Department for Transport

Railways Infrastructure Regulations

Response to the consultation

Moving Britain Ahead

May 2016

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Contents

Introduction

1 On 24 March 2015 the Department for Transport ("the Department") published a consultation paper on draft Railways Infrastructure (Access and Management) and Railways (Licensing of Railway Undertakings) (Amendment) Regulations 2016 ("the draft 2016 Regulations").

2 The consultation, which closed on 18 May 2015, outlined proposals to replace the Railways Infrastructure (Access and Management) Regulations 2005 and amend the Railways (Licensing of Railway Undertakings) Regulations 2005 ("the 2005 Regulations").

3 These changes are necessary to transpose Directive 2012/34/EU ("the Directive") which establishes a single European railway area and repeals and consolidates ("recasts") a tranche of previous EU legislation (principally the 1st Railway Package) into one place, for ease of reference. The Directive also makes changes to substantive law in some places.

4 Eleven responses were received to the consultation and Table 1 outlines a breakdown of the sectors from which these were received (a list of responding organisations can be found at page 27). A majority were supportive of the proposals although some organisations provided detailed drafting suggestions for the implementing legislation. The Government's response, which, in some instances, includes making a number of minor amendments to the text of the draft 2016 Regulations, is outlined below. Several consultees also raised broader issues surrounding the need for further information and guidance for service facility operators. Although these were beyond the scope of the consultation exercise, where appropriate, the Government's response is also noted below.

Table 1: Responding Sectors

Train Operating Companies	5
Government or Regulatory	3
Other railway industry	3
Total	11

The Government would like to take this opportunity to thank all those who have considered and responded to the consultation. There follows a summary of those responses which indicates where suggested changes have been accepted or rejected and also notes any other additional drafting amendments which have been made to the draft 2016 Regulations post-consultation.

1. Are you considered to be a small or micro business according the Better Regulation Framework Manual?

1.1 Of the six organisations which expressed a view on this question none considered themselves to be a small or micro business.

2. The Department has assessed the approach of not using copy out as being the least burdensome and least costly to businesses. Do you agree with this assessment?

2.1 The majority of responses that expressed a preference (seven) agreed with the proposed approach of not using copy out in this instance, and instead amending the existing 2005 Regulations. However, several suggested some areas of further clarification of specific areas in the draft 2016 Regulation, and there were a number of suggestions for the Regulations to revert to copy out in certain areas in order to minimise the risk of misinterpretation. A table of the areas where the Department has decided to amend the drafting following comments from the consultees has been included at Annex A. As a result of further legal assurance after the consultation closed, both internal and with Parliamentary Counsel, there are a number of other minor drafting changes not referred to in this document.

2.2 Where typographical errors in the text of the draft 2016 Regulations have been identified by consultees, the draft 2016 Regulations have been amended. Some responses were more complex and therefore have not been included in the table. These issues have been considered in greater detail below in the Department's response.

2.3 Wherever the drafting in the consultee responses below says "*the Office of Rail Regulation*" this has been updated in the draft 2016 Regulations to "*the Office of Rail and Road*".

2.4 We have made a decision to remove regulation 11 (transparent debt relief) of the draft 2016 Regulations on the basis that the relevant requirements in the Directive (which relate to obligations to reduce indebtedness of publicly owned railway undertakings only) could be complied with administratively and without legislative implementation. It should therefore be noted that the numbering of the Regulations has changed accordingly. There are also some changes to paragraph numbers arising from other drafting changes. Where references to regulations and paragraphs as numbered in the pre-consultation draft 2016 Regulations have changed, we supply both references.

Definitions

Regulation 3(1)

2.5 **Consultee response:** The draft 2016 Regulations have broadly kept the definition of "*railway infrastructure*" from the 2005 Regulations, however that wording differs from the Directive. This causes some ambiguity around whether a service provider could be viewed as an infrastructure manager, which would place additional obligations on them. If a copy out approach was used for the definition of "*railway infrastructure*" any ambiguity remaining would not be as a result of a misinterpretation from the transposition of the Directive.

2.6 **Government response:** This was an area raised by a number of consultees. We have reviewed the drafting and have decided to revert to the definition as it was in the 2005 Regulations. We considered copy out, but, as with the rest of the draft 2016 Regulations, we are minded to limit the changes to the text, to minimise the impact on the railway sector. It is our view that reverting to the definition in the 2005 Regulations will properly transpose the Directive whilst ensuring consistency with the Railways Act 1993 definition. We do not believe that the additional words in the Directive, as compared to the preceding text of Directive 91/440/EEC, expand the list of infrastructure items. Rather, it is our view that they offer elucidation which it is not necessary to include in the draft 2016 Regulations.

2.7 **Consultee response:** Suggest that the definition of "*shuttle service*" is no longer required.

2.8 **Government response:** The Department notes the point but has retained this definition because the term is used in regulation 4(8) and therefore needs to be defined. Regulation 4(8) is copy out from article 2.9 of the Directive.

