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Dear Rob,

Guidance on The Railways (Access, Management and Licensing of Railway Undertakings) Regulations 2016

Thank you for this consultation.

Eurostar is a commercial operator of high speed international passenger services between the UK and mainland Europe. We provide passenger services in a competitive multimodal environment. We are pleased to provide our comments on the draft guidance.

We believe there is value in the ORR providing guidance on the regulations, and we welcome this. The draft guidance provides indications of the ORR's view, is clearly written, and it is clear how and when ORR appeals can be made.

The regulations are new. Given this, over time we would expect the guidance to take into account the ORR's experience as the Regulations are applied, and – as now – for any proposed changes to be subject to consultation.

Our specific comments on elements of the draft guidance are below in the order of publication in the consultation document.

Access arrangements

Regulation 6

The suggested timetable of reply within 10 days to a service facilities request is very short (paragraph 15). We have three comments in respect of the proposed timeline:

- We think that this needs to be a longer period of time in order to allow for a response of the kind envisaged by the ORR in this consultation, and recognising the diverse nature of service facilities that are included under this provision. We wonder if too short a period of time may lead to some facilities denying a request that may have been accommodated if the facility had a longer period of time to consider this? There may be times when a short response time is justified, however we think it is likely that in a large number of cases the applicant will be advance planning and will have more than a ten day window to procure a response in respect of a service. Therefore earlier notice and a longer period of time to respond to a request will not adversely affect the railway undertaking seeking access.

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- For all service facilities, we recommend that timeframes be expressed in working days. This provides certainty on all sides, while neutralising the effect of service facility office closures due to public holidays or weekends.
- Given the range of facilities covered by this provision, in addition to the general comments above we recommend that there is flexibility on longer time limits afforded in two specific, separate sets of circumstances: (i) where other agreed time limits already exist (for example, where timeframes for application and response to requests for access have been set via binding European Commission merger control commitments). This recognises the previous regulatory review of reasonable limits – in our case by the European Commission last year - and also the systems and processes in place for these arrangements, and (ii) where a maintenance facility has not previously handled requests, an additional period of time to recognise the new nature of handling such requests for the first year that they receive requests. This allows a grace period for facilities previously not supplied to third parties to meet their obligations and refine their procedures for doing so.

We agree that there is no express requirement under regulation 6(4) to provide a reason for a refusal (paragraph 18). We are concerned that a 'fully reasoned' response as currently expected in the draft guidance could add cost and time to the system, and may not be necessary in a number of cases. Given this is not an express requirement, we suggest that a 'reasoned response' indicating a reason for refusal of the request should be sufficient in this case to provide information to the applicant. This comment applies equally to the final line of paragraph 21 of the draft guidance, in respect of multiple requests for access to services.'

We also agree that it is not necessary for a service provider to make investments in order to accommodate a service facility request, or reduce services allocated or provided to railway undertakings to make space. In this paragraph, we read the phrase 'other railway undertakings' in the final line of paragraph 19 to refer to all of the railway undertakings that are using the facility in question other than the applicant railway undertaking. We think this should also include capacity that the service provider has allocated in the facility which is not yet in use in the service facility. We suggest this phrase could be "...already provided or allocated to all other railway undertakings to make space."

We agree that services may be granted subject to restrictions (paragraph 22), as this may provide a workaround for services. We assume that this would include an offer for some, but not all, of the services sought at the facility and that, in assessing any appeal in respect of restricted offers, that the ORR will consider whether the applicant could indeed operate with a restricted service facility offer at one or more locations.

We agree that the service provider should signpost viable alternatives where possible (paragraph 25). We think there needs to be more guidance on what the ORR means by an 'objectively argued case' in this context, as the requirement is that a viable alternative exists. We think it should be recognised that a service provider may not be the expert in all service facilities (in particular, in respect of facilities along the route of the applicant but not near the service provider), therefore should not suffer detriment in respect of information on other facilities it could not know from widely available public information. A request for any more than this will potentially add cost and time to the system and, as we note above, may not be necessary in all cases. Finally, we note that in respect of international services, a viable alternative may exist in another EU Member State and this should be recognised as part of this assessment.

We agree that constrained capacity should be a reason for refusal or restricted access and that a request is not an obligation to substitute an applicant for his own or a planned future user. We also agree that if a service provider is seeking to respond in this manner it should provide a response with reasons identifying the nature of the capacity constraints, that it has organised to make efficient use of capacity and examined options for accommodating the railway undertaking's request. In these elements, we would expect any response would respect the commercial confidentiality of any information, any examination of capacity to recognise that an element of good capacity planning requires an element of resilience planning, and as noted earlier in this response, a reasoned response providing these elements appears sufficient for this purpose. In respect of the current draft requiring a fully reasoned and objectively justified case, in these early days of the legislation we are not sure this will be necessary for the majority of requests as long as a reasoned response is provided, and a requirement for this evidentiary standard in every case may lead to additional cost to the system.

On paragraph 36, we note that the requirement is for this information to be available. We think it is sufficient for a link to be in the relevant infrastructure manager's Network Statement as this will clearly signpost the facilities in question. Is this what is meant by through the relevant Network Statement? We think the service provider should be free to determine the form in which the relevant information is made available.

Annex A – Viable Alternatives

Page 16, paragraph 2. We would expect the viable alternative burden of proof to apply equally to all service providers, and not to flex to become more onerous where a specific set of characteristics arise.

Page 16, paragraph 3. This is a key point, and further information on what the ORR considers a material increase, a competitive price, together with those elements it would expect to examine in this context would be welcomed.

Annex B – Dominance

To avoid doubt and to conform with paragraph 1 and the heading above paragraph 3, the third line in paragraph 2 should refer to '...any national railway transport services market'.

Appeals

We welcome the guidance in respect of provision of information and requests for non-disclosure of information for confidential or commercially sensitive reasons.

We note the intention to issue specific guidance on the appeals process in respect of the Fixed Link.

In respect of viable alternative appeals, our earlier comments including taking into account service facilities based in other EU Member States for international services, and provision of restricted services (including offers for part of a request and viable alternatives for the remaining services) should be considered as part of the appeals process.

Once again, thank you for this consultation. Please let me know if you would like to discuss these comments.

Yours sincerely



Samantha Spence
Head of Regulatory Affairs