

Rail Regulation – Call for Evidence

Transport Focus welcomes the opportunity to comment on the review of regulation – though we must sound a note of caution that the review is starting before there has been a decision on the future structure of Network Rail. Discussions on regulation ought to follow structure rather than vice versa.

While our response does touch on some of the wider issues raised in the consultation our main focus has been on the impact of regulation on passengers. Passengers now provide the majority of funding for the railway – around £9billion per year from fares and other charges - so it is important that passengers' interests are at the centre of any review.

In the light of Network Rail's reclassification, does the role of the regime remain valid? If not, how might it be changed?

Are the ORR's present statutory duties appropriate? If not, how might they be improved through refocussing, simplification or prioritisation?

The original regulatory regime was designed to provide checks and balances for a public limited company (Railtrack). Since then we have seen Government resume more direct control over the infrastructure provider. We now have a situation where Government sets its investment priorities and the required outputs (through the HLOS), provides the budget (through the SoFA) and governance (by virtue of the Secretary of State being the only shareholder and through the appointment of a 'special director'). ORR has gone from regulating a public company with its profit/shareholder considerations to regulating a Government 'department'. We believe this must have had an impact on the nature of regulation but we do not believe that it negates the need for independent regulation.

For instance, we believe that there is still a clear role for an independent safety regulator, separate from the DfT. ORR has performed this role since 2005 and there is nothing to suggest any pressing need for change. Safety continues to improve and is among the best in Europe. Moreover, it's 'culture' is firmly embedded in ORR's management and corporate ethos.

We also see the need for continued independent regulation to ensure fair access to the market. ORR acts as 'referee' between train companies and Network Rail and perhaps one of the more contentious areas in recent times has been disputes over access to scarce timetable paths/slots. ORR has no vested interest and is able to assess the benefits of competing bids (e.g. balancing the benefits of competition against capacity utilisation). It could be argued that DfT has a vested interest in maximising the value of its rail franchises.

One area where there could be change, however, is in the area of economic regulation. This was looked at in Dame Colette Bowe's review into the planning of Network Rail's enhancements programme, 2014 to 2019. She pointed to a lack of clarity in the planning process in roles, responsibilities and governance between DfT, ORR and Network Rail (NR). She referred to the reclassification of Network Rail and, while not blaming this, she did refer to it removing the established "escape route" available to Network Rail in previous years of borrowing its way out of trouble. She recommended:

- That DfT and Network Rail should reset the formal framework of rail enhancements planning, implementation and oversight. This would include a clear and transparent governance process;
- Major and especially complex route enhancement schemes should be subject to integrated governance frameworks, such as those already used on Crossrail and Thameslink, which are contractual and reflect the whole-system requirements of such upgrades (including greater involvement of operators).
- Leading project, programme and portfolio management practices should be introduced throughout the process; noting in particular the key issues of assurance, integration, and risk management.
- A more strategic, long term approach to managing the availability of the right people both within the three organisations and throughout the supply chain is required. This should include in particular identifying long term demands across the entire industry and emphasising opportunities for improved skills development in these areas.
- In planning how schemes are delivered and in focussing future investment there should be more consideration of passenger and operator priorities, with regard to both passenger and freight needs. Network Rail should be challenged to prioritise consistently users' needs when delivering enhancement works.

We agree with the broad thrust of the Bowe Report. There is an argument for moving big enhancement projects out of the current 5-year control process and creating bespoke programme structures for these that will help to build up expertise and allow for budgets to be set that incorporate more leeway/ contingency than the current process, which seems to require absolute accuracy years before the first spade hits the ground. Care would need to be taken, however, when 'transferring' the completed enhancement back into the regulatory regime. A mechanism would also have to be found to ensure that renewal work, which often surrounds enhancements, can still be coordinated. It can be the synergy between renewals and enhancement work that often maximises benefits to passengers.

As a consumer body we also particularly agree with the conclusions on greater engagement with passengers. For some time now we have pushed the concept of putting passengers at the heart of the rail industry. We acknowledge, of course, the

role of freight but as this is outside our remit we will just focus on passenger services. The railway exists to serve its customers so we feel it is right that it structures itself in a way that best delivers these services to its customers.

