

**2016 No. 420**

**TRANSPORT**

**The Railways Infrastructure (Access, Management and  
Licensing of Railway Undertakings) Regulations (Northern  
Ireland) 2016**

*Made* - - - - *1st December 2016*

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The Department for Infrastructure<sup>(a)</sup>, being a Department designated<sup>(b)</sup> for the purposes of section 2(2) of the European Communities Act<sup>(c)</sup> in relation to measures relating to railways and railway transport, in exercise of the powers conferred by that section, and of all other powers enabling it in that behalf, hereby makes the following Regulations:

PART 1  
PRELIMINARY

**Citation and commencement**

1. These Regulations may be cited as the Railways Infrastructure (Access, Management and Licensing of Railway Undertakings) Regulations (Northern Ireland) 2016 and shall come into operation on 23rd January 2017.

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(a) The Department for Regional Development was renamed the Department for Infrastructure by virtue of section 1(6) of 2016 c.5 (N.I.)  
(b) S.I. 1996/266  
(c) 1972 c.68

**2.—(1) In these Regulations—**

“access rights” means rights of access to railway infrastructure for the purpose of operating a service for the transport of goods or passengers;

“ad hoc request” means a request for individual train paths made other than in accordance with the timetable for the capacity allocation process as set out in Schedule 3;

“allocation” means the allocation of railway infrastructure capacity by an infrastructure manager;

“allocation body” means a body or undertaking, other than the infrastructure manager, which is responsible, by virtue of regulation 19(3), for the functions and obligations of the infrastructure manager under Part 5 and Schedule 3;

“applicant” means a railway undertaking or an international grouping of railway undertakings or other persons or legal entities, such as competent authorities under Regulation No. 1370/2007(a) and shippers, freight forwarders and combined transport operators, with a public service or commercial interest in procuring infrastructure capacity;

“capacity enhancement plan” means a measure or series of measures with a calendar for their implementation which aim to alleviate the capacity constraints which led to the declaration of an element of infrastructure as congested infrastructure;

“charging body” means a body or undertaking, other than the infrastructure manager, which is responsible, by virtue of regulation 14(6), for the functions and obligations of the infrastructure manager under Part 4 and Schedule 2;

“charging scheme” means the specific charging rules established in accordance with regulation 14 by the Office of Rail and Road or the infrastructure manager; governing the determination of access charges as set out in Part 4;

“competent authority” has the same meaning as in Article 2 of Regulation No. 1370/2007;

“cross-border agreement” means any agreement between two or more Member States or between Member States and third countries intended to facilitate the provision of cross-border rail services;

“the Department” means the Department for Infrastructure;

“the Directive” means Directive 2012/34/EU of the European Parliament and of the Council of 21<sup>st</sup> November 2012 establishing a single European railway area (recast)(b);

“the environment” means all or any of the following media, namely the air, water and land (and the medium of air includes the air within buildings and the air within other natural or man-made structures above or below ground);

“European licence” means a licence granted to a railway undertaking pursuant to these regulations (valid throughout the territory of any EEA State) by which the capacity of the railway undertaking as such is recognised and which authorises the undertaking to provide in and between EEA States such train services as may be specified in the licence;

“framework agreement” means a legally binding general agreement under public or private law, setting out the rights and obligations of an applicant and the infrastructure manager in relation to the infrastructure capacity to be allocated and the charges to be levied over a period in excess of one working timetable period;

“infrastructure capacity” means the potential to schedule train paths requested for an element of infrastructure for a certain period;

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

“international freight service” means a transport service where the train crosses at least one border of a member State; the train may be joined and/or split and the different sections may have different origins and destinations, provided that all wagons cross at least one border;

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(a) L.315, 3.12.2007

(b) O.J. No. L343, 14.12.12, p.32 as corrected by Corrigendum, O.J. L.67, 12.3.15, p.32

“international grouping” means any association of at least two railway undertakings established in different Member States for the purpose of providing international transport between Member states; “international passenger service” means a passenger service where the train crosses at least one border of a Member State and where the principal purpose of the service is to carry passengers between stations located in different Member States; the train may be joined and/or split, and the different sections may have different origins and destinations, provided that all carriages cross at least one border;

“network” means the entire railway infrastructure managed by an infrastructure manager;

“network statement” means the statement required to be prepared and published under regulation 13;

“the Office of Rail and Road” means the body established under section 15 of the Railways and Transport Safety Act 2003(a);

“public passenger transport”, “public service contract” and “public service operator” have the same meaning as in Article 2 of Regulation No 1370/2007;

“railway infrastructure” means all the items listed in Annex 1 to the Directive;

“railway service performance” includes, in particular, performance in securing each of the following in relation to railway services—

- (a) reliability (including punctuality);
- (b) the avoidance or mitigation of passenger overcrowding; and
- (c) that journey times are as short as possible;

“railway undertaking” means any public or private undertaking licensed according to the Directive;

“reasonable profit” means a rate of return on own capital that takes account of the risk, including that to revenue, or the absence of such risk, incurred by the operator of the service facility and is in line with the average rate for the sector concerned in recent years;

“regional services” means transport services whose principal purpose is to meet the transport needs of a region, including a cross-border region;

“Regulation EC No. 1370/2007” means Regulation 1370/2007(b) of the European Parliament and of the Council of 23<sup>rd</sup> October 2007 on public passenger transport services by rail and road and by repealing Council Regulations (EEC) No. 1191/69(c) and 1107/70(d);

“Regulation No. 913/2010” means regulation (EU) No 913/2010 of the European Parliament and of the Council of 22<sup>nd</sup> September 2010 concerning a European rail network for competitive freight(e);

“SNRP” means a statement of national regulatory provisions, issued under regulation 46;

“service provider” means 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;

“the Treaty” means the Treaty on the Functioning of the European Union(f);

“train path” means the infrastructure capacity needed to run a train between two places over a given period;

“train service” means a service for the transport of goods or passengers (or both) by rail;

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(a) 2003 c.20  
(b) L.315, 3.12.2007  
(c) L156, 28.8.69  
(d) L130, 15.6.70  
(e) L276, 20.10.10  
(f) O.J. no. C326, 26.10.2012, p.47

“transit rights” means rights of transit through a Member State using the railway infrastructure located in the Member State;

“urban” or “suburban” means, in relation to a transport service, a service whose principal purpose is to meet the transport needs of an urban centre or conurbation, including a cross-border conurbation, together with transport needs between such a centre or conurbation and surrounding areas;

“viable alternative” means access to another service facility which is economically acceptable to the railway undertaking, and allows it to operate the freight or passenger services concerned;

“working day” means any day which is not a Saturday, Sunday or a public holiday;

“working timetable period” means the calendar year commencing at midnight on the second Saturday in December.

(2) Except where a definition in paragraph (1) applies, expressions used in these regulations and in the Council Directives have the meanings given by the Directives.

(3) The Interpretation Act (Northern Ireland) 1954<sup>(a)</sup> shall apply to these regulations as it applies to an Act of the Northern Ireland Assembly.

### Scope

3.—(1) These regulations apply to domestic and international rail traffic.

(2) Subject to paragraphs (3) and (6), Parts 2 and 3 (save for regulation 13), regulations 14(6) and (7), 15, 19(3), 33 and Schedule 1 lay down the rules applicable to—

- (i) the management of railway infrastructure;
- (ii) the rail transport activities of the railway undertakings established or to be established in an EEA State; and
- (iii) the licensing of railway undertakings and groupings in respect of international services and international combined transport goods services which they operate.

(3) The provisions referred to in paragraph (2) do not apply to railway undertakings 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.

(4) Notwithstanding paragraph (3), the following regulations apply where a railway undertaking referred to in that paragraph is 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—

- (a) regulation 8;
- (b) regulation 9, with regard to the relationship between the railway undertaking and the undertaking or entity which controls it, directly or indirectly; and
- (c) regulations 12(4) to (7).

(5) Subject to paragraphs (6) and (7), regulation 13, Parts 4 to 6 and Schedules 2, 3 and 5, lay down the principles and procedures applicable to—

- (a) the setting and collection of railway infrastructure charges; and
- (b) the allocation of railway infrastructure capacity.

(6) The following provisions do not apply to the networks listed in paragraph (7)—

- (a) regulation 5;
- (b) regulation 10;
- (c) regulation 11;

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(a) 1954 c.33 (N.I.)

- (d) regulation 12;
  - (e) regulation 13;
  - (f) Parts 4 to 6; and
  - (g) Schedules 2, 3 and 5.
- (7) The networks referred to in paragraph (6) are—
- (a) local and regional stand-alone networks for passenger services on railway infrastructure;
  - (b) networks intended only for the operation of urban or suburban rail passenger services;
  - (c) until such time as capacity is requested by another applicant, regional networks used for regional freight services solely by a railway undertaking referred to in paragraph (3); or
  - (d) privately owned railway infrastructure that exists solely for use by the infrastructure manager for its own freight operations.

## PART 2

### ACCESS TO RAILWAY INFRASTRUCTURE AND SERVICES

#### **Access and transit rights**

4.—(1) A railway undertaking is entitled, on equitable, non-discriminatory and transparent conditions, access rights to such railway infrastructure as may be necessary for the purpose of operating all types of rail freight or international passenger services.

(2) An international grouping which includes a railway undertaking established in Northern Ireland, for the purpose of operating all types of rail freight or international passenger services, is entitled to such access or transit rights as may be necessary for the provision of international transport services between the EEA States where the undertakings constituting the grouping are established.

(3) The access rights described in paragraph (1) include access to railway infrastructure connecting the service facilities referred to in paragraph 2 of Schedule 1.

(4) The access rights described in paragraph (1) for the purposes of operating rail freight services include the right of access to railway infrastructure serving, or potentially serving, more than one final customer.

(5) The access rights of a railway undertaking for the purposes 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.

(6) The access rights granted under paragraphs (1) to (5) are exercisable subject to the provisions of regulation 33, and to paragraph (7).

(7) Subject to paragraph (8), the Office of Rail and Road may limit the access rights granted by this regulation on services between a place of departure and a destination which are covered by one or more public service contracts which are in accordance with the law of the European Union.

(8) The access rights granted under paragraph (5) must not be restricted except where the exercise of such rights would compromise the economic equilibrium of a public service contract.

(9) It is the duty of the infrastructure manager to ensure that the entitlements conferred by this regulation are honoured.

(10) Without prejudice to the generality of regulation 32, if a railway undertaking is denied the entitlements conferred on it by this regulation other than pursuant to a decision of the Office of Rail and Road under paragraph (7) or regulation 33 that railway undertaking has a right of appeal to the Office of Rail and Road in accordance with regulation 32.

## Access to services

5.—(1) Subject to paragraph (2), 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,

described in paragraphs 1 and 2 of Schedule 1.

(2) The services described in paragraph (1) must be supplied by the infrastructure manager or, as the case may be, service provider in an equitable, non-discriminatory and transparent manner.

(3) Requests by railway undertakings for access to, and the supply of, services described in paragraph 2 of Schedule 1 must be answered within a reasonable time limit as stipulated by the Office of Rail and Road.

(4) Subject to paragraph (7), where an infrastructure manager or a service provider supplies any of the services described in paragraph 2 of Schedule 1, a request for access to and supply of such services 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.

(5) Where—

- (a) a request referred to in paragraph (3) concerns access to and supply of services described in sub-paragraphs 2(a), (b), (c), (d), (e) and (f) of Schedule 1; and
- (b) such request is made to a service provider which is under the direct or indirect control of a dominant body or firm,

the infrastructure manager or service provider must justify, in writing, any decision to refuse such a request, and provide information about the viable alternative described in paragraph (4).

(6) Paragraph (4) does not oblige the infrastructure manager or service provider to make investments in resources or facilities in order to accommodate all requests by railway undertakings.

(7) Where the infrastructure manager or service provider of services referred to in paragraph 2 of Schedule 1, encounters a conflict between different requests, it must attempt to meet all requests in so far as possible. If no viable alternative is available, and it is not possible to accommodate all requests for capacity for the relevant facility on the basis of demonstrated need, the applicant may complain to the Office of Rail and Road.

(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—

- (a) offer the operation of the service facility, or part of it, for lease as a rail service facility; and
- (b) publicise this offer.

(9) Paragraph (8) does not apply if the service provider can demonstrate that ongoing redevelopment work reasonably prevents the use of the service facility by any railway undertaking.

(10) Where the infrastructure manager or service provider offers to supply any of the services described in paragraph 3 of Schedule 1, as an additional service he must, in response to a request from an applicant, supply the services to that applicant in a non-discriminatory manner

(11) An applicant may request the supply of any of the services described in paragraph 4 of Schedule 1 from an infrastructure manager or service provider but that infrastructure manager or service provider is under no obligation to supply the services requested. Where the infrastructure manager or service provider does offer to supply such services, it must do so in a non-discriminatory manner.

(12) Without prejudice to the generality of regulation 32, if an applicant is denied the entitlements conferred on it by this regulation, that applicant has a right of appeal to the Office of Rail and Road in accordance with regulation 32.

(13) In fulfilling their duties under this regulation, the infrastructure manager and service provider must comply with any relevant provisions regarding procedure and criteria adopted by the Commission.

### **Access to training facilities**

**6.—**(1) Railway undertakings applying for a safety certificate in accordance with the requirements of Council Directive 2004/49/EC shall be entitled to a fair and non-discriminatory access to training facilities for train drivers and staff accompanying the trains, whenever such training is necessary for the fulfilment of requirements to obtain that certificate.

(2) The services offered under paragraph (1) must include training on—

- (a) necessary route knowledge;
- (b) operating rules and procedures
- (c) the signalling and control command system; and
- (d) emergency procedures,

in respect of the routes operated.

(3) The infrastructure manager, and any of his staff with responsibility for safety critical tasks, must have a fair and non-discriminatory access to the services listed in paragraph (2).

(4) It is the responsibility of the safety authority set up in accordance with the requirements of Council Directive 2004/49/EC to ensure that the provision of training services meets the safety requirements laid down in the National Safety Rules.

(5) If the training facilities to which access is granted by virtue of this regulation are available only through the services of one single railway undertaking, or the infrastructure manager, the Department must ensure that those facilities and services are available to applicants at a reasonable and non-discriminatory price, which is cost-related and may include a profit margin.

(6) Railway undertakings recruiting new train drivers, on-board staff, or staff with responsibility for safety critical tasks must take into account any training, qualifications and experience acquired by job-applicants from any previous employment with another railway undertaking.

(7) The staff described in paragraph (6) must be granted access to all documents attesting to their training, qualifications and experience, and be entitled to have copies of such documentation.

(8) It is the responsibility of each railway undertaking and infrastructure manager to provide the appropriate level of training and qualification of staff set out in Article 8 and Annex III to Council Directive 2004/49/EC.

