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STATUTORY INSTRUMENTS

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**2005 No. 3049**

**TRANSPORT**

**The Railways Infrastructure (Access and Management) Regulations 2005**

<i>Made</i>	- - - -	<i>1st November 2005</i>
<i>Laid before Parliament</i>		<i>4th November 2005</i>
<i>Coming into force</i>	- -	<i>28th November 2005</i>

The Secretary of State, being a Minister designated<sup>(1)</sup> for the purposes of section 2(2) of the European Communities Act 1972<sup>(2)</sup> in relation to measures relating to railways and railway transport, in exercise of the powers conferred by that section, makes the following Regulations:

**PART 1**

**PRELIMINARY**

**Citation, commencement and extent**

1.—(1) These Regulations may be cited as the Railways Infrastructure (Access and Management) Regulations 2005 and shall come into force on 28th November 2005.

(2) With the exception of paragraphs 1 to 3 of Schedule 1, these Regulations do not extend to Northern Ireland.

**Amendments, repeals, revocations and transitional provisions**

2.—(1) Subject to the transitional provisions in paragraphs (2) and (3), the Railways Regulations 1998<sup>(3)</sup>, in so far as they continue to have effect, are revoked.

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(1) S.I.1996/266, to which there are amendments not relevant to these Regulations.

(2) 1972 c. 68. By virtue of the amendment of section 1(2) of the European Communities Act 1972 by section 1 of the European Economic Area Act 1993 (c. 51) regulations may be made under section 2(2) of the European Communities Act 1972 to implement obligations of the United Kingdom created or arising by or under the Agreement on the European Economic Area signed at Oporto on 2nd May 1992 (Cm 2073) and the Protocol adjusting the Agreement signed at Brussels on 17th March 1993 (Cm 2183).

(3) S.I. 1998/1340, amended by S.I.1998/1519, regulations 1 and 2; S.I. 2001/3291, regulations 13 - 16; the Railways and Transport Safety Act 2003 (c. 20) section 16(4), (5) and paragraph 4 of Schedule 3, and the British Overseas Territories Act 2002 (c. 8) section 2(3).

(2) The transitional provisions are that the Railways Regulations 1998 shall continue to have effect in relation to any—

- (a) application for transit, or access and transit rights under regulation 11; or
- (b) appeal brought under regulation 14,

of those regulations made, but not concluded, prior to their revocation by virtue of paragraph (1).

(3) In the case of an application or appeal to which paragraph (2) applies, references in regulations 11 and 14 of the Railways Regulations 1998 to the International Rail Regulator shall be taken to be a reference to the Office of Rail Regulation.

(4) Schedule 1 (amendments and repeals) shall have effect.

## Interpretation

3.—(1) In these Regulations—

“access and transit rights” means rights of access to railway infrastructure and rights of transit through a Member State using the railway infrastructure;

“the Act” means the Railways Act 1993<sup>(4)</sup>;

“access charges review” means a review of access charges carried out in accordance with Schedule 4A to the Act<sup>(5)</sup>;

“the 1996 Act” means the Channel Tunnel Rail Link Act 1996<sup>(6)</sup>;

“*ad hoc* request” means a request for individual train paths made other than in accordance with the timetable for the capacity allocation process as set out in Schedule 4;

“allocation body” means a body or undertaking, other than the infrastructure manager, which is responsible, by virtue of regulation 16(3), for the functions and obligations of the infrastructure manager under Part 5 and Schedule 4;

“applicant” means—

- (a) a railway undertaking licensed in accordance with the provisions of Council Directive 95/18/EC dated 19th June 1995 on the licensing of railway undertakings<sup>(7)</sup>, as amended by Directive 2001/13/EC dated 26th February 2001<sup>(8)</sup> and Directive 2004/49/EC dated 29th April 2004<sup>(9)</sup>, both of the European Parliament and of the Council;
- (b) an international grouping of railway undertakings; or
- (c) a body or undertaking with public service or commercial interest in procuring infrastructure capacity, such as public authorities under Regulation (EEC) No. 1191/69<sup>(10)</sup> and shippers, freight forwarders, and combined transport operators;

“charging body” means a body or undertaking, other than the infrastructure manager, which is responsible, by virtue of regulation 12(7), for the functions and obligations of the infrastructure manager under Part 4 and Schedule 3;

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<sup>(4)</sup> 1993 c. 43.

<sup>(5)</sup> Schedule 4A is amended by Schedule 4 to the Railways Act 2005 (c. 14) on a date to be appointed.

<sup>(6)</sup> 1996 c. 61.

<sup>(7)</sup> O.J. No L143, 27.6.1995, p70. Added to Annex XIII of the EEA Agreement by Article 1 of the Decision of the EEA Joint Committee No. 71/95 of 15th December 1995 (O.J. No. L57, 7.3.96, p.37).

<sup>(8)</sup> O.J. No L75, 15.3.2001, p26. Added to Annex XIII of the EEA Agreement by Article 2 of the Decision of the EEA Joint Committee No. 118/2001 of 28th September 2001 (O.J. No. L322, 6.12.2001, p32).

<sup>(9)</sup> O.J. No. L164, 30.04.04, p58. Added to Annex XIII of the EEA Agreement by Article 1 of the Decision of the EEA Joint Committee No. 151/2004 of 29th October 2004 (O.J. No. L102, 21.4.2005, p27).

<sup>(10)</sup> Regulation (EEC) No. 1191/69 of the Council of 26th June 1969 on action by Member States concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway (O.J. L156, 28.6.1969, p1). Regulation as last amended by Regulation (EC) No. 1893 (O.J. No. L169, 29.6.1991, p1).

“charging scheme” means the specific charging rules established in accordance with regulation 12 by the Office of Rail Regulation or, as the case may be, the infrastructure manager;

“charging system” means the system established by an infrastructure manager to determine access charges;

“the Concessionaires”, “the tunnel system” and “shuttle service” have the same meanings as in the Channel Tunnel Act 1987(11);

“the Council Directives” means—

- (a) Council Directive No 91/440/EEC dated 29th July 1991 on the development of the Community’s railways(12), as amended by Directive 2001/12/EC dated 26th February 2001(13) and Directive 2004/51/EC(14) dated 29th April 2004, both of the European Parliament and of the Council; and
- (b) Directive No 2001/14 dated 26th February 2001 on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure(15), as amended by Directive 2004/49/EC dated 29th April 2004 on safety on the Community’s railways, both of the European Parliament and of the Council;

“development agreement” and “rail link facility” have the same meanings as in the 1996 Act(16), except that the definition of “rail link facility” shall also include any rail maintenance depot which provides maintenance services primarily for rail vehicles providing services on the rail link, as defined in section 56 of that Act, and to which the rail access is via that rail link;

“EEA state” means a Member State, Norway, Iceland or Liechtenstein;

“electrical plant” has the same meaning as in the Electricity Act 1989(17);

“factory” has the same meaning as in the Factories Act 1961(18);

“framework agreement” means either—

- (a) an access contract described in section 18(2)(a) of the Act which satisfies one of the conditions in sub-section (1) of that section; or
- (b) a legally binding agreement made other than in pursuance of sections 17 or 18 of the Act setting out the rights and obligations of an applicant and the infrastructure manager or, as the case may be, allocation body in relation to the infrastructure capacity to be allocated and the charges to be levied over a period in excess of one working timetable period;

“infrastructure manager” means any body or undertaking that is responsible in particular for—

- (a) the establishment and maintenance of railway infrastructure; and
- (b) the provision with respect to that infrastructure of network services as defined in section 82 of the Act,

but, notwithstanding that some or all of the functions of the infrastructure manager on a network or part of a network may be allocated to different bodies or undertakings, the obligations in respect of those functions remain with the infrastructure manager except where the functions

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(11) 1987 c. 53. see section 49.

(12) O.J. L237, 24.8.91, p25: the text of the Directive is subject to the amendments in a corrigendum published in O.J. No. L305, 6.11.91, p22.

(13) O.J. No L75. 15.03.01, p1. Added to Annex XIII of the EEA Agreement by Article 1 of the Decision of the EEA Joint Committee No. 118/2001 of 28th September 2001 (O.J. No. L322, 6.12.2001, p32).

(14) O.J. L164, 30.4.04, p16. Added to Annex XIII of the EEA Agreement by Article 1 of the Decision of the EEA Joint Committee No. 151/2004 of 29th October 2004 (O.J. No. L102, 21.4.2005, p27).

(15) O.J. No. L75, 15.3.01, p29. Added to Annex XIII of the EEA Agreement by Article 3 of the Decision of the EEA Joint Committee No. 118/2001 of 28th September 2001 (O.J. No. L322, 6.12.2001, p32).

(16) see sections 56 and 17 respectively.

(17) 1989 c. 29. See section 64, to which amendments have been made which are not relevant to this instrument.

