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2 November 2009

Dear Mr Franklyn

### **The Rail Passengers' Rights and Obligations Regulations 2009 Consultation**

Thank you for inviting comments on the above consultation. I am responding on behalf of Passenger Focus, the statutory body established by the 2005 Railways Act to represent the interests of rail users in Great Britain.

Comments on the questions are as follows:

***Question 1: Do you think our proposal to enforce the provisions of the Regulation listed in Schedule II of the draft SI through the licensing and SNRP regime will provide for an enforcement regime that is effective and workable? Do you think there should be other enforcement mechanisms, in addition or in substitution to this? Do you agree with the content of that Schedule, or do you think provisions of the Regulation should be added or taken out? Do you agree with the provisions setting out the obligation to cause certain licensing conditions and SNRPs to be imposed, namely regulations 14 and 15, or do you think they should be more, or less, specific, or that anything should be added to them?***  
***Question 2: Do you agree with the way the Regulations provide details of the process to change existing licences and SNRPs?***

Passenger Focus agrees that licences are an established method of enforcement on the railway. However, from a passenger perspective it is not so much the mechanism that matters as the fact that the right exists in the first place.

***Question 3: Do you agree with the ORR being the designated enforcement body for the Regulation, and for Passenger Focus and London TravelWatch to handle complaints, and that in matters relating to the Regulation they report to the ORR rather than the Secretary of State? Do you think the ORR powers as an enforcement body under the draft SI are adequate (i.e. neither insufficient nor excessive to enforce the Regulation effectively)?***



The draft Statutory Instrument establishes ORR as the designated enforcement body for the regulation and Passenger Focus and London TravelWatch as “bodies to whom complaints may be made” relating to the regulation. We agree with this proposal which, in essence, mirrors Passenger Focus’ existing duty to deal with representations from rail passengers (including those about existing passenger rights).

However, the SI could change the statutory remit of Passenger Focus. By disapplying clause 76(7C) of the Railways Act 1993 it could bring charter train operations within this new complaints remit. We do not think that charter train operations sit comfortably within the spirit /aim of the regulation - see further comments on question 7 – nor do we feel that Passenger Focus would have the same powers/options when dealing with charter services as it would for non-charter services. For instance, with franchised operations we have recourse to provisions within franchise agreements, passenger’s charters, and industry rules on ticketing, all of which allow us to get a better deal for passengers: something that would not apply to charter train operations. Hence for franchised operators we have a much wider role that allows us to be more proactive on behalf of passengers, while for charter train operations it would be a reactive, ‘wait until contacted’ role. We fear that the designation of Passenger Focus as a body ‘to whom complaints may be made’ for charter train operations risks creating a two-tier set of passenger advocacy.

This is not to say that customers of charter train operations should not have rights. They already have recourse to general consumer law – and in some cases will also be covered by ABTA/holiday insurance provisions.

The SI also changes the escalatory procedure in that unresolved issues concerning the Regulation would be referred to ORR rather than, as per the 1993 Railways Act, the Secretary of State. Passenger Focus has no concerns with this. While it does create a slight inconsistency of approach in reality we already engage direct with ORR and with DfT on different issues.

We note that each EC member state will create its own enforcement body and appoint/create a body to handle complaints. This will presumably create a network of passenger complaint handling bodies across Europe. We believe that passengers will have the right to complain to the ‘body of their choice’ so in theory a British passengers going from, say, Paris to Rome would be able to refer a complaint regarding the application of passenger rights to Passenger Focus or the equivalent body in France or Italy. At present Passenger Focus does not engage directly with European operators other than Eurostar. Having to do so would clearly have an impact on our complaints handling processes and also on our resources.



**Question 4: The draft SI currently does not have any provision for the enforcement against ticket vendors that are not railway undertakings. We propose to apply to those vendors enforcement measures similar to those in the Railways Act 1993 for breach of licensing conditions (see section 55 and following). These would consist of a power of the ORR to impose an order to secure compliance, with civil penalties in case of default. Do you agree that the Regulation should be enforced, as against ticket vendors, by provisions similar to those in the Railways Act 1993 for breach of licensing conditions?**

We agree.

The aim of the regulation is to enhance passenger protections. From a passenger perspective it shouldn't really matter whether they bought their ticket direct from a railway undertaking or from another ticket vendor – the rights should 'follow' the passenger. So unless there is to be a two-tier system of redress it must follow that there is some means of enforcing these rights regardless of where the ticket was purchased.

**Question 5: Do you approve of the way the rights of disabled persons and PRMs will be enforced under the draft SI?**

We note that regulations 10 and 11 make provisions in respect of the rights of disabled persons and people with reduced mobility (PRM). To prevent double-regulation, the directive disapplies part of the Disability Discrimination Act 1995. Regulation 11 of the EC directive, however, creates a similar right to damages, enforceable in the courts, for breach of the rights of PRM.

