

**ORR's Code of Practice for the application
of Sections 16A to I of the Railways Act
1993**

November 2006

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Executive summary

1. In October 2005 sections 16A – I of the Railways Act 1993 were brought into force. The mechanism in these sections allows an applicant to apply to the Office of Rail Regulation (“ORR”) to direct the improvement or construction of a new railway facility. The Department for Transport (“DfT”) has said that the power is intended for use when it is clearly in the interests of the railway generally for the improvement to be made, but an individual railway operator may have no commercial incentive to make it unless a direction is given. Section 16H requires ORR to publish a code of practice for dealing with any such applications.
2. We expect any such applications to relate to Network Rail’s facilities (although section 16A also applies to non-Network Rail facilities), and also expect Network Rail to take the lead in making enhancements to the railway.
3. ORR has already developed an investment framework to facilitate investment in the railway network in as efficient a manner as possible. As part of the implementation of this framework, Network Rail has developed a code of practice for dealing with dependent persons (in this context, investment stakeholders)¹. As such, it is envisaged that the mechanism in sections 16A – I will be used in exceptional circumstances, given the other mechanisms and remedies put in place under the investment framework to facilitate investment in railway infrastructure.

¹ For further information for dependent persons wishing to invest in the network see "Investing in the network" (in particular section 13) which is available at http://www.networkrail.co.uk/documents/3418_investing%20in%20the%20network.pdf.

1. Introduction

Purpose

- 1.1 In October 2005, the DfT commenced sections 16A – I of the Railways Act 1993 (the Act), giving powers to ORR to issue directions in relation to the provision, improvement or development of railways facilities. A copy of the relevant sections is included at Annex A for ease of reference.
- 1.2 While sections 16A – G contain the process for submitting applications and the provision of representations, section 16H requires ORR to prepare a code of practice to which we shall have regard when exercising our functions under those sections, and which we shall publish in such manner as we consider appropriate. We consulted stakeholders on a draft code of practice in August 2006 and received responses from Network Rail, South West Trains and Transport *for* London.
- 1.3 We have discussed this code of practice with the DfT and Transport Scotland (“TS”) who are broadly content with the approach set out in this document.

Background

- 1.4 Sections 16A – I of the Act provide powers for ORR, at the request of either the DfT or TS or another person with the consent of DfT or TS, to direct Network Rail infrastructure Limited (Network Rail) or another ‘appropriate person’, e.g., the operator of a network, station or light maintenance depot, to either improve or develop an existing railway facility, or to provide a new railway facility.²

² References to the DfT should, where the context so requires, be construed as references to the Secretary of State. Any references to the powers of the DfT reflect those that it exercises on behalf of the Secretary of State. Likewise any references to TS should, where the context so requires, be construed as references to Scottish ministers. Any references to the powers of TS reflect those that it exercises on behalf of Scottish ministers.

Sections 16A – I use the term ‘appropriate facilities authority’. The Scottish ministers are the appropriate facilities authority for facilities in Scotland and the Secretary of State is the appropriate facilities authority for any other facilities.

A ‘railway facility’, as defined by section 83(1) of the Act, means any track, station or light maintenance depot.

- 1.5 DfT's intention is that the section 16A process should be used in circumstances where an individual railway operator may have no commercial incentive to make an improvement to a railway facility, but where it is clearly in the interests of the railway for an improvement to be made. Section 16A enables ORR to direct an appropriate person in such circumstances within the framework set out in sections 16B - G. That framework, among other things, provides for:
- (a) the procedure to be followed when an application for a direction is made;
 - (b) the procedure to be followed when considering an application, including the consultation arrangements; and
 - (c) what must be taken into account when considering whether there will be an adequate reward for the appropriate person to provide an improved or enhanced facility.

The provisions (section 16B) also include powers for the DfT to grant, by order, exemptions for certain operators in specific circumstances – this provision is dealt with in more detail in paragraphs 3.3 to 3.4 below.

Scope of the code of practice

- 1.6 As mentioned above, section 16H requires us to prepare a code of practice to which we shall have regard when exercising our functions under those sections, and which we shall publish and maintain in such manner as we consider appropriate. Although the contents and format of the code of practice are for us to determine, the Act specifies that the code of practice may, in particular:
- (a) set out minimum periods and the terms under which information and/or representations should be made to ORR;
 - (b) specify the principles followed in allowing the person specified in the application, or any other person providing information, to recover an appropriate amount of the costs incurred in connection with the application; and
 - (c) provide the terms for consultation in certain circumstances.

