



OFFICE *of*
RAIL REGULATION

Licensing Review: Consultation

August 2005

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Executive Summary

1. Licensing operators of trains, stations, networks and light maintenance depots is one of our key statutory functions. Through licences, and in particular the conditions attached to licences, we promote effective and efficient working relationships between industry parties and hold operators to account in the public interest.
2. This consultation document seeks views on our proposals to amend and simplify operator licences following our review of all standard licence conditions. Other changes to licences arise from the Railways Act 2005, in particular the transfer in July 2005 of consumer protection licence conditions formerly the responsibility of the Strategic Rail Authority (SRA), and from the implementation by the Department for Transport (DfT) later this year of a European Directive on rail licensing.
3. The document deals with three key areas. Firstly, in Chapter 3, we explain the proportionate approach we propose to take to the new requirements of the EU Directive on licensing. DfT has recently consulted on draft regulations to implement the Directive, which provide for licences to be granted by ORR, valid throughout the EU, to most passenger and freight train operators. To remain valid, four criteria - professional competence, third party liability insurance, good repute and financial standing – must be met on an ongoing basis.
4. While these criteria are broadly similar to those we currently apply to licence applicants, the new financial fitness standard is more explicit. We will continue to focus on assessing an applicant's ability to participate in industry arrangements together with the ability to operate but using more forward looking data. In terms of ongoing compliance we propose to base our assessment broadly on an annual declaration by the licence holder in the case of professional competence and good repute and on generally accepted accounting and auditing standards in the case of financial fitness. Ongoing insurance requirements will, as now, require annual approvals.
5. Matters currently included in licence conditions under the Railways Act 1993 will be incorporated in a Statement of National Regulatory Provisions (SNRP).

Existing licences will be designated as partly new European licences and partly as a SNRP, thus avoiding the need for existing operators to apply for new licences. The new requirements do not apply to operators of stations, networks and light maintenance depots

6. Secondly, in Chapter 4, we explain the changes to licences needed to implement the transfer of consumer protection licence conditions from the SRA to ORR. The imposition and enforcement of the seven standard consumer protection licence conditions are now the responsibility of ORR following commencement of the relevant provisions of the Railways Act 2005.
7. ORR has also assumed the policy lead, monitoring and approval roles for conditions relating to third party liability insurance, claims handling and timetabling. We propose to carry forward the SRA's existing policies and procedures on insurance for the time being, although a review of arrangements could be sensible later. On claims handling and timetabling we propose to merge the current four conditions previously split on the creation of the SRA back into two. We are not proposing at this stage to make any changes of substance to these conditions beyond making explicit the current implicit obligation to comply with the Claims Allocation and Handling Agreement.
8. DfT has assumed approval roles and routine monitoring of compliance under the terms of certain of these conditions, relating to through-ticketing, complaints procedures and disabled persons protection, reflecting the synergies between those areas and the DfT's franchising and other roles. Licence enforcement, however, remains with ORR and we will be working closely with DfT. We propose to set down our approach to enforcement of consumer protection licence matters in our published licensing guidance. This will confirm our focus on systemic or chronic failures in industry arrangements.
9. Modification schemes are making the minimum changes to licences and exemptions, needed to effect changes arising as a result of the Railways Act 2005. Other changes to existing licences set out in the consultation document would be implemented with the consent of licence holders.
10. Thirdly, in Chapters 5 to 7, we make proposals further to our review of licence conditions in the light of ORR's changing responsibilities, the experience built up since privatisation of the industry and the wider 'better regulation' agenda.

11. These proposals include the deletion of five conditions that are out of date and no longer required, including:
 - market structure and competition conditions which deal with matters we believe are better dealt with under competition legislation which was not available when the conditions were first introduced; and
 - the information gathering condition where we consider these matters could be more appropriately dealt with under amended Railways Act 1993 provisions.
12. On the safety related conditions, minor drafting changes are proposed to the Railway Group Standards condition to improve transparency and clarity and we have proposed that there is no longer a need to set out the objectives and principles governing the RSSB constitution agreement now that the RSSB has been established in accordance with these objectives. We also propose to reword the revocation provision to provide for revocation in the event of systemic or chronic safety failings that are not being addressed.
13. We propose to review our approach to environmental matters and timetabling licence obligations in due course.
14. This document will be of interest to all GB licensed rail operators and to potential licence applicants who will want to understand how the licensing system is developing. The holders of licence exemptions with an insurance condition, who are otherwise unaffected, will be interested in Chapter 4.
15. The consultation period runs for twelve weeks until 11 November 2005. Subject to responses to this consultation, we expect to publish conclusions around December 2005 and to implement our conclusions early in 2006. This is expected also to involve making minor drafting improvements to our standard licence conditions to improve readability and transparency. On similar timescales ORR will, where appropriate, seek the consent of current licence holders to make the modifications to their licences to reflect the conclusions of this consultation.
16. We will also publish updated licensing guidance.

Chris Salt

Chris Bolt
Chairman
August 2005

1. Introduction

Purpose

- 1.1 This consultation document explains the changes to the GB licensing regime occurring this year as the result of recent domestic and EU legislation, and asks for views on further changes proposed by the Office of Rail Regulation (ORR) following a review of licence conditions.
- 1.2 The first changes discussed are those that will be necessary to implement the First Package of EU Rail Directives¹, on which the Department for Transport (DfT) consulted in June 2005². The DfT's draft Railway (Licensing of Railway Undertakings) Regulations 2005 (the Regulations) will require most operators providing passenger and freight train services in GB to hold a European licence, valid throughout Europe, rather than a domestic passenger or non-passenger licence. The DfT consultation closed on 5 August 2005. Subject to consideration of consultation responses, the DfT intends that the Regulations will be made and take effect in autumn 2005, at which time affected licence holders will have their existing licences transposed automatically into the new regime. The Regulations will not affect licences for stations, light maintenance depots and networks.
- 1.3 The second set of changes outlined in this document includes those that have been or will be made as a result of the Railways Act 2005. These include the transfer of various licensing responsibilities related to consumer protection from the Strategic Rail Authority (SRA) to ORR and the DfT and the creation of the new national Rail Passengers Council (RPC). Again, no action is required from licence holders to effect these legislative changes.
- 1.4 In addition, ORR's 2005-08 Business Plan³ and Corporate Strategy⁴ committed ORR to work to ensure that the licensing regime remains up to

¹ In particular Directive 2001/13. This amends Directive 1995/18 on the licensing of railway undertakings. See [SCADPlus: Licensing of railway undertakings](#).