2.9 **Consultee response:** Suggest that the definition of "*service provider*" is amended to copy out.

2.10 **Government response:** The Department has considered the suggestion made, however we have decided to keep the definition as drafted. The Department has taken a policy decision not to use copy out in the draft 2016 Regulations with view to keep, wherever possible, to the drafting of the 2005 Regulations. This decision has been taken in order to make clear that where the European legislation has not changed, the drafting in the 2005 Regulations (now to be draft 2016 Regulations) has not changed either. Where there is no change in the drafting, then there is no change in the meaning.

Scope exclusions

Regulation 4(7) and 16(4) (now 4(8) and 15(4))

2.11 **Consultee response:** Suggest that copy out approach is used here to align with the Directive which uses the term "*relevant parties*".

2.12 **Government response:** As part of a wider issue (which is outlined further in our response on pages 5 and 6) the drafting in Regulation 16(4) (now 15(4)) has been revised to remove the term "*the Concessionaires*". We have also amended the drafting in Regulation 4(7) (now 4(8)) to revert to copy out.

Access to service facilities

Regulation 6(7)

2.13 **Consultee response:** This is missing the wording "in so far as possible". In addition the whole paragraph differs slightly from that used in the Directive which appear to alter the overall meaning. Suggest using copy out to keep consistency with Article 13(5) of the Directive.

2.14 **Government response:** The Department has considered the suggestion and has reverted to copy-out, as suggested by the consultee.

Regulation 6(9)

2.15 **Consultee response:** Article 13(6) of the Directive requires a service facility that has not been used for two consecutive years to be publicised for lease or rent. Regulation 6(9) only requires it to be leased, there is no requirement to rent. Suggest that the Regulations need to require both *"lease"* and *"rent"*.

2.16 **Government response:** In English law the terms rent and lease do not carry the distinct meaning that the consultee suggests. The lease is the contract and the rent is the payment made from the lessee, to the lessor. We do not think that the Regulations need to refer to both to implement the Directive.

Regulatory body monitoring of separation of accounts

Regulation 9(4)

2.17 **Consultee response:** This particular requirement does not seem to appear in the Directive, and therefore we would question where this originates from if it has not been copied out.

2.18 **Government response:** This reference derives from Directive 2001/12/EC which amended Directive 91/440/EEC. It introduced the following text in 6(3):

Member States shall take the measures necessary to ensure that the functions determining equitable and non-discriminatory access to infrastructure, listed in Annex II, are entrusted to bodies or firms that do not themselves provide any rail transport services. Regardless of the organisational structures, this objective must be shown to have been achieved.

And the list of "essential functions" in Annex II included:

- monitoring observance of public service obligations required in the provision of certain services.

2.19 The list of "essential functions" was simplified in the Recast to cover only access and charging and was moved from the Annexes to Article 7. On this basis we have taken the decision to remove Paragraph 4 from Regulation 9 in the draft 2016 Regulations.

Dominant undertaking

Regulation 10

2.20 **Consultee response:** A number of consultees had some concerns over the use of the term "*dominant undertaking*" and wanted further clarification in terms of the definition that the Department had used. Article 13 in the Directive refers to *"dominant body or firm"*.

2.21 **Government response:** The Department has taken the decision to amend the definition in Regulation 3 so as to refer to a *"dominant body or firm"* and to use that term in Regulation 10.

Infrastructure costs and accounts

Regulation 16(4) (now 15(4))

2.22 **Consultee response:** Regulation 16(4) (now 15(4)) as currently drafted appears to only extend to the Concessionaires, however other infrastructure managers not caught by 16(2) and (3) should be able to be covered under Regulation 16(4). Suggest amending the Regulation to:

"(4) For the purposes of paragraph (1), the Office of Rail Regulation is designated in relation to infrastructure that is not covered by paragraphs (2) or (3), and must, in order to discharge its obligations under that paragraph, have the power to issue ~~the Concessionaires with directions limiting, to any extent necessary, their ability to~~

~~*finance infrastructure expenditure out of borrowed funds*~~ ***such directions as it considers requisite****."*

2.23 **Government response:** The Department has considered the response and has taken the decision to amend the drafting of 16(4) (now 15(4)) to include other infrastructure managers.

Reservation charges

Regulation 18 (now 17)

2.24 **Consultee response:** Although the Department has copied out the wording from Article 36 (reservation charge) from the Directive, the Regulations split the Article into four separate paragraphs in Regulation 18 (now 17) rather than one paragraph as it is laid out in the Directive. This approach could have significant impact on stakeholders as it leaves little room for flexibility in terms of interpretation, therefore it is suggested that the Department revert to keeping the paragraph as one single paragraph rather than four separate ones.

