



OFFICE OF RAIL REGULATION

Real Time Train Information

- a consultation by ORR on the findings from its review

December 2012

Contents

1. Executive Summary	4
Real time train information products and services why are they important	4
So what is the problem?	4
The role of ORR – the Code of Practice	5
What do we want to achieve?	5
Summary	6
Questions for stakeholders	7
Responding to this consultation	7
2. Introduction	9
Purpose of the document	9
Context	9
Structure	10
3. Background	11
Introduction	11
NRE and ATOC	11
Real time train information and the Darwin database	12
ORR's involvement	13
4. Our review of NRE's Code	15
Introduction	15
Background	15
Conduct of the review	16
Key stakeholder concerns and NRE's responses	17
Stakeholder questions	22
5. State of the market – other indicators	23
Introduction	23
Our objectives	23
Competition policy concerns	24
Ability of downstream firms to bring products to market	25
Open data approaches	27
6. Summary of the issues and options for next steps	30

Introduction	30
Summary of previous chapters and options for next steps	30
ANNEX A – The current Code of practice	32
ANNEX B – Revised Code of Practice	35
Annex C – More detail about stakeholder responses & our dialogue with NRE	39
Introduction	39
Outline of the Code and stakeholder responses	39
Our discussions of stakeholder views with NRE	42
Annex D - Powers available to us	49

1. Executive Summary

Real time train information products and services why are they important

1.1 Consumers have become accustomed to having information at their fingertips. The use of smartphones and tablets means that consumers can access information even when on the move and to suit their own preferences and lifestyle. Rail passengers are no longer content with information provided by way of published timetables which show only when a train is scheduled to arrive or depart – passengers want up to the minute information about the actual running of their trains. This enables them to plan and to avoid, say, the dash for a train that has been cancelled or to make alternative plans in the event of disruption. They also want to choose how they receive the information; where they receive the information; and what it looks like.

1.2 Passengers, in summary, want to see access to information and technological advancement in the railways in line with what they are enjoying elsewhere.

1.3 Software developers can make an important contribution to the passenger experience by bringing to market new products or services which meet this increasingly sophisticated demand. The emergence of mobile real time train information (RTTI) applications, for example, has, with the support of the industry, been enabled by third party developer expertise and know-how. Passengers have met these new advancements with enthusiasm. The first paid RTTI smartphone app, by a small developer, AGANT, became one of the top five grossing Apple apps in its first year of operation. More than one million people had installed National Rail Enquiries (NRE)'s free-to-download smartphone app three months after its launch in May of this year (*National Rail Enquiries for Android & iPhone* – this app provides real time journey planning, arrival/departure boards, and alerting functionality).

So what is the problem?

1.4 Historically, third party developers have been wholly dependent on NRE for access to the data needed to develop RTTI products and services. NRE grants access by way of a licensing regime which has attracted criticism from the developer community. A number of concerns were expressed to us during the conduct of our review about the application criteria; the application process; the appeals mechanism; and the charging regimes, which third parties considered to be insufficiently transparent.

1.5 We ask consultees whether these concerns have been addressed by proposed revisions to the Code, which NRE has told us would better reflect its current practice.

1.6 Our concern is to ensure that NRE provides the right conditions for third party entry to occur and to ensure that passengers are not being denied the benefits that competition in the supply of these products and services could bring in the form of greater choice, lower prices and increased innovation.

The role of ORR – the Code of Practice

1.7 In 2009, we published the conclusions of a Competition Act 1998 (the Act) investigation¹ into the provision of RTTI by the Association of Train Operating Companies (ATOC)². Our investigation found that ATOC had not infringed the Act, however, ATOC had significant control over the RTTI database³ (Darwin), which represented an important input in the development and production of RTTI products and services, and as such ATOC had a special responsibility not to allow its conduct to distort the market. Because of this, we asked ATOC to develop a Code of Practice governing how it would deal with applications for access to Darwin. This voluntary code ('the Code'⁴) was published on NRE's website in April 2010.

1.8 During the Code's drafting, a number of parties expressed concerns to us about whether the Code went far enough and how it would work in practice. NRE agreed that it would keep the Code under review in the light of experience and we undertook to seek stakeholder views on the Code's effectiveness once it had been in operation for a year. We commenced that review in May 2011. This document focuses, in particular, on that review and our findings. We ask questions about whether the changes that NRE has agreed to make now go far enough in stimulating third party interest and in encouraging third party applications.

What do we want to achieve?

1.9 Significantly, the rail sector, in 2011-12, received around £4bn⁵ in public subsidy to provide services. This means that the industry has a responsibility to ensure that it does not act as a barrier or dampener to the development of products and services that will benefit the passenger and the wider taxpayer community.

¹ <http://www.rail-reg.gov.uk/upload/pdf/rtti-decision-011209.pdf>.

² NRE is the body with whom third parties generally engage in order to procure a licence for access to RTTI. NRE is a part of ATOC.

³ <http://www.nationalrail.co.uk/contact/about-nre/realtime-by-darwin.html>. In this document we refer to Darwin as a 'database' in line with our understanding of fairly common practice within the industry and for consistency with our earlier publications. In its dialogue with us, NRE has explained that Darwin is an application that processes source data from databases.

⁴ <http://www.atoc.org/about-atoc/national-rail-enquiries/code-of-practice>

⁵ <https://dataportal.orr.gov.uk/displayreport/html/html/bfee944f-5d61-42ee-a4ad-df41d02ef567>

1.10 We recognise, for example, that there are applications for this data that the industry would not necessarily have the incentive to develop itself, such as multi-modal travel applications. We want taxpayers and passengers to benefit from their investment in rail, meaning the whole industry demonstrating an openness to what third party development can deliver.

1.11 We ask in this document, whether a more open data⁶ approach such as that adopted by Transport for London and Network Rail provides better signals for an effective outcome in terms of the speed to market and innovation that can result.

Summary

1.12 The extent of new entry and exits provides a key indicator of how well a market is functioning. We would expect to see a reasonably well-functioning RTTI marketplace deliver good-quality downstream uses of RTTI, with consumers freely able to choose between competing products and suppliers.

1.13 According to information provided to us by NRE⁷, the number of issued Darwin licences⁸ stood at around 14 in July 2009, 36 (i.e. an increase of 22 from the previous year's figure) in July 2010, 74 (an increase of 42) in July 2011, and 148 in October 2012⁹. As of July 2011, around one quarter of the total number of issued licences were held by companies who held more than one licence. As of July 2011 around one third of all issued licences related to mobile applications. The overall picture provided by this limited evidence appears to be one of a reasonable pace of growth in the total number of licences issued. There has also been a significant increase in the number of smartphone apps.

1.14 However, we know from our review of the Code that third party developers have significant concerns about how NRE deal with their applications and about the operation of the Code in practice. It is not clear to us, at this stage, what the marketplace would have looked like, for example, should NRE have adopted a more open data approach and whether this would, therefore, be a preferred outcome.

1.15 This consultation has the purpose, therefore, of seeking views from interested parties on these issues and to help us to design next steps which could include that we:

- (i) withdraw from scrutiny of this part of the industry because there is not sufficient evidence to suggest that it is operating other than healthily;

⁶ The Open Knowledge Foundation considers 'open data' to be: "[a] piece of content or data is open if anyone is free to use, reuse, and redistribute it — subject only, at most, to the requirement to attribute and/or share-alike".

⁷ Email from NRE to ORR, 20 July 2011.

⁸ Licences for all downstream uses – see Chapter 3 of this document for important examples of these.

⁹ *ATOC's submission to the ORR's Approach to Transparency, a consultation, July 2012*

(ii) continue to monitor, in line with market developments and continue to influence openness via our transparency agenda; or

(iii) take action under the various powers available to us including referring the market to the Competition Commission under the Enterprise Act 2002 (we set out the various regulatory and competition tools available to us in Annex D of this document).

Questions for stakeholders

1.16 Consultation question 1: We are looking for stakeholder comments on NRE's proposed changes to its Code and where changes have not been made, comments on NRE's reasoning.

1.17 Consultation question 2: We are looking for stakeholder comments on the extent to which Network Rail's data feed represents a viable alternative to Darwin and the uses that these feeds can be put to.

1.18 Consultation question 3: We are interested to hear consultees' views on the evidence that we present in Chapter 5 on the number of new licences and apps., and on any reasons why they consider this growth might overstate the health of this market. In particular we welcome stakeholder views on:

(a) The medium-term sustainability (to the extent that this is possible to predict in a fast-moving technology market) of the relatively large number of apps that are currently on the market, including on the feasibility of paid and ad-funded or free-to-download apps coexisting; and

(b) The likelihood of a significantly better range of applications and functionality being made available under a more open data standard.

1.19 Consultation question 4: We ask consultees for views on whether an open data approach, if adopted, would lead to change in the market for RTTI products and services and if so: (a) what this change might look like; and (b) whether it would be desirable.

Responding to this consultation

1.20 We welcome responses to this consultation. Please send your responses by 28 February 2013 to:

John Trippier

Office of Rail Regulation

1 Kemble Street

London

WC2B 4AN

Or by email at: competition@orr.gsi.gov.uk

1.21 Please note, when sending documents to us in electronic format that will be published on our website, we would prefer that you email us your correspondence in Microsoft Word format. This is so that we are able to apply web standards to content on our website. If you do email us a PDF document, where possible please:

- create it from the electronic Microsoft Word file (preferably using Adobe Acrobat), as opposed to an image scan; and
- ensure that the PDF's security method is set to no security in the document properties.

1.22 If you send a written response, you should indicate clearly if you wish all or part of your response to remain confidential to ORR. Otherwise, we would expect to make it available on our website and potentially to quote from it. Where your response is made in confidence please can you provide a statement summarising it, excluding the confidential information, which can be treated as a non-confidential response. We may also publish the names of respondents in future documents or on our website, unless you indicate that you wish your name to be withheld.

2. Introduction

Purpose of the document

2.1 This document reports on the the key changes made to NRE's voluntary Code, which governs how NRE deals with applications for access to its RTTI database, known within the industry as 'Darwin'. NRE has agreed to make these changes in the light of stakeholder concerns raised during the course of a review which we started in May 2011 (after the Code had been in operation for a full 12 months). The background to the Code is set out in Chapter 2 and the conduct of our review is set out in Chapter 3. This document also sets out where NRE has not agreed to make changes to the Code and the reasons for this.

2.2 We also in this document explain how the conditions of supply and demand for real time products have developed since 2009, drawing on examples of real time data supply in other transport sectors. We go on to suggest what a well-functioning market might look like. Our purpose is to put the concerns raised with us during the course of our review of the Code into a market context to assist consultees in framing their response in such a way as to help us decide next steps.

Context

2.3 Consumers have become accustomed to having information at their fingertips. The use of smartphones and tablets means that consumers can access information even when on the move and to suit their own preferences and lifestyle. Rail passengers are no longer content with information provided by way of published timetables which show only when a train is scheduled to arrive or depart. They also want to choose how they receive the information; where they receive the information; and what it looks like.

