

Guidance on the scope of the Recast First Rail Package Transposition Regulations (The Railways (Access, Management and Licensing of Railway Undertakings) Regulations 2016)

This Document provides guidance only and sets out how the Department intends the Regulations to be interpreted. The Department for Transport cannot, however, provide legal advice as to the application of the Regulations in specific circumstances. Such matters will be for the ORR to determine on appeal in the first instance, and ultimately for the courts. Where further clarification is sought, readers should seek their own legal advice.

Introduction

1. The Department for Transport (“the Department”) has transposed the requirements of Directive 2012/34/EU (“the Directive”) in one set of Regulations – the Railways (Access, Management and Licensing of Railway Undertakings) Regulations 2016 (S.I. 2016/645) (“the Regulations”). The Directive predominantly consolidates the “Initial EU Rail Directives” (i.e. Directives 91/440/EEC¹, 95/18/EC² and 2001/14/EC³) and the various subsequent amending directives. It also harmonises terminology and eliminates the need to cross refer to different directives. In addition it clarifies and strengthens some substantive provisions. As consolidated, the Directive requires Member States to open up access to the entire rail network to international passenger traffic and rail freight. This includes access to service facilities, such as stations, freight terminals and marshalling yards, and to the services supplied in those facilities.

2. The Regulations replace (and therefore revoke) in their entirety the Railways Infrastructure (Access and Management) Regulations 2005 (S.I. 2005/3049) (as amended) (the “2005 Access and Management Regulations”); these were the regulations previously implementing Directives 91/440/EEC and 2001/14/EC and subsequent amending directives. The present Regulations, however, only make amendments to the Railway (Licensing of Railway Undertakings) Regulations 2005 (S.I. 2005/3050) (the “2005 Licensing Regulations”), which implemented 95/18/EC.

3. The European Commission’s policy objectives underlying the Directive are as follows:

- foster non-discriminatory access to rail services to increase competition within the rail sector;
- decrease the cost of rail passenger and freight transport to increase rail's attractiveness and mode share;
- facilitate international rail flows by enhancing cross international border co-operation;
- improve the efficiency of Member State railways through modernisation and the removal of bottlenecks; and

¹ OJ L 237, 24.8.1991, p. 25

² OJ L 143, 27.6.1995, p. 70

³ OJ L 75, 15.3.2001, p. 29

- enhance the competencies, independence and powers of national rail regulatory bodies to improve their ability to take action on problems where they exist.

4. The Department's aim in transposing the Directive has been on the one hand to implement properly the requirements of the Directive whilst on the other to minimise the impact on existing legislation. In addition, our broad policy intentions for transposition have been to make full use of the derogations. However, the wording and nature of the derogations in the Directive are not wholly transferable to GB and have had to be adapted to reflect the nature of the privatised GB rail network. In addition, specification of the railway undertakings and networks which are exempt in the Regulations would be likely to necessitate regular amending legislation to bring in or remove networks or railway undertakings from scope as the railway evolves over time. This, in our view, would in the medium to long term lead to unnecessary bureaucracy, as well as confusion and uncertainty as to the status of various networks and types of operation.

5. The Directive permits Member States to choose to exclude certain networks from certain provisions, and therefore the Regulations exclude networks such as those owned by MoD, nuclear facilities and facilities whose primary purpose is not directly connected with the provision of rail services, for example, networks into mines, generating stations or factory sites. Furthermore, the Directive excludes certain railway undertakings from the scope of various management provisions such as those concerning separation of accounts and independence of essential functions (see paragraphs 13 and 17 below).

6. The position is complex because the exclusions permitted by the Directive (both the optional exclusions for various networks, and the exclusion of certain railway undertakings from various management functions) apply in respect of different parts of the Directive, depending on the nature of the undertaking or network which is being excluded.

7. The Regulations therefore need to address a complex regulatory situation. They mirror the language of the Directive in describing what falls within or outside scope and do not identify by name the undertakings or networks that may fall outside the scope of the Regulations. The Department believes it may be helpful to illustrate the practical effect of the exclusions from scope through this guidance. It is possible that some of the railway undertakings or networks listed in the guidance could be excluded under a number of exclusion provisions. The ones listed appear to the Department to most accurately reflect the current position, but that position may change as the railway develops over time.