2.25 **Government response:** The Department has taken into account the numerous responses received on this issue and has reconsidered the drafting of Regulation 18 (now 17). We have taken the decision to amend the drafting in the draft 2016 Regulations to provide that the reservation charge is mandatory for regular failure to use capacity, only where a reservation charge is already in place (see regulation 17(2)).

Capacity allocation

Regulation 20(16)(a) (now 19(16)(a))

2.26 **Consultee response:** The last five words of Article 39(1) of the Directive *"in accordance with union law"* have been omitted here.

2.27 **Government response:** We have considered the response here, but believe that our implementation is correct as this is implied. This is consistent with the drafting in the 2005 Regulations.

Congested infrastructure and capacity enhancement

Regulation 28 and 29 (now 27 and 28)

2.28 **Consultee response:** Suggest that the drafting structure in Regulations 28(4) (now 27(4)) and 29(2)(b) (now 28(2)(b)) follows that already set out in Regulation 27(3).

2.29 **Government response:** The Department has considered the suggestion, however we have decided to keep the original drafting in Regulation 28(4) (now 27(4)). The Department has taken a policy decision not to use copy out in the draft 2016 Regulations with view to keeping, wherever possible, to the drafting of the 2005 Regulations. This decision has been taken in order to make clear that where the European legislation has not changed the drafting in the 2005 Regulations has not changed either. This will mean that where there is no change in drafting, then there is no change in meaning either. We have, however, amended the drafting so that where any part of the capacity analysis relates to railway infrastructure in Scotland, both the Secretary of State and Scottish Ministers must be consulted. This aligns with Regulation 27(3) (now 26(3)). See comments below on regulation 29(2)(b).

Regulation 29(2)(b) (now 28(2)(b))

2.30 **Consultee response:** The drafting in this Regulation currently requires the infrastructure manager to seek Secretary of State approval prior to the publication of the capacity enhancement plan. This is considered unnecessary and bureaucratic. The Directive (Article 51(2)) states *"the plan may be subject to prior approval by the Member State"*.

2.31 **Government response:** We have considered the points made by consultees and have decided to retain this prior approval (which was found in the 2005 Regulations) within the draft 2016 Regulations to ensure the Secretary of State, as the overall responsible owner for transport strategy in GB, continues to be consulted on possible plans for enhancement on the railway. Scottish Ministers' approval is required if the infrastructure is in Scotland, jointly with the Secretary of State if the infrastructure concerned is in both England and Scotland.

Appeals to the regulatory body

Regulation 33(9) (now 32(9))

2.32 **Consultee response:** The drafting from Article 13(5) of the Directive has not been fully transposed and is missing the *"in so far as possible"* wording. Propose adding new paragraph 33(9)(a) *"whether an attempt to meet all requests in so far as possible has been made"*.

2.33 **Government response:** The Department has considered the suggestion, however we do not think that amendment would helpfully add anything or provide further clarification. We have therefore decided to keep the original drafting. The Department has taken a policy decision not to use copy out in the draft 2016 Regulations with view to keep, wherever possible, to the drafting of the 2005 Regulations. This decision has been taken in order to make clear that that where the European legislation has not changed the drafting in the 2005 Regulations has not changed either. This will mean that where there is no change in drafting, then there is no change in meaning either.

Appeals and complaints

Regulation 33

2.34 **Consultee response:** The Directive allows a mechanism for third parties to make complaints to the regulatory body, however this has not been transposed into the draft 2016 Regulations, which only allow for appeals. Suggest that there is a difference between appeals and complaints and that the draft 2016 Regulations also includes a mechanism for third parties to make a complaint to the ORR.

2.35 **Government response:** The Department has considered the suggestion, however we do not think that amendment would helpfully add anything or provide further clarification. We have therefore decided to keep the original drafting. The Department has taken a policy decision not to use copy out in the draft 2016 Regulations with view to keep, wherever possible, to the drafting of the 2005 Regulations. This decision has been taken in order to make clear that that where the European legislation has not changed the drafting in the 2005 Regulations has not changed either. This will mean that where there is no change in drafting, then there is no change in meaning either.

Regulatory body decisions concerning international passenger services

Regulation 34(4) (now 33(4))

2.36 **Consultee response:** There is a slight difference in wording between this Regulation and the Directive where the list of relevant parties is identified. Propose amending to revert back to previous wording. This list is for the purposes of Regulation 34(3) (now 33(4)) and (6) which is to transpose Article 11(2) and (3) of the Directive. However the list of relevant parties in these two paragraphs is slightly different in the Directive. Suggest revert to copy out.

2.37 **Government response:** The Department has considered the suggestion and has taken the decision to amend the drafting in what is now regulation 33(4)). The new drafting follows more closely the wording used in the Directive.

Competition in the rail services markets

Regulation 35 Paragraph 1

2.38 Consultee response: Regulation 31(1) gives the ORR a mandatory function to monitor the situation of the rail services markets, however the Directive expresses this as a power to monitor, rather than a mandatory function. Suggest aligning to the wording in the Directive.