(9) For the purposes of this regulation—

- (a) “national safety rules” means any legislation and other requirements—
  - (i) applicable to Northern Ireland; and
  - (ii) which contain requirements (including common operating rules) relating to railway safety,

except that where the requirements in paragraph (9)(a)(i) consist of common operating rules of the railway it shall not include such rules which regulate matters which are covered by a technical specification for interoperability; and

- (b) “safety critical task” means—
  - (i) in relation to vehicle used on a railway—
    - (aa) driving, despatching or any other activity which is capable of controlling or affecting the movement of that vehicle;

- (bb) signalling, and signalling operations, the operation of level crossing equipment, receiving and relaying of communications or any other activity which is capable of controlling or affecting the movement of that vehicle;
  - (cc) coupling or uncoupling;
  - (dd) installation of components;
  - (ee) maintenance; or
  - (ff) checking that that vehicle is working properly and, where carrying goods, is correctly loaded before being used;
- (ii) in relation to a railway—
    - (aa) installation or maintenance of any part of it or of the telecommunications system relating to it or used in conjunction with it, or of the means of supplying electricity directly to that transport system or to any vehicles using it or to the telecommunications system;
    - (bb) controlling the supply of electricity directly to it or to any vehicles used on it; or
    - (cc) receiving and relaying of communications;
  - (iii) in relation to ensuring worker safety on a railway, any person ensuring the safety of any persons working on or near the track, whether or not the persons working on or near the track are carrying out safety critical work; and
  - (iv) in relation to training, any practical training or the supervision of any practical training in any of the tasks set out in sub-paragraphs (i) to (ii),

which could significantly affect the health or safety of persons on a railway.

(10) An applicant denied access to training facilities contrary to the provisions of this regulation shall have a right of appeal to the Department in accordance with regulation 32(3).

(11) For the purposes of this regulation the provisions of regulation 32(3) shall apply to the Department as the appellants authority.

### **Cross-border agreements**

7.—(1) The Department must ensure that provisions contained in cross-border agreements do not discriminate between railway undertakings, or restrict their freedom to operate cross-border services.

(2) Without prejudice to the division of competence between the European Union and Member States, the Department must notify the European Commission of any intention to enter into negotiations on, to conclude, or to revise a cross-border agreement.

(3) The Department must keep the European Commission regularly informed of any negotiations referred to in paragraph (2) and, where appropriate, must invite the European Commission to participate as an observer.

(4) The Department may apply or conclude a new or revised cross-border agreement with non-EEA countries provided that it is compatible with European Union law and does not harm the object and purpose of the transport policy of the European Union.

## **PART 3**

### **INFRASTRUCTURE MANAGEMENT**

#### **Management independence**

8.—(1) Railway undertakings which are directly or indirectly controlled by a Member State must, in their management, administration and internal control over administrative, economic and

accounting matters, maintain the status of an independent operator and hold, in particular, assets, budgets and accounts which are separate from those of the State.

(2) Subject to the requirements set out in Parts 4 and 5 and Schedules 2 and 3 about the determination of infrastructure charges and the allocation of infrastructure capacity an infrastructure manager must be responsible for its own management, administration and internal control.

### **Separation of accounts**

**9.**—(1) Any body which incorporates the functions of both infrastructure manager and railway undertaking must—

- (a) prepare and publish separate profit and loss accounts and balance sheets in respect of business relating to the—
  - (i) provision of transport services as a railway undertaking; and
  - (ii) management of railway infrastructure; and
- (b) ensure that public funds granted to such a body is not transferred between that part of the body responsible for the provision of transport services and that responsible for management of railway infrastructure.

(2) Any body which conducts business activities relating to the provision of both rail freight transport services and passenger transport services must—

- (a) prepare and publish separate profit and loss accounts and balance sheets in respect of each of these business activities;
- (b) account separately for public funds granted for activities relating to the provision of transport services as public service remits in accordance with Article 7 of (EC) Regulation No 1370/2007; and
- (c) ensure that public funds granted as described in sub-paragraph (b) are not transferred to activities relating to the provision of other transport services, or any other business.

(3) Accounts for the areas of activity described in paragraphs (1) and (2) must be kept in such a way as to allow for monitoring of—

- (a) the prohibition set out in those paragraphs relating to the transfer of public funds; and
- (b) the use of income from infrastructure charges and surpluses from other commercial activities.

(4) The monitoring of the observance of public service obligations, where stipulated in the terms of a contract required by regulation 19(11), must be carried out by the Department.

### **Independence of service providers from dominant bodies and firms**

**10.**—(1) Where the service provider of a service described in paragraph 2 of Schedule 1 is under direct or indirect control of a dominant body or firm, it must hold separate accounts from that body or firm, including separate balance sheets and profit and loss accounts.

(2) Where the service provider of a service described in sub-paragraphs (a) – (f) of paragraph 2 of Schedule 1, is under direct or indirect control of a dominant body or firm, it must be independent in organisational and decision making terms from that body or firm.

(3) Paragraph (2) does not require the establishment of a separate legal entity to provide such services, and may be fulfilled by the formation of distinct divisions within a single legal entity.

(4) Where any of the services referred to in paragraph (2) are provided, and the operation of the service facility is ensured by either—

- (a) an infrastructure manager, or
- (b) a service provider under the direct or indirect control of an infrastructure manager,

the requirements of paragraphs (1) and (2) are met if regulations 14(6) and 19(3) are complied with.

### **Indicative railway infrastructure strategy**

**11.**—(1) The Department must, by 19th December 2019 and after consultation with interested parties, publish an indicative railway infrastructure strategy for Northern Ireland which must—

- (a) be drafted with a view to meeting future mobility needs in terms of the maintenance, renewal and development needs of the railway infrastructure in Northern Ireland;
- (b) take into account, as necessary, the general needs of the European Union, including the need to cooperate with neighbouring countries which are not EEA States; and
- (c) be based on sustainable financing.

(2) The strategy referred to in paragraph (1) must—

- (a) be in respect of such period as the Department must determine, and
- (b) be renewed following this period, in respect of successive periods of time, the length and commencement of which the Department must determine.

(3) The strategy described in paragraph (1) is to be known as the indicative railway infrastructure strategy for Northern Ireland.

### **Business Plans**

**12.**—(1) The infrastructure manager must draw up a business plan which is designed for the purpose of ensuring—

- (a) optimal and efficient use and development of the infrastructure; and
- (b) financial balance.

(2) The plan referred to in paragraph (1) must —

- (a) include details of investment and financial programmes;
- (b) provide the means by which the objectives set out in that paragraph are to be achieved; and
- (c) take into account the strategy referred to in regulation 11 and the financing provided to it.

(3) Before it is approved, the infrastructure manager must ensure that applicants known to it and, upon their request, potential applicants, have access to the relevant information and are given the opportunity to express their views on the content of the draft business plan regarding the conditions for access and use, and the nature, provision and development of the infrastructure.

(4) Each railway undertaking must draw up a business plan, which must include their investment and financing programmes, and which is designed for the purpose of ensuring—

- (a) financial equilibrium; and
- (b) other technical, commercial and financial management objectives.

(5) The plan referred to in paragraph (4) must provide the means by which the objectives set out in that paragraph are to be achieved.

(6) The Office of Rail and Road shall, at least once a year, request confirmation that a business plan has been produced in accordance with paragraphs (1) and (4) and each infrastructure manager or, as the case may be, railway undertaking, to whom such a request is made shall be under an obligation to comply with that request.

(7) For the purposes of regulation 36, a request by the Office of Rail and Road in accordance with paragraph (6) is to be treated as a request for information.

### **Network Statement**

**13.**—(1) The infrastructure manager must, following consultation with all interested parties, develop and publish a network statement containing the information described in paragraph (4).

(2) Where, by virtue of regulations 14(6) or 19(3) a charging body or, as the case may be, allocation body is responsible for the functions of the infrastructure manager in Parts 4 or 5, that

charging body or allocation body must provide the infrastructure manager with such information as is necessary to enable that infrastructure manager to—

- (a) include the information described in paragraph (4) in the network statement; and
- (b) keep the network statement up to date in accordance with paragraph (7).

(3) A service provider who is not the infrastructure manager must provide the infrastructure manager of the infrastructure to which the relevant service facility is connected, with such information as is necessary to enable that infrastructure manager to—

- (a) include the information described in paragraph (4)(b) and, where applicable, (d) in the network statement; and
- (b) keep the network statement up to date in accordance with paragraph (7).

(4) The information referred to in paragraph (1) is—

- (a) a section setting out the nature of the railway infrastructure which is available to applicants and the conditions of access to it;
- (b) details as to where further information may be obtained about the nature of the track access to, and supply of services in, any of the service facilities to which access may be obtained pursuant to regulation 5;
- (c) a description of the charging principles and tariffs, including appropriate details of the charging scheme, framework, methodology, rules and, where applicable, scales used in relation to the application of regulations 14, 16 and 18 and Schedule 2;
- (d) information on charges for gaining access to and supply of service facilities listed in Schedule 1, including those which are provided by only one supplier, and including information on technical access conditions, or details of a website where such information is available free of charge in electronic format;
- (e) the list of market segments to be published under paragraph 2(7) of Schedule 2, subject to any amendments made by the Office of Rail and Road;
- (f) information relating to the performance scheme referred to in regulation 16;
- (g) details for the supply of those services listed in Schedule 1 which are provided by only one supplier;
- (h) a description of the principles and criteria for the allocation of infrastructure capacity, setting out the general capacity characteristics of the infrastructure available and any restrictions on its use, including likely capacity requirements for maintenance;
- (i) information about procedures for dispute resolution and appeal relating to matters of access to rail infrastructure and services.
- (j) the procedures and deadlines in the capacity allocation process and specific criteria employed in that process, in particular—
  - (i) the procedures according to which applicants may request infrastructure capacity from the infrastructure manager;
  - (ii) the information to be provided by applicants;
  - (iii) the timetable for the application and allocation process;
  - (iv) the principles governing the co-ordination process, in particular the arrangement of international train paths, and the effect the modification of such paths might have on other infrastructure managers;
  - (v) the dispute resolution procedure established in accordance with regulation 23(7);
  - (vi) details of any section of railway infrastructure which has been designated for use by specified types of rail services in accordance with regulation 25;
  - (vii) the procedures to be followed and criteria used where infrastructure is congested infrastructure, including any priority criteria for the allocation of congested infrastructure set in accordance with regulation 26(5) and (6);

- (viii) the findings of any capacity enhancement plan completed in accordance with regulation 28;
  - (ix) details of restrictions on the use of infrastructure;
  - (x) the threshold quota to be applied by the infrastructure manager in requiring a train path to be surrendered under regulation 29(1); and
  - (xi) the conditions relating to previous levels of utilisation of capacity to be taken into account by the infrastructure manager in determining priorities in accordance with regulation 29(3);
  - (k) details of any section of railway infrastructure which has been designated for use by specified types of rail services in accordance with regulation 25;
  - (l) the measures taken by the infrastructure manager to ensure fair treatment of rail freight services and international services, and in responding to ad hoc requests for infrastructure capacity.
  - (m) a template form for requests for capacity and detailed information about the allocation procedures for international train paths;
  - (n) information related to applications for–
    - (i) a licence, as published under regulation 10(1) of the Train Driving Licences and Certificates Regulations (Northern Ireland) 2010(a); and
    - (ii) a rail safety certificate issued in accordance with regulation 5 of the Railways (Safety Management) Regulations (Northern Ireland) 2006(b).

or, as an alternative to the information described in (i) and (ii) above, a reference to a website where such information is made available free of charge in electronic format.
  - (o) a model agreement for the conclusion of a framework agreement between an infrastructure manager and an applicant in accordance with regulation 21; and
  - (p) the criteria to determine failure to use capacity published under regulation 18(3)(a).
- (5) The information provided under paragraph (4)(a) must be made consistent, on an annual basis with, or must refer to, the rail infrastructure registers to be published in accordance with Article 35 of Directive 2008/57/EC of the European Parliament and of the Council of 17<sup>th</sup> June 2008 on the interoperability of the rail system within the Community (Recast)(c).
- (6) The information provided under paragraph (4)(c) and (d) must include–
- (a) information on changes to charges referred to in that paragraph already decided upon or foreseen in the next five years, if available; and
  - (b) information on charges as well as other relevant information on access applying to services listed in Schedule 1 which are provided only by one supplier.
- (7) The infrastructure manager must keep the network statement up to date and modify it as necessary.
- (8) The infrastructure manager must publish the network statement in at least two official languages of the European Union.
- (9) The infrastructure manager must publish the network statement not less than four months before the deadline for applications for infrastructure capacity as described under paragraph 2(1) of Schedule 3.
- (10) Any fee charged by the infrastructure manager for the provision, on request, of a copy of the network statement must not exceed the cost of producing that copy.
- (11) The content of the network statement must be made available free of charge in electronic format on the web portal of the infrastructure manager and must be accessible through a common web portal.

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(a) S.R. 2010 No. 132

(b) S.R. 2006 No. 237

(c) O.J. L191, 18.7.08, p.1, to which there are amendments not relevant to these Regulations.

(12) The common web portal referred to in paragraph (11) must be set up by the infrastructure manager in the framework of its cooperation with infrastructure managers from other Member States, in accordance with regulations 17 and 20.

(13) If the information required under paragraphs (2) or (3) is not provided to the satisfaction of the infrastructure manager, the infrastructure manager may refer the matter to the Office of Rail and Road for a determination as to whether additional information must be supplied.

(14) Where a matter is referred to the Office of Rail and Road in accordance with paragraph (13), it is the duty of the Office of Rail and Road to make the determination within such period as is reasonable in all the circumstances, and any such determination shall be binding on all parties.

## PART 4

### INFRASTRUCTURE CHARGES

#### **Establishing, determining and collecting charges**

**14.**—(1) The Department must establish the charging framework and the specific charging rules governing the determination of the fees to be charged in accordance with paragraphs (3) and (4).

(2) Subject to paragraph (7), the infrastructure manager must—

- (a) determine the fees to be charged for use of the infrastructure in accordance with the charging framework, the specific charging rules, and the principles and exceptions set out in Schedule 2; and
- (b) collect those fees.

(3) Subject to the provisions in paragraphs (1) and (2), the infrastructure manager must –

- (a) charge fees for the use of the railway infrastructure for which the infrastructure manager is responsible; and
- (b) utilise such fees as are received to fund the infrastructure manager’s business.

(4) A service provider must –

- (a) charge fees for the use of a service facility for which the service provider is responsible; and
- (b) utilise such fees as are received to fund the service provider’s business.

(5) Applicants must, subject to the right of appeal to the Office of Rail and Road, pay such fees as are charged by the infrastructure manager or service provider for use of the railway infrastructure or service facility.

(6) Subject to paragraph (7), if the infrastructure manager in its legal form, organisation and decision making functions, is not independent of any railway undertaking, the infrastructure manager must ensure that the functions described in this Part and Schedule 2 are performed by a charging body that is independent in its legal form, organisation and decision-making from any railway undertaking.

(7) The separation required by paragraph (6) does not apply to the function of the collection of fees charged in accordance with paragraph (2)(b).

(8) The infrastructure manager or service provider must be able to justify that the charges invoiced to each railway undertaking for access to the infrastructure comply with the methodology, rules and, where applicable, scales laid down in the network statement and, where information about the charges imposed is requested by the Office of Rail and Road the infrastructure manager or service provider must supply the information requested.

(9) Infrastructure managers or service providers must co-operate to achieve the efficient operation of train services which cross more than one infrastructure network and should, in particular, aim to guarantee the optimum competitiveness of international rail freight.