(18) 1961 c. 34. See section 175, amended by S.I. 1983/978, regulations 3(1) and Schedule 1.

and obligations pass to an allocation or charging body by virtue of regulations 16(3) and 12(7) respectively;

“military establishment” means an establishment intended for use for naval, military or air force purposes or for the purposes of the Department of the Secretary of State responsible for defence;

“mine” has the same meaning as in the Mines and Quarries Act 1954<sup>(19)</sup>;

“nuclear site” has the same meaning as in the Radioactive Substances Act 1993<sup>(20)</sup>;

“quarry” has the same meaning as in the Quarries Regulations 1999<sup>(21)</sup>;

“the Office of Rail Regulation” means the body established under section 15 of the Railways and Transport Safety Act 2003<sup>(22)</sup>;

“railway infrastructure” consists of the items described as “network”, “station” and “track”, in section 83 of the Act, but excludes such items—

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

“service provider” means a body or undertaking that supplies any of the services—

- (a) to which access is granted by virtue of regulations 6 or 7; or
- (b) listed in paragraphs 2, 3 or 4 of Schedule 2,

whether or not that body or undertaking is also an infrastructure manager;

“transit rights” means rights of transit through a Member State using railway infrastructure located in that Member State;

“the Treaty” means the consolidated versions of the Treaty on European Union and of the Treaty establishing the European Community<sup>(23)</sup>;

“working day” means any day which is not a Saturday, Sunday, Good Friday, Christmas Day or a bank holiday in England and Wales by virtue of section 1 of the Banking and Financial Dealings Act 1971<sup>(24)</sup>; and

“working timetable period” means the calendar year commencing at midnight on the second Saturday in December.

(2) Except where a definition in paragraph (1) applies, expressions used in these Regulations and in the Council Directives shall have the same meaning as in the Council Directives.

## Scope

4.—(1) Subject to paragraph (2), regulations 5, 6, 8 to 10, 12(5) and (6) and paragraph 1(2) of Schedule 3 apply to—

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(19) 1954 c. 70; see section 180, amended by S.I. 1974/2013, regulation 2(1)(b) and Schedule 2, paragraph 3; S.I. 1993/1897, regulation 41(2) and Schedule 3, Part II; S.I. 1999/2024, regulation 47(1) and Schedule 2, Parts 1 and Part II.

(20) 1993 c. 12. See section 47, to which amendments have been made which are not relevant to this instrument.

(21) S.I. 1999/2024, see regulation 3.

(22) 2003 c. 20.

(23) 2002/C325/01.

(24) 1971 c. 80.

- (a) the management of railway infrastructure; and
  - (b) the rail transport activities of the railway undertakings established or to be established in an EEA State.
- (2) Paragraph (1) does not apply to railway undertakings whose activity is limited to the provision of solely urban, suburban or regional services.
- (3) Subject to paragraphs (4) and (5), Parts 2 to 5 and Schedules 2 to 4, with the exception of the provisions referred to in paragraph (1), apply to the use of—
- (a) railway infrastructure; and
  - (b) to the extent stated to apply, the services described in regulation 7 and Schedule 2, for domestic and international rail traffic.
- (4) Paragraph (3) does not apply—
- (a) to stand-alone local and regional networks for passenger services on railway infrastructure;
  - (b) to networks intended only for the operation of urban or suburban passenger services;
  - (c) until such time as capacity is requested by another applicant, to regional networks used for regional freight services solely by a railway undertaking referred to in paragraph (2); or
  - (d) to networks—
    - (i) situated within a factory, nuclear site, or site housing electrical plant;
    - (ii) within a mine or quarry;
    - (iii) used solely in connection with the carrying out of any building works; or
    - (iv) within a military establishment,that are used only by the person responsible for that network for the purposes of freight operations connected with the premises or building works referred to in this subparagraph.
- (5) Part 5 and Schedule 4 do not apply to the services referred to in regulation 6.
- (6) Parts 6 and 7 and Schedule 1 apply to all matters within any part of the scope of Parts 2 to 5 and Schedules 2 to 4.
- (7) These Regulations do not apply to the management of the tunnel system and the rail transport activity of the Concessionaires in respect of any shuttle service.

## PART 2

### ACCESS TO RAILWAY INFRASTRUCTURE AND SERVICES

#### Access and transit rights

- 5.—(1) An international grouping is entitled, on equitable conditions—
- (a) in the case of an international grouping which includes a railway undertaking established in the United Kingdom, to such access and transit rights; or
  - (b) in the case of any other international grouping, to such transit rights,
- as may be necessary for the provision of international transport services between the EEA States where the undertakings constituting the grouping are established.
- (2) A railway undertaking is entitled, on equitable conditions, to such access as may be necessary for the purpose of the operation of any type of rail freight service.
- (3) It is the duty of the infrastructure manager to ensure that the entitlements conferred by this regulation are honoured.

(4) Without prejudice to the generality of regulation 29, if an international grouping or railway undertaking is denied the entitlements conferred on it by this regulation, that international grouping or railway undertaking has a right of appeal to the Office of Rail Regulation in accordance with regulation 29.

### **Access to terminals and ports**

6.—(1) Subject to paragraph (2), an international grouping or railway undertaking is entitled, for the purposes of the rail activities referred to in regulation 5, to track access to and the supply of services in terminals and ports linked to the rail network which serve, or potentially serve, more than one final customer.

(2) Requests by international groupings and railway undertakings, in accordance with the entitlements conferred by paragraph (1), may be subject to restrictions only if viable alternatives by rail under market conditions exist.

(3) The infrastructure manager or, as the case may be, service provider must ensure that the entitlements conferred by this regulation are honoured, and that access to, and the supply of, services is granted in a transparent and non-discriminatory manner.

(4) Without prejudice to the generality of regulation 29, if an international grouping or railway undertaking is denied the entitlements conferred on it by this regulation, or if the entitlements are made subject to restrictions other than in accordance with paragraph (2), that international grouping or railway undertaking has a right of appeal to the Office of Rail Regulation in accordance with regulation 29.

### **Access to services**

7.—(1) Subject to paragraph (2), applicants are entitled to services comprising—

- (a) the minimum access package; and
- (b) the track access to service facilities and the supply of services,

described in paragraphs 1 and 2 of Schedule 2.

(2) If the infrastructure manager or service provider to whom a request has been made for the supply of a service referred to in paragraph (1) does not supply such a service, the infrastructure manager must, if he is the provider of the main infrastructure, use all reasonable endeavours to facilitate the supply of that service through the appropriate service provider.

(3) The infrastructure manager or, as the case may be, service provider must ensure that the entitlements granted by this regulation are honoured, and access to the services referred to in paragraph (1) must be provided in a non-discriminatory manner.

(4) Where the infrastructure manager or service provider supplies any of the services described in paragraph 2 of Schedule 2, requests for the supply of such services may only be refused if a viable alternative means of the service being provided under market conditions exists.

(5) Where the infrastructure manager or service provider offers to supply any of the services described in paragraph 3 of Schedule 2 he must, in response to a request from an applicant, supply the services to that applicant.

(6) An applicant may request the supply of any of the services described in paragraph 4 of Schedule 2 from an infrastructure manager or service provider but that infrastructure manager or service provider is under no obligation to supply the services requested.

(7) Without prejudice to the generality of regulation 29, if an applicant is denied the entitlements conferred on it by this regulation, that applicant has a right of appeal to the Office of Rail Regulation in accordance with regulation 29.

## PART 3

### INFRASTRUCTURE MANAGEMENT

#### **Management independence**

**8.—(1)** Railway undertakings must, in their management, administration and internal control over administrative, economic and accounting matters, maintain the status of an independent operator and hold, in particular, assets, budgets and accounts which are separate from those of the State.

(2) Subject to the requirements set out in Parts 4 and 5 and Schedules 3 and 4 about the determination of infrastructure charges and the allocation of infrastructure capacity an infrastructure manager must be responsible for its own management, administration and internal control.

(3) Railway undertakings must keep and publish profit and loss accounts and either balance sheets or annual statements of assets and liabilities for business relating to the provision of rail-freight transport services.

(4) Funds paid for activities relating to the provision of passenger-transport services as public-service remits must be shown separately in the relevant accounts and may not be transferred to activities relating to the provision of other transport services or any other business.

#### **Separation between infrastructure management and transport operations**

**9.—(1)** Any body which incorporates the functions of both infrastructure manager and railway undertaking must—

- (a) prepare and publish separate profit and loss accounts and balance sheets in respect of business relating to the—
  - (i) provision of transport services as a railway undertaking; and
  - (ii) management of railway infrastructure; and
- (b) ensure that public funds granted to such a body are not transferred between that part of the body responsible for the provision of transport services and that responsible for the management of railway infrastructure.

(2) Accounts for the two areas of activity described in paragraph (1) must be kept in such a way as to reflect the prohibition set out in that paragraph.

(3) The monitoring of the observance of public service obligations, where stipulated in the terms of a contract required by regulation 16(10), must be carried out by bodies or undertakings which do not provide rail transport services.

#### **Business Plans**

**10.—(1)** The infrastructure manager must draw up a business plan which is designed for the purpose of ensuring—

- (a) optimal and efficient use and development of the infrastructure; and
- (b) financial balance.

(2) The plan referred to in paragraph (1) must include details of investment and financial programmes, and provide the means by which the objectives set out in that paragraph are to be achieved.

(3) Each railway undertaking must draw up a business plan, which must include their investment and financing programmes, and which is designed for the purpose of ensuring—

- (a) financial equilibrium; and

(b) other technical, commercial and financial management objectives.

(4) The plan referred to in paragraph (3) must provide the means by which the objectives set out in that paragraph are to be achieved.