2.39 Government response: The ORR has a statutory obligation to monitor competition in the rail services market under the competition legislation. It is therefore consistent to make this a mandatory function in the Regulations.

Paragraph 3 (now 34(3))

2.40 **Consultee response:** The wording in Article 56(9) of the Directive has not been fully transposed in Regulation 35(3) (now 34(3)) and suggest that the following needs to be added to the Regulation:

"Without prejudice to the powers of the national competition authorities for securing competition in the rail services market, the Office of Rail Regulation……."

2.41 **Government response:** The Department has considered the suggestion, however we have decided to keep the original drafting as we do not consider the amendment necessary given the ORR's concurrent powers as the competition authority for the rail market.

Paragraphs 5 and 6

2.42 **Consultee response:** the terminology used between these two paragraphs is inconsistent. Regulation 35(5) (now 35(5)) uses the term *"the rail market"* and 35(6) (now 35(6)) uses the term *"the railway market"*. This inconsistency carries throughout the entire of Regulation 35, although this is a reflection of the same inconsistency throughout Article 56 of the Directive, this has the potential to cause confusion.

2.43 **Government response:** The Department has concluded that although there is a difference in terminology, there is no clear distinction between the different terms used. Therefore the Department has taken the decision to replace the different terms *"the rail market, the railway market and the rail services market"* with the one term of *"the rail services market"*.

Provision of information to the regulatory body

Regulation 37 (now 36)

2.44 **Consultee response:** Article 56(8) of the Directive allows for the regulatory body to have the power to request relevant information from the infrastructure manager, applicants, and any third party within the Member State concerned. Regulation 37(1) (now 36(1)) however sets out all the specific regulations which the regulatory body has the power to request information under. This has the potential to be more confusing. Propose to amend Regulation 37(1) (now 36(1)) as follows:

"The Office of Rail Regulation may request information in connection with its functions under these regulations and the provisions of section 80 of the Act (duty of certain person to furnish information on request) shall apply for such purposes as if-"

2.45 **Government response:** The Department has considered the suggestion and has broadly adopted the consultee's proposed drafting.

3. Do you agree with the Department's decision to retain the derogations in the Regulations?

3.1 The majority of responses that expressed a preference (seven) agreed with the proposed approach of retaining the derogations in the Regulations.

3.2 One consultee provided further comments which are set out below along with the Department's response.

Regulation 4(6)(c) and (d)

3.3 **Consultee response:** Given the spirit of the Directive and the scope of extension of the regulation to rail services facilities, are there any facilities that are captured by the exclusions which could usefully be included without excessive regulatory burden, in some of the more basic requirements such as publishing information on access services?

3.4 **Government response:** The Department has considered the response and considered extending the scope of the requirements in respect of service facilities. However, we have not identified any instances where extending the scope would offer benefits which would justify going against Government policy of taking advantage of derogations to reduce burdens on businesses and other bodies. The public consultation responses received did not identify any specific examples where extending the scope of the requirements in respect of service facilities would offer benefits. The derogations included in Regulation 4 will therefore be retained.

4. Question 4: Do you think that applying a penalties regime akin to Sections 55-57A of the Railways Act 1993, in relation to breaches of requirements under the draft 2015 Regulations, would give the ORR appropriate and adequate powers to enforce its decisions under the Directive?

4.1 The majority of responses that expressed a preference (five) agreed with the proposed approach of applying a penalties regime akin to Sections 55-57A of the Railways Act 1993.

4.2 One consultee expressed concern with the Department's proposal but suggested that the extension of the ORR's enforcement powers would create uncertainty and stated that further consideration of this area was required in order to develop consistent arrangements.

4.3 One consultee did not agree with the Department's proposal and their comments along with the Department's response are outlined below.

Implementation of Article 56(9)

4.4 **Consultee response:** The ORR already has very wide enforcement powers (including the ability to impose fines) under the Railways Act 1993 and we believe that this meets the requirements in the Directive. Therefore we support the first option to leave the penalty regime as status quo. We are concerned that the application of a regime akin to Section 55-57A of the Railways Act 1993 will impose an unnecessary new regime. We recognise that there are some operators that are not covered by a licence and therefore would not be able to be fined under the existing regime, and would suggest an extension of similar provisions to those in the Railways Act by the Regulations to provide a consistent regime.

4.5 **Government response:** The Department has considered the response given and the reasons set out in it, however we do not agree that the existing regime meets the requirements of the Directive. The existing regime would only allow the ORR the power to fine if a license holder was in breach of its licence conditions. The licence conditions are not the same as the requirements of the Directive.

In addition, as the consultee has pointed out there are some bodies which are in scope of the Directive that are not required to be licenced. Therefore the Department has taken the decision to apply Sections 57A-F of the Railways Act to breaches of the Regulations, to enable the ORR to enforce its decisions made under the Regulations.

5. Do you believe that any of the new provisions will impact on your business?

5.1 The majority of responses received believed that there would be some impact from the new provisions. However only two consultees provided quantitative information about additional costs to their businesses.