2.4 Passengers, in summary, want to see access to information and technological advancement in the railways in line with what they are enjoying elsewhere.

2.5 Software developers can make an important contribution to the passenger experience by bringing to market new products or services which meet this increasingly sophisticated demand.

2.6 The objective of our review of the Code and our consultation now is to consider the extent to which NRE has and is providing the right conditions for third party entry to occur.

Structure

2.7 The remainder of this document is organised as summarised below.

3 - Background

This section provides the background information on real time train information and how it makes up the Darwin database. It also explains the history of the Code and ORR's involvement.

4 - Our review of NRE's Code

This section explains how we conducted this review and sets out the key concerns raised by third parties. It provides high-level summaries of our exchanges with ATOC on how these concerns could be addressed (more details of these are contained in Annex C); and explains either where changes have been made to the Code in the light of those exchanges or alternatively sets out ATOC's reasons for why changes are not necessary.

5 - State of the market – other indicators

This section explains how the conditions of supply and demand for real time products have developed since 2009, and looks at examples of real time data supply in other transport sectors. It goes on to suggest what a well functioning market might look like. Our intention in writing this section has been to put the concerns raised in this consultation into a market context and to assist consultees in framing their response in such a way as to help us decide next steps.

6 Summary of the issues and possible next steps

In this last chapter we summarise the issues identified in the previous two chapters, and explain the high-level options available to us going forward.

Annex A - The current Code of Practice

This annex provides a copy of the current Code of Practice

Annex B - Revised Code of Practice

This annex provides a copy of the revised Code of Practice, it includes the changes suggested by NRE in response to the third party concerns raised through this review

Annex C– More detail about stakeholder responses & our dialogue with NRE

This annex summarises stakeholder comments on the Code and the subsequent exchanges that held with NRE.

Annex D – Powers available to us

This annex provides information on the regulatory tools available to us

3. Background

Introduction

3.1 This chapter provides an outline of:

- the parties involved in providing RTTI via the Darwin database;
- the nature of Darwin including source data and end uses; and
- the history of ORR's involvement including in the NRE's voluntary Code which sets out how it will deal with applications for access to Darwin.

NRE and ATOC

3.2 NRE is the principal body with whom third parties engage in order to procure a licence for access to RTTI. NRE is also active as a provider of information directly to passengers¹⁰. NRE was initially formed in 1996, with a mandate focused on responsibility for all of the telephone enquiry bureaus that were at the time spread across the national rail network.

3.3 NRE is owned by a company called Train Information Services Limited (TISL). TISL is wholly owned by GB's train operating companies (TOCs). ATOC is a trade association of, and provider of business services to, GB's TOCs. NRE's website states¹¹ that, "*NRE is part of ...ATOC...*" and that NRE's chief executive, "*reports to... the Chief Executive of the ATOC*". ATOC's response to ORR's consultation on transparency¹² dated 24 October 2012 states that NRE is, "*...part of ATOC...*" and expresses opinions on behalf of both ATOC and NRE.

3.4 We generally refer to NRE throughout this document other than where ATOC is a named party, for example, in correspondence.

¹⁰ See, for example, <http://www.nationalrail.co.uk/about/>.

¹¹ Ibid.

¹² ORR's Approach to Transparency – a consultation, July 2012

Real time train information and the Darwin database

3.5 RTTI is currently presented to passengers in a variety of forms. These include the following.

- Enquiry services, such as information provided by telephone (the NRE telephone enquiry bureau).
- Public departure boards displayed at stations (on platforms or concourses) or sometimes at other public buildings.
- Various alerting services, typically sent to passengers via social media, SMS¹³, smartphone apps, or email.
- Information provided on standard web pages, which can be accessed via web browsers on desktop or handheld computing devices such as smartphones or tablets. This information can be presented in various forms including, notably, live arrival and/or departure boards (LDBs) and journey planning software.
- Information provided via smartphone applications ('apps'), often with similar functionality to that provided via web pages, but with added speed/convenience of access and features made possible by the use of a dedicated app.



Agant's "UK Train Times" smartphone app



Next train to	Plat	Due	Expt
Harrogate	5C	1459	On time
Rayle	12C	1511	On time
Haymarket	8D	1505	On time
Reading	5C	1459	On time
Hobden Bridge	12C	1437	On time
Hullfield	10A	1449	On time
Hornbeam Park	5C	1459	On time
Horsforth	5C	1459	On time
Horton In R	10A	1449	On time
Reddersfield	16A	1440	On time
Hill	15B	1438	On time
Tilley	3B	1432	On time
Inter-tilting	8D	1505	On time
Knight	10A	1449	On time
Kirby Stephen	10A	1449	On time
Kirkcaldy	9D	1505	On time
Doncaster	5C	1459	On time
Nottingham	17B	1500	On time
Ladbank	9D	1505	On time
Langley Hill	17B	1505	On time
Langthorpe	10A	1449	On time

Station live departure board

3.6 The main¹⁴ upstream source of national RTTI in Great Britain is NRE's Darwin database. The key individual inputs that feed into Darwin include the following:

- Timetable data, which effectively provides a list of the predicted location of all of the trains on the network at different points in time. Network Rail's Train Service Database (TSDB) is the source of such data in GB.

¹³ Short Message Service, i.e. a mobile phone text message.

¹⁴ For example, as of November 2012, as we understood it all but one of the 30 or more 'real time' train information mobile applications on offer in GB were at least partly driven by Darwin.

- Movement data, i.e. automatically generated information on the location of trains at different points in time (which ultimately comes from track-side detectors operated by Network Rail). A comparison between the timetabled and actual location of trains enables the identification of trains that are not on time and, together with disruption data (see below), can be used to make predictions about future train times. Network Rail's Train Operating Processing System (TOPS) is GB's central train operating system.
- Additional information - movement data, i.e. comparisons between actual and predicted train locations are not sufficient on their own to enable reliable predictions, which require information, for example, on train cancellations or changes to train stopping patterns, covering:
 - planned disruptions (e.g. resulting from pre-scheduled works);and
 - unplanned disruptions, input manually by TOC staff in control rooms and at stations.

3.7 Drawing on this raw information, Darwin adds various functionality in order to provide a comprehensive feed that is readily useable by third parties. This functionality includes:

- various systems and software for aggregating, manipulating, and distributing the above; and
- prediction algorithms. These are used to make predictions about the arrival time at stations of trains that are currently behind schedule.

ORR's involvement

3.8 In 2009, we published the conclusions of a Competition Act 1998 investigation into the provision of RTTI by ATOC ('the Decision')¹⁵. Our investigation found that ATOC had not infringed the Act, however, ATOC had significant control over Darwin which represented an important input in the development and production of RTTI products and services, and as such ATOC had a special responsibility not to allow its conduct to distort the market. Because of this, we asked ATOC to develop a code of practice governing how it would deal with applications for access to Darwin. The Code¹⁶ was published on NRE's website in April 2010. The purpose of the Code is to:

- introduce transparency into an area where there is significant market power in the hands of one party and, therefore, a responsibility on that party to demonstrate that it has processes in place not to abuse that position; and
- set out a behavioural framework against which all future conduct could be assessed.

¹⁵ <http://www.rail-reg.gov.uk/upload/pdf/rtti-decision-011209.pdf>

¹⁶ <http://www.atoc.org/about-atoc/national-rail-enquiries/code-of-practice>

3.9 During the Code's drafting, a number of parties expressed concerns to us about whether the Code went far enough and how it would work in practice. NRE agreed that it would keep the Code under review in the light of experience and we undertook to seek stakeholder views on the Code's effectiveness once it had been in operation for a year. We commenced that review in May 2011.

4. Our review of NRE's Code

Introduction

4.1 In this chapter we provide the following:

- A brief outline of the relevant background to our review and how we conducted it (more detail about the exchanges between us and NRE during the course of the review are contained at Annex C).
- For each of the main themes contained within stakeholder responses, a summary of:
 - the content of the relevant section(s) of the Code;
 - stakeholder concerns that were raised with us; and
 - NRE's response to these concerns including changes that it has agreed to make to the Code.

4.2 Where appropriate we also provide our own views on NRE's position.

4.3 We ask consultees: (i) for their views on the changes to the Code and whether they now meet the concerns raised during our review and (ii) for views on where changes have not been agreed including views on the reasons NRE has given for this.

Background

4.4 Our review of NRE's Code started in May 2011. In conducting the review we met with NRE and invited views from all parties who had recent experience of, or an interest in, accessing or seeking access to Darwin. In particular we set out that we were interested to hear views on:

- the criteria and process for gaining access;
- the terms on which access is provided (including contractual conditions);
- the Code's appeals procedure;
- how the Code contributes to the development of a competitive market for the provision of RTTI dependent products; and

- whether there were any steps that third parties thought that we should take to facilitate access to data which is essential to the development of new services and products for consumers.

4.5 We also set out the range of possible outcomes from the review including that we reach a view that the Code is fully effective in fulfilling its objectives.

4.6 The submissions made to us raised a number of concerns about the Code and how it was being implemented. We discussed these with NRE and details of those exchanges, and what was agreed in terms of changes to the Code, are set out below in the section on key stakeholder concerns and NRE's responses.

Conduct of the review

4.7 Initially and during the period May to July 2011 we:

- sought views from NRE and third parties (inviting interest via our website and directly contacting those parties whom we were aware had a current interest in this area); and
- held meetings with NRE and a number of interested parties including prospective licencees.

4.8 We received a total of 20¹⁷ written responses, a number of whom, due to a continuing contractual relationship with NRE, asked that their identity be kept confidential. Around 40% of these responses were from public sector organisations. The other 60% were sent by private individuals and companies, ranging from interested passengers, through sole trader software developers, to large organisations.

4.9 We followed this initial phase with a meeting with NRE on 14 November 2011 followed by written exchanges¹⁸ over the period December 2011 to June 2012.

4.10 Between June 2012 and the publication of this document we have held further meetings with third party developers and also Network Rail and NRE to discuss developments in the market since the commencement of our review, such as the release of Network Rail's train running data and the emerging wider transparency agenda (see Chapter 5).

¹⁷ A number of third parties to the March 2011 consultation "Amending licences to give passengers the information they need to plan and make journeys" referred to real time information. Where relevant, we have included those responses in this review. See: <http://www.rail-reg.gov.uk/server/show/ConWebDoc.10368>

¹⁸ These exchanges are available on our website at <http://www.rail-reg.gov.uk/server/show/nav.2589>. Other exchanges, undertaken by e-mail, were concerned primarily with invitations to clarify certain points or to seek further detail.

Key stakeholder concerns and NRE's responses

Introduction and Status (sections 1 and 3 of the Code)

4.11 These two sections explain why, and how, the Code was drafted and its voluntary status. They are short and uncontroversial from a stakeholder perspective. We received no responses about either.