(5) The Office of Rail Regulation shall, at least once a year, request confirmation that a business plan has been produced in accordance with paragraphs (1) and (3) and each infrastructure manager or, as the case may be, railway undertaking, to whom such a request is made shall be under an obligation to comply with that request.

(6) For the purposes of regulation 31, a request by the Office of Rail Regulation in accordance with paragraph (5) shall be treated as a request for information.

### **Network Statement**

**11.**—(1) The infrastructure manager must, following consultation with all interested parties, develop and publish a network statement containing the information described in paragraph (4).

(2) Where, by virtue of regulations 12(7) or 16(3) a charging body or, as the case may be, allocation body is responsible for the functions of the infrastructure manager in Parts 4 or 5, that charging body or allocation body must provide the infrastructure manager with such information as is necessary to enable that infrastructure manager to—

- (a) include the information described in paragraph (4) in the network statement; and
- (b) keep the network statement up to date in accordance with paragraph (5).

(3) A service provider who is not the infrastructure manager must provide the infrastructure manager with such information as is necessary to enable that infrastructure manager to—

- (a) include the information described in paragraph (4)(b) and, where applicable, (d) in the network statement; and
- (b) keep the network statement up to date in accordance with paragraph (5).

(4) The information referred to in paragraph (1) is—

- (a) a section setting out the nature of the railway infrastructure which is available to applicants and the conditions of access to it;
- (b) details as to where further information may be obtained about the nature of the track access to, and supply of services in, any of the terminals, ports and service facilities to which access may be obtained pursuant to regulations 6 and 7;
- (c) a description of the charging principles and tariffs, including details of the charging methodology, exceptions to the charging principles, and discounts;
- (d) details of charges for the supply of those services listed in Schedule 2 which are provided by only one supplier;
- (e) a description of the principles and criteria for the allocation of infrastructure capacity, setting out the general capacity characteristics of the infrastructure available and the restrictions on its use, including likely capacity requirements for maintenance;
- (f) the procedures and deadlines in the capacity allocation process and specific criteria employed in that process, in particular—
  - (i) the procedures according to which applicants can request infrastructure capacity from the infrastructure manager;
  - (ii) the information to be provided by applicants;
  - (iii) the timetable for the application and allocation process;



- (iv) the principles governing the co-ordination process, in particular the arrangement of international train paths, and the effect that modification of such paths might have on other infrastructure managers;
  - (v) information about the procedures established in accordance with regulation 17(4) for the allocation of infrastructure capacity at an international level, including information about the membership and methods of operation of any representative groups, and all relevant criteria used to assess and allocate infrastructure capacity which crosses more than one network;
  - (vi) the dispute resolution procedure established in accordance with regulation 20(5);
  - (vii) details of any section of railway infrastructure which has been designated for use by specified types of rail services in accordance with regulation 22;
  - (viii) the procedures to be followed for congested infrastructure, and any priority criteria for the allocation of congested infrastructure set in accordance with regulation 23(5) and (6);
  - (ix) the findings of any capacity enhancement plan completed in accordance with regulation 25;
  - (x) details of restrictions on the use of infrastructure;
  - (xi) the threshold quota to be applied by the infrastructure manager in requiring a train path to be surrendered under regulation 26(1); and
  - (xii) the conditions relating to previous levels of utilisation of capacity to be taken into account by the infrastructure manager in determining priorities in accordance with regulation 26(3); and
- (g) the measures taken by the infrastructure manager to ensure fair treatment of freight services and international services, and in responding to *ad hoc* requests for infrastructure capacity.
- (5) The infrastructure manager must keep the network statement up to date and modify it as necessary.
- (6) The infrastructure manager must publish the network statement not less than four months before the deadline for applications for infrastructure capacity as described under paragraph (4)(f) (iii).
- (7) Any fee charged by the infrastructure manager for the provision, on request, of a copy of the network statement must not exceed the cost of producing that copy.
- (8) If the information required under paragraphs (2) or (3) is not provided to the satisfaction of the infrastructure manager, he may refer the matter to the Office of Rail Regulation for a determination as to whether additional information must be supplied.
- (9) Where a matter is referred to the Office of Rail Regulation in accordance with paragraph (8), it is the duty of that Office to make the determination within such period as is reasonable in all the circumstances, and any such determination shall be binding on all parties.

## PART 4

### INFRASTRUCTURE CHARGES

#### **Establishing, determining and collecting charges**

**12.**—(1) Subject to paragraph (3), the Office of Rail Regulation must establish the charging framework and the specific charging rules governing the determination of the fees to be charged in accordance with paragraph (5).

(2) Subject to paragraphs (3) and (7), the infrastructure manager must—

(a) determine the fees to be charged for use of the infrastructure in accordance with the charging framework, the specific charging rules, and the principles and exceptions set out in Schedule 3; and

(b) collect those fees.

(3) Paragraphs (1) and (2) do not apply where the infrastructure to which the charge relates is a rail link facility.

(4) Where paragraph (3) applies, the Secretary of State must establish the charging framework through the development agreement, and the infrastructure manager must, subject to paragraph (7)—

(a) establish the specific charging rules governing the determination of the fees to be charged in accordance with paragraph (5);

(b) determine the fees to be charged for the use of the infrastructure in accordance with the charging framework, the specific charging rules and the principles and exceptions set out in Schedule 3; and

(c) collect those fees.

(5) Subject to the provisions in paragraphs (1) to (4), the infrastructure manager must—

(a) charge fees for use of the railway infrastructure for which he is responsible; and

(b) utilise such fees as are received to fund his business.

(6) Applicants must, subject to the right of appeal to the Office of Rail Regulation provided in regulation 29, pay such fees as are charged by the infrastructure manager for use of the railway infrastructure.

(7) Subject to paragraph (8), an infrastructure manager responsible for any of the functions of the infrastructure manager described in this Part and Schedule 3 must, in its legal form, organisation or decision-making functions, be independent of any railway undertaking and, where he is not so independent, that infrastructure manager must ensure that the functions described in this Part and Schedule 3 are performed by a charging body that is so independent.

(8) The separation required by paragraph (7) does not apply to the function of the collection of fees charged in accordance with paragraph (2)(b) and (4)(c).

(9) The infrastructure manager must be able to justify that the charges invoiced to each railway undertaking for access to the infrastructure comply with the methodology, rules and, where applicable, scales laid down in the network statement and, where information about the charges imposed is requested by either the Secretary of State or the Office of Rail Regulation, the infrastructure manager must supply the information requested.

(10) Infrastructure managers must co-operate to achieve the efficient operation of train services which cross more than one infrastructure network and must, in particular, aim to guarantee the optimum competitiveness of international rail freight.

(11) Infrastructure managers may establish such joint organisations as may be appropriate to enable the co-operation referred to in paragraph (10) to be achieved and any such co-operation or joint organisations shall be bound by the rules set out in these Regulations.

(12) The infrastructure manager must respect the commercial confidentiality of information provided to it by applicants for infrastructure capacity.

### **Infrastructure costs and accounts**

**13.**—(1) The Office of Rail Regulation through the access charges review or, in the case of a rail link facility, the Secretary of State through the development agreement, must lay down conditions, including where appropriate advance payments, to ensure that, under normal business conditions and over a reasonable time period, the accounts of an infrastructure manager shall at least balance—

- (a) income from infrastructure charges;
- (b) surpluses from other commercial activities; and
- (c) public funds,

with infrastructure expenditure.

(2) The infrastructure manager must, with due regard to safety and to maintaining and improving the quality of the infrastructure service, be provided with incentives to reduce the costs of provision of infrastructure and the level of access charges.

(3) It shall be the responsibility of the Office of Rail Regulation through the access charges review or, in the case of a rail link facility, the Secretary of State through the development agreement, to ensure that the requirements set out in paragraph (2) are implemented.

### **Performance scheme**

**14.**—(1) The infrastructure manager must establish a performance scheme as part of the charging system to encourage railway undertakings and the infrastructure manager to minimise disruption and improve the performance of the railway network.

- (2) The performance scheme referred to in paragraph (1) may include—
- (a) penalties for actions which disrupt the operation of the rail network;
  - (b) compensation for undertakings which suffer from disruption; and
  - (c) bonuses that reward better than planned performance.

(3) The basic principles of the performance scheme must apply in a non-discriminatory manner throughout the network to which that scheme relates.

### **Reservation charges**

**15.**—(1) The infrastructure manager may levy an appropriate charge for capacity that is requested but not used, and the imposition of this charge must provide incentives for efficient use of capacity.

(2) The infrastructure manager must provide, to any interested party, information about the infrastructure capacity allocated to applicants.

## PART 5

### ALLOCATION OF INFRASTRUCTURE CAPACITY

#### Capacity allocation

16.—(1) Whilst respecting the requirements for management independence stipulated in regulation 8, the Office of Rail Regulation or, in the case of a rail link facility, the Secretary of State, may establish a framework for the allocation of infrastructure capacity.

(2) The infrastructure manager shall, subject to paragraph (3), be responsible for the establishment of specific capacity allocation rules and for the process of allocating infrastructure capacity in respect of the infrastructure for which he has responsibility.

(3) An infrastructure manager responsible for any of the functions of the infrastructure manager described in this Part and Schedule 4 must, in its legal form, organisation or decision-making functions, be independent of any railway undertaking and, where he is not so independent, that infrastructure manager must ensure that the functions of the infrastructure manager described in this Part are performed by an allocation body that is so independent.