Licensing Provisions

8. The Department has chosen to amend rather than consolidate the existing Railway (Licensing of Railway Undertakings) Regulations 2005 ("the 2005 Licensing Regulations") in order to transpose the provisions of the Directive which relate to licensing.

9. Subject to the scope for exemptions referred to below (see paragraphs 10 and 11), the licensing provisions of the Directive apply to all passenger and freight train railway undertakings operating in GB, as well as to the operators of international passenger and freight services. They do not apply to undertakings whose only operations are shuttle services to transport road vehicles through the Channel Tunnel. As railway undertakings which wish to avail themselves of the open access provisions in the Directive have to be licensed, most railway undertakings which fall within the scope of the access provisions will also be affected by the licensing provisions.

10. The Directive allows Member States to exclude certain categories of undertakings from the scope of the licensing requirements, and the 2005 Licensing Regulations as now amended reflect the Department's policy to apply all available exclusions.

11. Regulation 4 of the 2005 Licensing Regulations therefore excludes undertakings whose activities are limited to providing:

- passenger services on local and regional stand-alone infrastructure, for example, heritage railways and Island Line. The Department's interpretation of "stand-alone" is that it applies to railways which are functionally separate from either the main networks operated by Network Rail or HS1. This means that the exemption will apply in circumstances where the relevant infrastructure is intended primarily for a specific service – either local or regional – rather than for those services which are primarily national services operating on the mainline network;
- urban or suburban passenger services, for example London Underground, Docklands Light Railway, Merseyrail and Nexus – the Tyne and Wear metro. In the Department's view, this would not exclude from the provisions of these Regulations the operation of any passenger service which runs primarily on Network Rail's infrastructure (those who normally operate as part of a wider geographical franchise such as South West Trains, Northern Rail etc.) or indeed HS1;
- regional rail freight networks and services. As far as we are aware, there are no distinct regional freight networks in GB;
- freight services using privately owned infrastructure dedicated for the owner's use; or
- shuttle services for road vehicles through the Channel Tunnel.

12. Those railway undertakings whose activities are excluded from the scope of the 2005 Licensing Regulations still fall within the scope of the 1993 Railways Act (so London Underground Ltd, for example, is licensed under that Act). However, those undertakings which have exemptions from the licensing provisions of the 1993 Act will continue to have those exemptions. Licences for network, station and light maintenance depot operators also fall outside the scope of the Directive and these Regulations. However, those undertakings will continue to be subject to the licensing requirements of the 1993 Act.

Access and Management Provisions

13. Regulation 4, paragraphs (1)-(3) of the Regulations transpose the scope requirements of the Directive which relate to the management of railway infrastructure in GB, set out in Chapter II of the Directive. Railway undertakings providing only urban, suburban or regional services on local and regional stand-alone networks or on networks solely intended for urban and suburban rail services are excluded from the provisions of Chapter II. Further guidance on this exclusion is set out in paragraph 17 below. Chapter II of the Directive also does not apply to undertakings whose only train operations are shuttle services to transport road vehicles through the Channel Tunnel, with the exception of the provisions relating to access to infrastructure, separation of accounts, independence, and certain regulatory decisions and functions (see regulation 4(8)).

14. Subject to the scope for exemption detailed in paragraph 13 above, the Regulations apply to the UK side of the Channel Tunnel. Implementation of the Directive in respect of the Tunnel is also achieved through the Channel Tunnel (International Arrangements) (Charging Framework and Transfer of Economic Regulation Functions) Order 2015 (S.I. 2015/785) which gives force to a binational regulation made by the Intergovernmental Commission, transferring the functions of economic regulation to the UK and French regulatory bodies, setting out principles for cooperation between those bodies, and establishing a charging framework.

Exclusions

15. The Regulations make full use of the available exclusions, although, as with the 2005 Access and Management Regulations, exclusions are framed in terms of categories of rail undertakings and networks rather than by reference to named or specifically described undertakings or networks.

16. Regulation 4(6)-(7) excludes certain networks from the scope of regulations 6, 10, 11, 12(1)-(3), 13, Parts 4 to 6 and Schedules 2 to 5⁴. See paragraphs 22 - 26 below for detail of the types of network which the Department considers would be covered by these exclusions.

