



**ORR guidance module:  
service facilities**



**Service facilities under the Access  
and Management Regulations and  
Implementing Regulation**

June 2019

**DRAFT**

# Contents



1. Overview .....	3
2. Background .....	10
3. Provision of information .....	14
4. Access arrangements .....	16
5. Service facility charges .....	32
6. Unused facilities .....	34

DRAFT

# 1. Overview

## Introduction

- 1.1. This module is the Office of Rail and Road's (ORR's) guidance on service facilities under *The Railways (Access, Management and Licensing of Railway Undertakings) Regulations 2016* (the 2016 Regulations).
- 1.2. The 2016 Regulations transpose *Directive 2012/34/EC* (the Recast Directive<sup>1</sup>) into GB law. This guidance deals with the provisions relating to service facilities. This module also reflects the provisions of *The Commission Implementing Regulation (EU) 2017/2177 of 22 November 2017 on access to service facilities and rail-related services* (the Implementing Regulation)<sup>2</sup>.
- 1.3. The module does not cover all aspects of the 2016 Regulations and some of these are more appropriately covered in other guidance modules. All our track access guidance modules are available on our dedicated webpage<sup>3</sup>.
- 1.4. This chapters in this module are structured as follows:
  - Chapter 2: [Background](#), an introduction to the legislation and explanation of ORR's role.
  - Chapter 3: [Provision of information](#), a description of the information that operators of service facilities must provide.
  - Chapter 4: [Access](#), an overview of the regulations that concern access to infrastructure and service facilities.
  - Chapter 5: [Service facility charges](#), an overview of the regulations on charging principles for access to services.
  - Chapter 6: [Unused facilities](#), a description of the requirements for unused facilities.
- 1.5. This guidance should be read in conjunction with our guidance modules<sup>4</sup> on *Facility access agreements (non-Network Rail)*, for access agreements made under the

---

<sup>1</sup> The Recast Directive: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32012L0034&from=EN>

<sup>2</sup> The Implementing Regulation: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32017R2177>

<sup>3</sup> <http://orr.gov.uk/rail/access-to-the-network/track-access/guidance>

<sup>4</sup> <http://orr.gov.uk/rail/access-to-the-network/track-access/guidance>

## DRAFT

Railways Act 1993 (the Act) and *Access and Management Regulations: appeals*, for more information on making an appeal.

### Definitions

- 1.6. As a general rule, in this module, except where specifically indicated otherwise, the citation of regulations is under the 2016 Regulations and articles are under the Implementing Regulation.
- 1.7. Please note that through the different legislation there is now a variety of different terms covering the operators, managers and owners of service facilities and sites. For convenience we generally refer simply to **service facilities** and **service providers** in this module. If you are in any doubt as to whether a provision applies to you, please refer directly to the legislation. Some key definitions are in Annex A to this chapter.
- 1.8. Our view is that the definitions used in the 2016 Regulations, Implementing Regulation, Recast Directive and the Act are all particularly important in understanding the application of the 2016 Regulations.
- 1.9. The terms used throughout the guidance have the same meanings as in the 2016 Regulations, the Implementing Regulations and the Act unless the context requires otherwise.

## Annex A: Definitions

The terms used throughout the guidance have the same meanings as in the 2016 Regulations, the Implementing Regulations and the Act unless the context requires otherwise. Some key definitions used in this module are set out below:

**'infrastructure manager'** is defined in the 2016 Regulations as:

*any body or undertaking that is responsible in particular for:*

- (a) the establishment, management and maintenance of railway infrastructure, including traffic management and control-command and signalling; and*
- (b) the provision with respect to that infrastructure of network services as defined in section 82 of the Act,....*

We consider the bodies listed below to be infrastructure managers for the purposes of the 2016 Regulations:

- Network Rail Infrastructure Limited.
- HS1 Limited, in respect of High Speed 1.
- Heathrow Airport Ltd, in respect of the Heathrow Spur.
- Rail for London (Infrastructure) Ltd, in respect of Crossrail's Central Operating Section ('the Crossrail Tunnel').
- The Channel Tunnel Group Limited and France-Manche S.A. (jointly "Eurotunnel"), in respect of the Channel Tunnel (but [see below](#)).

Our view is that operators of heritage railways are not infrastructure managers for the purposes of the 2016 Regulations. Similarly, operators of private stations are not infrastructure managers if they do not provide network services (as defined in section 82 of the Act).

The definition of railway infrastructure does not include infrastructure in ports or freight terminals. In our view, while track leading to a service facility in a port or freight terminal is part of the rail network and therefore constitutes railway infrastructure, track within such a service facility is part of the operation of the service facility and therefore does not constitute 'railway infrastructure'. This is because the main operation of ports and freight terminals is concerned with the supply of services, rather than the provision of train paths.

Consequently, it follows that the operators of ports and terminals are not infrastructure

## DRAFT

managers and are therefore not bound by the requirements applicable to infrastructure managers under the 2016 Regulations. Rather, we consider operators of ports and terminals to be service providers within the meaning of the 2016 Regulations.

It is possible for an infrastructure manager also to be a service provider, for the purposes of the 2016 Regulations, where that infrastructure manager also supplies services. However, it is not possible for a service provider that only supplies services to be regarded as an infrastructure manager.

**'service provider'** is defined in the 2016 Regulations as:

*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 paragraphs 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.*

It is also the generic term ORR uses in this guidance for the person responsible for providing access and services at a service facility.

**'railway infrastructure'** is defined in the 2016 Regulations as consisting of:

*...the items described as "network", "station" and "track" in section 83 of the Act but excludes such items-:*

- (a) which consist of, or are situated on, branch lines and sidings whose main operation is not directly connected to the provision of train paths;*
- (b) within a maintenance or goods depot, or a marshalling yard;*
- (c) within a railway terminal, port, factory, mine, quarry, nuclear site or site housing electrical plant;*
- (d) which consist of, or are situated on, networks reserved mainly for local, historical or touristic use; and*
- (e) within a military establishment.*

**'network'** is defined in the Act as:

- (a) any railway line, or combination of two or more railway lines, and*
- (b) any installations associated with any of the track comprised in that line or those*

lines,

*together constituting a system of track and other installations which is used for and in connection with the support, guidance and operation of trains.*

**'station'** is defined in the Act as:

*any land or other property which consists of premises used as, or for the purposes of, or otherwise in connection with, a railway passenger station or railway passenger terminal (including any approaches, forecourt, cycle store or car park), whether or not the land or other property is, or the premises are, also used for other purposes.*

**'track'** is defined in the Act as:

*any land or other property comprising the permanent way of any railway, taken together with the ballast, sleepers and metals laid thereon, whether or not the land or other property is also used for other purposes; and any reference to track includes a reference to:*

- (a) any level crossings, bridges, viaducts, tunnels, culverts, retaining walls, or other structures used or to be used for the support of, or otherwise in connection with, track; and*
- (b) any walls, fences or other structures bounding the railway or bounding any adjacent or adjoining property.*

**'network'** is defined in the 2016 Regulations as meaning:

*except in those cases where the context otherwise requires, the entire railway infrastructure managed by an infrastructure manager.*

The effect of this definition is to capture for the purposes of the 2016 Regulations:

- All of the items included in the definition of *'network'* under the Act (as set out above); and
  - Every other item included in the definition of *'railway infrastructure'*.
- Network is therefore a broad concept under the 2016 Regulations.