5.2 The Department has taken the areas that have been mentioned in the responses into consideration and is considering what guidance is required on the scope of the 2016 Regulations. The Office of Rail and Road (ORR) is also considering what guidance is required. Network Rail is also considering how best to obtain the information from service facility operators which needs to be included in their Network Statement.

5.3 The following areas, which consultees suggested could be further clarified, are:

- Access to service facilities
- Provision of information on access to and charges for service facilities for inclusion in the network statement
- Additional obligations for service facility operators that are under the direct or indirect control of a body or firm which is active and holds a dominant position in the national railway transport services market.
- Additional requirements placed upon service facility operators where an access request has been refused.
- When regulatory oversight would be triggered in relation to access to service facilities.
- What is meant by viable alternative?
- What would happen in cases where 100% capacity of a service facility was already used and another access request was submitted? Would this be treated as conflicting requests?

6. Are there any areas which have not been covered where you believe your business will be impacted, either positively or negatively?

6.1 The majority of the issues raised in the responses to the consultation have been included and responded to above. However these additional areas were raised and these are addressed below.

Scope

Regulation 4(1)(b)

6.2 **Consultee response:** The Regulation refers to railway undertakings established in the EEA. If Scotland were to be independent and outside of the EU, what would this mean in terms of the application of the Regulations in Scotland?

6.3 **Government response:** The drafting in the draft 2016 Regulations is for the current constitutional position in Great Britain.

Regulation 5(5)

6.4 **Consultee response***: "it is the duty of the infrastructure manager to ensure that the entitlements conferred by this regulation are honoured"* appears to be a blanket statement and does not recognise the appropriate qualifying sections and the wider provisions on the Regulation. Suggest amending the drafting to read *"…entitlements conferred by this regulation 5 are honoured".*

6.5 **Government response:** We have noted the response but we believe that our implementation here is correct and have decided to keep the original drafting (see regulation 5(8)).

Regulation 6(4)

6.6 **Consultee response:** The drafting around *"viable alternative"* had been reworded and we would welcome confirmation that this does not change the overall meaning of viable alternative.

6.7 **Government response:** The Department has amended the drafting in Regulation 6(4) (by comparison with the drafting of the equivalent provisions in regulation 7(4) of the 2005 Regulations) to copy out text from the Directive. The definition of viable alternative in the Directive is new, and is transposed in regulation 3. The Department notes that the ORR is considering whether to produce guidance around access to service facilities which may provide further detail.

Regulation 8(1)

6.8 **Consultee response:** The 2005 Regulations encompassed all state owned railways, however the draft 2016 Regulations now limits this to all UK owned railways. Suggest that this should read *"…directly or indirectly controlled by a* **Member State***…"*

6.9 **Government response:** The Department has considered the response and agrees that this should be amended as suggested.

Separate profit & loss accounts for passenger and freight services

Regulation 9(2)

6.10 **Consultee response:** Is this a requirement for occasional bespoke passenger charter services or is it aimed at a large government-owned company that runs full-scale passenger and freight services? For example would a freight operator running 10-15 bespoke passenger charter services each year be in scope? The costs of separating the accounts for such a small undertaking that uses locomotives, coaches and access from other parties are likely to be unduly high.

6.11 **Government response:** It is for operators to satisfy themselves that they comply with the Regulations.

6.12 **Consultee response:** On the same Regulation: If a freight operator's driver was contracted to a passenger train operator as a 'route conductor' would this bring the freight operator into scope of the requirement in Regulation 9(2)?

6.13 **Government response:** It is for operators to satisfy themselves that they comply with the Regulations.

Dominant undertaking

Regulation 10

6.14 **Consultee response:** Question the meaning of *"national railway transport services market"* mean UK wide or would it apply to England Scotland and Wales separately?

6.15 **Government response:** The "national railway transport services market" in the Directive refers to the market of the EU Member State in question, in this case the UK.

Infrastructure manager cooperation on charging and capacity allocation across more than one network

Regulations 19 and 21 (now 18 and 20)

6.16 **Consultee response:** The provisions in Regulations 19 and 21 (now 18 and 20) are framed primarily from an international perspective, with the obligations on the infrastructure manager to cooperate being with other national network infrastructure managers in the EU. This does not recognise multiple "domestic" infrastructure managers. Suggest that the draft 2015 Regulations need to be applied in a manner that reflects the development of the rail network in Great Britain.

6.17 **Government response:** The Department notes this point. However, the Directive covers the co-operation of all infrastructure managers within the EU, not just infrastructure managers operating networks that are adjacent to international borders or carrying traffic crossing from other member states. Infrastructure managers are required to co-operate on charging and the allocation of infrastructure capacity. The Department considers that the draft 2016 Regulations properly implement the requirements of the Directive in this respect.