² *Implementation of the First Package of EU Rail Directives, A Consultation Paper*: June 2005, Department for Transport. The consultation closed on 5 August 2005.

³ *ORR Business Plan 2005-08*, April 2005, <http://www.rail-reg.gov.uk/upload/pdf/232.pdf>

⁴ *ORR Corporate Strategy*, April 2005, <http://www.rail-reg.gov.uk/upload/pdf/233.pdf>

date and fit for purpose, and in particular to review licence conditions and policies in the context of assuming new responsibilities and other developments. We have completed this review and the consultation document sets out our main proposals for change. Changes to existing licences, other than as a result of legislative changes, generally require the licence holders' consent. Where proposals for change are supported we will seek the necessary consent when we publish our conclusions following this consultation.

- 1.5 All licence holders will be interested in the changes to their own licences and to the system generally. Potential licence applicants will also be interested to understand how the system will develop. The holders of licence exemptions with an insurance condition will be interested in Chapter 4.

Scope of this document

- 1.6 This consultation document focuses on changes to both existing licences and to the template passenger, non-passenger, station, light maintenance depot and network operator licences published on the ORR website⁵.
- 1.7 It does not consider non-standard licence terms included in a few bespoke licences. Nor have we considered directly the network licence held by Network Rail Infrastructure Limited, although there will be some read across to that licence where it contains conditions similar to those in other operators' licences.
- 1.8 We have not proposed changes to the licensing regime in the specific context of the development of Community Railways, although changes proposed to template licence conditions may be relevant to Community Rail operations. There is considerable flexibility within the licensing regime to regulate operations in a proportionate way (for example, ORR's discretion over the terms on which it grants licences and the ability to grant licence exemptions to particular operations), and ORR considers each case on its merits. However, ORR would welcome views on whether more should be done.

⁵ See [The licensing regime - The licensing regime : Office of Rail Regulation](#).

Structure of this document

- 1.9 Chapter 2 outlines the legislative framework and regulatory context. Chapter 3 deals with European licensing issues and how current arrangements will need to change when the DfT implements the First Package of EU Rail Directives later this year. Chapter 4 explains how consumer protection related licence conditions and related enforcement matters, formerly the responsibility of the SRA, will be handled. Chapter 5 considers safety related licence conditions. Chapter 6 proposes changes to market structure and competition related conditions. Chapter 7 considers conditions covering information gathering, environmental policies, fees and other matters. Annex 1 lists the consultation questions asked throughout this document. Annex 2 summarises which standard licence conditions typically appear in which type of template licence. Annex 3 sets out possible text for a revised claims allocation and handling condition discussed in Chapter 4.

Consultation responses

- 1.10 We invite your comments and views on any aspect of the licensing regime, on the proposals in this document, and in particular on the consultation questions posed in each chapter. Consultation responses should be sent by Friday 11 November 2005 to:

Chris Dodds
Senior Executive
Office of Rail Regulation
1 Waterhouse Square
138-142 Holborn
London
EC1N 2TQ

- 1.11 It would be very helpful if consultees could also email their responses to chris.dodds@orr.gsi.gov.uk.
- 1.12 Respondents should indicate clearly if they wish all or part of their responses to remain confidential to ORR. Otherwise, it is expected that they will be placed in the ORR library and on its website and may be quoted from.
- 1.13 Where a response is made in confidence, it should be accompanied by a statement summarising the submission but excluding the respondent's confidential information. This statement may be used as above.

- 1.14 ORR may also publish the names of respondents in future documents or on its website unless a consultee indicates that they wish their name to be withheld.
- 1.15 Any of the issues raised in this document can be discussed with Chris Dodds on 020 7282 2111 or with Rob Plaskitt, Head of Licensing, on 020 7282 2072. This document can also be accessed through our website (www.rail-reg.gov.uk) and in the ORR library.

Next steps

- 1.16 The consultation period runs for twelve weeks until 11 November 2005. During that period we will organise a seminar to discuss the key issues raised.
- 1.17 Subject to responses to this consultation, we expect to publish conclusions around December 2005 and to implement our conclusions early in 2006.
- 1.18 This would involve amending our template licences (including making drafting changes to improve readability and transparency) and, where appropriate, seeking the consent of licence holders to modify current licences accordingly.
- 1.19 In addition we plan to publish updated licensing guidance reflecting the changes described and the conclusions of this consultation.
- 1.20 Although it is for licensees to be aware of their licence obligations at any given time, if licence holders would find it useful ORR will make consolidated versions of licences available electronically, once all the changes discussed take effect.

2. The legislative framework and regulatory context

The Railways Act 1993

- 2.1 All operators of railway assets are required to hold an appropriate licence or licence exemption granted either by ORR or by the Secretary of State in accordance with sections 6 to 9 of The Railways Act 1993 (as amended) (the Act), and associated regulations.
- 2.2 The licensing regime is a key mechanism for the protection of the public interest, as reflected in ORR's duties under section 4 of the Act. This purpose is achieved mainly by way of licence conditions that are used to require and maintain adherence to industry wide standards and arrangements. Over time, conditions have been used to achieve a range of consumer protection, safety, environmental, competition and other objectives reflecting the range of issues set down in section 4 of the Act. Through licence conditions, ORR promotes effective and efficient working relationships between industry parties in accordance with its Business Plan objectives, while also holding operators to account for the delivery of public interest objectives.
- 2.3 ORR has wide discretion over the subject matter of conditions included in licences at grant, although the section 4 duties apply and a General Authority issued by the Secretary of State under section 8 of the Act imposes certain requirements; (for example, certain conditions must be included in licences, except with the agreement of the Secretary of State).
- 2.4 Post grant, licence conditions can be modified with the consent of the licence holder following a statutory consultation, or without consent following referral to and investigation by the Competition Commission.

