

**2019 No. 15**

**TRANSPORT**

**The Railways Infrastructure (Access, Management and Licensing of Railway Undertakings) (Amendment) Regulations (Northern Ireland) 2019**

*Made* - - - - *12th February 2019*

*Coming into operation* - *15th March 2019*

The Department for Infrastructure<sup>(a)</sup>, being a Department designated<sup>(b)</sup> for the purposes of section 2(2) of the European Communities Act<sup>(c)</sup> in relation to measures relating to railways and railway transport, in exercise of the powers conferred by that section, and of all other powers enabling it in that behalf, hereby makes the following Regulations:

**Citation, extent and commencement**

1.—(1) These Regulations may be cited as the Railways Infrastructure (Access, Management and Licensing of Railway Undertakings) (Amendment) Regulations (Northern Ireland) 2019 and shall come into operation on 15th March 2019.

**Amendment of the 2016 Regulations**

2. The Railways Infrastructure (Access, Management and Licensing of Railway Undertakings) Regulations (Northern Ireland) 2016<sup>(d)</sup> are amended in accordance with the following regulations.

**Interpretation**

3. In regulation 3 (interpretation)—

(a) after the definition of “the Department” insert—

““development”, in relation to railway infrastructure, means network planning, financial and investment planning as well as the building and upgrading of the infrastructure;”;

(b) for the definition of “the Directive” substitute—

““the Directive” means Directive 2012/34/EU of the European Parliament and of the Council of 21st November 2012 establishing a single European railway area (recast)<sup>(a)</sup>;”;

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(a) The Department for Regional Development was renamed the Department for Infrastructure by virtue of section 1(6) of 2016 c.5 (N.I.)

(b) S.I. 1999/266

(c) 1972 c.68

(d) S.R. 2016 No. 420

- (c) after the definition of “the environment” insert—
- ““essential functions”, in relation to infrastructure management, means decision-making concerning—
- (a) train path allocation, including both the definition and the assessment of availability and the allocation of individual train paths, and
  - (b) infrastructure charging, including determination and collection of charges, in accordance with the charging framework and the capacity allocation framework established pursuant to regulations 14 and 19 respectively;”;
- (d) after the definition of “international grouping” insert —
- ““maintenance”, in relation to railway infrastructure, means works intended to maintain the condition and capability of the existing infrastructure;
- “management board” means the senior body of an undertaking performing executive and administrative functions, which is responsible and accountable for day-to-day management of the undertaking;”;
- (e) after the definition of “the Office of Rail and Road” insert—
- ““operation”, in relation to railway infrastructure, means train path allocation, traffic management and infrastructure charging;”;
- (f) after the definition of “public passenger transport” insert—
- ““public-private partnership” means a binding arrangement between public bodies and one or more undertakings other than the main infrastructure manager, under which the undertakings—
- (a) partially or totally construct or fund railway infrastructure; or
  - (b) acquire the right to exercise any of the functions of the infrastructure manager for a predefined period of time;”;
- (g) after the definition of “Regulation No. 913/2010” insert—
- ““renewal”, in relation to railway infrastructure, means major substitution works on the existing infrastructure which do not change its overall performance”;
- (h) after the definition of “service provider” insert—
- ““supervisory board” means the most senior body of an undertaking that fulfils supervisory tasks, including the exercise of control over the management board and general strategic decisions regarding the undertaking;”;
- (i) after the definition of “transit rights” insert—
- ““upgrade” in relation to railway infrastructure, means major modification works to the infrastructure which improve its overall performance;” and
- (j) after the definition of ““urban” or “suburban”” insert—
- ““vertically integrated undertaking” means an undertaking where, within the meaning of Council Regulation (EC) No. 139/2004 on the control of concentrations between undertakings (the EC Merger Regulation)(b)—
- (a) an infrastructure manager is controlled by an undertaking which at the same time controls one or several railway undertakings that operate rail services on the infrastructure manager’s network;
  - (b) an infrastructure manager is controlled by one or several railway undertakings that operate rail services on the infrastructure manager’s network; or

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(a) OJ No. L 343, 14.12.2012, p.32; as amended by Directive (EU) 2016/2370 of the European Parliament and of the Council amending Directive 2012/34/EU as regards the opening of the rail market for domestic passenger transport services by rail and the governance of the railway infrastructure (OJ No. L 352, 23.12.2016, p.1).

