

2019 No. 82

TRANSPORT

The Railways (Access, Management and Licensing of Railway Undertakings) (Amendment) Regulations 2019

<i>Made</i>	- - - -	<i>17th January 2019</i>
<i>Laid before Parliament</i>		<i>21st January 2019</i>
<i>Coming into force</i>	- -	<i>11th February 2019</i>

The Secretary of State makes the following Regulations in exercise of the powers conferred by section 2(2) of the European Communities Act 1972(a).

The Secretary of State is a Minister designated for the purposes of that section in relation to measures relating to railways and railway transport(b).

Citation, extent and commencement

1.—(1) These Regulations, which do not extend to Northern Ireland, may be cited as the Railways (Access, Management and Licensing of Railway Undertakings) (Amendment) Regulations 2019.

(2) These Regulations come into force on 11th February 2019.

Amendment of the 2005 Regulations

2.—(1) Until the end of 31st December 2020, the Railway (Licensing of Railway Undertakings) Regulations 2005(c) apply with the following modifications.

(2) In regulation 2 (interpretation) for the definition of “the 2012 Directive” substitute—

““the 2012 Directive” means Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area (recast)(d);”.

(3) In Schedule 2, paragraph 2(c)(i), after “health and safety” insert “or any applicable law relating to binding collective agreements”.

(a) 1972 c. 68. Section 2(2) was amended by section 27(1) of the Legislative and Regulatory Reform Act 2006 (c. 51) and by section 3(3) of, and Part 1 of the Schedule to, the European Union (Amendment) Act 2008 (c. 7).

(b) S.I. 1996/266, to which there are amendments not relevant to these Regulations.

(c) S.I. 2005/3050, amended by SI 2016/645; there are other amendments but none is relevant.

(d) OJ No. L 343, 14.12.2012, p.32; as amended by Directive (EU) 2016/2370 of the European Parliament and of the Council of 14 December 2016 amending Directive 2012/34/EU as regards the opening of the rail market for domestic passenger transport services by rail and the governance of the railway infrastructure (OJ No. L 352, 23.12.2016, p.1) and Commission Delegated Decision (EU) 2017/2075 of 4 September replacing Annex VII to Directive 2012/34/EU of the European Parliament and of the Council establishing a single European railway area (OJ No. L 295, 14.11.2017, p.69).

Amendment of the 2016 Regulations

3. The Railways (Access, Management and Licensing of Railway Undertakings) Regulations 2016^(a) are amended in accordance with regulations 4 to 7.

Regulatory decisions concerning passenger services

4. In Regulation 33—

- (a) omit paragraph (2);
- (b) in paragraph (13), after “set out in” insert “Commission Implementing Regulation (EU) 2018/1795 of 20 November 2018 laying down procedure and criteria for the application of the economic equilibrium test pursuant to Article 11 of Directive 2012/34/EU of the European Parliament and of the Council^(b) or, in relation to applicants’ notifications received sufficiently in advance for the passenger services to be able to start before 12 December 2020,”.

Timetable for the Allocation Process

5. For Schedule 4 (timetable for the allocation process), substitute the schedule that is set out in Schedule 1 to these Regulations.

Transitory modifications

6. After regulation 46 (review) insert—

“Transitory modifications

47. The transitory modifications set out in Schedule 6 apply.”

7. After Schedule 5, insert the schedule that is set out in Schedule 2 to these Regulations.

Signed by the authority of the Secretary of State

17th January 2019

Andrew Jones
Parliamentary Under Secretary of State
Department for Transport

(a) S.I. 2016/645.

(b) OJ No. L 294, 21.11.2018, p. 5

“SCHEDULE 4

Regulations 19 and 22

Timetable for the Allocation Process

This Schedule substantially reproduces the provisions of Annex VII to the Directive (the text of which was replaced by Commission Delegated Decision (EU) 2017/2075 replacing Annex VII to Directive 2012/34/EU of the European Parliament and of the Council establishing a single European railway area^(a))

1. The working timetable must be established once per calendar year.
2. The change of working timetable must take place at midnight on the second Saturday in December. Where an adjustment 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 and at such other intervals between these dates as are required. Infrastructure managers may agree on different dates and in this case they must inform the Commission if international traffic may be affected.
3. The deadline for receipt of requests for capacity to be incorporated into the working timetable must be no more than twelve months in advance of the change of the working timetable. Requests received after the deadline must also be considered by the infrastructure manager.
4. No later than 11 months before the change of the working timetable, the infrastructure managers must ensure that provisional international train paths have been established in cooperation with other relevant infrastructure managers. Infrastructure managers must ensure that as far as possible these are adhered to during the subsequent processes.
5. The infrastructure manager must prepare and publish a draft working timetable at the latest four months after the deadline referred to in paragraph 3.
6. The infrastructure manager must decide on the requests it receives after the deadline referred to in paragraph 3 in accordance with a process published in the network statement.
7. The infrastructure manager may reschedule an allocated train path if it is necessary to ensure the best possible matching of all path requests and if it is approved by the applicant to which the path had been allocated. The infrastructure manager must update the draft working timetable no later than one month before the change of the working timetable in order to include all train paths allocated after the deadline referred to in paragraph 3.
8. In the case of trains crossing from one network to another which arrive with a presumed delay of not more than 10 hours and, from 14 December 2019, 18 hours, the infrastructure manager of the other network must not consider the train path cancelled or request application for another train path, including if it decides to allocate a different train path, unless the applicant informs the infrastructure manager that the train will not cross to the other network. The infrastructure manager must communicate to the applicant the updated or new train path without delay, including, if different, the link between that train path number and the train path number of the cancelled train path.
9. As regards temporary restrictions of the capacity of railway lines, for reasons such as infrastructure works, including associated speed restrictions, axle load, train length, traction, or structure gauge ('capacity restrictions'), of a duration of more than seven

