

The logo for Which? is a red square with the word "Which?" in white, bold, sans-serif font. The question mark is slightly larger and more prominent than the rest of the text.

Which?, 2 Marylebone Road, London, NW1 4DF

Date: - 2 February 2012 To: Gordon Herbert Response by: John D Holmes

## Consultation Response

Gordon Herbert  
Office of Rail Regulation

By Email

### A greater role for ORR regulating passenger franchisees in England and Wales

#### About Which?

Which? is an independent, not-for-profit consumer organisation with over 700,000 members and is the largest consumer organisation in Europe. Which? is independent of government and industry, and is funded through the sale of Which? consumer magazines, online services and books. Which? is a registered charity under the name 'the Consumers Association.'

In recent years passenger rail services have come under the spotlight for fare rises in excess of inflation, serious concerns about efficiency of the industry and poor performance of the rail network. Passengers are not receiving value for money. This leaves individuals out of pocket, suffering from overcrowding or other poor quality issues and, given the essential need for people to get to work on time, undermines economic growth.

This response sets out some overall comments, reflecting specific research into passengers' experience but also drawing on our work in utility regulation across energy, telecommunications and aviation. Where appropriate we have responded to specific questions.

If you have any queries or would like to discuss this response further please contact John D Holmes ([john.holmes@which.co.uk](mailto:john.holmes@which.co.uk), Tel: 020 7770 7645).

No part of this response is confidential.

#### Key comments

We support the steps for ORR to adopt greater responsibility for regulation of rail operators. This has a number of advantages:

#### Which? Is a consumer champion

We work to make things better for consumers. Our advice helps them make informed decisions. **Our campaigns make people's lives fairer, simpler and safer.** Our services and products put consumers' needs first to bring them better value.

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- It simplifies responsibility and accountability for regulation, which reflects passengers experience that is dependent upon the effective performance of both Network Rail and the franchise operator;
- It enables greater consistency in regulation where appropriate and for good practice to be applied across franchisees or even freight operators where relevant; and
- It enables greater flexibility to respond to changes in passengers' or industry needs, this would be especially relevant where franchises are to operate for a much longer duration.

However, ORR faces a significant challenge to become a trusted 'passenger champion.' This will include being open and transparent about its work, making passengers aware where franchisees are failing to meet their responsibilities. We hope to support ORR as it places passengers at the core of its regulatory approach.

The licensing system itself must be flexible and open to change in light of the changing needs of passengers and train operator's performance.

### **Passengers' experience and areas for urgent improvement**

Rail travel is in high demand. Passengers' experience varies between commuters and leisure travellers and across different franchise services. We have, however, found that many aspects of rail travel are too complex or confusing, leading to errors and additional expense for passengers. The industry itself has struggled to meet existing demand and failed to react innovatively to this demand. The ORR, in its regulation of passenger rail services, must review and improve the following areas:<sup>1</sup>

- Ticket complexity and transparency - there is significant variation in the terms and conditions or availability of tickets across networks and via different sales channels. For example, passengers find the system of 'peak hours', which differ significantly between operators, confusing. Whilst ticket vending machines and websites do not offer the same access to all ticket types as staffed ticket offices.
- Punctuality - the current system of measurement fails to reflect passengers' valuation of lost time, especially for commuters, or account for delays serving intermediate stations.
- Compensation - systems of compensation vary unnecessarily across franchises, operate to different standards and do not meaningfully compensate passengers. In particular, passengers should receive cash or equivalent compensation not rail vouchers. It is also unnecessarily difficult to claim compensation, especially for those with season tickets.

An effective passenger champion will need to tackle these areas as soon as practicable.

### **Response to specific questions**

*1. May we publish your response?*

Yes.

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

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<sup>1</sup> These observations draw on a number of Which? Magazine research and investigations reported in September 2010, March 2011, October 2011 and February 2012. We would be happy to supply ORR with these articles and, where possible, the underlying research.



There are well established principles for good regulation or public administration, for example those set out by the Better Regulation Executive. This change of responsibility, however, must achieve:

- Accountable passenger rail services - where delivery of high levels of operational performance and value for money is a core focus of franchise operators and the regulatory regime;
- Prompt action - to make accountability matter, in the absence of market forces, regulatory actions must follow quickly from failure by franchisees; and
- Visible action and clear communication - transparency, in this case, means seeing a responsive regulatory regime in place and that information or actions are communicated clearly to passengers and other stakeholders.

The factors above are key to ensuring passengers can have confidence in the regulator and rail service overall.

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

No comments.

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

No comments.

*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?*

Passengers' key interest in enforcement is to ensure a material and sustainable improvement to services.

Formal, legally binding commitments may well offer an effective route to improvement. To be effective, we must see:

- Prompt action - the regulator must act to address failures quickly;
- Transparency - we must know that an investigation is occurring, see the issues or failings under investigation and have a clear opportunity to respond to proposed commitments; and
- Comprehensive action - the proposed actions must be comprehensive, fully addressing all aspects of the issues or failures with clear and measured outcomes.