We can see the benefits from having a single set of legislation/regulation rather than two pieces of potentially 'overlapping' protection. The key point for passengers is that there is no diminution of rights and redress for passengers with disabilities or reduced mobility. Subject to this being the case Passenger Focus has no objection to this proposal.

**Question 7: Do you believe the exemptions in Articles 2(4) and 2(5) should be used? If you think the exemptions should be used, please provide details, giving supporting evidence wherever possible. In particular, we would need details of costs and benefits to domestic rail passengers and operators of not receiving the full benefits and burdens of the Regulation. As far as the Article 2(4) exemption is concerned, we would need this for 5, 10 and 15 years durations respectively. In particular, if the Commission does not object, do you think the exemption in Article 2(4) should be used in respect of charter train operators and other similar services?**

#### **Charter train operations**

We believe that there is a strong case to press for charter train services to be exempt from the



regulation. We feel that the regulation is designed to address and protect the rights of the users of public transport services. We do not feel that charter train operations fall under this public service umbrella and so should be excluded from the scope of the regulation.

### **International and domestic services**

Passenger Focus is strongly opposed to article 2(5) being used to grant a permanent derogation from most of the provisions to urban, suburban and regional routes; and for article 2(4) to create a temporary derogation (from 5-15 years) for all domestic services.

Passenger Focus and London TravelWatch have already supplied DfT with arguments as to why this should be the case. The following points are extracts from this submission:

- Implementing the regulation in full would be consistent with the government's current statements of consumer policy. The government says that it wants the UK's consumer regime to be "as good as any in the world" and that it has set itself a "target of reaching the level of the best".
- Passenger train services in Great Britain are, in the main, structured on the basis of franchises awarded by the Department for Transport (DfT) to Train Operating Companies. This structure effectively provides most operators with a virtual monopoly of passenger railway services between their stations for at least five years. As such, if they are provided with poor service, consumers are often unable to "vote with their feet" and change to another operator.

In the Preamble to the Regulation, it is recognised that rail passengers are the weaker party to the transport contract, and therefore that passengers' rights should be safeguarded. It continues by stating that "strengthened rights of compensation and assistance in the event of delay, missed connection or cancellation of a service should lead to greater incentives for the rail passenger market, to the benefit of passengers". We consider that the consistent provision of passenger rights, such as monetary compensation and assistance in the event of delay, to all railway passengers should help make operators more responsive to their passengers' needs and safeguard consumer interests. This is all the more important in view of the virtual monopolies that train companies have in running passenger services.

- We consider that British consumers should not have their rights deferred or have fewer rights than those given to consumers elsewhere in continental Europe. Providing a consistent system of rights is more likely to be understood by passengers and applied by train service providers than systems that vary between and within member states. Rail passengers' consumer rights would be greatly enhanced both in the UK and across Europe if they can be based upon consistent regulation.



- Many of the provisions in the regulation already reflect current practice in Great Britain or are exceeded either in licence requirements or franchise agreements.
- Exempting one section of passengers from the Regulation for up to 15 years would result in passengers making identical journeys having varying degrees of consumer protection. For instance, a passenger buying a through ticket between Luton and Paris would have different rights to one travelling with separate tickets between Luton and London and London and Paris. In the event that inter-urban services were subject to the Regulation but urban, suburban and regional services were excluded, passengers making journeys between towns such as Luton, Reading, Peterborough, Slough, Milton Keynes or Colchester and London could find that their journeys are subject to the regulation on some trips but not on others. The impact would also vary across the country, with the majority of railway passengers in the London area not being covered by the Regulation while consumers making journeys of a similar distance in other parts of the country would be covered.

We consider that such distinctions would be a recipe for confusion and would serve only to undermine network benefits. It would be difficult, if not impossible, to explain to consumers their varying rights, and would ultimately lead them to not understand or exercise them.

We recognise, however, DfT's concerns that there is insufficient time between the end of this consultation and the December implementation date to reach an informed decision. As a result we understand DfT's decision to grant a derogation for domestic services. We believe, though, that this *must* be a temporary/holding position pending a formal decision early in 2010. Any attempt to utilise the full five-year derogation period would be deeply disappointing.

***Question 8: If the exemptions are used, we will need to define the services to which it applies. If you are of the opinion that it should apply to certain services, do you have comments as to the legal criteria to be used to define the scope of the exemption? For example, in respect of charter train operators, two possible criteria which might be used for the definition are: the fact such services are demand-led, and the fact they are outside published timetables.***

We would reiterate our belief that charter train operators should be excluded from the regulations. We agree with the two criteria listed in the question, namely that they are demand-led and the fact that they are outside published timetables.