**'railway undertaking'** is defined in the 2016 Regulations as:

*any public or private undertaking licensed according to [the Recast Directive], the principal business of which is to provide services for the transport of goods and/or passengers by rail with a requirement that the undertaking ensure traction; this also includes undertakings which provide traction only.*

## DRAFT

In practice railway undertakings will be licensed freight and passenger train operators.

**'Applicant'** is defined in the 2016 Regulations as:

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

While certain provisions in the 2016 Regulations only confer entitlements and obligations on railway undertakings, some provisions apply more widely to bodies such as shippers and freight forwarders. Where the 2016 Regulations apply more broadly, the term *'applicant'* is used.

Where a party that is not a railway undertaking is considering whether the 2016 Regulations confer any entitlements or obligations on it, it will need to look at whether the relevant provision applies to *'applicants'* and whether it falls within that definition.

**'dominant body or firm'** is defined in the 2016 Regulations as:

*a body or firm which is active and holds a dominant position in the national railway transport services market in which the relevant service facility is used.*

For an overview of what is a dominant position in the GB national railway transport services market see ORR's publication *Guidance on ORR's approach to the enforcement of the Competition Act 1998 in relation to the supply of services relating to railways 2016*<sup>5</sup>.

## Definitions in the Implementing Regulation

*The following definitions are set out in the Implementing Regulation*

**'basic service'** is defined as any service listed in point 2 of Annex II to the Recast Directive (Schedule 2 of the 2016 Regulation).

**'rail-related service'** means a basic, additional or ancillary service listed in points 2, 3 and 4 of Annex II to Directive 2012/34/EU.

**'service facility description'** means a document which lays down detailed information necessary for access to service facilities and rail-related services.

---

<sup>5</sup> [http://orr.gov.uk/data/assets/pdf\\_file/0019/21367/competition-act-guidance.pdf](http://orr.gov.uk/data/assets/pdf_file/0019/21367/competition-act-guidance.pdf)

## DRAFT

**‘service facility capacity’** means the potential to use a service facility, and the supply of a service, over a given period of time, taking into account the time needed to access and leave the service facility.

**‘coordination procedure’** means a procedure through which the operator of a service facility and applicants attempt to resolve situations in which requests for access to a service facility or rail-related services concern the same service facility capacity and are in conflict.

**‘linked service facilities’** means service facilities which are adjacent to one another and require passage through one to reach the other.

**‘controlling entity’** means a body or firm, which exercises direct or indirect control over an operator of a service facility, and which is also active and holds a dominant position in national railway transport services markets for which the facility is used, or exercises direct or indirect control over an operator of a service facility and a railway undertaking holding such a position.

**‘self-supply of services’** means a situation where a railway undertaking performs itself a rail-related service on the premises of a service facility operator, provided that access to and the use of the facility by that railway undertaking for self-supply of services is legally and technically feasible; does not endanger the safety of the operations; and that the operator of the service facility concerned offers such a possibility.

**‘reconversion’** means a formal process by which the purpose of the service facility is changed to a use other than for the supply of rail-related services.

**‘ad hoc request’** means a request for access to a service facility or a rail-related service that is linked to an ad hoc path request for an individual train path referred to in Article 48(1) of Directive 2012/34/EU;

**‘late request’** means a request for access to a service facility or a rail-related service submitted after the expiry of a deadline for submitting requests defined by the operator of the facility in question.

## 2. Background

### The legislation

- 2.1. Directive 2012/34/EC was issued in November 2012. It is widely referred to as ‘the Recast’. It was intended to simplify and consolidate the previous directives into a single text. In addition it clarifies certain provisions and tackles certain problem areas identified in the market over the years, including access to rail-related facilities.
- 2.2. The changes made by the Recast are designed to address issues in the EU railway market such as low levels of competition within rail, low levels of public and private investment in railways and inadequate market supervision and regulatory oversight within some EU Member States. It was transposed into GB law by the 2016 Regulations. Similar regulations apply in Northern Ireland.
- 2.3. The Recast also envisaged the use of secondary legislation, including implementing regulations, in some areas to set out particular detailed requirements. The Implementing Regulation relevant to this guidance sets out new rules for operators of service facilities<sup>6</sup>. It was adopted in November 2017 and most provisions apply from 1 June 2019<sup>7</sup>.
- 2.4. The 2016 Regulations and the Implementing Regulation apply alongside the Act. Where the Act applies service providers should follow the established ORR procedures, such as for contesting access to a rail facility.

### Equivalent regulations

- 2.5. The 2016 Regulations do not extend to Northern Ireland and separate regulations apply. Please see our separate guidance<sup>8</sup>. The Implementing Regulation has direct effect in the UK and EU Member States so the references to it in this module are the same as for our guidance in Northern Ireland.
- 2.6. There are additional bi-national regulations set out in the schedule to the Channel Tunnel (International Arrangements) (Charging Framework and Transfer of Economic Regulation Functions) Order 2015 that apply in respect of the UK section of the Channel Tunnel.

---

<sup>6</sup> The Implementing Regulation:

<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32017R2177>

<sup>7</sup> The provisions concerning applying for exemption applied from 1 January 2019.

<sup>8</sup> <http://orr.gov.uk/rail/economic-regulation/northern-ireland-regulation>

## DRAFT

- 2.7. The Department for Transport has produced guidance on the scope of the 2016 Regulations<sup>9</sup>. This guidance should be the starting point in assessing whether the 2016 Regulations affect you.
- 2.8. The Implementing Regulations apply to all service providers covered by the Recast. However, it is possible for certain service facilities to apply to ORR for exemptions from certain provisions.
- 2.9. Please note that, contrary to some common assumptions, facilities that are not owned by an infrastructure manager or public body are not excluded from the legislative requirements -they are within scope.
- 2.10. The Recast Directive allowed member states to exempt certain railway undertakings and networks from certain provisions relating to the access regime. These exemptions are reflected in GB through the 2016 Regulations, specifically through regulation 4. Where a service facility is not subject to the requirements in the 2016 Regulations, the Implementing Regulation will not apply to it. In cases where the service facility is subject to the 2016 Regulations, the Implementing Regulation allows service providers to apply to ORR for individual exemptions. The procedures for doing this are explained below.

## Application

- 2.11. The 2016 Regulations describe entitlements and obligations in respect of access and governance for railway undertakings (as well as service providers and infrastructure managers).
- 2.12. These entitlements and obligations do not apply to railway undertakings whose activities are 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. However where such a railway undertaking 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), the provisions on management independence, separation of accounts and business plans will still apply.
- 2.13. Further, the provisions of the 2016 Regulations relating to:

---

<sup>9</sup> DfT guidance on scope: <https://www.gov.uk/government/publications/recast-first-railway-package-guidance-on-scope-of-2016-transposition-regulations>

## DRAFT

- access to services, independence of service providers, indicative railway infrastructure strategy, business plans, network statement, infrastructure charges, allocation of infrastructure capacity, regulation and appeals; and
- the provisions relating to services to be supplied to railway undertakings, access charging, timetable for the allocation process and accounting information to be supplied to ORR upon request,

do not apply to the following networks:

- local and regional stand-alone networks for passenger services on railway infrastructure;
- networks intended only for the operation of urban or suburban rail passenger services;
- regional networks used for regional freight services solely by a railway undertaking already excluded from the scope of the 2016 Regulations (until such time as capacity is requested by another applicant);
- networks that are used only by the person responsible for that network for the purposes of freight operations connected with the premises or building works, which are:
  - situated within a factory, nuclear site, or site housing electrical plant;
  - within a mine or quarry;
  - used solely in connection with the carrying out of any building works;
  - within a military establishment.