(a) OJ No. L 295, 14.11.2017, p.69.

consecutive days and for which more than 30% of the estimated traffic volume on a railway line per day is cancelled, re-routed or replaced by other modes of transport, the infrastructure managers concerned must publish all capacity restrictions and the preliminary results of a consultation with the applicants for a first time at least 24 months, to the extent they are known, and, in an updated form, for a second time at least 12 months before the change of the working timetable concerned.

10. The infrastructure managers concerned must also create a mechanism whereby they jointly discuss those capacity restrictions, if the impact of the capacity restrictions is not limited to one network, with interested applicants, the representatives of infrastructure managers referred to in regulation 20(4) and the main operators of service facilities concerned when they are published for the first time, unless the infrastructure managers and the applicants agree that such a mechanism is not needed. The purpose of the joint discussions is to facilitate the preparation of timetables, including the provision of diversionary routes.

11. When publishing capacity restrictions in accordance with paragraph 9 for a first time, the infrastructure manager must launch a consultation with the applicants and the main operators of services facilities concerned on the capacity restrictions. Where a coordination in accordance with paragraph 12 is required between the first and second publication of capacity restrictions, infrastructure managers must consult with applicants and the main operators of service facilities concerned a second time between the end of that coordination and the second publication of the capacity restriction.

12. If the impact of any proposed capacity restrictions is not limited to one network, the infrastructure managers concerned, including infrastructure managers that might be impacted by the rerouting of trains, must coordinate between themselves capacity restrictions that could involve a cancellation, re-routing of a train path or a replacement by other modes. The coordination must be completed—

- (a) no later than 18 months before the change of the working timetable if more than 50% of the estimated traffic volume on a railway line per day is cancelled, re-routed or replaced by other modes of transport for a duration of more than 30 consecutive days;
- (b) no later than 13 months and 15 days before the change of the working timetable period if more than 30% of the estimated traffic volume on a railway line per day is cancelled, re-routed or replaced by other modes of transport for a duration of more than seven consecutive days;
- (c) no later than 13 months and 15 days before the change of the working timetable period if more than 50% of the estimated traffic volume on a railway line per day is cancelled, re-routed or replaced by other modes of transport for a duration of seven consecutive days or less.

The infrastructure managers must, if necessary, invite the applicants active on the lines concerned and the main operators of service facilities concerned to get involved in that coordination.

13. As regards capacity restrictions of a duration of seven consecutive days or less that need not be published in accordance with paragraph 9 and for which more than 10% of the estimated traffic volume on a railway line per day is cancelled, re-routed or replaced by other modes, that occur during the following timetable period and that the infrastructure manager becomes aware of no later than 6 months and 15 days before the change of the working timetable, the infrastructure manager must consult the applicants concerned on the envisaged capacity restrictions and communicate the updated capacity restrictions at least four months before the change of the working timetable. The infrastructure manager must provide details on the offered train paths for passenger trains no later than four months and for freight trains no later than one month before the beginning of the capacity restriction, unless the infrastructure manager and the concerned applicants agree on a shorter lead time.

14. Infrastructure managers may decide to apply more stringent thresholds for capacity restrictions based on lower percentages of estimated traffic volumes or shorter durations than indicated in this Schedule or to apply criteria in addition to the ones mentioned in this Schedule, pursuant to a consultation with applicants and facility operators. They must publish the thresholds and criteria for clustering capacity restrictions in their network statements under regulation 13(4)(g) and (h).

15. The infrastructure manager may decide not to apply the periods laid down in paragraphs 9 to 13, if the capacity restriction is necessary to re-establish safe train operations, the timing of the restrictions is beyond the control of the infrastructure manager, the application of those periods would be cost ineffective or unnecessarily damaging in respect of asset life or condition, or if all concerned applicants agree. In those cases and in case of any other capacity restrictions that are not subject to consultation in accordance with other provisions of this Schedule, the infrastructure manager must consult the applicants and the main operators of service facilities concerned forthwith.

16. The information to be provided by the infrastructure manager when acting in accordance with paragraphs 9, 13 or 15 must include—

- (a) the planned day, time of day, and, as soon as it can be set, the hour of the beginning and of the end of the capacity restriction;
- (b) the section of line affected by the restriction; and
- (c) where applicable, the capacity of diversionary lines.