- 1.7 Section 16I(2) makes it clear that nothing in the provisions of sections 16A - H limit any power of ORR under any other provision of the Act. Nor should any part of those sections affect any obligation to provide a new railway facility, or to improve or develop an existing railway facility, arising otherwise than from a direction under section 16A. We would also expect any application to state how it meets the criteria set out in this code of practice.

ORR's investment policy framework

- 1.8 This code of practice has been developed on the assumption that section 16A applications will only be necessary in exceptional circumstances. We expect that an applicant would have pursued the other remedies available under our investment policy framework (the framework document)³, prior to submitting an application under section 16A.

ORR's section 4 duties

- 1.9 The exercise of our functions under the Act is governed by statutory duties, most of which are set out under section 4 of the Act. As such we must have regard to these in developing our code of practice and otherwise in performing our functions under sections 16A – H. Although the duties are of equal importance and we must, therefore, balance them all when exercising our functions, we expect that the following duties may be of particular relevance:
- (a) to promote improvements in railway service performance (section 4(1)(zb));
 - (b) otherwise to protect the interests of users of railway services (section 4(1)(a));
 - (c) to promote the use of the railway network in Great Britain for the carriage of passengers and goods, and the development of that railway network, to the greatest extent that we consider economically practicable (section 4(1)(b));
 - (d) to contribute to the development of an integrated system of transport of passengers and goods (section 4(1)(ba));

³ See paragraphs 2.56 – 2.61 of '*Policy framework for investments: conclusions*', Office of Rail Regulation, London, October 2005, available at www.rail-reg.gov.uk/upload/pdf/255.pdf.

- (e) to promote efficiency and economy on the part of persons providing railway services (section 4(1)(c)); and
- (f) to enable persons providing railway services to plan their businesses with a reasonable degree of assurance (section 4(1)(g)).

Structure of this document

1.10 This document is structured as follows:

- (a) chapter 2 sets out our process for considering applications made under section 16A, particularly in terms of who can apply, what an applicant may require under sections 16A – H, and the criteria for determining the appropriate person to provide a new or improved railway facility. This chapter also sets out the sorts of information that we are likely to require in any applications made to us; and
- (b) chapter 3 sets out the process for issuing directions.

2. Applications under section 16A

Introduction

- 2.1 This chapter sets out the process for the submission of applications made under section 16A and their consideration by ORR. The application process is summarised in the flow chart in annex B. The chapter also sets out the general criteria we expect to follow in determining whether the person specified in the application is an appropriate person to provide a new or improved railway facility.
- 2.2 In the absence of experience of dealing with any section 16A applications, it should be noted that we are not in a position at this stage to give indicative timescales for processing applications. Although we have indicated below a minimum of 30 working days for various stages of the process, our consideration of an application will depend upon a number of factors, including the size and complexity of the application, any variations sought by the applicant, and any objections received - particularly in terms of whether or not the person specified in the application is the appropriate person. Clearly, this position and our understanding will change and improve in the light of experience of processing section 16A applications.

Who can apply

- 2.3 An application may be made directly by:
- (a) TS for facilities in Scotland, and the DfT in respect of any other facilities (the 'appropriate facilities authority'); or
 - (b) other persons with the consent of the appropriate facilities authority. e.g. Transport for London (TfL), train operators, Passenger Transport Executives (PTEs) and local authorities.
- 2.4 As we mentioned in chapter 1, we would expect that it should only be necessary to use the section 16A process in exceptional circumstances, after an applicant has tried without success the other remedies available under the investment framework. One of the aims of the investment framework is to remove barriers to efficient investment, which result in delays to schemes, inflated costs or missed opportunities to improve services. We believe this

framework will continue to help remove these barriers and enable Network Rail, and others, to facilitate and deliver necessary, efficient and sustained improvements to the railway network to benefit both current and future rail users.

- 2.5 Chapter 2 of the framework document sets out Network Rail's role and obligations in investment schemes on the rail network, how we will secure and incentivise the delivery of these obligations and which remedies are available to Network Rail's customers when Network Rail fails to meet its obligations. In particular, paragraphs 2.41 – 2.45 of the framework document set out Network Rail's obligations in respect of delivering improvement and development of the network (which is specifically set out in licence conditions 7, 24 and 25 of its Network Licence⁴). The framework document also sets out in paragraphs 2.56 – 2.61 the remedies available to Network Rail's customers (other than government) through relevant contracts, or to stakeholders without a contract with Network Rail in its dealings with Network Rail (if Network Rail failed to meet its obligations).
- 2.6 We would expect that in most cases the investment framework would provide sufficient remedies through mechanisms to address most issues arising. We would therefore only expect it to be necessary to consider making an application under section 16A in exceptional circumstances. The provisions are therefore intended to be used as a last resort and have been drafted to ensure that the process is comprehensive and allows for proper and full consultation, including the need to understand why it has not been possible to progress the proposal through other means. Applicants must recognise that because of this and the lack of any precedents for us to follow, it may, in the handling of early cases, be some time before we are in a position to issue directions. We would of course expect the timescales to reduce as we gained the necessary experience and case law. It is possible that any action that might be taken under section 55 of the Act in respect of a breach of Network Rail's licence condition could also be conducted in parallel with a section 16A application.

