CONSULTATION: THE RAILWAYS (ACCESS, MANAGEMENT AND LICENSING OF RAILWAY UNDERTAKINGS) REGULATIONS 2016

Q1. Is there value in ORR providing guidance on these regulations; is there an alternative to ORR providing guidance?

Yes, there is value in the ORR providing guidance.

Q2. Does the guidance help you understand the impact of the 2016 Regulations?

The guidance helps provide an understanding of the 2016 Regulations.

Q3. Is it clear what your rights and obligations are?

The guidance certainly assists. It is a technical document and appears to be aimed at those who already have a detailed understanding of the laws relating to railways. The technical wording reflects the wording in both UK and EU legislation.

Some specific areas of the guidance require clarification.

Facility owner / Service Provider
It is not clear from the guidance how the role / responsibilities of the 'service provider' inter-act with those of the 'facility owner'.

S.17(3)(6) of the 1993 Railways Act defines the facility owner as any person-
(a) has an estate or interest in or, right over, a railway facility, and
(b) whose permission to use that railway facility is needed by another before that other may use it

Regulation 3 defines the service provider as –
"service provider" means a body or undertaking that supplies any of the services—
(a) to which access is granted by virtue of regulation 6; or
(b) listed in paragraph 2, 3 or 4 of Schedule 2,
or which manages a service facility used for this supply, whether or not that body or undertaking is also an infrastructure manager;

The 'service provider' and 'facility owner' are not necessarily the same person. The identity of the 'facility owner' is normally determined through completion of an ORR approved Connection Contract. There can be difficulties with this allocation when the connected party is a Tenant rather than the land owner.

This business leases 2 freight sites from Network Rail. In both instances Network Rail requires to consent to any 3rd party sharing occupation / use of the site, including 'open access' dealings. This requirement supersedes the requirements of the law. Attempts are being made to persuade Network Rail that such consent should not be unreasonably withheld or delayed, rather than a matter of absolute discretion. Network Rail, may at their option make the grant of consent conditional. Consent has been sought on one occasion. It was granted 21 days after the initial approach was made.

In the examples above both Landlord and Tenant have interests which satisfy the definition of 'facility owner' and indeed the permission of both is needed to permit another party to use the facility. The existing method by which the 'facility owner' is identified works well when the party

entering the connection contract is the Landlord or a Tenant with the necessary rights. It is considered the Guidance and 2016 Regulations adequately relate to situations where the 'facility owner' and 'service provider' is the same party and have sufficient rights to perform their responsibilities.

The Guidance is inadequate in the situation where the Tenant has been appointed as facility owner, without sufficient rights in the property lease to perform the responsibilities being granted. As the landlord is not facility owner and has no responsibility for railway regulatory compliance they can use the property lease to protect their own commercial position. It is not their concern if the lease terms they insist upon prevent the Tenant from being able to perform the duties of facility owner / service provider. The Tenant has to comply with both the terms of the property lease and the 2016 Regulations – something which is not always possible.

The guidance is not necessarily suitable when the identity of the 'facility owner' and 'service provider' is different. They do not address the position where either the 'facility owner' or 'service provider' does not have the right to fulfil these legal obligations (as the result of property lease or contractual terms).

In order to address the issues highlighted it is proposed that processes for determining the identities of the 'facility owner' and 'service provider' should be improved and / or created. For example, check lists of responsibilities could be used. Should the identified party not be entitled to perform the role/s they should not be appointed. In the event that the criteria are not satisfied the default positions should be as follows:

- Landlord is facility owner
- Facility owner is service provider

These arrangements provide incentive for appropriate rights to be granted at all levels by the party controlling the rights.

There are further complications when property title conditions (Deed of Grant) affect the ability of the owner / leaseholder to perform the duties of facility owner / service provider. In particular service charges (which are regulated by RICS) may be relevant. The guidance should be updated to account for this.

<u>Regulation 4(7)(d)</u>
This Regulation lists facilities which are exempt from the requirements. Can you clarify if this list is definitive or are examples only?

Should the list be examples only it is proposed that 'intermodal rail freight' terminals (and others meeting similar criteria) within areas of strong market competition where there is spare capacity should be included. This would be beneficial to terminals who would avoid un-necessary management costs (important in industries with low margins). It would also benefit rail users as it would highlight localities where they can use facilities and gain from the effects of market competition. Creating a process to identify such terminals and reviewing the selection periodically would be beneficial.

