

Guide

Rail-related services and service facilities

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1. Introduction

Background of this guide

Railway undertakings that wish to offer railway transport services not only depend on access to the railway infrastructure in the narrow sense of the word, but also on 'rail-related services and service facilities.' These are services and facilities that are not part of the minimum access package,¹ which Dutch network infrastructure manager ProRail must safeguard, but that are nevertheless of great importance to the provision of a 'complete' railway transport service. That is why these services, too, are regulated. These are, for example, services and facilities in connection with train maintenance and access to passenger stations and freight terminals.

The rules that apply to service facility operators are laid down in the Dutch Railway Act and in thereto-related regulations. These regulations stipulate under what conditions a service facility operator must offer access to that service facility (access obligations), what fees can be charged (charging restrictions) and what information regarding service facilities must be published (transparency obligations).

On 1 June 2019, the new Implementing Regulation (EU) 2017/2177 on access to service facilities and rail-related services will come into force. This Implementing Regulation works out in greater detail various (pre-existing) obligations with regard to rail-related services and service facilities. The Implementing Regulation has direct effect in the Dutch legal system: the new rules are in operation in addition to anything that has already been laid down in other rules and regulations.

A preliminary investigation by ACM revealed that several of the providers of rail-related services and service facilities are not sufficiently aware of these regulations. ACM aims to increase compliance with the rules regarding services and service facilities, and, in particular, the rules regarding transparency.

Objective of this guide, and its legal status

With this guide, ACM wishes to provide an overview of the rules that apply to service facility operators, and of the corresponding rights of railway transport undertakings. With regard to several of those rules, ACM also wishes to explain what they mean according to ACM. In addition, ACM wants to give information about the way it will interpret the exemption regime of the new Implementing Regulation.

This document has the characteristics of a guide. Therefore, it does not contain an exhaustive legal analysis of all rules and regulations. First and foremost, the guide seeks to provide an overview of the laws that are in operation. It does not alter the legal framework or from the explanations of the rules given by the national and European courts.

Validity

The rules and regulations that are discussed in this guide are, for the most part, currently already in operation. However, the specific obligations that have been laid down in the Implementing

¹ The minimum access package consists of the use of the railway infrastructure, including the facilities for using traction current, and the necessary information in order to be able to provide the railway transport service. This package has been described in more detail in category 1 of annex II of Directive 2012/34/EU.

Regulation will come into force on 1 June 2019.

What is discussed in this guide?

Chapter 2 provides an overview of the rules and regulations that are discussed in this guide. In chapter 3, it is explained for whom these rules and regulations are of importance. Chapter 4 explains to what services and facilities the rules and regulations apply. And in chapter 5, the obligations with regard to access, charges, and transparency are discussed. Finally, ACM explains in chapter 6 how it will handle exemptions requests under the new Implementing Regulation.

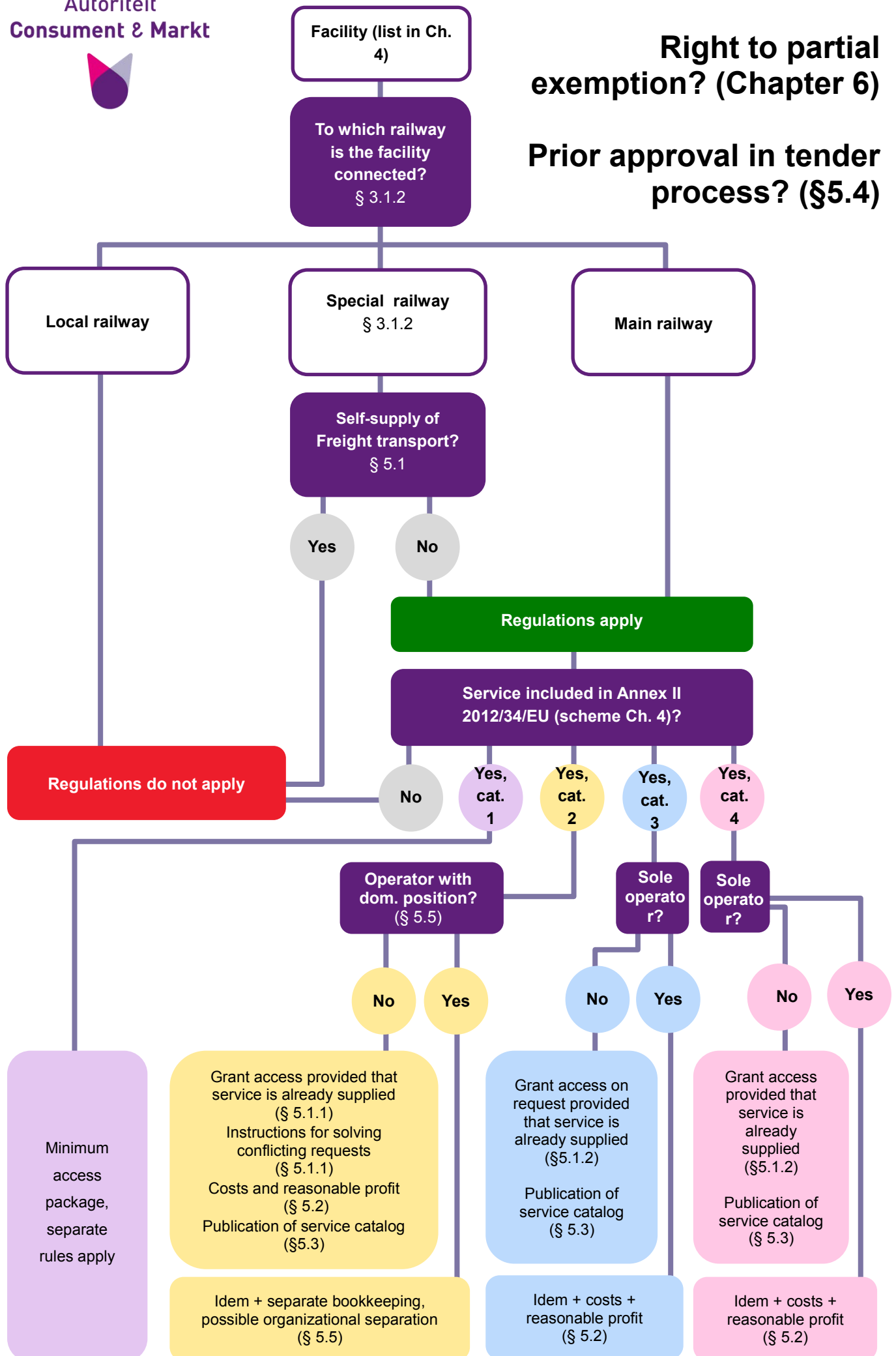
Flow chart

Using the flow chart on the next page, you can easily see which sections of this guide are the most relevant to you.