⁴ Available at http://www.rail-reg.gov.uk/upload/pdf/network_licence.pdf.

What is required of the applicant?

- 2.7 Section 16A provides for an application to be made to ORR for directions to be given to the operator⁵ of a network, station or light maintenance depot to provide a new railway facility, i.e., any new network, station or light maintenance depot. Such an application may also be made for ORR to issue directions to a person who has an estate or interest in, or right over, an existing railway facility (usually the facility owner)⁶ to develop or improve that facility.
- 2.8 As provided for in section 16C, we would expect the applicant to specify clearly in the application, which must be in writing:
- (a) the person to whom the direction would be given and the reasons why they consider them to be the appropriate person; and
 - (b) the new assets or enhanced capacity/capability of existing assets.
- 2.9 In addition, applicants should provide specific detail and information on the type and specification of the new or enhanced railway facility, what the applicant is expecting to be delivered, and by when. We would also expect the applicant to provide detail of how it would expect the appropriate person to be adequately rewarded for providing, improving or developing a railway facility.
- 2.10 Before making an application under section 16A, we would expect applicants to have had regard to our views on how a facility owner will be adequately rewarded for any new or enhanced facility, together with our policy on allocation of risk as set out in chapter 3 of the framework document.

Representations

Written representations

- 2.11 On receipt of an application, we are required under section 16D to invite written representations from the specified person on the application, together with any other persons who we consider should be notified. Where the applicant is a third party, a copy will also be sent to the DfT or TS as appropriate. We are also required to provide the applicant with an opportunity

⁵ An operator of a railway asset is defined in section 6(2) of the Act.

⁶ Facility owner is defined in section 17(6) of the Act.

to respond further on any representations received. Although we would expect any representations to be comprehensive and address all relevant issues, we may need to revert to any party for further information or clarification following the exchange of representations.

- 2.12 As explained in paragraph 2.2 above, because of the lack of any case precedent, it is not possible at this stage to be exact about timescales. However, given the potential complexity of any such applications, we believe it is reasonable to suggest allowing the parties a minimum of 30 working days to respond with their representations. We also suggest that at least 30 working days would initially apply as the default timescales for all other stages in the process, e.g., for the applicant to respond to representations (section 16D(4)), any exchanges arising from decision on the appropriate person (section 16D(3)), any direction to supply information (section 16D(7)) and representations on our proposed direction (section 16F(3)). We would expect to re-visit these timescales in the light of experience.

Determining an 'appropriate person'

- 2.13 We may only direct the person specified in the application to provide a new or enhanced railway facility if we consider that they are the appropriate person to do this.
- 2.14 In the event of any dispute over whether or not a person is an appropriate person, we would usually expect:
- (a) the specified person to already be operating the same type of facility it was being asked to provide, e.g., the appropriate person to provide a new light maintenance depot would be an existing light maintenance depot operator. While the specified person may be the appropriate person to provide the facility, we might conclude that they do not have the experience of constructing a new or enhanced facility. In these circumstances, we would consider whether the person had access to suitable expertise and resources to project manage a sub-contractor;
 - (b) the facility the appropriate person was directed to provide to be of a similar size and nature to one it already operated. For example, we would not expect to determine that a small rural station operator is an appropriate person to provide a new major urban station in London; and

- (c) not to direct an operator to provide a new facility outside of its operating area.

2.15 Normally we would also expect our decision to take into account the opportunity cost for the specified person in providing the facility, any previous experience of similar construction schemes (especially where the appropriate person is unable to sub-contract and must construct the facility itself) and any history of sound financial management in these type of schemes. Other factors which might need to be considered will depend on the circumstances of each case.

Other procedural matters

Variation of the application (sections 16C(3) and (4))

2.16 The applicant may at any time after submission apply to vary the application by giving notice to ORR. This variation should be accompanied by representations which state why the applicant is seeking to vary the application. Potential applicants should be aware that where an application is varied, this will extend the timescales for completion of consideration of the application because we will then restart the consultation process. We would hope an applicant would give us advance notice if it expected to vary its application.

2.17 As set out in section 16C(3), where the application is made by a third party with the necessary consent from the DfT or TS (as appropriate), any variation should also be accompanied by a notice of consent to the variation from either the DfT or TS (as appropriate).