The infrastructure manager must publish that information, or a link where it can be found, in its network statement under regulation 13(4)(g) and (h). The infrastructure manager must keep this information updated.

17. As regards the capacity restrictions of a duration of at least 30 consecutive days and affecting more than 50% of the estimated traffic volume on a railway line, the infrastructure manager must provide the applicants upon their request during the first round of consultation with a comparison of the conditions to be encountered under at least two alternatives of capacity restrictions. The infrastructure manager must design those alternatives on the basis of the input provided by the applicants at the time of their requests and jointly with them. The comparison must, for each alternative, include at least—

- (a) the duration of the capacity restriction;
- (b) the expected indicative infrastructure charges due;
- (c) the capacity available on diversionary lines;
- (d) the available alternative routes; and
- (e) the indicative travel times.

Before making a choice between the alternatives of capacity restrictions, the infrastructure manager must consult the interested applicants and take into account the impacts of the different alternatives on those applicants and on the users of the services.

18. As regards the capacity restrictions of a duration of more than 30 consecutive days and affecting more than 50% of the estimated traffic volume on a railway line, the infrastructure manager must establish criteria for which trains of each type of service should be re-routed, taking into account the applicant's commercial and operational constraints, unless those operational constraints result from managerial or organisational decisions of the applicant, and without prejudice to the aim of reducing costs of the infrastructure manager in accordance with regulation 15(7). The infrastructure manager must publish in the network statement those criteria together with a preliminary allocation of the remaining capacity to the different types of train services when it acts in accordance with paragraph 9. After the end of the consultation and without prejudice to the obligations of the infrastructure manager in accordance with regulation 13(4)(g) and (h) the infrastructure manager, based on the feed-back it received from the applicants, must

provide the railway undertakings concerned with an indicative break-down by type of service of the remaining capacity.”

“SCHEDULE 6

Transitory modifications

1. Until the end of 31 December 2020, these Regulations apply with the following modifications.

Interpretation

2. In regulation 3 (interpretation)—

- (a) after the definition of “cross-border agreement” insert—

““development”, in relation to railway infrastructure, means network planning, financial and investment planning as well as the building and upgrading of the infrastructure;”;
- (b) for the definition of “the Directive” substitute—

““the Directive” means Directive 2012/34/EU of the European Parliament and of the Council of 21st November 2012 establishing a single European railway area (recast)(a);”;
- (c) after the definition of “electrical plant” insert—

““essential functions”, in relation to infrastructure management, means decision-making concerning—

 - (a) train path allocation, including both the definition and the assessment of availability and the allocation of individual train paths; and
 - (b) infrastructure charging, including the determination and collection of charges, in accordance with the charging framework and the capacity allocation framework established pursuant to regulations 14 and 19 respectively;”;
- (d) after the definition of “framework agreement” insert—

““high speed passenger services” means passenger rail services operated without intermediate stops between two places separated by a distance of at least 200km on specially-built high-speed lines equipped for speeds generally equal to or greater than 250km/h and running on average at those speeds;”;
- (e) for the definition of “infrastructure manager” substitute—

““infrastructure manager” means any body or undertaking that is responsible for the operation, maintenance and renewal of railway infrastructure on a network and participating in its development;”;
- (f) omit the definition of “international passenger service” and insert—

““main infrastructure manager” has the same meaning as in the Directive;
“maintenance”, in relation to railway infrastructure, means works intended to maintain the condition and capability of the existing infrastructure;

(a) OJ No. L 343, 14.12.2012, p.32; as amended by Directive (EU) 2016/2370 of the European Parliament and of the Council of 14 December 2016 amending Directive 2012/34/EU as regards the opening of the market for domestic passenger transport services by rail and the governance of the railway infrastructure (OJ No. L 352, 23.12.2016, p.1) and Commission Delegated Decision (EU) 2017/2075 of 4 September 2017 replacing Annex VII to Directive 2012/34/EU of the European Parliament and of the Council establishing a single European railway area (OJ No. L 295, 14.11.2017, p.69).

“management board” means the senior body of an undertaking performing executive and administrative functions, which is responsible and accountable for day-to-day management of the undertaking;”;

