'objectively argued case' when refusing a request on the basis of the existence of viable alternatives noting that a service provider might not be an expert on the full provision of other service facilities, nor what the parameters of 'economically acceptable' might be for the railway undertaking.

21. We consider that where a service provider is refusing a request for access on the basis that it considers there is a viable alternative, the onus is on the service provider to justify to the railway undertaking why it considers that there is an appropriate viable alternative. The service provider will therefore need to satisfy itself that it has carried out a suitable assessment in identifying and considering the existence of a viable alternative and its suitability in terms of meeting the needs of the railway undertaking.

22. It is for the service provider in each case, to determine what it considers is a suitable assessment in the circumstances. However, we do recognise that a service provider will not necessarily be the expert in all service facilities and its assessment may be limited by the

information publically available (noting that some information on technical characteristics and services provided at an alternative facility should be available via the Network Rail network statement).

23. In response to comments from two respondents, we have clarified the wording in the guidance on viable alternatives as to when we consider access can be refused or granted subject to restrictions. In particular, where there are conflicting requests but the service provider is able to grant the requests subject to restrictions, we have clarified that the service provider may do so without having to consider whether a viable alternative exists.

24. Eurostar also sought further guidance on what ORR would consider to be a competitive price, or material increase, and what supporting evidence would be accepted. We appreciate the desire for greater certainty. However, it is not possible to provide definitions that would apply in all instances. Such concepts will be dealt with on a case-by-case basis.

Responsibilities of service providers (regulation 6 and general)

25. WH Malcolm raised several practical issues about restrictions placed on service providers relating to the landlord-tenant relationship. Our guidance is not intended to specifically cover lease terms. As a general principle, however, landlords and tenants should only enter into leases that enable them to comply with all their legal obligations.

Dominance

30. On the question of market dominance, Freightliner referred to an approach adopted elsewhere in Europe, whereby the competitive situation within rail markets should be assessed with reference to modal substitutability within the broader transport market.

31. However, the EU and domestic legislation requires that the assessment of dominance should be with reference to a national rail market, thereby excluding consideration of other transport modes.

Conclusion

32. Again, thank you for the replies. The guidance is now available on our website.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Rob Plaskitt', written in a cursive style.

Robert Plaskitt