The rail review

- 2.5 The Government's *Future of Rail* White Paper⁶ recognised the ongoing importance of ORR's operator licensing function. This role is extended under the Railways Act 2005 to include responsibility for the imposition and

⁶ *The Future of Rail*, DfT, Cm 6233, July 2004, [The Future of Rail - White Paper CM 6233](#)

enforcement of licence conditions related to consumer protection, conditions that were previously the SRA's responsibility. These and other related changes will need to be reflected in the text of licences, and the Railways Act 2005 provides mechanisms to make those changes.

European Licensing Directive

- 2.6 The DfT has recently consulted on draft regulations to implement the First Package of EU Rail Directives. The package includes one Directive focused on licensing matters (the Directive). The implementing Regulations proposed by the DfT will give ORR the power to grant European licences to “railway undertakings”, meaning most passenger and freight train operators (though not station, light maintenance depot or network operators). These licences will be valid throughout the EU.
- 2.7 In order to accommodate the European view of licences as an authorisation to operate, narrowly focused on the fitness of an operator, the DfT has proposed that incumbent operators caught by the Directive will have their existing passenger and non-passenger licences designated, partly as a new European licence and partly as a Statement of National Regulatory Provisions (SNRP). The DfT intends that this will largely involve reformatting existing licences and that no existing operator caught by the Directive will be required to apply for a new European licence and associated SNRP.
- 2.8 The DfT has proposed that SNRPs will deal with virtually all the matters currently handled as licence conditions under the Act. The SNRP will therefore be the mechanism by which ORR imposes specific public interest obligations on affected passenger and freight train operators. The Act's provisions for the modification and enforcement of licence conditions will also apply to SNRP conditions.
- 2.9 The DfT consultation closed on the 5 August 2005. Subject to consultation responses, the DfT intends to make regulations to implement the arrangements described above that will take effect in autumn 2005.

Better regulation

- 2.10 ORR is committed to fair and effective regulation and has an explicit duty under section 4 of the Act to impose on operators the minimum restrictions consistent with the performance of its functions under Part 1 of the Act. In

addition, the ORR 2005-08 Business Plan includes a commitment to conduct a review of the licensing regime and to work to ensure that the licensing regime remains up to date and fit for purpose. We have completed this review, taking account of the experience built up since privatisation of the industry and the better regulation agenda exemplified by the work of the Better Regulation Task Force⁷ and the Hampton Review⁸.

⁷ See <http://www.brtf.gov.uk/>.

⁸ *Reducing administrative burdens: effective inspection and enforcement*, Philip Hampton, HM Treasury, March 2005, <http://www.hm-treasury.gov.uk/media/A63/EF/bud05hamptonv1.pdf>.

3. The European regime

Railways Act 1993 licences

- 3.1 Licences granted under the Act are normally evergreen; they remain valid unless and until revoked in accordance with revocation terms set down in the licence. These terms provide for revocation (with notice) in varied circumstances, including where an enforcement order has not been complied with or where ORR does not approve a change of control of the licence holder. Revocation without notice on safety grounds is also possible where licensed activities are subject to the Railways (Safety Case) Regulations 2000 (as amended) (see Chapter 5).

European licences under the Directive

- 3.2 European licences granted under the Regulations proposed by the DfT will also be evergreen, remaining valid unless and until revoked in accordance with revocation terms set down in the licence, or the Regulations themselves.
- 3.3 In order for new-style European licences to remain valid, licence holders will need to meet four key criteria set down in the Regulations, both at the time of application and on an ongoing basis. These criteria relate to professional competence, third party liability insurance, good repute and financial standing.
- 3.4 For the most part the criteria are very similar to those that ORR currently applies when determining if a licence applicant is a 'fit and proper' person to hold a licence. ORR already considers evidence about a prospective operator's safety record for example, and will normally only grant a licence when the applicant has a safety case or safety case exemption accepted by the Health and Safety Executive (HSE). Appropriate insurance against third party liabilities is also required before operations can begin. This approach is consistent with the requirements laid down in the Directive.
- 3.5 Similarly, we already consider evidence about an applicant's good repute, including conducting a statutory consultation on proposals to grant a licence. This approach is very similar to that laid down in the Directive, except that ORR will also have to check whether an applicant has been convicted of

serious or repeated failures in respect of social and labour law, or customs law where the operator moves freight subject to customs procedures.

- 3.6 There are further differences with respect to the financial fitness criteria, discussed below.

The financial fitness criteria

- 3.7 Our current criteria for assessing financial standing are very flexible and focused on the ability to participate in industry arrangements. A judgement is normally reached by looking at annual accounts and other information required under the Railways (Licence Applications) Regulations 1994.

- 3.8 The Directive introduces the following more explicit test.

“The requirements relating to financial fitness shall be met when an applicant railway undertaking can demonstrate that it will be able to meet its actual and potential obligations, established under realistic assumptions, for a period of twelve months.”

- 3.9 In addition, the Directive states that a person cannot be considered financially fit if “considerable arrears of taxes or social security are owed as a result of the undertaking’s activity”.

- 3.10 When the Directive is implemented, this ongoing requirement will apply to all applicants for European licences, i.e. to most prospective passenger and freight train operators. The DfT envisages implementation in autumn 2005.