In addition to these measures, we consider that any remedial action must include appropriate arrangements for redress. For example, regulators' are strongly placed to guide firms in offering an appropriate amount and form of compensation especially where a systematic failure affects many passengers. This is both more efficient than dealing with many individual complaints and adds another important regulatory tool by strengthening incentives to meet or exceed performance standards. The rail industry would benefit too from greater transparency, allowing lessons or examples to be shared where a failure occurred.



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

As we understand the proposed arrangement, ORR will take responsibility for franchises as they come up for renewal. For certain services, two or more train operators may use the line, stations and offer over-lapping services to passengers. In these cases we hope that, as far as possible, the standards for customers will be equivalent and at the highest level. We do not want to see a sustained difference in outcomes for passengers on the same line but using different services. Further, where possible, direct rivalry between services (where properly timetabled and regulated) may give passengers more choice and encourage innovation, efficiency and downward pressure on pricing.

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

No comments.

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

As set out above, we broadly support a move to consolidate and simplify regulation. We strongly support the proposal for a more comprehensive review of existing guidance for complaint handling, the outcomes of complaint procedures and the approach to regulating complaints handling. This review will need to account for the EU requirements for alternative dispute resolution schemes currently under discussion.

ORR should publish a proposed date for the start of this review as soon as possible.

*9. Do you have any comments on any of the proposals for regulating DPPP's?*

We broadly support the proposed changes. Paragraph 4.39 notes that 'action that entails excessive cost would remain unchanged.' We are not familiar with the basis on which this is determined:

- Whose costs are considered relevant? Are only TOC's costs taken into account, rather than the difficulty and expense for passengers?
- How are the costs estimated, calculated or verified?
- On what basis is the definition or measure of 'excessive' judged?

If not already available, guidance on these matters would be useful.

*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?*

As set out above, we support this proposal.

However, the obligation to meet the performance standards and the process of enforcement appears to build in significant delay before meaningful action is taken. An effective consumer champion must be empowered and prepared to act promptly.

The punctuality and reliability targets must be subject to periodic review, to reflect the growing demands of passengers, local demographic changes and needs of the economy for a cost effective and efficient rail network. Paragraph 5.18 sets out an apparently convoluted set of exceptions or ‘reasonable’ tests before enforcement action would be taken to address failures to meet punctuality / reliability standards. Guidance should be published in advance that sets out the categories or nature of the circumstances that may be considered as ‘relevant circumstances’ or reasonable steps etc. This guidance should ensure that only genuine improvements to punctuality or reliability are measured. Otherwise, it appears that this process would be long and drawn out, significantly weakening the prospect of prompt regulatory action.

The performance of franchisees against these targets must also be easily available to passengers or other stakeholders. Regulatory enforcement (paragraphs 5.20 - 5.22) should consequently also be transparent. Passengers must have confidence that the regulator is acting and can be seen to act. This would add further incentive to franchisees to manage their services to avoid regulatory action.

*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 have not undertaken detailed work on the needs of passengers. Our surveys of passengers and review of the industry has found some key area for improvement, set out above, that should be addressed urgently.

Service quality measures that matter to passengers can be identified through surveys, which is broadly what the Government proposes through use of the Passenger Focus National Passenger Survey. This particular survey has some strengths. It may not however capture all salient points, for example it is based on passengers’ recall of a single journey. In addition, we are not convinced that a single source or approach is satisfactory. We propose that mystery shopping, with a specific set of issues relating for example to customer service, tariff advice or complexity and physical environment may be a valuable addition to large scale survey. Local passenger representative groups may also offer views, alongside passenger feedback collected by the franchisee itself.

There is merit in a core set of requirements but solely on the basis that all passengers value a core range of services. This would strengthen comparative benchmarking.

*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.*

As we note above, a licence regime offers greater flexibility to reflect both national or common standards and service specific needs.

*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?*



Where a franchise grants exclusivity - a monopoly - over services for a particular area for a long period of time, reputational incentives alone are not adequate. There must be a compliance obligation, and effective enforcement of this obligation where necessary.

*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 have not considered the specific requirements that should be required in guidelines to ensure quality. Any research should meet an objective standard, for example those established by the Market Research Society or other reputable bodies.

The information on performance should be presented to allow comparison between franchisees (and published in hardcopy and online). An individual passenger would be unlikely to directly benefit from this, but it provides an important benchmark comparison that strengthens incentives to improve relative performance.

The way that service quality information is presented to passengers matters. The use of market testing with passengers and representative groups would provide valuable feedback on the content, its appearance, language used etc.

The guidelines themselves should be reviewed from time to time, following feedback from franchisees, passengers and representatives and other stakeholders.

*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 that compliance must be monitored. However, we are not able to comment on the benefits or drawbacks of the above model.

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

As set out above, passengers will expect prompt improvement, however implemented. A plan to implement changes may be expected to work where it is:

- comprehensive, fully addressing issues of concern;
- established in consultation with passengers, representatives and other stakeholders;
- ambitious with clearly defined milestones and targets;
- urgently acted upon and fully resourced; and
- monitored and publicly reported.

However, we do not consider that ORR should fetter its discretion to take prompt and effective enforcement action wherever necessary. For example, some practices may be clear breaches of unfair terms or consumer protection regulations that may require enforcement (these usually include a pre-action protocol to allow firms' to remedy the breach in advance of formal action).