(10) Infrastructure managers or service providers may establish such joint organisations as may be appropriate to enable the co-operation referred to in paragraph (9) to be achieved and any such

organisations, or co-operation arising out of the operation of such organisations, must be bound by the rules set out in these Regulations.

(11) The infrastructure manager or service provider must respect the commercial confidentiality of information provided to it by applicants for infrastructure capacity.

### **Infrastructure costs and accounts**

**15.**—(1) The Department must ensure that, under normal business conditions and over a reasonable time period, which must not exceed five years, the accounts of an infrastructure manager shall at least balance—

- (a) income from infrastructure charges;
- (b) surpluses from other commercial activities;
- (c) non-refundable incomes from private sources; and
- (d) state funding, including, where appropriate, advanced payments from the state.

with railway infrastructure expenditure.

(2) The infrastructure manager must enter into an agreement with the Department which must fulfil the basic parameters of Annex V of the Directive, and cover a period of not less than five years.

(3) The infrastructure manager must, with due regard to safety and to maintaining and improving the quality of the infrastructure service, be provided with incentives to reduce the costs of provision of infrastructure and the level of access charges.

(4) In fulfilling its obligations under paragraph (2), the Department must base its decision on an analysis of the achievable cost reductions.

(5) The infrastructure manager must develop and maintain a register of its assets and the assets it is responsible for managing insofar as this information would be used to assess the funding needed to repair or replace such assets.

(6) The register referred to in paragraph (5) must be accompanied by details of expenditure on renewal and upgrading of the infrastructure.

(7) The infrastructure manager must establish a method for apportioning costs to the different categories of services offered by the railway undertakings, which must be updated from time to time on the basis of best international practice.

(8) Where required by the Department, the infrastructure manager must seek prior approval for the method of apportioning costs referred to in paragraph (7).

### **Performance scheme**

**16.**—(1) The infrastructure manager must establish a performance scheme as part of the charging system to encourage railway undertakings and the infrastructure manager to minimise disruption and improve the performance of the network.

(2) The performance scheme referred to in paragraph (1) may include—

- (a) penalties for actions which disrupt the operation of the network;
- (b) compensation for undertakings which suffer from disruption; and
- (c) bonuses that reward better than planned performance.

(3) The performance scheme referred to in paragraph (1) must be based on the basic principles listed in paragraph 7 of Schedule 2 and must apply in a non-discriminatory manner throughout the network to which that scheme relates.

(4) The infrastructure manager must, as soon as possible, communicate to the railway undertaking a calculation of payments due under the performance scheme.

(5) A calculation under paragraph (4) must encompass all delayed train runs within a period of at most one month.

(6) Without prejudice to existing appeal procedures and to the right of appeal under regulation 32, in the case of disputes relating to the performance scheme, a dispute resolution system must be made available in order to settle such matters promptly.

(7) The dispute resolution system described in paragraph (6) must be impartial towards the parties involved and, if this system is applied, a decision must be reached within a time limit of 10 working days.

(8) Once a year, the infrastructure manager must publish the annual average level of performance achieved by the railway undertakings on the basis of the main parameters agreed in the performance scheme.

### **Cooperation in relation to charging systems on more than one network**

**17.—**(1) The infrastructure manager must cooperate with other infrastructure managers within the European Union to enable the application of efficient charging schemes, and must associate with them to coordinate the charging or to charge for the operation of train services which cross more than one infrastructure network of the rail system within the European Union.

(2) The infrastructure manager must, in particular, aim to guarantee the optimal competitiveness of international rail services and ensure the efficient use of the railway networks; to this end the infrastructure manager must cooperate with other infrastructure managers in the European Union to establish appropriate procedures, subject to the rules set out in these regulations.

(3) For the purpose of paragraphs (1) and (2) the infrastructure manager must cooperate with other infrastructure managers within the European Union to enable mark-ups (as referred to in Schedule 2, paragraph 2) and performance schemes (as referred to in regulation 16) to be efficiently applied for traffic crossing more than one network of the rail system within the European Union.

### **Reservation charges**

**18.—**(1) The infrastructure manager may levy an appropriate charge (“reservation charge”) for capacity that is requested but not used.

(2) Where the infrastructure manager makes provision for a reservation charge to be imposed, that charge—

- (a) must provide incentives for efficient use of capacity, and
- (b) is mandatory in the case of a regular failure by an applicant to use the paths, or part of the paths, allocated to them.

(3) Where provision for a reservation charge has been made—

- (a) the infrastructure manager must publish in its network statement the criteria used to determine the failure to use allocated paths, and
- (b) the Office of Rail and Road must control such criteria in accordance with regulations 32 and 34.

(4) The infrastructure manager must provide, at the request of any interested party, information about the infrastructure capacity allocated to applicants.

## **PART 5**

### **ALLOCATION OF INFRASTRUCTURE CAPACITY**

#### **Capacity allocation**

**19.—**(1) Whilst respecting the requirements for management independence stipulated in regulation 8, the Office of Rail and Road may establish a framework for the allocation of infrastructure capacity.

(2) The infrastructure manager must, subject to paragraph (3), be responsible for the establishment of specific capacity allocation rules and for the process of allocating infrastructure capacity in respect of the infrastructure for which it has responsibility.

(3) If the infrastructure manager, in its legal form, organisation and decision making functions, is not independent of any railway undertaking, the infrastructure manager must ensure that the functions described in this Part and Schedule 3 are performed by an allocation body that is independent in its legal form, organisation and decision-making from any railway undertaking.

(4) Subject to paragraph (7), any applicant may apply to the infrastructure manager for the allocation of infrastructure capacity.

(5) In order to use such capacity, an applicant which is not a railway undertaking must appoint a railway undertaking to conclude a contract with the infrastructure manager in accordance with paragraph (14): this is without prejudice to the right of the applicant to conclude an agreement with the infrastructure manager under regulation 22(1).

(6) The infrastructure manager must ensure that the allocation process is conducted in accordance with the timetable set out in Schedule 3.

(7) Subject to paragraph (8), an applicant who has been granted capacity by the infrastructure manager, whether that capacity is in the form of—

- (a) a framework agreement made in accordance with regulation 21 specifying the characteristics of the infrastructure granted; or
- (b) specific infrastructure capacity in the form of a train path,

must not trade that capacity with another applicant or transfer it to another undertaking or service.

(8) Any person who trades in capacity contrary to the provisions of paragraph (6) shall not be entitled to apply for capacity under paragraph (4) for the period of the working timetable period to which the allocation of capacity transferred related.

(9) The use of capacity by a railway undertaking on behalf of an applicant who is not a railway undertaking, in order to further the business of that applicant, is not a transfer for the purpose of paragraph (6).

(10) The infrastructure manager must not allocate capacity in the form of specific train paths for any period in excess of one working timetable period.

(11) A contract, either in the form of a framework agreement or any other type of contract, setting out the rights and obligations of the parties, must be concluded between the infrastructure manager and any applicant to whom infrastructure capacity is allocated before that infrastructure capacity is utilised.

(12) The infrastructure manager must—

- (a) ensure that infrastructure capacity is allocated on a fair and non-discriminatory basis;
- (b) ensure that the agreements referred to in paragraph (10) are non-discriminatory, transparent, and in accordance with the requirements of these regulations; and
- (c) respect the confidentiality of information supplied as part of the capacity allocation process, including the identity of other applicants during disclosure under regulation 23(5) unless the relevant applicant has agreed to disclosure of their identity. .

(13) In reserving infrastructure capacity for the purposes of scheduled track maintenance, as requested under regulation 22(3), the infrastructure manager must take into account the effect of that reservation on applicants.

(14) An applicant applying for infrastructure capacity with a view to operating an international passenger service must give notice of that fact to the infrastructure manager concerned and to the Office of Rail and Road and provide such information as the Office of Rail and Road may reasonably require or prescribe.

(15) When the Office of Rail and Road receives a notice from an applicant under paragraph (13) it must provide—

- (a) any competent authority that has awarded a rail passenger service, defined in a relevant public service contract;

- (b) any railway undertaking which is a relevant public service operator; and
- (c) any other competent authority with a right to limit access along the route of the international passenger service notified under paragraph (7).

with a copy of the information in relation to that service provided to it in accordance with that paragraph.

(16) The infrastructure manager may set requirements with regard to applicants to ensure that its legitimate expectations about future revenues and utilisation of the infrastructure capacity are safeguarded.

(17) Requirements under paragraph (16)—

- (a) Must be appropriate, transparent and non-discriminatory;
- (b) Must be specified in the network statement; and
- (c) May only include the provision of a financial guarantee by an applicant if the level of such guarantee does not exceed an appropriate level which is proportional to the contemplated level of activity of the applicant, and where such guarantee provides assurance of the applicant's capability to prepare compliant bids for infrastructure capacity.

(18) The infrastructure manager must set any requirements under paragraph (15) in accordance with the criteria contained in Commission Implementing Regulation (EU) 2015/10 of 6 January 2015(a) on criteria for applicants for rail infrastructure capacity and repealing implementing Regulation (EU) No. 870/2014(b).

### **Co-operation in the allocation of infrastructure capacity crossing more than one network**

**20.**—(1) This regulation applies to the allocation of infrastructure capacity in the form of a train path crossing more than one network of the rail system within the European Union.

(2) Infrastructure managers must –

- (a) co-operate to enable the efficient creation and allocation of infrastructure capacity to which this regulation applies, including under a framework agreement, and
- (b) before consulting on the draft working timetable in relation to relevant train paths agree with the other relevant infrastructure managers which international train paths are to be included in that draft working timetable.

(3) The international train paths referred to in paragraph (2)(b) may only be adjusted if absolutely necessary.

(4) The infrastructure managers must establish such procedures as are appropriate, in accordance with the requirements set out in these regulations, to enable the co-operation referred to in paragraph (2)(a) to take place, and such procedures must include coordination with representatives of the infrastructure managers whose allocation decisions have an impact on one or more other infrastructure managers.

(5) The procedures established by virtue of paragraph (4) may permit appropriate representatives of infrastructure managers outside the European Union to be associated with these procedures.

(6) The infrastructure managers must inform the European Commission of, and invite representatives to attend, main meetings at which common principles and practices for the allocation of infrastructure crossing more than one network are developed, as an observer.

(7) The infrastructure manager must provide the Office of Rail and Road with sufficient information about the development of common principles and practices for the allocation of infrastructure and from any IT-based allocation systems, to allow it to perform its regulatory supervision.

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(a) O.J. No. L3, 7.1.15, p.34

(b) O.J. No. L237/11, 12.8.14

(8) At any meeting or other activity undertaken to facilitate the allocation of infrastructure capacity across more than one network, decisions may only be taken by representatives of the relevant infrastructure managers.

(9) In acting in accordance with paragraph (2) the infrastructure managers must assess the need for and, where necessary, propose and organise international train paths in such a way as to enable *ad hoc* capacity for freight services to be granted in accordance with regulation 24.

(10) The prearranged train paths referred to in paragraph (2)(b) must be made available to applicants through any infrastructure manager who participates in the international co-ordination of train paths referred to in this regulation.

### **Framework agreements**

**21.**—(1) Subject to the requirements of this regulation, and without prejudice to articles 101, 102 and 106 of the Treaty, an infrastructure manager may enter into a framework agreement with an applicant for the purpose of specifying the characteristics of the infrastructure capacity required by and offered to the applicant over a period of time exceeding one working timetable period.

(2) An applicant who is party to a framework agreement may apply for the allocation of capacity in accordance with the terms of that agreement.

(3) Whilst seeking to meet the legitimate commercial needs of the applicant, and without prejudice to paragraph (11), a framework agreement must not specify any train path in detail.

(4) The effect of a framework agreement must not be such as to preclude the use of railway infrastructure subject to that framework agreement by other applicants or services.

(5) A framework agreement must contain terms permitting the amendment or limitation of any condition contained in that framework agreement if such amendment or limitation would enable more efficient use to be made of the railway infrastructure.

(6) A framework agreement may contain penalties applicable on modification or termination of the agreement by any party.

(7) Other than in circumstances described in paragraphs (8) and (9), a framework agreement made in accordance with paragraph (1) will in principle be for a period of five years renewable for periods equal to its original duration, provided that the infrastructure manager may agree to a shorter or longer period in specific cases.

(8) Subject to paragraphs (9) and (10), a framework agreement for a period of longer than five years must be justified by the existence of commercial contracts, specialised investments or risks.

(9) Subject to paragraph (10), a framework agreement in relation to railway infrastructure which has been designated in accordance with regulation 25(2) (“a designated infrastructure framework agreement”) may be for a period of up to fifteen years where there is a substantial and long term investment justified by the applicant.

(10) A framework agreement for a period in excess of fifteen years may be made in exceptional cases, which may be justified by the existence of large-scale and long-term investment and in particular where such investment is covered by contractual commitments.

(11) Whilst respecting commercial confidentiality, the general nature of each framework agreement must be made available by the infrastructure manager to any interested party.

(12) An application for a designated infrastructure framework agreement to which paragraph (9) or (10) applies may specify the capacity characteristics, including the frequency, volume and quality of the train paths, to be provided to the applicant for the duration of the framework agreement in sufficient detail to ensure these are clearly established.

(13) The infrastructure manager may reduce capacity reserved under the terms of a designated infrastructure framework agreement to which paragraph (9) or (10) applies where, over a continuous period of at least one month, that capacity has been used less than the threshold stipulated in the network statement.

## **Application for infrastructure capacity**

22.—(1) Applicants may submit a request to the infrastructure manager, for an agreement granting rights to use railway infrastructure against a charge as provided for in Part 4.

(2) An applicant wishing to apply for infrastructure capacity must submit an application to the infrastructure manager in accordance with the timetable for the allocation process set out in Schedule 3.

(3) Requests for infrastructure capacity to enable maintenance of the network to be carried out must be submitted in accordance with the timetable set out in Schedule 3.

(4) The infrastructure manager must inform interested parties as soon as possible about the unavailability of infrastructure capacity due to unscheduled maintenance work.

## **Scheduling and co-ordination**

23.—(1) The infrastructure manager must, so far as possible—

- (a) meet all requests for infrastructure capacity, including those requests for train paths which cross more than one network; and
- (b) in doing so, take account of all constraints on applicants, including the economic effect on their business.

(2) The infrastructure manager may give priority to specific services within the scheduling and co-ordination process, but only in accordance with the provisions in regulations 25 and 26.

(3) The infrastructure manager must consult interested parties about the draft working timetable, and must allow such interested parties a period of at least one calendar month to submit their comments.

(4) In the event of conflict between different requests for infrastructure capacity, the infrastructure manager must use all best endeavours, in consultation with the appropriate applicants, to co-ordinate the requests and, in so far as it is reasonable to do so, may propose alternative infrastructure capacity from that requested in order to resolve the conflict.

(5) Consultation under paragraph (4) must be based on the disclosure by the infrastructure manager of the following information within a reasonable time, free of charge and in written or electronic form—

- (a) train paths requested by all other applicants on the same routes;
- (b) train paths allocated on a preliminary basis to all other applicants on the same routes;
- (c) alternative train paths proposed on the relevant routes in accordance with paragraph (4); and
- (d) full details of the criteria being used in the capacity allocation process

(6) Information disclosed by the infrastructure manager in accordance with paragraph (5) must not disclose the identity of other applicants, unless the applicants concerned have agreed to such disclosure.

