



**Submission by the Chartered Institute of Logistics and Transport in
the UK to the
ORR and DfT Consultation:
'A Greater Role for ORR Regulating Passenger Franchisees in
England and Wales'**

The Chartered Institute of Logistics and Transport in the UK ("the Institute") is a professional institution embracing all transport modes whose members are engaged in the provision of transport services for both passengers and freight, the management of logistics and the supply chain, transport planning, government and administration. We have no political affiliations and do not support any particular vested interests. Our principal concerns are that transport policies and procedures should be effective and efficient and based, as far as possible, on objective analysis of the issues and practical experience and that good practice should be widely disseminated and adopted.

The Institute has a specialist Strategic Rail Forum, a nationwide structure of locally based groups and a Public Policies Committee which considers the broad canvass of transport policy. This submission draws on contributions from all these sources.

Publication

1. May we publish your response?

Yes

General principles

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

CILT (UK) supports the general principle that there should be better alignment of incentives across the boundaries of the disaggregated rail industry as this would promote better long-term, whole-system outcomes and benefits for passengers and freight customers. We recognise that the proposal *to have the same regulator for franchises as for Network Rail came partly out of the RVfM Study* which saw this as a way of delivering such alignment. We also recognise that it fits with the laudable aim of removing government from the day to day administration of the railway and with the granting of longer franchises.

Nevertheless, we do not accept that the case has yet been fully made for the transfer of the regulation of passenger franchises from DfT to ORR. Good practice in contract management involves the enforcement of contract terms on a current basis being effected by the contracting parties, who are able quickly to assess the value of the variables - this may in practice be beyond the natural competencies of ORR which, having the principal aim of constraining abuse by monopolies, attracts staff skilled in that area rather than in those needed for overseeing franchising. In particular, some of the commercial decision-making

and trade-offs that are a regular feature of the franchise management environment may sit uncomfortably within ORR's independent, public interest led, decision-making framework.

It is also a cause for concern that the 'Franchising Director' function has been located in three different institutions in the 18 years since rail privatisation – OPRAF, SRA, and DfT – and is now proposed to be transferred to a fourth, ORR. We understand that the transfer of functions to ORR would still leave Ministers and DfT involved in the grant of franchises but not in their management and enforcement. These changes in the functional body do not seem to have led to a significant improvement and their very frequency might suggest that it is the role and the function it is trying to discharge which needs fixing, rather than its location. Whilst there will be clear synergies between co-location of franchise design, letting, management and licensing in the one organisation there are very significant risks. If a franchise starts to fail and ORR takes action under its licence, there could be strong grounds for claiming that it – the ORR – was ultimately responsible because it had specified the franchise. This could be anomalous to the perceived need to separate safety regulation from accident investigation (when both were under HSE) or indeed the requirement to separate out the industry's railway safety functions from Railtrack and then Network Rail which led to the creation of RSSB. In any case, the interfaces will not actually be reduced as the funding for franchises will still have to be agreed by DfT or ultimately, the Treasury.

Regulation of passenger franchises should not be unduly burdensome, and the transfer of responsibility, should it occur, should not introduce significant additional bureaucratic requirements and additional interfaces which would themselves tend to increase industry costs and potentially reduce flexibility and market responsiveness by TOCs.

We understand that the term 'regulation' is used more widely than economic regulation in the consultation document and is intended mainly to apply to the setting and enforcement of licence conditions.

We support the principle that the ability of TOCs to contribute to the reduction of the industry cost base should be enhanced where possible and would suggest that the proposed changes should be assessed in that context.

The use of a single regulator in the context of greater cooperation between Network Rail and TOCS (alliancing) which is envisaged for all three 2012 franchise bids would tend to prevent duplication of activities between DfT and ORR and to lead to better outcomes

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

An advantage of increasing the ORR's role would be the removal of DfT and Ministers from involvement in the detail of franchise activity thus allowing government to focus on policy rather than delivery as recommended in the RVfM study.