(4) Subject to paragraph (7), any applicant may apply to the infrastructure manager for the allocation of infrastructure capacity.

(5) The infrastructure manager must ensure that the allocation process is conducted in accordance with the timetable set out in Schedule 4.

(6) Subject to paragraph (8), an applicant who has been granted capacity by the infrastructure manager, whether that capacity is in the form of—

- (a) a framework agreement made in accordance with regulation 18 specifying the characteristics of the infrastructure granted; or
- (b) specific infrastructure capacity in the form of a train path,

must not trade that capacity with another applicant or transfer it to another undertaking or service.

(7) Any person who trades in capacity contrary to the provisions of paragraph (6) shall not be entitled to apply for capacity under paragraph (4) for the period of the working timetable period to which the allocation of capacity transferred related.

(8) The use of capacity by a railway undertaking on behalf of an applicant who is not a railway undertaking, in order to further the business of that applicant, is not a transfer for the purposes of paragraph (6).

(9) The infrastructure manager must not allocate capacity in the form of specific train paths for any period in excess of one working timetable period.

(10) A contract, either in the form of a framework agreement or any other type of contract, setting out the rights and obligations of the parties, must be concluded between the infrastructure manager and any applicant to whom infrastructure capacity is allocated before that infrastructure capacity is utilised.

(11) The infrastructure manager must—

- (a) ensure that infrastructure capacity is allocated on a fair and non-discriminatory basis;
- (b) ensure that the contracts referred to in paragraph (10) are non-discriminatory, transparent, and in accordance with the requirements of these Regulations; and
- (c) respect the confidentiality of information supplied to him as part of the capacity allocation process.

(12) In reserving infrastructure capacity for the purposes of scheduled track maintenance, as requested under regulation 19(5), the infrastructure manager must take into account the effect of that reservation on applicants.

### **Co-operation in the allocation of infrastructure capacity crossing more than one network**

**17.—**(1) This regulation applies to an application for infrastructure capacity crossing more than one network.

(2) The infrastructure managers must—

- (a) co-operate to enable the efficient creation and allocation of infrastructure capacity pursuant to a request for capacity crossing more than one network; and
- (b) before consulting on the draft working timetable agree with the other relevant infrastructure managers which international train paths are to be included in that draft working timetable.

(3) The international train paths referred to in paragraph 2(b) may only be adjusted if absolutely necessary.

(4) The infrastructure managers must establish such procedures as are appropriate, in accordance with the requirements set out in these Regulations, to enable the co-operation referred to in paragraph 2(a) to take place, and such procedures must include representatives of the infrastructure managers whose allocation decisions have an impact on one or more infrastructure managers.

(5) Subject to paragraph (6), the procedures established by virtue of paragraph (4) may permit appropriate representatives of infrastructure managers outside the European Community to be associated with these procedures.

(6) Where paragraph (5) applies, the infrastructure managers must inform the European Commission and invite representatives to attend appropriate meetings as an observer.

(7) At any meeting or other activity undertaken to facilitate the allocation of infrastructure capacity across more than one network, decisions may only be taken by representatives of the relevant infrastructure managers.

(8) In acting in accordance with paragraph (2) the infrastructure managers must assess the need for and, where necessary, propose and organise international train paths in such a way as to enable *ad hoc* capacity for freight services to be granted in accordance with regulation 21.

(9) The prearranged train paths referred to in paragraph (8) must be made available to applicants through any infrastructure manager who participates in the international co-ordination of train paths referred to in this regulation.

### **Framework agreements**

**18.—**(1) Subject to the requirements of this regulation, and without prejudice to articles 81, 82 and 86 of the Treaty, an infrastructure manager may enter into a framework agreement with an applicant for the purpose of specifying the characteristics of the infrastructure capacity required by and offered to the applicant over a period of time exceeding one working timetable period.

(2) An applicant who is a party to a framework agreement may apply for the allocation of capacity in accordance with the terms of that agreement

(3) Whilst seeking to meet the legitimate commercial needs of the applicant, a framework agreement must not specify any train path in detail.

(4) The effect of a framework agreement must not be such as to preclude the use of the railway infrastructure subject to that framework agreement by other applicants or services.

(5) A framework agreement must contain terms permitting the amendment or limitation of any condition contained in that framework agreement if such amendment or limitation would enable better use to be made of the railway infrastructure.

(6) A framework agreement may contain penalties applicable on modification or termination of the agreement by any party.

(7) Other than in circumstances described in paragraphs (8) and (9), a framework agreement made in accordance with paragraph (1) shall in principle be for a period of up to five years.

(8) A framework agreement for a period of between five and ten years must be justified by the existence of commercial contracts, specialised investments or risks.

(9) A framework agreement for a period in excess of ten years may only be made in exceptional cases, in particular where there is large-scale and long-term investment, and particularly where such investment is covered by contractual commitments.

(10) Whilst respecting commercial confidentiality, the general nature of each framework agreement must be made available by the infrastructure manager to any interested party.

(11) This regulation is without prejudice to section 18 of the Act in the case of a framework agreement which is an access contract to which that section applies.

(12) Except where section 17(3) of the 1996 Act applies—

- (a) a framework agreement in relation to a rail link facility shall not be subject to the approval of the Office of Rail Regulation under section 18 of the Act; and
- (b) nothing in these Regulations shall have the effect of applying any of sections 17 to 22C of the Act to a rail link facility.

### **Application for infrastructure capacity**

**19.**—(1) Applicants may submit a request to the infrastructure manager for an agreement granting rights to use railway infrastructure against a charge as provided for in Part 4.

(2) An applicant wishing to apply for infrastructure capacity must submit an application to the infrastructure manager in accordance with the timetable for the allocation process set out in Schedule 4.

(3) Applicants may submit a request to a single infrastructure manager for infrastructure capacity crossing more than one network and, where such an application is made, that infrastructure manager is permitted to act on behalf of that applicant in seeking from other infrastructure managers the infrastructure capacity requested.

(4) The infrastructure manager must ensure that, for infrastructure capacity crossing more than one network, applicants may apply direct to any joint body established by the infrastructure managers.

(5) Requests for infrastructure capacity to enable maintenance of the network to be carried out must be submitted in accordance with the timetable set out in Schedule 4.

### **Scheduling and co-ordination**

**20.**—(1) The infrastructure manager must, so far as possible—

- (a) meet all requests for infrastructure capacity, including those requests for train paths which cross more than one network; and
- (b) in so doing, take account of all constraints on applicants, including the economic effect on their business.

(2) The infrastructure manager may give priority to specific services within the scheduling and co-ordination process, but only in accordance with the provisions in regulations 22 and 23.

(3) The infrastructure manager must consult interested parties about the draft working timetable, and must allow such interested parties a period of at least one calendar month to submit their comments.

(4) In the event of conflict between different requests for infrastructure capacity, the infrastructure manager must use all best endeavours, in consultation with the appropriate applicants, and through co-ordination of the requests, to ensure the best possible matching of all requirements and, in so far as it is reasonable to do so, may propose alternative infrastructure capacity from that requested in order to resolve the conflict.

(5) The infrastructure manager must facilitate the establishment and operation of a dispute resolution system to resolve disputes about the allocation of infrastructure capacity and, where that system is applied, a decision on the matters in dispute must be reached no later than ten working days after the final submission of all relevant information in accordance with that system.

(6) The infrastructure manager must take such measures as are appropriate to deal with any concerns about the allocation process raised by interested parties.

(7) For the purposes of this regulation “interested parties” includes—

- (a) all applicants for infrastructure capacity as part of the specific allocation process to which the draft working timetable relates; and
- (b) other parties who have indicated to the Office of Rail Regulation, in such form or manner as that Office may from time to time prescribe, that they wish to have the opportunity to comment as to the effect that the working timetable might have on their ability to procure rail services during the working timetable period to which the draft working timetable relates.

### **Ad hoc requests**

**21.**—(1) In addition to making an application for capacity in accordance with the annual timetable process described in regulation 19, an applicant may submit *ad hoc* requests for infrastructure capacity in the form of individual train paths to the infrastructure manager.

(2) The infrastructure manager must respond to a request described in paragraph (1) as quickly as possible and, in any event, no later than five working days from receipt of the request.

(3) The infrastructure manager must make available, to all potential applicants for such individual train paths, information about available spare capacity on the network for which he is responsible.

(4) The infrastructure manager must, including in the case of congested infrastructure, undertake an evaluation of the need for reserve capacity to be kept available within the final working timetable to enable him to respond rapidly to foreseeable *ad hoc* requests for infrastructure capacity.

### **Declaration of specialised infrastructure**

**22.**—(1) Subject to paragraph (2), all infrastructure capacity must be available for the use of all types of rail transport service which conform to the characteristics necessary for use of that infrastructure, as defined in the infrastructure manager’s network statement.

(2) Subject to the provisions set out in paragraph (3), the infrastructure manager may designate particular sections of the infrastructure for use by specified types of rail service without prejudice to articles 81, 82 and 86 of the Treaty and, once the infrastructure is so designated, may give priority to that specified type of rail service in the allocation of infrastructure capacity.