- (g) after the definition of “nuclear site” insert—
““operation”, in relation to railway infrastructure, means train path allocation, traffic management and infrastructure charging;”;
- (h) after the definition of “public passenger transport” insert—
““public-private partnership” means a binding arrangement between a public body or bodies and one or more undertakings other than the main infrastructure manager, under which the undertakings—
(a) partially or totally construct or fund railway infrastructure; or
(b) acquire the right to exercise any of the functions of the infrastructure manager for a predefined period of time;”;
- (i) in the definitions of “relevant public service contract” and “relevant public service operator” for “an international” substitute “a”;
- (j) after the definition of “relevant public service operator” insert—
““renewal”, in relation to railway infrastructure, means major substitution works on the existing infrastructure which do not change its overall performance;”;
- (k) after the definition of “service provider” insert—
““supervisory board” means the most senior body of an undertaking that fulfils supervisory tasks, including the exercise of control over the management board and taking general strategic decisions regarding the undertaking;”;
- (l) after the definition of “tunnel system” insert—
““upgrading” in relation to railway infrastructure, means making major modification works to the infrastructure which improve its overall performance;”
; and
- (m) after the definition of ““urban” or “suburban”” insert—
““vertically integrated undertaking” means—
(a) an undertaking where, within the meaning of Council Regulation (EC) No. 139/2004 on the control of concentrations between undertakings (the EC Merger Regulation)(a)—
(i) an infrastructure manager is controlled by an undertaking which at the same time controls one or several railway undertakings that operate rail services on the infrastructure manager’s network;
(ii) an infrastructure manager is controlled by one or several railway undertakings that operate rail services on the infrastructure manager’s network; or
(iii) one or several railway undertakings that operate rail services on the infrastructure manager’s network are controlled by an infrastructure manager; or
(b) an undertaking consisting of distinct divisions, including an infrastructure manager and one or several divisions providing transport services that do not have a distinct legal personality,
provided that where an infrastructure manager and a railway undertaking are fully independent of each other, but both are controlled directly by a Member State without an intermediary entity, they are not considered to constitute a vertically integrated undertaking for the purposes of these Regulations;”.

(a) OJ No. L 24, 29.1.2004, p.1.

Scope

3. In regulation 4 (scope)—

(a) for paragraph (6) substitute—

“(6) The provisions of—

- (a) regulation 6;
- (b) regulation 8A;
- (c) regulation 8B;
- (d) regulation 8C;
- (e) regulation 9A;
- (f) regulation 10;
- (g) regulation 11;
- (h) regulation 12(1), (2) and (3);
- (i) regulation 13;
- (j) Parts 4 to 6; and
- (k) Schedules 2 to 5 (insofar as those Schedules apply by virtue of any of the provisions referred to in sub-paragraphs (a) to (j)),

do not apply to the networks listed in paragraph (7).

(6A) The provisions of—

- (a) regulation 8A;
- (b) regulation 8B;
- (c) regulation 8C;
- (d) regulation 9A;
- (e) regulation 11;
- (f) regulation 12(1), (2) and (3);
- (g) regulation 14(9), (9A) and (10);
- (h) regulation 15(1); and
- (i) regulation 19(4) and (4A),

do not apply to the lines described in paragraph (7A).

(6B) In the case of the lines referred to in paragraph (7A), where sub-paragraph (7A)(a) applies, regulation 13 and Parts 4 to 6, together with the regulations referred to in paragraph (6A), do not apply until capacity is requested by another applicant.

(6C) The provisions of—

- (a) regulation 8A;
- (b) regulation 8B;
- (c) regulation 8C
- (d) regulation 9A;
- (e) regulation 14(9), (9A) and (10); and
- (f) regulation 19(4) and (4A),

do not apply to the regional, low-traffic networks described in paragraph (7B).

(6D) Where there is an existing public-private partnership concluded before 16th June 2015 and the private party to that partnership is also a railway undertaking responsible for providing passenger railway services on the infrastructure, that private party is exempt from the provisions of—

- (a) regulation 8A;

- (b) regulation 9A;
- (c) regulation 14(9), (9A) and (10); and
- (d) regulation 19(4) and (4A),

and regulation 5(4) does not apply to services operated by railway undertakings on the same infrastructure as the passenger services provided by the private party under the public private partnership.”

- (b) after paragraph (7) insert—

“(7A) The lines referred to in paragraph (6A) and (6B) are local, low-traffic lines of a length not exceeding 100km that are used for freight traffic between a mainline and points of origin or destination of shipments along those lines, provided that those lines are managed by entities other than the main infrastructure manager and that either—

- (a) those lines are used by a single freight operator, or
- (b) the essential functions in relation to those lines are performed by a body which is not controlled by any railway undertaking.

(7B) The regional, low-traffic networks referred to in paragraph (6C) are regional, low-traffic networks managed by an entity other than the main infrastructure manager and used for the operation of regional passenger services provided by a single railway undertaking where—

- (a) capacity for passenger services on that network has not been requested, and
- (b) the single railway undertaking is independent of any railway undertaking operating freight services.

(7C) The lines described in paragraph (7A) include those that are used also, to a limited extent, for passenger services and the regional, low-traffic networks described in paragraph (7B) include those where the line is used also, to a limited extent, for freight services.”

Access rights

- 4. In regulation 5 (access rights)—

- (a) in paragraph (1) omit “international”;
- (b) in paragraph (4)—
 - (i) for “an international passenger service” substitute “a passenger service”;
 - (ii) for “the international route” substitute “the route”; and
 - (iii) omit “, including stations located in the same Member State”;
- (c) omit paragraph (5);
- (d) for paragraph (6) substitute—

“(6) The Office of Rail and Road may, in accordance with regulation 33, limit the access rights granted by this regulation in relation to the operation of passenger services between a place of departure and a destination where—

 - (a) one or more public service contracts cover the same route or an alternative route, and
 - (b) the exercise of such access rights would compromise the economic equilibrium of the public service contract or contracts in question.”;
- (e) omit paragraph (7); and
- (f) in paragraph (9) for “or regulation 33” substitute “and regulation 33”.