Substitution of the applicant (section 16D(5))

2.18 We may substitute any other person for the applicant, but only if the applicant, the other person and the DfT or TS (if neither is the applicant) consent to the substitution. In the absence of previous case history, it is difficult to identify the circumstances that will dictate when we might do this.

⁷ Available to view at <http://www.rail-reg.gov.uk/upload/pdf/277.pdf>

Withdrawal or suspension of the application (section 16D(6))

- 2.19 The applicant may at any time prior to us issuing directions, decide to withdraw or suspend its application. For example, a third party might be seeking to vary the application and will need the DfT's or the TS's (as appropriate) consent. Until it obtains this, it may decide to suspend its application. Furthermore, an applicant may decide to withdraw the application if it is able to conclude negotiations with an operator or facility owner over constructing a new or enhanced facility.

Provision of information (sections 16D(7), 16D(8) and 16D(9))

- 2.20 Apart from the representations submitted by the applicant and specified person, we may direct either party to provide us with information in order to decide whether to give the direction. Section 16D(7)(c) states that we may direct any other person (except the appropriate facilities authority) to provide information that we may require in order to make a decision. The information we expect the parties to provide should cover all material aspects, not just those which the party considers are important. If we consider that the person has not complied with the information requirement, we can issue further directions to that person to provide the information requested.
- 2.21 In cases where the person does not comply with the direction, section 16D(8) permits us to apply to the High Court in England and Wales, or Court of Session in Scotland, for an order for the failure to provide information to be made good. Under section 16(D)(9) such an order may require any costs to be borne by the person who failed to comply.

Compensation to third parties

- 2.22 During the construction of any facility as a result of a section 16A application, there is a possibility that third parties will be affected by the construction works for which compensation will be payable. To ensure consistency with compensation arrangements already in place across the railway industry, we would expect any such compensation to be calculated in accordance with the procedures set out in Part G (Network Change) of the Network Code⁸ and the equivalent provisions for stations and depots.

⁸ Available to view at <http://www.networkrail.co.uk/browseDirectory.aspx?dir=Network%20Code\Network%20Code%20and%20incorporated%20documents&pageid=2889&root=>.

3. Issuing directions

Introduction

3.1 This chapter sets the process for issuing directions. This includes who can receive a direction, the format of directions, making supplementary provisions to the directions, and also recovering the costs incurred in relation to the application.

Who can receive a direction?

3.2 Directions from ORR under section 16A to provide a new railway facility may be given to the operator of a network station or light maintenance depot; or to a person who has an estate or interest in, or right over, an existing railway facility to improve or develop the railway facility.

3.3 This regime does not apply to all operators or facility owners of network, stations or light maintenance depots by virtue of the Railways (Provision etc. of Railway Facilities) (Exemptions) Order 2005⁹, which was made under section 16B. This order restricts the persons which are subject to this regime. In summary, this order provides that the following are **not** exempt:

- (a) Network Rail;
- (b) any franchise operator;
- (c) a concession operator;
- (d) operators holding station licences (other than those providing railway services for or on behalf of TfL, or those providing services on the Heathrow Express network, or those providing railway services on the network constructed in the Channel Tunnel, or those providing railway passenger services); and
- (e) operators holding light maintenance depot licences (other than those providing light maintenance services for or on behalf of TfL, or those providing light maintenance services for rolling stock used on the

⁹ Available to view at <http://www.opsi.gov.uk/si/si2005/20052628.htm>.

Heathrow Express network or the Channel Tunnel, and other than those providing light maintenance services, wholly or predominantly for rolling stock used for non-franchised passenger services or holders of train operator licences (including through a Group Company, as defined by section 42(1) the Landlord and Tenant Act 1954) who operates light maintenance depots wholly or predominantly for freight purposes.

3.4 Exempted facilities include:

- (a) TfL-controlled network (i.e. London Underground and Docklands Light Railway networks), station and light maintenance depots;
- (b) Heathrow Express network (from Heathrow Airport junction to the Airport) and any light maintenance depot or station on this network;
- (c) railway facilities used wholly or predominantly in connection with freight purposes;
- (d) any specified station or light maintenance depot;
- (e) any part of a station which was used by the British Railways Board (or a subsidiary) or TfL prior to 1994; and
- (f) Waterloo International and Ashford International stations as well as North Pole and Temple Mills Depots.

3.5 The preceding paragraphs summarise the exemption order and prospective applicants should seek their own legal advice on whether the facility is exempt before making an application to us.