(7) The infrastructure manager must facilitate the establishment and operation of a dispute resolution system, which must be set out in the network statement, to resolve disputes about the allocation of infrastructure capacity and, where that system is applied, a decision on the matters in dispute must be reached no later than ten working days after the final submission of all relevant information in accordance with that system.

(8) The dispute resolution system provided for in paragraph (7) is without prejudice to the right of appeal to the Office of Rail and Road under regulation 32(1).

(9) The infrastructure manager must take such measures as are appropriate to deal with any concerns about the allocation process raised by interested parties.

(10) For the purposes of this regulation “interested parties” includes—

- (a) all applicants for infrastructure capacity as part of the specific allocation process to which the draft working timetable relates; and

- (b) other parties who have indicated to the Office of Rail and Road, in such form or manner as the infrastructure manager may from time to time require, that they wish to have the opportunity to comment as to the effect that the working timetable might have on their ability to procure rail services during the working timetable period to which the draft working timetable relates.

#### **Ad hoc requests**

**24.**—(1) In addition to making an application for capacity in accordance with the annual timetable process described in regulation 22 an applicant may submit *ad hoc* requests for infrastructure capacity in the form of individual train paths to the infrastructure manager.

(2) The infrastructure manager must respond to a request described in paragraph (1) as quickly as possible and, in any event, no later than five working days from receipt of the request.

(3) The infrastructure manager must make available, to all potential applicants for such individual train paths, information about available spare capacity on the network for which it is responsible.

(4) The infrastructure manager must, including in the case of congested infrastructure, undertake an evaluation of the need for reserve capacity to be kept available within the final working timetable to enable it to respond rapidly to foreseeable *ad hoc* requests for infrastructure capacity.

#### **Declaration of specialised infrastructure**

**25.**—(1) Subject to paragraph (2), all infrastructure capacity must be available for the use of all types of rail transport service which conform to the characteristics necessary for use of that infrastructure, as defined in the infrastructure manager's network statement.

(2) Subject to the provisions set out in paragraph (3), and without prejudice to articles 101, 102 and 106 of the Treaty, an infrastructure manager may designate particular sections of the infrastructure for use by specified types of rail service and, once the infrastructure is so designated, may give priority to that specified type of rail service in the allocation of infrastructure capacity.

(3) Those provisions are that—

- (a) suitable alternative routes for other types of rail transport service must exist and be available;
- (b) before making such a designation the infrastructure manager must consult the Department, the Office of Rail and Road and all other interested parties; and
- (c) such designation must not prevent the use of that designated infrastructure by other types of rail transport service when capacity is available

#### **Congested infrastructure**

**26.**—(1) Where, after the co-ordination of requests for capacity and consultation with the applicants in accordance with regulation 23(4), it is not possible for the infrastructure manager to satisfy requests for infrastructure capacity adequately, the infrastructure manager must declare that element of the infrastructure on which such requests cannot be satisfied to be congested.

(2) Where, during the preparation of the working timetable for the next timetable period, the infrastructure manager considers that an element of the infrastructure is likely to become congested during the period to which that working timetable relates, he must declare that element of the infrastructure to be congested.

(3) When railway infrastructure has been declared to be congested under the provisions of this regulation the infrastructure manager must inform—

- (a) existing users of that railway infrastructure;
- (b) new applicants for infrastructure capacity which includes that element of the infrastructure which has been declared to be congested;

- (c) the Office of Rail and Road; and
- (d) the Department.

(4) Where railway infrastructure has been declared to be congested in accordance with paragraph (1) or (2) the infrastructure manager must undertake a capacity analysis of the congested infrastructure, as described in regulation 27, unless a capacity enhancement plan, as described in regulation 28, is in the process of being implemented.

(5) When an element of the infrastructure has been declared to be congested in accordance with paragraphs (1) or (2) and either—

- (a) a charge as described in paragraph 1(8) of Schedule 2 has not been levied; or
- (b) the charge described in sub-paragraph (a) has been levied but has not achieved a satisfactory result,

the infrastructure manager may set priority criteria for the allocation of infrastructure capacity which includes that congested element of the infrastructure.

(6) The priority criteria referred to in paragraph (5) must—

- (a) take account of the importance of a service to society, relative to any other service which will consequently be excluded; and
- (b) ensure that freight services, and in particular international freight services, are given adequate consideration in the determination of those criteria.

(7) If during the course of the working timetable period to which the declaration of congested infrastructure relates, but before the completion of the capacity analysis, the congestion is resolved, the infrastructure manager may revoke the declaration made in accordance with sub-paragraph (1).

(8) Where sub-paragraph (7) applies, the infrastructure manager must inform the persons referred to in sub-paragraph (3) that the declaration has been revoked.

### **Capacity analysis**

**27.**—(1) Where required in accordance with regulation 26(4), the infrastructure manager must carry out a capacity analysis of the congested infrastructure in order to identify the reasons for the congestion and the measures which might be taken in the short and medium term to ease that congestion.

(2) In conducting the capacity analysis, and in order to identify the reasons for the congestion, the infrastructure manager must consider the—

- (a) characteristics of the congested railway infrastructure;
- (b) operating procedures used on that railway infrastructure; and
- (c) characteristics of the different rail services which have been allocated capacity to operate on that infrastructure.

(3) In seeking to determine measures to alleviate congestion the infrastructure manager must consider, in particular—

- (a) re-routing of services;
- (b) re-timing of services;
- (c) alterations to the line-speed; and
- (d) infrastructure improvements.

(4) The infrastructure manager must consult the Department during the preparation of the capacity analysis.

(5) The infrastructure manager must complete the capacity analysis within six months from the date on which the railway infrastructure is declared to be congested in accordance with regulation 26(1) or (2) and make the findings of the analysis available to the parties described in regulation 26(3).

### **Capacity enhancement plan**

**28.**—(1) The infrastructure manager must, within six months of the publication of a capacity analysis in accordance with regulation 27, produce a capacity enhancement plan.

(2) In producing the capacity enhancement plan, the infrastructure manager must—

- (a) consult such interested parties as he considers necessary, including those described in regulation 26(3); and
- (b) at least one month before the deadline for completion of the plan seek the prior approval of the Department to the capacity enhancement plan

(3) The capacity enhancement plan must identify the—

- (a) reasons for the congestion;
- (b) likely future development of traffic;
- (c) constraints on railway infrastructure development; and
- (d) options for and costs of enhancing the capacity, including the potential effect on access charges.

(4) On the basis of a cost benefit analysis of the potential measures for action identified in the capacity enhancement plan, that plan must include—

- (a) details of the action to be taken to enhance the capacity of the congested infrastructure; and
- (b) a timetable for the completion of the detailed measures identified in accordance with subparagraph (a).

(5) Subject to paragraph (6), if the utilisation of capacity on that element of the railway infrastructure which is the subject of the capacity enhancement plan attracts a scarcity charge, in accordance with paragraph 1(8) of Schedule 2 the infrastructure manager must cease the levying of such charge in situations where—

- (a) paragraph (1) applies but a capacity enhancement plan for that part of the railway infrastructure which is subject to the scarcity charge has not been produced, as required by this regulation; or
- (b) the infrastructure manager fails to make progress with implementation of those areas of the action plan produced in accordance with paragraph (4).

(6) Paragraph (5) does not apply where—

- (a) the action plan produced in accordance with paragraph (4) cannot be implemented for reasons beyond the immediate control of the infrastructure manager; or
- (b) the options identified in that action plan are not economical or financially viable,
- (c) provided that prior approval to continue to levy the scarcity charge is obtained from the Office of Rail and Road.

(7) At the end of the six month period starting with the publication of the capacity analysis in accordance with regulation 27, whether or not the approval sought under paragraph (2) (b) has been received, the infrastructure manager must provide the parties consulted under paragraph (2) (a) with a copy of the plan and the timetable for completion of the measures identified to resolve the congestion.

### **Use of train paths**

**29.**—(1) Subject to paragraph (2) the infrastructure manager must, in particular where railway infrastructure has been declared to be congested in accordance with regulation 26, require an applicant who has, over a period of at least one month, used a train path less often than the threshold quota stipulated in the network statement, to surrender that train path.

(2) Paragraph (1) does not apply if, in the view of the infrastructure manager, the failure to use the train path in accordance with the threshold quota stipulated in the network statement arose as a result of non-economic reasons outside the control of the applicant.

(3) The infrastructure manager must in the network statement specify conditions under which previous levels of capacity utilisation will be taken into account in determining the priorities to be used in making decisions on the allocation of capacity.

### **Special measures to be taken in the event of disruption**

**30.**—(1) In the event of disruption to train movements caused by technical failure or accident, the infrastructure manager must take all such steps as are necessary to restore the normal operation of the network.

(2) The infrastructure manager must have in place a contingency plan listing the various bodies who are required to be informed in the event of a serious incident or serious disruption to train movements.

(3) The infrastructure manager may, in the event of an emergency and where absolutely necessary on account of a breakdown which renders a part of the railway infrastructure temporarily unusable, withdraw allocated train paths without warning and with immediate effect for such period as is necessary to repair the affected infrastructure.

(4) Subject to paragraph (5), the infrastructure manager may, if he deems it to be necessary, require applicants to make available to him such resources as the infrastructure manager considers appropriate to restore the normal operation of the network as quickly as possible.

(5) Where a contract or framework agreement between an applicant and the infrastructure manager incorporates conditions as to the special measures to be taken in the event of disruption, the resources required by the infrastructure manager under paragraph (4) must be in accordance with those conditions.

## **PART 6**

### **REGULATION AND APPEALS**

#### **Regulatory body**

**31.**—(1) The Office of Rail and Road is designated as the regulatory body for the purposes of these regulations and when carrying out its functions under these Regulations shall have a duty to act in a manner which is best calculated—

- (a) to promote improvements in railway service performance;
- (b) to protect the interests of users of railway services;
- (c) to promote the use of the railway network for the carriage of passengers and goods, and the development of that network, to the extent that it considers economically practicable;
- (d) to contribute to the development of an integrated system of transport of passengers and goods;
- (e) to promote efficiency and economy on the part of persons providing railway services;
- (f) to promote measures designed to facilitate the making, by passengers, of journeys which involve use of the services of more than one passenger service operator;
- (g) to take account of the need to protect all persons from dangers arising from the operation of railways;
- (h) to have regard to the effect on the environment of activities connected with the provision of railway services;
- (i) to have regard to any general guidance given to it, by the Department, about railway services or other matters relating to railways;
- (j) to have regard to the funds available to the Department for the purposes of its functions in relation to railways and railway services;

- (k) to have regard to the interests of persons who are disabled when performing its duties relating to the services for the carriage of passengers by railway or to station services; and
- (l) where any general guidance is given to the Office of Rail and Road for the purposes of subparagraph (i) above—
  - (i) it may be varied or revoked by the Department at any time; and
  - (ii) the guidance, and any variation or revocation of the guidance, must be published by the Department in such manner as it considers appropriate.

(2) The Office of Rail and Road must ensure that charges for the use of railway infrastructure imposed by the infrastructure manager comply with the requirements of Part 4 and Schedule 2.

(3) Negotiations between an applicant and the infrastructure manager about the level of infrastructure charges are only permitted if carried out under the supervision of the Office of Rail and Road and, if such negotiations are likely to contravene the requirements of these regulations, it is the duty of the Office of Rail and Road to intervene.

(4) The Office of Rail and Road may in particular, as part of the intervention mentioned in paragraph (3), issue such directions to the applicant or the infrastructure manager as it considers appropriate for the purpose of ensuring that no contravention arises or, to the extent that a contravention has arisen, that it ceases.

(5) Where the Office of Rail and Road prescribes the manner and form in which any notification or appeal must be lodged in accordance with these regulations, it must publicise this information in such manner as it considers appropriate.

(6) Procedural arrangements made by the Office of Rail and Road must ensure that a person with ultimate responsibility for taking a decision under regulations 32, 33, 34 and 35, complies with the criteria listed in paragraph (7); and

- (a) shall include arrangements under which a member, employee or committee-member who has a financial or other personal interest which is likely to influence his performance of a particular function is obliged—
  - (i) to declare the interest; and
  - (ii) to withdraw from the performance of the function to the relevant extent.
- (b) Procedural arrangements made by the Office of Rail and Road shall include arrangements under which a member, employee or committee-member who has a financial or other personal interest which is relevant to a particular function but does not fall under subparagraph (a) is obliged –
  - (i) to declare the interest; and
  - (ii) unless the members of the Office of Rail and Road direct otherwise, to withdraw from the performance of the function to the relevant extent

(7) The criteria are that such persons—

- (a) must make an annual declaration of—
  - (i) their commitment to the impartial fulfilment of their duties under these regulations, and
  - (ii) any direct or indirect interests which may be considered prejudicial to their independence and which might influence their performance of any function;
- (b) must withdraw from decision making in cases which concern an undertaking with which they have had a direct or indirect connection in the year before the commencement of any procedure relating to a decision described in paragraph (6);
- (c) must not seek or take instructions from any government or other entity when carrying out their functions; and
- (d) must have no professional position or responsibility with any regulated railway undertaking or entity for a period of not less than a year commencing at the end of their term of employment to take decisions under paragraph (6).

(8) Without prejudice to the right of any person to make an application to the Court under Order 53 of the Rules of Court Judicature (NI) 1980(a), it is the duty of any person to whom a direction is given under paragraph (4) to comply with and give effect to that direction.

(9) The Office of Rail and Road may levy a charge on the Infrastructure Manager for such fees and expenses as are appropriate for the discharge of its duties.

### **Appeals to the regulatory body**

**32.**—(1) Subject to paragraph (3), an applicant has the right of appeal to the Office of Rail and Road if it believes that it has been unfairly treated, discriminated against or is in any other way aggrieved and, in particular, against decisions adopted by the infrastructure manager, an allocation body, a charging body, a service provider or as the case may be, a railway undertaking or any interested party, concerning the matters described in paragraph (2).

(2) Those matters are—

- (a) the network statement produced in accordance with regulation 13, in its provisional and final versions;
- (b) the information which, by virtue of regulation 13(4), must be included in that network statement;
- (c) the allocation process and its result as prescribed in Part 5 and Schedule 3;
- (d) the charging scheme and charging system established in accordance with regulation 14;
- (e) the level of structure of railway infrastructure charges, the principles of which are prescribed in Part 4 and Schedule 2, which it is, or may be, required to pay;
- (f) the arrangements for access granted under Part 2 and Schedule 1; and
- (g) access to and charging for services provided under Part 2 and Schedule 1.

(3) Where the Office of Rail and Road has received an appeal under paragraph (1) it must -

- (a) as appropriate, ask for all relevant information and initiate a consultation with the relevant parties within one month of the date of receipt of the appeal; and
- (b) within a predetermined and reasonable time, and, in any case, within six weeks of the date of receipt of all relevant information (including information provided pursuant to regulations 31 and 36)—
  - (i) make a decision;
  - (ii) inform the relevant parties of its decision, providing reasons for this;
  - (iii) 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
  - (iv) publish the decision.