Infrastructure management: independence; outsourcing and sharing functions and impartiality in respect of traffic management and maintenance planning

5. After regulation 8 (management independence) insert—

“Independence of the infrastructure manager

8A.—(1) Subject to paragraph (5), the infrastructure manager, in its legal form, must be independent of any railway undertaking and, in vertically integrated undertakings, also be independent of any other legal entity within the undertaking.

(2) In vertically integrated undertakings, the other legal entities must not exercise any decisive influence on the decisions of the infrastructure manager in relation to the essential functions.

(3) Members of the supervisory board and the management board, and managers reporting directly to them, must act in a non-discriminatory manner and their impartiality must not be affected by any conflict of interest.

(4) An individual must not be concurrently appointed or employed—

- (a) as a member of the management board of an infrastructure manager or the head of division in charge of the management of infrastructure, and as a member of the management board of a railway undertaking or the head of division in charge of railway services;
- (b) as a person in charge of taking decisions on the essential functions and as a member of the management board of a railway undertaking;
- (c) where a supervisory board exists, as a member of the supervisory board of an infrastructure manager and as a member of the supervisory board of a railway undertaking;
- (d) as a member of the supervisory board of an undertaking which is part of a vertically integrated undertaking and which exercises control over both a railway undertaking and an infrastructure manager and as a member of the management board of that infrastructure manager.

(5) Paragraph (1) and sub-paragraphs (c) and (d) of paragraph (4) do not apply where infrastructure charging and path allocation functions are performed by a charging body and an allocation body by virtue of regulations 14(9) and 19(4) respectively.

(6) In vertically integrated undertakings, the members of the management board of the infrastructure manager or, as the case may be, the head of division in charge of the management of infrastructure, and the persons in charge of taking decisions on the essential functions must not receive—

- (a) any performance-based remuneration from any other legal entities or divisions within the vertically integrated undertaking; or
- (b) any bonuses principally related to the financial performance of particular railway undertakings or, as the case may be, divisions providing railway services,

but they may be offered incentives related to the overall performance of the railway system.

(7) Where information systems are common to different entities within a vertically integrated undertaking, access to sensitive information relating to essential functions must be restricted to authorised staff of the infrastructure manager and not passed on to other entities within the vertically integrated undertaking.

Outsourcing and sharing the infrastructure manager's functions

8B.—(1) Subject to paragraphs (2) and (3), an infrastructure manager may outsource—

- (a) functions to a different entity, provided the latter is not a railway undertaking, does not control a railway undertaking, or is not controlled by a railway undertaking;
- (b) the execution of works and related tasks on development, maintenance and renewal of the railway infrastructure to railway undertakings or companies which control the railway undertaking, or are controlled by the railway undertaking.

(2) When outsourcing functions or the execution of works and related tasks under paragraph (1) the infrastructure manager must—

- (a) ensure that no conflicts of interest arise and that the confidentiality of commercially sensitive information is guaranteed; and
- (b) except where the functions and obligations pass to a charging or allocation body by virtue of regulations 14(9) and 19(4) respectively, retain the supervisory power over, and bear ultimate responsibility for, the exercise of the functions described in the definition of “infrastructure manager” set out in regulation 3 (interpretation).

(3) Within a vertically integrated undertaking, the infrastructure manager must not outsource essential functions to any other entity of the vertically integrated undertaking under paragraph (1)(a), unless that entity exclusively performs essential functions.

(4) Any entity carrying out essential functions which have been outsourced under paragraph (1)(a) must comply with regulations 8A, 8C, 9A, 14(9) and 19(4).

(5) Provided that compliance by the infrastructure manager with its obligations concerning the development of the network in regulations 11 and 12 and 15(1) is ensured, a power supply operator which does not carry out any essential functions is exempt from any provisions of these Regulations that apply to infrastructure managers.

(6) Infrastructure management functions may be performed by different infrastructure managers, including parties to public-private partnership arrangements, provided that each infrastructure manager fulfils the obligations under regulations 8A, 8C, 9A, 14(9) and 19(4) and assumes full responsibility for the exercise of the functions assigned to it.

(7) Subject to supervision by the Office of Rail and Road, an infrastructure manager may conclude cooperation agreements with one or more railway undertakings provided that these are non-discriminatory and concluded with a view to delivering benefits to customers such as reduced costs or improved performance on the part of the network covered by the agreement.

Impartiality of the infrastructure manager in respect of traffic management and maintenance planning

8C.—(1) The infrastructure manager must exercise the functions of traffic management and maintenance planning in a transparent and non-discriminatory manner and ensure that the persons in charge of taking decisions in respect of those functions are not affected by a conflict of interest.

(2) As regards traffic management, the infrastructure manager must ensure that railway undertakings, in cases of disruption concerning them, have full and timely access to relevant information.