## Exemptions

2.14. Article 2(2) of the Implementing Regulation allows ORR to exempt service providers from certain specified provisions. Article 2(2) states that heritage railway operators may request exemption from the whole of the Implementing Regulation. ORR will consider any applications received on a case by case basis. We will have regard to the criteria set out in the Implementing Regulation and the International Regulators' Group paper on exemptions<sup>10</sup>.

---

<sup>10</sup> Independent Regulators' Group – Rail Subgroup on Access to Service Facilities Common Principles on granting exemptions under Article 2 (2) of Commission Implementing Regulation (EU) 2017/2177  
<https://www.irg-rail.eu/>

2.15. Exemption from the Implementing Regulation **does not** necessarily provide exemption from any of the requirements and obligations under the 2016 Regulations or the Act.

DRAFT

## 3. Provision of information

### Summary

3.1. Transparency of access arrangements and procedures is key to ensuring the basis for non-discriminatory access to service facilities for all railway undertakings, as required by the 2016 Regulations. The Implementing Regulation sets out further detail on information that must be made available, in the form of a service facility description, and on requirements to make this information publicly available.

### Service facility description

3.2. Article 4 of the Implementing Regulation provides that service providers should make available a 'service facility description' for the service facilities and services for which they are responsible. The service facility description must include at least the following information:

- (a) List of all the relevant installations including their locations and opening hours.
- (b) Key contact details of the service provider.
- (c) A description of the technical characteristics.
- (d) A description of all rail-related services supplied in the facility and of their type (basic, additional or ancillary).
- (e) The possibility of self-supply and the conditions to be met for self-supply.
- (f) Information on the procedures for requesting access, with deadlines for submitting the requests and time limits for handling them.
- (g) Information on whether separate requests are needed where there is more than one provider of services.
- (h) Information on the minimum content and format of an access request or a template.
- (i) Model access contracts and general terms and conditions, in particular where service facilities are operated by operators under the direct or indirect control of a controlling entity<sup>11</sup>.

---

<sup>11</sup> Defined in Article 3 of the Implementing Regulation.

## DRAFT

- (j) Information on the terms of use of IT systems, where access to these systems is required, and the rules concerning the protection of sensitive and commercial data.
- (k) A description of the coordination procedure, measures which may be adopted to maximise capacity and any priority criteria.
- (l) Information on changes in technical characteristics and temporary capacity restrictions.
- (m) Information on charges.
- (n) Information on principles of discount schemes offered, respecting commercial confidentiality requirements.

### Publication

- 3.3. Article 5 of the Implementing Regulation provides that service providers must make the service facility descriptions available free of charge through the infrastructure manager's network statement<sup>12</sup>. The service provider can supply the service facility description to the infrastructure manager or provide the infrastructure manager with a link to the service provider's own website. The information must be kept up to date as necessary.
- 3.4. Network Rail has developed a common template that service providers may use.

---

<sup>12</sup> Network Rail's network statement and service provider information is available here: <https://www.networkrail.co.uk/industry-commercial-partners/information-operating-companies/network-statement/>

## 4. Access arrangements

### Introduction

- 4.1. The entitlement of railway undertakings to access railway infrastructure, and service facilities, are set out in regulations 5 and 6 of the 2016 Regulations.
- 4.2. We expect infrastructure managers and service providers to have regard to the principles of transparency, non-discrimination and fair competition in the application of regulations 5 and 6 (as applicable).

### Regulation 5: access rights

- 4.3. Regulation 5(1) applies to railway undertakings operating all types of rail freight services or international passenger services. It gives these railway undertakings rights to access the railway infrastructure (network, station and track) necessary to operate these types of services.
- 4.4. Regulation 5(2) provides that the access rights described in regulation 5(1) include access to railway infrastructure (usually track) connecting the service facilities referred to in paragraph 2 of Schedule 2, which includes refuelling facilities, passenger stations and freight terminals.
- 4.5. Regulation 5(3) provides that the access rights described in regulation 5(1) for the purpose of operating rail freight services include the right of access to railway infrastructure serving, or potentially serving, more than one final customer.
- 4.6. Infrastructure managers must ensure that the entitlements to access provided by regulation 5 are honoured. There is no provision in regulation 5 which enables an infrastructure manager to refuse a request for access made under that regulation.
- 4.7. Access rights in respect of railway undertakings operating international passenger services are also subject to regulation 33 (*Regulatory decisions concerning international passenger services*).
- 4.8. Where requested by a competent authority or interested railway undertaking, we must determine whether the principal purpose of a service is to carry passengers between stations located in different member states in accordance with the process set out in regulation 33. An ORR decision on the 'principal purpose' is binding on all parties affected by that decision.
- 4.9. A railway undertaking has a right to appeal to ORR under regulation 32 if it is denied the entitlements conferred on it under regulation 5.

## Regulation 6(1): Minimum access package

- 4.10. Regulation 6(1) requires infrastructure managers to supply to all railway undertakings the minimum access package in a non-discriminatory manner. The minimum access package is set out in paragraph 1 of Schedule 2. It is primarily concerned with access to track and the infrastructure around track, including power supplies and signalling.
- 4.11. To clarify the interaction between regulation 5(1) and regulation 6(1), we have set out below our view on the application of these regulations.
- 4.12. While regulation 5(1) and regulation 6(1) both give rights of access to railway undertakings, regulation 5(1) applies only to railway undertakings seeking access for the purpose of operating freight services and international passenger services. Regulation 6(1) applies to all railway undertakings, including those seeking access for the purpose of operating domestic passenger services.
- 4.13. We would therefore expect railway undertakings seeking access rights for freight services and international passenger services to rely on regulation 5(1) for access to railway infrastructure while all railway undertakings that are seeking rights of access in accordance with the minimum access package should rely on regulation 6(1).
- 4.14. A railway undertaking has a right to appeal to ORR under regulation 32 if it is denied the entitlements conferred on it under regulation 6(1).

## Regulation 6: Access to services

- 4.15. Regulations 6(2) to 6(12) deal with access to, and the supply of, services for railway undertakings. Service providers are required to supply access to all railway undertakings. This includes track access, and access to service facilities and the supply of services described in paragraph 2 of Schedule 2. This includes refuelling, stations, marshalling yards, sidings and freight terminals.
- 4.16. Service providers must supply access to services to all railway undertakings (including those operating freight and international passenger services) who are seeking access to service facilities and the supply of services (including the supply of services at ports and terminals).
- 4.17. Requests for access to, and the supply of, services must be answered within a reasonable time limit as set by ORR<sup>13</sup>. In our view a reasonable time limit is, as a general rule, ten working days, commencing on the first working day after the request has been made. However, where there is a short-notice request (such as ad hoc

---

<sup>13</sup> Regulation 6(3).

requests for unplanned access), we would expect service providers to deal with such requests within a shorter timescale where it is reasonable to do so. We do not, however, intend to set a separate time limit for short-notice requests at this point in time.

