



## Department for Transport

Rachel Kelley  
Rail Franchising Policy  
Department for Transport  
Great Minster House  
33 Horseferry Road  
London  
SW1P 4DR

[S26Consultation@dft.gsi.gov.uk](mailto:S26Consultation@dft.gsi.gov.uk)

Web Site: [www.dft.gov.uk](http://www.dft.gov.uk)

31 January 2013

**Important notice:** An incorrect version of this letter was uploaded to the DfT website at 09:30 on 31 January 2013. Please treat this document, which was uploaded to the DfT website at 13:30 on 31 January 2013, as the correct version, and disregard the previous version. The draft statement at Annex A remains the same. We apologise for any inconvenience caused.

Dear Sir/Madam,

I am writing to give you the opportunity to comment on a revised **statement of policy on the exercise of the Secretary of State's power under section 26(1) of the Railways Act 1993 (as amended by the Railways Act 2005)** (the "Act"), a draft of which is annexed to this letter. The last statement was issued in March 2008 and this revised statement has been drafted to take account of the recommendations of the Brown Review of the Rail Franchising Programme, one of which is that this policy statement is reissued. The Department for Transport is running a short consultation inviting comments on the draft statement before publishing a final version.

### Background

Section 26 of the Act requires the Secretary of State to publish a statement of policy describing how he proposes to exercise his franchising power.

The statement covers three areas:

- a) when selection of the person to be a franchisee under a franchise agreement is likely to be from those submitting tenders in response to an invitation to do so;
- b) when it is likely such an invitation will not be issued; and
- c) the means by which it is proposed that the selection will be made in cases where there is no such invitation.

The aim of the Department is to ensure that those with an interest in these areas have an opportunity to comment on the draft statement.

Following the consultation the Department will publish a consultation response document alongside the new policy statement, replacing that of March 2008.

## **How to respond**

The consultation begins on 31 January 2013 and ends on 1 March 2013. Please ensure your response reaches us by that date. Please state whether you are responding as an individual or representing the views of an organisation. If responding on behalf of an organisation please make clear who the organisation represents and, where applicable, how the views of members were assembled.

## **Consultation questions**

The key questions for consultation are:

- Does the policy statement provide sufficient explanation of the Department's intended approach in the three areas referred to above?
- Is the approach set out by the Department appropriate, given the variety of circumstances in which the Secretary of State could exercise his franchising power?

In considering these questions, respondents should note that this draft statement is intended only to support the established rail franchising approach of the Secretary of State, and does not seek to revise the Secretary of State's wider policy in relation to franchising.

Any policy set out in this statement must be consistent with the legal powers and duties of the Secretary of State set out in the Act, including the provisions in section 25 that preclude a public sector operator from being a franchisee under the Act.

Due to the length of the draft policy statement and the resources and capacity of those likely to respond, we consider a one month consultation period appropriate in these circumstances.

Please send responses by post or by email to:

Railways Act: Section 26 Consultation  
5/15  
Department for Transport  
Great Minster House  
33 Horseferry Road  
London  
SW1P 4DR

Email: [S26consultation@dft.gsi.gov.uk](mailto:S26consultation@dft.gsi.gov.uk)

## **Consultees**

A list of those consulted follows. While this is a targeted and technical consultation we also welcome responses from those not included on this list.

- ATOC
- London Travel Watch
- Franchise owning groups
- Network Rail
- Office of Rail Regulation
- Passenger Focus
- Passenger Transport Executive Group
- Rail Delivery Group
- Rail Freight Group
- Rolling Stock Owners (ROSCOs)
- The Scottish Government
- Trades Union Congress
- Transport for London
- The Welsh Government

## **ANNEX A**

### **Proposed statement of policy on the exercise of the Secretary of State's power under section 26(1) of the Railways Act 1993**