(3) Where the infrastructure manager grants further access to the traffic management process, it must do so for the railway undertakings concerned in a transparent and non-discriminatory way.

(4) The infrastructure manager must carry out the scheduling of maintenance works in a non-discriminatory way.

(5) As regards the long-term planning of major maintenance or renewal of the railway infrastructure, the infrastructure manager must consult applicants and, so far as reasonably practicable, take into account any concerns expressed.”.

Financial transparency

6. After regulation 9 (separation of accounts) insert—

“Financial transparency

9A.—(1) Infrastructure managers must not use income from infrastructure network management activities, including any such income that has been provided from public funds, for any purposes other than to finance the business of the infrastructure manager.

(2) Financing the business of the infrastructure manager may include the servicing of the infrastructure manager’s loans and the payment of dividends to its shareholders provided that the income is not used to pay dividends to undertakings within a vertically integrated undertaking which exercise control over both a railway undertaking and the infrastructure manager.

(3) Infrastructure managers must not grant loans to railway undertakings, either directly or indirectly.

(4) Railway undertakings must not grant loans to infrastructure managers, either directly or indirectly.

(5) Loans between legal entities of a vertically integrated undertaking may only be granted, disbursed and serviced at market rates and on conditions which reflect the individual risk profile of the entity concerned.

(6) Other legal entities within a vertically integrated undertaking may only provide services to the infrastructure manager if those services are provided on a contractual basis and paid for at market rates or at prices which reflect the cost of production, plus a reasonable margin of profit.

(7) Debts attributed to the infrastructure manager must be—

(a) clearly separated from debts attributed to other legal entities within vertically integrated undertakings; and

(b) serviced separately from debts attributed to other legal entities within vertically integrated undertakings,

but, this does not prevent the final payment of debts being made via an undertaking which is part of a vertically integrated undertaking and which exercises control over both a railway undertaking and an infrastructure manager, or via another entity within the undertaking.

(8) Within vertically integrated undertakings, the infrastructure manager must keep detailed records of any commercial and financial relations with the other legal entities within that undertaking.

(9) In vertically integrated undertakings, the infrastructure manager and other legal entities must keep their accounts in a way that ensures fulfilment of the requirements of this regulation and allows for separate accounting and transparent financial circuits within the undertaking.

(10) Where essential functions are performed by a charging or allocation body in accordance with regulation 14(9) or 19(4), the provisions of this regulation apply to

that body and references in this regulation to an infrastructure manager, a railway undertaking or another legal entity of a vertically integrated undertaking are to be taken as references to the respective divisions of the undertaking in question.

(11) In the case referred to in paragraph (10), compliance with the requirements set out in this regulation must be demonstrated in the separate accounts of the respective divisions of the undertaking.

(12) This regulation does not apply to private infrastructure managers that are party to a public-private partnership concluded before 24th December 2016 where—

- (a) the infrastructure manager does not receive any public funds; and
- (b) any loans or financial guarantees operated by the infrastructure manager do not directly or indirectly benefit specific railway undertakings.

(13) Loans between entities of a vertically integrated undertaking granted before 24th December 2016 may continue until their maturity, provided that they were contracted at market rates and that they are actually disbursed and serviced.”.

Coordination mechanisms

7. After regulation 13 (network statement) insert—

“Coordination mechanisms

13A.—(1) A main infrastructure manager must put in place appropriate coordination mechanisms to ensure that they coordinate, at least annually, with all interested railway undertakings as well as applicants referred to in regulation 12(3) regarding the matters set out in paragraph (3).

(2) Where relevant a main infrastructure manager must invite representatives of users of the rail freight and passenger transport services, and national, local or regional authorities to participate in the coordination required by paragraph (1) and the Office of Rail and Road may participate as an observer.

(3) The matters referred to in paragraph (1) are—

- (a) the needs of applicants related to the maintenance and development of the infrastructure capacity;
- (b) the content of the user-oriented performance targets contained in the agreement referred to in regulation 15(6) and of the incentives referred to in regulation 15(7) and their implementation;
- (c) the content and implementation of the network statement;
- (d) issues of intermodality and interoperability;
- (e) any other issues related to the conditions for access, the use of the infrastructure and the quality of the services of the infrastructure manager.

(4) A main infrastructure manager must draw up and publish guidelines for the coordination required by paragraph (1) in consultation with interested parties and must publish on its website an overview of the activities undertaken pursuant to this regulation.

(5) For the purposes of this regulation—

- (a) “national authorities” means the Secretary of State, the Scottish Ministers or the Welsh Ministers;

- (b) “local or regional authorities” includes a combined authority established under section 103(1) of the Local Democracy, Economic Development and Construction Act 2009^(a).