(3) Those provisions are that—

- (a) suitable alternative routes for other types of rail transport service must exist and be available;
- (b) before making such a designation the infrastructure manager must consult—

- (i) the Secretary of State;
  - (ii) where an element of the infrastructure which it is proposed to designate is in Scotland, Scottish Ministers;
  - (iii) the Office of Rail Regulation; and
  - (iv) all other interested parties; and
- (c) such designation must not prevent the use of that designated infrastructure by other types of rail transport service when capacity is available and an application for that capacity is submitted by an applicant wishing to operate a service using rolling stock which conforms to the technical characteristics necessary for operation on that infrastructure.

### **Congested infrastructure**

**23.**—(1) Where, after the co-ordination of requests for capacity and consultation with the applicants in accordance with regulation 20(4), it is not possible for the infrastructure manager to satisfy requests for infrastructure adequately, the infrastructure manager must declare that element of the infrastructure on which such requests cannot be satisfied to be congested.

(2) Where, during the preparation of the working timetable for the next timetable period, the infrastructure manager considers that an element of the infrastructure is likely to become congested during the period to which that working timetable relates, he must declare that element of the infrastructure to be congested.

(3) When infrastructure has been declared to be congested under the provisions of this regulation the infrastructure manager must inform—

- (a) existing users of that infrastructure;
- (b) new applicants for infrastructure capacity which includes that element of the infrastructure which has been declared to be congested;
- (c) the Office of Rail Regulation;
- (d) the Secretary of State; and
- (e) where any element of the infrastructure which has been declared to be congested is in Scotland, Scottish Ministers.

(4) When infrastructure has been declared to be congested in accordance with paragraphs (1) or (2) the infrastructure manager must undertake a capacity analysis of the congested infrastructure, as described in regulation 24, unless a capacity enhancement plan, as described in regulation 25, is in the process of being implemented.

(5) When an element of the infrastructure has been declared to be congested in accordance with paragraphs (1) or (2) and either—

- (a) a charge as described in paragraph 1(8) of Schedule 3 has not been levied; or
- (b) the charge described in paragraph (a) has been levied but has not achieved a satisfactory result,

the infrastructure manager may set priority criteria for the allocation of infrastructure capacity which includes that congested element of the infrastructure.

(6) The priority criteria referred to in paragraph (5) must—

- (a) take account of the importance of a service to society, relative to any other service which will consequently be excluded; and
- (b) ensure that freight services, and in particular international freight services, are given adequate consideration in the determination of those criteria.



(7) If during the course of the working timetable period to which the declaration of congested infrastructure relates, but before the completion of the capacity analysis, the congestion is resolved, the infrastructure manager may revoke the declaration made in accordance with paragraph (1).

(8) Where paragraph (7) applies, the infrastructure manager must inform the persons referred to in paragraph (3) that the declaration has been revoked.

### **Capacity analysis**

**24.**—(1) Where required in accordance with regulation 23(4), the infrastructure manager must carry out a capacity analysis of the congested infrastructure in order to identify the reasons for the congestion and the measures which might be taken in the short and medium term to ease that congestion.

(2) In conducting the capacity analysis, and in order to identify the reasons for the congestion, the infrastructure manager must consider the—

- (a) characteristics of the congested infrastructure;
- (b) operating procedures used on that infrastructure; and
- (c) characteristics of the different rail services which have been allocated capacity to operate on that infrastructure.

(3) In seeking to determine measures to alleviate congestion the infrastructure manager must consider, in particular—

- (a) re-routing of services;
- (b) re-timing of services;
- (c) alterations to the line-speed; and
- (d) infrastructure improvements.

(4) The infrastructure manager must consult the Secretary of State or, where any part of the capacity analysis relates to railway infrastructure in Scotland, Scottish Ministers, during the preparation of the capacity analysis.

(5) The infrastructure manager must complete the capacity analysis within six months from the date on which the infrastructure is declared to be congested in accordance with regulation 23(1) or (2) and make the findings of the analysis available to the parties described in regulation 23(3).

### **Capacity enhancement plan**

**25.**—(1) The infrastructure manager must, within six months of the publication of a capacity analysis in accordance with regulation 24, produce a capacity enhancement plan.

(2) In producing the capacity enhancement plan, the infrastructure manager must—

- (a) consult such interested parties as he considers necessary, including those described in regulation 23(3); and
- (b) at least one month before the deadline for completion of the plan seek the prior approval of the Secretary of State or, if any part of the capacity enhancement plan relates to infrastructure in Scotland, Scottish Ministers, to the capacity enhancement plan.

(3) The capacity enhancement plan must identify the—

- (a) reasons for the congestion;
- (b) likely future development of traffic;
- (c) constraints on infrastructure development; and

- (d) options for and costs of enhancing the capacity, including the potential effect on access charges.
- (4) On the basis of a cost benefit analysis of the potential measures for action identified in the capacity enhancement plan, that plan must include—
  - (a) details of the action to be taken to enhance the capacity of the congested infrastructure; and
  - (b) a timetable for the completion of the detailed measures identified in accordance with sub-paragraph (a).
- (5) Subject to paragraph (6), if the utilisation of capacity on that element of the infrastructure which is the subject of the capacity enhancement plan attracts a scarcity charge, in accordance with paragraph 1(8) of Schedule 3, the infrastructure manager must cease the levying of such charge in situations where—
  - (a) paragraph (1) applies but he does not produce a capacity enhancement plan for that part of the infrastructure which is subject to the scarcity charge, as required by this regulation; or
  - (b) he fails to make progress with implementation of those areas of the action plan produced in accordance with paragraph (4).
- (6) Paragraph (5) does not apply where—
  - (a) the action plan produced in accordance with paragraph (4) cannot be implemented for reasons beyond the immediate control of the infrastructure manager; or
  - (b) the options identified in that action plan are not economical or financially viable,
 provided that prior approval to continue to levy the scarcity charge is obtained from the Office of Rail Regulation or, in the case of a rail link facility, the Secretary of State.
- (7) At the end of the six month period starting with the publication of the capacity analysis in accordance with regulation 24, whether or not the approval sought under paragraph (2)(b) has been received, the infrastructure manager must provide the parties consulted under paragraph (2)(a) with a copy of the plan and the timetable for completion of the measures identified to resolve the congestion.

### **Use of train paths**

- 26.—(1) Subject to paragraph (2) the infrastructure manager must, in particular where infrastructure has been declared to be congested in accordance with regulation 23, require an applicant who has, over a period of at least one month, used a train path less often than the threshold quota stipulated in the network statement, to surrender that train path.
- (2) Paragraph (1) does not apply if, in the view of the infrastructure manager, the failure to use the train path in accordance with the threshold quota stipulated in the network statement arose as a result of non-economic reasons outside the control of the applicant.
- (3) The infrastructure manager may in the network statement specify conditions under which previous levels of capacity utilisation will be taken into account in determining the priorities to be used in making decisions on the allocation of capacity.

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

- 27.—(1) In the event of disruption to train movements caused by technical failure or accident, the infrastructure manager must take all such steps as are necessary to restore the normal operation of the network.
- (2) The infrastructure manager must have in place a contingency plan listing the public bodies who are required to be informed in the event of a serious incident or serious disruption to train movements.

(3) The infrastructure manager may, in the event of an emergency and where absolutely necessary on account of a breakdown which renders a part of the infrastructure temporarily unusable, withdraw allocated train paths without warning and with immediate effect for such period as is necessary to repair the affected infrastructure.

(4) Subject to paragraph (5), the infrastructure manager may, if he deems it to be necessary, require applicants to make available to him such resources as he considers appropriate to restore the normal operation of the network as quickly as possible.

(5) Where a contract or framework agreement between an applicant and the infrastructure manager incorporates conditions as to the special measures to be taken in the event of disruption, the resources required by the infrastructure manager under paragraph (4) must be in accordance with those conditions.

## PART 6

### REGULATION AND APPEALS

#### **Regulatory body**

**28.**—(1) Section 4 of the Act has effect, to the extent relevant and consistent with the Council Directives, as if the reference to the functions assigned or transferred to the Office of Rail Regulation under or by virtue of Part 1 of the Act included the functions assigned to it under or by virtue of these Regulations.

(2) The Office of Rail Regulation or, in the case of a rail link facility, the Secretary of State, must ensure that charges for the use of railway infrastructure imposed by the infrastructure manager comply with the requirements of Part 4 and Schedule 3.

(3) Subject to paragraph (4), negotiations between an applicant and the infrastructure manager about the level of infrastructure charges shall only be permitted if these are carried out under the supervision of the Office of Rail Regulation and, if such negotiations are likely to contravene the requirements of these Regulations, it shall be the duty of the Office of Rail Regulation to intervene.

(4) Where negotiations described in paragraph (3) relate to the level of infrastructure charges in respect of a rail link facility, references in that paragraph to the Office of Rail Regulation shall be taken to be references to the Secretary of State.

(5) The Office of Rail Regulation must exchange information about its—

- (a) work;
- (b) decision making principles; and
- (c) practice,

with other national regulatory bodies for the purpose of co-ordinating decision making principles across the Community.

(6) Where the Office of Rail Regulation, by virtue of regulations 20(7)(b), 29(4) or 30(2), prescribes the manner and form of any notification, appeal or complaint to be lodged in accordance with those regulations, that Office must make that prescription and details of such manner and form publicly available.