Purpose (section 2 of the Code)

Outline and stakeholder concerns

4.12 This section of the Code sets out the Code's purpose and also the criteria that NRE will apply to applicants.

- The Code requires that proposed uses of Darwin be of "additional benefit" to passengers (as judged by NRE). A number of third parties argued that this requirement was too arbitrary, and queried whether NRE was best placed to judge whether new services would provide additional benefits to passengers.
- The Code states that NRE might reject applications on the grounds of, "material adverse impact on TOCS (whether financially, strategically, operationally or in regards to their reputation or the reputation of the industry as a whole)...". A number of third parties commented on the lack of clarity, potential arbitrariness, and potential breadth of this rule. One third party suggested that the Code should include a commitment to work with applicants to help them refine and re-submit applications that had been rejected on these grounds.
- The Code requires that applicants should be an example of a "reputable company". Public bodies and/or those who have a statutory role in providing information queried whether the reputable company test reflected their status.

4.13 On a more general point one third party argued that, rather than reject an application outright, NRE might amend the Code to include a commitment not only to identify to the applicant those areas that raised concerns but also to suggest how these concerns might be resolved should the applicant wish to amend and resubmit its application.

NRE's views, the current position and our view

4.14 On Additional benefit, NRE told us¹⁹ that, in practice, it does not apply the additional benefit test and agreed, therefore, to remove references to this test from the Code. On this basis, we believe that concerns over this particular element of the Code have been resolved.

¹⁹ Meeting between ORR and NRE, 14 November 2011

4.15 On Material adverse impact, NRE considered that changes to this part of the Code would not be appropriate. NRE cited an instance whereby it had rejected an application that, in its view, could have led to an increase in fraudulent compensation claims.

4.16 NRE further added that it intended to amend the Code to clarify that it would look for “risk” of a material adverse impact, i.e. potential as well as current outcomes, in order to better reflect current practice.

4.17 We remain concerned that, as currently drafted, the material adverse impact test now has further reach due to the addition of the consideration of potential as well as current ‘adverse impact’ and that this could potentially lead to access being denied to applications that could bring benefits to passengers.

4.18 We are currently carrying out our own research, for example, on passenger awareness of compensation rights and the level of take up and are aware of previous research by Passenger Focus²⁰ that demonstrated that passengers’ understanding of their entitlements around compensation is low. Further, passengers believe that operators should do more to communicate entitlement to affected passengers and that passengers need the process of submitting a claim to be as straight-forward as possible. The Passenger Focus report stated that *“[a]s a longer term objective, the system would benefit from innovation that would make claims more streamlined, ideally with elements of automation”*.

4.19 We are of the view that NRE should be open to applications that facilitate access to compensation for passengers. Rather than denying access, NRE should enter into dialogue with developers to look for ways to limit the opportunities for fraudulent claims.

4.20 On reputable company - NRE has confirmed that the factors that it takes into account in assessing whether an applicant met this criterion included the applicant’s:

- history and conduct including if a potential licensee has a record of breaching NRE’s terms and conditions and/or those of other service providers;
- record of complaints and litigation; and
- financial standing.

4.21 Its subsequent revision to the Code, however, which appears to restrict consideration to a record of applicants using NRE data without permission or breaching their licence terms, is we believe now misleading. We have invited NRE to include the above factors in the Code to provide more transparency. We would also anticipate that Public Bodies would typically not fail to be able to meet the criteria.

²⁰ June 2011, Passenger Focus report on: “Train Operator Compensation Schemes – Qualitative Research” (http://www.passengerfocus.org.uk/media/03f6922a97bff32001a3b0d18c66cf59ef047ba2/compensation_report_june_2011.pdf).

4.22 We pursued with NRE the suggestion that NRE provide more help to rejected applicants on how to amend and resubmit an application. We also discussed with NRE the possibility that, in the interests of transparency, it could publish a list of applications that it had already granted and a summary of key considerations underlying its decisions with the past 12 months.

4.23 NRE argued that to provide rejected applicants with more help would represent a disproportionate effort and providing more detail about past applications could potentially raise confidentiality issues. NRE pointed out that it does provide full written explanations to unsuccessful applicants and on that basis has decided not to change the Code.

How to use the Code (section 4)

Outline and stakeholder concerns

4.24 This section of the Code sets out the procedures that apply when applicants consider that a licence decision is unfair or has not been handled within the Code. The procedure requires applicants to contact NRE's Chief Executive in the first instance. Comments from third parties suggested a lack of confidence in this appeal process. Some third parties suggested that credibility and transparency would be improved if the Code provided for the appointment of an independent party to reach a final decision.

NRE's views, the current position and our view

4.25 NRE has agreed to amend the Code to include a right of appeal to an independent arbiter as a final route of appeal against its licensing decisions. NRE proposed that, if proceeded with, the arbiter would be appointed by TISL from a panel of independent arbiters used in inter-TOC disputes by ATOC. Under NRE's proposals this arbiter:

- would act independently;
- would consider appeals that an application has been treated unfairly or was not handled within the Code;
- could apply its own decision (including against TISL); and
- could make an award of costs.

4.26 Under NRE's proposals applicants would initially need to fund their own costs of appeal subject to any award of costs by the arbiter. NRE suggested that any appeal to the independent arbiter would need to be made within 20 working days of the applicants' receipt of its final decision.

4.27 Subject to views of consultees, we believe that these changes go a long way towards addressing concerns about the impartiality of NRE's appeals process.

Commitments and guidelines (section 5 of the Code)

4.28 This section of the Code sets out NRE's commitments and guidelines around the process for applying for a licence and charging.

Outline and stakeholder concerns

Process for applying for licences (Section 5(a))

4.29 This section of the Code sets out a two-stage process for applying for a licence.

4.30 Third parties' comments included that applying for a licence is, "*cumbersome and slow*", and that the disclosure requirements for commercial parties are "*overbearing upon potential users of the data*". A number of criticisms were made of NRE's policy whereby new uses of Darwin by existing licence holders require new licences.

Charging (Section 5(b))

4.31 This section of the Code details NRE's approach to charging. The Code explains that, amongst other things, NRE's pricing involves a strong case-by-case element and that charges are set to reflect the usefulness of an application to the public.

4.32 Dissatisfaction with NRE's approach to charging was fairly common amongst third parties who provided views to our review. Third parties cited factors including NRE's unwillingness to offer volume discounts or to consider an applicant's business model when setting charges. One third party told us that "*NRE is not willing to consider any variations to its standard terms and conditions*". Other comments went to the level of the charges, arguing for example that charges were currently in excess of NRE's costs, or even that Darwin access should be provided as open data (i.e. without charge) given the level of public subsidy that underpins the railways.

Form of service (section 5(d))

4.33 This section of the Code specifies the form of service available for licence and explains that, although NRE will generally supply "*pull*" services²¹, "*push*" services²² are also available to applicants. This is subject to the condition that in NRE's reasonable opinion there are sufficient safeguards in place to ensure the security of the data; that the data is not subject to corruption or amendment; and, that the output of the application is consistent with the information provided by NRE.

²¹ A pull feed (various forms of this type of access may also be referred to as an 'enquiry feed', 'enquiry port' or 'web services'). Third parties are given direct access to Darwin through a 'port' and can interrogate it on the ATOC server, which will return responses to individual queries. The full data set is not transferred to the third party's server.

²² A push feed (also sometimes referred to as a 'push port'). ORR understands this to be the highest level of access to Darwin as it involves the full output of the database (i.e. including minute by minute updates) being provided to a third party via a constant stream of data. Further processing of the data is then conducted by the third party.

4.34 One stakeholder had expressed an interest in obtaining push services, but had not (at that time) been able to obtain a licence.

NRE's views, the current position and our view

4.35 In relation to the process for applying for licences, NRE proposed a number of changes to the Code to bring it in line with its actual practice. The changes include a shorter one-stage process for applications and an indicative timescale that it would work to. We are of the view, subject to the views of consultees, that the simplified process would appear to be positive and moving in the right direction.

4.36 NRE has also, however, revised the Code to explain that applicants will need to submit a separate application for each permitted use which, if approved, would result in a new schedule to the licence.

4.37 We do not fully understand NRE's response, to our request for clarity on the purpose of the revision²³, that new uses constitute the same amount of work as agreeing a schedule for a new licence. The revision appears to have clarified process, but does not address the fundamental concern expressed by third parties that subsequent applications should be processed in quicker time than the original.

4.38 In relation to charging, NRE has responded that it would not be appropriate for it to publish standard charges, for example because its view on an appropriate level of charges might change over time. NRE has, however, agreed to publish within the Code a list of prices for standard uses such as on mobile apps, but also wishes to retain flexibility in its charging regime where it considers it necessary "*to encourage innovative solutions*".

4.39 We remain concerned that this section of the Code is open to misinterpretation and as currently drafted creates an expectation that NRE is willing to negotiate charges on an individual basis. Our view is that more openness would help the Code to provide assurance that NRE will act fairly and on a non-discriminatory basis, and will provide access on reasonable terms.

4.40 In relation to the form of access, we understand that NRE has now negotiated commercial terms with one party for a push port, but that the terms of that agreement, including the price of access, are contractually confidential to the parties. Our view is that the terms and conditions of such access should be made more transparent – even if this is kept to very broad terms. As with charging, transparency is key to providing assurance that NRE will act fairly to all comers. Further, it provides potential applicants with a better feel for what would or would not be available given the particular circumstances in which the application is being made.

²³ NRE e-mail dated 6 December

Stakeholder questions

4.41 In this chapter we have outlined the key stakeholder concerns that have been raised, together with NRE's:

- proposals to change its Code in the light of these concerns; and
- arguments as to why some of the possible changes that had been identified would not be appropriate.

Consultation Question 1: We are looking for stakeholder comments on NRE's proposed changes to its Code and where changes have not been made, comments on NRE's reasoning.

5. State of the market – other indicators

Introduction

5.1 In this chapter we use evidence on the number of licences granted by NRE, and end-customer uses of its data, to comment on the overall health of this market²⁴. We also discuss the current position in the context of the wider open data agenda.

Our objectives

5.2 Our key underlying objective in considering the efficacy of the Code is that it supports the development of products that depend on access to RTTI.

5.3 Stakeholder comments on the effectiveness of the Code (see the previous section) can only provide a certain level of insight. Even the best-functioning markets rarely operate without an element of frustration on the part of at least some industry players.

5.4 In this chapter we therefore attempt to put the seriousness of the issues outlined in the previous chapter into context. We have focused on a small number of high-level indicators, in particular on

- the number of new licences for access to Darwin that have been issued since the publication of NRE's Code; and
- the number of end uses of Darwin.

5.5 We have not carried out a more detailed competition assessment looking at, for example, evidence on downstream market shares or profitability or detailed aspects of the functionality of new applications. A key aim of this consultation is to ask consultees to present us with any evidence that they believe would be relevant to our view of the seriousness of problems within these markets.