(b) OJ No. L 24, 29.1.2004, p.1.

(c) one or several railway undertakings that operate rail services on the infrastructure manager's network are controlled by an infrastructure manager, and includes an undertaking consisting of distinct divisions, including an infrastructure manager and one or several divisions providing transport services that do not have a distinct legal personality.

Where an infrastructure manager and a railway undertaking are fully independent of each other, but both are controlled directly by a Member State without an intermediary entity, they are not considered to constitute a vertically integrated undertaking for the purposes of these Regulations”.

## Scope

4.—(1) In regulation 3 (Scope)—

(a) for paragraph (6) substitute—

“(6) (a) The provisions of—

- (i) regulation 5;
- (ii) regulation 10;
- (iii) regulation 13; and
- (iv) Parts 4 to 6

do not apply to the networks listed in paragraph (7);

(b) the provisions of—

- (i) regulation 11;
- (ii) regulation 12(1), (2) and (3); and
- (iii) regulation 15(1)

also do not apply to the networks listed in paragraph (7) and do not apply to the lines described in paragraph (7A); and

(c) the provisions of—

- (i) regulation 8A;
- (ii) regulation 8B;
- (iii) regulation 8C;
- (iv) regulation 9A;
- (v) regulation 14(6), (6A) and (7); and
- (vi) regulation 19(3) and (3A),

also do not apply to the networks listed in paragraph (7) and the lines described in paragraph (7A) and do not apply to the regional, low traffic networks described in paragraph (7B).”;

(b) after paragraph (7) insert—

“(7A) The lines referred to in paragraph (6)(b) and (c) are local, low traffic lines of a length not exceeding 100km that are used for freight traffic between a mainline and points of origin and destination of shipments along those lines, provided that those lines are managed by entities other than the main infrastructure manager and that either—

- (a) those lines are used by a single freight operator, or
- (b) the essential functions in relation to those lines are performed by a body which is not controlled by any railway undertaking.

(7B) The regional, low traffic networks referred to in paragraph (6)(d) are regional, low traffic networks managed by an entity other than the main infrastructure manager and used for the operation of regional passenger services provided by a single railway undertaking where—

- (a) capacity for passenger services on that network has not been requested, and
- (b) the single railway undertaking is independent of any railway undertaking operating freight services.

(7C) The lines described in paragraph (7A) include those that are used also, to a limited extent, for passenger services and the regional, low traffic networks described in paragraph (7B) included those where the line is used also, to a limited extent, for freight services.

(7D) Where a railway undertaking is party to a public-private partnership concluded before 16th June 2015 and is responsible for providing passenger railway services on the infrastructure, the provisions of—

- (a) regulation 8A;
- (b) regulation 9A;
- (c) regulation 14(6), (6A) and (7); and
- (d) regulation 19(3) and (3A)

do not apply to the railway undertaking.”.

### **Access rights**

5. In regulation 4 (Access rights)—

- (a) in paragraph (1) omit “international”;
- (b) in paragraph (5)—
  - (i) for “an international passenger service” substitute “a passenger service”;
  - (ii) for “the international route” substitute “the route”; and
  - (iii) omit “, including stations located in the same Member State”;
- (c) omit paragraph (6);
- (d) for paragraph (7) substitute—

“(7) The Office of Rail and Road may, in accordance with regulation 33, limit the rights granted by this regulation to passenger services between a place of departure and a destination where one or more public service contracts cover the same route or an alternative route if the exercise of any such right would compromise the economic equilibrium of the public service contract or contracts in question.”;

- (e) omit paragraph (8); and
- (f) in paragraph (10) for “or regulation 33” substitute “and regulation 33”.

