

A Greater Role for ORR in Regulating Passenger Franchises in England and Wales

Response from DB Schenker

March 2012

1. DB Schenker is pleased to respond to the DfT and ORR consultation on a greater role for ORR in regulating passenger franchises in England and Wales. This response can be made public in full.

General Comments

2. DB Schenker does not have a direct interest in rail franchising, but given the key position they occupy in UK Rail the roles and powers of both DfT and the ORR are important for the success and future of our business.
3. DfT has a vital role in ensuring a supportive Government framework for rail freight, and for freight and logistics generally, and in supporting network investment for rail freight through the Strategic Freight Network.
4. The role of the ORR as an independent regulator is also vital to freight operators such as DB Schenker to ensure business growth, to enable us to plan our business and investments with reasonable certainty and to encourage customer confidence in the sector. This role has two key aspects;
 - a. the regulation of Network Rail, ensuring fair, non discriminatory charges for freight, ensuring that Network Rail delivers regulated outputs and preventing abuse of monopoly position,
 - b. The regulation of access, to ensure that all operators are able to gain access to the network, and to facilities on a fair and non discriminatory basis.
5. DB Schenker notes that DfT is the prime funder of passenger services, and receives income from its franchises through premia and cap and collar arrangements. Given the extent of public support for franchises and, through the Network Grant, for Network Rail, it is inevitable that DfT will need to retain some element of control to ensure proper oversight of the spending of public money. It is not clear to DB Schenker how an appropriate balance would be struck between the need of DfT to undertake their continued responsibilities to ensure proper oversight of public monies and any greater role for ORR.
6. DB Schenker also notes that whilst ORR's duties require it to take account of the requirements of funders, it is required by its duties to take other public interests and wider social outcomes into account. This balance of duties ensures that ORR can take key decisions (e.g. access, periodic reviews) on an impartial basis.

7. DB Schenker would therefore be concerned if the fundamentally independent nature of the main ORR duties/role changed as a result of adopting greater powers in respect of franchising. We recognise that the two specific proposals in this consultation would not give ORR any significant role in passenger franchising, but we would be concerned if that signalled the start of a potentially wider redistribution of powers to ORR which may impact on its impartiality.
8. DB Schenker believes that the significant number of current major industry initiatives (cf PR13, Network Rail devolution, Alliancing, Rail Reform, facilitating better whole industry working) are such that any potential dilution of ORR's focus or capability onto new areas at this time would not be helpful. The key priorities of the ORR should not change.
9. We therefore would have concerns about moving performance management to ORR. Not only might this conflict with their role with respect to making decisions in awarding access (particularly on busy routes), it might appear to place ORR in a potentially difficult position in drawing an appropriate balance between the interests of franchises and other users. Passenger service performance is often intensely political in nature and any perceived, even if advertent, erosion of ORR's independent position would be of concern to DB Schenker and our customers.

As freight is a private sector activity, the only element of railfreight performance that is subject to regulatory scrutiny is Network Rail's freight performance on the network. We recognise that there is an inevitable interlinking between passenger and freight trains and that the effects of freight performance can impact on passenger services (and vice versa).

DB Schenker is firmly of the view that freight market forces are the best driver of our performance and that no further regulatory oversight would be appropriate. We are concerned that a greater role for ORR with respect to franchised passenger performance management might risk some polarisation of general management attention within ORR into "that which we are responsible for" and "that which we are not". That would not be healthy or a positive move and DB Schenker would be very wary of the risk to freight of creeping increases in regulatory oversight of performance.

10. Freight operators such as DB Schenker place immense importance on ORR's role in the independent economic regulation of Network Rail. The current PR13 process has confirmed that there are still ongoing issues of performance, efficiency and data and asset information – in addition to the current wider governance debate. DB Schenker would be most concerned if any expansion of ORR's responsibilities reduced the focus and capability needed for this key role in ensuring that Network Rail becomes a more efficient, customer-facing organisation.
11. In addition, DB Schenker has concerns about whether any greater role for ORR in regulating franchises would increase industry costs. It seems evident to DB Schenker that ORR would have to increase its capability and skill sets to manage any greater role, but it is not clear if this would be offset by fully compensating cost reductions at DfT or elsewhere in the industry. Currently, the economic part

of ORR is funded by Network Rail. DB Schenker would hope that any duties taken on by ORR in respect of franchising would not result in any change to the funding structure that would be to the detriment of freight.

