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Dear Stefano

Consultation on the proposed amendments to the Railways & Other Guided Transport Systems (Miscellaneous Amendments) Regulations

I am writing on the joint behalf of Passenger Focus and London TravelWatch in response to your letter of 30 July 2012, in which ORR invites our views on a series of questions relating to the proposed ROGS (Miscellaneous Amendments) Regulations. The questions are listed verbatim below, together with our response.

Question 1 : Do you have any comments on ORR's role as certification body? If so, please state.

Response : This refers to ORR's role in certifying premises used by "entities in charge of maintenance" (ECMs) for freight vehicles. These are outwith our statutory remit, and it would therefore be inappropriate for us to take a collective view.

Question 2 : Do you have any comments on the proposed new regulation 4(4A) of EARR? If so, please state.

Response : This refers to ORR's role as an enforcing authority in relation to railways in certain categories of industrial premises. These are outwith our statutory remit, and it would therefore be inappropriate for us to take a collective view.

Question 3 Do you agree with the proposed approach for carving out specific railway systems from the mainline railway requirements in ROGS through the use of an Approved List? Please explain your answer.

Response : In general, t seems appropriate to us that non-mainline railways should be defined by exception, i.e. that systems are assumed to be included unless they fall within a category listed for exclusion, and that the onus should be on (future) operators to demonstrate that they qualify for this status (as is currently the case with safety certificates and authorizations). But, that said, we wonder whether it would be unnecessarily administratively complex to maintain a list of individual systems and ensure that it is current, given the frequency at which changes in it may be required. As most of the systems in question are free-standing, i.e. they have no physical connection with the mainline network, and have other common characteristics (such as speed restrictions), it might be possible to cover them by a suitably-worded class exemption and reserve the list approach simply for those which are not then caught by it.

Question 4 : Are there any systems that should not be on the Approved List? Please identify them if so and explain why they should not be exempted.

Response : The Cross-River Tram in London, described as "proposed", has been formally abandoned. There are no entire rail systems of which we are aware – but we do not believe that Island Line and the various mainline vehicles and branches listed in category 2.2(b) should be so listed merely because they are exempted from the requirements of the Interoperability Directive governing the technical standards which apply to their infrastructure and rolling stock.

These lines, vehicles and branches are not functionally autonomous, and are subject to the same safety reporting regime (SMIS) as the rest of the mainline railway. They provide conventional public transport services. Their physical characteristics may be such that, for interoperability purposes, it is advantageous to treat them differently. But for reporting purposes, it would actually probably require more time and effort to isolate and exclude information relating exclusively to them than to continue to provide it as part of a single package.

And, equally or more importantly, their exclusion would have the effect of removing them from the coverage of the data used as the basis of the Common Safety Indicators and Targets. This would be undesirable for two reasons. One is that it would mean that there was no longer a consistent statistical basis used for tracking national rail safety performance at EU level. The other is that it might have the consequence (already shown in other countries to be real) of major rail safety incidents being omitted from the ERA's reporting system, reducing the comprehensiveness of its overview of the industry's safety performance. We strongly urge ORR to reconsider this element of its proposals, which appears to us to offer no administrative savings and no practical benefits.

Question 5 : Are there any systems that are not on the Approved List that should be? Please identity them if so and explain why they should be included.

Response : In response to question 3, we have suggested an alternative approach to exclusions, which may make this list largely superfluous. However, if it is decided to retain it for any purpose, then the Wells & Walsingham Light Railway and the Wells Harbour Railway ought probably to be included. "Angelsey" Central Railway should be "Anglesey". Although listed amongst the mainstream tramway systems in category 2.2(a), the Southport Pier Tramway actually has much more in common with such systems in category 2.2(e) as the Hythe Pier Railway and the Southend Pier Railway, so it is not obvious why it has been differently categorised.

Question 6: Do you agree with the proposal to issue one safety certificate instead of two? If not, please explain why.

Response : We have no objection to this, in principle, provided that (a) operators are required to deliver comparable safety outcomes irrespective of the class of certificate sought and issued, and (b) non-mainline operators running on the mainline system are still required to consult Passenger Focus and/or London TravelWatch (as appropriate) when making applications for safety certificates.

Question 7: Do you agree with the proposal to remove from ROGS the requirement for mainline operators to carry out safety verification? Please explain your answer.

Response : We have no objection to the withdrawal of this requirement if and when it is supplanted by the requirement for mainline operators to adopt the Common Safety Method in conformity with EU requirements. It would be unreasonably onerous to require duplication of effort for no beneficial purpose.

Question 8 : Do you agree with the proposal to make the 28-day consultation period run concurrently with ORR's four month processing time? Please explain your answer.

Response : We have no objection, if including the 28 days within the four months will still allow ORR sufficient time to take due account of any issues raised by statutory consultees (of which we are two). It is assumed – though not explicitly stated in the consultation document – that the 28-day and four-month periods would have a common starting date, i.e. that applications would be copied to consultees at the same time that they are sent to ORR. It is our impression that, on occasion, consultees have not been notified by applicants until some time after these have been submitted – and, indeed, that the circulation of copies has sometimes been left to ORR, rather than being undertaken by applicants as the regulation requires.

Question 9 : Do you agree with the proposal to remove the requirement for non-mainline operators to submit annual safety reports to ORR? Please explain your answer.

Emphatically not. We strongly oppose the proposal that this obligation be lifted from metro and light rail operators. These are major public transport undertakings – except the North Yorkshire Moors Railway, which may have been listed in paragraph 4.57 in error. They may carry as many passengers as a train company (or in the case of London Underground, more than all of them).