### **Infrastructure management: independence; outsourcing and sharing functions and impartiality in respect of traffic management and maintenance planning**

6. After regulation 8 (management independence) insert—

#### **“Independence of the infrastructure manager**

**8A.**—(1) Subject to paragraph (5), the infrastructure manager, in its legal form, must be independent of any railway undertaking and, in vertically integrated undertakings, also be independent of any other legal entity within the undertaking.

(2) In vertically integrated undertakings, the other legal entities must not exercise any decisive influence on the decisions of the infrastructure manager in relation to the essential functions.

(3) Members of the supervisory board and the management board, and managers reporting directly to them, must act in a non-discriminatory manner and their impartiality must not be affected by any conflict of interest.

(4) The same individuals cannot be concurrently appointed or employed—

- (a) as members of the management board or an infrastructure manager and as members of the management board of a railway undertaking;
- (b) as persons in charge of taking decisions on the essential functions and as members of the management board of a railway undertaking;
- (c) where a supervisory board exists, as members of the supervisory board of an infrastructure manager and as members of the supervisory board of a railway undertaking;
- (d) as members of the supervisory board of an undertaking which is part of a vertically integrated undertaking and which exercises control over both a railway undertaking and an infrastructure manager and as members of the management board of that infrastructure manager.

(5) Paragraph (1) and sub-paragraphs (c) and (d) of paragraph (3) do not apply where infrastructure charging and path allocation functions are performed by a charging body and an allocation body by virtue of regulations 14(6) and 19(3) respectively.

(6) In vertically integrated undertakings, the members of the management board of the infrastructure manager and the persons in charge of taking decisions on the essential functions must not receive—

- (a) any performance-based remuneration from any other legal entities within the vertically integrated undertaking, or
- (b) any bonuses principally related to the financial performance of particular railway undertakings,

however, they may be offered incentives related to the overall performance of the railway system.

(7) Where information systems are common to different entities within a vertically integrated undertaking, access to sensitive information relating to essential functions must be restricted to authorised staff of the infrastructure manager and not passed on to other entities within the vertically integrated undertaking.

### **Outsourcing and sharing the infrastructure manager's functions**

**8B.**—(1) Provided that no conflicts of interest arise and that the confidentiality of commercially sensitive information is guaranteed, the infrastructure manager may outsource—

- (a) functions to a different entity, provided the latter is not a railway undertaking, does not control a railway undertaking, or is not controlled by a railway undertaking;
- (b) the execution of works and related tasks on development, maintenance and renewal of the railway infrastructure to railway undertakings or companies which control the railway undertaking, or are controlled by the railway undertaking.

(2) Within a vertically integrated undertaking, the infrastructure manager must not outsource essential functions to any other entity of the vertically integrated undertaking under paragraph (1)(a), unless that entity exclusively performs essential functions.

(3) Any entity carrying out essential functions which have been outsourced under paragraph (1)(a) must comply with regulations 8A, 8C, 9A, 14(6) and 19(3).

### **Impartiality of the infrastructure manager in respect of traffic management and maintenance planning**

**8C.**—(1) The infrastructure manager must exercise the functions of traffic management and maintenance planning in a transparent and non-discriminatory manner and ensure that the persons in charge of taking decisions in respect of those functions are not affected by a conflict of interest.

(2) As regards traffic management, the infrastructure manager must ensure that railway undertakings, in cases of disruption concerning them, have full and timely access to

relevant information. Where the infrastructure manager grants further access to the traffic management process, it must do so for the railway undertakings concerned in a transparent and non-discriminatory way.

(3) The infrastructure manager must carry out the scheduling of maintenance works in a non-discriminatory way. As regards the long-term planning of major maintenance and/or renewal of the railway infrastructure, the infrastructure manager must consult applicants and, so far as reasonably practicable, take into account the concerns expressed.”.