‘Adequate reward’

3.6 Before giving a direction under section 16A, we have to satisfy ourselves (section 16E) that the directed person will be adequately rewarded for the provision or the enhancement of the facility as specified in the application.

3.7 In general, we would expect the level of this adequate reward to be decided through negotiations or discussions between the parties and reflected in the application instead of being determined by us. Nonetheless we recognise that there may be cases where this may not be possible. In satisfying ourselves

that the appropriate person will be adequately rewarded, we intend to use the same criteria set out in chapter 4 of our guidelines for implementing the investment framework conclusions.¹⁰ In particular, we expect that we would need to be satisfied that:

- (a) the level of reward agreed by the parties is adequate, and that it fully reflects all the costs efficiently incurred by the directed person for the full delivery of the applicant's reasonable requirements;
- (b) the cost estimates should represent efficient prices;
- (c) the underlying risk allocation should be appropriate and consistent with the default risk allocation specified in the framework document (or there should be clear justification for differences from the default allocation); and
- (d) the procurement and governance arrangements are clearly specified and design and implementation services are procured through a transparent competitive process.

Decisions on applications

- 3.8 Once we have received all the information necessary to enable us to make a decision (either to issue directions or to reject the application), we expect to issue our provisional determination which will enable the parties to see the reasons for the ORR's decision. If we intend to issue directions, this will also allow the parties to provide any new or additional information before the directions are issued.
- 3.9 The directions will specify what the appropriate person is expected to deliver and are likely to include the timescales for delivery of the new facility or enhancement. It will then be up to the appropriate person to employ a contractor if necessary. It is also possible that the directions may contain a number of preconditions which must be fulfilled e.g. whether local planning permission has been obtained and whether the appropriate person has used all reasonable endeavours to ensure that this is obtained.

¹⁰ Available to view at <http://www.rail-reg.gov.uk/upload/pdf/277.pdf>.

Direction in modified terms

- 3.10 In some instances we may determine that the application should be amended and accordingly the directions will highlight any amendments that are necessary.

Supplementary provisions to a direction

- 3.11 Under section 16F(2), we may include supplementary provisions in any direction that is issued under section 16A. For example, this could be used where we determine the application submitted should be directed but additional works are also necessary, which could be included as supplementary provisions.
- 3.12 A copy of the directions will be sent to the applicant and also to the DfT or TS where they are not the applicant. On significant applications it is expected that we may inform other consultees and stakeholders of our provisional decision. We also expect that the initial application (subject to any excisions under section 71(2) of the Act) and a copy of the directions would be placed on the ORR public register and on the ORR website.¹¹ Where any party considers there is confidential information included in the directions, the party should ensure that they are consistent with the criteria set out in section 71(2)¹².

Assessing compliance with a direction

- 3.13 Section 16(G) states that a person will not be assessed as having failed to comply with a direction if he has done everything that is reasonably practicable to comply with the direction including everything which is reasonably practicable to obtain the rights or powers over land to comply the direction. We would expect any contract between the appropriate person and the applicant to contain remedies and a dispute mechanism to deal with any disagreement over compliance, including disputes over specifications and timescales in the direction.

¹¹ www.rail-reg.gov.uk.

¹² Section 71(2) states that where we exclude information, we shall regard to any matter which may in our opinion have a serious and prejudicial affect on the interests of an individual or company.

Application costs

- 3.14 With any application under section 16A, we would expect there to be costs associated with gathering information and developing a proposal to improve or build a new facility. Under section 16F(5), ORR is able to direct either the applicant or the specified person in the application to pay the costs of either party, as well as any other person directed to provide information.
- 3.15 We would generally expect the applicant to bear its own costs (which is consistent with arrangements for applications under section 17 and 18 of the Act) and if we were to consider appropriate to make such a direction, we would also expect the directed person to bear its own reasonable incremental costs. If we decide not to issue directions, then we would generally expect the applicant to bear any costs incurred. If the applicant requests that a direction should not be given because the parties have agreed a contract for the works we would generally expect the contract to address the position regarding costs.

Annex A: Sections 16A – I of the Railways Act 1993

16A Provision, improvement and development of railway facilities

- (1) The Office of Rail Regulation may, on an application—
- (a) made by the appropriate facilities authority, or
 - (b) made by any other person with the consent of the appropriate facilities authority,
- give to the operator of a network, station or light maintenance depot a direction to provide a new railway facility if the Office of Rail Regulation considers him to be an appropriate person to provide the new railway facility.
- (2) The Office of Rail Regulation may, on an application—
- (a) made by the appropriate facilities authority, or
 - (b) made by any other person with the consent of the appropriate facilities authority,
- give to a person who has an estate or interest in, or right over, an existing railway facility a direction to improve or develop the railway facility if the Office of Rail Regulation considers him to be an appropriate person to improve or develop the railway facility.
- (3) The consent of the appropriate facilities authority to the making by any other person of an application under subsection (1) or (2) above may be given subject to compliance with conditions (and may be withdrawn if any condition is not complied with before the Office of Rail Regulation decides whether to give the direction).
- (3A) In this section and sections 16B to 16G below “the appropriate facilities authority”-
- (a) in relation to facilities in Scotland, means the Scottish Ministers; and
 - (b) in relation to any other facilities, means the Secretary of State.