<u>Regulation 6(1) – Access to services</u>
It is noted that only railway undertakings may now be supplied with the minimum access package. It is not understood how this sits with Freight Customer Track Access Contracts or where a non-railway undertaking seeks to enter an access agreement within a terminal. Please clarify.

Regulation 6(3) – Response Timescales

You state a reasonable time limit is 10 days. Is this 10 calendar days or 10 working days?

Normally, 10 days seems sensible. However, there should be extensions to this time limit available. If 10 days is insufficient the applicant should be informed as quickly as possible this will be the case, the reasons for the delay and the expected timescale. As mentioned previously Landlords consent may be necessary for any arrangements, and this will affect timescales.

Regulation 6(4) – Viable alternative

It is in the business interest of the service provider to offer to provide services to any party. They will only decline to so for reasons such as insufficient capacity, resource restrictions, failure to agree terms, environmental constraints, legal restrictions etc. The Guidance does not make clear how the service provider is to discover what alternatives are available, on what terms and within what timescales.

Regulation 6(9) – 'Use It or Lease it'

This Regulation deals with the situation whereby the service provider is the owner of the property or a Tenant with suitable unexpired Lease term (who has rights to sub-let or novate the lease). It is impractical if the service provider is a Tenant with only a short term lease interest remaining or the terms prevent it from sub-letting or novating the lease.

It is possible for a Tenant initially to have sufficient interest to perform the role of service provider in this respect. However, as they approach expiry of the property lease (or potential expiry) that may no longer be the case. It is considered the Guidance should address this situation.

Regulation 22 - Framework Agreements

It is considered that Guidance on the duration of such agreements is necessary. Network Rail has advised they now only grant commercial leases of rail freight sites if they include absolute termination rights linked to the extent of rail use. They indicate the period has now been reduced to 90 days. The risk is held by the Tenant. There are no compensatable improvements in respect of capital investment, even in the case of multi million pound investment. It is understood Network Rail does this in order to ensure Tenant's cannot block access to rail facilities should they no longer use them.

It is expected that the duration of Framework Agreements will be able to accommodate these commercial approaches, and ensure the access beneficiary is not given unfair advantage to the detriment of the Tenant.

It is proposed that guidance upon the content of Framework Agreements should be provided. The existing 2 authorised templates are based upon the facility owner in one case being the landowner and in the other a long term leaseholder / land owner. The situation where the Tenant does not have such a robust interest needs to be addressed, in particular the manner in which the responsibilities in the property lease filter through to access beneficiaries (in the interests of fairness).

One of the objectives of the EU in developing railway legislation was to encourage private sector investment. It is considered the guidance should make clear what protection is available for those willing to invest capital. There needs to be a fair balance between service providers and applicants to encourage and protect investment, which benefits all rail users.

Service Charges – Note 6 – Para. 1(6) of Schedule 3

The information that service providers should publish as a minimum is noted. It is considered this requirement should only apply to service providers who are the property owner or a tenant with a suitable long-term lease interest. It is considered that these requirements should not apply to service providers who –

- Have insufficient legal interest in the property to satisfy the responsibilities of service provider
- Tenant's with a short – term interest only (suggest less than 3 years)

There is a particular issue with the charging principles for Tenant's who have lease of a property linked to specific levels of rail traffic and no right to compensatable improvements (making acting in such a manner as to protect capital investment of fundamental importance). In such circumstances it is reasonable to expect the Tenant (service provider) to seek to recover capital investment as quickly as possible. This may include charging certain market segments more if it is expected they can afford to pay more. Discounts may be offered in order to protect capital investment via retention of the property lease. It is not clear from the Guidance how this would operate. It is considered there should be no requirement to publish information in such circumstances (other than on a voluntary basis).

Q4. Is it clear how and when to appeal to ORR?

It is clear that any 'applicant' can appeal. In order to prevent unjustified appeals it is considered the Guidance notes should specifically exclude certain areas from appeal, particularly those which are outside the control of the service provider, for example –

- Mandatory operating hours curfew (e.g. Town & Country Planning condition)
- Restrictions arising from another agreement (e.g. property lease, title deed conditions etc.)

Q5. How can we improve the guidance? What areas need to be developed, if any?

This has been addressed in responses above.

WH Malcolm Limited
13 October 2016