To this end we advocate that any reform of regulation includes:

- Focussing Network Rail's incentives on delivering the type of railway that passengers want. Incentives can influence behaviour - which makes it all the more important that the targets/incentives used encourage the outputs and behaviours that passengers want to see in the first place. We have a wealth of research and data identifying these needs and aspirations which we would be happy to share.

Currently Transport Focus does feed passengers' aspirations and priorities into the HLOS / Periodic Review process and the route planning process. This helps to ensure that taxpayer money is focussed on the things that passenger want.

Having done so it is hard to see a direct role for passengers in then choosing the exact projects that get selected as part of the control period process. Passenger engagement is best at determining the priorities that the 'experts' then work on. For example, having chosen punctuality as a key requirement it is then hard to ask passengers whether they want scheme A in London or scheme B in Manchester.

Once individual schemes have been chosen, however, there is scope for Network Rail/ the industry to engage on delivery. For example, the bigger schemes ought to include 'passenger plans' for:

- Consultation on delivery. Where there is scope for direct engagement the process should both require it and provide the necessary resource to deliver it.
- Consultation on disruption. This should include the extent of disruption to services, the consideration of alternatives and how passengers will be informed. The reference point for this is our research on disruption at Reading/Bath in 2010 and 2015¹ which showed that higher awareness of disruption leads to greater acceptance of the alternatives. This also requires dedicated funding.

This is certainly the case for enhancement schemes but there is no reason why similar processes can't also apply to the larger maintenance and renewal

¹ Planned Rail Engineering Work – the Passenger Perspective. December 2015
<http://www.transportfocus.org.uk/research/publications/planned-rail-engineering-work-passenger-perspective>

programmes. So whatever the model of economic regulation chosen there is scope for greater engagement with passengers.

- Designing metrics and monitoring systems that make sense to passengers and drive behaviours that passengers want to see. For example:
 - Hard targets for punctuality and cancellations are required. But these need to be devised in a way that best captures and reflects passengers' experiences.

In 2010 we looked at passengers' experience of delay and how that corresponded to official PPM figures². The work explored in detail the correlation between passenger satisfaction with punctuality as measured by the NRPS for a three to four year period and actual train performance recorded by the train company over the same period. An initial study was conducted on London commuter services with (the then) National Express East Anglia, with three further studies in subsequent years carried out on Northern Rail regional commuter services (into and from Manchester) and on longer distance journeys with CrossCountry and East Coast. Just recently we've also refreshed the work for Greater Anglia³.

The research found that passengers notice/experience delays before the official PPM threshold for delays. On average, passenger satisfaction with punctuality reduces by between two and three percentage points with every minute of delay, with this increasing up to 5 percentage points per minute. So a commuter train that is 4 mins late may technically be on time but passenger satisfaction will have dropped significantly.

This confirms our suspicions that PPM does not fully reflect passengers' own experience of delays. The closer the railway is managed to right-time rather than PPM the closer it will reflect passenger's perceptions. It also shows that there is a value in

² Towards a right time East Anglian railway. March 2010
<http://www.transportfocus.org.uk/research/publications/what-passengers-want-towards-a-right-time-east-anglian-railway>

³ Greater Anglia (2015): <http://www.transportfocus.org.uk/research/publications/train-punctuality-the-passenger-perspective-full-report>
 Cross Country(2010): <http://www.transportfocus.org.uk/research/publications/relationship-between-customer-satisfaction-and-performance-crosscountry>
 Northern (2011): <http://www.passengerfocus.org.uk/research/publications/relationship-between-customer-satisfaction-and-performance-northern-rail>
 East Coast (2012): <http://www.passengerfocus.org.uk/research/publications/examining-the-links-between-customer-satisfaction-and-performance-east-coast>

focussing on reducing small sub-threshold delays – for instance, reducing lateness on a train from 4 minutes to 2 minutes may not have an impact on PPM scores but it will on satisfaction (i.e. there is a payback/dividend from doing so).

In short, passenger-centric targets and regulation can generate passenger-centric behaviours.