17. As noted above (at paragraph 13), the Directive excludes from the scope of its Chapter II (“Development of Union Railways”) certain railway undertakings. This is reflected in regulation 4(3). Under this regulation railway undertakings whose activity is limited to providing solely urban, suburban or regional services on local and regional stand-alone networks or networks intended only for the operation of urban or suburban rail services are exempted from Parts 2 and 3 of the Regulations (apart from regulation 13) as well as regulations 14(9) and (10), 15(1) to (6), 19(4), 33 and Schedule 2. These are the provisions in the Regulations which transpose the provisions in Chapter II of the Directive on rights of access, management independence, separation of accounts, and the requirement for infrastructure

⁴ Several of these provisions relate to charging and allocation which is discussed further at paragraphs 20 to 26.

managers to charge for the use of railway infrastructure. The types of undertakings which the Department considers are excluded from the scope of Chapter II include:

- heritage railways;
- London Underground and other metro and light rail systems;
- Community Railways, where they are micro franchised and do not form part of Network Rail's infrastructure;
- Merseyrail; and
- Island line.

18. However, where a railway undertaking which would otherwise be exempt under regulation 4(3) is under the direct or indirect control of another entity which performs or integrates rail transport services which are not urban, suburban or regional, then the provisions in the Regulations relating to management independence, separation of accounts (as regards the relationship between the railway undertaking and the entity which controls it) and the requirement to draw up a business plan will all apply to that railway undertaking (see regulation 4(4)).

19. Railway undertakings whose activity is not limited to the provision of solely urban, suburban or regional services are included in the scope of these parts of the Regulations. Undertakings whose activities are so limited also only benefit from the exemption under regulation 4(3) where the service in question is provided on a regional stand-alone network or a network intended only for the operation of urban or suburban rail services.

Charging and Capacity Allocation

20. The provisions of the Regulations relating to infrastructure charges and the allocation of capacity apply in respect of the use of railway infrastructure for domestic and international rail services. This means that they apply to:

- international groupings;
- railway undertakings;
- other persons or legal entities, such as competent authorities under Regulation No 1370/2007 and shippers, freight forwarders and combined transport operators, with a public-service or commercial interest in procuring infrastructure capacity;
- infrastructure managers; and
- to the extent specified in particular regulations, service providers (as defined in regulation 3).

Specific Exclusions

21. The Department has taken advantage of the scope for optional exclusions of networks from the provisions of the Directive relating to charging and allocation of capacity provisions. The paragraphs below set out examples of the different types of network which the Department considers would be excluded in a GB context. The list is not definitive but serves to illustrate how we consider the exemptions apply.

22. Regulation 4(7)(a) excludes stand-alone local and regional networks used for passenger services on railway infrastructure. The Department interprets "stand-alone" as applying to railways which are functionally separate from either the main network operated by Network Rail or HS1 - London Underground for example. This means that the exemption will apply in circumstances where the relevant infrastructure is intended primarily for a specific service - either local or regional - rather than for those services which are primarily national services operating on the mainline network. The types of networks which we consider are excluded under this provision, would include:

- heritage railways;
- Community Railways, where they are not part of Network Rail's infrastructure (where lines designated as Community Rail partnerships currently form part of Network Rail's infrastructure, they would be subject to the specific capacity allocation, charging and other requirements of the Regulations. If Network Rail was in future no longer the infrastructure manager for a Community Railway (following micro franchising for example), then this exemption might apply depending on the individual circumstances); and
- Island Line.

23. Regulation 4(7)(b) excludes networks intended only for the operation of urban or suburban passenger services. The Department considers this exclusion will apply to networks used solely for urban and suburban services even if some such services using that network also do part of their (urban and suburban) journey on the mainline/national rail network alongside longer distance services. However a network which is used for both urban and suburban and longer distance services would not be exempt. So, for example, Network Rail lines running out of central London to the South Coast and used both for trains going to South Coast destinations and London suburban destinations would not be exempt under regulation 4(7)(b). So, for example, the rules on allocation of capacity and charging would be identical for a service running on Network Rail from Waterloo to Surbiton as for a train running on those same lines from Waterloo to Bournemouth.