### **Separation of accounts**

7. In regulation 9 (separation of accounts) after paragraph (3) insert—

“(4) Where infrastructure charging and path allocation functions are performed by a charging body and an allocation body by virtue of regulations 14(6) and 19(3) respectively, the undertaking must be organised in distinct divisions that do not have a separate legal form within a single undertaking.”.

### **Financial transparency**

8. After regulation 9 (separation of accounts) insert—

#### **“Financial transparency**

**9A.**—(1) Infrastructure managers must not use income from infrastructure network management activities for any purposes other than to finance the business of the infrastructure manager, but this may include the servicing of the infrastructure manager’s loans and the payment of dividends to its shareholders provided that the income is not used to pay dividends to undertakings within a vertically integrated undertaking which exercise control over both a railway undertaking and the infrastructure manager.

(2) Infrastructure managers must not grant loans to railway undertakings, either directly or indirectly.

(3) Railway undertakings must not grant loans to infrastructure managers, either directly or indirectly.

(4) Loans between legal entities of a vertically integrated undertaking may only be granted, disbursed and serviced at market rates and conditions which reflect the risk profile of the entity concerned.

(5) Other legal entities within a vertically integrated undertaking may only provide services to the infrastructure manager if those services are provided on a contractual basis and paid for at market rates or at prices which reflect the cost of production, plus a reasonable margin of profit.

(6) Debts attributed to the infrastructure manager must be—

(a) clearly separated from debts attributed to other legal entities within vertically integrated undertakings, and

(b) serviced separately from debts attributed to other legal entities within vertically integrated undertakings,

but, this does not prevent the final payment of debts being made via an undertaking which is part of a vertically integrated undertaking and which exercises control over both a railway undertaking and an infrastructure manager, or via another entity within the undertaking.

(7) Within vertically integrated undertakings, the infrastructure manager must keep detailed records of any commercial and financial relations with the other legal entities within that undertaking.

(8) In vertically integrated undertakings, the accounts of the infrastructure manager and of the other legal entities must be kept in a way that ensures fulfilment of the requirements of

this regulation and allows for separate accounting and transparent financial circuits within the undertaking.

(9) Where essential functions are performed by a charging or allocation body in accordance with regulation 14(6) or 19(3), the provisions of this regulation apply to that body and references in this regulation to infrastructure manager, railway undertaking and other legal entities of a vertically integrated undertaking are to be taken as references to the respective divisions of the undertaking in question.

(10) This regulation does not apply to private infrastructure managers that are party to a public-private partnership concluded before 24th December 2016 where—

- (a) the infrastructure manager does not receive any public funds, and
- (b) any loans or financial guarantees operated by the infrastructure manager do not directly or indirectly benefit specific railway undertakings.”.

## **Coordination mechanisms**

9. After regulation 13 (network statement) insert—

### **“Coordination mechanisms**

**13A.**—(1) The main infrastructure manager must put in place appropriate a coordination mechanism to ensure it coordinates, at least annually, with all interested railway undertakings as well as applicants referred to in regulation 12(3) regarding the matters set out in paragraph (3).

(2) Where relevant, representatives of users of the rail freight and passenger transport services, and national, local or regional authorities, must be invited to participate in the coordination required by paragraph (1) and the Office of Rail and Road may participate as an observer.

(3) The matters referred to in paragraph (1) are—

- (a) the needs of applicants related to the maintenance and development of the infrastructure capacity;
- (b) the content of the user-oriented performance targets contained in the agreement referred to in regulation 15(2) and of the incentives referred to in regulation 15(3) and their implementation;
- (c) the content and implementation of the network statement referred to in regulation 13;
- (d) issues of intermodality and interoperability;
- (e) any other issues related to the conditions for access, the use of the infrastructure and the quality of the services of the infrastructure manager.