5.6 Having considered some of the relevant issues from a competition policy perspective we go on to compare the RTTI position with some relevant open data approaches.

²⁴ In this chapter we have in some instances used the term 'market' in the sense of the common parlance rather than formal competition law terms

Competition policy concerns

5.7 Competitive markets ensure that the economy's resources are put to their best use, by widening choice and encouraging enterprise and efficiency.

5.8 Markets that function well in competition terms tend to be characterised by certain key attributes. Relative ease of market entry (and exit) is an important example of these attributes. Another is the ability of well-informed consumers to compare the terms offered by different suppliers, choosing between the products and terms that are most advantageous to them.

5.9 The fundamental concern underlying our focus to date on RTTI has been that:

- Downstream firms, such as smartphone app developers are dependent on access to NRE's Darwin database if they want to provide RTTI-based services to passengers; and
- Upstream, NRE's approach to granting access to Darwin may have had the effect of restricting the ability of downstream firms to bring RTTI-based applications to market.

5.10 The paragraphs below consider these two points in turn.

Dependence on NRE

5.11 Paragraphs 49 to 102 of our 2009 Competition Act decision²⁵ explained our view at the time of the extent of industry dependence on NRE.

- We defined RTTI as timetable information that drew on a range of sources including both Network Rail's timetable and train movement data and further detailed information gathered from sources including individual stations and area control rooms. We concluded that, upstream, RTTI constituted a distinct economic market, in other words a product for which there was no commercially viable substitute.
- NRE was the only player in this market (the market for supplying RTTI to itself and other downstream firms). Any other firm wishing to establish its own rival database would face various entry barriers that, in our view, were prohibitively big. Key amongst these barriers was the need to reach agreements with a large number of industry players, i.e. Network Rail and all of NRE's member TOCs. Given these facts, we concluded that NRE held a dominant position in the market for the supply of RTTI.

5.12 The key relevant development in the intervening period has been the decision of Network Rail to release a number of data feeds, starting in June 2012²⁶ (see below). These feeds include train movement and location data (TRUST, TD) and information on changes to train scheduling (VSTP). These feeds

²⁵ <http://www.rail-reg.gov.uk/upload/pdf/rtti-decision-011209.pdf>

²⁶ See <http://www.networkrail.co.uk/news/2012/JUN/our-transparency-programme-launches/> for a news release and <http://www.networkrail.co.uk/data-feeds/> for details of feeds.

enable downstream firms to develop applications without gaining access to NRE's Darwin database. The relative newness of this availability and lack of products developed using it do not, however, allow us to have a view on the extent to which Network Rail's data represents a viable alternative to Darwin.

5.13 Our discussions with industry stakeholders have suggested to us that Darwin feeds provide certain advantages over using the Network Rail feeds only. In particular, Darwin gives access to live data supplied by TOCs. But the usability of the Network Rail feeds for at least some purposes has been illustrated by its use in the *Citymapper* app²⁷. Whilst NRE's Darwin database currently remains the most comprehensive, best established, source of RTTI, and the one that powers the majority of apps that are available, Network Rail's open data stance at least calls into question the extent to which NRE will retain its historical control over the downstream market for RTTI products and services.

Consultation Question 2: We are looking for stakeholder comments on the extent to which Network Rail's data feed represents a viable alternative to Darwin and the uses that these feeds can be put to.

Ability of downstream firms to bring products to market

5.14 The extent of new entry and exits provides a key indicator of how well a market is functioning. We would expect to see a reasonably well-functioning RTTI marketplace deliver good-quality downstream (i.e. customer- rather than developer-facing) uses of RTTI, with consumers freely able to choose between competing products and suppliers.

5.15 This means that, whilst not perhaps conclusive in itself, the number of downstream uses of RTTI is an important indicator of both the effectiveness of the Code and, more generally, of the extent to which RTTI is able to play a role in improving the passenger experience.

5.16 According to information provided to us by NRE²⁸, the number of issued Darwin licences²⁹ stood at around 14 in July 2009, 36 (i.e. an increase of 22 from the previous year's figure) in July 2010, 74 (an increase of 42) in July 2011, and 148 in October 2012³⁰. As of July 2011, around one quarter of the total number of issued licences were held by companies who held more than one licence. As of July 2011 around one third of all issued licences related to mobile applications. The overall picture provided by this limited evidence appears to be one of a reasonable pace of growth in the total number of licences issued.

²⁷ See <http://citymapper.com/>.

²⁸ Email from NRE to ORR, 20 July 2011

²⁹ Licences for all downstream uses – see Chapter 3 for important examples of these

³⁰ *ATOC's submission to the ORR consultation on transparency*

5.17 RTTI-powered smartphone apps have been a particular issue for the third parties who have engaged with us during this review and in the past. They were also the focus of Kizoom’s complaint in our 2009 investigation. Such apps represent a significant growth area, and are relatively easy for developers to charge for through marketplaces such as Apple’s App Store.

5.18 In the UK the two leading (measured by sales) mobile platforms are Apple’s iOS and Google’s Android. Figure 1 and Figure 2 below show, based on research that we carried out in September 2012, the emergence of new Darwin-powered smartphone apps in GB.

Figure 1 – Number of Darwin-powered smartphone apps available for download (iOS)

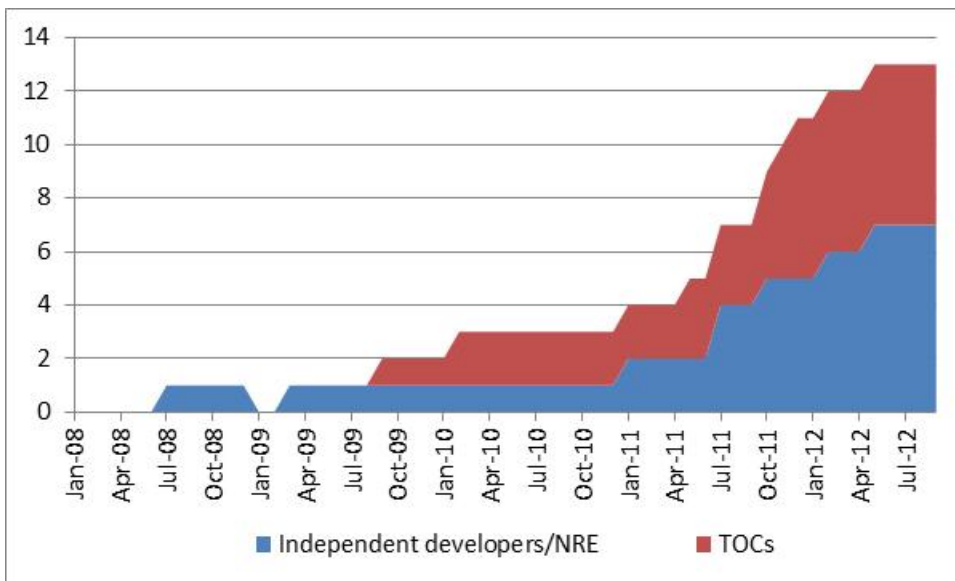
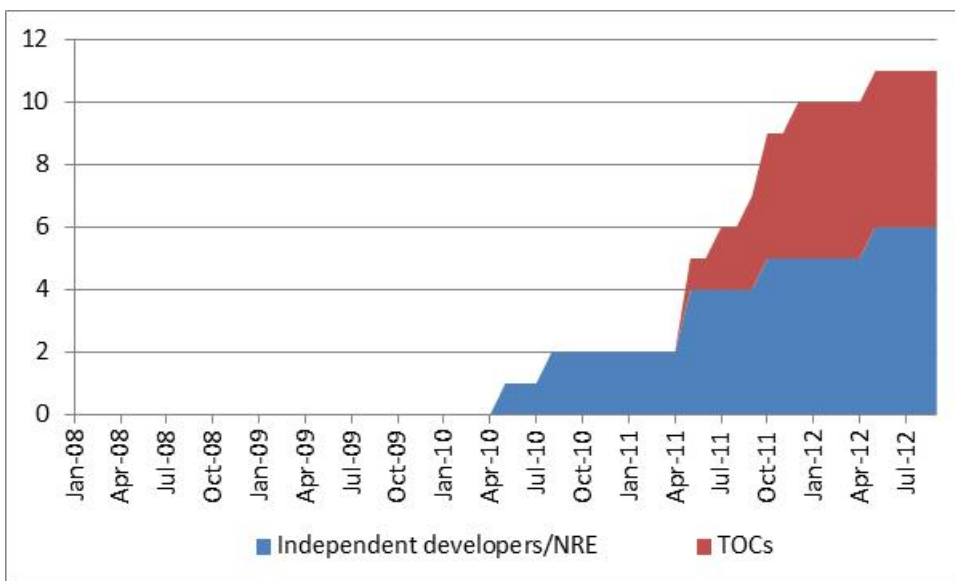


Figure 2 - Number of Darwin-powered smartphone apps available for download (Android)



5.19 These figures show that as of September 2012 both iOS and Android users were able to choose from at least ten Darwin-powered smartphone apps. Almost all of these apps have been released within the past

two years, i.e. after the introduction of the Code. These apps have broadly similar basic functionality, focusing on live departure boards and journey planners. A smaller number of apps were available on other platforms such as Blackberry and Windows Phone 7³¹.

5.20 In the case of Apple's iOS, as of September 2012 we found, via Apple's App store, six distinct third party branded apps (priced at between £2.50 and £5 per download), an NRE-branded app, and six TOC branded apps. None of the NRE or TOC-branded apps required a per download fee.

5.21 In the case of the Android platform, we found, with pricing similar to the iOS apps, five third party branded, an NRE branded app, and a further five TOC-branded apps.

5.22 We are not aware of any factors that make it unusually difficult for passengers to make comparisons between, or choose freely from these selections of apps. All can be found relatively easily within the Apple and Android online stores. Comments and ratings from users who have already downloaded the apps are clearly visible.

5.23 A further factor to consider is that, as outlined above, there has, as of November 2012, been at least one release of an app offering access to a form of real time train information that does not rely on access to Darwin. The release of the Network Rail feeds is too recent an event for us to properly gauge the materiality of these developments, but overall its impact seems to us to be likely to be positive.

5.24 In summary, it appears to us that passengers are currently able to choose from a reasonably wide selection of RTTI-based apps. Ten or more suppliers seems, in our view, to be a relatively large number and indicative of a market structure likely to contribute to effective competition.

Consultation Question 3: We are interested to hear consultees' views on the evidence that we present in Chapter 5 on the number of new licences and apps., and on any reasons why they consider this growth might overstate the health of this market. In particular we welcome stakeholder views on:

- (a) The medium-term sustainability (to the extent that this is possible to predict in a fast-moving technology market) of the relatively large number of apps that are currently on the market, including on the feasibility of paid and ad-funded or free-to-download apps coexisting; and
- (b) The likelihood of a significantly better range of applications and functionality being made available under a more open data standard.