Right to partial exemption? (Chapter 6)

Prior approval in tender process? (§5.4)



2. Applicable rules and regulations

Rules and regulations

The rules with regard to service facilities and rail-related services come from different sources of law (European and Dutch). In this guide, the following sources will be discussed:

- The Dutch Railway Act (Spoorwegwet; Sw);
- Decision on implementing Directive 2012/34/ of 21 November 2012 establishing a single European railway area (Implementing decision);
- Decision on deadlines for responding to requests for access to, and supply of services in a service facility (Time limit decision);
- Directive 2012/34/ of 21 November 2012 establishing a single European railway area (Recast directive);
- Implementing regulation 2017/2177 of 22 November 2017 on access to service facilities and rail-related services (Implementing regulation).

Network statement

In addition to these rules and regulations, the [network statement of ProRail](#) is also relevant. This is a document that ProRail publishes annually, in which it provides information about the railway infrastructure it manages, and about the conditions under which that infrastructure can be used. The network statement also contains information about the services and service facilities that are available in the Netherlands. These also include services and service facilities provided by others, not just those provided by ProRail.

Legal basis for oversight

ACM has been appointed as the regulator of the Dutch railway sector. ACM is an independent regulator, enforcing compliance with the Dutch Railway Act among market participants, as well as with thereto-related regulations. The objective of this regulatory regime is to ensure that railway undertakings are able to use the railway infrastructure and thereto-related facilities in a fair and non-discriminatory manner.

As regulator, ACM is able to launch investigations on its own accord into compliance with the Dutch Railway Act in relation to undertakings that are active in the railway sector. Undertakings also have the possibility to file complaints with ACM, if they believe that another undertaking does not play by the rules. In both situations, ACM is able to take specific measures, such as imposing an order subject to periodic penalty payments, if it turns out that an undertaking has indeed violated the law.

3. To whom is this guide of relevance?

In this chapter, ACM will explain to whom the rules and regulations regarding services and service facilities apply. In this context, a distinction is made between market participants that have obligations (service facility operators) and market participants that have been granted rights (railway undertakings). Both of these 'roles' do not rule each other out: it is quite possible that your undertaking is considered both a railway undertaking as well as a service facility operator.

3.1 Service-facility operators

The obligations that are explained in chapter 5 of this guide apply to market participants that are designated as "operator of a service facility." You are an operator of a service facility if you:

- Operate a service facility, and/or;
- Provide a rail-related service.²

In the following sections, it is explained what this means.

3.1.1 Operation of a facility or provision of a service

The term "service facility operator" is quite broad. You are a service facility operator if you exercise control (legal or de facto) over a service facility or a rail-related service that is supplied in that facility. This means that you do not necessarily need to be the owner of a service facility in order to be able to be designated as operator. For example, if you have the facility on loan or lease (partially or in full), you and the facility's owner can both be designated as operator. In that case, both of you will have to comply with the obligations that follow from the relevant rules and regulations. In chapter 4, it is further explained what constitutes a service facility or rail-related service.

3.1.2 Exception: use is for self-supply only

Do you operate a service facility or do you provide a rail-related service? If so, it is possible that these rules and regulations do not apply to you. This is the case if you meet the criteria for the exception of "self-supply".³

Self-supply means that you operate a service facility for freight transport purposes (such as a freight terminal), and you only use that service facility for transporting your own goods to/from your own company. For example, think of a factory owner who ships in raw materials for themselves, and transports final goods. You can only rely on this exception if your service facility is located adjacent to a special railway⁴ (so not adjacent to the main railway infrastructure), which is privately owned.

Please note: this exception only applies to situations where you use the service facility *exclusively* for self-supply. If the facility is also used (partially or in full) by third parties, you cannot rely on this exception.

² Section 1, paragraph 1, of the Dutch Railway Act, in conjunction with Article 3 under 12 of the Recast Directive.

³ Article 12 under b of the Implementing Decision.

⁴ For more information, see the Decision on special railways (Bulletin of Acts. 2015, 267).

3.2 Railway undertakings

The obligations on service facility operators and service providers apply vis-à-vis railway undertakings.⁵ These are undertakings that supply traction for rail freight services and/or rail passenger services. These undertakings usually possess a license for rail transport services.

ACM points out that the scope of the regulations with regard to services and service facilities is more limited than that of the rules for using the main railway infrastructure. Access to the main railway infrastructure can be requested not only by railway undertakings but also by other natural persons or legal persons who, for commercial reasons, have a demonstrable interest in obtaining infrastructure capacity.⁶ This is not the case for services and service facilities. That means that market participants that seek access to a service facility, but that are not railway undertakings themselves, are unable to invoke the protection offered by the regulations described in this guide. Conversely, if they file the request *on behalf of* a railway undertaking, they can.

⁵ See, among other provisions, Section 67, paragraph 1, of the Dutch Railway Act.

⁶ Section 57, paragraph 2 of the Dutch Railway Act.

4. Services and service facilities

Annex II of the Recast directive explains which rail-related services and service facilities fall under the scope of the regulation. This annex contains four different categories of services and facilities. The first category relates to the minimum access package that is offered by ProRail, and which will not be discussed here. The other three categories explain what are considered to be 'rail-related services and service facilities'. These are: service facilities and the basic services supplied in these facilities (category 2), additional services (category 3) and ancillary services (category 4):

Category 2

Access, including track access, shall be given to the following services facilities, when they exist, and to the services supplied in these facilities:

- (a) passenger stations, their buildings and other facilities, including travel information display and suitable location for ticketing services;*
- (b) freight terminals;*
- (c) marshalling yards and train formation facilities, including shunting facilities;*
- (d) storage sidings;*
- (e) maintenance facilities, with the exception of heavy maintenance facilities dedicated to high-speed trains or to other types of rolling stock requiring specific facilities;*
- (f) other technical facilities, including cleaning and washing facilities;*
- (g) maritime and inland port facilities which are linked to rail activities;*
- (h) relief facilities;*
- (i) refueling facilities and supply of fuel in these facilities, charges for which shall be shown on the invoices separately.*

Category 3

Additional services may comprise:

- (a) traction current, charges for which shall be shown on the invoices separately from charges for using the electrical supply equipment, without prejudice to the application of Directive 2009/72/EC;*
- (b) pre-heating of passenger trains;*
- (c) tailor-made contracts for:*
 - control of transport of dangerous goods,*
 - assistance in running abnormal trains.*

Category 4

Ancillary services may comprise:

- (a) access to telecommunication networks;*
- (b) provision of supplementary information;*
- (c) technical inspection of rolling stock;*
- (d) ticketing services in passenger stations;*
- (e) heavy maintenance services supplied in maintenance facilities dedicated to high-speed trains or to other types of rolling stock requiring specific facilities.*

4.1 Scope

Several of the descriptions of the services and service facilities in Annex II have an open-ended character. This means that it has not always been prescribed at a detailed level what services and services facilities (or elements thereof) fall under the regulation. This may lead to questions about

the scope of the regulations. The mere fact that a service is supplied in an installation that is designated as 'service facility', does not necessarily mean that this service is regulated.