(4) When an appeal under paragraph (1) contests a decision under regulation 5(4) to refuse a request for access to, and the supply of services described in paragraph 2 of Schedule 1, a decision under paragraph (3) must include a determination as to whether, in respect of the access and provision of services to which the appeal relates, a viable alternative exists.

(5) When an appeal under paragraph (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), a determination under paragraph (3) must include a determination, as appropriate and in respect of the circumstances to which the appeal relates, of—

- (a) whether a viable alternative as described in regulation 5(4) exists;
- (b) whether it is possible to accommodate the conflicting requests on the basis of demonstrated need; and

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(a) Rules of the Court of Judicature under para 3.3 of Schedule 11 to the Constitutional Reform Act 2005

(c) whether, and if so what, part of the service capacity must be granted to the applicant.

(6) Where a decision under paragraph (3) concerns a refusal by the infrastructure manager or allocation body to allocate infrastructure capacity, or concerns an appeal against the terms of an offer of infrastructure capacity, the Office of Rail and Road must, in such a decision, either—

(a) confirm that no modification of the infrastructure manager or allocation body's decision is required; or

(b) require modification of that decision in accordance and issue directions to that effect.

(7) Without prejudice to the right of any person to make an application to the court under Order 53 of the Rules of the Court of Judicature (Northern Ireland) 1980(a).

(a) a decision by the Office of Rail and Road on an appeal brought under this regulation is binding on all parties affected by that decision;

(b) it is the duty of any person to whom a direction is given under this regulation to comply with and give effect to that direction.

### **Regulatory decisions concerning international passenger services**

**33.—**(1) The Office of Rail and Road must at the request of a relevant competent authority or interested railway undertaking, determine whether the principle purpose of a service is to carry passengers between stations located in different Member States.

(2) In fulfilling its function under paragraph (1), the Office of Rail and Road must follow the procedure and criteria set out in Regulation (EU) 896/2014 of 11 August 2014 on new rail passenger services(b).

(3) The Office of Rail and Road must—

(a) at the request of a relevant party and in accordance with paragraphs (5) and (6) determine whether the exercise of the right conferred under regulation 4 by an applicant for infrastructure capacity notified under regulation 19(14) would compromise the economic equilibrium of a relevant public service contract; and

(b) make the determination on the basis of an objective economic analysis and in accordance with pre-determined criteria published by it.

(4) For the purposes of paragraph (3), and (6)(d) a relevant party is—

(a) the competent authority or authorities that awarded the public service contract;

(b) any other competent authority with a right to limit access along the route of the international passenger service notified under regulation 19(14);

(c) the infrastructure manager; and

(d) the railway undertaking performing the relevant public service contract to which the request relates.

(5) Within one month of receipt of a request under paragraph (3)(a), the Office of Rail and Road must consider the information provided, and, as appropriate, ask for further relevant information from, and initiate consultation with, all relevant parties.

(6) The Office of Rail and Road must, within six weeks of receipt of all relevant information and, where appropriate, of any representations made by the Department—

(a) complete a consultation initiated under paragraph (5) or, as the case may be, under paragraph (9) if required;

(b) make a decision on a request made under paragraph (3);

(c) where appropriate, issue a direction to the infrastructure manager, allocation body, charging body, service provider or, as the case may be, railway undertaking, limiting the

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(a) The Rules of the Supreme Court were renamed the Rules of the Court of Judicature under para 3(3) of Schedule 11 to the Constitutional Reform Act 2005.

(b) O.J. No. L239, 12.8.2014, pl.

access rights conferred under regulation 4, if the exercise of those rights would compromise the economic equilibrium of a relevant public service contract;

- (d) provide the relevant parties and any railway undertaking seeking access rights for the purpose of operating an international passenger service with the grounds for its decision; and specify a reasonable time period within which, and the conditions under which, any of those parties may request a reconsideration of the decision or direction or both.

(7) Where the Office of Rail and Road has received a properly made request for a reconsideration of its decision or direction in accordance with paragraph (6)(d), any decision or direction it has made under paragraph (6) will not take effect pending reconsideration.

(8) Where the Office of Rail and Road has received a properly made request for a reconsideration of its decision or direction in accordance with paragraph (6)(d), it must, within six weeks of the date of receipt of all relevant information and of any representations made by the Department—

- (a) make a reconsidered decision on the request; and
- (b) where appropriate, issue or reissue a direction or directions to the infrastructure manager, allocation body, charging body, service provider or, as the case may be, railway undertaking.

(9) In making a decision on a request made under paragraph (3), or a request for a reconsideration of its decision under paragraph (6), the Office of Rail and Road must either—

- (a) confirm that no modification of the infrastructure manager or allocation body's decision to award access rights is required; or
- (b) require modification of that decision in accordance with directions issued by the Office of Rail and Road.

(10) Without prejudice to the right of any person to make an application to the Court under Order 53 of the Rules of the Court of Judicature (Northern Ireland) 1980(a)—

- (a) a decision by the Office of Rail and Road on a request made under paragraph (3) or a request for a reconsideration of its decision under paragraph (6) is binding on all parties affected by that decision; and
- (b) it is the duty of any person to whom a direction is given under this regulation to comply with and give effect to that direction.

(11) The procedure and criteria to be applied by the Office of Rail and Road in the performance of its functions under paragraphs (3) and (8) shall be subject to, and include, the relevant procedures and criteria set out in Commission Implementing Regulation (EU) No. 869/2014(b) of 11 August 2014 on new rail passenger services.

### **Monitoring the rail services markets**

**34.**—(1) The Office of Rail and Road must monitor the competitive situation in the rail services markets.

(2) In particular it must-

- (a) control the matters referred to in regulation 32(2) on its own initiative and with a view to preventing discrimination against applicants; and
- (b) check whether the network statement contains discriminatory clauses or creates discretionary powers for the infrastructure manager that may be used to discriminate against applicants.

(3) The Office of Rail and Road must, where appropriate and on its own initiative, give appropriate directions to correct—

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(a) The Rules of the Supreme Court were renamed the Rules of the Court of Judicature under para 3(3) of Schedule 11 to the Constitutional Reform Act 2005

(b) O.J. No. L239, 12.8.2014, p.1-10

- (a) discrimination against applicants;
- (b) market distortion; or
- (c) undesirable developments in relation to the competitive situation in the rail services markets, in particular with reference to the matters referred to in paragraph 32(2).

(4) Without prejudice to the right of any person to make an application to the court under Order 53 of the Rules of the Supreme Court (Northern Ireland) 1980, it is the duty of any person to whom a direction is given under paragraph (3) to comply with and give effect to that direction.

(5) The Office of Rail and Road must regularly, and in any case at least every two years, consult representatives of users of the rail freight and passenger transport services, to take into account their views on the rail market.

(6) The Department must, while respecting the role of social partners, supply to the European Commission on an annual basis necessary information on the use of the networks and evolution of framework conditions in the rail sector.

(7) Information under paragraph (6) must conform with any provisions to ensure consistency in the reporting obligations contained in Commission Implementing Regulation (EU) 2015/1100 of 7<sup>th</sup> July 2015 on the reporting obligations of the Member States in the framework of rail market monitoring(a).

(8) The Office of Rail and Road and the Department as safety authority must co-operate closely, in particular with a view jointly, to develop a framework for information sharing and co-operation aimed at preventing adverse effects on competition or safety in the rail services markets.

## **Audits**

**35.**—(1) The Office of Rail and Road may carry out an audit or initiate an external audit of an infrastructure manager, service provider and, where relevant, railway undertakings to verify compliance with the account separation provisions laid down in regulation 9.

(2) For the purposes of paragraph (1) the power of the Office of Rail and Road, under r36 to request relevant information to perform its functions includes a power to request any relevant party to provide all or part of the accounting information listed in Schedule 5 with a sufficient level of detail as is deemed necessary and proportionate.

(3) For the purposes of paragraph (2) “any relevant party” includes an infrastructure manager, service provider, railway undertaking or other entity performing or integrating different types of rail transport or infrastructure management as referred to in regulations 5 and 9(1).

(4) The Office of Rail and Road may draw conclusions from the accounts concerning state aid issues which it must report to the Department.

## **Duty of certain persons to furnish information to the Department or the Office of Rail and Road**

**36.**—(1) The infrastructure manager, applicant, service provider, allocation body, charging body or any other party shall be under a duty to furnish to the Department or the Office of Rail and Road, in such form and manner as requested, such information as is required, being information which the Department or the office of Rail and Road considers necessary for the purpose of facilitating the performance of any functions of the Department or the office or Rail and Road, or any other function or activity in relation to railway services.

(2) Holder of European licences shall be under a duty to furnish to the office of Rail and Road, in such form and manner as it may by notice request, such information as it may so request, being information which the Office of Rail and Road considers necessary for the purpose of facilitating the performance of any of its functions under any instrument made for the purpose of implementing Directive 2004/49/EC dated 29<sup>th</sup> April 2004(b), both of the European Parliament

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(a) O.J. No. L181/1, 9.7.2015

(b) O.J. No. L164, 30.04.2004, p.44-133

and of the Council, and Directive 2012/34/EU of the European Parliament and of the Council of 21<sup>st</sup> November 2012.

(3) A request under subsections (1) and (2) above must be complied with within such time (being not less than 28 days from the making of the request) as may be specified in the request.

(4) If a request under subsection (1) above is not complied with, the Department or the office of Rail and Road may serve a notice under subsection (6) below on the person from whom the information was requested under subsection (1) above.

(5) If a request under subsection (2) above is not complied with, the Office of Rail and Road may serve a notice under subsection (6) below on the person from whom the information was requested under subsection (2) above.

(6) A notice under this subsection is a notice signed by the Department or the Office of Rail and Road and requiring the person on whom it is served to produce, at a time and place specified in the notice, to the Department or to the Office of Rail and Road, any documents which are specified or described in the notice and are in that person's custody or under this control.

(7) No person shall be required under this section to produce any documents which he could not be compelled to produce in civil proceedings in the court, or, in complying with any requirement for the furnishing of information, to give any information which he could not be compelled to give in evidence in any such proceedings.

(8) A person who intentionally alters, suppresses or destroys any document which he has been required by any notice under subsection (6) above to produce, is guilty of an offence and shall be liable—

- (a) on summary conviction, to a fine not exceeding the statutory maximum, or
- (b) on conviction or indictment, to a fine.

(9) If a person makes default in complying with a notice under subsection (6) above, the court may, on the application of the Department or the office of Rail and Road in the case of a request under subsection (1) above, or the Office of Rail and Road in the case of a request under subsection (2) above, make such order as the court thinks fit for requiring the default to be made good; and any such order may provide that all the costs or expenses of and incidental to the application, shall be borne by the person in default or by any officers of a company or other association who are responsible for its default.

(10) Any reference in this section to the production of a document includes a reference to the production of a legible and intelligible copy of information recorded otherwise than in legible form; and the reference to suppressing a document includes a reference to destroying the means of reproducing information recorded otherwise than in legible form.

(11) In this section “the court” means the Court of Judicature.

### **Co-operation between regulatory bodies**

**37.—**(1) The Office of Rail and Road must exchange information about its work, decision making principles, and practice with the national regulatory bodies of other Member States, and in particular it must exchange information on the main issues of its procedures and on the problems of interpreting transposed European Union railway law.

(2) The Office of Rail and Road must cooperate with such bodies for the purpose of coordinating their decision-making across the European Union, and for this purpose it must participate and work together with them in a network, to be coordinated and supported by the Commission, that convenes at regular intervals.

(3) The Office of Rail and Road must cooperate closely with such bodies, including through working arrangements, for the purpose of mutual assistance in their market monitoring tasks and handling appeals or investigations.

(4) In the case of an appeal or an own-initiative investigation on issues of access or charging relating to an international train path, as well as in the framework of monitoring competition on the market related to international rail transport services, the Office of Rail and Road must consult the national regulatory bodies of all other Member States through which the international train

path concerned runs and, where appropriate, the European Commission, and must request all necessary information from them before taking its decision.

(5) The Office of Rail and Road must use any information it receives pursuant to paragraph (4) only for the purpose of handling the appeal or investigation.

(6) If the Office of Rail and Road receives a request for information from the regulatory body of another Member State in relation to an appeal or investigation of a type described in paragraph (4) for which that regulatory body is responsible, the Office of Rail and Road must use its best endeavours to provide all such information that it has the right to request under these regulations.

(7) If the Office of Rail and Road receives an appeal, or conducts an investigation on its own initiative in relation to an issue for which another regulatory body is responsible, it must transfer relevant information to that regulatory body in order for that body to take measures regarding the parties concerned.

(8) Infrastructure managers required to co-operate in the allocation of infrastructure capacity crossing more than one network, as referred to in regulation 20(2)(a), must provide, without delay, all the information requested by the Office of Rail and Road, which is necessary for the purpose of handling the appeal or investigation referred to in paragraph (4).

(9) The Office of Rail and Road may transfer such information regarding the international train path concerned to the regulatory bodies referred to in paragraph (4).

(10) The Office of Rail and Road must work with the regulatory bodies of other Member States to develop common principles and practices for making the decisions for which they are empowered under these regulations.

(11) The Office of Rail and Road must review decisions and practices of infrastructure managers required to co-operate over train services which cross more than one network, as referred to in paragraph (8) and regulation 20, that implement provisions in these regulations or which otherwise facilitate international rail transport.

## PART 7

### ENFORCEMENT BY THE REGULATORY BODY

#### **Enforcement of decisions, directions and notices**

**38.**—(1) If the Office of Rail and Road or the Department, in respect of its function under regulation 6(10), is satisfied that a relevant operator has contravened, or is contravening, a relevant decision, direction or notice, the authority may impose on the relevant operator a penalty of such amount as is reasonable.

(2) A penalty is payable to the Department.

(3) The amount of a penalty imposed on a relevant operator may not exceed 10 per cent. of his turnover in accordance with a direction made by the Department.

(4) In this regulation—

(a) “relevant decision, direction or notice” means—

(i) a decision made, or direction issued, by the Office of Rail and Road under regulation 31, 32, 33 or 34; or

(ii) a notice served by the Office of Rail and Road under regulation 36.

(b) “relevant operator” means—

(i) a person issued with a decision or direction under regulations 31, 32, 33, or 34; or

(ii) a person on whom a notice is served under regulation 36.

## Statement of policy

**39.**—(1) The Office of Rail and Road, in consultation with the Department and other interested parties, shall prepare and publish a statement of policy with respect to the imposition of penalties and the determination of their amount.

(2) A statement of policy may include provision for a decision whether to impose a penalty, or the determination of the amount of any penalty, in respect of the contravention of any relevant condition or requirement or direction to be influenced by—

- (a) the desirability of securing compliance with that relevant condition or requirement or direction;
- (b) the consequences or likely consequences of anything which has been or is being done or omitted to be done in contravention of that relevant condition or requirement or direction; and
- (c) the desirability of deterring contraventions of relevant conditions and requirements and final and provisional directions.

(3) In deciding whether to impose a penalty, and in determining the amount of any penalty, in respect of a contravention the Office of Rail and Road shall have regard to any statement of his, their or its policy published at the time when the contravention occurred.