Open data approaches

5.25 In the sections above we have considered how this market looks from a competition policy perspective. We are aware, however, of a two examples of 'open data' approaches that differ from that

³¹ For third party (rather than TOC-) branded examples, see http://www.nationalrail.co.uk/times_fares/info_on_the_move/apps/index_custom.html

adopted by NRE and ATOC. These examples bear similar characteristics to NRE in that the supplier receives revenue from both tax- and fare payers, and is supplying data on rail-based services. Such examples demonstrate what an open data policy might look like if adopted by NRE.

5.26 The Open Knowledge Foundation has defined ‘open data’ as follows: “A piece of content or data is open if anyone is free to use, reuse, and redistribute it — subject only, at most, to the requirement to attribute and/or share-alike”. Under a partly or fully open data approach, RTTI would be freely available, subject to certain conditions that would probably not include consideration of the financial impact on ATOC/NRE. NRE’s licensing approach is not consistent with this standard.

Example – Network Rail

5.27 As explained above, in June 2012 Network Rail demonstrated its commitment to greater transparency with a new information portal containing a broad range of information about its finances and also real time train movement data. This was provided in a raw format on a without charge basis.

Network Rail’s Chief Executive, Sir David Higgins said:

“I believe in transparency. It helps improve decision making and can drive culture change in an organisation. Given the amount of money that taxpayers put into the rail industry, it is only correct they are given the right to scrutinise what their money is paying for. I believe Network Rail has to take the lead in opening up the industry to new levels of transparency and I hope others will soon follow that lead.”

5.28 The data has not been available over a sufficient enough period for a marked number of applications to have been developed and brought to market, but there has been significant interest by third party developers in its potential use. The usability of the Network Rail feeds for at least some purposes has been illustrated by its use in the Citymapper app³² and opentraintimes.com.

Example - Transport for London

5.29 (TfL) has also demonstrated its commitment to being transparent with its data – again, providing it on a without charge basis. TfL believes it is vital that data is shared openly and freely so that the market can build travel information products that customers can use in the way that they want.

5.30 As of July 2012, TfL had 27 datasets open and freely available and considers that there are big benefits to it and to its customers. Interest in the data is significant. Again as of July 2012 there were 30,900 feeds taken by 3,768 registered users (developers) and TfL’s approach has already facilitated the availability of high-tech information products by third party developers.

³² See <http://citymapper.com/>.

Speed to market is a further benefit. TfL has told us:

“developers bring products to the market much quicker than we can. For example, when on-line information became available for Barclays Cycle Hire availability, two different apps for the iPhone were developed within days. The speed to market was amazing. Making data openly available can help further stimulate that innovation and providing a proper API for developers to use makes it all more reliable and manageable, both for them and for us.”

5.31 Also, in preparation for the Olympics, TfL made critical data sets available on the same basis for use by the transport and travel information industry. This included information on temporary road closures, Games road event routes, last mile routes to venues, and station waiting times.

TfL’s Director of Games Transport Mark Evers said:

“TfL’s open data policy means that our regular live travel information feeds are already available online, leading to the development of some fantastic apps to help Londoners move around. Making this hotspot data freely accessible to developers will ensure that this information is widely available to customers in the form that best suits them”.

5.32 In summary, TfL sees the main benefit of making its data available on an open and free basis as extending the reach of its travel information far wider than TfL could do on its own, so that customers can make better use of its core products.

Open data – ATOC’s view of its approach

5.33 ATOC has expressed the view³³ that, “*Britain probably has the most open data access regime for rail in Europe and quite possibly the developed world.*” ATOC argues that, through NRE, it has played a key role in delivering this. In particular it points to:

- A licensing scheme which “seeks, among other things, to attract entrepreneurs and stimulate the market in real time information.”
- The number of licences that NRE has issued (see above); and
- NRE’s charging policy – which ATOC argued is cost reflective and structured so as to “encourage micro developers”, including through the way that “*developers are charged nothing until they sell their first smartphone app and start making money.*”

Consultation Question 4: We ask consultees for views on whether an open data approach, if adopted, would lead to change in the market for RTTI products and services and if so: (a) what this change might look like; and (b) whether it would be desirable.

³³ ATOC response dated 24 October 2012 to ORR’s consultation on transparency, July 2012

6. Summary of the issues and options for next steps

Introduction

6.1 In this chapter we summarise the issues identified in the previous two chapters, and explain the high-level options available to us going forward.

Summary of previous chapters and options for next steps

6.2 In Chapter 3 we summarised a number of concerns about NRE's treatment of licence applications and the wording of the Code. We outlined the revisions that NRE has agreed to make to the Code which it told us reflects current practice. Where appropriate, we set out our views on whether we think those revisions are sufficient to meet stakeholder concerns. In the light of the above, we ask consultees for their views including views on the reasons that NRE gives where it proposes no changes to the Code.

6.3 In Chapter 4 we presented evidence on the number of licences granted by NRE and the number of end customer uses of its data, which together appear to us to paint an overall picture of a reasonable pace of growth. We ask for stakeholder views on this tentative finding. We also ask, having described the benefits of an open data approach in other parts of the industry and the transport sector more generally, whether this would be a more appropriate model for NRE to adopt.

6.4 Our objective is to shed light on:

- The extent to which the Code as revised will now meet its objectives of:
 - introducing transparency into an area where there is significant market power in the hands of one party and, therefore, a responsibility on that party to demonstrate that it has processes in place not to abuse that position; and
 - setting out a behavioural framework against which future conduct could be assessed.
- Whether this is a market now functioning well by reference to the number of applications now available and by reference to alternative approaches to open data adopted by comparable sources of rail data.

6.5 These questions will help us to consider which of the following options offers the most appropriate way forward:

- We withdraw from scrutiny of this market because there is not sufficient evidence to suggest that it is operating other than healthily;
- We continue to monitor the health of the market in line with market developments (including how the market responds to the release of Network Rail data) and continue to influence openness via our transparency agenda; or
- We take action under the various powers available to us to include a possible reference to the Competition Commission as a Market Investigation Reference. (Annex D sets out in more detail the various regulatory and competition tools available to us).

ANNEX A – The current Code of Practice

NATIONAL RAIL ENQUIRIES - REAL TIME SYSTEMS CODE OF PRACTICE

1. Introduction

National Rail Enquiries (NRE) has developed a number of systems to provide real time information to passengers travelling by rail in the UK.

NRE is keen to ensure that access to these systems is open to third parties who want to invest in the industry, inject new ideas and innovate with a view to expanding the range of applications available to passengers. This voluntary Code of Practice, drawn up with help from ORR, sets out the process for accessing those systems and the criteria on which access is granted.

The systems NRE provide include live departure and arrival information and real time journey planning as well as alerting services and disruption information.

2. Purpose

Publication of this Code is designed to bring more transparency to the licensing process and help developers understand the application process and enable them to work with NRE to improve and enhance the products and services available to passengers. NRE will consider applications from all parties for access to these systems on a fair and non-discriminatory basis, and will provide access on reasonable terms with a view to enabling new products and services to enter the market. In order to achieve this, certain criteria need to be met to enable access to be granted. These criteria are:

- Whether the proposed use is of additional benefit to passengers. Applications which in NRE's reasonable opinion are of demonstrable benefit to passengers will be granted unless outweighed by a material adverse impact on TOCs (whether financially, strategically, operationally or in regards to their reputation or the reputation of the industry as a whole).
- Whether the applicant is a reputable company. This criterion may include the applicant's previous track record of past developments, and will also include any previous dealings with NRE. Applicants who use NRE data without permission or breach their licence terms may be disqualified for consideration for a licence.

In the event that an application is refused NRE will provide the applicant with a written explanation and full details of the reasons for the refusal.

3. Status of the Code

This Code has been written by NRE on a voluntary basis, but in conjunction with the ORR, to provide clarity to potential licensees of Darwin data following on from the ORR's 17th November 2009 decision, available at: <http://www.rail->

reg.gov.uk/upload/pdf/rtti-decision-011209.pdf. The Code develops and consolidates the existing processes that NRE has used for assessing potential licensees.

4. How to use the Code

If you feel a licence decision has been unfair or has not been handled within this code you should contact in the first instance Chris Scoggins, Chief Executive, National Rail Enquiries, 3rd Floor, 40 Bernard Street, London WC1N 1BY. All concerns will be dealt with by the Chief Executive in a fair and impartial way within reasonable timescales. His decision with full reasons will be provided to you in writing.

If, following receipt of this decision, you still feel that your application has been treated unfairly or has not been handled within this code; you can apply, setting out why you believe your application was not handled in line with this code, for your complaint to be escalated to the Board of NRE.

5. Commitments and guidelines

The process of awarding a Darwin licence is in two stages. First there is the initial assessment of the proposed application and licensee, followed by a second stage where the details of the application and scope will be discussed and agreed. By way of guidance, the data is usually provided by way of Web Service XML feeds. NRE will provide details of the current interface specifications and messaging structures on request in order to assist in the development of an application.

NRE does not provide service levels in respect of its data provision, since it is obtained from sources external to NRE. However, NRE does commit to treating all licensees without discrimination regarding service levels. Doc # 371368.01

a) Process for applying for a real time train information systems Licence.

Applications need to be made in writing either by E-Mail to NRELICENSING@ATOC.ORG or by letter to Data Licensing, National Rail Enquiries, 3rd Floor, 40 Bernard Street, London WC1N 1BY.

Any application needs to include the following:

- Details of the proposed use including the commercial model (charging mechanism, funding etc.), projected volumes, services to be offered, support arrangements, how the service will be presented to the customer, the platform it will be offered on and any other relevant details. NRE only require the information necessary to assess the request but it is important to note that the more detail supplied at this stage the quicker the application process will be.
- Details of the applicant; where the applicant is a limited company or trading entity, then the information we would expect to see would include its last year`s accounts, in addition or where the applicant is an individual or non trading entity, we would like to receive details of any previous successful development, relevant qualifications or experience and references.

This application will be reviewed against the approval criteria and NRE will respond within 21 working days. In some circumstances this response may be a request for further information, so it is in the applicant`s interests to ensure that as much information as possible is included in the original application.

If the applicant satisfies the first stage, NRE will then enter into the second stage, involving detailed discussions on the proposal covering scope, presentation of the

data, charges, accreditation etc. It is not possible for NRE to commit to a definite timescale for this stage, as it is dependent on the complexity of the proposal, and the availability of NRE technical staff and the timely response of the applicant to requests for information. However, NRE will give an indication of time scales based on its experience and will liaise with the applicant with a view to agreeing the same. To date these timescales have been typically between 1 and 3 months. NRE will, in any event, use all its reasonable endeavours to ensure the process is completed as quickly as possible.

If the application is approved then the applicant will need to sign a licence for the NRE services prior to using the data.