16B Exemption of railway facilities from section 16A

- (1) The appropriate facilities authority may, after consultation with the Office of Rail Regulation, by order grant exemption from subsection (1) or (2) of section 16A above (or from both of those subsections) in respect of such railway facilities as may be specified in the order, but subject to compliance with such conditions (if any) as may be so specified.
- (2) An exemption under subsection (1) above may be granted in respect of—
- (a) railway facilities of a particular class or description, or

(b) a particular railway facility,

or in respect of part only of railway facilities of a particular class or description or a particular railway facility.

- (3) An exemption under subsection (1) above may be granted generally, to persons of a particular class or description or to a particular person.
- (4) If a person fails to comply with any condition subject to compliance with which an exemption was granted, the appropriate facilities authority may give a direction declaring that the exemption is revoked, so far as relating to that person, to such extent and as from such date as may be specified in the direction.
- (5) Subject to subsection (4) above, an exemption, unless previously revoked in accordance with any term contained in the exemption, shall continue in force for such period as may be specified in, or determined by or under, the exemption.
- (6) Exemptions may make different provision, or be granted subject to compliance with different conditions, for different cases.
- (7) A statutory instrument containing an order made under this section by the Scottish Ministers shall be subject to annulment in pursuance of a resolution of the Scottish Parliament.

16C Making of applications for directions

- (1) An application for a direction under section 16A above must be made to the Office of Rail Regulation in writing.
- (2) The application must—
 - (a) specify the person to whom the direction would be given;
 - (b) state what it would require him to do; and
 - (c) give the applicant's reasons for considering that person to be an appropriate person to do what the direction would require him to do.
- (3) The applicant may at any time vary what the direction would require that person to do by giving to the Office of Rail Regulation notice in writing of the variation; but if the applicant is a person other than the appropriate facilities authority such a notice may only be given with the consent of the appropriate facilities authority.
- (4) The application or notice of a variation may be accompanied by any written representations which the applicant wishes to make in relation to the direction.

16D Procedure for considering applications

- (1) When the Office of Rail Regulation has received the application or notice of a variation, it must—
 - (a) send a copy to the person specified in the application, the appropriate facilities authority

(if it is not the applicant) and any other persons who the Office of Rail Regulation considers ought to be sent one; and

- (b) invite them to make written representations within a period specified in the invitation.
- (2) If the person specified in the application makes representations that he is not an appropriate person to do what the direction would require him to do, the Office of Rail Regulation must decide that issue in advance of considering any other matters which may be relevant in deciding whether to give the direction.
 - (3) If that person makes such representations but the Office of Rail Regulation decides that he is an appropriate person to do what the direction would require him to do, the Office of Rail Regulation must—
 - (a) notify him of that decision; and
 - (b) invite him to make written representations within a period specified in the invitation about any other matters which may be relevant in deciding whether to give the direction.
 - (4) The Office of Rail Regulation must—
 - (a) send the applicant a copy of any representations received by him in response to any invitation under subsection (1) or (3) above; and
 - (b) invite him to make further written representations within a period specified in the invitation.
 - (5) Subject to subsection (6) below, the Office of Rail Regulation may substitute as the applicant any other person if—
 - (a) the applicant,
 - (b) the other person, and
 - (c) the appropriate facilities authority (if it is neither the applicant nor the other person),consent to the substitution.
 - (6) The applicant may, by giving notice in writing to the Office of Rail Regulation, withdraw or suspend the application at any time before the Office of Rail Regulation decides whether to give the direction.
 - (7) The Office of Rail Regulation may direct—
 - (a) the person specified in the application,
 - (b) the applicant, or
 - (c) any other person (apart from the appropriate facilities authority),to provide him with any information required by him in order to decide whether to give the direction.

- (8) If a person fails to comply with a direction under subsection (7) above, the High Court or the Court of Session may, on the application of the Office of Rail Regulation, make such order as it thinks fit for requiring the failure to be made good.
- (9) Such an order may provide that all the costs or expenses of and incidental to the Application shall be borne by—
 - (a) the person who failed to comply; or
 - (b) in the case of a company or other association, any officers who are responsible for the failure to comply.