- 3.11 The information that ORR will require to assess financial fitness against this new standard will be slightly different to now with more emphasis on forward forecasts. However, there is still scope for ORR to interpret the standard and to apply it proportionately. We therefore propose to exercise this discretion to maintain the current focus on assessing an applicant’s ability to participate in industry arrangements and agreements (these will form the backbone of its actual obligations), together with the actual ability to operate (staff and performance costs), using forward looking data to inform this assessment. For example business plans and sources of finance.

- 3.12 The grant of a licence to an applicant who has passed the financial fitness test does not imply any assurance about that applicant’s financial stability or viability, any endorsement of its business plan or the insulation of the industry from its financial collapse. This will not change under the new test.

- 3.13 Given that the Directive does not apply to station, light maintenance depot or network operator licences, it would be administratively complex and confusing to applicants to apply two standards of fitness, especially where an applicant required licences under both the Regulations and the Act.
- 3.14 ORR therefore proposes to apply the new criteria to all licence applicants on implementation of the Directive. ORR has considerable discretion to act proportionately within the framework of the 'new' standard, for example over the level of detail required from applicants. Consequently we do not consider applying the criteria to all licence applicants will create a barrier to entry.

The ongoing obligation

- 3.15 Implementation of the Directive will also introduce a new obligation on European licence holders to meet the professional competence, third party liability insurance, good repute and financial standing criteria on an ongoing basis. Currently this is only an obligation on the two holders of international licences⁹. The amended Directive removes the distinction between domestic and international operations and so extends the obligation to all European licence holders. It will not apply to station, light maintenance depot or network licence holders.
- 3.16 A proportionate approach would be to ask licence holders to declare annually that they continue to meet the required standards, perhaps using a template letter. The declaration would not however need to cover ongoing insurance (because ongoing insurance arrangements will be separately approved by ORR), or professional competence to the extent that it was already demonstrated by an accepted safety case. Confirmation would however be required that the good repute and financial fitness criteria continued to be met.
- 3.17 With respect to the financial fitness criteria, ORR could also base its ongoing assessment on generally accepted accounting and auditing standards, for example the going concern basis used in the preparation of financial statements. These arrangements would apply to all European licence holders from the anniversary of implementation of the Directive, although operators may wish to provide information earlier according to their own accounting

⁹ These are English Welsh and Scottish Railway International Limited (EWSI) and Eurostar (UK) Limited.

timetable. This alignment should avoid unnecessary duplication of work for operators.

- 3.18 In addition, we propose that European licence holders should notify ORR if they became concerned that they no longer met the criteria. ORR will publish revised licensing guidance confirming how it will interpret the criteria that will help operators decide if they are likely to fall short.
- 3.19 We intend to hold a seminar for licence holders during the consultation period to discuss how these arrangements will work in greater detail.
- 3.20 Do you agree with the proposals for implementing the four European licensing criteria and for demonstrating ongoing compliance?**

4. Consumer protection conditions

Introduction

- 4.1 There are seven standard licence conditions that were previously designated as consumer protection matters administered and enforced by the SRA. These conditions require licensees to maintain approved insurance, be party to various industry agreements (for example, on through ticketing) and to establish approved procedures (for example, for handling complaints and protecting disabled persons' interests). Liaison with passenger representative bodies and timetabling are also covered. Licences authorising regular, scheduled passenger train operations normally include all seven conditions, regardless of whether the operator is franchised or open access. All operators are subject to at least two of the conditions (those related to insurance and claims allocation and handling).

Recent changes under the Railways Act 2005

- 4.2 ORR was given the statutory responsibility for the imposition and enforcement of these conditions on 24 July 2005, on the repeal of section 7A of the Act. ORR will also be responsible for all policy and approval responsibilities under the terms of the conditions relating to insurance and the handling of claims against the industry (ORR previously shared responsibility for the latter with the SRA) and timetabling.
- 4.3 The DfT has assumed various approval roles under the terms of the licence conditions dealing with disabled persons protection, through ticketing, complaints handling and general RPC liaison. This reflects the synergies between those issues and franchising, fares policy and the DfT's other statutory responsibilities: as a funder, in relation to the Code of Practice for protecting the interests of disabled users of railway services (under section 71B of the Act) and as sponsor of the new RPC. The DfT will also be responsible for routine monitoring of compliance with the arrangements they approve, many of which are also reflected in franchise agreements.

- 4.4 A modification scheme¹⁰ made by the Secretary of State under section 59(2) of the Railways Act 2005 made the minimum changes to licences and licence exemptions needed to effect the changes detailed above. ORR has amended the template licences to reflect the scheme, and these can be found on the ORR website. A further scheme is anticipated in the autumn to ensure that the new roles envisaged for Scottish Ministers will be appropriately reflected in licences. A third scheme may be necessary later to amend references to the HSE when ORR assumes railway safety responsibilities.

The former consumer protection conditions

Insurance

- 4.5 All licences contain an obligation to hold insurance against third party liabilities in accordance with published guidance. The SRA's responsibility for approving industry insurance arrangements under this condition transferred to ORR on 24 July 2005. Licence holders will note that changes to the insurance licence condition made by the modification scheme mentioned above included requiring policies to be endorsed so that ORR is notified prior to any lapse, cancellation or material change to the policy, rather than the SRA. Licence holders should ensure that this change is made. Policies previously approved by the SRA are deemed to have been approved by ORR; there is no need to resubmit policies for re-approval ahead of licence holder's usual insurance renewal dates.
- 4.6 We propose to adopt and apply the SRA's existing policies and procedures with respect to industry insurance for the time being. This should ensure continuity through this period of industry change and enable a smooth transfer of responsibilities. The SRA's guidance material will be republished on our website with updated contact details and appropriate references to ORR's new role.
- 4.7 Industry third-party liability insurance arrangements have not been reviewed for some years. We therefore propose that a review would be sensible in 2006-07 or thereafter, once the changes mentioned in this document are all completed.

