



Arriva's comments on 'A greater role for ORR regulating passenger franchisees in England & Wales', December 2011

These comments are made on behalf of Arriva plc, its subsidiary Arriva UK Trains Limited and its wholly owned franchised train operating companies, Arriva Trains Wales/Trenau Arriva Cymru Limited (ATW), DB Regio Tyne & Wear Limited (DBTW), The Chiltern Railway Company Limited (CR) and XC Trains Limited (XC). Arriva is a wholly owned subsidiary of Deutsche Bahn AG (DB AG).

We note that the Government and ORR wish to explore whether a regulatory approach to the protection of passenger interests, implemented through the licensing system, could deliver useful benefits in certain areas and welcome the opportunity to comment whilst proposals are at this formative stage. We support the objectives set out in the Foreword of simplifying regulation, better alignment of incentives and improving value for money for passengers and taxpayers. We have to express a general reservation that the approach outlined does not appear entirely consistent with these objectives. It seems to advocate using measures appropriate for regulating a monopoly utility, where the reasonable costs of fulfilling its duties are assessed through periodic pricing reviews, with a system where contracts are tendered competitively against a detailed specification and contract and the resulting contract has a fixed price. Our concern is that this may well actually complicate franchise management and add cost to the industry.

We support the response made by ATOC and are pleased to comment additionally below on the specific consultation questions in the text and Appendix B.

Question 1: May we publish your response?

Yes.

Question 2: Please comment on the general principles against which changes in responsibility for regulation of passenger franchises should be assessed.

Clearly they should be tested against the objectives, to see if the proposals are reasonably likely in practice to deliver the intended outcomes. They must also be consistent with domestic legislation and European railway law as existing and as likely to emerge in the recast of the First Railway Package and anticipated Fourth Package. To accord with best practice, a financial and regulatory impact assessment should be undertaken before a decision is made on any specific proposal.

Question 3: Do you see any potential benefits or drawbacks in moving towards giving ORR an enhanced role in respect of franchise change?

We do not see any benefits. There are certainly some issues with the current Franchise Change process that can give rise to blockage of worthwhile change and this contributes to value for money problems in the rail industry. However we consider these arise primarily from a lack of confidence by DfT to make commercial deals and the absence in franchise agreements of good value dispute resolution procedures. Such procedures are available

elsewhere, such as the Rail Industry Disputes Resolution Committee and commercial arbitration. Commercial arbitration does not appear to be a current competence of ORR, so we think it unlikely to be a value for money outcome for this to be established as a new function at ORR when other opportunities already exist.

Question 4: Are there any representations you would like to make concerning ORR's role in holding Network Rail to account?

The fundamental role for ORR is to regulate Network Rail. The infrastructure side of the rail industry is a monopoly with no direct UK comparator organisations, but its performance is fundamental to passenger and freight train operators and their respective customers. Passenger operations are subject to vigorous competition for the market through franchising and some competition in the market, whilst freight operators compete in the market. So the deficit in impact of market forces is with Network Rail not the train operators. In our view ORR has not been sufficiently effective in its regulation of Railtrack and Network Rail in terms of outputs delivered and costs. It should prioritise holding Network Rail to account over taking on new roles that could be a distraction to this core task.

Question 5: Should ORR consider any revisions to its enforcement and penalties policies if it takes on a wider role? In particular, should ORR consider how and whether it could accept commitments to make improvements for passengers as an alternative to levying a penalty?

We consider that since the Infrastructure Manager became a not for profit company, the imposition of financial penalties became largely irrelevant to incentivising its behaviour. We would welcome a change to make commitments to undertake improvements for the benefit of passengers (and/or freight customers if relevant to the circumstances) an alternative to financial penalties. DfT already chooses on occasion to accept certain penalties under franchise agreements in the form of commitments to improvements, so it would be retrograde if this ability was lost in respect of any activities transferred from DfT to ORR.

Question 6: Are there any specific points on which DfT and ORR should set out their proposed approach during the transition period?

We consider it would be totally unreasonable to try to add new obligations to existing contracts without a matching adjustment in payments and observe that even an attempt to take this approach will drive up costs in the rail industry as bidders for franchises will have to price in the potential for such behaviour in the future.

In principle we can accommodate changes, such as ORR taking responsibility for managing certain issues, in future franchises. In this event it would be greatly in the financial interests of DfT for there to be clarity in ITTs, data sites and franchise agreements of the policy, standards required to be achieved, any compulsory inputs or processes, the enforcement approach in the event of these not being achieved, extent to which contractual obligations and financing will be taken into account and how matters that are joint responsibilities with other industry players will be addressed.

Question 7: Should ORR review its funding arrangements in the light of the changes proposed in this consultation?

If ORR anticipates any material costs arising from the proposed new duties there should firstly be a financial and regulatory impact assessment to establish whether any benefit will arise to cover such additional costs. Even if this proves positive, no changes to ORR charges should impact on any existing franchise, open access or freight operator. If ORR is to undertake a contract management function currently undertaken by DfT it would be logical for DfT to fund this.

Question 8: Do you have any comments on the proposals for regulating complaints handling procedures?

We have no objection the proposal on the basis stated that there will be no material effect on the obligation as it currently stands and therefore should not result in any additional burdens.