16E Decisions on applications; adequate reward

- (1) The Office of Rail Regulation may only give a direction to a person under section 16A above to provide, improve or develop a railway facility if he is satisfied that the person will be adequately rewarded for providing, improving or developing the railway facility in accordance with the direction.
- (2) In considering whether it is so satisfied the Office of Rail Regulation shall take into account (in particular)—
 - (a) any receipts obtained or likely to be obtained by the person (from the appropriate facilities authority, passengers, operators of railway services or any other persons) in connection with, or as a result of, the provision, improvement or development of the railway facility; and
 - (b) any other benefit obtained or likely to be obtained by him in consequence of its provision, improvement or development.
- (3) Representations made by the applicant for a direction—
 - (a) under section 16C(4) above, or
 - (b) in response to an invitation under section 16D(4) above,

may, in particular, include representations as to matters which he considers the Office of Rail Regulation should take into account in deciding whether the person to whom the direction would be given would be adequately rewarded for doing what it would require him to do.

16F Other provisions about decisions

- (1) If the Office of Rail Regulation does not consider it right to give a direction under section 16A above in the terms applied for (or to reject the application), it may give a direction under that section in modified terms.
- (2) The Office of Rail Regulation may include supplementary provisions in any direction under section 16A above, including (in particular)—
 - (a) provision adding detail (for instance, as to the time by which, or standard to which, the person to whom it is given is to do anything which it requires him to do); and

- (b) provision imposing requirements on the applicant (for instance, to make arrangements for rewarding the person to whom the direction is given or to make payments to him).
- (3) Before giving a direction under section 16A above which is in modified terms or includes supplementary provisions, the Office of Rail Regulation shall—
- (a) notify its intention to give a direction to the applicant, the appropriate facilities authority (if it is not the applicant) and any other persons who the Office of Rail Regulation considers ought to be notified; and
 - (b) invite them to make written representations within a period specified in the invitation;
- and if the applicant makes representations that the direction should not be given, the Office Of Rail Regulation shall not give it.
- (4) Whatever the Office of Rail Regulation's decision on an application it shall notify the decision to—
- (a) the person specified in the application;
 - (b) the applicant; and
 - (c) any other persons who he considers ought to be notified.
- (5) The Office of Rail Regulation may direct the person specified in the application or the applicant to pay to—
- (a) the other of those persons, or
 - (b) any other person directed to provide information under section 16D(7) above,
- any such amount as he considers appropriate in respect of costs incurred in connection with the application.

16G Directions: compliance, variation and revocation

- (1) A person shall not be regarded as failing to comply with a direction under section 16A above if he has done everything which it is reasonably practicable to do in order to comply with the direction.
- (2) If a person is unable to comply with such a direction because he does not have the necessary powers or rights (including rights over land), he shall not be taken to have done everything which it is reasonably practicable to do in order to comply with the direction unless he has done everything which it is reasonably practicable to do in order to obtain those powers or rights.
- (3) A direction under section 16A above may only be revoked or varied by the Office Of Rail Regulation —
 - (a) on the application of the person to whom the direction was given, the applicant for the direction or the appropriate facilities authority (if it was not the applicant); and

- (b) after consultation with the other persons with power to apply for a revocation or variation.
- (4) Such a direction may only be varied on an application by the applicant or the direction or the appropriate facilities authority if the Office of Rail Regulation is satisfied that the person to whom the direction was given will be adequately rewarded for providing, improving or developing the railway facility in accordance with the varied direction, taking into account (in particular) the matters specified in section 16E(2) above.
- (5) The Office of Rail Regulation may grant an application for the variation or revocation of a direction under section 16A above by the applicant for the direction or the appropriate facilities authority on condition that he or it secures that any such compensation as the Office of Rail Regulation may specify is paid to the person to whom the direction was given in respect of any liabilities incurred, or other things done, by him in complying with the direction.

16H Code of Practice

- (1) The Office of Rail Regulation shall prepare, and from time to time revise, a code of practice supplementing sections 16A to 16G above and shall publish it in such manner as it considers appropriate.
- (2) The Office of Rail Regulation shall have regard to the code of practice in the exercise of its functions under those sections.
- (3) The code of practice may (in particular)—
 - (a) set out minimum periods to be specified in invitations to make representations;
 - (b) include provision about requesting the provision of information prior to giving a direction under section 16D(7) above;
 - (c) specify principles according to which directions to pay costs are to be given under section 16F(5) above; and
 - (d) make provision about the consultation required by section 16G(3)(b) above.