Applicants will need to submit a separate application for each permitted use.

b) Charges

NRE adopt a case by case approach to charging for access to their systems. This approach is designed to encourage innovation and allow smaller developers to enter the market. It is also designed to encourage promotion of rail travel.

Charges will be set reflecting the usefulness of the application to the public, level of innovation, costs and returns arising to the applicant from the application, timescales for development, impact on NRE and impact on TOCs. The charges will also reflect the lifetime cost of the application to NRE.

NRE is willing to adopt a flexible approach to charging for the grant of a licence, to be agreed with the applicant during the second stage of the application. Such licence charges could include for example, a fixed annual fee, fee per transaction, a share of revenue and will be designed to fit with the charging model of the licensee and the costs incurred by NRE.

c) Technical assistance

Subject to availability, NRE may be able to assist applicants with their application, subject to NRE's entitlement to charge for such assistance at an agreed daily rate.

NRE are under no obligation to supply this assistance but will use its reasonable endeavours to provide what it can.

d) Form of service

NRE will generally supply "pull" services, i.e. where queries are made to the NRE systems and the response is sent back for the developer to present to customers. This allows for consistent calculation of results and maintains the security of the data.

"Push" services are available to applicants, i.e. where the data is sent to a developer for them to interpret and present to the customer. This type of service will be allowed provided, in NRE's reasonable opinion, there are sufficient safeguards in place, first, to ensure security of the data, in particular that it does not become available to unlicensed third parties, secondly, to ensure the data is not subject to corruption or amendment and, finally, that output of the application is consistent with the information provided by NRE. If such concerns are met, NRE will not unreasonably refuse access.

ANNEX B – Revised Code of Practice

REVISED NATIONAL RAIL ENQUIRIES - REAL TIME SYSTEMS CODE OF PRACTICE

Introduction

Train Information Services Limited, which owns and operates National Rail Enquiries (NRE) services, has developed systems to provide real time information to passengers travelling by rail in the UK.

NRE is keen to ensure that access to these systems is open to third parties who want to invest in the industry, inject new ideas and innovate with a view to expanding the range of applications available to passengers. This draft voluntary Code of Practice, agreed with the ORR, sets out the process for accessing those systems and the criteria on which access is granted.

The systems NRE provide include live departure and arrival information.

Status of this Code

This Code has been written by NRE on a voluntary basis, but in conjunction with the ORR, to provide clarity to potential licensees of Darwin services following on from the ORR's 17th November 2009 decision, available at: <http://www.rail-reg.gov.uk/upload/pdf/rtti-decision-011209.pdf>. The Code develops and consolidates the existing processes that NRE has used for assessing potential licensees. The Code has been amended on a voluntary basis by NRE to its current form to reflect the operation of the Code during its first two years of operation.

Purpose of this Code

Publication of this Code is designed to bring more transparency to the licensing process and help developers understand the application process and charging structure applicable to the grant of licences for real time services. NRE will consider applications from all parties for access to these systems, on a fair and non-discriminatory basis, and will provide access on reasonable terms with a view to enabling new products and services to enter the market. In order to achieve this, certain criteria need to be met to enable access to be granted. These criteria are:

- The application or proposed service does not risk a material adverse impact on TOCs, whether financially, strategically, operationally or in regards to their reputation or the reputation of the industry as a whole.

- The applicant is a reputable company or person. Applicants who use NRE services or data without permission or breach their licence terms may either be disqualified for consideration for a licence or have the same withdrawn.

NRE have so far issued over 100 licences to 3rd parties for use of real time services for various uses including websites, mobile apps and public display screens.

Process

The process of awarding a licence requires the applicant to be able to detail what services it requires and the intended use of the services. This process can be an iterative one to ensure the best service is offered.

By way of guidance, the services available are listed in the Appendix with links to the technical documentation. NRE does not provide service levels in respect of its service provision, since some of the data that feeds into the service is obtained without warranty from sources external to NRE. However, NRE does commit to treating all 3rd party licensees without discrimination regarding service levels.

a) Process for applying for a licence for real time services.

Applications need to be made in writing either by E-Mail to NRELICENSING@ATOC.ORG or by letter to NRE Licensing National Rail Enquiries, 3rd Floor, 40 Bernard Street, London WC1N 1BY.

All applications need to include the following:

- Details of the proposed use, the services to be offered by the applicant, the platform on which the services will be offered and any other relevant details. NRE only require the information necessary to assess the request but it is important to note that the more detail supplied at this stage the quicker the application process will be.

This application will be reviewed and NRE will respond initially within 21 working days. In some circumstances this response may be a request for further information, so it is in the applicant's interests to ensure that as much information as possible is included in the original application. NRE anticipates that licence applications for the standard types of usage can be completed in four weeks from the date of receipt of all relevant information

If the application is approved then the applicant will need to sign a licence for the NRE services prior to receiving access to the service.

Applicants will need to submit a separate application for each permitted use which, if approved, will result in a new schedule to the licence.

b) Charges

The grant and maintenance of a licence is subject to payment of NRE's licence fees.

Such fees will be agreed with the applicant during the course of the application but such charging arrangements must be within the constraints of equal treatment for licensees and taking into account the cost of providing the service.

There are a number of established usages of the services that have typical charging arrangements. Certain uses, such as display of Live Departure/Arrivals on websites, may not incur a licence fee. However the use of real time services in mobile apps ranges from £1.00 to £1.50 per app downloaded.

NRE is willing to adopt a flexible approach to charging for innovative types of use of the services.

c) Technical assistance

Subject to availability, NRE may be able to assist applicants with their application, subject to NRE's entitlement to charge for such assistance at an agreed daily rate.

NRE are under no obligation to supply this assistance but will use its reasonable endeavours to provide what it can.

d) Form of service

NRE will generally supply "pull" services, i.e. where queries are made to the NRE systems and the response is sent back for the developer to present to customers. This allows for consistent calculation of results and maintains the security of the service.

The provision of "push" services can be granted to applicants, i.e. where the service sends processed information to a developer for them to interpret and present to the customer. This type of service will be available if, in NRE's reasonable opinion, there are sufficient safeguards in place, first, to ensure security of the service, in particular that it does not become available to unlicensed third parties, secondly, to ensure the service is not subject to corruption or amendment and, finally, that output of the application is consistent with the information provided by NRE.

Appeals Process

In the event that an application is refused, NRE will provide the applicant with a written explanation including full details of the reasons for the refusal.

If you feel a licence decision has been unfair or has not been handled in accordance with this Code, in the first instance you should contact Mr. Chris Scoggins, Chief Executive, Train Information Services Limited, 3rd Floor, 40 Bernard Street, London WC1N 1BY. All concerns will be dealt with by the Chief Executive in a fair and impartial way and within reasonable timescales. His decision with full reasons will be provided to you in writing.

If, following receipt of this decision, you still feel that your application has been treated unfairly or has not been handled within this Code; you can apply, setting out why you believe your application was not handled in line with this code, for your complaint to be escalated to the Board of Train Information Services Limited for review.

In the event that, following receipt of a decision on appeal from the NRE Board, an applicant still considers that his application has been treated unfairly or not handled in accordance with the Code, he may request a further, final review of the evidence placed before the Board by an independent arbitrator selected from a panel of arbitrators maintained to adjudicate disputes in or about the rail industry.

The applicant must complete, sign and submit such a request to the Chief Executive of NRE within twenty working days following receipt of the Board's decision. The submission must include full details of the grounds of the appeal and can only relate to unfair treatment or failure to handle the application in accordance with the Code, as above.

The applicant shall bear his own costs of the review including those of the arbitrator (which the arbitrator may require to be paid in advance) unless the arbitrator, following his review, makes an order that, in the circumstances of the case, his costs or any part thereof should be paid by NRE.

Annex C – More detail about stakeholder responses & our dialogue with NRE

Introduction

1. This Annex summarises stakeholder comments on the Code and the subsequent exchanges that held with NRE. These exchanges are typically cited by reference to the date of the following letters:
 - ORR letter of 1 December 2011;
 - NRE response of 16 December 2011;
 - NRE letter of 6 January 2012;
 - ORR letter of 6 February 2012;
 - NRE response of 20 March 2012;
 - ORR letter of 10 May 2012; and
 - NRE letter of 28 June 2012.
2. The key sections in this Annex are:
 - *Outline of the Code and stakeholder responses*; and
 - *Our discussions of stakeholder views with NRE*.

Outline of the Code and stakeholder responses

Sections 1 and 3 – Introduction and Status of the Code

3. These two sections explain why, and how, the Code was drafted and its voluntary status. They are short and uncontroversial from a stakeholder perspective. We received no responses about either.

Section 2 – Purpose

4. This section of the Code sets out its purpose and also the criteria that NRE will apply to applicants. Key criteria include the following.
 - The Code requires that proposed uses of Darwin be of “*additional benefit*” to passengers.

- The Code states that NRE might reject applications on the grounds of “material adverse impact on TOCS (whether financially, strategically, operationally or in regards to their reputation or the reputation of the industry as a whole)...”.
 - The Code requires that applicants should be an example of a “*reputable company*”.
 - The Code states that, “Applicants who use NRE data without permission or breach their licence terms may be disqualified for consideration for a licence”.
5. Third parties raised particular concerns about criteria (i) to (iii). We consider each of these areas of concern below.

‘Additional benefit’

6. One third party raised concerns that NRE may not be best placed to determine whether a proposed use is of additional benefit to passengers. The third party further commented that the wording of the Code suggests that ‘overlapping’ benefits might be excluded, whereas in practice the introduction of similar products could bring benefits and could foster the development of better services. A second third party argued that the test was the test was “*arbitrary and unfair*” and that NRE’s approach could prevent market entry on purely subjective measures.

‘Material adverse impact’

7. One third party was unclear what the phrase (“*material adverse impact*”) meant and how it was applied in practice. Moreover, it considered the cited categories of adverse impact to be so broad as to suggest that NRE will block applications even where they arguably offer legitimate benefits to consumers. A second third party commented that the wording appeared to allow NRE to refuse to grant a licence application on arbitrary grounds.
8. One third party also suggested that rather than reject an application outright, NRE might amend the Code to include a commitment not only to identify to the applicant those areas which raised concerns but also to suggest how these concerns might be resolved should the applicant wish to amend and resubmit its application.

“Reputable company”

9. One third party stated that it has a statutory role in providing passenger transport information and thought the Code ought to recognise this. In similar vein a second third party queried how the “*reputable company*” criterion was applied as regards public bodies and requested clarification as to whether public bodies are automatically deemed to be reputable without the need for further evidence or investigation.

Section 4 - How to use the Code

10. Section 4 sets out the procedure which applies in cases where applicants consider that a licence decision is unfair or has not been handled within the Code. The procedure requires applicants to contact NRE's Chief Executive in the first instance:
11. Comments from third parties suggested little confidence in the appeal process. Some third parties suggested that credibility and transparency would be improved if the Code provided for the appointment of an independent third party to reach a final decision.