From ACM's point of view, the regulatory regime only relates to services that are necessary for (or that are ancillary to) the performance of the railway transport service for which the service facility can be used. This means, for example, that the installation of an information display with train departures at a train station *does* fall under the scope of the regulation, but the installation of a similar display for bus, tram and metro departures does *not*. After all, the latter concerns a service or facility that is ancillary to the performance of *another* transport service, not of a railway transport service. In order to clarify the scope of the regulation, ACM indicates below whether several specific services and facilities are considered to be regulated from ACM's point of view. Please note that this is not an exhaustive list.

Category 2a: passenger stations

The primary objective of passenger stations is facilitating the transfer of passengers, both from outside the station to a train (and vice versa) as well as between trains. In that light, access to the service facility "passenger station" includes the use of at least the following facilities:

- Railway infrastructure elements that form part of the walking routes for passengers (such as platforms, stairs and escalators, ramps, etc.);
- Information facilities (including for travel information), including:
 - o Signage;
 - o Announcement facilities;
 - o Digital and analog travel-information displays.
- Service and information facilities for passengers, including:
 - o Public-transport service areas;
 - o Locations for mobile information desks;
 - o Locations for service and emergency columns.
- Locations for hardware for the distribution and validation of transportation tickets, such as:
 - o Ticket machines;
 - o Add-value machines for public-transport smartcards (OV-chipkaart);
 - o Machines for checking in and out;
 - o Ticket gates.
- Break rooms for train employees and for on-board cleaning staff.

Controlled Access Stations and the distribution of passage passes

Passenger stations in the Netherlands are managed by ProRail and NS Stations.⁷ More and more passenger stations have been closed off for non-passengers by ticket gates. Railway undertakings can offer their passengers and employees access to these stations in various manners:

- Installation of ticket gates of their own;
- Applying for passage passes with the NS Passage desk;⁸
- Applying for a facility (software-based or otherwise) in order to be able to produce one's own passage passes.

⁷ In this context, see also www.stations.nl.

⁸ <https://www.ns.nl/reisinformatie/reizen-met-ov-chipkaart/aanvragen-passagepas-station.html>.

Categories 2c and 2d: Railway yards and storage sidings

These two categories of service facilities concern yards that are used for stabling and/or shunting rolling stock, and yards that have been equipped for those purposes. As the stabling and shunting of rolling stock in practice often takes place at the same yards, ACM will discuss both categories of service facilities together.

Railway and stabling yards can be equipped with facilities for rolling stock maintenance. ACM considers facilities that are meant for small-scale rolling stock maintenance activities to be part of the service facility 'Marshalling and stabling yard'.

ACM designates at least the following facilities as railway and stabling facilities:

- Water hydrants;
- Brake-testing cabinets;
- Service points for the internal cleaning of railway vehicles;
- Depot power supply;
- Guidance for embarking and disembarking facilities.

Shunting is usually done using railway infrastructure that can also be used for stabling (such as rails, points and operational points). Specialized railway yards also exist, which have been equipped with specific facilities for shunting operations. In accordance with its network statement, ProRail offers interested railway undertakings access to these facilities. If the shunting process can only be carried out using specially equipped locomotives, that are for instance connected with the control system for the shunting process, ACM considers shunting with these locomotives to be a regulated service.

Category 2e: maintenance services and facilities

Train maintenance concerns the activities aimed at maintaining rolling stock.⁹ ACM designates at least the following facilities as maintenance facilities:

- Maintenance workshops for rolling stock, including:
 - o Pit tracks;
 - o Level tracks;
 - o Platforms;
 - o Wheel lathes;
 - o Drop tables (for changing wheelsets).
- Facilities for small maintenance at yards, including:
 - o Working pits;
 - o Hydraulic arms;
 - o Platforms.

At least the following services are understood to fall under "maintenance services":

- Use of the described maintenance facilities, including any tools available;
- Performance of short cyclical maintenance (preventive and corrective) on rolling stock, in

⁹ This category does not contain the maintenance services and facilities for large-scale maintenance that are solely used for high-speed trains or other types of rolling stock that require specific facilities. These services and facilities have been designated as category-4 services.

- accordance with the maintenance concept for the rolling stock type in question;
- Turning (rounding) and calibration of wheels;
 - Revising and repairing train components;
 - Periodical technical safety checks of rolling stock (including systems such as ATB and GSM-r).

According to ACM, the following, maintenance-related activities are not regulated or only partially so:

Applying stickers to rolling stock

This concerns the application of stickers to rolling stock. The application process is, for the most part, not rail-related, since the stickers can be produced at an external location by businesses that do not need any facilities with track access. Since the application process requires the use of a workshop, the use itself is however designated as a regulated service.

Spray-painting rolling stock

This concerns the coating/painting of rolling stock using paint spray techniques. Although spray-painting rolling stock may help maintain the rolling stock (through corrosion prevention), ACM believes that this activity cannot be designated as a rail-related service. The spray-painting of the rolling stock can also be performed by businesses that use mobile spraying booths, and thus do not necessitate fixed installations. As with the stickers for rolling stock, the use of a workshop for spraying purposes is designated as a regulated service.

Refurbishment of rolling stock

Refurbishment entails the revision of existing rolling stock, aimed at improving or changing the specifications. This may include refurbishing the traction and bogies, modernizing and changing the lay-out of the car interiors, and installing facilities such as WiFi and air conditioning in passenger trains. According to ACM, such activities have more similarities with train manufacturing than with maintenance of rolling stock. That is why modernization of trains is not a maintenance service, and falls outside of the scope of the regulation.

Category 2f: other technical facilities

The following facilities are designated by ACM as at least “other technical facilities”:

- Train washing facilities;
- Cleaning platforms (fixed or movable);
- (Mobile) toilet vacuum installations;
- Eco-toilet flush systems;
- Discharge facilities for toilet cleaning;
- Anti-icing installations.

At least the following services are regulated:

- Use of the above-described technical facilities;
- Graffiti cleaning;
- Cleaning of rolling stock after collisions with humans or animals.