European Network of Infrastructure Managers

13B. With a view to facilitating the provision of efficient and effective rail services within the European Union, a main infrastructure manager must participate and cooperate in a network of infrastructure managers in the European Union that meets at regular intervals to—

- (a) develop European Union rail infrastructure;
- (b) support the timely and efficient implementation of the single European railway area;
- (c) exchange best practices;
- (d) monitor and benchmark performance;
- (e) contribute to the market monitoring activities referred to in Article 15 of the Directive;
- (f) tackle cross-border bottlenecks; and
- (g) discuss the application of Articles 37 and 40 of the Directive.”.

Independence of the essential functions

8.—(1) In regulation 14 (establishing, determining and collecting charges) after paragraph (9) insert—

“(9A) In paragraph (9) the infrastructure manager is not independent in its organisation or decision-making functions if, in particular—

- (a) a railway undertaking or any other legal entity exercises a decisive influence on the infrastructure manager in relation to the infrastructure charging elements of the essential functions, without prejudice to the charging framework and specific charging rules established pursuant to this regulation;
- (b) a railway undertaking or any other legal entity within the vertically integrated undertaking has decisive influence on appointments and dismissals of persons in charge of taking decisions on the infrastructure charging elements of the essential functions; or
- (c) the mobility of persons in charge of the infrastructure charging elements of the essential functions creates a conflict of interest.”.

(2) In regulation 19 (capacity allocation) after paragraph (4) insert—

“(4A) In paragraph (4) the infrastructure manager is not independent in its organisation or decision-making functions if, in particular—

- (a) a railway undertaking or any other legal entity exercises a decisive influence on the infrastructure manager in relation to the train path allocation elements of the essential functions, without prejudice to the allocation framework established pursuant to this regulation;
- (b) a railway undertaking or any other legal entity within the vertically integrated undertaking has decisive influence on appointments and dismissals of persons in charge of taking decisions on the train path allocation elements of the essential functions; or

(a) 2009 c. 20. Section 103(1) was amended by sections 12(1) and (2) and 14(1) and (2) of the Cities and Local Government Devolution Act 2016 (c. 1).

- (c) the mobility of persons in charge of the train path allocation elements of the essential functions creates a conflict of interest.”.

Capacity rights

9. In regulation 19 (capacity allocation)—

- (a) in paragraph (7)—
 - (i) for “an international” substitute “a”; and
 - (ii) at the end of the sentence insert “at least 18 months before the entry into force of the working timetable to which the request for capacity relates”; and
- (b) in paragraph (8)—
 - (i) after “it must” insert “, without undue delay and at the latest within 10 days of receiving the notice,”; and
 - (ii) in sub-paragraph (c) omit “international”.

Special measures to be taken in the event of disruption

10. In regulation 30 (special measures to be taken in the event of disruption)—

- (a) after paragraph (2) insert—

“(2A) In the event of disruption which has the potential to affect cross-border traffic, the infrastructure manager must share any relevant information with other infrastructure managers whose network or traffic may be affected and the infrastructure managers concerned must cooperate to restore cross-border traffic to normal.”;
- (b) after paragraph (3) insert—

“(3A) Railway undertakings operating passenger services must put in place contingency plans and must ensure that these contingency plans are properly coordinated to provide passengers with assistance in the sense of Article 18 of Regulation (EC) No 1371/2007, in the event of major disruption to services.”.

Appeals to the regulatory body

11. In regulation 32 (appeals to the regulatory body) in paragraph (2)—

- (a) at the end of sub-paragraph (f) omit “and”;
- (b) at the end of sub-paragraph (g) for the full stop substitute a semi-colon; and
- (c) after sub-paragraph (g) insert—
 - “(h) traffic management;
 - (i) renewal planning and scheduled or unscheduled maintenance; and
 - (j) compliance with the requirements, including those regarding conflicts of interest, set out in regulations 8A, 8B, 8C, 9A, 14(9) and 19(4).”.

Regulatory decisions concerning passenger services

12.—(1) In the heading to regulation 33 (regulatory decisions concerning international passenger services) omit “international”.

(2) In regulation 33—

- (a) omit paragraphs (1) and (2);
- (b) in paragraph (3)—
 - (i) for “The” at the beginning of the paragraph, substitute “At the request of a relevant party submitted within one month of receipt from the Office of Rail

and Road of the information on the intended passenger service referred to in regulation 19(8), the”; and

- (ii) in sub-paragraph (a) omit “at the request of a relevant party and”;
- (c) in paragraph (4)(b) omit “international”;
- (d) in paragraphs (5) and (6)(b) for “paragraph (3)(a)” substitute “paragraph (3)”;
- (e) for paragraph (6)(d) substitute—
 - “(d) provide the relevant parties and any railway undertaking seeking access for the purpose of operating a passenger service with—
 - (i) the grounds for its decision;
 - (ii) the conditions under which any of those parties may request a reconsideration of the decision or direction or both; and
 - (iii) where paragraph (6)(c) applies, an indication of possible changes to the service which would ensure that the conditions to grant the right of access provided for in regulation 5 are met.”;
- (f) after paragraph (6) insert—
 - “(6A) A request for a reconsideration in accordance with paragraph (6)(d)(ii) must be made within one month of receipt of the information referred to in paragraph (6)(d).”;
- (g) in paragraphs (7) and (8) after “(6)(d)” insert “(ii) and (6A)”.