#### Introduction

1. This statement of policy is published by the Secretary of State for Transport (the "Secretary of State") pursuant to section 26(4A) of the Railways Act 1993 (as amended) (the "Act").
2. Terms defined in the Act have the same meanings when used in this statement unless the context requires otherwise.
3. Section 26(1) of the Act provides that the appropriate franchising authority may select the person who is to be the franchisee in relation to a franchise agreement from among those who submit tenders in response to an invitation to tender under section 26 of the Act for the right to provide, or to secure that a wholly owned subsidiary provides, services for the carriage of passengers by railway under that franchise agreement.
4. The Secretary of State is, for the time being, the appropriate franchising authority in relation to all franchise agreements except Scottish franchise agreements.
5. Section 26(4A) of the Act requires the Secretary of State to publish a statement of policy about how he proposes to exercise his power under section 26(1) (the "Franchising Power"). (Please note that the Franchising Power is separate and distinct from the Secretary of State's duties under section 30 of the Act.)
6. Section 26(4B) of the Act requires that statement to include the policy of the Secretary of State about:
  - a) when his selection of the person to be a franchisee under a franchise agreement is likely to be from among those submitting tenders in response to an invitation to do so;
  - b) when it is likely such an invitation will not be issued; and
  - c) the means by which he is proposing that the selection will be made in cases where there is no such invitation.

#### General use of the Franchising Power

7. In accordance with his obligations under EU Treaty principles of equal treatment, non-discrimination and transparency, the Secretary of State intends to select the person who is to be the franchisee in relation to a franchise agreement wherever possible by way of open, competitive tender. It is therefore likely that his selection

of the person to be a franchisee under a franchise agreement will be from among those submitting tenders in response to an invitation to do so.

8. Where a franchisee is selected in this way, that selection will be based on an analysis of those tenders in relation to criteria set out in the invitation to tender and associated documents made available to the bidders.
9. As an exception to the principle outlined in paragraph 7, domestic and European law prescribe certain circumstances in which the Secretary of State may select a person to be the franchisee in relation to a franchise agreement without issuing an invitation to tender (in other words, by making a direct award of the agreement to that person). Accordingly, the Secretary of State will only consider the making of a direct award where he considers that this is permitted under the applicable legal framework(s) (including any restrictions which prohibit the overcompensation of the direct award recipient), and that the award can be made in accordance with the procedures prescribed by law.

#### Circumstances in which it is likely that an invitation to tender will not be issued

10. Within the parameters described in paragraph 9, the Secretary of State will not issue an invitation to tender (and will make a direct award) where, in his reasonable opinion, the disruption of rail services, or the immediate risk of such disruption, means that it is not practicable to do so.
11. In addition (but subject always to the parameters described in paragraph 9), it is also likely that the Secretary of State will not issue an invitation to tender (and will make a direct award) where, in his reasonable opinion, doing so would not be conducive to:
  - a) the effective administration of a sustainable and well-resourced programme of franchise competitions; or
  - b) the fulfilment of government objectives in relation to rail transport (including as to the remapping of franchises),

and the Secretary of State is able to comply with any applicable requirements regarding the publication of information in relation to the direct award.

12. Where a direct award is made, the Secretary of State will look to issue an invitation to tender in relation to the relevant services as soon as appropriate, in accordance with the Secretary of State's obligations under the EU Treaty principles, as set out in paragraph 7.

#### Means by which selection will be made if no invitation to tender is issued

13. Where one or other of the circumstances indicated in paragraphs 10 or 11 arises, and the Secretary of State considers it appropriate to select the person who is to be the franchisee in relation to a franchise agreement without publishing an invitation to tender, the Secretary of State proposes (subject to paragraph 15) to

secure the continued operation of those passenger rail services by direct award of the agreement to the incumbent operator, or another operator.

14. In choosing whether to make a direct award to the incumbent operator or another operator, the Secretary of State will consider all relevant factors, including his obligations under the EU Treaty principles of non-discrimination, transparency and equal treatment. Relevant factors may include the following:
- a) business and service continuity, outcomes for passengers, value for money, affordability, delivery risk and the continued quality of the franchise proposition;
  - b) broader market or programme considerations, the delivery of major projects and investment, franchise remapping, impacts on the wider UK rail network and impacts that extend beyond or arise after the term of the franchise agreement in question; and
  - c) the wider government objective of enabling the continued provision of passenger rail services by private sector operators.

#### Section 30 of the Act

15. If the Secretary of State is unable to enter into or conclude negotiations with any private sector operator, because he considers that the direct award of the agreement to a private sector operator would not be appropriate in the circumstances and/or in light of the factors set out in paragraph 14, will he act in accordance with his operator of last resort duties under section 30 of the Act, which may include securing the services of a public sector operator.