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

**29.**—(1) An applicant has a right of appeal to the Office of Rail Regulation if it believes that it has been unfairly treated, discriminated against or is in any other way aggrieved, and in particular against decisions adopted by the infrastructure manager, an allocation body, a charging body, a service

provider or, as the case may be, a railway undertaking, concerning any of the matters described in paragraph (2).

(2) Those matters are—

- (a) the network statement produced in accordance with regulation 11;
- (b) the information which, by virtue of regulation 11(4), must be included in that network statement;
- (c) the allocation process and its result as prescribed in Part 5 and Schedule 4;
- (d) the charging scheme and charging system established in accordance with regulation 12;
- (e) the level or structure of infrastructure fees, the principles of which are prescribed in Part 4 and Schedule 3, which it is, or may be, required to pay; and
- (f) the arrangements in connection with the entitlements to access granted under Part 2 and Schedule 2.

(3) Where the matter of an appeal under this regulation is one in relation to which directions may be sought from the Office of Rail Regulation under sections 17 or 22A of the Act, the applicant must lodge the appeal by way of an application under the relevant section and, subject to any applicable provisions of these Regulations, the appropriate provisions of that Act shall apply to the consideration of that application.

(4) Where the matter of an appeal under this regulation is one to which paragraph (3) does not apply because—

- (a) the railway facility to which the appeal relates is, by virtue of section 20 of the Act, an exempt facility;
- (b) the appeal relates to a rail link facility; or
- (c) the subject matter of the appeal is not within the scope of directions which may be sought under sections 17 or 22A of the Act,

the applicant must lodge the appeal by way of an application under this regulation, in such form and manner as the Office of Rail Regulation may from time to time prescribe.

(5) When considering an appeal in respect of circumstances described in paragraph (6), the Office of Rail Regulation is under a duty to determine whether, in respect of the access to which the appeal relates, viable alternatives under market conditions exist.

(6) Those circumstances are when the appeal contests that—

- (a) viable alternatives by rail under market conditions do not exist so as to justify a request under regulation 6(2) being subject to restrictions; or
- (b) viable alternative means of the service being provided under market conditions do not exist so as to justify the refusal of a request for the supply of services under regulation 7(4).

(7) Subject to paragraph (8), the Office of Rail Regulation must, within two months of the date of receipt of all relevant information (including information provided pursuant to regulation 31)—

- (a) make a decision on; and
- (b) where appropriate, issue a direction to the infrastructure manager, allocation body, charging body, service provider or, as the case may be, railway undertaking, to remedy the situation arising out of,

an appeal brought under this regulation.

(8) Where a decision or direction under paragraph (7) would affect a rail link facility or, as the case may be, the operation of the development agreement, the Office of Rail Regulation must consult and, subject to paragraph (9), take into account any representations made by, the Secretary of State before making or issuing such a decision or direction.

(9) Where paragraph (8) applies and, following consultation, the Secretary of State submits representations, the Office of Rail Regulation must, before making or issuing a decision or direction, consult such interested parties as it considers appropriate on the representations submitted by the Secretary of State.

(10) In making a decision on an appeal brought under this regulation against refusal by an infrastructure manager or allocation body to allocate infrastructure capacity, or against the terms of an offer of infrastructure capacity, the Office of Rail Regulation must either—

- (a) confirm that no modification of the infrastructure manager or allocation body's decision is required; or
- (b) require modification of that decision in accordance with directions issued by that Office.

(11) Without prejudice to the right of any person to make an application to the court under Part 54 of the Civil Procedure Rules 1998~~(25)~~—

- (a) a decision by the Office of Rail Regulation on an appeal brought under this regulation is binding on all parties affected by that decision; and
- (b) it is the duty of any person to whom a direction is given under this regulation to comply with and give effect to that direction.

(12) Where the subject matter of an appeal relates to the allocation of capacity crossing more than one network and, in particular, the procedures described in regulation 17, the Office of Rail Regulation may, where the decision of an infrastructure manager in another Member State is a material fact, refer that appeal to the Commission for a decision.

### **Competition in the rail services markets**

**30.**—(1) The Office of Rail Regulation shall be responsible for—

- (a) monitoring; and
- (b) determining complaints lodged under paragraph (2) relating to,

competition in the rail services markets, including the rail freight transport market.

(2) Any applicant or interested party may submit a complaint to the Office of Rail Regulation, in such form and manner as that Office may from time to time prescribe, if it believes that it has been treated unjustly, been the subject of discrimination or has been injured in any other way.

(3) Subject to paragraph (4) where, following receipt of—

- (a) a complaint lodged under paragraph (2); or
- (b) information gathered on its own initiative,

the Office of Rail Regulation identifies undesirable developments in relation to competition in the rail services markets it must, at the earliest possible opportunity, determine measures and take appropriate action to correct those developments.

(4) Paragraph (3) is without prejudice to the rights of any person to make an application to the court under Part 54 of the Civil Procedure Rules 1998.

### **Provision of information to the regulatory body**

**31.** If the Office of Rail Regulation requests information in connection with its functions under regulations 10, 29 or 30, section 80 of the Act (duty of certain persons to furnish information on request) shall apply as if—

- (a) in subsection (1)—

- (i) for “Licence holders” there were substituted “An infrastructure manager, allocation body, charging body, applicant, service provider or any other party”;
  - (ii) for “he, they or it” in both places there were substituted “it”; and
  - (iii) for “functions of the Secretary of State, the Scottish Ministers or (as the case may be) that Office under this Part, the Transport Act 2000 or the Railways Act 2005 or any other function or activity of his, theirs or its in relation to railway services” there were substituted “of its functions under subordinate legislation made for the purpose of implementing Council Directive 91/440/EEC dated 29 July 1991 on the development of the Community’s railways, as amended by Directive 2001/12/EC dated 26 February 2001 and Directive 2004/51/EC dated 29 April 2004, both of the European Parliament and of the Council, and Directive 2001/14/EC dated 26 February 2001 on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure, as amended by Directive 2004/49/EC dated 29 April 2004 on safety on the Community’s railways, both of the European Parliament and of the Council”; and
- (b) for “Secretary of State, the Scottish Ministers or the Office of Rail Regulation” in each place there were substituted “Office of Rail Regulation”.

### **The International Rail Regulator**

**32.**—(1) Subject to the transitional provisions set out in regulation 2, the office of “International Rail Regulator”, as provided for in the Railways Regulations 1998(26), is abolished.

(2) All property, rights and liabilities to which the International Rail Regulator is entitled or subject at the coming into force of this regulation (including rights and liabilities relating to staff) are transferred to the Office of Rail Regulation.

## **PART 7**

### **MISCELLANEOUS**

#### **Statutory authority to run trains**

**33.** Any applicant granted transit, or access and transit, rights under these Regulations shall, if and to the extent that it would not, apart from this regulation, have statutory authority to run trains over any track in exercise of such rights, be taken to have statutory authority to do so.

#### **Application of enactments concerning railways**

**34.** Paragraphs 2 (disapplication of enactments in the case of Concessionaires and through service operators), 3 (extension of enactments in relation to through service operators) and 4 (modification of enactments applying to Concessionaires and through service operators) of Schedule 6 to the Channel Tunnel Act 1987(27) shall apply to international groupings and railway undertakings, other than the Concessionaires and the British Railways Board, in relation to the provision of international services in exercise of access or transit rights under these Regulations who are not through service operators within the meaning of that Schedule as they apply to those who are.

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(26) S.I. 1998/1340, see regulation 9 and Schedule 2.

(27) 1987 c. 53. Paragraph 2 of Schedule 6 was amended by the Railways Act 1993 (c. 43), section 152, schedule 12 paragraph 27, and schedule 14; Paragraph 3 of Schedule 6 was amended by the Transport and Works Act 1992 (c. 42), section 68 and Part 1 of Schedule 4, and the Inquiries Act 2005 (c. 12), section 49(2) and Schedule 3.

### **International Groupings**

**35.** In the event of a contravention of, or a refusal or failure to comply with, a requirement or prohibition imposed by these Regulations on an international grouping—

- (a) where the contravention, or refusal or failure to comply, would be an offence under these Regulations each railway undertaking comprised in the grouping shall be guilty of the offence and liable to be proceeded against and punished accordingly unless that undertaking proves that the contravention, refusal or failure occurred without the consent or connivance of that undertaking and that the undertaking exercised all due diligence to prevent that contravention, refusal or failure; and
- (b) where a civil remedy would be available to any person in respect of any loss, damage or injury caused by the contravention, or refusal or failure to comply, each railway undertaking comprised in the grouping shall be jointly and severally liable in respect of such loss, damage or injury.

### **Civil proceedings**

**36.—**(1) The obligation to comply with—

- (a) regulation 8;
- (b) regulation 9;
- (c) paragraphs (7) and (12) of regulation 12;
- (d) paragraphs (3), (10), and (11)(c) of regulation 16; or
- (e) paragraph (11) of regulation 29,

shall be a duty owed to any person who may be affected by a breach of that duty and shall be actionable by any such person who sustains loss, damage or injury caused by the breach at the suit or instance of that person.

(2) In any proceedings brought against an infrastructure manager, international grouping, railway undertaking, allocation body, charging body or applicant under paragraph (1), it shall be a defence for it to prove that it took all reasonable steps and exercised all due diligence to avoid the breach of duty.

(3) Without prejudice to the right which any person may have by virtue of paragraph (1) to bring civil proceedings in respect of any breach of duty, the obligation to comply shall be enforceable by civil proceedings by the Office of Rail Regulation for an injunction or for interdict or any other relief.