Service facilities

Schedule 2(2)

6.18 **Consultee response:** Shunting facilities in marshalling yards needs to clearly state the limitations of shunts that can be made (for example maximum train lengths that can be accommodated).

6.19 **Government response:** The Department has copied out the drafting in Annex II of the Directive and therefore the drafting in the draft 2016 Regulations will remain. However Annex IV of the Directive (transposed by Regulation 13), which details the requirements of the network statement, requires *"...information on charging for gaining access to the facility and for the provision of services, and information on technical access conditions for inclusion in the network statement.."*. The type of information the consultee has suggested could be included in the network statement as a technical access condition.

Access Charges

Schedule 3(2)

6.20 **Consultee response:** Responses from some freight train operating companies express concerns around the mark ups that can be charged to market segments which are deemed able to bear them.

6.21 **Government response:** The draft 2016 Regulations allow the infrastructure manager to levy these mark ups with the approval of the ORR (in relation to infrastructure subject to the access charges review) and therefore there are regulatory parameters in place.

Schedule 3(6)(4)

6.22 **Consultee response:** The current drafting in the draft 2016 Regulations would only permit discounts to apply on the classic network or on HS1, therefore suggest the following alternative wording:

"(4) **In the case of infrastructure subject to an access charges review,** *the discounts available must be in accordance with the access charges review or, in the case of a rail link facility,* **the discounts available must be in accordance with** *the development agreement.*

6.23 **Government response:** We agree that there is a gap here and have redrafted these provisions accordingly.

The role of the Mayor of London

6.24 **Consultee response:** The requirement to create an indicative railway infrastructure strategy needs to recognise the Mayor's general duties regarding transport facilities and services to, from and within London and his responsibility on behalf of the Greater London Authority (GLA) for developing strategies such as the Mayor's Transport Strategy. Propose that the Regulations need to be amended to include a reference to the strategies developed by the Mayor and his role, as stated in the 1999 GLA Act.

6.25 The role of the Mayor also needs to be recognised in any consultation process undertaken with the Secretary of State regarding any declaration of specialised infrastructure. Currently the draft 2015 Regulations only recognise the Mayor as an "interested party" within this process. Propose that the Mayor of London should be specifically designated in this provision in relation to the Crossrail Central Operating System.

6.26 The same point also applies to any declaration of congested infrastructure and consultations covering capacity analysis and capacity enhancement plans.

6.27 **Government response**

6.28 **Indicative railway infrastructure strategy:** The Department has considered this but has decided not to include drafting to specifically provide for the Mayor's strategy in the Regulations for the following reasons:

- When developing the strategy we will ask for input from other infrastructure managers to ensure all networks were covered, therefore any strategies developed by the Mayor could be included.
- We would like to keep the drafting as simple as possible to avoid the possibility of the Regulations becoming outdated if other infrastructure managers are created in the future, we think the simplest way is to refer to Secretary of State's strategy.
- The Regulation 11 requirement for a national rail infrastructure strategy in no way lessens or prejudices the Mayor's separate function of developing a cross modal transport strategy for London under the GLA Act.

6.29 **Consultation with the Mayor on specialised infrastructure:** The Department agrees that the Mayor could be consulted as an interested party in an appropriate case. We do not think it is necessary to specifically reference the Mayor, and would prefer to keep the drafting simple.

6.30 **Congested infrastructure, capacity analysis and capacity enhancement plans:** It is the Department's view that the draft 2016 Regulations as currently drafted do not prevent Transport for London from consulting the Mayor and completing its own governance practices. We have therefore decided not to provide separately for them in the draft 2016 Regulations.

The Network Statement

6.31 **Consultee response:** One consultee was concerned about the requirement to publish the network statement in another official language of the EU, particularly in circumstances where that infrastructure manager would be unlikely to accommodate international traffic. The consultee felt that this was overly burdensome.

6.32 **Government response:** Whilst the Department notes the position this is a mandatory requirement of the Directive.

Exclusions for undertakings providing solely shuttle services

6.33 **Consultee response:** One consultee was unclear as to the rationale for this exclusion given that, in the case of the Channel Tunnel they are direct competitors to railway undertakings conveying rail freight who operate through the same tunnels. The consultee also questioned whether the exclusion would be applicable to shuttle services through the Channel Tunnel as this is not the sole business of the infrastructure manager.

6.34 **Government response:** The Department has considered the comments made, however the exclusion is provided for in the Directive, and it is Government policy to take full advantage of derogations where they exist to reduce burdens on businesses and other bodies, therefore the draft 2016 Regulations will include this exclusion, although for clarity the Department has decided to revert to copy out in this instance.

Transposition of Article 12

6.35 **Consultee response:** After the closing date of the public consultation on the draft 2015 Regulations the Department received a response from a stakeholder raising the possibility of implementing the optional Article 12 into UK law. This would authorise the authority responsible for rail passenger transport to impose a levy on railway undertakings providing passenger services for the operation of routes which fall within that authority's jurisdiction, and which are operated between two stations in that Member State. The levy would be intended to compensate the authority for public service obligations laid down in public service contracts, awarded in accordance with Union law.