- Targets for service quality
This was at the core of our submission to the Brown review of franchising⁴. We believe that it is not just a case of ‘what’ the railway does but of ‘how’ it does it. Our strong preference is to base this qualitative measure on what passengers say - the best judge of quality being those who have used the services in question.

These are now a feature of franchise agreements but there is scope for more alignment within Network Rail. For us the crucial elements are that the targets reflect passenger priorities and that the measure reflects passenger experiences.

- Managing Delays/network availability
We have a growing body of research on managing delays and disruption – our most recent being the Reading and Bath research mentioned above. Managing delays is the main driver of passenger satisfaction and the provision of good information is the best way of minimising frustrations arising from delays. Hence, targets that incentivise more communication and engagement around engineering work will potentially lead to happier (or at the least less dissatisfied) passengers.

What is the most effective role for the regulatory regime in competition and securing effective protection of rail users and passengers?

We believe there is a need for consumer regulation. Passenger rail is not a competitive market and many passengers, especially commuters, are effectively captive consumers. Where the market can't regulate itself it is right that there is regulation. This is both in terms of legal consumer provisions (i.e. covering such things as mis-selling and unfair contracts) and in competition aspects (i.e. abusing market powers).

⁴ Brown Review of Franchising. 2013. <http://www.transportfocus.org.uk/research/publications/brown-review-of-franchising-passenger-focus-summary-of-key-points>

Existing consumer protections are to a degree fragmented with some delivered by DfT (e.g. through the franchising regime and policy on things like fare increases) and some by ORR (e.g. through licence conditions).

It has been argued that consumer protection items could be removed from licences and moved into franchises and that this would dovetail nicely with other consumer protection contained within franchise agreements – e.g. compensation levels and fares regulation. However, a franchise-led approach ignores open access operators who have no such contract but who are covered by licence arrangements. It also ignores the fact that ORR’s recent interventions in complaints handling procedures (CHPs) and Disabled Peoples Protection Policies (DPPPs) has been positive and we believe will bring positive developments for passengers. We would also ask how a franchising approach would cope with devolution, not just in Scotland and Wales but also for Transport for London, Transport for the North and potentially other city regions. Almost by definition devolution leads to differences but there are times when having a single set of consumer protections/provisions is in the best interest of passengers, especially those who travel between countries/regions. We know that passengers still value the sense of being part of a network. Licence provisions currently apply to all train and station operators across Great Britain – thus ensuring a degree of consistency and enabling competitive benchmarking. Licence provisions also have the benefit of applying at the same time – with a franchise based approach it can take 20 years or more for all franchises to be renewed and updated.

So the issue for us is not so much one of trying to shoe-horn all consumer protections into the same ‘vehicle’ but of ensuring, where there is some overlap between licences and franchises, that both are aligned. We see this as covering things like retailing, compensation to passengers for delays and dealing with ticketless travel. This would require ORR and DfT having a shared vision / set of aspirations that both parties push towards through licences and franchising. For example, in ensuring that:

- retailing requirements set out in franchising (through ticket vending machines or smart) are aligned with the type of output/functionality required by consumer law.
- compensation for delays written into franchises incorporates and mirrors developments in consumer protection (e.g. how easy it is to claim, how compensation is paid out).
- revenue protection targets in franchise agreements take greater cognisance of the code of practice on retailing (which set out many of the limitations of ticketing that put passengers in a position of being challenged over ticketless travel in the first place).

The aim being to ensure that both parties have aligned objectives and incentives. This could either be through a Memorandum of Understanding (MOU) or even via a statutory duty to cooperate in such areas.

The consultation also touches on consumer bodies such as ourselves. We believe that being independent is absolutely critical to our success and the way that we are perceived. Independence allows us to present ourselves as a user ‘champion’ and this would not be possible if we were to be subsumed within, say, the DfT. It could be argued that transferring sponsorship to the ORR would align the independent consumer watchdog with the independent consumer regulator but, while this may technically apply to our road and rail functions it would not do so to our bus, coach and tram duties as ORR has no remit in these areas. This function would still require a separate funding and governance arrangement with the DfT. We also see value in keeping the ‘champion’ role separate from the regulation role. This effectively keeps the ‘advocate’ separate from the regulator – where both are under the same roof such boundaries could become blurred and the public perception damaged.