- 4.18. Under regulation 6, only railway undertakings (and not applicants more widely) are entitled to be supplied the minimum access package and to request access to, and supply of, services described in paragraph 2 of Schedule 2.
- 4.19. The 2016 Regulations require a service provider to justify, in writing, a decision to refuse a request for access to, and the supply of, services in specified situations. However, we expect all service providers to ensure refusals for any of the services referred to in paragraph 2 of Schedule 2 are in writing and fully reasoned and objectively justified. Therefore, whenever a service provider is refusing access, we expect the service provider to explain why it is refusing access and, where applicable, why it considers the alternative facility it has identified is a viable alternative for the railway undertaking. This is because all such decisions are appealable and may be subject to ORR scrutiny in due course.

## **Non-conflicting requests for access to services**

- 4.20. A non-conflicting request is one where the request does not conflict either with requests from other railway undertakings or with capacity at the facility which has already been allocated to another railway undertaking. Regulation 6(4) provides that a request for access to, and the supply of, any of the services described in paragraph 2 of Schedule 2, 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.
- 4.21. When considering viable alternatives, the process we would generally expect to be followed (in article 12 of the Implementing Regulation) is set out below.
- 4.22. The provisions of regulation 6(4) do not, however, require the service provider to make investments in resources or facilities in order to accommodate all requests by railway undertakings for access to, and the supply of, services. Accordingly where there is a non-conflicting request which would require such investment, we consider that a service provider may refuse a request without having to consider if a viable alternative exists.
- 4.23. The flowchart at Annex C sets out the indicative process and steps a service provider should follow when considering non-conflicting requests for access to services. It does not, however, cover every eventuality or circumstance and it is for the service

provider to ensure it complies with the legal requirements under the 2016 Regulations and the Implementing Regulation.

## Conflicting requests for access to services (including conflict with allocated capacity)

4.24. Regulations 6(7) and 6(8) and articles 10 to 11 of the Implementing Regulation set out the process that should be followed where a service provider receives a request for access to a service facility (or supply of a service), described in paragraph 2 of Schedule 2, which conflicts with another request or with service facility capacity which is already allocated. We refer to these as conflicting requests.

4.25. Regulations 6(4) and 6(5) apply to conflicting requests as well as non-conflicting requests. In other words, requests may only be refused where there is a viable alternative, but this does not require the service provider to make investments in resources or facilities in order to accommodate all requests. However, for conflicting requests, there are also a number of other provisions to consider.

4.26. Regulation 6(7) provides that where there are conflicting requests, the service provider must attempt to meet all requests in so far as possible. Article 10 of the Implementing Regulation builds on this by requiring the service provider to complete a coordination procedure as a first step, to attempt to remove the conflict through agreement with affected parties.

### Stage 1

4.27. Stage 1 – the Coordination Procedure is described in this text box:

#### ***Stage 1 - The Coordination Procedure:***

- The service provider must attempt to ensure the best possible matching of all requests and meet all requests in so far as possible . This should be achieved through discussion and coordination with the relevant railway undertakings.
- Where the request conflicts with capacity that has already been allocated at the service facility and would involve modifying access rights which have already been granted, the service provider must get agreement of

---

<sup>14</sup> See article 10(1) of the Implementing Regulation, which requires the service provider to ensure the best possible matching of all requests and regulations 6(7) and 6(8) of the 2016 Regulations, which requires a service provider to attempt to meet all requests in so far as possible and to seek to accommodate all requests for capacity on the basis of demonstrated need.

the railway undertaking affected before making any modifications (and obtain any required regulatory approval).<sup>15</sup>

- Where the railway undertaking has requested access to, or the supply of, services set out in paragraphs 3 and 4 of Schedule 2 and those services are offered in the service facility, the Coordination Procedure must also include the providers of those services.<sup>16</sup>
- The Coordination Procedure should include consideration by the service provider of different options enabling it to accommodate the conflicting requests. These options must, when necessary, include measures to maximise the capacity available in the service facility to the extent they do not require additional investment in resources or facilities, such as:
  - proposing alternative timing;
  - changing opening hours or shift patterns, where possible; and
  - allowing access to the facility for self-supply of services, where self-supply is legally and technically feasible.

4.28. Article 10(2) of the Implementing Regulation provides that if capacity is available that matches the needs of the railway undertaking or the service provider expects such capacity to become available during or following the Coordination Procedure, the service provider must not reject those requests for access nor indicate to the railway undertaking viable alternatives<sup>17</sup>. This means that, where capacity is expected to be available within this timeframe which will meet an undertaking's needs, the service provider must not pre-empt the outcome of the Coordination Procedure but must complete the Coordination Procedure to attempt to resolve any conflict with affected parties.

## Stage 2 – Deciding upon the request(s):

4.29. If the Coordination Procedure does not lead to a resolution which accommodates all requests in a manner agreed with all parties, the service provider must consider the process for the rejection of requests (or restricting access requested) without the agreement of the undertaking.

4.30. This would include where the conflict remains between two or more requests or between a request and capacity allocated (where all requests could not be

<sup>15</sup> See regulations 6(7) and 6(8) of the 2016 Regulations and article 10(1) of the Implementing Regulation.

<sup>16</sup> See article 10(1) of the Implementing Regulation.

<sup>17</sup> See article 10(2) of the Implementing Regulation.

accommodated without additional investment in resources of facilities). It would also include where railway undertakings agree on changes which would resolve the conflict, but where the service provider nevertheless considers that there might be a viable alternative (which would entitle it to reject the request).

4.31. In considering which requests it might reject from different railway undertakings, the service provider must take into account the demonstrated needs of the applicable railway undertakings.

4.32. Article 11 of the Implementing Regulation provides that the service provider may determine priority criteria to allocate capacity, although it does not make the adoption of priority criteria mandatory.

**Priority Criteria:**

- Any priority criteria must be non-discriminatory and objective and published in the service facility description. In addition, such priority criteria must also take into account:
  - the purpose of the service facility;
  - the purpose and nature of the railway transport services concerned; and
  - the objective of securing an efficient use of available capacity.
- Priority criteria may also take into account the following aspects, as determined by the service provider:
  - existing contracts;
  - the intention and ability to use the capacity requested, including previous failure, if any, to use all or part of allocated capacity and the reasons for that failure;
  - already allocated train paths linked to the requested services;
  - priority criteria for allocation of train paths;
  - timely submission of requests.