Category 4: ancillary services

ACM designates at least the following as ancillary services:

- Providing information (travel information or otherwise) by platform personnel at passenger stations;
- Compiling and forwarding up-to-date, dynamic travel information;
- Information systems aimed at facilitating the sale of inter-concession train tickets;¹⁰
- Facility services related to ticket machines (handling malfunctions);
- Technical stand-by service for rail emergencies (collision, derailment).

Shared use of equipment for sale and validation of transportation tickets is currently not technically possible. Should this become possible in the future, the commercial exploitation of these machines could then be designated as a category 4-service.

¹⁰ For example, see the online service Route and Price Finder (in Dutch: Route- en Prijsbepaling) offered by NS.

5. Access, charges, and transparency

The rules and regulations listed in Chapter 2 of this guide impose various obligations on service facility operators. These obligations primarily concern the following topics:

- *Access*: service facility operators are obliged to offer railway undertakings access to their services and facilities. Access can only be refused if several conditions are met. In addition, the regulations contain procedural rules governing access requests, for example, stipulating within what time limit access requests must be responded to.
- *Charges*: Specific charging restrictions apply to the provision of services in a service facility. In principle, the charge cannot be higher than the costs that are needed for providing the service, plus a reasonable profit.
- *Transparency*: Service facility operators are required to publish information about the services they provide. This information, or a URL to the site where this information can be found, must be published in the network statement of ProRail.

In the following sections, ACM will discuss these topics in greater detail.

5.1 Access to service facilities and rail-related services

Railway undertakings have a right to access to service facilities and rail-related services. That means that service facility operators are, in principle, obliged to offer railway undertakings access to their service facilities, if they request such access. That right to access has a non-discriminatory nature: operators must treat requests from all railway undertaking equally, except if there are objective reasons for treating requests differently.

Access to a service facility can be designed in different ways. Railway undertakings have at least the right to access to the (regulated) services that are supplied by operators. Operators can also give railway undertakings the opportunity to supply services *themselves* in the service facility (hereafter: self-supply of services). However, they are not required to do so.¹¹

Operators may impose certain technical (safety) requirements and compatibility requirements on the provision of access. Such requirements must be applied in a non-discriminatory manner in all cases, and cannot go beyond what is required in order to meet the objective for which they were introduced.

Railway undertakings only have a right to access to existing service facilities. Service facility operators cannot be compelled to make investments in order to expand the capacity of a facility, or to realize facilities that do not (or not yet) exist at the location in question.¹²

Different rules apply to the access to service facilities and rail-related services, depending on the category from Annex II of the Recast directive under which the service or service facility falls. Below, ACM gives an overview of the procedures for the various categories.

¹¹ Article 3, paragraph 8 of the Implementing regulation.

¹² Article 15, paragraph 4 of the Implementing decision.

5.1.1 Access to service facilities and basic services (cat. 2)

Railway undertakings that wish to gain access to a service facility or basic service can file a request for that with the operator. Such a request must contain all the information that the operator needs in order to be able to draw up an irrevocable offer in a timely manner, including conditions (tariff conditions or otherwise).¹³

After receipt of a request for access, the operator has five working days to assess the request on completeness, and to inform the applicant about the findings of this assessment.¹⁴ If the request for access is incomplete or insufficiently specified, the service facility operator informs the applicant thereof, and determines a reasonable time limit within which the missing information needs to be provided. If that information is not provided within the time limit, the request may be turned down.¹⁵

If the request is complete and sufficient specified, then the operator will have to respond within a certain time limit.¹⁶ What time limit applies to a request can be determined from the Time limit decision (in Dutch: Termijnbesluit). With regard to requests for access to maintenance facilities, a time limit of 30 working days applies. For all other facilities in category 2, a time limit of 20 working days applies.¹⁷

Does the facility have capacity to accommodate the access requested by the applicant? If so, the operator must respond to the request by making an offer for access to the service facility.¹⁸

Does the request for access have any overlap with another request or with capacity that has already been allocated? If so, this constitutes an *access conflict*. Access conflicts can be resolved using a step-by-step guide, which is set out below.

Step 1: Coordination procedure

In the case of an access conflict, the operator must first enter discussions with the applicants involved in the conflict, in order to meet all requests insofar as possible. In that context, the operator must also explore measures to maximise the capacity available in the facility, such as proposing alternative timing, and adjusting the opening hours or the work schedules. However, the operator does not need to take any measures that would require additional investments in resources or facilities.¹⁹

Step 2: Search for viable alternatives

If the coordination procedure fails to resolve the conflict, the operator and the applicants involved are to examine together whether or not another service facility is available that is able to meet the needs of the applicants (hereafter: viable alternative).²⁰ Another service facility acts as a viable alternative if the use of that service facility allows the applicant to operate the freight or passenger

¹³ Article 2 of the Time Limit Decision, and Article 9, paragraph 1 of the Implementing regulation.

¹⁴ Article 3, paragraph 1 of the Time Limit Decision.

¹⁵ Article 8, paragraph 3 of the Implementing regulation.

¹⁶ Article 9, paragraph 1 of the Implementing regulation.

¹⁷ Article 3, paragraphs 2 and 3 of the Time Limit Decision.

¹⁸ Article 9, paragraph 2 of the Implementing regulation, and Article 15, paragraph 2 of the Implementing Decision.

¹⁹ Article 10 of the Implementing regulation.

²⁰ Article 12, paragraph 2 of the Implementing regulation.

service concerned under economically acceptable conditions.²¹

When searching for viable alternatives, the initiative lies with the operator. It is up to the operator to make proposals for possible alternatives based on information provided by the applicants, in combination with publicly available information about other facilities. If information provided by the applicants is business-confidential, the operator must respect that confidentiality.²²

Whether or not another service facility is a viable alternative must be assessed on a case-by-case basis. On the one hand, this depends on the needs of the applicants involved, and, on the other hand, on the usage possibilities of the other service facility. When making proposals, the operator must pay attention to at least the comparability of the operational, physical, and technical features of the alternative service facility, and to the effects on the quality and costs of the planned transport service of the applicant. However, this is only required insofar the operator is able to assess such elements, considering their role and the information available to them.²³

If the service facility operator proposes one or more viable alternatives, it is up to the applicant to determine whether those alternatives would allow them to operate the planned transport service under economically acceptable conditions.²⁴

Step 3: Refusal of access

If the search for viable alternatives does not yield any results, the service facility operator may refuse the request for access. If the applicant and operator disagree on the viability of the examined alternatives, the service facility operator may refuse the request, while naming the alternatives that the operator deems viable, insofar available.²⁵

Service facility operators may set priority criteria in order to determine which request is granted if no viable alternatives exist. Those priority criteria must be objective and non-discriminatory, and must be published in the description of the service facility.²⁶

When determining these kinds of criteria, the operator must take into account the following:

- The purpose of the facility;
- The purpose and nature of the rail transport services involved; and
- The objective of securing an efficient use of available capacity.