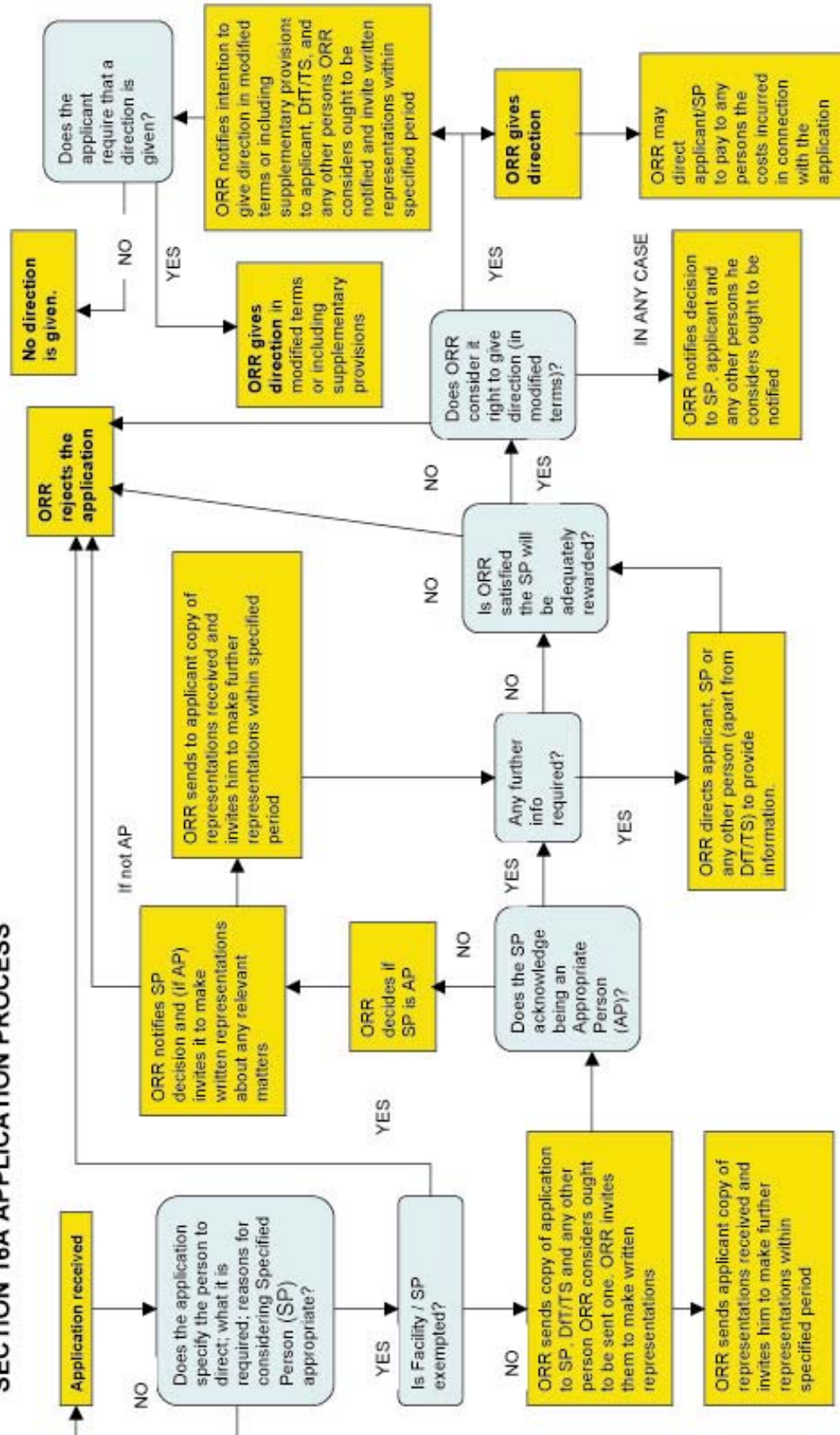
16I Supplementary

- (1) References in sections 16A to 16H above and this section to a railway facility include part of a railway facility.
- (2) Nothing in any of those sections or a direction under section 16A above—
 - (a) limits any power of the Office of Rail Regulation under any other provision of this Act;
or

Affects any obligation to provide a new railway facility, or to improve or develop an existing railway facility, arising otherwise than from such a direction.

Annex B

SECTION 16A APPLICATION PROCESS



Notes: The application or the applicant's written representations may include matters he considers ORR should take into account in deciding whether the SP will be adequately rewarded. The applicant may at any time vary what the direction would require the SP to do (with the DfT/TS's consent) by giving to ORR notice in writing. ORR may vary or revoke a direction only on an application by the applicant or DfT/TS and only if the SP will be adequately rewarded and compensated after the variation/revocation.