It is equally clear that Ministers will continue to be held accountable for rail issues by Parliament (given the level of public support), by constituency MPs and by individual members of the public. Accordingly Ministers will retain an interest in key rail elements such as performance and fares even if regulatory oversight passes to ORR. It is hard therefore, to see any substantive reduction in DfT's role in the near future.

Experience from other sectors would suggest that increased regulation generally leads to increased costs for the sectors concerned; given the post-McNulty emphasis on reducing the costs of UK rail, this has to be resisted.

Specific Questions

Publication

12. *May we publish your response?*

Yes, in full.

General principles

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

DB Schenker believes that any potential changes in responsibility should be tested against the following :

- No actual, potential, or perceived change to ORR's independence.
- No net increase in regulatory burden for TOCs, FOCs or Network Rail.
- No net increase in industry costs (whether directly through regulatory burden or additional bureaucracy or indirectly through regulatory risk).

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

DB Schenker would be concerned at any diminution (actual, potential, or perceived) in ORR's independence or significant change to ORR's duties such that the current balance of duties might be impacted.

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

DB Schenker places great importance on ORR's role in regulating Network Rail. In this respect we would like to make four comments.

- We are aware that the governance arrangements for Network Rail are under active review and that changes to the governance of Network Rail are likely to feature in the delayed but imminent Command Paper and that further consultation on this is then likely. We will reserve any further comments on governance until we have considered the contents of the Command Paper.
- For DB Schenker, the biggest challenge for the ORR is still to exercise effective regulation of Network Rail. We are mindful of the conclusion of the Public Accounts Committee whose July 2011 report, 'Office of Rail Regulation: Regulating Network Rail's Efficiency' concluded:

“Overall we do not believe that the Regulator exerted sufficient pressure on Network Rail to improve its efficiency...”

We would be concerned if we felt that any greater role for ORR in regulating franchises diminished its independence (or perceived independence) or made the task of regulating Network Rail harder. It is important that ORR is seen to be regulating Network Rail in accordance with the entire range of its duties and in a way that balances the reasonable requirements of all users of the Network.

- The current process of industry reform has Network Rail at its centre. Many of the changes – Network Rail devolution to routes, Alliancing etc – pose significant potential challenges to national and secondary operators such as DB Schenker who will rely on the ORR to ensure:
 - effective protection for secondary operators
 - fair and impartial access management and timetabling
 - Impartial and non-discriminatory management of network-wide activities such as possession planning, standards etc.

ORR's role in overseeing the implementation of Network Rail's System Operator role will be critical and a key reason why ORR has to remain – and be perceived to remain – entirely independent of all operators.

- As part of the reform process, ORR will have a key role in facilitating how the industry works together to unlock whole industry cost reductions that are beyond individual parties. For DB Schenker, this is a crucial area for the industry over the next control period but we do not underestimate the complexities that will need to be overcome. We would not want ORR distracted from the critical role they have to play in making this work.

16. 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?

DB Schenker has no comment on this.

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

DB Schenker has no comment on this.

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

Any increase in ORR's costs as a result of assuming any greater role should be;

- Offset by fully compensating cost reductions elsewhere in the industry
- Borne by Franchised TOCs only, as they relate to franchising. DB Schenker would be strongly resistant to making any contribution to any such costs.

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

DB Schenker has no comments on this.

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

DB Schenker has no comments on this.

21. 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?

DB Schenker is concerned that this proposal might compromise – or be capable of misinterpretation as potentially compromising - ORR's independence in awarding access, as it would have a particular interest in the performance of some, but not all, network operators, which might impact on its ability to balance its duties impartially and fairly.

22. 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?

DB Schenker has no comments on this.

23. 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.

DB Schenker's primary concern is to ensure ORR's continued independence and to avoid any suggestion that this might be impacted by an increase in their responsibilities for franchised operators over other operators.

24. 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?

DB Schenker has no comments on this.

25. 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?

DB Schenker has no comments on this.

26. 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?

DB Schenker has no comments on this.

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

DB Schenker has no comments on this