4.33. Where, having been through the Coordination Procedure and, having considered demonstrated needs (and, where applicable, through the application of priority criteria) the service provider proposes to reject a request, the service provider must

## DRAFT

inform the railway undertaking without undue delay before going on to consider viable alternatives. If requested by ORR, it must also promptly inform ORR of its decision.<sup>18</sup>

- 4.34. The Implementing Regulation has broadened the requirements for a service provider to consider viable alternatives. Article 12(1) of the Implementing Regulation requires the service provider to consider whether there is a viable alternative facility whenever the service provider proposes to refuse a request, even where the basis for a refusal is a conflict and the need to make additional investment. However, in such cases the Implementing Regulation does provide that the service provider is not required to indicate viable alternatives where the railway undertaking in question has asked it not to<sup>19</sup>.
- 4.35. The process for considering viable alternatives is set out [below](#).
- 4.36. Where the service provider refuses a request, or grants a request subject to restrictions, as noted above we expect the decision to be in writing and fully reasoned and objectively justified.
- 4.37. We note that the Implementing Regulation provides that where a railway undertaking has requested the service provider does not indicate viable alternatives or proceed to the joint assessment, the service provider may refuse the request and does not have to provide its decision in writing. However, even where the railway undertaking has made such a request, we would generally expect the service provider to still explain its decision in writing. The decision should set out why the request has not been accommodated following the Coordination Procedure, including setting out any viable alternatives which are considered to exist (if this is the basis for the request not being accommodated). This is because the decision may still be subject to an appeal.
- 4.38. The flowchart at Annex C sets out the indicative process and steps that a service provider should follow when considering conflicting requests for access to services. It does not, however, cover every eventuality or circumstance and it is for the service provider to ensure it complies with the legal requirements under the 2016 Regulations and the Implementing Regulation.

### Constrained capacity

- 4.39. Where capacity at a service facility is constrained, we do not consider that the 2016 Regulations create an obligation on the service provider to substitute the railway undertaking's services for its own or for those of an existing or planned future user.

---

<sup>18</sup> See article 12(1) of the Implementing Regulation.

<sup>19</sup> See article 12(5) of the Implementing Regulation.

However, where a service provider considers that it has constrained capacity we would expect it to:

- provide a fully reasoned and objectively justified case explaining the nature of the capacity constraints;
- demonstrate that it has organised its business in a manner that maximises the available capacity of its service facilities; and
- demonstrate that it has examined all options for accommodating the requests.

4.40. We note that where, following the Coordination Procedure described above, requests cannot be accommodated and the service facility is close to congestion, ORR may request that the service provider takes measures aimed at enabling the accommodation of additional requests for access<sup>20</sup>. Such measures shall be transparent and non-discriminatory. ORR will only make requests that are reasonable in all the circumstances, normally after consultation with the service provider.

## Viabale alternative

4.41. The requirement to consider whether there is a ‘viable alternative’ when refusing a request for access only applies to requests for access to, and the supply of, services described in paragraph 2 of Schedule 2.

## The definition of ‘viable alternative’

4.42. ‘Viable alternative’ is defined in the 2016 Regulations as “...*access to another service facility which is economically acceptable to the railway undertaking, and allows it to operate the freight or passenger services concerned*”. The viable alternative must therefore be available to rail. There are two limbs to the definition and an alternative will only be a viable alternative where both limbs are satisfied.

4.43. The first limb is that the service facility must be economically acceptable to the railway undertaking:

- We will expect a railway undertaking to have specified precisely its requirements for access into a particular facility and the supply of services it requires. This information will enable the service provider to take a view on the relevant downstream service facilities against which services of viable alternative facilities can be tested.
- The commercial assessment for determining whether a service facility is a viable alternative needs to include consideration of all relevant costs and not

---

<sup>20</sup> See article 10(5) of the Implementing Regulation.

## DRAFT

just the price for accessing the alternative service facility. Wherever possible, it should include an assessment of the impact on the railway undertaking's operational costs and the profitability of the envisaged services<sup>21</sup>.

- If use of another service facility was certain to impose a material increase in the railway undertaking's costs, such that the railway undertaking could no longer operate the traffic at a competitive price, then that service facility would not be a viable alternative.

4.44. The second limb is that the service facility must allow the railway undertaking to operate the freight or passenger services concerned:

- An important starting point for a service provider making the case for a viable alternative will be for it to consider whether any alternative sites are operationally or logistically capable of replicating the amenity offered by the service facility to which access is being refused.
- This should involve consideration of the physical and technical characteristics of the facility (such as location, means of access, length of track and electrification), the operational characteristics of the facility (such as opening hours, capacity, driver training requirements and the type of services offered) and the attractiveness and competitiveness of the services (such as routing, transport connections and transportation time).
- We recognise that there may be instances where there are alternative service facilities that meet all the criteria required by the railway undertaking but where a request for access at those facilities may nevertheless not be granted. Previous refusals of access could be taken as an indication that this option may not be a viable alternative.
- Under some circumstances self-supply by the railway undertaking could be regarded as a viable alternative. This would need to be considered relative to the scale of the access requested and the capital costs involved for self-supply. We expect that it would only be where the costs were low or the scale of access represented a significant proportion of the total capacity at the service facility in question that self-supply is likely to be a viable alternative.

4.45. It is important to note that a service provider will require a robust rationale for stating that another facility is a viable alternative, having considered the above issues in detail. The Implementing Regulation recognises that many service facilities cannot

---

<sup>21</sup> See Recital 16 of the Implementing Regulation

be easily duplicated, given the significant investment involved and the limitations on where such facilities can be constructed.

## The process for considering viable alternatives

- 4.46. The Implementing Regulation sets out a process for the applicant and the service provider to jointly assess whether there are viable alternatives. This process is explained below. Although the process is set out to apply wherever the service provider proposes to reject a request or restrict access following the coordination procedure (applicable to conflicting requests), we expect the service provider to take all reasonable steps to conduct a joint assessment wherever it is required to consider viable alternatives (including where there is a non-conflicting request).
- 4.47. The viable alternative assessment will involve the service provider indicating possible alternatives (which may include possible alternatives in other Member States where relevant) on the basis of:
- other service facility descriptions;
  - information published on a common web portal; and
  - any information provided by the railway undertaking.
- 4.48. We expect the railway undertaking to provide a detailed and precise description of its needs when making a request for access, including detailing requirements for access and for the supply of services (including around operational characteristics) and any geographical requirements. However, the railway undertaking is not required to disclose its business strategy and the service provider must respect the commercial confidentiality of the information provided.
- 4.49. When proposing possible alternatives, the service provider must take into account, as a minimum, the following criteria to the extent that they can be assessed by the service provider:
- substitutability of operational characteristics of the alternative service facility;
  - substitutability of physical and technical characteristics of the alternative service facility;
  - clear impact on attractiveness and competitiveness of the railway transport service envisaged by the railway undertaking;
  - estimated additional cost for the railway undertaking.

4.50. Where information on the capacity of the proposed alternative is not publicly available, the railway undertaking must verify it.

4.51. Once it has been provided with the possible alternatives, it is then the railway undertaking's role to assess whether using the proposed alternatives will allow it to operate the envisaged transport service under economically acceptable conditions. It should then inform the service provider of the outcome of its assessment within a jointly agreed deadline.

4.52. Following the joint assessment:

- It may be that the service provider and railway undertaking have jointly identified viable alternatives, in which case this provides a reason for refusing the request.
- Where the service provider and railway undertaking conclude that no viable alternative exists, provided it is not possible for the request to be accommodated without additional investment, the service provider may refuse the request. Whether or not additional investment would be required could be the subject of an appeal to ORR.
- If the service provider and railway undertaking do not agree on a viable alternative, the service provider may refuse the request indicating the alternatives it considers to be viable. Whether or not there is actually a viable alternative could be the subject of an appeal to ORR.