Two drawbacks which should be addressed in the detailed design are:

- Currently, DfT monitoring is not labour intensive. ORR would need to avoid establishing an unduly burdensome approach to franchise regulation, which would increase industry costs.
- Additional risk associated with revised franchise regulation, particularly where this risk is itself difficult to assess and/or is unfunded, would reduce the overall value of franchises to the DfT

The consultation refers to the possible use of Periodic Reviews of elements of franchise finances. As franchises operate in a non-monopolistic, commercial environment (with some constraints such as fares) it does not seem compatible with this business model to have

periodic re-setting of franchise finances unless there is to be significant change to the franchise bidding requirements.

Thus we disagree with the first bullet point in para 2.22 (independent advice on efficient cost changes). These are matters properly handled by the parties to the franchise agreement. Were ORR rather than DfT to be involved in regulating TOCs in terms of changes to the Financial Model there should be an appeal process, which is not available under the current arrangements.

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

As part of the wider alignment of industry incentives, it is worth considering how Network Rail could be made more accountable for passenger interests. This may be achieved through the proposals for alliancing without the regulatory changes proposed

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?

ORR's current procedures and particularly its Penalties Statement have been developed in the context of regulating Network Rail rather than TOCs and there is an explicit reference to not being influenced by the financial outcome of the enforcement/penalty. This should be reviewed if the ORR becomes more involved in enforcing TOC licence conditions. This should examine the circumstances for accepting commitment to improvements for passengers.

An advantage of replacing enforcement by DfT with enforcement by ORR should be a transparent enforcement policy which would be subject to scrutiny rather than individual contractual negotiations.

A potential risk is that poor decisions could result from poor appreciation by ORR of the commercial realities, as it would not be financially involved in the contracts. Currently both parties to the contracts are aware of the full financial impact of compensation negotiations. We fully endorse the principle that any penalties should take the form of expenditure on improved facilities – at present any penalties (which have to be in fines) go to the Treasury; we believe it is far more transparent and publicly acceptable for those who have suffered from the failing (passengers) to benefit from the penalty imposed.

It is important that the body deciding the penalty should have a good understanding of passenger priorities – it is not clear how the ORR would place itself in a position to determine passenger priorities.

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

The proposed changes to complaints handling and DPPP are minor and can presumably be made for all franchised operators at the same time.

However the other proposed changes, if implemented as each new franchise is granted, would result in different contractual and licensing provisions applying to operators and this would be exacerbated given the need to reach agreement with the devolved governments, Merseytravel and TfL. There is an argument in favour of piloting such changes and for an

overall review in say 5 years time so that all new franchises can contain provisions for change if it is decided to implement it.

The worse problem is administrative as it would be costly to have people both in DfT and in ORR carrying out similar functions.

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

To some extent the changes proposed would see a shift of functions and personnel from DfT to ORR. The DfT cost is paid by the taxpayer and a shift to the regulator would be likely to put the cost on to the industry. If that is the decision then there may still be no need to move from the current arrangements for recovering cost through the access charges. The important thing is to keep the costs low and to avoid bureaucratic procedures which would increase the industry's costs.

Arrangements would need to be made for any transitional period during which the some franchises were inside and others outside the new arrangement to avoid the 'early adopters' incurring additional costs. Eventually the cost would be spread over all TOCs. We would advocate that any additional costs should be spread in the same manner as ORR's other costs.

Specific proposals

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

We believe the transfer of the existing responsibilities from the DfT to the ORR is a sensible simplification. Similarly, the proposal for a requirement for an operator to review its procedure and to make changes approved by ORR if ORR requires it. However, some of the proposals (e.g. para 4.12 'delivery of improvements to passengers' appear to go well beyond the process for handling complaints into the content of the complaint. Para 4.22 extends complaints handling to 'how train companies respond to the issues raised by their complaints'. This seems outside of scope for the subject of complaints handling procedure and introduces a whole range of issues about compensation for contractual change.