¹⁰ See http://www.rail-reg.gov.uk/upload/pdf/ra_2005_lms_sch1.pdf.

- 4.8 A review could include: policy issues (such as the overall level of cover required); approval procedures and associated guidance; and the potential to formalise the process for securing derogation from the standard requirements. Given that insurance raises broad public policy issues, we will wish to engage the DfT fully in any review.
- 4.9 Do you agree that a review of insurance policy, procedures and related guidance would be useful? If so, should ORR include such a review in its 2006-09 Business Plan?**

Claims Allocation and Handling Agreement

- 4.10 All licences contain two standard licence conditions that require licence holders to sign up to approved industry arrangements for claims allocation and handling:
- (a) Claims Allocation And Handling (formerly a consumer protection condition administered by the SRA); and
 - (b) Liability of Operators To Each Other (administered by ORR).
- 4.11 The two conditions are both satisfied by licence holders signing up to (and maintaining membership of) the Claims Handling and Allocation Agreement (CAHA). This is the only such approved industry agreement.
- 4.12 The SRA's role in approving changes to CAHA transferred to ORR on 24 July 2005, meaning that ORR is now solely responsible for approvals. The agreement will, in due course, need amendment to reflect this change. In the meantime, there is no detriment in leaving references to the SRA in the agreement itself as they are simply redundant.
- 4.13 The two CAHA conditions cover consumer-facing and intra-industry arrangements. With the removal of the 'consumer protection condition' designation¹¹, there need no longer be a licensing distinction between the two different aspects of CAHA. Therefore, we propose to merge the two conditions back into one that covers both aspects. A draft of what a merged condition might look like is attached at Annex 3.

¹¹ Condition 7A of the Railways Act 1993 (as amended) was introduced by the Transport Act 2000 and repealed by the Railways Act 2005 under Commencement Order No. 2 (SI 2005 No 1909).

- 4.14 Unlike other licence conditions requiring participation in industry arrangements, there is no explicit requirement to comply with CAHA in either licence condition. However compliance is implicit to the condition in that not abiding by the terms of CAHA would amount to allocating and handling claims in accordance with an unapproved agreement. For clarity and consistency therefore, we propose to insert an explicit reference to compliance in a merged condition. Such an amended condition would read along the lines of “...the licence holder shall...at all times be a party to *and comply with* such arrangements...” (new text italicised), and would be interpreted in line with the discussion of enforcement below.
- 4.15 Do you agree that it would be clearer to have one condition containing all CAHA-related obligations rather than two?**
- 4.16 Do you agree that making compliance with CAHA explicit in the licence condition would make sense in terms of transparency (making implicit obligations explicit) and consistency with other licence conditions?**

Timetabling

- 4.17 There are two standard passenger licence conditions which cover the process of creating and disseminating national timetables of passenger services:
- (a) Provision of Timetable Information (which relates to the provision of information to travel agents and others); and
 - (b) Timetabling (which requires cooperation with Network Rail’s timetabling processes).
- 4.18 As with the CAHA conditions, these two conditions split passenger-facing and intra-industry aspects of timetabling. We therefore propose to join the two conditions back together now that ORR will be responsible for both parts. Putting all timetabling obligations into one condition will improve clarity and transparency.
- 4.19 We think that a more fundamental look at the timetabling obligations in licences would be sensible once T-12 is achieved and sustained. This could be taken forward as part of the current industry review of timetabling processes under Network Code reform. The current enforcement action and action plans in place to deliver T-12 will provide useful experience in how the

condition works in practice. Potential improvements could be identified and explored in light of that experience.

4.20 Do you agree that it would be clearer to have one condition containing all timetabling obligations and that no substantive changes to the conditions are necessary at this time?

4.21 What suggestions do you have to improve the timetabling licence obligations in the light of the T-12 experience and the Network Code reform process?

Rail Passengers' Committees and Rail Passengers' Council

4.22 Passenger and station licences normally contain a standard condition requiring cooperation with the Rail Passengers Committees and Council. This cooperation takes the form of attending meetings and providing information. Changes have been made to this condition through a modification scheme pursuant to the Railways Act 2005 to remove references to the Committees. These follow the creation of the new national RPC. References to the London Transport Users Committee (LTUC) have been inserted due to its continuing role.

4.23 Under the terms of this licence condition, the SRA had responsibility for determining the reasonableness of Committee and Council requests, if required. This responsibility was transferred on 24 July 2005 to the DfT, except that for Network Rail's network licence the responsibility transferred to ORR. This split reflects the DfT's focus on franchised operations and ORR's focus on Network Rail's core business. The modification scheme mentioned above has made appropriate changes to the text of the affected licences.

4.24 We are not proposing any further changes to this standard condition.

Complaints handling procedures and disabled persons protection policies

4.25 Passenger and station licences typically contain these two standard conditions that require licence holders to prepare and comply with various procedures and policies. Procedures for the handling of customer complaints are the mechanisms by which the RPC is given its role in complaints appeals. Policies for the protection of disabled persons establish minimum standards for disabled access and give practical effect to the statutory code of practice to be produced by DfT under section 71B of the Act.

- 4.26 The SRA's role in approving the procedures and policies produced under these conditions transferred to the DfT on 24 July 2005, and appropriate amendments to the text of the conditions were subsequently made by the modification scheme mentioned at paragraph 4.4.
- 4.27 We are not proposing any further changes to these standard conditions.