(4) The Office of Rail and Road —

- (a) may at any time alter or replace a statement of their policy; and
- (b) shall publish the altered or replacement statement.

(5) The Office of Rail and Road shall undertake appropriate consultation when preparing, altering or replacing a statement of policy.

(6) Office of Rail and Road shall publish a statement of policy in the manner that appears most suitable for bringing it to the attention of those likely to be affected by it.

(7) This regulation applies in relation to sums required to be paid by virtue of regulation 41 above as to penalties, but as if—

- (a) references to the imposition of penalties were to the inclusion in a direction of a requirement to pay a sum;
- (b) references to relevant conditions or requirements were omitted; and
- (c) the reference in subparagraph (2)(b) above to anything which has been or is being done or omitted to be done included a reference to anything which is likely to be done or omitted to be done.

## Procedural requirements for penalties

**40.**—(1) Before it imposes a penalty on a relevant operator, the Office of Rail and Road shall give notice—

- (a) stating that it proposes to impose a penalty on the relevant operator and the amount of the penalty proposed,
- (b) setting out the relevant condition or requirement or direction in question,
- (c) specifying the acts or omissions which, in its opinion, constitute contraventions of that condition or requirement or direction and the other facts which, in its opinion, justify the imposition of a penalty and the amount of the penalty proposed,
- (d) specifying the manner in which, and place at which, it is proposed to require the penalty to be paid, and
- (e) specifying the period (not being less than 21 days from the date of publication of the notice) within which representations or objections with respect to the proposed penalty may be made,

and shall consider any representations or objections which are duly made and not withdrawn.

(2) A notice under paragraph (1) above shall be given—

- (a) by publishing the notice in such manner as the Office of Rail and Road considers appropriate; and
  - (b) by serving a copy of the notice on the relevant operator.
- (3) Where the Office of Rail and Road serves a copy of a notice under paragraph (1) above on a licence holder, he shall also serve a copy on the Department.
- (4) The Office of Rail and Road shall not modify a proposal to impose a penalty except—
- (a) with the consent of the relevant operator;
  - (b) where the modifications consist of a reduction of the amount of the penalty or a deferral of the date by which it is to be paid; or
  - (c) after complying with the requirements of paragraph (5) below.
- (5) The requirements mentioned in subparagraph (4)(c) above are that the Office of Rail and Road shall—
- (a) give to the relevant operator such notice as appears to it requisite of its modified proposal;
  - (b) unless the proposed modifications are trivial, in that notice specify a period (not being less than seven days from the date of service of the notice) within which representations or objections with respect to the proposed modifications may be made; and
  - (c) consider any representations or objections which are duly made and not withdrawn.
- (6) As soon as practicable after imposing a penalty, the Office of Rail and Road shall give notice—
- (a) stating that it has imposed a penalty on the relevant operator and its amount;
  - (b) setting out the relevant condition or requirement or direction in question;
  - (c) specifying the acts or omissions which, in its opinion, constitute contraventions of that condition or requirement or direction and the other facts which, in its opinion, justify the imposition of the penalty and its amount;
  - (d) specifying the manner in which, and place at which, the penalty is to be paid; and
  - (e) specifying the date (not being less than fourteen days from the date of publication of the notice) by which the penalty is to be paid.
- (7) A notice under paragraph (6) above shall be given—
- (a) by publishing the notice in such manner as the Office of Rail and Road considers appropriate; and
  - (b) by serving a copy of the notice on the relevant operator.
- (8) The relevant operator may, within 21 days of the date of service on him of the notice under paragraph (6) above, make an application to the Office of Rail and Road for it to specify different dates by which different portions of the penalty are to be paid.

### **Interest and payment of instalments**

**41.** If the whole or any part of a penalty is not paid by the date by which it is to be paid, the unpaid balance from time to time shall carry interest at the rate for the time being specified in Article 127 of the Rules of the Court of Judicature (Northern Ireland) 1980(a).

### **Validity and effect of penalties**

**42.—**(1) If the relevant operator to whom a penalty notice relates is aggrieved by a penalty and desires to question its validity on the ground—

- (a) that it was not within the powers of regulation 38 above,

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(a) The Rules of the Supreme Court were renamed the Rules of the Court of Judicature under para 3(3) of Schedule 11 to the Constitutional Reform Act 2005

- (b) that any of the requirements of regulation 38 above have not been complied with in relation to it and his interests have been substantially prejudiced by the non-compliance, or
- (c) that it was unreasonable of the appropriate authority not to grant an application under regulation 40(8) above;

he may make an application to the court under this section.

(2) An application under this section by a person shall be made—

- (a) where it is on the ground mentioned in subparagraph (1)(c) above, within 42 days from the date on which he is notified of the decision not to grant the application under regulation 40(8) above, and
- (b) in any other case, within 42 days from the date of service on him of the notice under regulation 40(6) above.

(3) If an application is made under this section in relation to a penalty, the penalty need not be paid until the application has been determined.

(4) On an application under this section on the ground mentioned in paragraph (1)(a) or (b) above the court, if satisfied that the ground is established, may quash the penalty or (instead of quashing it) make provision under either or both of subparagraphs (a) and (b) of paragraph (5) below.

(5) The provision referred to in paragraph (4) above is—

- (a) provision substituting a penalty of such lesser amount as the court considers appropriate in all the circumstances of the case; and
- (b) provision substituting as the date by which the penalty, or any portion of the penalty, is to be paid a date later than that specified in the notice under regulation 40(6) above.

(6) On an application under this section on the ground mentioned in subparagraph (1)(c) above the court, if satisfied that the ground is established, may specify different dates by which different portions of the penalty are to be paid.

(7) Where the court substitutes a penalty of a lesser amount it may require the payment of interest on the substituted penalty at such rate, and from such date, as it determines; and where it specifies as the date by which the penalty, or a portion of the penalty, is to be paid a date before the determination of the application it may require the payment of interest on the penalty, or portion, from that date at such rate as it determines.

(8) Except as provided by this section, the validity of a penalty shall not be questioned by any legal proceedings whatever.

## PART 8

### EUROPEAN LICENCES

#### **Prohibition of unlicensed provision of international services**

**43.**—(1) Where a person is a railway undertaking to which these regulations apply, that person shall not provide a train service in Northern Ireland unless he is authorised to do so by a European licence which is appropriate for that train service, and any person who provides such services without such a licence shall be guilty of an offence.

(2) Any person who is guilty of an offence under this regulation shall be liable—

- (a) on summary conviction, to a fine not exceeding the statutory maximum;
- (b) on conviction on indictment, to a fine.

(3) No proceedings shall be instituted in Northern Ireland in respect of an offence under this regulation except by or on behalf of the Office of Rail and Road.

(4) In this regulation the expression “European licence” includes a licence granted pursuant to any action taken by an EEA State for the purpose of implementing the 1995 Directive<sup>(a)</sup> or the 2012 Directive<sup>(b)</sup>.

#### **Appointment of licensing authority and grant of European licences**

**44.**—(1) The Department is hereby designated as the body responsible for granting European licences.

(2) In exercise of its functions under these regulations, the Department shall comply with Commission implementing Regulation (EU)2015/171 of 4 February 2015 on certain aspects of the procedure of licensing of railway undertakings<sup>(c)</sup>.

(3) The Department shall determine and publish the procedures for the granting of European licences and inform the Commission of those procedures.

(4) Subject to and in accordance with these regulations, the Department shall grant a European licence to a railway undertaking if that undertaking—

(a) is established in Northern Ireland, and

(b) makes an application to the Department in accordance with the published procedures.

(5) An applicant shall submit with his application such application fee as the Department may reasonably require and such information, specified in the published procedures referred to in paragraph (4)(b), as the Department reasonably requires in order to be satisfied that the applicant satisfies the requirements referred to in Schedule 4.

(6) Before granting or modifying a European licence the Department shall consult the Health and Safety Executive for Northern Ireland.

(7) A European licence may authorise the provision of train services generally or be restricted to particular types of service specified in the licence.

(8) At any time after submitting the application the applicant shall submit such further information as the Department may reasonably require in connection with the application.

(9) The Department shall grant a European licence if, and only if, it is satisfied before the start of the applicant’s activities, that the applicant will be able at any time to satisfy the requirements referred to in Schedule 4 as to good repute, financial fitness, professional competence and insurance cover for civil liberties.

(10) An application for a European licence shall be determined by the Department as soon as possible and in any event within three months of receipt of the information referred to in paragraph (8).

(11) In respect of each application for a European licence the Department shall give notice stating—

(a) that the applicant has made an application for a European licence;

(b) the name of the applicant and the address of its registered or principal office; and

(c) a summary of the activities which the applicant wishes to carry out pursuant to the European licence.

(12) A notice under paragraph (11) shall be given by publishing the notice in such manner as the Department considers appropriate for bringing it to the attention of persons likely to be affected by the grant of the European licence.

(13) The Department shall inform the applicant in writing of its decision and, where it refuses to grant a European licence, the refusal shall state the reasons for its decision.

(14) When the Department grants a European licence in accordance with this regulation it shall inform the European Commission of the grant.

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(a) O.J. No. L143, 27.6.1995. p70-74.

(b) O.J. No. L343, 14.12.2012, p.32, as correct by Corrigendum, O.J. L67, 12.3.15, p.32

(c) O.J. No. L29, 5.12.15, p.3

(15) As soon as practical after granting a European licence the Department shall send a copy of the licence to the Health and Safety Executive for Northern Ireland.

(16) Any sums received by the Department under this regulation shall be paid into the Consolidated Fund.

(17) Schedule 4 (qualifications for European licence) shall have effect.

### **Validity of European licences**

**45.**—(1) A European licence shall, unless previously revoked or surrendered in accordance with any provision in these regulations or the licence, continue in force as long as the Department is satisfied that the railway undertaking concerned continues—

- (a) to satisfy the requirements referred to in Schedule 4 as to good repute, financial fitness, professional competence and insurance cover for civil liabilities, and
- (b) to submit the licence to the Department for review or approval when so required under regulation 46.

(2) A European licence may incorporate specific provisions governing the suspension or revocation of the licence.

### **Monitoring, suspension and revocation of European licences**

**46.**—(1) Subject to paragraph (5), this regulation applies to a railway undertaking to which a European licence has been granted.

(2) The Department must take such steps as necessary to enable it to determine whether the railway undertaking complies with the requirement referred to in Schedule 4—

- (a) at regular intervals of at least 5 years; or
- (b) at any time the Department considers that there is serious doubt whether or not a railway undertaking complies with the requirement.

(3) If, having taken the steps referred to in paragraph (2), the Department is satisfied that a railway undertaking does not comply with any such requirement, it shall revoke the European licence held by the railway undertaking or suspend it.

(4) The Department shall revoke a European licence if proceedings have been commenced for the winding up of a railway undertaking on the grounds that the undertaking is unable to pay its debts and the Department is satisfied that there is no reasonable prospect of satisfactory financial restructuring of the undertaking within a reasonable period of time.

(5) Where the Department is satisfied that there is a serious doubt whether a railway undertaking to which a European licence has been granted by a licensing authority other than itself complies with any requirement of the 2012 Directive, it shall without delay so notify that licensing authority. In this paragraph, the expression “European Licence” means a licence granted pursuant to any action taken by an EEA State for the purposes of implementing the 2012 Directive.

(6) Where the Department has suspended or revoked a European licence solely on the grounds of the non-compliance by the railway undertaking with the requirements of financial fitness specified in Schedule 4 but the Department considers that there is a realistic prospect of a satisfactory financial restructuring of the undertaking taking place within a reasonable period of time, it may grant to the undertaking a temporary European licence pending such financial restructuring.

(7) A temporary European licence under paragraph (6) shall not be granted—

- (a) where the Department considers that safety would be jeopardised, or
- (b) for a period exceeding six months.

(8) Where a railway undertaking to which a European licence has been granted has either ceased the operations to which the licence relates for a continuous period of six months or, subject to paragraph (9), has not commenced such operations within six months of the date of such grant,

then the Department may either require the railway undertaking to resubmit its European licence to the Department for approval or suspend the European licence.

(9) When making an application for a European licence, or where the Department has required a railway undertaking to resubmit its European licence in pursuance of paragraph (8) on the grounds that the railway undertaking has not commenced such operations, the railway undertaking shall be entitled to request that a period longer than six months be granted in which it can commence operations, taking into account the specific nature of the services to be provided.

(10) In the event of a change affecting the legal situation of a railway undertaking, in particular following a change in the control or ownership of the railway undertaking as a result of a merger with or take-over by another undertaking, the Department may require the railway undertaking to submit the European licence to the Department for approval.

(11) Where a European licence is submitted for approval pursuant to paragraph (10), the railway undertaking may continue operations whilst its European licence is under review unless the Department decides that safety is jeopardised by the change referred to in paragraph (10).

(12) If the Department decides that safety is jeopardised by that change, it shall notify the railway undertaking of its decision and of the grounds for it.

(13) When a railway undertaking intends significantly to change or extend its activities from those in respect of which a European licence was granted to it, the railway undertaking shall submit its European licence to the Department for review.

(14) When the Department amends, suspends or revokes a European licence it shall forthwith inform the European Railway Agency of such an amendment, suspension or revocation.

## **Review**

**47.**—(1) The Department must, from time to time—

- (a) carry out a review of these Regulations;
- (b) set out the conclusion of the review in a report; and
- (c) publish the report.

(2) In carrying out the review the Department must, so far as is reasonable, have regard to how the 2012 Directive (2012/34/EU), (which is implemented by means of these Regulations) is implemented in other EEA states.

(3) The report must, in particular—

- (a) set out the objectives intended to be achieved by the regulatory system established by these Regulations;
- (b) assess the extent to which those objectives are achieved; and
- (c) assess whether those objectives remain appropriate and, if so, the extent to which they would be achieved with a system which imposes less regulation.

(4) The first report under this regulation must be published before the end of a period of 5 years beginning with the day on which these Regulations come into force.

(5) Reports under this regulation are afterwards to be published at intervals not exceeding 5 years.

## **PART 9**

### **STATEMENTS OF NATIONAL REGULATORY PROVISIONS**

#### **Prohibition on operating trains without a statement of national regulatory provisions**

**48.**—(1) Where a person is a railway undertaking to which these regulations apply, that person may not act as the operator of a train for the purpose of providing train services in Northern

Ireland unless (in addition to being authorised by a European licence) he holds a valid statement of national regulatory provisions (SNRP).

(2) Any person who provides such services without holding such a statement shall be guilty of an offence.

(3) Any person who is guilty of an offence under this regulation shall be liable—

- (a) on summary conviction, to a fine not exceeding the statutory maximum, or
- (b) on conviction on indictment, to a fine.

(4) No proceedings shall be instituted in Northern Ireland in respect of an offence under this regulation except by or on behalf of the Department.

(5) In this regulation and in regulations 49 and 50, the expression “European licence” includes a licence granted pursuant to any action taken by an EEA State for the purpose of implementing the 1995 Directive<sup>(a)</sup> or the 2012 Directive<sup>(b)</sup>.

### **Statements of national regulatory provisions (“SNRPs”)**

**49.**—(1) Upon application being made, the Department shall issue a SNRP to a holder of a valid European licence.

(2) Any application for a SNRP—

- (a) shall be made in writing to the Department and in such form and manner as the Department may from time to time determine and publish, and
- (b) shall be accompanied by a copy of the European licence, if already held.