6.36 **Government response:** Article 12 was, and remains, an optional element of EU legislation that member states can choose to implement or not. The Article first appeared in EU law in Article 1 of Directive 2007/58/EC. It has since been consolidated into Directive 2012/34/EU.

6.37 At this time the Department has not implemented Article 12. However, the Department is considering options, including legislation, to ensure that open access operators contribute to the provision of socially and economically beneficial services, as franchised operators have to do. The Department would want to consult fully before introducing any such options.

Transposition of Article 30

6.38 **Consultee response:** A number of consultees noted that the Department had decided not to transpose Article 30 as the requirements of this were already provided for in existing process, for example the Periodic Review in respect of the wider network. However the consultation raised some questions about how the requirements of Article 30 would apply to infrastructure managers that were not part of the existing regime.

6.39 **Government response:** As a result of the consultation responses received the Department has reconsidered the need to transpose Article 30. We have taken the

decision to provide new drafting to transpose these requirements, albeit we consider they are met in many instances as set out previously.

Transposition of Article 34

6.40 **Consultee response:** Article 34 of the Directive would allow the UK to introduce a mechanism to compensate operators for the charges incurred accessing the railway network by taking into account the environmental, safety and infrastructure costs that are not paid by competing modes. Recognising the externality benefits offered by rail, this could be a helpful and important mechanism to increase the competitiveness of rail and facilitate a mode shift to rail. We are disappointed that this article has not been transposed in the draft 2016 Regulations, and would like the Department to reconsider this decision.

6.41 **Government response:** The Department has considered the response given but has concluded that the provisions already existing in national legislation – which have provided the basis for the current Mode Shift Revenue Support scheme and its predecessors, as well as for the Freight Facilities Grant scheme still in application in Scotland and Wales which was originally introduced in the 1970s – already permit the recognition of the externality benefits of rail transport. Article 34 of Directive 2012/34/EU merely replicates Article 10 of Directive 2001/14/EC and therefore it does not introduce a new concept.

Transposing the optional provisions

6.42 **Consultee response:** One consultee was disappointed with the decision not to implement the optional provision described in theme 10 of the Impact Assessment (Article 32(4) in the Directive). This would allow the UK to extend the differentiation of charges for the use of railway lines on corridors specified in Commission decision 2009/561/EC to railway lines not specified in this decision. The consultee felt that this would allow flexibility in the UK should the funding mechanisms change in the future.

6.43 **Government response:** Prior to consultation the Department considered that to implement this optional provision would be gold plating and therefore not in line with the Government's guiding principles to transpose European legislation as described on page 16 above. In the absence of clear evidence of the benefits of implementing this provision, the Department still considers that to transpose it would be going beyond the minimum requirements to implement the Directive.

7. Other post consultation drafting amendments

7.1 Aside from the amendments noted in the sections above which have been made to address issues raised in consultation responses, some additional minor revisions have been made to the draft 2016 Regulations following further consideration to improve readability and clarity of the legislative provisions. No amendments of substance have been made, but for completeness, the main changes are listed below.

Review Clause

7.2 The Department has considered the need for a review clause in the light of the requirements of the Small Business, Enterprise and Employment Act 2015 and decided that a five year review clause will need to be included in the draft 2016 Regulations. Therefore drafting for this has now been added to the Regulations.

Implementing Acts

7.3 Since the consultation Implementing Acts on Rail Market Monitoring, on the calculation of the cost that is directly incurred as a result of operating the train services and on Framework Agreements have been adopted by the Single European Railway Area Committee (SERAC). SERAC is a committee of Member State representatives which votes on implementing legislation proposed by the European Commission. Where applicable the draft 2016 Regulations have been amended to include references to these Implementing Acts.

Title

7.4 The title of the Regulations has been amended to The Railway (Access, Management and Licensing of Railway Undertakings) Regulations 2016 for the purposes of clarity.

8. List of responding organisations

Transport for London

Rail Delivery Group

Freightliner

Network Rail

Rail Freight Group

Eurostar

DB Schenker

GB Railfreight

Transport Scotland

South West Trains

Office of Rail and Road

The Department also received a late response from Eurotunnel to the Regulations, which was received several weeks after the consultation closure.

Annex A: Table of amendments

The table below shows the consultee responses which were either to revert to copy out or to add or amend to the drafting. These are the suggestions that the Department is in agreement with. Whilst drafting amendments have been made in response to each suggestion, the new drafting is not always entirely in accordance with the specific drafting proposed by the consultees. The amendments are, nonetheless, intended to address the points raised by the consultees.

