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To service facility owners including freight and passenger train operators, freight customers, freight terminal operators, trade associations, infrastructure managers and other track access consultees

24 May 2019

Implementing Regulation on Service Facilities: ORR consultation

Introduction

1. Access to service facilities and greater transparency is key to the efficient working of GB's railways. In November 2017 new regulations were made which strengthen operators' access rights and to make sure more information about service facilities is made available. These regulations come into effect on 1 June 2019.
2. This letter explains how the regulations could affect you. We are asking if you have any comments our proposed changes to the existing guidance. A copy of our proposed updated guidance is on our consultations webpage¹. A list of the main changes is set out below and at Annex A.

Responses

3. I would welcome your feedback on our proposals. Please send your response to this consultation to me at track.access@orr.gov.uk by 23 June 2019.

The Implementing Regulation

4. *Commission Implementing Regulation (EU) 2017/2177 of 22 November 2017 on access to service facilities and rail-related services* (the Implementing Regulation) was made by the European Commission under Directive 2012/34/EU (the Recast Directive). The Implementing Regulation has direct effect in the UK and does not need further transposition into UK law. It applies in full from 1 June 2019. Some provisions relating to applications for exemption have applied since 1 January 2019.
5. The UK, like other EU member states, has already transposed the Recast Directive through *The Railways (Access, Management and Licensing of Railway Undertakings) Regulations 2016, as amended*, (the 2016 Regulations) in Great Britain; and *The Railways Infrastructure (Access, Management and Licensing of Railway Undertakings) Regulations (Northern Ireland) 2016, as*

¹ <https://orr.gov.uk/rail/consultations/open-consultations/consultation-on-updating-orr-guidance-on-access-to-service-facilities>

amended, (the NI Regulations) in Northern Ireland. The Implementing Regulation provides additional detail.

Consultation

6. We have already published guidance on the 2016 Regulations². We need to update this guidance to reflect the Implementing Regulation. We have reflected the changes arising from the Implementing Regulation in the draft guidance. We also want to take the opportunity to restructure our guidance. The updated module will focus only on access to service facilities. Other issues covered by the current module will be separated out and form the basis of their own modules on Infrastructure Management³ and Appeals, with other updates to reflect The Railways (Access, Management and Licensing of Railway Undertakings) (Amendment) Regulations 2019.
7. Our guidance is intended to help interpret what is required and provide consistency of approach. It is your responsibility to ensure that you comply with all the relevant legislation. If there are any matters that you think we should clarify further then please let us know. In particular, is it clear whether and how the Implementing Regulations affect you and what you need to do. We would welcome any comments you have on our proposed guidance.
8. We have separate guidance for the NI Regulations and we will be consulting on equivalent changes to that guidance.

Information provision

9. Service providers must already make available information about their service facilities under the 2016 Regulations. Under regulation 13 of the 2016 Regulations service providers must provide specified information to the infrastructure manager (IM) whose network it is connected to, for inclusion in that IM's network statement. The great majority of service providers connect to Network Rail's network. Network Rail has established a dedicated spreadsheet on its network statement webpage for this purpose⁴. Other IMs, including HS1, have incorporated information directly into the main body of their network statements.
10. This is not new but we take this opportunity to remind service providers of the requirements that are already in place. If you are not currently making this information available, you should review this.

Main changes

Service facility descriptions (articles 4-5 of the Implementing Regulation)

11. Under the Implementing Regulation the information to be provided is described as a 'service facility description' (article 4). The information to be provided in

² https://orr.gov.uk/_data/assets/pdf_file/0003/23628/guidance-on-new-access-management-regulations-december-2016.pdf

³ infrastructure management, infrastructure charges and allocation of infrastructure capacity

⁴ <https://www.networkrail.co.uk/industry-commercial-partners/information-operating-companies/network-statement/> service provider information.

service facility descriptions covers a range of issues including access, charges and dispute resolution processes. EU IMs⁵ have developed a common template for use across the EU that service providers may use. Service providers can work with Network Rail if they wish to use this new format.

Access requests (articles 8 – 13 of the Implementing Regulation)

12. Service providers must allow railway undertakings access to service facilities, on a non-discriminatory basis, subject to specified exceptions. The Implementing Regulation sets out further detail around how requests for access should be considered. This includes setting out a coordination procedure which should be followed where there is a conflict between access requests. The Implementing Regulation also adds additional detail around determining whether there is a viable alternative and broadens the circumstances where service providers need to consider whether there is a viable alternative.

Unused facilities (article 15 of the Implementing Regulation)

13. Our guidance on the 2016 Regulations explained the so-called ‘use it or lease it’ provisions. Article 15 of the Implementing Regulation adds further details.

Exemptions (article 2 of the Implementing Regulation)

14. Article 2 allows service providers to request to be exempted from the Implementing Regulation.
15. Operators of heritage railways can be exempted from the whole of the Implementing Regulation. Most heritage railways in the UK will not be covered by the Recast Directive and therefore will not need to apply to ORR at all for an exemption. However, there may be some that are covered. European regulatory bodies (IRG)⁶ have produced a position paper on definitions of heritage railways in this context⁷. ORR will take that paper into account when making relevant decisions for any applications made to us.
16. Under article 2(2) service providers may apply for limited exemptions if they meet certain criteria.

Responses and publication

17. I would be grateful for any comments on our proposals. Please send your comments to me by 23 June 2019. We intend to publish responses to this consultation on our website. For more information on our approach to this, please see our consultation webpage⁸.

Yours faithfully

A handwritten signature in black ink, appearing to read 'GH'.

Gordon Herbert

⁵ Through the Rail Net Europe network (RNE) <http://www.rne.eu/>

⁶ Independent Regulators' Group: IRG-Rail, Subgroup Access to Service Facilities

⁷ [file:///C:/Users/gherbert/Downloads/IRG-Rail_18_8 - Compilation of national definitions of heritage railways%20\(2\).pdf](file:///C:/Users/gherbert/Downloads/IRG-Rail_18_8_-_Compilation_of_national_definitions_of_heritage_railways%20(2).pdf)

⁸ <https://orr.gov.uk/rail/consultations/open-consultations/consultation-on-updating-orr-guidance-on-access-to-service-facilities>

Annex A – list of key Guidance changes

Chapter (current version)	Current guidance	Proposed change	Reason
1 Introduction	Key changes	Deleted	No longer necessary to describe differences between 2005 Regs and 2016 Regs.
	Definitions	List is moved to annex A	Clarity.
	Application of 2016 Regs	Reworked as Scope and Application	To reflect IRSF.
	N/A	New section on Exemptions	To reflect IRSF.
	-	New chapter 2 - Background	Explain context
2 Access arrangements	Chapter 2 - access	Re-numbered as Chapter 4	Reordering.
	Regulation 5	Revised text	To update the guidance.
	Regulation 6	Substantial revisions to the text and description of the coordination procedure. Detail on viable alternatives in main body rather than annex.	To reflect IRSF.
	Dominant firm or body with annex D	Description removed	Distinction not needed.
	Use it or lease it	Expand and move to new Chapter 6: <i>Unused Facilities</i>	Reflect IRSF and nature of the issue
	Provision of information	New Chapter 3	To better reflect significance of issue. Introduction of service facility descriptions.
	Annexes	Revisions to flowcharts	Consolidation, to reflect IRSF and better indicate the access request process.
3 Service charges	Chapter 3	Renumbered as Chapter 5	Re-ordering
4 Infrastructure	Chapter 4	To form separate guidance module.	Subject matter.
5 Appeals	Chapter 5	To form separate guidance but updated for other legislation.	Subject matter. Other new legislation.