In addition, the operator may take into account the following aspects:

- Existing contracts;
- The intention and ability to use the requested capacity, taking into account any failure to use all or part of allocated capacity in the past, and the reasons for that failure;
- Already allocated train paths linked to the requested services;

²¹ Article 1 of the Implementing Decision, in conjunction with Article 3, under 10, of the Recast directive.

²² Article 12, paragraph 3 of the Implementing regulation.

²³ Article 12, paragraph 3 of the Implementing regulation.

²⁴ Article 12, paragraph 4 of the Implementing regulation.

²⁵ Article 13, paragraph 1 of the Implementing regulation.

²⁶ For more information, see section 5.3 of this guide.

- The priority criteria for the allocation of train paths;²⁷
- The timely submission of requests.²⁸

Step 4: Complaint with ACM

If a railway undertaking is of the opinion that their access request has been wrongfully turned down, they may file a complaint with ACM.²⁹ Based on the complaint, ACM will subsequently assess whether the operator complied with the rules when handling the access request. If this is not the case, ACM may take measures to ensure that an appropriate share of the capacity is awarded to the railway undertaking in question³⁰

5.1.2 Access to additional services (cat. 3) and ancillary services (cat. 4)

With regard to additional and ancillary services within the meaning of Annex II of the Recast directive, less extensive rules apply to them than to services facilities and basic services.

If a service facility operator provides an additional service, it must provide that service in a non-discriminatory manner. However, this is only necessary if a railway undertaking requests access to such a service.³¹

If a service facility operator provides an ancillary service, it is not required to provide this service to railway undertakings. However, if the operator decides to provide such a service to a railway undertaking, it has to provide this service in a non-discriminatory manner to *all* railway undertakings.³²

As with requests for access to service facilities and basic services, requests for access to additional or ancillary services must contain information that the operators need in order to be able to make a decision. If the request is complete and sufficiently specified, the operator will have to respond to that request within a reasonable amount of time. What a reasonable amount of time is, may vary in each case.³³

If a request for access to an additional or ancillary service conflicts with another request, the operator needs to follow the coordination procedure as described on page 15 of this guide in order to attempt to meet all of the different requests insofar as possible.³⁴ If this does not lead to a resolution of the access conflict, the operator does not need to assess first whether any viable alternatives exist before the operator is allowed to turn down the request. As with service facilities and basic services, an operator is allowed to publish objective and non-discriminatory priority criteria for the allocation of capacity in the case of conflicting requests.³⁵

²⁷ See the Decision on capacity allocation in the main railway infrastructure (in Dutch: Besluit capaciteitsverdeling hoofdspoorweginfrastructuur).

²⁸ Article 11 of the Implementing regulation.

²⁹ Article 71, paragraph 1 and under c of the Dutch Railway Act, in conjunction with Article 13, paragraph 5 of the Recast regulation.

³⁰ Article 71, paragraph 3 of the Dutch Railway Act.

³¹ Article 16 of the Implementing Decision.

³² Article 17 of the Implementing Decision.

³³ Article 9, paragraph 5 of the Implementing regulation.

³⁴ Article 10, paragraph 1 of the Implementing regulation.

³⁵ Article 11 of the Implementing regulation.

With regard to additional and ancillary services, too, railway undertakings have the opportunity to file complaints with ACM if they believe their request for access was denied wrongfully.

5.2 Charges

A charging restriction applies to service facility operators. ACM assesses whether the charges in the operator's service offer fulfil these conditions.

The charge imposed for access to services facilities and the provision of basic services cannot exceed the costs that are needed for providing it, plus a reasonable profit.³⁶ The charge restriction only applies to additional and ancillary services if the service is only provided by a single operator.³⁷

In this section, ACM describes how it conducts this assessment.

5.2.1 Cost orientation; basic principles

Upon request, the supplier of the rail-related service or service facility must, in concrete cases, make transparent to ACM in what way the charges have been determined.

In order to be able to assess whether the charges are cost-oriented, ACM assesses the underlying cost allocation system. The idea of such a system is to go from costs to charges. ACM assesses the cost allocation system against the basic principles of proportionality, integrality, causality, and market conformity. ACM also sets several quality criteria. These basic principles and quality criteria are based on accepted business principles, and are also used by ACM in other regulated sectors. The four basic principles are detailed below. The quality criteria are discussed in section 5.2.2.

Proportionality

In terms of level of detail and clarity, the cost allocation system must be in line with what can be reasonably expected of an undertaking the size of the operator in question, and taking into account the volume³⁸, the nature, and the level of complexity of the service provided. For example, this means that ACM imposes stricter requirements on the cost allocation system of ProRail or that of NS than on the cost allocation system of an operator of a port terminal in a small inland port. This of course holds true unless statutory regulations mandate otherwise.

Integrality

In order to be able to check whether costs are rightfully allocated to charges, the input³⁹ of the cost allocation system either needs to be equal to the undertaking's integral costs as much as reasonably possible or it must be deduced from objective data in a simple manner. The principle of integrality also means that the output of the system (the charges) must contain the integral costs of the services for which the charges are set.

Without an overview of the integral costs of the undertaking, no conclusions can be drawn

³⁶ Please note: a lower charge is allowed. In section 5.2.3., it is further discussed what is considered a reasonable profit.

³⁷ Article 19 of the Implementing Decision.

³⁸ For example, to be determined based on the magnitude of the regulated turnover.

³⁹ Or the costs that are entered in the cost allocation system.

regarding the question whether the output is correct, and whether too large a share or too small a share of the total costs is allocated to the charges.

Causality

In the application of cost orientation, ACM applies the principle of causal allocation, insofar possible. This means that services or activities are only to be assigned costs that are incurred for the purpose of those services or activities. This assumes that a causal relationship is made between charges and costs. It must be clear where in the organization and for the purpose of what activities costs are made, and how they are used by the different activities.

In this context, ACM supports a broad interpretation of the concept of cost causality, in the sense that costs of certain facilities or activities do not necessarily need to be allocated to their original purpose. For example, if an installation was purchased for the purpose of a specific service, but is also used for other services, ACM will, in principle, consider it reasonable that those other purposes are allocated a proportional share of the costs of the installation in question.

A clear, direct causal relationship with a service of market may not be identifiable for all costs. ACM distinguishes three levels in the cost allocation, in descending order of causality:

- Direct allocation: cost are directly allocated to services or markets;
- Allocation based on allocation keys: costs are allocated to services or markets using cost drivers or cost allocation keys; and
- Other allocations: costs are allocated to services or markets through a surcharge on costs that have already been allocated.