(4) The main infrastructure manager must draw up and publish guidelines for the coordination required by paragraph (1) in consultation with interested parties and must publish on its website an overview of the activities undertaken pursuant to this regulation.

## **European Network of Infrastructure Managers**

**13B.**—(1) With a view to facilitating the provision of efficient and effective rail services within the European Union, the main infrastructure manager must participate and cooperate in a network of European infrastructure managers, that meets at regular intervals to—

- (a) develop European Union rail infrastructure;
- (b) support the timely and efficient implementation of the single European railway area;
- (c) exchange best practices;
- (d) monitor and benchmark performance;

- (e) contribute to the market monitoring activities referred to in Article 15 of the Directive;
- (f) tackle cross-border bottlenecks; and
- (g) discuss the application of Articles 37 and 40 of the Directive.”.

### **Independence of the essential functions**

**10.**—(1) In regulation 14 (establishing, determining and collecting charges) after paragraph (6) insert—

“(6A) In paragraph (6) the infrastructure manager is not independent in its organisation or decision-making functions if, in particular—

- (a) a railway undertaking or any other legal entity exercises a decisive influence on the infrastructure manager in relation to the infrastructure charging elements of the essential functions, without prejudice to the charging framework established pursuant to this regulation;
- (b) a railway undertaking or any other legal entity within the vertically integrated undertaking has decisive influence on appointments and dismissals of persons in charge of taking decisions on the infrastructure charging elements of the essential functions; or
- (c) the mobility of persons in charge of the infrastructure charging elements of the essential functions creates a conflict of interest.”.

(2) In regulation 19 (capacity allocation) after paragraph (3) insert—

“(3A) In paragraph (3) the infrastructure manager is not independent in its organisation or decision-making functions if, in particular—

- (a) a railway undertaking or any other legal entity exercises a decisive influence on the infrastructure manager in relation to the train path allocation elements of the essential functions, without prejudice to the allocation framework established pursuant to this regulation;
- (b) a railway undertaking or any other legal entity within the vertically integrated undertaking has decisive influence on appointments and dismissals of persons in charge of taking decisions on the train path allocation elements of the essential functions; or
- (c) the mobility of persons in charge of the train path allocation elements of the essential functions creates a conflict of interest.”.

### **Capacity rights**

**11.** In regulation 19 (capacity allocation)—

- (a) in paragraph (14)—
  - (i) for “an international” substitute “a”; and
  - (ii) after “Office of Rail and Road” insert “at least 18 months before the entry into force of the working timetable to which the request for capacity relates”; and
- (b) in paragraph (15)—
  - (i) after “it must” insert “, without undue delay and at the latest within 10 days, ” and change “paragraph (13)” to “paragraph (14);
  - (ii) in sub-paragraph (c) omit “international”. and replace “paragraph (7)” with “paragraph (14)”.

### **Special measures to be taken in the event of disruption**

**12.** In regulation 30 (special measures to be taken in the event of disruption) after paragraph (2) insert—



“(2A) In the event of disruption which has the potential to affect cross-border traffic, the infrastructure manager must share any relevant information with other infrastructure managers whose network or traffic may be affected and the infrastructure managers concerned must cooperate to restore cross-border traffic to normal.”.

### **Appeals to the regulatory body**

**13.** In regulation 32 (appeals to the regulatory body) in paragraph (2)—

- (a) at the end of sub-paragraph (f) omit “and”;
- (b) at the end of sub-paragraph (g) for the full stop substitute a semicolon; and
- (c) after sub-paragraph (g) insert—
  - “(h) traffic management;
  - (i) renewal planning and scheduled or unscheduled maintenance;
  - (j) compliance with the requirements, including those regarding conflicts of interest, set out in regulations 8A, 8B, 8C, 9A, 14(6) and 19(3).”.

### **Regulatory decisions concerning passenger services**

**14.—(1)** In the heading to regulation 33 (regulatory decisions concerning international passenger services) omit “international”.