**Question 12: A draft Impact Assessment accompanying this consultation document is at Annex C. This has been prepared largely on cost estimates provided by the Association of Train Operating Companies. Are there any additional costs or benefits that you feel have not been reflected in the draft Impact Assessment? In particular, the Department seeks information from respondents on the potential benefits and costs to passengers so that the Department is able to monetise the benefits and costs.**

We note from the impact assessment contained with the consultation that ATOC have submitted a menu of costs associated with implementing the provisions of the regulation.

Their estimate for the mandatory items is:

<b>Summary of Estimated Costs for Mandatory Items (per annum)</b>		
<i>Key Concerns (£ per annum)</i>	<i>Low estimate</i>	<i>High estimate</i>
PRM/ Accessibility	£100K	£100K
Liability-Insurance Costs	£1m	£3m
International Distribution of GB Fares	£100K	£100K
More complaints (15%)	£1.5M	£2M
<b>Total</b>	<b>£3M</b>	<b>£5M</b>

We would query the cost associated with an increase in passenger complaints – estimated at a 15% increase in complaint volume and based on the fact that the implementation of the European Air Passenger Rights Legislation led to a similar outcome.

We feel that the latter is not necessarily a fair comparison. Rail already has well defined complaint mechanisms, an established appeal process and an established set of rights to compensation prior to the creation of the EC directive. Indeed, in the case of train companies operating the delay repay mechanism these compensation rights are already higher than the minimum set out in the Regulation. We do not believe that air passengers had such a well defined rights/expectations prior to the air directive – hence the increase in complaints in that sector.

ATOC's estimate for non-mandatory costs is much higher:

<b>Summary of Estimated Costs for Items with Optional Exemptions (per annum)</b>		
<i>Key Concerns (£ per annum)</i>	<i>Low estimate</i>	<i>High estimate</i>
Abandon Journey	£1m	£9m
Cash compensation	£4.1m	£7m
Assistance if delayed	£6m	£17m
Tickets transferable	£20m	£80m
Other Commercial / TAP-TSI	Minimal	Minimal
Service Quality Measurement	Minimal	£1m
PRM –Multiple Booking	£500K	£500K
<b>Total</b>	<b>£32m</b>	<b>£115m</b>



Clearly ATOC's biggest concern is the cost of allowing tickets to be transferable (from £20m pa to £80m pa). ATOC's main fear appears to be that: passengers will share season tickets; return portions of Off-Peak tickets could be used by different passengers; and tickets such as Advance tickets could be resold.

We must again query the assumptions behind these figures:

- They assume that all 'losses' arising from the transferability of tickets would be attributable to the Regulation. This begs the question of how much transferability already goes on – there is very little to stop off-peak and advance fares from being swapped now. If there is to be an estimate of lost revenue arising from transferability it should at least deduct a similar estimate of current levels of practice – the point being that the latter is not being incurred as a result of the EC Regulation and should not be attributed to it.
- ATOC estimates a loss of around 10% of revenue from weekly season tickets (estimated to be in the region of £53m). We would ask DfT to satisfy itself on two issues:
  - Is it realistic that 10% of weekly commuters will actually find someone to share with: just because something might be possible does not mean that people will do so?
  - Whether the actual wording of the regulation already provides a solution. It says: "the ticket shall be transferable if it has not been made out in the passenger's name and if the journey has not begun." In the case of a weekly season ticket does the "journey begin" on the day it is first used. If so then transferability is prohibited on future days.

Clearly it would be difficult for the industry to prove who used the ticket on the first day but this would be no different to the present situation – again, care must be taken that the current 'losses' suffered by the industry as a result of tickets being transferred are not attributed to the Regulation.

The other high-end costs concern:

- Assistance if delayed (£6-9m)  
This relates to the requirement to provide refreshments to rail passengers whose journeys have been delayed by 60 minutes or more. Generally, such refreshments consist of light snacks and beverages but in special circumstances, meals may be provided. While this duty already exists for refreshment on trains making it apply to stations would be a new requirement.

The impact assessment paper estimates that there are 600,000 people who are delayed for more than an hour. The high-end cost of £17m would therefore equate to £28.30 per person. This seems a high figure (even taking into account administration costs)



especially considering that not all passengers will claim and not all stations or trains have refreshment facilities to claim from in any event.

- Abandon journey (£1-9m)

This relates mainly to passengers who are delayed on a route for more than 60 minutes and therefore choose to abandon their journey and seek a refund. The low estimate is based on 15% of those who are delayed for more than an hour giving up and seeking a refund while the high estimate is based on 50% doing so.