Question 9: Do you have any comments on any of the proposals for regulating DPPPs?

We have no objection the proposal on the basis stated that the proposed change would not have a material effect on the obligation as it currently stands and, as such, should not result in any additional burdens and that the requirement that the licence holder shall not be obliged to undertake any action that entails excessive cost would remain unchanged

Question 10: Do you agree that the regulation of punctuality and reliability performance should be brought together in one place? Could this proposal work and what refinements could be made? Are there any alternative ways of doing this?

We do not believe that current issues, or indeed any issues since privatisation, with performance arise from the division of responsibility between ORR regulating Network Rail's performance and DfT managing franchise performance. We have shown at Arriva's TOCs how collaboration is possible within the current structure and can achieve substantial improvements. So we do not accept that this is a problem that needs solving. We also believe it is misleading to say it will bring the issue together in place, as it will remain unavoidable that DfT has to take a view of the desired future performance that it wants and is prepared to fund through both the HLOS/SoFA process and in letting future franchise. We also consider there are significant difficulties in trying to enforce performance obligations in a collective manner using the PPM measure, which cannot be disaggregated by cause. We consider the continued management of Delay Minutes attributed to Network Rail and to TOCs is necessary and that means there is no particular difficulty if Network Rail Delay Minutes are the responsibility of ORR and TOC Delay Minutes the responsibility of DfT. As with any other change, it is possible for this to be introduced with new franchises, providing sufficient clarity is given to the issues in our response to Question 6 and, in this case in particular, how the respective contributions of TOCs and Network Rail would be regulated separately to avoid one party being held responsible for the shortcomings of another over which it had no control.

Question 11: What are the key areas that should be covered by service quality measures and commitments? How should Government decide what to include in each franchise? Is there merit in having a core set of requirements that apply to all?

We do not consider there is any general necessity for a train operating company to have external measures and commitments on service quality or for such measures to be

standardised. The key incentive for any industry in the market is to satisfy its customers such that they choose to consume and pay for its products, in this case train travel. We accept that in the sectors of the rail market requiring significant public support this market mechanism may be weaker, but it remains effective. It is of course open to any client body procuring public service obligation train services to specify a quality measurement and/or management system, which bidders can price as part of their overall offer. However, there is an on-cost to this and client bodies should satisfy themselves that there are sufficient benefits to justify this cost. Train service offers and markets differ substantially, so standardised measures are inappropriate.

Question 12: Please comment on the specific benefits and disbenefits of the requirements on service quality measurement and commitments being enforced by licence rather than by contract.

We consider service quality measurement and commitment to be inappropriate for licence enforcement as they are essentially part of the contractual decision by a client body of what it wishes to purchase and fund. Adding them as a licence obligation removes choice for tendering authorities and masks the cost implications of their specifications. Whilst we are quite happy in principle to publish reasonable requirements for service quality, we note that in practice it is the quality experienced by each passenger that drives their satisfaction, which is already measured and published, and their future travel behaviour, which is fundamental to income, so we question the value for money of extensive new publication obligations.

Question 13: Do you believe that the proposed licence condition would provide effective and proportionate accountability for delivery of service quality standards? Would a transparency obligation, relying on reputational incentives, be adequate? Or should it be supplemented by a compliance obligation? Should the compliance obligation be subject to doing what is reasonably practicable to deliver it, for instance through a purposive approach similar to that being considered for performance?

Purposive licence conditions are appropriate to the regulation of monopoly utilities subject to periodic price control reviews rather than competitively tendered contracts such as passenger train franchises. It is important not to ignore the most important transparency, which is that the passenger sees and experiences the quality delivered and, if unhappy, may form a view on whether to complain, seek compensation or not continue to use the product.

Question 14: What would need to be set out in guidelines to ensure credibility and consistency of reporting against service quality measures and transparency for passengers? How do we ensure that we give sufficient clarity and flexibility for franchisees in guidelines?

The most cost-effective structure to achieve suitable quality of service is to allow train operators to adopt the procedures appropriate to their business. If a client body wishes to purchase a specific system as part of a contract we are quite happy to price accordingly, but would draw attention again to our comment in response to Question 6.

Question 15: Do you agree with the approach set out on monitoring of compliance with the service quality commitments? In particular do you think that an adapted safety management maturity model could be applied in this context?

We do not agree that any particular management model should be a specific obligation enforced by licence. Train operators provide service quality in line with their contractual obligations, respond to the revenue incentive of providing a product that passengers choose to consume and are guided by the reputational incentive. The exact form of quality management system used is one of each company's specific offers and attempting to force a particular model will only increase costs and reduce innovation in the industry.

Question 16: Do you agree with ORR's proposed approach for service quality commitments of requiring improvement plans as a prelude to formal enforcement action?

We do not agree that it is appropriate for ORR to be involved in the quality management systems of train service contracts procured by the Government. However, we agree with the general principle that the body managing such quality provisions should, in the event of shortfall against such provisions, look first to requiring remedial plans and only if these are unsuccessful or not provided move to penalties. There should always be clarity at the time of bidding for such contracts of the required standards, the level of intervention if not met and the consequences. If these are unclear the risk will be added as an additional cost to the contract.