Where possible, costs must be allocated on the basis of the method with the highest possible level of causality. When determining the appropriate method of allocation, the principle of proportionality also plays a role.

The allocation keys need to be objective, transparent, and efficient. This means that the keys must have been determined in an objective manner. It should be clear *how* they have been developed (transparency) and whether these keys promote an efficient allocation. It also needs to be clear in what way and how often the source data for the keys are measured.

Market conformity

The starting point for setting the costs and charges is that this takes place in a manner that is common among undertakings that are similar in terms of nature, size, and complexity, for example with regard to asset valuation (or the basis thereof),⁴⁰ the depreciation method, etc. If deviations from these principles are made, these deviations must be motivated.

5.2.2 Quality criteria

In addition, ACM imposes several quality criteria on the cost allocation system.

Consistency

Choices regarding allocation principles are substantiated, and these principles are followed during

⁴⁰ For the valuation of assets, ACM uses the standard of historical costs. In exceptional cases, ACM deviates from this standard, supported with reasons.

the entire allocation process. If deviations are made from the basic choices, the necessity of these deviations should be substantiated.

Transparency

The system must be described clearly. This description must contain all information that is needed to assess how costs are allocated to charges. Furthermore, the description must be accessible, complete, correct, and consistent with existing internal processes and decision-making such as the organization structure, the budget cycle, the bookkeeping, the annual accounts, etc. At least the following aspects must be included therein:

- The different types and categories of costs, revenues, and invested capital that are allocated to the services and markets.
- The cost allocation method, including the most important cost centers and cost allocation keys. Based on the costs that are incurred, it must be clear how these costs are allocated to services and markets. In that context, it should always be clear what method is used: direct assignments, assignment on the basis of cost drivers, cost allocation keys, or assignment using surcharges. In the case of assignment using cost drivers or cost allocation keys, it must be clear what cost pools and what cost drivers or cost allocation keys are used. If assignment using surcharges is used, it must be clear how these surcharges are calculated.
- The sources of the data. On the one hand, this is about the sources of the financial data, and, on the other hand, the sources of the non-financial data. It needs to be clear to what extent this data is compiled using automated processes, or whether this data is based on estimates of employees or external experts.

Repeatability

In order to be able to determine whether the system indeed leads to the intended output, all steps from input to output must be repeatable. For example, calculation methods and calculations need to be correct, all steps need to have been followed, and no internal inconsistencies can exist.

In concrete cases, ACM assesses whether the cost allocation system complies with the abovementioned basic principles and quality criteria, and whether the cost allocation system is applied correctly by the operator.

5.2.3 Reasonable profit; basic principles

The reasonable profit must be calculated in accordance with the definition of reasonable profit laid down in the Recast directive.

Reasonable profit is defined in Article 3 under 17 of the Recast directive as:

“Reasonable profit means a rate of return on own capital that takes account of the risk, including that to revenue, or the absence of such risk, incurred by the operator of the service facility and is in line with the average rate for the sector concerned in recent years”

In the explanatory notes to the Implementing decision, it is stated that it is desirable that the method for calculating the rate of return be consistent with those used in other regulated sectors, and, when assessing those, ACM can use the same basic principles that are used in the other regulated

sectors.⁴¹

Because of this, ACM assesses whether the method used for determining profit is consistent with the method that ACM uses for determining the rate of return in other regulated sectors.

Normally speaking, ACM determines the cost of own capital (equity) based on the Capital Asset Pricing Model (CAPM). This dynamic model is pre-eminently suitable for determining what a reasonable profit is, taking into account the relevant risks and the situation on the capital market.

Since the regulations explicitly stipulate that the rate of return must be calculated based on equity, ACM will apply the CAPM in this case slightly differently than in most other regulated sectors. Normally speaking, ACM calculates a reasonable rate of return for the total capital.

As in this case the regulation requires the reasonable rate of return to be calculated against the equity, the actual cost of debt capital can be included in the profit calculation as costs.

In the context of proportionality, ACM may deviate from this method, and, for example, fall back on a fixed profit percentage that has been determined based on a 'benchmark', such as average profitability of the sector involved over the past few years.

5.3 Transparency

Railway undertakings are only able to exercise their right to access to rail-related services and service facilities if they know what services and facilities they can purchase from whom, where, and under what conditions. This requires service facility operators to be transparent about the services and facilities they offer.

In order to reach the desired level of transparency, operators are required to publish a description of their service facility (hereafter: a service catalogue). This service catalogue must at least contain the following information:⁴²

Type of information	Required information
Basic information	<ul style="list-style-type: none"> • a list of all installations in which rail related services are supplied; • information on the locations and opening hours of these installations; • a description of the technical characteristics of the service facility; • a list of all rail-related services that are supplied in the service facility;
Access procedures	<ul style="list-style-type: none"> • the contact details of the service facility operator; • information on procedures for requesting access to the service facility or services supplied in the facility or both, including deadlines for submitting requests, and time limits for handling those requests; • information on the minimum content and format of a request for access to service facilities and rail-related services, or a template for such a request;

⁴¹ See explanatory notes for Article 1 of the Decision on the implementation of directive 2012/34/EU establishing a single European railway area, p. 28.

⁴² Article 4, paragraph 2 of the Implementing regulation. A more limited transparency obligation applies to exempted operators; for more information, see chapter 5 of this guide.

Charges	<ul style="list-style-type: none">• a description of the coordination procedure and any priority criteria applied by the operator;• information about the possibilities for railway undertakings regarding self-supply of rail-related services and conditions applying thereto;• if applicable: model access contracts and general terms and conditions;• where relevant, information on the terms of use of the operator's IT systems, if applicants are required to use such systems, and the rules concerning the protection of sensitive and commercial data;• with regard to service facilities in which multiple operators are active: whether separate or combined access requests need to be filed;• information on charges for gaining access to service facilities, and charges for each rail-related service that is supplied in these facilities;• information on the principles of any discount schemes offered to applicants, taking into consideration the required commercial confidentiality;
Up-to-date information	<ul style="list-style-type: none">• information on changes in technical characteristics and temporary capacity restrictions of the service facility, which could have a major impact on the service facility's operation, including planned works.

What exact information in the abovementioned categories the operators should publish, depends on the type of service facility that they offer. The service catalogue must contain at least the information that a railway undertaking reasonably needs in order to be able to file a complete and sufficiently specified access request.

There are various ways in which service facility operators can publish their service catalogue. In any case, the relevant information must be included in the network statement of ProRail. This can be done in full, but including a link to a website where the service catalogue is published will also suffice.