Again, this seems to us to be a high assumption. The National Conditions of Carriage already give a right to an immediate refund if you decide not to travel because of a delay of cancellation so presumably these figures only refer to people who have already started to travel and then give up because of a delay. Having started the journey would 50% really give up rather than carry on?

Also, many train companies would already look to compensate passengers who 'gave up' after an hour delay so ATOC would need to subtract any such compensation. It would also need to deduct any compensation from those who otherwise have struggled on with their journey and subsequently claimed for the 60 minute delay – we are presuming you cannot get a refund for abandoning your journey and compensation for being delayed by more than 60 minutes.

- Cash Compensation (£4.1m-£7m)

The Regulation sets out compensation for delays. The minimum shall be:

- (a) 25 % of the ticket price for a delay of 60 to 119 minutes,
- (b) 50 % of the ticket price for a delay of 120 minutes or more

This is better than the minimum set out in current conditions of carriage [20% for delays over 60 minutes as long as they are within the control of the rail industry, payable in vouchers]. Just about all train companies already exceed this so the only additional costs would seem to come from the right to request this compensation in cash rather than via national rail vouchers.

There are many reasons why passengers would prefer to be compensated in cash terms. Firstly, there is the ethical case - we consider that many passengers would argue that, if you pay for a good in cash, you should be able to receive compensation for delays in the same terms. Providing cash compensation provides tangible and immediate compensation to the passenger for being inconvenienced, while providing vouchers is akin to promising that you will be compensated at some stage in the future (or in some cases, not at all).



Vouchers are not a suitable form of compensation for all types of passenger or for every type of ticket transaction. For instance, it is not currently possible to purchase train tickets online using vouchers, so those passengers with vouchers are often unable to access the cheapest rail tickets available for any particular journey

We know from our casework that it is often possible to persuade an operator to compensate passengers in cash instead (albeit on occasions they are not prepared to pay the same cash value as they would in vouchers). The incentive to accept vouchers, therefore, often comes from the fact that train companies will sometimes offer a higher value in vouchers than they would in cash. Companies claim that vouchers can generate additional sales – if it is truly generative then they will not lose out if they continue to incentivise acceptance of vouchers in this way.

We would also reiterate the consequences of imposing the derogations:

- The consistent provision of passenger rights, such as monetary compensation and assistance in the event of delay, to all railway passengers should help make operators more responsive to their passengers' needs and safeguard consumer interests.

Passenger Focus' research shows that punctuality is the key driver of overall satisfaction, while the way the industry manages delays is the key driver of dissatisfaction. Providing an incentive to improving both via the Regulation will, therefore, address the very areas that maximise passenger satisfaction.

But it is not only passengers who will benefit from such incentives. A report by OXERA into the costs of rail delays to the economy concluded in 2003 that rail delays cost the economy between £2.2 and £2.5 billion a year.

Also, in January 2005, the GLA produced a report on the economic effects of transport delays in Central London. It estimated that the economic cost (in terms of value of time) of these delays to Central London employees and businesses was £1,190m a year (equivalent to £4.6m per business day or £830 a year for each person working in Central London). An additional £560m a year in lost time was also attributable to non-work travel (e.g. shopping, visiting friends). Furthermore, the report concluded that staff productivity is reduced by problems faced in commuting – both in terms of being delayed but also by the stress and tiredness of commuting.

The British Chambers of Commerce 'Business Transport Survey' (November 2008) also identified problems (i.e. added costs, loss of staff-hours, and loss of staff) for business as a result of poor transport infrastructure (NB. not just rail).



This shows that incentivising train companies to improve performance could have a big impact on the economy as well as passengers. Incentive schemes are not new to the industry – Section 8 of the Track Access contract incentivises Network Rail to minimise delays and cancellations. Performance incentive schemes can work to the public benefit.

- Exempting one section of passengers from the Regulation for up to 15 years would result in passengers making identical journeys having varying degrees of consumer protection. The impact would also vary across the country, with the majority of railway passengers in the London area not being covered by the Regulation while consumers making journeys of a similar distance in other parts of the country would be covered. We consider that such distinctions would be a recipe for confusion and would serve only to undermine network benefits. It would be difficult, if not impossible, to explain to consumers their varying rights, and would ultimately lead them to not understand or exercise them.

***Question 13: What areas of the Regulation do you consider need clarification and you would like to see covered in guidance?***

We would refer DfT to the point made in question 3 about the potential resource implications of Passenger Focus having to handle complaints and deal with companies from outside Great Britain.

Please do not hesitate to contact us if you would like to discuss this submission further.

Yours sincerely

Mike Hewitson  
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