Through ticketing and network benefits

- 4.28 Passenger licences normally contain a standard condition requiring licence holders to be party to and comply with industry arrangements in respect of through tickets and the operation of a telephone enquiry bureau.
- 4.29 The SRA's role in approving these arrangements under the terms of the condition transferred to the DfT on 24 July 2005. Appropriate amendments to substitute references to the SRA with references to the Secretary of State in the text of the condition were subsequently made by the modification scheme mentioned at paragraph 4.4.
- 4.30 We are not proposing any further changes to this standard condition.
- 4.31 Do you agree that no further changes are required to licence conditions relating to RPC liaison, complaints handling, disabled persons protection and through-ticketing and network benefits?**

Enforcement

- 4.32 ORR has responsibility for enforcing all licence conditions. One consequence of the arrangements described above is that ORR may take enforcement action where, for example, a breach of a condition has been identified through DfT monitoring or where a licensee has not complied with industry arrangements approved by the DfT.
- 4.33 In practice, this will not be very different to the situation pre-SRA when the statutory Franchise Director oversaw several consumer protection matters. Similarly, there will be certain areas for certain operators where there are obligations under both licences, where ORR has enforcement responsibility, and franchise agreements, where the DfT has enforcement responsibility as Franchising Authority.

- 4.34 ORR will establish clear liaison arrangements with the DfT to manage this division of enforcement from the routine monitoring and approval roles, and to ensure that ORR's independent perspective is properly considered when policy is developed in these areas of common interest. ORR will also be able proactively to investigate any particular complaints that may arise.
- 4.35 ORR's approach to enforcement of these consumer protection matters will mirror the general approach taken to the enforcement of other licensing matters and to enforcement in general. That is, ORR will tend to focus on remedying systemic or chronic failures in industry arrangements, rather than enforcing the detail of industry agreements that are best left to industry parties to resolve themselves. This approach will be reflected in the general enforcement policy statement that ORR intends to consult on later this year. Subject to consultation, we will also set down this approach in our published licensing guidance.
- 4.36 The approach could be reinforced by setting down, in the interpretation section of licences, that obligations to comply with a policy or industry agreement are to be interpreted in accordance with published enforcement guidance.
- 4.37 Would it be helpful to include an explicit reference to guidance on enforcement within licences?**

5. Safety conditions

Introduction

- 5.1 We have not identified any changes to licences that will be necessary to reflect ORR's new responsibilities as a merged railway safety and economic regulator, or to reflect the conclusions of the recent review of the Rail Safety and Standards Board (RSSB)¹².
- 5.2 From a "better regulation" perspective, however, we are proposing a number of changes to standard licence conditions that guarantee inspectors free access to trains and require membership of RSSB and compliance with Railway Group Standards, along with provisions relating to revocation on safety grounds.

Safety related licence obligations

Inspecting officers

- 5.3 A standard condition in passenger and non-passenger train operator's licences requires the holder to give free access to Her Majesty's Railway Inspectorate (HMRI) officers whilst on duty. The HSE has confirmed that inspectors already have sufficient powers under sections 20 and 33 of the Health and Safety at Work etc. Act 1974 that guarantee the necessary free access. We therefore propose to delete this condition.

Safety and Standards Condition

- 5.4 This standard condition requires licensed train operators to become a member of and actively participate in the RSSB, as well as to abide by relevant Railway Group Standards (RGS). The condition also sets down over seven pages the objectives and principles that the RSSB constitution agreement must satisfy.
- 5.5 It is not clear that the licence condition still needs to cover all that it does. For example, there appears to be limited benefit in including the objectives and principles governing the constitution agreement in licences now that the

¹² *Review of Rail Safety and Standards Board: Report*, ORR, February 2005, <http://www.rail-reg.gov.uk/upload/pdf/221.pdf>

RSSB has been established in accordance with those objectives and principles (and noting that the RSSB constitution agreement cannot be changed without ORR's consent).

Railway Group Standards

- 5.6 Virtually all licences contain a Condition requiring compliance with relevant RGS. In licences with the Safety and Standards Condition, that requirement is incorporated in it.
- 5.7 ORR wishes to review the current requirement in licences to comply with the RGS. However, given the uncertainties arising from the planned transfer of safety responsibilities to ORR, RSSB's current review of RGS and the implementation of the Interoperability and Safety Directives, we propose to defer this review. In the meantime, we would be pleased to receive any general comments consultees might have on the licence requirement.
- 5.8 However, there are two minor drafting changes that we propose to consider now. Firstly, standard licences still refer to Network Rail's network licence as the source of RGS. This has not been the case since the RSSB was established. We therefore propose to update the wording of the standard condition to reflect the creation of RSSB as the body responsible for RGS.
- 5.9 Secondly, to improve clarity, we could move the RGS paragraph from within the Safety and Standards Condition to create a stand-alone condition, mirroring the wording in the standard station, light maintenance depot and network operator licences, where the RGS condition is already stand-alone.

Revocation provision

- 5.10 Most licences granted by ORR provide for their revocation without notice should a serious breach of the Railway Safety Case Regulations 2000 (RSCR 2000) occur. Those granted by the Secretary of State also contain this provision. The only exceptions are licences authorising light maintenance depot operations, since those operations are exempt from the RSCR 2000.
- 5.11 Under the RSCR 2000, HSE does not have powers to revoke its approval of a previously approved safety case (although one-off safety issues can be addressed through, for example, prohibition orders). Therefore the revocation provision provides an additional mechanism to stop unsafe operations. Under the forthcoming Railways and Other Guided Transport Systems (Safety)

Regulations (ROGTS) the Safety Authority will be able, and in certain circumstances obliged, to revoke a safety certificate.