So we see no obvious reason to subject these systems/branches to a more relaxed reporting regime than the mainline railway. Although ORR states that "information from these operators is available in other ways", these other ways are not identified, and even if they are available to ORR, they are certainly not accessible to the travelling public at large. Even London Underground, which is by far Britain's largest train operator in terms of passenger numbers, publishes virtually nothing about its safety performance (in terms of physical safety, as distinct from personal security).

It is calculated at paragraph 4.42 of the Impact Assessment that the saving per operator will be of the order of £280 per year. We are not in a position either to confirm or to deny the reasonableness of this estimate, although we know that at least some of them already produce quarterly safety reports along these lines for their own internal management purposes, so the net additional cost of making this public once a year would be negligible. But even if ORR's figure is correct, we do not regard this as disproportionate to the benefit to these organizations of being able to demonstrate to their users that they are delivering acceptable safety outcomes.

And we believe that these considerations apply equally to the tramway systems listed in category 2.2(a), with the exception of the Southport Pier Tramway already mentioned. Rather

than lifting this provision in relation to metro and light rail systems, we wish to see tramways brought within its ambit too.
Please see also our related response to Question 11,

Question 10 : Do you agree with the proposal to clarify that the monitoring arrangements of the controller of 'safety-critical work' have to be suitable and sufficient? Please explain your answer.

Response : This is a technical amendment, to clarify an ambiguity in the wording of the current law. It has no direct implications for passengers, but it appears to us to be a helpful and uncontentious suggestion.

Question 11 : Do you have any other comments in relation to the issues raised in this consultation document (and annexes)?

Response : Yes. This comment is complementary to our response to Question 9 above, relating to the requirement for operators to submit annual safety reports.

The requirement to prepare and submit an annual safety report is a requirement of the Railway Safety Directive. It is therefore mandatory upon mainline operators, a requirement which was given effect in Britain (other than in Northern Ireland) by the ROGS regulation 20.

At the time that the ROGS regulations were being drafted, Passenger Focus and London TravelWatch argued that it was important that operators' annual safety reports should be in the public domain, because the travelling public at large was reasonably entitled to know how well transport providers were performing against their safety targets and statutory duties. This argument was accepted by other members of RIAC (the industry-wide rail safety advisory committee, then still under the sponsorship of HSE). Accordingly, regulation 21 provides that copies of these reports shall "be made available for public inspection at the notified address at reasonable times and on reasonable notice."

The two passenger bodies argued at the time that although this regulation satisfied an important principle, it would be of limited practical value, if members of the public wishing to inspect such a report were required to attend in person at an address and time of the operator's choosing. We suggested that operators should also be required to send copies on request (subject, if necessary, to a charge proportionate to the cost of doing this), and/or to make them available electronically via websites or e-mail. This suggestion was not taken up because (as far as we were able to discover) of some legal doubts as to whether this constituted "publication".

Whatever the case, it is now the situation – several years later – that the government itself only "publishes" some documents electronically. Our experience has been that while some rail operators readily send electronic copies of these reports on request, others have been reluctant to do so, and that they have been reinforced in this position by advice from ATOC that they are under no legal obligation to do so. This is technically correct, but hardly in keeping with the spirit of the law, and it betrays a cast of mind which is scarcely consistent with the general principle of openness in public life.

As other elements of ROGS are currently up for review and potential amendment, we would like to take this opportunity to renew our request that all operators' annual safety reports should be available on-line, on request, as well as in printed form at a specified address. We think it is highly unlikely that any of them are now compiled in any form other than by electronic word processing, so the effective cost to operators of this change would be virtually zero. But the saving in time and effort to members of the public wishing to exercise their statutory right of inspection could be considerable.

ORR is concurrently conducting a consultation exercise on its approach to transparency. The opening sentences read :

"Transparency really matters. It is central to the drive to make public services more accountable and more responsive to their users and to stimulating businesses to improve their performance and to innovate.

"In a sector like rail, that receives several billion pounds of public investment every year, transparency is an absolute necessity… It can facilitate comparisons between different parts of the sector and help to empower those who use rail services to make better informed choices.

"By doing so, it can help to build confidence and trust in the railways – and not only in the sector, but across the sector."

The section on safety states :

"We are currently encouraging the industry to be more transparent with the data it gathers and to consider the publication of data on a duty holder rather than whole industry basis."

It appears to us that ORR and the industry could take a major step towards the realization of this aim by putting operators' safety reports on-line, by retaining the requirement for metros and light rail operators to produce such reports, and by extending this requirement to major tram operators. ORR could usefully provide guidance on the content and format of such reports, to ensure consistency in their content and in the use of KPIs. Conversely, we would regard failure to take this opportunity to do so (and to revise ROGS accordingly) as a major missed opportunity, which would invite questions as to the depth of the commitment to transparency asserted in the consultation document.

We accept, however, that to extend such a public reporting requirement to the (typically) small operators in the heritage and tourist sectors could be disproportionately onerous. These are outside our remit, and if ORR is satisfied that it has sufficient access to the relevant information by other means, it would be unreasonable to impose a regulatory burden (in the form of a reporting requirement) that would add little or no real benefit. We must point out, however, that very little data about the safety performance of minor railways is currently published, and we hope that in the interests of transparency ORR will be minded to rectify this omission – at least by providing aggregate data for the sector on its website.

We therefore hope that ORR will be willing to give this suggested improvement in the law its favourable consideration. We are grateful for the opportunity which was afforded to us to discuss these matters with ORR during the consultation period.

Yours sincerely

John Cartledge

Safety Policy Adviser