Section 5 - Commitments and guidelines

Part (a) Process for applying for licence

12. This section of the Code sets out a two stage process when applying for a licence: first an initial assessment of the proposed application and licence and second, a more detailed discussion about the details of the application and its scope. The Code sets out full details of the information required by NRE of each applicant both in terms of the proposed use of the data and the applicant itself.
13. Third parties expressed the view that the process is "*cumbersome and slow*", and that the disclosure requirements for commercial parties are "*overbearing upon potential users of the data*". Moreover, one third party raised concerns that NRE currently requires a new application to be made for each individual use of the data which makes the application process unnecessarily lengthy.
14. Another third party suggested NRE consider whether existing licences could be varied to accommodate new uses, rather than applicants having to apply for a new licence each time. A further suggestion was that parties meeting strict licensing criteria could be granted licences allowing universal use to avoid the need for multiple applications.
15. A third party who intended to contract out its development of RTTI services noted that NRE required its contractor to sign a non-disclosure agreement which included a bar on disclosure of the cost of the data. This was said to have acted as a barrier and impeded discussions between the third party and its contractor regarding what fee might be appropriate.

Part (b) charging

16. This section of the Code deals with NRE's approach to charging. It states that NRE will adopt a case by case approach and that charges will be set to reflect (amongst other things) the usefulness of an application to the public. The Code specifies that licence charges could include for example, a fixed annual fee, fee per transaction, or a share of revenue. All of these factors are specified as being with the intention of encouraging innovation.
17. Third parties raised a number of concerns about NRE's approach to charging, for example, the failure to offer volume discounts or to consider an applicant's business model when setting charges. One third party complained that "*NRE is not willing to consider any variations to its standard terms and conditions*".

18. Other comments went to the level of the charge. For example, one third party considered that the charges appeared too high relative to the cost of NRE providing the access.
19. Other third parties thought that Darwin access should be provided without charge to all users or, in the case of public bodies, free access should be granted when providing information to the public. One third party specifically noted that although Darwin has been developed by NRE, a considerable amount of public subsidy is paid to Network Rail and the TOCs. Consequently, the third party suggested that Darwin should be made as accessible as possible for the benefit of the travelling public.
20. A number of other third parties have referred to the open government licence as a model which could be adopted for the distribution of Darwin data.

Part (c) Technical assistance

21. No comments were received in relation to this part of the Code.

Part (d) Form of service

22. Part (d) specifies the form of service available for licence and explains that, although NRE will generally supply “pull” services, “push” services are also available to applicants. This is subject to the condition that in NRE’s reasonable opinion there are sufficient safeguards in place to ensure the security of the data; that the data is not subject to corruption or amendment; and, that the output of the application is consistent with the information provided by NRE.
23. One third party had expressed an interest in obtaining push services, but had not (at that time) been able to obtain a licence. We understand that NRE has subsequently negotiated commercial terms with one party for a push port, but that the terms of that agreement, including the price of access, are contractually confidential to the parties.

Our discussions of stakeholder views with NRE

24. NRE considers that the Code has been a success, and in its letter dated 16 December 2011 notes that 100 licences have been issued with only three applications having been rejected³⁴. It considered that the success of the Code should be measured by “its substance” rather than by what it described as a small number of negative comments from what it believed to be a minority of third parties.
25. NRE also, however, recognised that in places the Code is not clear or does not reflect current practice. It undertook to amend the Code to reflect current practice and address the concerns raised through our review.
26. We discussed, subject to the confidentiality of individual responses, the concerns that had been raised through our review with representatives of NRE between December 2011 and June 2012³⁵. In the

³⁴ ATOC’s submission dated 24 October, 2012 in response to the ORR consultation on transparency, July 2012 refers now to the issue of 150 third party licences

³⁵ Supra footnote 18

following paragraphs we provide the detail of those discussions and identify where those discussions led to changes to the Code. We group our explanations of those discussions thematically by reference to: the criteria for access; the appeals process; the process for applying for access; and charging.

Criteria for access (see Section 2 – purpose)

Additional benefit test

27. NRE has confirmed³⁶ that, in practice, it does not apply the additional benefit test and has agreed, therefore, to remove this test from the Code. On this basis, we believe that concerns over this particular element of the Code have been resolved.

Material adverse impact

28. In relation to the concerns around material adverse impact NRE explained that it considered it necessary to be able to reject applications where these could potentially have a negative impact on TOCs. NRE also pointed out that the Code provides that in the event that an application is refused NRE will provide the applicant with a written explanation and full details of the reasons for the refusal.

29. NRE provided us with an example of an application that had been considered under this policy. The original application had been rejected, and appealed via the existing mechanism set out in the Code. The application was for a proposed service that would provide subscribed users an alert (via their mobile phone), based on their declared travel patterns, to notify them of delays or cancellations. The service would then assist subscribers (passengers) in dealing with train operator's compensation processes. The appeal was denied on the basis that: (i) it would increase the risk of fraudulent claims; and, (ii) it did not in itself represent an enhanced product or service available to passengers. The NRE Board's decision noted³⁷ in this regard that an established compensation service was already available (as provided by train operators).

30. NRE did, however, suggest that the Code be amended to state that it will look for the "risk" of a material adverse impact. We asked for more clarity³⁷ on how this would address the concerns that had been raised with us and expressed the view that this change could actually be interpreted as being more restrictive than the current approach. In response, NRE confirmed that the addition of the word "risk" simply reflected actual practice as the consideration is intended to capture potential as well as current impact.

Reputable company

31. We asked³⁸ NRE to explain what factors it takes into consideration in deciding whether a company meets the reputable company requirement (for example, the grounds on which a company would be denied access; and what harm NRE sought to address by retaining this requirement). NRE has

³⁶ Meeting between ORR and NRE, 14 November 2011

³⁷ ORR letter to ATOC, 6 February 2012

³⁸ ORR letter to ATOC, 6 February 2012

confirmed that the factors that it takes into account in assessing whether an applicant met this criterion include the applicant's:

- history and conduct including if a potential licensee has a record of breaching NRE's terms and conditions and/or those of other service providers;
- record of complaints and litigation; and
- financial standing.

32. A subsequent revision to the Code appeared to restrict consideration to a record of applicants using NRE data without permission or breaching their licence terms. A later explanation by NRE, however³⁹, has confirmed that in spite of this revision the previous factors still form part of its consideration. We have asked NRE⁴⁰ to increase transparency by including those factors on the face of the Code.

Other access criteria issues

33. In response to the stakeholder suggestion that, rather than reject an application outright, NRE might amend the Code to include a commitment not only to identify to the applicant those areas which raised concerns but also to suggest how these concerns might be resolved should the applicant wish to amend and resubmit its application, NRE stated that it did not believe that any applicant would need such support or that it would necessarily be able to provide it.

34. It considered that to provide this type of assistance would represent it acting as a consultant, "*effectively assisting an individual private enterprise in a way that was not available to other (successful) applicants*". On those grounds NRE thought that this was not an appropriate change to make to the Code. It noted that in any case the Code requires NRE to provide a full written explanation on the reasons for a rejection and believes that this will allow subsequent applications to be more closely aligned to the acceptance criteria.

35. We also suggested⁴¹ to NRE that in order to increase transparency and public confidence it would be helpful if it would publish on its website alongside the Code a list of the types of applications which it had already granted. We considered that this would assist potential applicants in understanding whether their proposition was likely to be acceptable.

36. In similar vein, and in relation to a discussion on the appeals process (see below), we asked NRE⁴² to consider publishing (along with the Code) a summary of the key considerations around each of the applications accepted or rejected over the past 12 months with the objective of providing third parties

³⁹ NRE e-mail of 6 December 2012

⁴⁰ ORR e-mail of 6 December 2012

⁴¹ ORR letter to ATOC, 1 December 2011

⁴² ORR letter dated 10 May 2012

with more insight into what makes a successful application. We considered that this information would not only substantially deliver more transparency around NRE's processes but would also ease the process for future applications.

37. NRE considered that publishing information on the applications it receives could breach its confidentiality obligations, and could also be prejudicial to the commercial interests of licensed users of Darwin. In addition, NRE considered that this would be an additional administrative burden and in itself would not be beneficial due to the low number of applications that are rejected.

The appeals process (Section 4 – How to use the Code)

38. In response to a question from us, NRE has confirmed that an applicant may appeal a decision on the grounds of both substance and procedure i.e (a) they feel that a licence decision has been unfair; and/or (b) it has not been handled in accordance with the Code.

39. We expressed concern⁴³ that the appeals process provided by the Code is not impartial and that this serves to undermine its credibility.

40. NRE considered that there was little evidence to support this view⁴⁴. It explained that it had (at that time) granted over 100 licences and had received only three appeals. NRE confirmed that in each case the processes outlined in the Code had been followed i.e. appellants had been provided with full reasons in writing (although in the example that we were shown, this followed prompting by the applicant). NRE considered that the outcome of these appeals would not have changed even with the benefit of an independent view but also acknowledged that third parties might not consider the process to be sufficiently impartial.

41. One option that we suggested to NRE was that it appoint an independent lawyer to make a final decision having allowed both parties to make suitable representations on the issues. NRE noted that any independent person would need to have a thorough understanding of the industry and how industry processes work in order for it to feel comfortable in being bound by the outcome of that assessment.

42. NRE, as an alternative, agreed an amendment to the Code to include a right of appeal to an independent arbiter as a final route of appeal against its licensing decisions. NRE has explained to us that, if proceeded with, the arbiter would:

- be appointed by Train Information Service Limited ('TISL') from a panel of independent arbiters used in inter-TOC disputes by ATOC;
- act independently;
- consider appeals that an application has been treated unfairly or was not handled within the Code;
- could apply its own decision (including against TISL); and

⁴³ Supra footnote 42

⁴⁴ NRE letter to ORR, 16 December 2011

- could make an award of costs.

43. However, an applicant would initially need to fund his own costs of appeal subject to any award of costs by the arbiter.
44. NRE initially suggested that any appeal to the independent arbiter would need to be made within 10 days of the applicants' receipt of its final decision. We considered that 10 days was unnecessarily restrictive and might not provide applicants sufficient time to decide whether to appeal and to prepare their case. We asked NRE to provide the reasoning behind this 10 day limit including any precedent they it was applying. NRE responded by agreeing to extend the timescale for an appeal to 20 working days.
45. NRE also re-affirmed its commitment, in the event that an application is rejected, to provide the applicant with a written explanation including full details for the reason for the refusal.