(2) In regulation 33—

- (a) omit paragraphs (1) and (2);
- (b) in paragraph (3)—
  - (i) for “The Office of Rail and Road must” substitute “At the request of a relevant party submitted within one month of receipt of the information on the intended passenger service referred to in regulation 19(14), the Office of Rail and Road must”; and
  - (ii) in sub-paragraph (a) omit “at the request of a relevant party and”;
- (c) in paragraph (4)(b) omit “international”;
- (d) for paragraph (6)(d) substitute—
  - “(d) provide the relevant parties and any railway undertaking seeking access for the purpose of operating a passenger service with—
    - (i) the grounds for its decision,
    - (ii) the conditions under which any of those parties may request a reconsideration of the decision or direction or both, and
    - (iii) where paragraph (6)(c) applies, an indication of possible changes to the service which would ensure that the conditions to grant the right of access provided for in regulation 4 are met.”;
- (e) after paragraph (6) insert—
  - “(6A) A request for a reconsideration in accordance with paragraph (6)(d)(ii) must be made within one month of receipt of the information referred to in paragraph (6)(d).”;
- (f) in paragraphs (7) and (8) after “(6)(d)” insert “(ii) and (6A)”.

### **Monitoring the rail services markets**

**15.** In regulation 34 (monitoring the rail services markets)—

- (a) in paragraph (1) after “rail services markets” insert “, including the market for passenger services and the activities of infrastructure managers in relation to the matters referred to in regulation 32(2)”; and
- (b) in paragraph (2)(a) for “control” substitute “verify compliance with”.

## Audits

16. In regulation 35 (audits)—

- (a) in paragraph (1) after “provisions laid down in regulation 9” insert “and the provisions on financial transparency laid down in regulation 9A”; and
- (b) after paragraph (3) insert—

“(3A) In the case of vertically integrated undertakings, the powers of the Office of Rail and Road under this regulation extend to all legal entities within the vertically integrated undertaking.”.

## Cooperation between regulatory bodies

17. In regulation 37 (cooperation between regulatory bodies)—

- (a) after paragraph (9) insert—

“(9A) Where matters concerning an international service require the decision of the Office of Road and Rail and the decision of a regulatory body in another Member State, the Office of Road and Rail must, whilst carrying out its functions in accordance with these Regulations, cooperate with the other regulatory body or bodies in preparing its decision in order to bring about a resolution to the matter.”; and
- (b) in paragraph (10) after “under these Regulations” insert “including arrangements for the resolution of disputes that arise within the framework of paragraph (9A)”.

## Timetable for the allocation process

18. For Schedule 3 (timetable for the allocation process), substitute the schedule that is set out in the Schedule to these Regulations.

Sealed with the Official Seal of the Department for Infrastructure on 12<sup>th</sup> February 2019



*Tom Reid*

A senior officer of the Department for Infrastructure

## SCHEDULE

Regulation 18

### “SCHEDULE 3

Regulations 19 and 22

### Timetable for the Allocation Process

The Schedule for the Allocation Process set out in Annex 7 to the Directive (the text of which was replaced by the text annexed to Commission delegated Decision (EU) 2017 replacing Annex 7 to Directive 2012/34/EU of the European Parliament and of the council establishing a single European railway area(a) applies for the purpose of this Schedule.”

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(a) O.J. No. L343, 14.12.12, p32 as corrected by corrigendum, O.J. L 67, 12.3.15, p32

## **EXPLANATORY NOTE**

*(This note is not part of the Regulations)*

These Regulations implement for Northern Ireland, Directive EU/2016/2370

The regulations make amendments to legislation in the field of railway infrastructure and in particular amend the Railways Infrastructure (Access, Management and Licensing of Railway Undertakings) Regulations (Northern Ireland) 2016

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£6.90

NI201902121007 02/2019 19585

<http://www.legislation.gov.uk/id/nisr/2019/15>

ISBN 978-0-33-801032-2



9 780338 010322