

Annex B – Setting and enforcing requirements under licence or franchise contract

Purpose of Annex

1. As part of our proposals to strengthen protection for passengers in the areas of compensation and accessibility, we reviewed the relative merits of using franchise contracts or licence conditions to set and enforce standards.
2. The framework for franchising rests on competitive tendering of rail franchises to private operators. The franchise contracts that are awarded define the services that the funder wants the railway to offer to its passengers. Franchise contracts contain a wide range of passenger-facing commitments, most notably around train performance, but also in areas such as specific improvements to facilities (such as stations, ticketing or trains) that can benefit passengers. They may also include passenger satisfaction targets. No two franchises are the same, and most requirements are bespoke.
3. Train operating company licences ensure operators are 'fit and proper' and meet a number of industry-wide conditions that promote the effective operation of the railway. They also contain a number of important passenger facing obligations. Currently, train and station licences include requirements in the areas of:
 - complaints handling procedures;
 - assistance to passengers with disabilities; and
 - provision of timetable and service information, including during disruption.
4. We have assessed the pros and cons of setting and enforcing passenger-facing service standards through licences or franchises against three objectives (which relate closely to our analysis of current shortcomings in the areas of accessibility and compensation). These are the need for:
 - minimum standards that apply consistently to passengers across the network;
 - effective accountability, with appropriate action if train or station operators (including Network Rail) fail to meet these standards; and
 - transparency over what passengers can expect and what they get, and over the actions which may be taken if train companies or station operators fall short of the expected standards.
5. Our analysis shows that – for setting network-wide standards for passengers - the licensing regime is better able to achieve these objectives quickly and simply, as well as allowing for future changes if evidence shows that standards need to be subsequently adjusted. In contrast, the franchising regime is better able to accommodate bespoke requirements for particular train companies, such as securing specific upgrades to facilities, which would need to be carefully priced by bidders as part of the tendering process.
6. We recognise that if both a regulator and franchise authority have the ability to enforce the same requirements there would be a clear risk of double-jeopardy for train operators, and if two bodies need to monitor compliance there can duplication in the costs of oversight. This means that it is

important requirements are not duplicated across franchise or licence conditions and that responsibility for oversight is clear in each area. Alignment of responsibilities is therefore a practical factor worth considering. ORR has a number of existing statutory duties, including to protect the interests of users of railway services¹⁷, and is also designated as a consumer law enforcement authority¹⁸. Strengthened licence conditions for accessibility and compensation would align with ORR's existing oversight roles, supporting consistency in treatment between related regulatory obligations.

7. Another notable feature of the licence regime is that ORR is independent in its judgements. Where appropriate, ORR's statutory duties mean that enforcement decisions must balance the interests of current and future railway users, business and those of funders, and weigh up all the consequences.
8. Finally, an important benefit of the licensing regime is the transparency of decisions and ability for decisions to be openly challenged. Operators are protected by the statutory consultation process, judicial review mechanism, and the Railways Act 1993. Section 72 of the Regulatory Enforcement and Sanctions Act 2008 also requires ORR to keep our functions under review and ensure that in exercising these functions we do not impose or maintain burdens which are unnecessary. In practice this has led to licence simplifications, for example, with some Network Rail licence conditions recently removed or simplified.¹⁹

¹⁷ <https://www.legislation.gov.uk/ukpga/1993/43/section/4>

¹⁸ Under the Enterprise Act 2002 (Part 8 Designated Enforcers: Criteria for Designation, Designation of Public Bodies as Designated Enforcers and Transitional Provisions) Order 2003, S.I. 2003 No. 1399
<http://www.opsi.gov.uk/si/si2003/20031399.htm>

¹⁹ <https://orr.gov.uk/rail/economic-regulation/regulation-of-network-rail/price-controls/periodic-review-2018/pr18-consultations/statutory-consultation-on-proposed-changes-to-network-rails-network-licence>