The service catalogue can, in principle, have any format. Operators can choose their own model, as long as the catalogue meets the requirements in terms of substance, and is included in the network statement (using a link or not). Standard solutions are also available, which operators may choose to use:

- RailNetEurope, a collaboration of European railway infrastructure managers, has developed a common template for the service catalogue. This *Common Template for Service Facilities* is available online⁴³ and can be filled out by operators. They can then publish it on their own websites, or have it included in the network statement.
- Commissioned by the European Commission, a joint European online portal is being developed for service facilities and rail-related services. As soon as this portal has been launched, operators will be able to publish their service catalogues on it.

The service catalogue (or link thereto) must be sent to ProRail no later than June 1 2019, for the

⁴³ http://www.rne.eu/rneinhalt/uploads/Common_template_for_service_facility_information_clean.pdf.

purpose of publication of the network statement.⁴⁴

5.4 Prior approval in tender processes

Additional rules regarding tender processes for concessions for (regional) rail passenger transport apply to suppliers of certain types of service facilities. This concerns the following categories of service facilities, and the services supplied in those facilities:

- Passenger stations (category 2a);
- Other technical facilities (category 2f); and
- Refuelling facilities (category 2i).

If you are an operator of a service facility from one of these categories, you may have to submit the charges and conditions under which you offer this service facility to ACM for approval. This is the case if:

- A concession for public transport by train is put out for tender;
- One of the abovementioned service facilities or of the services supplied in them is used for the fulfilment of this concession; and
- You are the only operator of such a service facility or service at the location in question.⁴⁵

If your service facility falls under the scheme for prior approval, you can only apply the charges, the conditions for access and/or supply of services after the conditions and charges have been approved by ACM.

Requests for approval of conditions and charges must be filed with ACM at least six weeks prior to the launch of the tender process in question. However, it is recommended to file the request sooner, since ACM's assessment can take longer than six weeks. ACM can extend the deadline for its decision once with an additional six weeks. The deadline can be extended even further if ACM is of the opinion that certain conditions or charges do not comply with the rules and regulations. In the case of an extension of the deadline, the prohibition of application of the conditions or charges remains in place.⁴⁶ In order to prevent this prohibition from continuing even after the commencement date of the tender process in question, ACM recommends contacting ACM well before the ultimate submission date. In that way, it can be mutually decided what the best time would be for you to file the request.

5.5 Special rules for operators with dominant positions

Additional rules apply to certain service facility operators. These concern:

- Operators that are under the direct or indirect control of a railway undertaking that is active on the national market for rail transport services for which the facility is used, and holds a dominant position on this market;⁴⁷
- Operators that are under the direct or indirect control of an undertaking that also has

⁴⁴ For more information, visit: <https://www.prorail.nl/vervoerders/spoorgebonden-diensten-en-dienstvoorzieningen>.

⁴⁵ Section 68b of the Dutch Railway Act.

⁴⁶ Section 68c of the Dutch Railway Act.

⁴⁷ Article 14, paragraph 1 of the Implementing Decision.

control over a railway undertaking that is active on the national market for rail transport services for which the facility is used, and which holds a dominant position on this market.⁴⁸

For the sake of brevity, such operators are referred to by ACM as “operators with dominant positions”.

Operators with dominant positions must comply with several additional requirements with regard to their organization and to their level of transparency. They need to have separate bookkeeping systems for all service facilities that they commercially exploit.⁴⁹ Depending on the type of service facility,⁵⁰ an additional obligation applies, which mandates independence from the operator with the dominant position, in terms of organization and decision-making.⁵¹

⁴⁸ Article 3 under 7 of the Implementing regulation.

⁴⁹ Article 14, paragraph 2 of the Implementing Decision.

⁵⁰ This obligation only applies to operators of passenger stations (cat. 2a), freight terminals (cat. 2b), marshalling/stabling yards (cat. 2c and 2d), maritime port and inland port facilities (cat. 2g) and refueling facilities (cat. 2i).

⁵¹ Article 14, paragraph 1 of the Implementing Decision.

6. Exemption requests

The new Implementing regulation contains a scheme under which service facility operators have the opportunity to file requests for exemption from the provisions (or a part thereof) of the Implementing regulation. In this chapter, ACM explains the effects of such an exemption, and also explains how it assesses such exemptions requests.

6.1 Effects of an exemption

As already indicated in the introduction of this guide, the Implementing regulation elaborates on different obligations (that are currently already in place) with regard to rail-related services and service facilities. More specifically, the Implementing regulation sets further rules regarding transparency (the service catalogue) and the assessment of access requests (including the procedures to be followed when assessing such requests).

The Implementing regulation offers opportunities for exemptions from the rules (or a part thereof) that have been laid down in the Implementing regulation. Operators can only be exempted from these rules. In other words, obtaining an exemption does not release an operator from the other obligations with regard to service facilities that are laid down in other rules and regulations. An exemption does not take anything away from, in particular:

- The obligation to grant access in a non-discriminatory manner, including the obligation to assess viable alternatives; and
- The charging restrictions as explained in section 5.2.

Furthermore, operators cannot be completely exempted from the obligation to compile and publish a service catalogue. Only operators of service facilities that are exclusively used for heritage rolling stock can be exempted from this obligation in full.

Obtaining an exemption can thus lead to a reduction (limited or otherwise) of the administrative burden on operators, but it does not take anything away from the essence of the obligations that follow from the rules and regulations with regard to service facilities and rail-related services.

6.2 Exemptions for service facilities for heritage railway operators

Operators of service facilities that are exclusively used for private use by operators of heritage rolling stock may file a request with ACM for exemption from all provisions laid down in the Implementing regulation.⁵²

ACM expects operators that file an exemption request on this basis to substantiate (with documentation) their claims as to what type of rolling stock the service facility is used for, and why this rolling stock is of special historical value. In addition, operators must demonstrate that this rolling stock is exclusively or predominantly used for tourist and/or educational purposes, and that it is not primarily used for meeting a specific transportation need.

ACM emphasizes that a service facility can only be exempted if this facility is *exclusively* used for

⁵² Article 2, paragraph 1, second sentence of the Implementing regulation.

heritage rolling stock. If the facility is also partially used for non-heritage rolling stock, ACM will not grant an exemption.