(3) A SNRP shall continue in force for such period as may be specified in or determined by or under the SNRP.

### **Conditions of SNRPs**

**50.**—(1) Subject to paragraph (4), a SNRP may include one or more conditions (whether or not relating to the activities for which the applicant for the SNRP requires a European licence) as appear to the Department to be requisite or expedient.

(2) Subject to paragraph (4), a SNRP may include conditions requiring the rendering to the Department of a payment on the grant of the SNRP or payments during the currency of the SNRP, or both, of such amount or amounts as may be determined by or under the SNRP

(3) Without prejudice to the generality of paragraph (1), conditions included in a SNRP by virtue of paragraph (1) may impose any of the following requirements—

- (a) specific technical and operational requirements for rail services;
- (b) safety requirements applying to staff, rolling stock and the internal organisation of the undertaking;
- (c) provisions on health, safety, social conditions and the rights of workers and consumers;
- (d) requirements applying to all undertakings in the relevant railway sector designed to offer benefits or protection to consumers.

(4) A condition may not—

- (a) impose any requirement which is incompatible with Community law, or
- (b) be applied in a discriminatory manner.

(5) Any sums received by the Department in consequence of the provisions of any condition of a SNRP shall be paid into the Consolidated Fund.

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(a) O.J. No. L143, 27.6.1995, p.70-74

(b) O.J. No. L343, 14.12.2012, p32, as corrected by Corrigendum, O.J. L67, 12.3.15, p.32

### **Referral for Commission's opinion**

**51.**—(1) A railway undertaking may at any time refer to the European Commission the question of whether a condition included in a SNRP—

- (a) is compatible with Community law, or
- (b) has been applied in a non-discriminatory manner.

(2) Where a railway undertaking refers a question referred to in paragraph (1) to the European Commission, and the European Commission delivers an opinion that a requirement imposed through a condition in a SNRP is incompatible with Community law or has been applied in a discriminatory manner, the Department shall review the condition.

### **Modification of SNRPs by consent**

**52.**—(1) Subject to regulation 50 and to the following provisions of this regulation, the Department may modify the conditions of a SNRP if the SNRP holder consents to the modifications.

(2) Before making modifications under this regulation, the Department shall give notice—

- (a) stating that it proposes to make the modifications and setting out their effect;
- (b) stating the reasons why it proposes to make the modifications; and
- (c) specifying the period (not being less than 28 days from the date of publication of the notice) within which representations or objections with respect to the proposed modifications may be made,

and shall, before making the modifications, consider any representations or objections which are duly made and not withdrawn.

(3) A notice under paragraph (2) shall be given—

- (a) by publishing the notice in such manner as the Department considers appropriate for the purpose of bringing the notice to the attention of persons likely to be affected by the making of the modifications; and
- (b) by serving a copy of the notice on the SNRP holder.

## **PART 10**

### **MISCELLANEOUS**

#### **Statutory authority to run trains**

**53.** Any applicant granted access rights under these regulations shall, if and to the extent that it would not, apart from this regulation, have statutory authority to run trains over any track in exercise of such rights, be taken to have statutory authority to do so.

#### **Civil proceedings**

**54.**—(1) Any obligation which a person owes under or arising from these regulations is a duty owed to any person who may be affected by a breach of that obligation and is actionable by any such person who sustains loss, damage or injury caused by the breach at the suit or instance of that person.

(2) In any proceedings brought against the infrastructure manager, railway undertaking, charging body, service provider, allocation body or applicant under paragraph (1), it is a defence for it to prove that it took all reasonable steps and exercised all due diligence to avoid the breach of duty.

(3) Without prejudice to the right, which any person may have by virtue of paragraph (1) to bring civil proceedings in respect of any breach of duty, the obligation to comply shall be

enforceable by civil proceedings by the Office of Rail and Road in the case of their functions under these Regulations or by the Department, in the case of their functions under regulation 6(11) for an injunction or any other relief.

#### **Making of false statements etc.**

**55.**—(1) If any person, in giving any information or making any application under or for the purposes of any provision of these regulations, makes any statement which that person knows to be false in a material particular, or recklessly makes any statement which is false in a material particular, that person is guilty of an offence and liable—

- (a) on summary conviction, to fine not exceeding the statutory maximum;
- (b) on conviction on indictment, to a fine.

(2) No proceedings shall be instituted in Northern Ireland in respect of an offence under this regulation except by or with the consent of the Department or the Director of Public Prosecutions.

#### **Offences by bodies corporate**

**56.** For the purposes of these regulations section 20(2) of the Interpretation Act (Northern Ireland) 1954<sup>(a)</sup> applies with the omission of the words “the liability of whose members is limited” and where the affairs of the body corporate are managed by its members, applies in relation to the acts or defaults of a member in connection with his functions of management as if he were a director of the body corporate.

#### **Breaches of duty outside the United Kingdom**

**57.**—(1) For the purpose of determining whether a breach of the duty imposed by regulation 9 has occurred, it is immaterial that the relevant acts or omissions occurred outside the United Kingdom if, when they occurred, the person—

- (a) was a United Kingdom national; or
- (b) was a body incorporated under the law of any part of the United Kingdom; or
- (c) was a person (other than a United Kingdom national or such a body) maintaining a place of business in the United Kingdom.

(2) In this regulation “United Kingdom national” means an individual who is—

- (a) a British citizen, a British Dependent Territories citizen, a British National (Overseas) or a British Overseas citizen;
- (b) a person who under the British Nationality Act 1981<sup>(b)</sup> is a British subject; or
- (c) a British protected person (within the meaning of that Act).

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(a) 1954 c.33 (N.I.)

(b) 1981 c.61

**Revocation**

**58.** The Railways Infrastructure Railways Infrastructure (Access, Management and Licensing of Railway Undertakings) Regulations (Northern Ireland) 2005<sup>(a)</sup> are hereby revoked.

Sealed with the Official Seal of the Department for Infrastructure on 1st December 2016



*Tom Reid*  
A senior officer of the Department for Infrastructure

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<sup>(a)</sup> S.R. 2005/537

**SERVICES TO BE SUPPLIED TO RAILWAY UNDERTAKINGS**

- 1.** The minimum access package referred to in regulation 5(1) must comprise—
  - (a) handling of requests for infrastructure capacity; and
  - (b) the right to utilise such capacity as is granted and, in particular—
    - (i) such railway infrastructure including track, points and junctions as are necessary to utilise that capacity;
    - (ii) the use of electrical supply equipment for traction current;
    - (iii) train control, including signalling, train regulation, dispatching and the communication and provision of information on train movements; and
    - (iv) all other information as is necessary to implement or to operate the service for which capacity has been granted.
  
- 2.** Access including track access to services facilities and the supply of services, referred to in regulations 4(1, 5 and 10 must comprise where they exist—
  - (a) refuelling facilities, and supply of fuel in these facilities, charges for which must be shown on the invoices separately;
  - (b) passenger stations, including buildings and other facilities such as travel information display and a suitable location for ticketing services;
  - (c) freight terminals
  - (d) marshalling yards;
  - (e) train formation facilities including shunting facilities;
  - (f) storage sidings;
  - (g) maintenance facilities with the exception of heavy maintenance facilities dedicated to rolling stock requiring specific facilities;
  - (h) other technical facilities, including cleaning and washing facilities; and
  - (i) relief facilities.
  
- 3.** The additional services referred to in regulation 5(10) may comprise—
  - (a) traction current, charges for which must be shown on the invoices separately from the charges for using the electrical equipment, without prejudice to the application of Directive 2009/72/EC of the European Parliament and of the Council of 13<sup>th</sup> July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC;
  - (b) pre-heating of passenger trains;
  - (c) tailor-made contracts for:
    - (i) control of the transport of dangerous goods; and
    - (ii) assistance in running abnormal trains.
  
- 4.** The ancillary services referred to in regulation 5(11) may comprise—
  - (a) access to the telecommunications network;
  - (b) the provision of supplementary information;
  - (c) technical inspection of rolling stock;
  - (d) ticketing services in passenger stations; and

- (e) heavy maintenance services supplied in maintenance facilities dedicated to rolling stock requiring specific facilities.

## SCHEDULE 2 Regulations 13, 14, 16 and 17

### ACCESS CHARGING

#### **Principles of access charging**

- 1.—(1) The infrastructure manager must ensure that the application of the charging scheme—
- (a) complies with the rules set out in the Network Statement produced in accordance with regulation 13; and
  - (b) results in equivalent and non-discriminatory charges for different railway undertakings that perform services of an equivalent nature in a similar part of the market.
- (2) The calculation of the charge may in particular take into account the mileage, composition of the train and any specific requirements in terms of such factors as speed, axle load and the degree or period of utilisation of the infrastructure.
- (3) Except where specific arrangements are made in accordance with paragraph 3, the infrastructure manager must ensure that the charging scheme in use is based on the same principles over the whole of the network.
- (4) Without prejudice to sub-paragraph (8) the charges for the minimum access package and track access to service facilities referred to in paragraphs 1 and 2 of Schedule 1 shall be set at the cost that is directly incurred as a result of operating the train service.
- (5) From 2 August 2019 or earlier, the infrastructure manager must calculate the cost under sub-paragraph (4) in accordance with the Commission Implementing Regulation (EU) 2015/909 of 12<sup>th</sup> June 2015 on the modalities for the calculation of the cost that is directly incurred as a result of operating the train service(a).
- (6) The charge imposed for track access within service facilities referred to in paragraph (2) of Schedule 1 and the supply of service in such service facilities must not exceed the cost of providing it, plus a reasonable profit.
- (7) If the additional or ancillary services referred to in paragraphs 3 and 4 of Schedule 1 are offered by only one supplier the charge imposed for the supply of those services must not exceed the cost of providing the service plus a reasonable profit.
- (8) The infrastructure charge may include a charge to reflect the scarcity of capacity of the identifiable segment of the infrastructure during periods of congestion.
- (9) The charges referred to in subparagraph (4) and (8) may be averaged over a reasonable spread of train services and times, but the relevant magnitudes of the infrastructure charges must be related to the costs attributable to the services.

#### **Exceptions to the charging principles**

- 2.—(1) In order to obtain full recovery of the costs incurred the infrastructure manager, with the approval of the Department, may levy mark-ups on the basis of efficient, transparent and non-discriminatory principles, whilst guaranteeing optimum competitiveness, in particular in respect of rail market segments.
- (2) The effect of sub-paragraph (1) must not be to exclude the use of infrastructure by market segments which can pay at least the cost that is directly incurred as a result of operating the railway service, plus a rate of return which the market can bear.
- (3) The charging system must respect the productivity increases achieved by applicants.

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(a) O.J. No. L148, 13.6.15, p.17

(4) Before approving the levy of a mark-up under sub-paragraph (1) the Department must ensure that the infrastructure manager evaluates the relevance of a mark-up for the specific market segments, considering at least the pairs listed in sub-paragraph (9) and retaining the relevant ones.

(5) The list of market segments to be considered by the infrastructure manager under sub-paragraph (3) must contain at least the three following segments: freight services, passenger services within the framework of a public service contract and other passenger services.

(6) In addition to the market segments considered under paragraph (4) the infrastructure manager may consider further market segments according to commodity or passengers transported.

(7) Market segments in which railway undertakings are not currently operating but in which they may provide services during the period of validity of the charging system, must also be defined. The infrastructure manager must not include a mark up in the charging system for those market segments.

(8) The list of market segments must be published in the network statement and reviewed at least every five years; the Office of Rail and Road must control that list in accordance with paragraph (2) of regulation 31.

(9) The pairs referred to in subparagraph (3) are—

- (a) passenger versus freight services,
- (b) trains carrying dangerous goods versus other freight trains,
- (c) domestic versus international services,
- (d) combined transport versus direct trains,
- (e) urban or regional versus interurban passenger services,
- (f) block trains versus single wagon load trains,
- (g) regular versus occasional train services.

**3.—**(1) Subject to subparagraph (2), for specific investment projects completed—

- (a) after 15th March 1988; or
- (b) following the coming into operation of these regulations,

the infrastructure manager may set or continue to set higher charges on the basis of the long-term costs of the project.

(2) For subparagraph (1) to apply—

- (a) the project must increase the efficiency or cost-effectiveness; and
- (b) the project must be one that could not otherwise have been undertaken without the prospect of such higher charges.

(3) A charging arrangement to which subparagraph (1) applies may incorporate agreements on the sharing of the risk associated with new investments.

**4.—**(1) An infrastructure manager's average and marginal charges for equivalent uses of the infrastructure must be comparable and comparable services in the same market segment must be subject to the same charges.

(2) The network statement produced by the infrastructure manager in accordance with regulation 13 must demonstrate that the charging system meets the requirements in subparagraph (1) in so far as this can be done without the disclosure of commercially confidential information.

**5.** If an infrastructure manager intends to modify the essential elements of the charging system referred to in paragraph 2 that infrastructure manager must make such modifications public at least three months in advance of the deadline for the publication of the network statement in accordance with regulation 13(9).

## Discounts

6.—(1) Subject to the provisions of articles 101, 102, 106 and 107 of the Treaty, and notwithstanding paragraph 1(5) of this schedule, any discount on the charges levied on a user of railway infrastructure by the infrastructure manager, for any service, must comply with the principles set out in this paragraph.

(2) Except where subparagraph (3) applies, discounts must be limited to the actual saving of the administrative cost to the infrastructure manager and, in determining the level of discount to be applied, no account may be taken of cost savings already incorporated in the charge levied.

(3) The infrastructure manager may introduce schemes available to all users of the infrastructure, with reference to specified traffic flows, granting time limited discounts to encourage the development of new rail services, or discounts encouraging the use of considerably underutilised lines.

(4) Discounts may relate only to charges levied for a specified infrastructure section.

(5) Similar discount schemes must be applied to similar services.

(6) Discount schemes must be applied in a non-discriminatory manner to any railway undertaking.

## Performance Schemes

7.—(1) The basic principles referred to in regulation 16(3) are as follows:

(2) In order to achieve an agreed level of performance and not to endanger the economic viability of a service, the infrastructure manager must agree with applicants the main parameters of the performance scheme, in particular the value of delays, the thresholds for payments due under the performance scheme relative both to individual train runs and to all train runs of a railway undertaking in a given period of time.

(3) The infrastructure manager must communicate to the railway undertakings the working timetable, on the basis of which delays will be calculated, at least five days before the train run. The infrastructure manager may apply a shorter notice period in case of force majeure or late alterations of the working timetable.