- 5.12 Nevertheless, going forward ORR believes it is important to have the ability to revoke a licence in the event of evidence of systemic or chronic safety failings in a company. This would be exceptional and might reflect, for example, repeated safety failings coupled with a failure to address underlying causes.
- 5.13 As currently drafted the revocation provision does not achieve this purpose, focused as it is on a single, serious breach of safety case regulations.
- 5.14 As explained in Chapter 3, under the proposed Railway (Licensing of Railway Undertakings) Regulations 2005 (2005 Licensing Regs), European licence holders will be required to demonstrate ongoing compliance with four criteria, one of which relates to professional (safety) competence. European licences could be revoked under the draft regulations where the criteria were not satisfied, and therefore the revocation provision will no longer be necessary or appropriate in European licences. The DfT could use the implementing regulations to substitute a revocation provision reflecting the new obligation to satisfy the four European licensing criteria, for the existing provision. This could improve clarity and highlight the change to affected licence holders.
- 5.15 ORR will set down in licensing guidance how these provisions will work in practice. The consideration of an operator's safety competence (taking account, for example, of evidence from the safety inspectorate and whether the operator held a valid safety certificate) would therefore be considered in the round alongside the other criteria that together establish whether a person is "fit and proper" to hold a licence.
- 5.16 For those operators who do not hold European licences, the question arises of how should the revocation provision be reworded to achieve the objective at paragraph 5.12. One option would be to allow for revocation where the licence holder "ceased to be a fit and proper person to hold a licence", and where "fit and proper" was defined in relation to the criteria applied when the licence was first acquired.
- 5.17 Do you agree with our proposals in respect of safety-related licence conditions, and in particular that:**

- **the inspecting officers condition should be deleted from standard passenger and non-passenger train operator's licences;**
- **there is no longer a need to set out the objectives and principles governing the RSSB constitution agreement in licences;**
- **the two minor drafting changes should be made to the Railway Group Standards condition to improve transparency and clarity, and that a fundamental review of the RGS condition should be deferred until after ORR assumes its safety responsibilities; and that**
- **the revocation provision following a serious breach of a safety case should be reworded along the lines of paragraph 5.16?**

6. Market structure and competition conditions

6.1 We have reviewed the conditions in operator licences that relate to market structure and competition matters. A number of simplifying changes are proposed below.

Exclusionary behaviour (and predatory fares)

6.2 Passenger and non-passenger operator licences contain a standard condition that prohibits exclusionary behaviour. The condition in passenger operator licences also gives predatory fares as an example of such exclusionary behaviour.

6.3 These two standard conditions were introduced prior to the Competition Act 1998 and essentially require ORR to conduct the same analysis of conduct as would have to be carried out under that Act (for example, in terms of defining a market and establishing an operator was dominant within that market). Although there are differences between the procedures for enforcement of licence conditions and enforcement under the Competition Act, there seems no clear advantage to retaining two parallel mechanisms, given the procedure set down in the licence condition mirrors the concerns of the Competition Act so closely. We therefore propose that the exclusionary behaviour condition in passenger and non-passenger operator licences is redundant and should be deleted.

Accounting separation

6.4 Station and depot operator licences contain a standard condition requiring the maintenance of accounting records sufficient to enable calculation of charges for services where more than one operator uses a facility.

6.5 The standard station and depot access conditions include more stringent requirements than the licence regarding the maintenance of accounting records, and a specific methodology for apportioning access charges between different operators. These obligations are carried over into the new Stations Code and the recently published draft of the Depots Code. Although access conditions and the Codes, when implemented, are enforced by the parties,

ORR pre-approves station and depot access agreements and is the appeal body for disputes on charges.

- 6.6 While there is some risk that, without a licence obligation, data ORR needed to fulfil its appeals role would not be available, on balance we feel that the risk is small, given the access arrangements described above and ORR's general information gathering powers (see Chapter 7). We therefore propose this condition is no longer required and should be deleted.

Prohibition of cross subsidy

- 6.7 Although not a standard condition included in template licences, a condition prohibiting the giving or receiving of unfair cross subsidy appears in the licences of ten operators. The condition was only introduced into the licences of operators undergoing a merger prior to 2002, when competition issues were dropped from ORR's consideration of changes of control.

- 6.8 Removing these conditions from the relevant licences would ensure all licence holders were treated in accordance with the current policy.

- 6.9 No changes are proposed to the standard licence conditions that require:

- all operators to notify ORR of a change of control of a licensee; or
- station, light maintenance depot and network operators not to unduly discriminate between persons or classes of persons in their activities.

- 6.10 Do you agree with our proposals for the market structure and competition related licence conditions, and in particular that the exclusionary behaviour, accounting separation and prohibition of cross subsidy conditions should be deleted?**

7. Information, fees, environmental and other conditions

Provision of information

- 7.1 Currently a standard licence condition covers the provision of information to ORR by the licence holder, as reasonably required to fulfil certain functions under Part 1 of the Act.
- 7.2 The condition was necessary because ORR had no general statutory power to gather information. However, the Railways Act 2005 provides ORR with a wide, statutory information gathering power under section 80 of the Railways Act 1993, and on which ORR could rely when discharging its functions in future. These extended powers took effect on 24 July 2005, and the DfT has proposed to extend them further to include the gathering of information in pursuance of ORR's new functions under regulations implementing the First Package of EU Rail Directives. We have therefore considered whether there is advantage in retaining the condition.
- 7.3 The enforcement mechanism that applies to section 80 is similar to the more familiar licence enforcement arrangements, in that ORR could make an order to secure compliance with a section 80 request. The arrangements would differ in that ORR would not be obliged to take enforcement action as it is in certain circumstances under section 55 of the Act. In addition, while enforcement made through both routes can ultimately involve the courts, it can take longer to reach that stage under the section 55 mechanisms. Given that it may also be confusing to have two different mechanisms available with differing scope, on balance we propose that the more limited information provision licence condition should be removed.
- 7.4 We note however that the industry may benefit from guidance on how we will apply the new extended powers. If licence holders considered it helpful, ORR could produce guidance, in the context of either ORR's general enforcement policy or our role in developing a rail industry information network.

Environmental policy

- 7.5 In exercising its licensing functions, ORR is required by section 4 (3)(b) of the Act to “have regard to the effect on the environment of activities connected with the provision of railway services”.
- 7.6 ORR mainly discharges this duty by including a standard condition in all licences that obliges operators to hold and have regard to an environmental policy, prepared in accordance with ORR guidance. Indeed, such a condition is required under the terms of the General Authority mentioned at paragraph 2.3 above.
- 7.7 This guidance was last revised in 1996. However, environmental issues remain important to the industry and indeed will gain new impetus as, for example, the UK implements the European Noise Directive and the industry considers changes to Part E (Environment) of the Network Code.
- 7.8 We propose to review and update our approach to environmental matters in general and to the existing environmental policy guidance in particular, and to include this work in our 2006-09 Business Plan.