6.3 Exemptions because of special market conditions

Service facility operators can be partially exempted from application of the Implementing regulation, if they are able to prove that one of the following three special market conditions is fulfilled:

- The service facility or service has **no strategic importance** for the functioning of the rail transport market, particularly with regard to the utilization of the facility, the type and volume of traffic that may be impacted, and the nature of the services supplied in the facility;
- The service facility or service is commercially exploited or provided in a **competitive market environment** where different competitors offer similar services;
- Application of the Implementing regulation creates risks of **negative effects on the functioning of the market** for service facilities.⁵³

Exempted operators are required to publish a service catalogue which contains at least the following information:

Type of information	Required information
Basic information	<ul style="list-style-type: none">• a list of all installations in which rail-related services are supplied;• information on the locations and opening hours of these installations;• a description of the technical characteristics of the service facility;• a list of all rail-related services that are supplied in the service facility;
Charges	<ul style="list-style-type: none">• the contact details of the service facility operator;• information on charges for gaining access to service facilities, and charges for each rail-related service that is supplied in these facilities.

The other requirements from the service catalogue, mentioned in the table in section 4.3 of this guide, do not apply to exempted operators. These operators are also exempted from the additional procedural rules regarding access requests.⁵⁴

6.3.1 No strategic importance

In order to qualify for an exemption on this basis, the service facility operator must demonstrate that the service facility in question has no strategic importance for the rail transport market(s) for which the service facility is relevant.

ACM determines the strategic importance of a service facility on the basis of four factors:

- The exercise of control over the service facility;
- The utilization rate of the service facility;
- The available alternatives for customers (including potential ones) of the service facility;
- The size (relative or otherwise) of the service facility.

⁵³ Article 2, paragraph 1, first sentence, in conjunction with paragraph 2 of the Implementing regulation.

⁵⁴ This concerns Articles 6 through 13 and 15 of the Implementing regulation.

Control

Service facilities are often owned (directly or indirectly) by railway undertakings. These undertakings may have an incentive to thwart rival railway undertakings, for example by denying them access to service facilities they control. Because such incentives exist, ACM will not easily decide to grant an exemption for service facilities that are owned (directly or indirectly) by a railway undertaking.

As explained in Chapter 5.5 of this guide, the relevant rules and regulations impose additional requirements on operators that are controlled (directly or indirectly) by a railway undertaking with a dominant position. The goal thereof is to safeguard completely transparent and non-discriminatory access to the service facilities operated by these undertakings and to the services supplied therein.⁵⁵ Considering the legislature's desire to create stronger safeguards for these undertakings with regard to transparency and access, ACM will not grant any exemptions for the services facilities operated by undertakings with dominant positions based on the ground of 'no strategic importance'.

Utilization rate of the service facility

Limited utilization of a service facility may indicate that there is little demand from the rail transport market for using it. This may be a sign of a lack of strategic importance of the facility in question. Conversely, a high utilization rate of the available capacity is usually seen as a sign that the facility *does* have strategic importance to the rail transport market.

Merely the existence of overcapacity is not enough to assume that a service facility lacks any strategic importance. Even in the case of overcapacity, access problems may arise, for example if the service facility is dealing with peak load. Keeping that in mind, ACM expects operators, when filing the exemption request, to provide insight into the capacity utilization rate of the service facility as well as into the number of access requests that they denied in the previous timetable year.

Alternatives for customers (including potential ones) of the service facility

Another factor that ACM finds important is the extent to which railway undertakings that use the service facility or would like to use it are able to go to alternative services facilities. That is why operators, when filing their request, must explain and substantiate what viable alternatives customers (including potential ones) of the service facility are able to use. The operator should not just make a plausible case that alternative service facilities (viable or otherwise) are available, but also that, in these facilities, the same rail-related services are supplied as in the service facility for which an exemption is requested.

For more information about the concept of "viable alternative", ACM refers to page 15/16 of this guide. If no viable alternatives are available, ACM will, in principle, not grant an exemption.

Size of the service facility

Finally, ACM may take into account the size of the service facility. In principle, only service facilities of limited size (physical or economic) are eligible for exemptions. What constitutes a 'limited size', depends on, among other things, the type of service facility for which an exemption is requested, and needs to be assessed on a case-by-case basis.

⁵⁵ Article 14, paragraph 1 of the Implementing Decision.

6.3.2 Competitive market environment

Operators that wish to get an exemption on this ground, must demonstrate to ACM that the service facility or service in question is commercially exploited or is supplied in a competitive market environment in which different competitors offer similar services.

ACM would like to know from any operator that files a request what undertakings it regards as competitors for the specific service or service facility for which an exemption is requested. The applicant must make it clear to what extent those undertakings offer services that are similar to those offered by the applicant, as perceived by the railway undertakings that purchase those services. In that context, both the nature and the technical characteristics of the service facility are important, as well as the conditions (including economic ones) under which the services are offered.

In addition, the applicant must discuss the locations (geographical or otherwise) of the service facilities (including the rival ones). The applicant must indicate the distance between these service facilities and the applicant's service facility, and substantiate as to why that distance does not pose any barrier for customers to switch.

When assessing exemption requests, ACM attaches great value to any documentation on actual market behaviour exhibited by customers (potential or otherwise). This may, for example, include recent data regarding customer switching behaviour, which reveals that the applicant's service facility experiences actual competitive pressure from the competitors mentioned by the applicant.

In order to determine whether the market landscape is competitive, ACM will first assess how many competitors the applicant has. If the applicant's service facility competes with fewer than two undertakings that are independent from the applicant, ACM will not grant an exemption.

ACM, when assessing exemption requests, will also take into account information, insofar available, on:

- The relative size of the rival service facilities, expressed in market share or turnover;
- Available capacity in the rival service facilities;
- Opportunities for capacity expansion of the rival service facilities;
- Opportunities for market entry;
- Countervailing buyer power.

6.3.3 Negative effects on the functioning of the market

Finally, an exemption can be obtained if application of the Implementing regulation leads to risks of negative effects on the functioning of the market for service facilities on which the operator is active.

It is important to stress that exemptions can only be granted from provisions that are laid down in the Implementing regulation, and not from provisions laid down in the Recast directive on which the Implementing regulation is based.

Exemptions can only be granted in the case of risks for negative effects on the entire service facility market (or on the functioning thereof) on which the operator is active. The circumstance that the Implementing regulation may negatively impact a specific operator is thus insufficient for becoming eligible for an exemption.

Operators that seek an exemption on this ground are expected by ACM to substantiate:

- Which provisions laid down in the Implementing regulation create risks of negative effects on the functioning of the service facility market in question;
- What these risks of negative effects consist of;
- Why compliance with the provisions in question cannot be realized without producing these risks of negative effects.

6.3.4 Duration of exemption

In principle, ACM grants exemptions for an indefinite amount of time. However, exemptions can also be withdrawn, if it turns out that the thereto-related requirements are no longer met.⁵⁶ Any reports from the market related to problems (including access problems) with regard to an exempted service facility may be a reason for ACM to review the granted exemption.

⁵⁶ Article 2, paragraph 4 of the Implementing regulation.