### **Making of false statements etc.**

**37.—**(1) If any person, in giving any information or making any application under or for the purposes of any provision of these Regulations, makes any statement which he knows to be false in a material particular, or recklessly makes any statement which is false in a material particular, he is guilty of an offence and shall be liable—

- (a) on summary conviction, to a fine not exceeding the statutory maximum;
- (b) on conviction on indictment, to a fine.

(2) No proceedings shall be instituted in England or Wales in respect of an offence under this regulation except by or with the consent of the Secretary of State or the Director of Public Prosecutions.

### **Offences by bodies corporate and Scottish partnerships**

**38.—**(1) Where an offence under these Regulations has been committed by a body corporate and it is proved to have been committed with the consent or connivance of, or to be attributable to any

neglect on the part of, any director, manager, secretary or other similar officer of the body corporate or any person who was purporting to act in any such capacity, he as well as the body corporate shall be guilty of that offence and be liable to be proceeded against and punished accordingly.

(2) Where the affairs of a body corporate are managed by its members, paragraph (1) shall apply in relation to the acts and defaults of a member in connection with his functions of management as if he were a director of the body corporate.

(3) Where a Scottish partnership is guilty of an offence under these Regulations in Scotland and that offence is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, a partner, he as well as the partnership shall be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

### **Restriction on disclosure of information**

**39.** Section 145 of the Act (restriction on disclosure of information) shall have effect in relation to information which has been obtained under or by virtue of any provision of these Regulations and which relates to the affairs of any individual or to any particular business as it has effect in relation to such information obtained under or by virtue of any of the provisions of that Act.

### **Offences outside the United Kingdom**

**40.**—(1) For the purpose of determining whether a breach of the duty imposed by regulation 9 has occurred, it is immaterial that the relevant acts or omissions occurred outside the United Kingdom if, when they occurred, the person—

- (a) was a United Kingdom national, or
- (b) was a body incorporated under the law of any part of the United Kingdom, or
- (c) was a person (other than a United Kingdom national or such a body) maintaining a place of business in the United Kingdom.

(2) In this regulation “United Kingdom national” means an individual who is—

- (a) a British citizen, a British Dependent Territories citizen, a British National (Overseas) or a British Overseas citizen;
- (b) a person who under the British Nationality Act 1981(28) is a British subject; or
- (c) a British protected person (within the meaning of that Act).

Signed by authority of the Secretary of State for Transport

1st November 2005

*Derek Twigg*  
Parliamentary Under Secretary of State,  
Department for Transport



## SCHEDULE 1

Regulation 2(4)

### AMENDMENTS AND REPEALS

#### PART 1

##### AMENDMENTS AND REPEALS OF PRIMARY LEGISLATION

###### **The Parliamentary Commissioner Act 1967**

1. In Schedule 2 to the Parliamentary Commissioner Act 1967(29) (departments and authorities subject to investigation), omit the entry relating to the International Rail Regulator.

###### **The House of Commons Disqualification Act 1975**

2. In Part 3 of Schedule 1 to the House of Commons Disqualification Act 1975(30) (offices disqualifying for membership), omit the entry relating to the International Rail Regulator.

###### **The Northern Ireland Assembly Disqualification Act 1975**

3. In Part 3 of Schedule 1 to the Northern Ireland Assembly Disqualification Act 1975(31) (offices disqualifying for membership), omit the entry relating to the International Rail Regulator.

###### **Railways Act 1993**

4. In the Railways Act 1993(32)—

- (a) in section 17 (access agreements: directions requiring facility owners to enter into contracts for the use of their railway facilities) omit—
  - (i) the words “or an international railway access contract” in subsection (1)(b);
  - (ii) subsection (1)(d) and “or” preceding it; and
  - (iii) the definitions of “the Directives”, “implementing regulation” and “international railway access contract” in subsection (7);
- (b) at the end of section 17(1)(b) insert “or”;
- (c) in section 18 (access agreements: contracts requiring the approval of the Office of Rail Regulation) omit—
  - (i) subsection (3)(b) and “or” preceding it; and
  - (ii) in subsection (8), the words ““international railway access contract””;
- (d) in section 22A (directions to require amendment permitting more extensive use)—
  - (i) in subsection (4)(b) omit the words “or an international railway access contract”; and
  - (ii) in subsection (7)(a) for the words ““international railway access contract” and “lease” have” substitute ““lease” has”;

(29) 1967 c. 13, the reference to the International Rail Regulator was inserted by S.I. 1998/1340, see regulation 9(2) and paragraph 7 of Schedule 2.

(30) 1975 c. 24, the reference to the International Rail Regulator was inserted by S.I. 1998/1340, see regulation 9(2) and paragraph 8 of Schedule 2.

(31) 1975 c. 25, the reference to the International Rail Regulator was inserted by S.I. 1998/1340, see regulation 9(2) and paragraph 8 of Schedule 2.

(32) 1993 c. 43, the amendments made to these sections which are relevant to these Regulations are that section 17(1) was amended by the Railways and Transport Safety Act 2003(c. 20.) section 16(5), schedule 2 Part 1 paragraphs 1 and 3(a), and section 17(1) and (7) by S.I. 1998/1340, regulation 21(5) - (8); section 145(2)(g) was amended by S.I. 1998/1340 regulation 21(10).

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(e) in section 145(general restrictions on disclosure of information)—

(i) omit subsection (2)(g); and

(ii) before subsection (2)(h), insert—

“(gb) for the purpose of facilitating the carrying out by the Office of Rail Regulation of any of its functions under any instrument made for the purpose of implementing Council Directive [91/440/EEC](#) dated 29 July 1991 on the development of the Community’s railways, as amended by Directive [2001/12/EC](#) dated 26 February 2001 and Directive [2004/51/EC](#) dated 29 April 2004, both of the European Parliament and of the Council, and Directive [2001/14/EC](#) dated 26 February 2001 on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure, as amended by Directive [2004/49/EC](#) dated 29 April 2004 on safety on the Community’s railways, both of the European Parliament and of the Council;”.

### **The Greater London Authority Act 1999**

**5.** In the Greater London Authority Act 1999(**33**), in section 235 (restrictions on the disclosure of information)—

(a) in subsection (2)(b), for “or the Railways Act 2005” substitute—

“,the Railways Act 2005 or any subordinate legislation made for the purpose of implementing—

(i) Council Directive [91/440/EEC](#) dated 29 July 1991 on the development of the Community’s railways, as amended by Directive [2001/12/EC](#) dated 26 February 2001 and Directive [2004/51/EC](#) dated 29 April 2004, both of the European Parliament and of the Council; or

(ii) Directive [2001/14/EC](#) dated 26 February 2001 on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure, as amended by Directive [2004/49/EC](#) dated 29 April 2004 on safety on the Community’s railways, both of the European Parliament and of the Council;”; and

(b) omit subsection 2(h).

### **The Channel Tunnel Rail Link Act 1996**

**6.** In the Channel Tunnel Rail Link Act 1996(**34**), omit section 22 (restriction of functions in relation to competition use).

### **Railways and Transport Safety Act 2003**

**7.** In Schedule 3 to the Railways and Transport Safety Act 2003(**35**) (abolition of Rail Regulator, savings, &c), omit paragraph 6.

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(33) [1999 c. 29](#). Section 235(2)(b) was amended by the Transport Act [2000 \(c. 38.\)](#), section 215 and Schedule 16 paragraphs 58, and 66(1) and (2), and by the Railways Act [2005 \(c. 14.\)](#), section 59(1) and Schedule 12 paragraph 14(1) and (5)(b). There are other amendments to this section which are not relevant to these Regulations.

(34) [1996 c. 61](#). Section 22 was amended by the Enterprise Act [2002 \(c. 40.\)](#), section 278, schedule 25, paragraphs 35(1), (3)(a) and (c) and Schedule 26; S.I. [2003/1398](#), article 2 and Schedule paragraph 24(1) and (2); the Railways and Transport Safety Act [2003 \(c. 20.\)](#), section 16(5) and Schedule 2; S.I. [2004/1261](#) regulation 5 and Schedule 2 paragraph 8.

(35) [2003 c. 20](#).

## PART 2

### REPEAL OF SECONDARY LEGISLATION

#### Scottish Parliament (Disqualification) Order 2003

8. In Part I of Schedule 1 to the Scottish Parliament (Disqualification) Order 2003(36), omit the words “The International Rail Regulator”.

#### SCHEDULE 2

Regulation 7

#### SERVICES TO BE SUPPLIED TO APPLICANTS

1. The minimum access package referred to in regulation 7(1) shall comprise—
  - (a) handling of requests for infrastructure capacity; and
  - (b) the right to utilise such capacity as is granted and, in particular—
    - (i) the right to use such running track points and junctions as are necessary to utilise that capacity;
    - (ii) train control, including signalling, train regulation, dispatching and the communication and provision of information on train movements; and
    - (iii) all other information as is necessary to implement or to operate the service for which capacity has been granted.
2. Track access to services facilities and the supply of services referred to in regulation 7(1) and (4) shall comprise—
  - (a) where available, the use of electrical supply equipment for traction current;
  - (b) refuelling facilities;
  - (c) passenger stations, including buildings and other facilities;
  - (d) freight terminals;
  - (e) marshalling yards;
  - (f) train formation facilities;
  - (g) storage sidings; and
  - (h) maintenance and other technical facilities.
3. The additional services referred to in regulation 7(5) may comprise—
  - (a) traction current;
  - (b) pre-heating of passenger trains;
  - (c) the supply of fuel, shunting and all other services provided at the access services facilities referred to in paragraph (2); and
  - (d) tailor-made contracts for—
    - (i) control of the transport of dangerous goods; and
    - (ii) assistance in running abnormal trains.
4. The ancillary services referred to in regulation 7(6) may comprise—

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(36) S.I. 2003/409.