4.53. If the railway undertaking requests the service provider not to proceed to joint assessment and the service provider is rejecting a request on the basis that there is a viable alternative, we expect the service provider to have made a robust assessment with the information it has from the railway undertaking and other information which is available. However, we would not expect a railway undertaking to make such a request if this is a likely basis for rejection. If the issue of whether or not there is a viable alternative is to determine whether or not a request is accepted or rejected, we would expect the railway undertaking to engage fully with any joint assessment and to cooperate with the service provider as the issue of viable alternatives is considered. (A failure to do so might prejudice the railway undertaking's position in any subsequent appeal.)

4.54. The flowchart at Annex D sets out the indicative process and steps in considering the assessment of viable alternatives. It does not, however, cover every eventuality or circumstance and it is for the service provider to ensure it complies with the legal requirements under the 2016 Regulations and the Implementing Regulation.

## DRAFT

- 4.55. A railway undertaking may bring an appeal concerning the entitlements to access conferred on it by regulation 5 and/or regulation 6. The process and procedure that the railway undertaking must follow for bringing an access appeal will depend on whether or not the matter of the appeal is one in relation to which directions may be sought from ORR under section 17 or 22A of the Act.
- 4.56. If the matter is one to which the Act applies, a railway undertaking must lodge its appeal by way of an application under the Act and not the 2016 Regulations. We have separate guidance on making an appeal pursuant to section 17 or 22A of the Act *Making an application*<sup>22</sup>. For other appeals under the 2016 Regulations see our module *Access and Management Regulations: appeals*.
- 4.57. If the matter is one to which the Act does not apply then the railway undertaking must lodge its appeal under the 2016 Regulations. An appeal will fall outside the scope of section 17 or 22A of the Act where:
- the railway facility to which the appeal relates has been exempted under section 20 of the Act;
  - the appeal relates to a rail link facility (as defined under the 2016 Regulations); or
  - the subject matter of the appeal is not within scope of directions which may be sought under sections 17 or 22A of the Act.
- 4.58. Where a railway undertaking brings an appeal concerning its entitlements to access under regulation 5 and/or regulation 6, we would expect the appeal application to include, at a minimum, the following information:
- A detailed list of the access being sought (for example time slots, name of the terminal, port or service to which access is sought, duration, type of rolling stock, commercial terms, if any).
  - An explanation as to why access is needed.
  - Confirmation that the railway undertaking holds, or is likely to obtain, access rights on the connecting network.
  - An explanation of why the service provider is competent to supply the level of access or type of services being sought.

---

<sup>22</sup> <http://orr.gov.uk/rail/access-to-the-network/track-access/guidance> Making an application

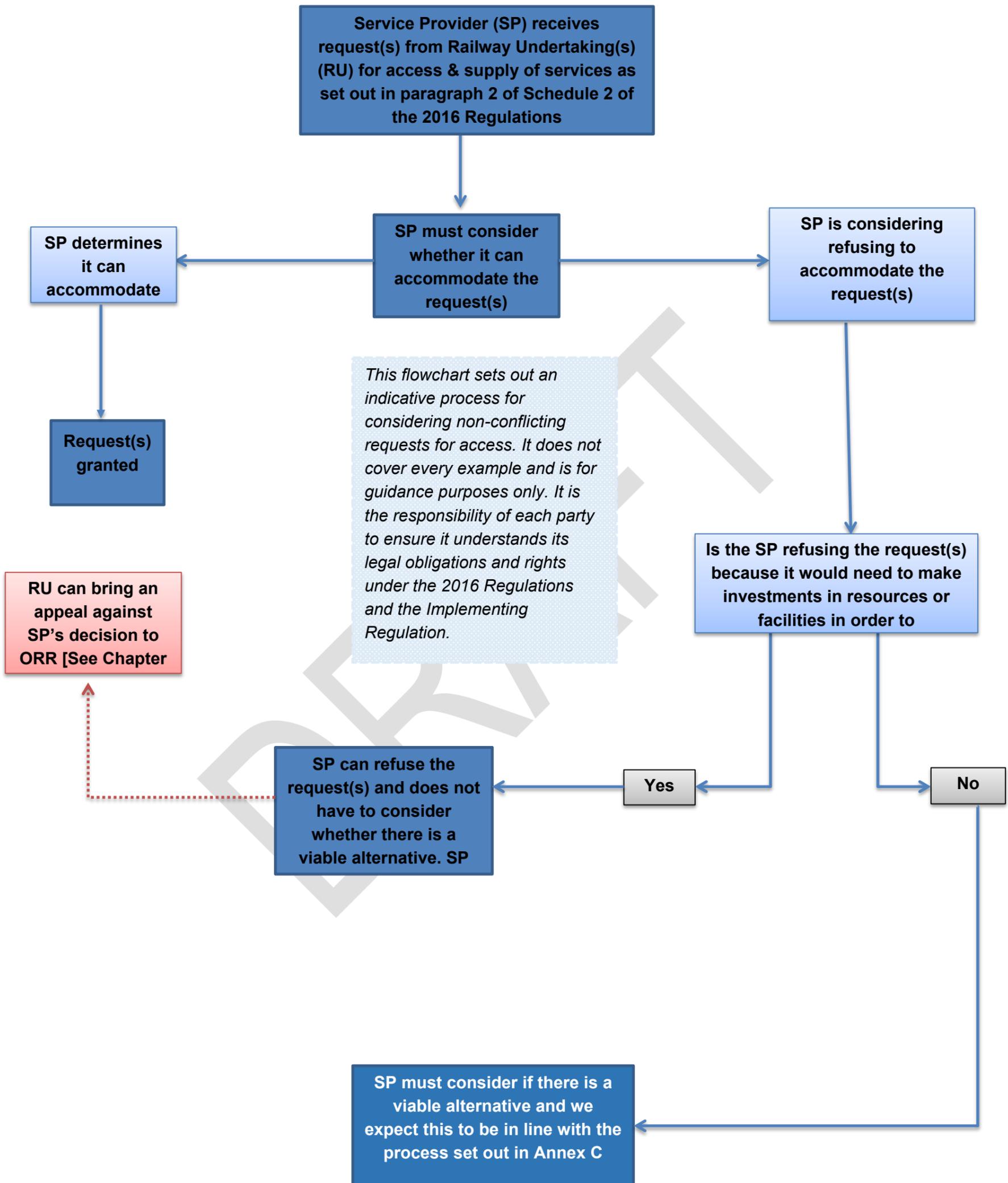
## DRAFT

- Where applicable, why it considers that an alternative facility suggested by the service provider is not a viable alternative.

4.59. We would expect the service provider to provide relevant information in its written response to the appeal, for example:

- Detailed reasons as to why access has been refused or granted subject to restrictions.
- Detailed reasons as to why it considers it would have to make investments in resources or facilities or any relevant capacity issues (including known capacity constraints on connecting networks) it considers might affect its ability to accommodate requests.
- Details of any viable alternatives that could be used to supply the required services, with an explanation as to why they are considered suitable and supporting evidence, where applicable.
- Any restrictions on access it has proposed (where applicable), with an explanation as to why they are fair, reasonable, proportionate and objectively justifiable.
- Whether there are any other affected parties and the impact on them of the request for access.