Monitoring the rail services markets

13. In regulation 34 (monitoring the rail services markets)—

- (a) in paragraph (1) after “rail services markets” insert “, including the market for high-speed passenger services and the activities of infrastructure managers in relation to the matters referred to in regulation 32(2)”;
- (b) in paragraph (2)(a) for “control” substitute “verify compliance with” and delete the word “and” at the end;
- (c) in paragraph 2(b) replace the full stop at the end with a semicolon; and
- (d) after paragraph (2)(b) insert—
 - “(c) monitor the use of income referred to in regulation 9A(1), the servicing of debts and payment of dividends referred to in regulation 9A(2), the loans referred to in regulation 9A(5) and the debts referred to in regulation 9A(7); and
 - (d) assess, and monitor the execution of any cooperation agreements concluded between an infrastructure manager and one or more railway undertakings and, where justified, may advise that a cooperation agreement should be terminated.”.

Audits

14. In regulation 35 (audits)—

- (a) in paragraph (1) after “provisions laid down in regulation 9” insert “and the provisions on financial transparency laid down in regulation 9A”; and
- (b) after paragraph (3) insert—
 - “(3A) In the case of vertically integrated undertakings, the powers of the Office of Rail and Road under this regulation extend to all legal entities within the vertically integrated undertaking.”.

Cooperation between regulatory bodies

15. In regulation 37 (cooperation between regulatory bodies)—

(a) after paragraph (9) insert—

“(9A) Where matters concerning an international service require a decision of the Office of Road and Rail and a decision of a regulatory body in another Member State, the Office of Road and Rail must, whilst carrying out its functions in accordance with these Regulations, cooperate with the other regulatory body or bodies in preparing their respective decisions in order to bring about a resolution to the matter.”; and

(b) in paragraph (10) after “under these Regulations” insert “including arrangements for the resolution of disputes that arise in relation to the matters referred to in paragraph (9A)”.

Enforcement of decisions, directions and notices

16. In regulations 38 (enforcement of decisions, directions and notices), in paragraph (2)(a)(ii), for “regulation 32(2)(c) to (g)” substitute “regulation 32(2)(c) to (j)”.

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations implement, for a transitory period ending at the end of 31st December 2020, Directive (EU) 2016/2370 of the European Parliament and of the Council of 14 December 2016 amending Directive 2012/34/EU as regards the opening of the market for domestic passenger transport services by rail and the governance of the railway infrastructure.

Directive 2012/34/EU was implemented in Great Britain by the Railways (Access, Management and Licensing of Railway Undertakings) Regulations 2016 (the “2016 Regulations”). In implementing Directive (EU) 2016/2370, these regulations make amendments to the 2016 Regulations.

Directive (EU) 2016/2370 introduces requirements facilitating open access to domestic, as well as international, Member State rail markets. It also contains separation and transparency requirements where both the rail infrastructure and rail passenger services are operated within a vertically operated undertaking.

These changes are implemented by means of transitory modifications to Parts 1 to 6 of the 2016 Regulations, set out in new Schedule 6 (Transitory modifications) to the 2016 Regulations (see regulations 6 and 7 and Schedule 2 to these Regulations).

These Regulations also (in regulation 2) make two minor transitory modifications to the Railway (Licensing of Railway Undertakings) Regulations 2005 to update the definition of “the 2012 Directive” and to give effect (in Schedule 2, paragraph 2(c)(i)) to Article 1(9) of Directive (EU) 2016/2370. This amends the criteria to be applied by the Office of Rail and Road in determining whether a railway undertaking is of good repute for the purposes of deciding whether to grant a European licence to that undertaking.

These Regulations also—

- (in regulation 5 and Schedule 1, which substitutes a new Schedule 4 (timetable for the allocation process) to the 2016 Regulations) give effect to Commission Delegated Decision (EU) 2017/2075 of 4 September 2017 replacing Annex VII to Directive 2012/34/EU of the European Parliament and of the Council establishing a single European railway area; and
- (in regulation 4) amend regulation 33 (Regulatory decisions concerning international passenger services) of the 2016 Regulations to take account of the coming into force of Commission Implementing Regulation (EU) 2018/1795 of 20 November 2018 laying down procedure and criteria for the application of the economic equilibrium test pursuant to Article 11 of Directive 2012/34/EU of the European Parliament and of the Council; Regulation (EU) 2018/1795 replaces (subject to transitional provisions) Commission Implementing Regulation (EU) No 869/2014 of 11 August 2014 on new rail passenger services.

An impact assessment has not been produced for this instrument as no, or no significant, impact on the private sector is foreseen.

An Explanatory Memorandum and Transposition Note is published alongside this instrument on www.legislation.gov.uk.

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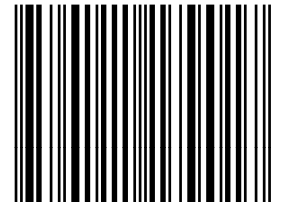
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