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- (a) access to the telecommunication network;
- (b) the provision of supplementary information; and
- (c) technical inspection of rolling stock.

## SCHEDULE 3

Regulation 12

### ACCESS CHARGING

#### **Principles of access charging**

- 1.—(1) The infrastructure manager must ensure that the application of the charging scheme—
- (a) complies with the rules set out in the network statement produced in accordance with regulation 11; and
  - (b) results in equivalent and non-discriminatory charges for different railway undertakings that perform services of an equivalent nature in a similar part of the market.
- (2) The calculation of the fee may in particular take into account the mileage, composition of the train and any specific requirements in terms of such factors as speed, axle load and the degree or period of utilisation of the infrastructure.
- (3) Except where specific arrangements are made in accordance with paragraph 3, the infrastructure manager must ensure that the charging system in use is based on the same principles over the whole of his network.
- (4) The charges for the minimum access package and track access to service facilities referred to in paragraphs 1 and 2 of Schedule 2 shall be set at the cost that is directly incurred as a result of operating the train service.
- (5) With the exception of sub-paragraphs (6) and (9), the supply of services referred to in paragraph 2 of Schedule 2 shall not be subject to the principles set out in this paragraph.
- (6) In setting the charge for the supply of services referred to in sub-paragraph (5), account must be taken of the competitive situation of rail transport.
- (7) If the additional or ancillary services referred to in paragraphs 3 and 4 of Schedule 2 are offered by only one supplier the charge imposed for the supply of those services must relate to the cost of providing the service, calculated on the basis of the actual level of use.
- (8) The infrastructure charge may include a charge to reflect the scarcity of capacity of the identifiable segment of the infrastructure during periods of congestion.
- (9) The charges referred to in sub-paragraphs (4) and (8) may be averaged over a reasonable spread of train services and times, but the relative magnitudes of the infrastructure charges must be related to the costs attributable to the services.

#### **Exceptions to the charging principles**

- 2.—(1) In order to obtain full recovery of the costs incurred the infrastructure manager, with the approval of the Office of Rail Regulation under the access charges review or, in the case of a rail link facility, the Secretary of State through the development agreement, may levy mark-ups on the basis of efficient, transparent and non-discriminatory principles, whilst guaranteeing optimum competitiveness, in particular in respect of international rail freight.
- (2) The effect of sub-paragraph (1) must not be to exclude the use of infrastructure by market segments which can pay at least the cost that is directly incurred as a result of operating the railway service, plus a rate of return which the market can bear.

(3) The charging system shall respect the productivity increases achieved by applicants.

3.—(1) Subject to sub-paragraph (2), for specific investment projects completed—

(a) since 15th March 1988; or

(b) following the coming into force of these Regulations,

the infrastructure manager may set or continue to set higher charges on the basis of the long-term costs of the project.

(2) For sub-paragraph (1) to apply—

(a) the effect of the higher charges must be to increase the efficiency or cost-effectiveness of the project; and

(b) the project could not otherwise have been undertaken without the prospect of such higher charges.

(3) A charging arrangement to which sub-paragraph (1) applies may incorporate agreements on the sharing of the risk associated with new investments.

4.—(1) An infrastructure manager's average and marginal charges for equivalent uses of his infrastructure must be comparable and comparable services in the same market segment must be subject to the same charges.

(2) The network statement produced by the infrastructure manager in accordance with regulation 11 must demonstrate that the charging system meets the requirements in paragraph (1) in so far as this can be done without the disclosure of commercially confidential information.

5. If an infrastructure manager intends to modify the essential elements of the charging system referred to in paragraph 2 that infrastructure manager must make such modifications public at least three months in advance of the modification taking effect.

## **Discounts**

6.—(1) Subject to the provisions of articles 81, 82, 86 and 87 of the Treaty, and paragraph 1(4) of this Schedule, any discount on the charges levied on a user of railway infrastructure by the infrastructure manager, for any service, must comply with the principles set out in this paragraph.

(2) Except where sub-paragraph (3) applies, discounts shall be limited to the actual saving of the administrative cost to the infrastructure manager and, in determining the level of discount to be applied, no account may be taken of cost savings already incorporated in the charge levied.

(3) The infrastructure manager may introduce schemes available to all users of the infrastructure, with reference to specified traffic flows, granting time limited discounts to encourage the development of new rail services, or encouraging the use of considerably under-utilised lines.

(4) The discounts available must be in accordance with the access charges review or, in the case of a rail link facility, the development agreement.

(5) Discounts may relate only to charges levied for a specified infrastructure section.

(6) Similar discount schemes must be applied to similar services.

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## SCHEDULE 4

Regulations 16(5) and 19(2)

### TIMETABLE FOR THE ALLOCATION PROCESS

#### **Date of timetable change**

1.—(1) Subject to sub-paragraph (2) the working timetable must be established once per calendar year, and the change of working timetable must take place at midnight on the second Saturday in December.

(2) Where a change or adjustment to the working timetable is carried out after the winter, in particular to take account, where appropriate, of changes in regional passenger traffic timetables, it must take place at midnight on the second Saturday in June.

(3) Further changes to the working timetable may be made at such other intervals as are required.

(4) The infrastructure manager may agree different dates to those stipulated in sub-paragraphs (1) and (2) and, in this case, must inform the European Commission if international traffic may be affected.

#### **Timetable for the production of the working timetable**

2.—(1) The final date for receipt of requests for capacity to be incorporated into the working timetable must be no more than 12 months in advance of the entry into force of the working timetable described in paragraph 1.

(2) No later than 11 months before the working timetable comes into force, the infrastructure managers must ensure that provisional international train paths have been established in co-operation with other relevant infrastructure managers or, as the case may be, allocation bodies, in accordance with regulation 17.

(3) Infrastructure managers must ensure that, so far as possible, provisional international train paths established in accordance with sub-paragraph (2) are adhered to during the subsequent allocation process.

(4) No later than four months after the deadline for submission of bids by applicants, the infrastructure manager must prepare a draft working timetable.

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### **EXPLANATORY NOTE**

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

These Regulations implement Council Directive [91/440/EEC](#) dated 29 July 1991 on the development of the Community's railways, as amended by Directive [2001/12/EC](#) dated 26 February 2001 and Directive [2004/51/EC](#) dated 29 April 2004, both of the European Parliament and of the Council, and Council Directive [2001/14/EC](#) dated 26 February 2001 on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure, as amended by Directive [2004/49/EC](#) dated 29 April 2004 on safety on the Community's railways, both of the European Parliament and of the Council. With noted exceptions relating to amendments to primary legislation, these Regulations do not apply to Northern Ireland.

Part 1 contains preliminary provisions. Part 2 grants access and transit rights to international groupings and freight operators to the entire rail network in Great Britain, including access to terminals and ports linked to the rail network. It also grants all applicants certain rights of access to, and the supply of, the services listed in Schedule 2 to the Regulations.

Part 3 imposes certain separation requirements between the bodies responsible for management of the railway infrastructure (“infrastructure managers”) and railway undertakings. Infrastructure managers are placed under a requirement to produce a network statement containing the information set out in regulation 11.

Part 4, together with Schedule 3, sets out the structure for the charging of fees for the use of railway infrastructure, and the charging principles.

Part 5, together with Schedule 4, sets out the framework and timetable for the process of allocating infrastructure capacity. The trading of capacity is prohibited, and allocation in the form of fixed train paths cannot be granted for longer than one timetable period. Regulations 23 to 25 set out the procedure that must be followed where an element of the railway infrastructure is congested, and regulation 26 provides a “use it or lose it” provision in respect of allocated capacity.

Part 6 allocates certain regulatory functions to the Office of Rail Regulation (“ORR”). Regulation 29 provides a right of appeal to the ORR for applicants aggrieved with various aspects of the allocation of capacity and the fees charged for the use of that capacity, and requires the ORR to make a decision on such appeals within two months. Regulation 30 requires the ORR to monitor competition in the rail services market and to take appropriate action to deal with undesirable developments in the market, either arising out of its own investigations, or from complaints which have been submitted. Regulation 32 provides for the abolition of the International Rail Regulator.

Schedule 1 contains consequential amendments and repeals to the Railways Act 1993, the Channel Tunnel Rail Link Act 1996, and other miscellaneous provisions.

A Regulatory Impact Assessment has been prepared and copies can be obtained from the Department for Transport, Great Minster House, 76 Marsham Street, London SW1P 4DR. A copy has been placed in the Library of each House of Parliament.

A copy of the Transposition Note is also available from the Department for Transport.

Copies of the Regulatory Impact Assessment and of the Transposition Note may also be accessed on the HMSO website [www.opsi.gov.uk](http://www.opsi.gov.uk).