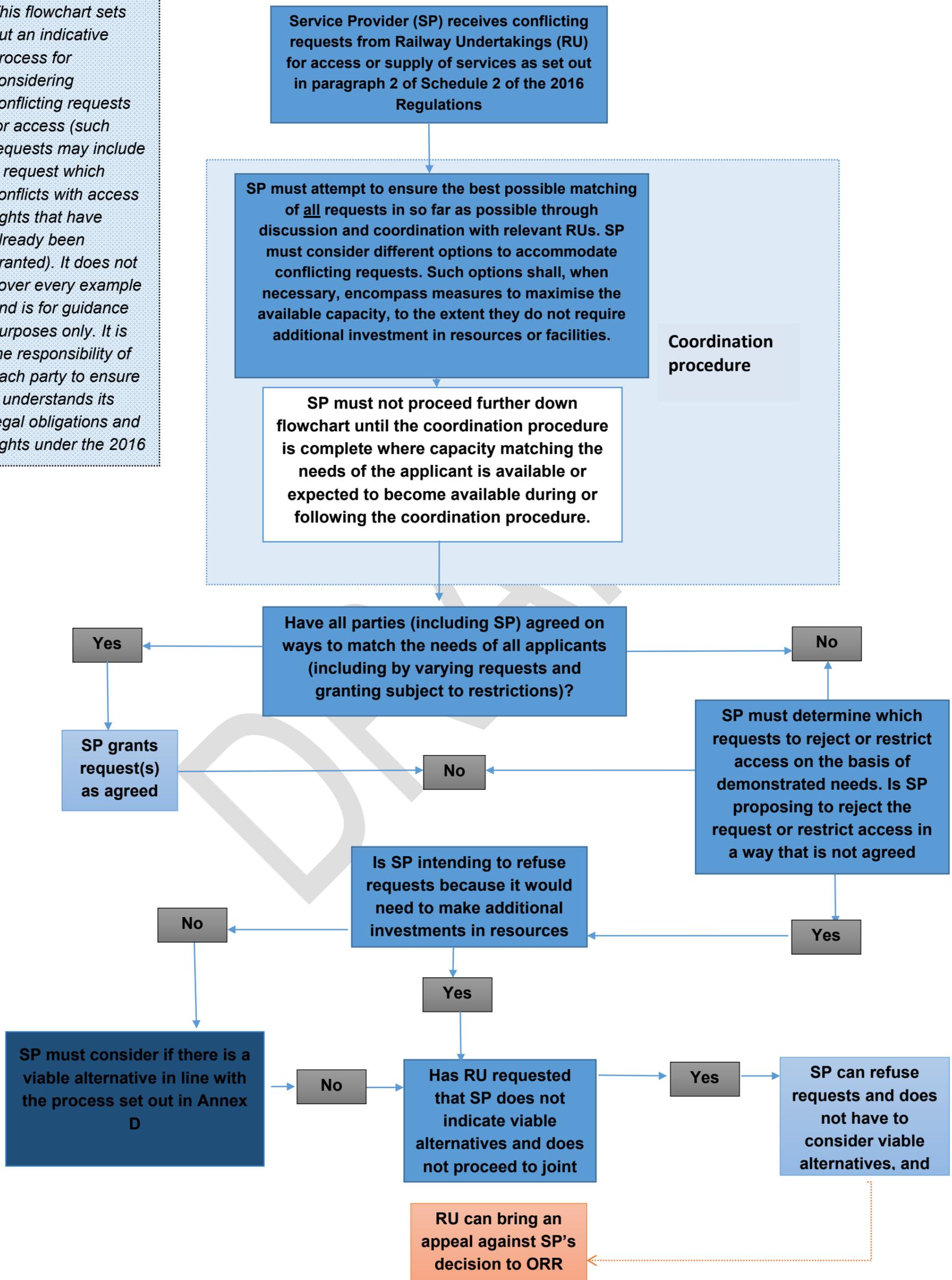
Annex B: Non-conflicting requests for access to, and the supply of, services



Key - SP: service provider RU: railway undertaking

## Annex C: Conflicting requests for access to, and the supply of, services

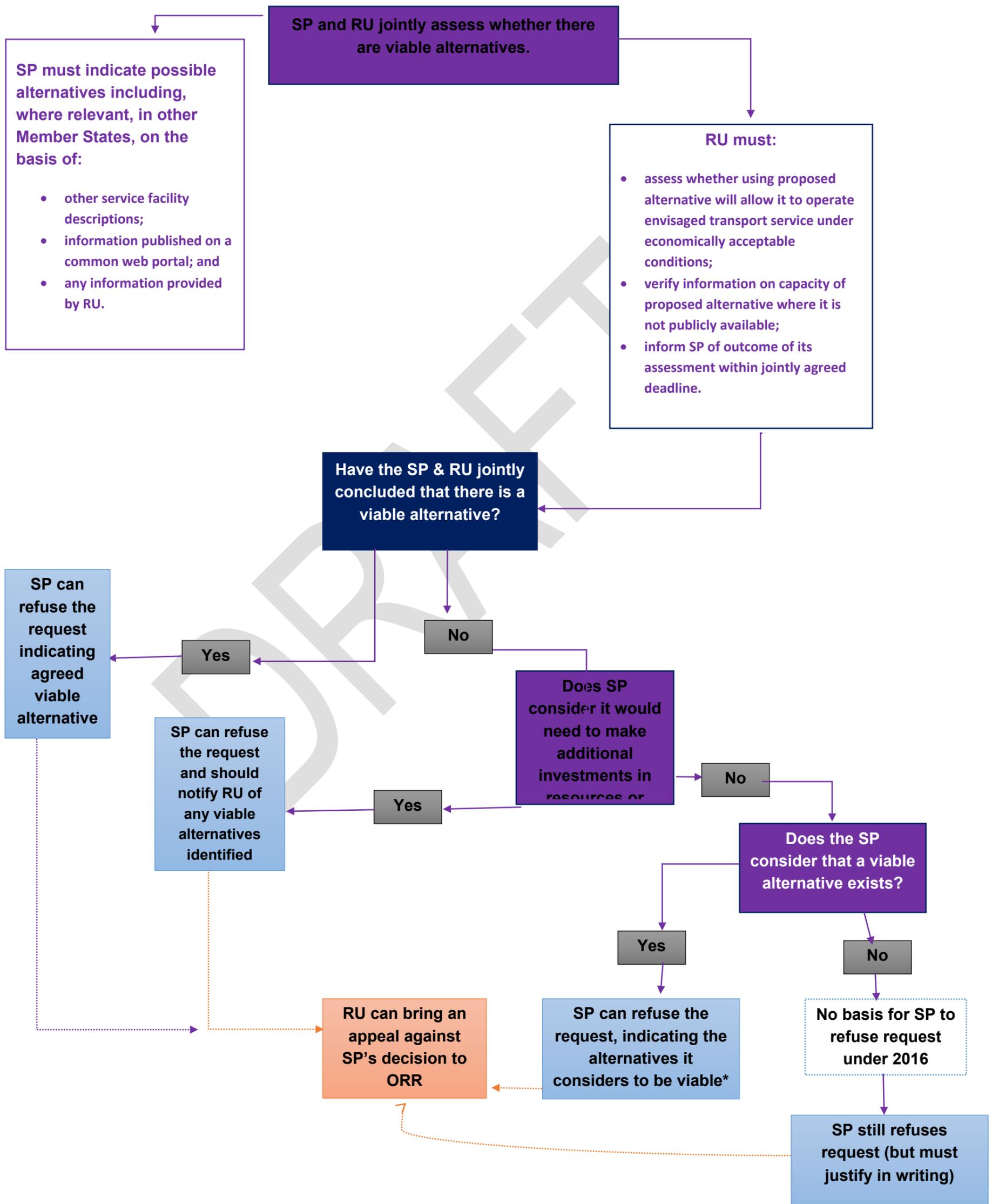
*This flowchart sets out an indicative process for considering conflicting requests for access (such requests may include a request which conflicts with access rights that have already been granted). It does not cover every example and is for guidance purposes only. It is the responsibility of each party to ensure it understands its legal obligations and rights under the 2016*