We believe there are real benefits in keeping Transport Focus where it currently is: a body able to present a professionalised, long-term, independent view and which can approach/deal with both DfT and ORR in an equal way. Dovetailing such a national organisation with local groups or scrutiny committees can leverage the benefits of local knowledge with national clout. We have seen this successfully deployed in the West Midlands where we work with the Centro sponsored Bus Alliance.

The ‘Triennial Review’ of Transport Focus⁵ touched on similar themes. It concluded that there was a “compelling case for retaining some form of independent body at national level to ensure passengers’ interests are effectively represented”, and that the NDPB model is generally working effectively at present.

However, this is not to suggest that the consumer landscape cannot change. We agree with the recommendation from the Triennial review about exploring the “the scope for efficiency benefits from closer working or even integration of its activities with other organisations”. This is something we will continue to work towards.

Nor does it suggest that we can’t add to existing channels of consumer advocacy. There are a number of options that could be looked at as part of the review:

- Consumer Panels.
Where a body like Transport Focus does not exist having an internalised consumer voice can help orientate the organisation towards their main function: making things better for users. We have experience of three years representation on the Civil Aviation Authorities Consumer Panel. The Panel has, deliberately, no external presence. Its sole job is to help CAA staff focus their work plans, issues and thoughts onto the needs of users. It has been successful in this and is now entering its fourth year.

⁵ Passenger Focus: triennial review, 2014 to 2015
<https://www.gov.uk/government/publications/passenger-focus-triennial-review-2014-to-2015>

The existence of Transport Focus means ORR does not need such a panel: we can provide the insight and challenge. However, to date, we have not been resourced to do this adequately. Focusing our work, briefing on insight and providing useful challenge takes time and resource. If funding could be found we could put some muscle behind a new Memorandum of Understanding between the two organisations.

- The appointment of a consumer representative as a non-executive board member of the regulatory body.
This does help ensure that users have a voice in the decision making process but issues of collective responsibility and confidentiality can sometimes place that representative in an invidious position.
- Statutory consumer duties
There could be value in reviewing ORR's existing duties and showing how these apply to, and are used for, consumer issues.
- Creating a duty to engage with users.
We mentioned in the section above how consultation / engagement with users can be formalised through the HLOS/Control period process: the aim being to ensure that decisions on investment priorities and the management of major disruption (e.g. such as that currently surrounding London Bridge and that coming for developments at Waterloo and Euston) are based around the priorities and views of consumers. We think this could really strengthen the passenger voice. As we also mentioned above, however, such a function needs to be funded.
- Using feedback from passengers to help monitor delivery.
There is potential to boost the role of consumers (and their representatives) in monitoring the delivery of services. We mentioned above how the use of passenger satisfaction targets can help incentivise behaviours. There is also scope to use passenger feedback to help monitor compliance with things like the provision of assistance to passengers with disabilities, provision of information during disruption, ease of buying tickets, complaints handling and 'T-12' provision of timetable information. This could involve a regular series of mystery shopping audits - clearly, any attempt at regularising such a function would require adequate funding.

How might the arrangements for securing the effective governance, accountability and efficiency for the ORR as part of the regulatory regime be improved?

The implications of comments in relation to the above for the broader functions of the ORR, particularly in relation to safety and roads regulation (to the extent not already detailed above)

Is there anything else about the future role and responsibilities of the ORR, or the regulatory functions of the railways, not covered in the questions above that you consider should be taken into account?

We have touched on some of these issues in the comments above so we will not reiterate them here.

We would though make one final point on transparency. While there have been improvements in transparency we think there is considerable scope to speed up and expand the provision of information available to consumers. Joint research with ORR established that passengers want more information in the public domain⁶. Even when they admit that they will be unlikely to read it themselves they see the value in it being available as it helps keep the operator on its toes. Key to this is the ability to 'personalise' information to make it relevant to 'my journey'. A specific regulatory duty to drive transparency (with accompanying powers to compel it) would be of benefit to passengers.

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⁶ Presenting 'right-time' performance information to rail passengers. 2013
<http://www.transportfocus.org.uk/research/publications/presenting-righttime-performance-information-to-rail-passengers>