Fees

- 7.9 A standard condition included in virtually all licences provides that operators can be required to contribute to ORR’s costs. The condition also provides that any costs incurred by the Competition Commission, in investigating licensing matters referred to it under section 13 of the Act, can also be recovered from licence holders; although to date no such references have been made.
- 7.10 ORR will be consulting shortly on how its work should be funded in the context of becoming a combined railway safety and economic regulator. Separately, the DfT has questioned in its consultation on implementation of the Directive whether ORR’s fees will in future be recoverable through a licence condition style obligation or whether some other mechanism will need to be developed.
- 7.11 Changes to the fees licence condition may become appropriate in consequence of either of these consultations. In the meantime, no changes are proposed to the standard fees condition.

Other standard licence conditions

7.12 No changes are proposed to the standard licence conditions that require:

- station, light maintenance depot and network operators to allow other operators access to their facilities in an emergency;
- station operators to cooperate with Transport for London where their interests overlap; or
- station and light maintenance depot operators to provide ORR with annual up-to-date lists of the facilities operated.

7.13 Do you agree with our proposals that:

- **the information gathering licence condition should be deleted; and**
- **ORR should review its general approach to environmental issues and the environmental policy guidance, and include this work in its 2006-09 Business Plan?**

7.14 Are there any other comments you would like to make on any aspect of the licensing regime?

Annex 1: Consultation questions

Chapter 3

3.20 Do you agree with the proposals for implementing the four European licensing criteria and for demonstrating ongoing compliance?

Chapter 4

4.9 Do you agree that a review of insurance policy, procedures and related guidance would be useful? If so, should ORR include such a review in its 2006-09 Business Plan?

4.15 Do you agree that it would be clearer to have one Condition containing all CAHA-related obligations rather than two?

4.16 Do you agree that making compliance with CAHA explicit in the licence condition would make sense in terms of transparency (making implicit obligations explicit) and consistency with other licence conditions?

4.20 Do you agree that it would be clearer to have one condition containing all timetabling obligations and that no substantive changes to the conditions are necessary at this time?

4.21 What suggestions do you have to improve the timetabling licence obligations in the light of the T-12 experience and the Network Code reform process?

4.31 Do you agree that no further changes are required to licence conditions relating to RPC liaison, complaints handling, disabled persons protection and through-ticketing and network benefits?

4.37 Would it be helpful to include an explicit reference to guidance on enforcement within licences?

Chapter 5

5.17 Do you agree with our proposals in respect of safety-related licence conditions, and in particular that:

- the inspecting officers condition should be deleted from standard passenger and non-passenger train operator's licences;

- there is no longer a need to set out the objectives and principles governing the RSSB constitution agreement in licences;
- the two minor drafting changes should be made to the Railway Group Standards condition to improve transparency and clarity, and that a fundamental review of the RGS condition should be deferred until after ORR assumes its safety responsibilities?; and that
- the revocation provision following a serious breach of a safety case should be reworded along the lines of paragraph 5.16?

Chapter 6

6.10 Do you agree with our proposals for the market structure and competition related licence conditions, and in particular that the exclusionary behaviour, accounting separation and prohibition of cross subsidy conditions should be deleted?

Chapter 7

7.13 Do you agree with our proposals that:

- the information gathering licence condition should be deleted; and
- ORR should review its general approach to environmental issues and the environmental policy guidance, and include this work in its 2006-09 Business Plan?

7.14 Are there any other comments you would like to make on any aspect of the licensing regime?

Annex 2: Standard conditions by type of licence

	Passenger	Non-passenger	Station	LMD	Network
Third party liability insurance	✓	✓	✓	✓	✓
Claims allocation and handling arrangements	✓	✓	✓	✓	✓
Through-ticketing and network benefits	✓				
Complaints handling procedure	✓		✓		
Disabled Persons Protection Policy	✓		✓		
RPC and Council liaison	✓		✓		
Timetable information	✓				
Claims allocation and handling arrangements (liability of operators to each other)	✓	✓	✓	✓	✓
Membership of RSSB	✓	✓			
Environmental Policy	✓	✓	✓	✓	✓
Licence fee	✓	✓	✓	✓	✓
List of stations/ light maintenance depots			✓	✓	
Railway Group Standards			✓	✓	✓
Predatory Fares and Exclusionary Behaviour	✓				
Exclusionary Behaviour		✓			
Timetabling	✓				
Non-Discrimination			✓	✓	✓
Inspecting Officers	✓	✓			
Provision of Information	✓	✓	✓	✓	✓
Accounting Separation			✓	✓	
Change of Control	✓	✓	✓	✓	✓
Emergency Access			✓	✓	✓
Co-operation with TfL			✓		

LMD = Light Maintenance Depot.

Network excludes Network Rail's network licence, which is bespoke.

TfL = Transport for London.

Annex 3: Example of a combined CAHA licence condition

Claims Allocation and Handling

1. The licence holder shall, except in so far as the Office may otherwise consent, at all times be a party to *and comply with* such arrangements relating to:
 - (a) the allocation of liabilities among operators of railway assets; and
 - (b) the handling of claims against operators of railway assetsas may have been approved by the Office (as amended from time to time).

2. Except with the consent of the Office, the licence holder shall not, in relation to any of the arrangements described in paragraph 1 (the "relevant claims handling arrangements"), enter into any arrangement with any other party to the relevant claims handling arrangements:
 - (a) under which the licence holder agrees not to exercise any rights which it may have under the relevant claims handling arrangements; or
 - (b) varying the relevant claims handling arrangements,other than as provided for under the terms of those arrangements.