24. The types of networks, which we consider are excluded under regulation 4(7)(b), would include:

- London Underground;
- Other metro systems, such as Nexus, the Tyne and Wear Metro;
- Light Rail Schemes, such as Docklands Light Railway, Manchester Metrolink etc.; and
- Merseyrail;

25. Regulation 4(7)(c) excludes, until such time as capacity is requested by another applicant, regional networks used for regional freight services solely by a railway undertaking excluded from the scope of Chapter II of the Directive (see paragraph 17 below and regulation 4(2) and (3)). As far as the Department is aware, there are no distinct regional freight networks in Great Britain.

26. Regulation 4(7)(d) transposes the requirements of Article 2(3)(d) of the Directive which provides an optional exclusion for privately owned railway infrastructure that exists solely for use by the infrastructure owner for its own freight operations. This exemption applies only if the sites and facilities are used exclusively by the person responsible for his own freight operations. Networks such as these are in any event not subject to the open access provisions in the Directive, because they do not fall within the definition of 'railway infrastructure', although the provisions of the 1993 Act might apply. However, this does not preclude the person responsible for these sites and facilities voluntarily opening up access to other applicants. If this happens, then the full provision of the relevant parts of the Regulations would apply without this exemption. In such a scenario, these persons would become service providers (as defined in the Regulations), rather than full infrastructure managers.

Access to Services

27. The Directive provides railway undertakings with a right to those services described as the minimum access package ("MAP") (see regulation 6(1) and paragraph 1 of Schedule 2). The MAP must be provided by infrastructure managers to all railway undertakings in a non-discriminatory manner.

28. The Directive also provides railway undertakings with a right to track access to service facilities (such as stations, freight terminals and marshalling yards) and the supply of a range of other services (such as the supply of fuel, maintenance facilities and other technical facilities such as cleaning and washing) (see regulation 6(2) and paragraph 2 of Schedule 2). However, in supplying such services and access to service facilities the owners of the facilities/suppliers of the services are not designated as infrastructure managers (although infrastructure managers can also be service providers). The Department has defined the providers of such services as "service providers" (see regulation 3) so as to exempt the owners of such services (who are not also infrastructure managers) from the full set of provisions applicable to infrastructure managers, such as establishing priority criteria, producing a network statement and setting up charging and allocation bodies and procedures to fulfil the requirements placed on infrastructure managers by the Regulations.

29. The practical effect of regulation 6 will be that owners of service facilities linked to the rail network listed in paragraph 2 of Schedule 2 will be required to provide track access to those facilities and access to the rail related services within them. These open access requirements apply to certain types of facility or service and apply regardless of contractual issues of ownership or leasing arrangements. In some circumstances, the services will be supplied by the infrastructure manager or a railway undertaking. In circumstances where the infrastructure manager is not the service provider, the infrastructure manager should take all reasonable measures to facilitate requests for services from railway undertakings. The Department anticipates that this would normally entail the provision of information so as to assist the railway undertaking in identifying the relevant service provider to which it may apply.

30. Track access to service facilities listed in paragraph 2 of Schedule 2 and the services in those facilities are open to railway undertakings and a request for such

access can only be refused in circumstances where "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" (regulation 6(4)). Where track access to the service is directly from either HS1 or the mainline network, the Department would expect the infrastructure manager for the appropriate network to facilitate that request in order to provide the necessary train paths for access to/from the main network. Where access is restricted or refused and the railway undertaking considers that such restriction or refusal is outside the provisions of the Regulations, it can appeal to the ORR (who will provide guidance on how it will assess this). Decisions of the ORR are binding on the parties, and are subject to judicial review.

31. Access to the services listed in paragraphs 3 and 4 of Schedule 2 is non-mandatory. Such services are classified as being additional or ancillary services which are provided at the discretion of the service provider.

Separation of accounts: freight and passenger

32. The Directive requires separate accounts to be prepared for business relating to the provision of rail freight transport services on the one hand and for activities relating to the provision of passenger transport services on the other. The Directive and thus the Regulations do not define the scope of these "activities relating to the provision of passenger transport services" and whether the requirement applies will depend on the exact nature of the activities undertaken. The Department anticipates that all costs and revenues associated with operating timetabled passenger services for which tickets are sold through the Ticketing Settlement Agreement to be in scope. The Department does not anticipate that activities such as the operation of heritage and charter services or the provision of traction to other operators would be in scope.

Department for Transport

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