(4) All delays must be attributable to one of the following delay classes and sub-classes—

(a) operation/planning management attributable to the infrastructure manager—

- (i) timetable compilation,
- (ii) formation of train,
- (iii) mistakes in operations procedure,
- (iv) wrong application of priority rules,
- (v) staff,
- (vi) other causes;

(b) infrastructure installations attributable to the infrastructure manager—

- (i) signalling installations,
- (ii) signalling installations at level crossings,
- (iii) telecommunications installations,
- (iv) power supply equipment,
- (v) track,
- (vi) structures,
- (vii) staff,
- (viii) other causes;

(c) civil engineering causes attributable to the infrastructure manager—

- (i) planned construction work,

- (ii) irregularities in execution of construction work,
- (iii) speed restriction due to defective track,
- (iv) other causes;
- (d) causes attributable to other infrastructure managers—
  - (i) caused by previous infrastructure manager,
  - (ii) caused by next infrastructure manager,
- (e) commercial causes attributable to the railway undertaking,
  - (i) exceeding the stop time,
  - (ii) request of the railway undertaking,
  - (iii) loading operations,
  - (iv) loading irregularities,
  - (v) commercial preparation of train,
  - (vi) staff,
  - (vii) other causes;
- (f) rolling stock attributable to the railway undertaking—
  - (i) roster planning/re-rostering,
  - (ii) formation of train by railway undertaking,
  - (iii) problems affecting coaches (passenger transport),
  - (iv) problems affecting wagons (freight transport),
  - (v) problems affecting cars, locomotives and rail cars,
  - (vi) staff,
  - (vii) other causes;
- (g) causes attributable to other railway undertakings—
  - (i) caused by next railway undertaking,
  - (ii) caused by previous railway undertaking;
- (h) external causes attributable to neither infrastructure manager nor railway undertaking—
  - (i) strike,
  - (ii) administrative formalities,
  - (iii) outside influence,
  - (iv) effects of weather and natural causes,
  - (v) delay due to external reasons on the next network,
  - (vi) other causes; and
- (i) secondary causes attributable to neither infrastructure manager nor railway undertaking—
  - (i) dangerous incidents, accidents and hazards,
  - (ii) track occupation caused by the lateness of the same train,
  - (iii) track occupation caused by the lateness of another train,
  - (iv) turn-around,
  - (v) connection,
  - (vi) further investigation needed.

(5) Wherever possible, delays must be attributed to a single organisation, considering both the responsibility for causing the disruption and the ability to re-establish normal traffic conditions.

(6) The calculation of payments must take into account the average delay of train services of similar punctuality requirements.

## SCHEDULE 3

Regulations 19 and 22

### TIMETABLE FOR THE ALLOCATION PROCESS

#### **Date of timetable change**

1.—(1) Subject to subparagraph (2), (3) and (4) the working timetable must be established once per calendar year and the change of working timetable must take place at midnight on the second Saturday in December.

(2) Where a change or adjustment to the working timetable is carried out after the winter, in particular to take account, where appropriate, of changes in regional passenger traffic timetables, it must take place at midnight on the second Saturday in June.

(3) Further changes to the working timetable may be made at such other intervals as are required.

(4) The infrastructure manager may agree different dates to those stipulated in subparagraphs (1) and (2) and, in this case, must inform the European Commission if international traffic may be affected.

#### **Timetable for the production of the working timetable**

2.—(1) The final date for receipt of requests for capacity to be incorporated into the working timetable must be no more than 12 months in advance of the entry into force of the working timetable.

(2) No later than eleven months before the working timetable comes into force, the infrastructure managers must ensure that provisional international train paths have been established in co-operation with other relevant infrastructure managers or, as the case may be, allocation bodies, in accordance with regulation 20.

(3) Infrastructure managers must ensure that, so far as possible, provisional international train paths established in accordance with subparagraph (2) are adhered to during the subsequent allocation process.

(4) No later than four months after the deadline for submission for bids by applicants, the infrastructure manager must prepare a draft working timetable.

## SCHEDULE 4

Regulations 44(9) and (17)

### QUALIFICATIONS FOR EUROPEAN LICENCE

#### **Good repute**

1. In determining whether a railway undertaking is of good repute, the Department shall have regard to all relevant evidence, including any information in its possession as to the previous conduct of any appropriate officer of the undertaking if that conduct appears to it to relate to the undertaking's fitness to hold a European licence.

2. Without prejudice to the generality of its powers under paragraph 1, the Department shall not determine that a railway undertaking is of good repute if—

- (a) an order has been made by the court for the winding up of the undertaking or sequestration of its estate under insolvency legislation or any appropriate officer of the undertaking for the time being has been adjudged bankrupt or his estate has been sequestrated under that legislation;
- (b) the undertaking or any appropriate officer of the undertaking has been convicted of a serious offence, including in particular an offence contrary to the law relating to commercial transactions, or the law relating to transport; or

- (c) the undertaking or any appropriate officer of the undertaking has been convicted of a serious offence which is contrary to either of the following laws or has been convicted repeatedly of offences which are contrary to either of those laws—
  - (i) social or labour law (including legislation relating to occupational health and safety); or
  - (ii) in the case of an undertaking seeking to operate cross-border goods transport subject to customs procedures, customs law.

**3.—**(1) For the purposes of paragraph 2, a person has been convicted of a serious offence if that offence was committed under the law of any part of the United Kingdom or under the law of a country or territory outside the United Kingdom and if on conviction there was imposed on him for that offence a sentence of imprisonment for a term exceeding three months.

(2) In subparagraph (1), the reference to a sentence of imprisonment includes a reference to any form of custodial sentence or order, other than one imposed under the enactments relating to mental health.

**4.—**(1) Any reference in paragraph 3 to an offence under the law of any part of the United Kingdom includes a reference to a civil offence (wherever committed) within the meaning of the Army Act 1955(a), the Air Force Act 1955(b) or as the case may be the Naval Discipline Act 1957(c).

(2) For the purposes of paragraphs 1 to 3—

- (a) convictions which are spent for the purposes of the Rehabilitation of Offenders (Northern Ireland) Order 1978(d) shall be disregarded; and
- (b) the Department may also disregard an offence if such time as it thinks proper has elapsed since the date of the conviction.

**5.** In paragraphs 1 and 2 the reference to any appropriate officer of the undertaking is to any director, manager, secretary or similar officer of the undertaking, any other person in charge of the management of the undertaking or any person purporting to act in any such capacity.

### **Financial fitness**

**6.** Subject to paragraph 8 an applicant for a European licence shall be considered to meet the required standard of financial fitness when it can demonstrate that it will be able to meet its actual and potential obligations, established under realistic assumptions, for a period of twelve months.

**7.** For the purpose of demonstrating its financial fitness a railway undertaking shall make available to the Department, the undertaking's annual accounts, or if the undertaking is not able to provide annual accounts then the undertaking's balance sheet, together with details of the following matters (in so far as these cannot be ascertained from the annual accounts, or as the case may be, the balance sheet)—

- (a) the railway undertaking's available funds, including the bank balance, pledged overdraft provisions and loans;
- (b) the railway undertaking's funds and assets available as security;
- (c) the railway undertaking's working capital;
- (d) relevant costs, including the railway undertaking's purchase costs of payments to account for vehicles, land, buildings, installations and rolling stock;
- (e) charges on the railway undertaking's assets; and
- (f) taxes and social security payments.

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(a) 1955 c.18

(b) 1955 c.19

(c) 1957 c.53

(d) S.I. 1978/1908 (N.I. 27)

8. The Department shall not find the railway undertaking to be financially fit if the railway undertaking has considerable or recurrent arrears of taxes or social security payments which are owed as a result of the undertaking's activity.

9. Without prejudice to paragraph 7 the Department may request that the railway undertaking provide to it audit reports or other suitable documents as the Department considers necessary in relation to the matters listed in paragraph 7(a) to (f) which have been prepared by a body other than the railway undertaking such as a bank, building society, accountant or auditor.

### **Professional competence**

10. For the purposes of these Regulations the requirements of professional competence are satisfied by a railway undertaking when the undertaking has or will have a management organisation which possesses the knowledge or experience (or both) necessary to exercise safe and reliable operational control and supervision of the type of operations specified in the licence.

### **Insurance cover**

11.—(1) An applicant for a European licence shall be considered to meet the requirement of insurance cover where in accordance with the law of the United Kingdom or any part of the United Kingdom and any relevant international law the undertaking maintains adequate insurance cover, or has made arrangements having equivalent effect, covering its liabilities in the event of accident to passengers, luggage, freight, mail and third parties.

(2) In determining whether adequate insurance cover is maintained, the Department may take into account the specificities and risk-profile of different types of services, in particular of railway operations for cultural or heritage purposes.

(3) In sub-paragraph (1) "relevant international law" means any provisions contained in any international agreement or arrangement to which the United Kingdom is a party and which have the force of law in the United Kingdom.

(4) Insurance cover shall be considered to be "adequate" for the purposes of paragraph (1) if it has been approved by the Department.

## **SCHEDULE 5**

Regulation 35(2)

### **ACCOUNTING INFORMATION TO BE SUPPLIED TO THE OFFICE OF RAIL AND ROAD UPON REQUEST**

1. The accounting information referred to in regulation 35(2) is as follows:

#### **Account separation**

2. Separate profit and loss accounts and balance sheets for freight, passenger and infrastructure management activities;

- (a) detailed information on individual sources and uses of public funds and other forms of compensation in a transparent and detailed manner, including a detailed review of the businesses' cash flows in order to determine in what way these public funds and other forms of compensation have been used;
- (b) cost and profit categories making it possible to determine whether cross-subsidies between these different activities occurred, according to the requirements of the Office of Rail and Road;
- (c) methodology used to allocate costs between different activities; and
- (d) where the regulated firm is part of a group structure, full details of inter-company payments.

### **Monitoring of track access charges**

3. Different cost categories, in particular providing sufficient information on marginal/direct costs of the different services or groups of services so that infrastructure charges can be monitored;

- (a) sufficient information to allow monitoring of the individual charges paid for services (or groups of services); if required by the Office of Rail and Road, this information must contain data on volumes of individual services, prices for individual services and total revenues for individual services paid by internal or external customers; and
- (b) costs and revenues for individual services (or groups of services) using the relevant cost methodology, as required by the regulatory body, to identify potentially anti-competitive pricing (cross-subsidies, predatory pricing and excessive pricing).

### **Indication of financial performance**

4. (a) a statement of financial performance;
- (a) a summary expenditure statement;
  - (b) a maintenance expenditure statement;
  - (c) an operating expenditure statement;
  - (d) an income statement; and
  - (e) supporting notes that amplify and explain the statements, where appropriate.

## EXPLANATORY NOTE

*(This note is not part of the Regulations)*

These Regulations implement Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012, establishing a single European railway area (Recast) (O.J. No. L343, 14.12.12, p.32) (“the Directive”). The Directive repeals 3 key EU measures: (i) Council Directive 91/440/EEC of 29 July 1991 on the development of the communities railways (O.J. No. L237, 24.8.1991, p.25); (ii) Council Directive 95/18/EC of 19 June 1995 on the licensing of railway undertakings (O.J. No. L143, 27.06.1995, p.70); and (iii) Directive 2001/14/EC of the European Parliament and of the Council of 26 February 2001 on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification (O.J. No. L75, 5/03/2001, p.29), together with the various Directives amending these and consolidates these provisions in one place. The Directive also makes some substantive changes to the consolidation legal obligations, although most of these remain unchanged.

Part 1 contains preliminary provisions.

Part 2 Regulations 4 to 7 and Schedule 1 grant access rights to operators of international passenger and freight services to the Northern Ireland rail network. It also grants all applicants the right of access to, and the supply of, the services listed in Schedule 1 to these Regulations.

Part 3 Regulations 8 to 13 impose certain separation requirements between infrastructure managers and railway undertakings. Regulation 10 imposes new provisions relating to independence and accounts where service providers are under direct or indirect control of dominant bodies or firms. Regulation 11 provides for the publication of an indicative railway infrastructure strategy. Regulation 12 requires the drawing up of a business plan by infrastructure managers, and applicants are given the opportunity to comment on a draft. Railway undertakings must also draw up a business plan. Infrastructure managers are placed under a requirement to produce a network statement containing the information set out in Regulation 13, the detailed content of which has been expanded. New provisions in this Part include a requirement that separate accounts are published for rail freight transport businesses and passenger transport businesses respectively, with strengthened provisions regarding the separate treatment of public funds provided for public services.

Part 4 Regulations 14 to 18, together with Schedule 2, set out the structure for the charging of fees for use of railway infrastructure, and the charging principles. Regulation 14 requires service providers to charge fees which must be used to fund their business. Regulation 15 contains information on infrastructure costs and accounts. Regulation 16 contains details of the performance scheme. Regulation 17 provides further provisions as to the calculation of payments under performance schemes, and allows for a dispute resolution system. Regulation 18 permits a charge to be imposed for regular non-usage of allocated train paths. Schedule 2 sets out principles of access charging and the charges for the supply of such services must not exceed the costs of providing them, plus a reasonable profit. Paragraph 2 of this Schedule requires the infrastructure manager to evaluate the relevance of any mark-up charges for different market segments. Paragraph 7 of this Schedule imposes new principles to apply to performance schemes.

Part 5 Regulations 19 to 30, together with Schedule 3, set out the framework and timetable for the process of allocating infrastructure capacity. The trading of capacity is prohibited, and allocation in the form of fixed train paths cannot be granted for longer than one timetable period. This part sets out the procedure that must be followed where an element of the railway infrastructure is congested and provides a ‘use it or lose it’ provision in respect of allocated capacity.

Part 6 Regulations 31 to 37; allocate certain regulatory functions to the Office of Rail and Road (“ORR”). Regulation 32 provides a right of appeal to the ORR for applicants aggrieved with various aspects of the allocation of capacity and the fees charged for the use of that capacity, and requires the ORR to make a decision on such appeals within two months. Regulation 34 requires the ORR to monitor competition in the rail services market and to take appropriate action to deal with undesirable developments in the market either arising out of its own investigations, or from appeals which have been submitted. Regulation 35 gives the ORR the power to audit various

bodies, and makes clear that its power to request information under Regulation 36 includes a power to request the information listed in Schedule 5. Regulation 37 provides for cooperation between regulatory bodies.

Part 7 Regulations 38 to 42, set out the arrangements for enforcement by the regulatory bodies. This includes the power to issue directions when required, the procedures to be followed for such directions and the enforcement arrangements.

Part 8 Regulations 43 to 47, impose requirements for licensing of railway undertakings; the provision of train services without having a European licence is made a criminal offence (Regulation 43). The Department is appointed as the body to issue European licences (Regulation 44). Applicants for such licences must satisfy requirements as to good repute, professional competence, financial fitness and insurance cover for liabilities (Regulation 46 and Schedule 4). Such licences are valid as long as the licence holder complies with the requirements referred to in Schedule 4 and the requirements to submit the licence for review or approval (Regulation 45). The licence is subject to monitoring and review by the Department, who may suspend or revoke such licences in certain circumstances (Regulation 46).

Part 9 Regulations 48 to 52, provide for Statements of National Regulatory Provisions (SNRP's). In addition to requiring a European licence, railway undertakings providing services in Northern Ireland will require a Statement of National Regulatory Provisions (Regulation 49). One or more conditions will be included in a SNRP by the Department, but these conditions must be compatible with Community law and must not be discriminatory (Regulation 51). SNRPs may be modified by consent (Regulation 52).

Part 10 Regulations 53 to 58, contain miscellaneous provisions including the provision of enforcement and penalty powers for the Office of Rail and Road and the Department in relation to the implementation of directions/ orders and compliance with these.

Schedule 5 stipulates the accounting information required by the Office of Rail and Road.

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