Key - SP: service provider RU: railway undertaking

## Annex D: Viable Alternatives

Note: Viable alternative must allow the RU(s) to operate the relevant freight or passenger service on the same or alternative routes under economically acceptable conditions.



## 5. Service facility charges

### Introduction

5.1. This chapter covers the requirements of the 2016 Regulations with regard to charges made by service providers for access to, and the supply of, services referred to in paragraph 2 of Schedule 2. It also covers performance schemes and reservation charges.

### Charges for services

5.2. The charging requirements at service facilities for services referred to in paragraph 2 of Schedule 2 apply to 'service providers'. This could include infrastructure managers in respect of their role as operators of service facilities, as well as those who only provide services and are not also infrastructure managers.

5.3. Paragraph 1(6) of Schedule 3 of the 2016 Regulations requires that the charge imposed for track access and the supply of services within these service facilities must not exceed the cost of providing it, plus '*a reasonable profit*'. We expect the service provider to be able to demonstrate how charges reflect the cost of providing access to its service facilities and/or the supply of services within those facilities, if requested.

5.4. If the additional or ancillary services referred to in paragraphs 3 and 4 of Schedule 2 are offered by only one service provider, the charge for the supply of those services must also not exceed the cost of providing the service, plus a reasonable profit.

5.5. Service providers may publish their charges in different ways, but we expect them to be open and transparent about charges for services. Service providers should list the services provided and include their charges methodology either as a set rate of tariffs (where appropriate) or as a list of the criteria that may affect the charges. Where services are provided using a list of charges, that list should be easily accessible on a website (usually the service provider's website or in the infrastructure manager's network statement). We expect the list of charges, or charging criteria, to follow the principles set out in the 2016 Regulations and to reflect the breakdown of services provided as set out in Schedule 2.

5.6. If a service provider publishes a set of charging criteria, it is not necessary for the service provider to publish detailed figures used to calculate the charges themselves. However, should a railway undertaking seek clarification around charges then it is the responsibility of the service provider to make available the breakdown of charges in a transparent manner.

5.7. In all circumstances we expect service providers to be clear about what criteria may affect the calculation of charges. For example, the following features of a request for access to, and the supply of, services are likely to impact on the calculation of the charge:

- type of facility needed;
- length of stay;
- time of day;
- refuelling;
- cleaning or other light maintenance services required;
- any charges for electricity and other items such as telecommunications which are required; and
- technical inspections and specialised maintenance which may be necessary.

5.8. The service provider must be able to demonstrate to a railway undertaking that any fees invoiced to it for the use of the service facility comply with the published criteria and, where applicable, tariffs. We expect service providers to answer all reasonable requests for access or charging information.

## 6. Unused facilities

- 6.1. Regulation 6 of the 2016 Regulations sets requirements for unused facilities to be made available for lease or rent. Article 15 of the Implementing Regulation adds detail.
- 6.2. Under regulation 6(9) of the 2016 Regulations, where a relevant service facility<sup>23</sup>:
- (a) has not been in use for at least two consecutive years<sup>24</sup>, and
  - (b) 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 offer the operation of the service facility, or part of it, for lease as a rail service facility, and publicise this offer.
- 6.3. The obligation does not, however, arise if the service provider can demonstrate that on-going redevelopment work ('a reconversion process') reasonably prevents the use of the service facility by any railway undertaking. Under article 15(6) the owner must inform ORR of the reconversion process. ORR may request substantiation and if that is unsatisfactory, ORR may require that the facility, either in whole or in part, is available for lease or rent.
- 6.4. Under article 15(7) the owner of a service facility must publicise on its website a notice on the availability of that facility for lease or rent. The notice must contain all the necessary information to enable interested undertakings to submit an offer to take over operation of the facility in whole, or in part. That information must include certain information as specified in article 15(7). It must also inform ORR<sup>25</sup> and the relevant infrastructure manager.
- 6.5. Where a railway undertaking expresses an interest in such a service facility, we recommend that it makes an application for track access in parallel. This is to ensure that where access has been granted to the service facility, railway vehicles can be accepted on and off the network promptly.
- 6.6. In particular, any applicant interested in using a facility which has not been in use for two years must express its interest in writing, demonstrating the needs of the railway undertaking concerned.

---

<sup>23</sup> Service facilities described in paragraph 2 of Schedule 2 of *The Railways (Access, Management and Licensing of Railway Undertakings) Regulations 2016* (the 2016 Regulations).

<sup>24</sup> According to Article 15(2) of the Implementing Regulation, the 2 year period shall start on the day following the day on which a rail-related service was supplied in the service facility concerned for the last time.

<sup>25</sup> [Track.access@orr.gsi.gov.uk](mailto:Track.access@orr.gsi.gov.uk)

## DRAFT

- 6.7. Article 15 states that the service provider may then decide to resume operations in the facility, in a way that satisfies the railway undertaking's demonstrated needs.
- 6.8. Where the service provider is required to offer the operation of the facility for lease, a notice of the offer (including all necessary information) must be published on the website and sent to the relevant infrastructure manager and ORR. The notice must in particular include details of the selection procedure<sup>26</sup>, selection criteria, the main characteristics of the technical equipment of the service facility and the address and time limit for the submission of tenders<sup>27</sup>.
- 6.9. The Implementing Regulation also sets out some specific requirements which will apply where an expression of interest is received where the owner of the facility is not also the service provider<sup>28</sup>.



This publication is licensed under the terms of the Open Government Licence v3.0 except where otherwise stated. To view this licence, visit [nationalarchives.gov.uk/doc/open-government-licence/version/3](http://nationalarchives.gov.uk/doc/open-government-licence/version/3).

Where we have identified any third party copyright information you will need to obtain permission from the copyright holders concerned.

This publication is available at [orr.gov.uk](http://orr.gov.uk)

Any enquiries regarding this publication should be sent to us at [orr.gov.uk](http://orr.gov.uk)

---

<sup>26</sup> The selection procedure must be transparent, non-discriminatory and take into account the objective of ensuring an optimum effective use of the capacity at the facility.

<sup>27</sup> The time limit must be at least 30 days after publication of the notice.

<sup>28</sup> Articles 15(4)-15(6).