The process for applying for licences (section 5(c) of the Code)

46. We asked NRE to address concerns around the process, in particular that it appeared, to third parties, to be unduly complicated. We considered that this could deter potential applicants.
47. NRE explained that, in practice, it does not require applicants to produce the level of detail envisaged by the Code. For example, it does not require limited companies to provide copies of their most recent accounts. We emphasised that we were keen to ensure that the Code reflects NRE's current practice, particularly where that is less onerous than suggested by the Code, so that applicants are not unnecessarily deterred. NRE agreed to update the Code.
48. NRE also confirmed that it does not require contractors working for a third party to sign a non-disclosure agreement, as had been said to us during this review (see above).
49. We also asked NRE whether the typical timescales set out in the Code are up to date. It responded that it was able to deal with standard licence applications in six to eight weeks i.e. a considerably shorter time period than the one to three months envisaged by the Code. However, for more complex applications, the process could take longer. We asked NRE to consider providing indicative timescales on its website using worked examples to demonstrate how the process might vary for a standard and non-standard application. NRE agreed to consider this with a view to increasing transparency, although noted that it would only be able to provide high level examples and could not commit to dealing with applications within a particular timescale.
50. NRE agreed to amend the Code to remove the previous two stage approach, replacing it with a single stage application procedure and to include an indicative timescale.
51. We also considered there to be merit in the suggestion by a third party that NRE should consider varying existing licences to accommodate new uses, rather than applicants having to apply for a new licence each time. Further, that parties meeting strict licensing criteria could be granted licences allowing universal use to avoid the need for multiple applications.
52. NRE has also revised the Code to explain that applicants will need to submit a separate application for each permitted use which, if approved, would result in a new schedule to the licence.

53. We do not fully understand NRE's response, to our request for clarity on the purpose of the revision⁴⁵, that new uses constitute the same amount of work as agreeing a schedule for a new licence. The revision appears to have clarified process, but does not address the fundamental concern expressed by third parties that subsequent applications should be processed in quicker time than the original.
54. We asked NRE to consider whether there was scope for it to waive confidentiality provisions in circumstances where there was an intention of an applicant to contract out development of the data to a third party, or to provide that the contractor enters into similar obligations as regards confidentiality to avoid third parties experiencing such difficulties. NRE has advised that it does not have such a confidentiality restriction.

Charging (Section 5(b) of the Code)

55. We expressed concern to NRE that this section of the Code is open to misinterpretation; was lacking in transparency; and therefore lacked credibility. We put to NRE that stakeholder criticism can largely be attributed to an expectation that NRE is willing to negotiate charges on an individual basis. This is because the Code states that "*NRE adopts a case by case approach to charging for access...*". NRE explained to us that what this actually means is that NRE adopts a case by case approach according to the type of licence sought (i.e. whether for mobile, website or public screen).

56. ATOC has set out its position on charging in its submission⁴⁶ to ORR's July Transparency Consultation:

"There is a cost involved in providing real time services. NRE believes that where there is a material cost of, or other impact from, making real time train information available, this should be recovered on a reasonable basis from licensees rather than relying on continued or increased support from taxpayers. This applies to all licensees, although it is important to note that train companies have already invested at risk in NRE and bear the cost of running its services. In most cases⁴⁷, NRE makes a charge to cover the services although in some cases it will accept non-monetary compensation, such as advertising and links to NRE's main site. Particularly keen to encourage micro developers, NRE has structured the charging so that developers are charged nothing until they sell their first smartphone app and start making money."

57. NRE initially expressed a preference not to include standard charges in the Code. This was explained as being due to those charges being subject to change and also readily available once a third party had expressed an interest in accessing Darwin. NRE has proposed an amendment to the Code to note that "*there are a number of established usages of the services that have typical charging arrangements*",

⁴⁵ NRE e-mail dated 6 December

⁴⁶ ATOC submission dated 24 October 2012

⁴⁷ NRE has explained in an e-mail to ORR dated 8 August 2011 that, although TOCs are subject to the same commercial terms as other licensees, in regards to charging they "[...] *only pay for actual incremental costs incurred.*"

and that “[c]ertain uses, such as display of Live Departure/Arrivals on websites, may not incur a licence fee.”

58. We thought that, in order for the Code to provide assurance that NRE will act fairly and on a non-discriminatory basis and will provide access on reasonable terms, ideally the charges should be openly available. We did not consider that such objectives would be achieved if charges were only accessible via a bi-lateral conversation between NRE and a potential applicant.
59. NRE explained that as a “customer facing organisation which needs to take into account proposed usage as well as price.” it needs to “retain a degree of flexibility”. It agreed, however, to publish, within the Code, a list of prices for standard uses such as on mobile apps, but also retain flexibility in its charging regime where it considers it necessary “to encourage innovative solutions”.

Form of access (Section 5(d) of the Code)

60. We asked NRE for an explanation as to the extent to which it provides push port facilities.
61. NRE initially explained that two parties had applied for push access, and that it was in the process of negotiating commercial terms. Although NRE initially considered that the Code could also be amended to specify standard charges for push access once they had been decided, it later changed its position on this. We understand that NRE has negotiated commercial terms with one party for a push port, but that the terms of that agreement, including the price of access, are contractually confidential to the parties. NRE has also stated that as this licence is for a specific use, it is not suitable for publication as a standard charge.
62. NRE has suggested changes to the wording around this part of the Code, for example, “*this type of service will be provided*” would be amended to read “*this type of service will be available*” and removing the words “*If such concerns are met, NRE will not unreasonably refuse access*”. We asked NRE to explain the purpose of these amendments and to confirm how, if at all, they would lead to a change in its approach to the provision of Push services. In response to this, NRE withdrew the suggested amendment and reverted to the original wording of the Code.
63. We understand that subsequent to these exchanges a party has now negotiated access on a push port basis. The terms of that access remain confidential to the parties.

Annex D - Powers available to us

Competition Act 1998

1. We have extensive powers under the Competition Act 1998 ('the Competition Act') to investigate companies believed to be involved in anti-competitive activities. The Competition Act came into force in March 2000 and prohibits:

- agreements between undertakings (companies) or decisions of associations of undertakings (e.g. trade associations), and concerted practices which have, as their object or effect, the prevention, restriction or distortion of competition within the United Kingdom (or any part of it) and which may affect trade in the United Kingdom. This is known as the Chapter I Prohibition; and
- conduct by one or more company amounting to the abuse of a dominant position in a market which may affect trade within the United Kingdom. This is known as the Chapter II Prohibition.

2. Where conduct has an effect on trade between member states we will apply Articles 101 and 102 of the Treaty on the Functioning of the European Union.

3. Any agreement or conduct will fall within ORR's jurisdiction under the Competition Act if it relates to the supply of services relating to railways⁴⁸. Whether we have jurisdiction is determined according to the subject matter of the agreement or conduct or the effect of the agreement or conduct (i.e. whether it relates to services relating to railways) and not according to the identities of the parties or undertakings.

4. Under the Competition Act we have the power to:

- consider complaints about possible infringements of any of Article 101, 102, the Chapter I and/or Chapter II prohibitions;
- impose interim measures to prevent serious and irreparable damage;
- carry out investigations both on our own initiative and in response to complaints, including requiring the production of documents and information and searching premises;

⁴⁸ This is defined in section 67(3ZA) of the Railways Act 1993 (as amended) and includes "the development, provision or maintenance of information systems designed wholly or mainly for facilitating the provision of railway services".

- impose financial penalties on undertakings up to a maximum of ten per cent of its worldwide turnover in the business year preceding the date of the decision, taking into account the statutory guidance on penalties issued by the OFT⁴⁹;
- issue and enforce directions to bring an infringement to an end;
- apply the Article 101(3) criteria to agreements which may breach Article 101 or the Section 9 criteria to agreements which may breach the Chapter I prohibition;
- accept commitments that are binding on an undertaking in lieu of a decision; and
- publish written guidance in the form of an opinion where a case raises novel or unresolved questions about the application of competition law in the rail sector and where ORR considers there is an interest in issuing clarification for the benefit of a wider audience.

5. The Competition Act is also enforced by the Office of Fair Trading (OFT). In relation to the railway industry, we hold concurrent powers and will lead in the investigation of rail related matters. The exception is with criminal cartels which are investigated by the OFT and the Serious Fraud Office.

Enterprise Act 2002

6. In addition to our powers under the Competition Act, we have powers under the Enterprise Act 2002 ('the Enterprise Act'), which makes provision for a system of market investigations by the Competition Commission. Market investigation references will focus upon the functioning of a market as a whole rather than the conduct of a single firm. If single firm conduct is a concern we will first consider whether the Chapter II/Article 102 prohibition has been breached. However, if anti-competitive conduct of a single firm or a number of firms is associated with structural features, it may be appropriate for us to make a market investigation reference to the CC. Such concerns may arise, for example, where we discover the existence of co-ordinated or tacit collusion between undertakings even in the absence of anti-competitive agreements.

7. We have a concurrent power to make a market investigation reference to the CC under section 131 of the Enterprise Act provided we have, in relation to services relating to railways: '...reasonable grounds for suspecting that any feature, or combination of features, of a market in the United Kingdom for goods or services prevents, restricts, or distorts competition...'.

8. We would consider referring a market to the CC if we believe that the market conditions make co-ordinated behaviour possible and if we have a reasonable suspicion of such co-ordinated effects. A non-exhaustive list of factors that we consider might enable co-ordinated behaviour may include:

- a highly concentrated market, in which firms are aware of each other's behaviour;
- stable market shares over a long time period;

⁴⁹ www.offt.gov.uk/shared_offt/business_leaflets/...guidelines/oft423.pdf

- a high degree of product homogeneity;
- disincentives to compete on price due to interdependence and the fear of price matching; and
- relatively weak competitive constraints, for example a low threat of entry to the market.

9. Further guidance on our powers under the Competition Act 1998 and the Enterprise Act 2002 can be found at <http://www.rail-reg.gov.uk/upload/pdf/247.pdf>

TOC licences

10. Clause 10 of the new passenger information condition in train operators' SNRPs states that they must, on request, give "*all timetable information providers' access to appropriate, accurate and timely information to enable them to provide passengers with the information they require to plan their journeys.*" The term "*timetable information provider*" is not defined so may, in principle, apply to any person wishing to provide such information to passengers. This condition appears capable, therefore, of being used to ensure the provision of real time train information to persons wishing to enter that market.

11. This condition was, however, placed in operator's licences following a statutory consultation process earlier this year. The stated purpose of the revision to the condition was to improve the provision of information to passengers, particularly during times of disruption – use of it to deal with RTTI issues was never mentioned. A 'regulatory statement' was also produced in an attempt to alleviate the industry's concerns about the consequences of the introduction of the revised condition. This clearly states that until the end of this control period we will not require operators to do any more than they currently do in relation to passenger information.

© Crown copyright 2012

You may re-use this information (excluding logos) free of charge in any format or medium, under the terms of the Open Government Licence. To view this licence, visit www.nationalarchives.gov.uk/doc/open-government-licence/ or email: psi@nationalarchives.gsi.gov.uk

Where we have identified any third party copyright information you will need to obtain permission from the copyright holders concerned.