Regulation	Consultee's Responses (which Government agrees with)
4(5) and (6)(d) (now (6) and (7)(d)) (Scope exclusions)	The wording on privately owned infrastructure in the draft 2016 Regulations on the scope exclusions differs from the wording used in the Directive and this could be misinterpreted to exclude networks that should, in the interest of fair access, be included. Propose reverting to copy out. *"privately owned railway infrastructure that exists solely for use by the infrastructure owner for its own freight operations"*
4(7) (now (8))(scope exclusions)	Suggest reverting to copy out at the end of paragraph 4(7) so that it reads: *"…in respect of ~~any shuttle service~~ transport operations in the form of shuttle services for road vehicles through undersea tunnels".*
6(4) and (5)(a) (access to service facilities)	The text slightly differs from the Directive. Propose to use copy out as detailed below. *"6(4) Subject to paragraph (7), where an infrastructure manager or a service provider supplies any of the services described in paragraph 2 of Schedule 2, a request for **access to**, **and** ~~the~~ supply of, such services…"* *"6(5) Where— (a) a request referred to in paragraph (3) concerns **access to and** ~~the~~ supply of services described in sub-paragraphs 2(a), (b), (c), (d), (f) and (i) of Schedule 2; and"*
6(10) (access to service facilities)	In the draft 2015 Regulations the term *"any applicant"* has been used, whereas in the Directive refers to *"any railway undertaking"*. Suggest using copy out and reverting to *"any railway undertaking"*
14(4)(b) (now 13(4)(b)) (network statement)	Annex IV of the Directive requires the service facility operator to supply *"information on charges for gaining access to the facility and for the provision of services, and technical access conditions".* Regulation 14 appears to go further than this and requires details of conditions and charges for access to and supply of service facilities. Although similar to the wording in the Directive *"details"* is subtly different and risks being misinterpreted as being more onerous than is intended. Copy out would reduce this risk.
15(9) (now 14(9)) (establishing, determining and collecting charges)	The wording used in the 2005 Regulations has been kept in the draft 2015 Regulations, and this does not exactly copy out the requirements in Article 7(2) of the Directive which appears to create unintended ambiguity as a result. The current drafting in the draft 2015 Regulations appears to allow that if an infrastructure manager can demonstrate independence in

	either its legal form, organisation **or** decision making functions then it can carry out the charging and capacity allocation, however the wording in the Directive requires that all three requirements must be satisfied to carry out these functions. Suggest amending the *"or"* to and *"and"* which will resolve the ambiguity.
16(1) (now 15(1)) (Infrastructure costs and accounts)	Article 8(4) from the Directive has not been directly transposed. Suggest amending to copy out: 16(1)(d) *"[shall at least balance] … state funding, including, **where appropriate**, advance payments from the state."*
20(5) (now 19(4)) (capacity allocation)	The wording used in the 2005 Regulations has been kept in the draft 2015 Regulations, and this does not exactly copy out the requirements in Article 7(2) of the Directive which appears to create unintended ambiguity as a result. The current drafting in the draft 2015 Regulations appears to allow that if an infrastructure manager can demonstrate independence in either its legal form, organisation **or** decision making functions then it can carry out the charging and capacity allocation, however the wording in the Directive requires that all three requirements must be satisfied to carry out these functions. Suggest amending the *"or"* to and *"and"* which will resolve the ambiguity.
35 (now 34) (competition in the rail services markets)	Propose that the title of Regulation 35 should be amended to *"Monitoring the rail services market"*.
35 (now 34) (competition in the rail services markets)	Regulation 35(1) and (3)(c) currently reads *"competition"*, suggest replacing this with *"competitive situation"* to more closely align with the Directive (Article 56(2)).
35 (now 34) (competition in the rail services markets)	As currently drafted Regulation 35(1) includes the wording *"including the freight transport market"* this is not included in the Directive and has the potential to cause confusion.
Schedule 2(1)(b)(i) (services to be supplied to applicants)	The current drafting has been taken from the 2005 Regulations and differs from that in the Directive slightly. Suggest copying out so that it reads: *"such ~~running~~ **railway infrastructure, including** track, points and junctions as are necessary to utilise that capacity"*
Schedule 2(2) (services to be supplied to applicants)	The current drafting differs from that in the Directive slightly. Suggest copying out so that it reads: *"**Access, including** ~~T~~**t**rack access to services facilities and the supply of services referred to in regulations 5(1) and 6(1), (3), (4), (7) and (9) and 10(1) and (2) shall comprise**, where they exist**—"*
Schedule 3 (access charging)	References to *"fee"* and *"charge"* appear to have been used interchangeably in Schedule 3. If there is no distinction suggest amend to *"charge"*

Schedule 3(2)(2) (access charging)	There is currently no applicable authority in paragraph 3 for the Heathrow Spur and Crossrail and any others in the future. Suggest that this needs to be added in.
Schedule 3(2)(6) (access charging)	The Directive Annex VI requires the market segments *"to be considered"* therefore suggest that Schedule 3(2) (6) reads *"list of market segments* ***to be*** *considered by the infrastructure manager…."*