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

CILT (UK) seeks reassurance that the transfer of responsibility will not dilute the knowledge and expertise of DPTAC (Disabled Persons Transport Advisory Committee) or its future equivalent. The proposed change should sustain the role and work of DPTAC and reinforce the work of ORR in providing high quality guidance that meets the needs of disabled travellers. We are pleased to take part in any future deliberations on the interests of disabled rail passengers. In addition we consider that the statement of policy should seek to set, monitor and enforce the highest standards of compliance by all train and station operators in England and Wales

We note the intention to leave the Code of Practice with the Secretary of State. At present this is a very prescriptive, input-based document (eg there should be X% disabled spaces in a car park) and we would advocate a more purposive style. If this could be achieved by transferring responsibility to the ORR then, in this respect we would support such a move. However we recognise that provisions for such passengers can be very expensive and it is only right that the funding authority should determine the extent that practices are met.

We believe the transfer of the existing approval and monitoring responsibilities from the DfT to the ORR is a sensible simplification. We remain concerned however that if the ORR is the approval/enforcing body it could require alterations that have significant cost implications for either TOCs or the DfT and this should be avoided. It would be unacceptable for a TOC to find itself being required to carry out an action by the ORR that is not funded by DfT. It was this issue that led to the creation of the Access for All fund, an arrangement which is working well and we must ensure there is no inadvertent adverse effect on it.

We note (para 4.44) the suggestion that the DfT should abandon the review of existing DPPPs and pass the responsibility to the ORR. This seems an opportunity for delay and inaction and we believe that the DfT should complete its task as a matter of urgency

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?

Existing arrangements work well and it is not clear that there would be material benefits from the transfer of this function beyond potential administrative cost saving. There is also a potential downside in that ORR would need to learn how to determine what performance measures and outputs should be for franchises. However, were DfT to withdraw from day to day involvement then either there would need to be a licence condition to replace the current contractual arrangements for punctuality and reliability, or some other route (such as delegated powers) under which ORR could become involved in these areas in place of DfT.

For clarity on existing arrangements - TOCs sign up to delivery of delay minutes and cancellations (and soon to CaSLs as well). These are clear, specific measureable items within the control of the TOC and suitable for monitoring and enforcement. There is also a balance struck at franchise letting between cost and deliverable. TOCs do not sign up contractually to PPM in any similar manner, principally because this is only partially under their control. The PPM itself introduces some perversities into TOC and NR behaviours that do not necessarily result in the best passenger outcome.

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?

Much work has been done within the last two years within the industry to develop a set of service quality measures that have the support of the DfT and TOCs. This acknowledges that different TOCs have different requirements. These could be introduced forthwith, avoiding the cost of further examination and be in line with the RVFM study.

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.

The service quality measures should be bespoke to each TOC. We note that paragraph 5.28 of the consultation document does envisage measures that are bespoke (albeit with a different focus to the current arrangements) and which would be set at the time of the franchise bid. This would avoid a potential problem with a licence based approach – the standardisation of deliverables and a common definition of ‘purpose’.

A concern is whether a licence based approach can be sufficiently flexible and responsive (and whether in these respects it can match a contractually based approach) in meeting the various challenges which arise in this area.

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?

The proposed Licence condition risks increasing obligations divorced from their cost and, despite the TOC specific licence condition approach, there is a risk that too much uniformity might be sought via the 'guidance published by the ORR'

A transparency obligation would support the personal experiences of customers; these two together influence the repeat use of the railway which in turn is fundamental to the commercial success of the TOC. However, recognising that this may not always be adequate, some measure of compliance regime, based around requiring improvement measures, is proportionate. A purposive approach is appropriate when a regime is being created (ie during a franchise bid) but not during the franchise term.

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?

We assume that transparency means more than using methods of reporting which are easily available to passengers. The guidelines should emphasis that the reporting should contain information which is readily understood by and relevant to passengers -eg the simple reporting of statistics may not achieve this although the use of graphs may do so

Credibility would require a combination of measuring and reporting in a consistent way and producing results which make sense to the passenger.

Your proposed approach to consultation should ensure that there is sufficient clarity and flexibility for franchisees

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 agree with the approach suggested in both questions.

We endorse 5.45

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

CILT (UK) advocates the use of improvement plans before enforcement action as customers will always prefer to see their service improve rather than the providers punished.

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