Principles for consumer-related regulation

Principle	Licence condition characteristics	Franchise contract characteristics	Implication for the proposals
<p>Minimum standards that apply consistently to passengers across the network</p>	<p>In general, licensing is designed to provide a consistent, long-term set of broad requirements. They can be high-level and purposive in nature, such as requiring compliance with a policy. This policy can evolve as needed over time.</p> <p>Licence conditions offer the ability to set standards across all operators.</p> <p>If licence conditions are updated, the changes can be applied to all licensees simultaneously.</p> <p>If one or more operator did not agree to the proposals, the next step would be for ORR to request determination by the CMA, which applies a public interest test.</p>	<p>Contracts offer the ability to make bespoke arrangements and are negotiated individually between the franchising authority and franchisee.</p> <p>Franchise contracts tend to be more specific than licence conditions so they are legally enforceable.</p> <p>Standards can be made consistent across the network but would need all franchising authorities to agree on the requirement and would likely involve a phased implementation as old contracts expire and new ones are agreed.</p> <p>To update standards in current franchise contracts across the network, each one would need to be renegotiated, with both parties to each contract needing to agree.</p>	<p>The compensation and accessibility proposals are intended to be long-term and to set uniform standards across the whole network, including all TOCs, both franchised and open access. A licence condition would achieve this.</p> <p>Additionally, if not captured under a licence condition it may only be possible to implement the proposed changes as franchise contracts expire, which would create inconsistency for consumers and take longer to deliver.</p> <p>Lastly, a licence regime can ensure that a set of appropriate minimum standards are maintained across the network should the requirements need to evolve in the future. This can be achieved through updating policy documents such as the proposed 'Compensation Code of Practice'.</p>

Principle	Licence condition characteristics	Franchise contract characteristics	Implication for the proposals
<p>Effective accountability, with appropriate action if operators fail to meet these standards</p>	<p>ORR's enforcement action decisions are guided by duties within the statutory framework, and require a decision by the ORR board. Decisions do not need to go court except in some cases of appeal.</p> <p>ORR board decisions are made independently from the franchising authority. Where appropriate, decisions are made balancing the potentially conflicting interests of users, funders, and commercial businesses involved in the railway.</p> <p>The regulator's decisions are also accountable and subject to judicial review or challenge under the Railways Act 1993.</p> <p>As noted in the following table, any decisions are also transparent, so consumers have visibility over how non-compliance is being acted on, which is a kind of public accountability.</p>	<p>Under franchise contracts, legal action is taken by one contract party against another (private law). This requires a successful legal case to be brought.</p> <p>Contract enforcement decisions may be influenced by such factors as commercial implications to franchise authority revenue, which can create a conflict of interest between the best outcome for consumers and the franchise authority.</p>	<p>In requirements that relate to consumer areas such as compensation and accessibility, it is particularly important that there is a system that can ensure operators that are non-compliant are held to account.</p> <p>The statutory framework that ORR operates within allows for independent judgment away from some of the influencing factors that exist for franchising authorities. The need for ORR to balance its duties means it is well placed to act as the independent judge of when and how it is appropriate to take action against train companies that do not meet the standards.</p>

Principle	Licence condition characteristics	Franchise contract characteristics	Implication for the proposals
<p>Transparency over what passengers can expect and what they get, and over the actions taken if train companies fall short of the expected standards</p>	<p>Both setting licence conditions and any enforcement action taken over them are fully transparent and published by default.</p> <p>When changing licence conditions, the statutory consultation must explain what the proposed change is, the anticipated effect and the rationale for making the change.</p>	<p>When a franchise is being set up or up for renewal there is a public consultation to inform the specification.</p> <p>The final contract is not automatically published but can be requested under the Freedom of Information (FOI) Act 2000, with redactions as determined by the Secretary of State under the exemptions permitted by the FOI Act.</p> <p>However, in contracts, changes can be made relatively simply if both parties agree. There is no requirement to publish these changes.</p> <p>Any enforcement action taken which is settled outside of courts is also non-transparent.</p>	<p>Trust levels remain low for train travel²⁰. One of the ways the industry can improve this is through making requirements transparent, particularly in the important consumer areas of compensation and accessibility.</p> <p>Transparency is embedded throughout the licencing process, including when making changes to requirements, which is not the case for contracts. This means that the franchising authority and franchisee could potentially agree on a change without consumers being aware.</p> <p>Transparency over the appeals route is also beneficial for these proposals, and a public interest test through the CMA is appropriate given the nature of the requirements.</p>

²⁰ <https://consumerinsight.which.co.uk/tracker/trust>