

Summary of the Responses to the Consultation on the Rail Passengers' Rights and Obligations Regulations 2009

Introduction

The European Union has adopted Regulation (EC) 1371/2007 ("the Regulation") to strengthen the rights of rail passengers, particularly in the areas of information and ticketing provision, compensation for delay and damage and assistance. It also introduces specific protections in respect of the rights for persons of reduced mobility (PRM). The Regulation also makes provision for the enforcement of those rights.

The UK is required to ensure the effective implementation the Regulation and in the autumn of 2009 the Government carried out a consultation on the proposed mechanism to achieve this. The core proposal was contained in a draft Statutory Instrument (SI) designed to give the Office of Rail Regulation enforcement responsibilities, mainly through the licensing regime, and Passenger Focus and London TravelWatch responsibilities with respect to complaints handling. The SI also had various provisions on particular aspects of the way that the Regulation would operate, many of which were provisions designed to remove duplication of regulation where requirements of the Regulation were already covered in existing UK law.

This document sets out the response to that consultation exercise and also how the Government is responding to the comments received.

The Regulation allows the national governments to exempt some services from some elements ("the non-mandatory elements") of the Regulation:

- Exemptions are permitted for all domestic services for a period of five years which is renewable twice, i.e. fifteen years in total (Article 2(4)). The UK Government made use of that facility in December 2009 – to allow proper consideration of the consultation responses before making a decision in 2010 on how and when to apply the various non mandatory elements to UK domestic services.
- Exemptions for urban, suburban and regional routes are also permitted under Article 2(5). This exemption is not time limited.

It should be noted that the mandatory elements of the Regulation have applied to all relevant rail services in the UK since December 2009. The Regulation has applied in full to international services from the same date.

This paper concerns the approach to how the Regulation will be reflected in UK law in England, Scotland, and Wales. Implementation in Northern Ireland is being dealt with separately by the Northern Ireland Executive Department of Regional Development.

Consultation Responses

28 consultation responses were received and are listed in Appendix 1.

The respondents included representatives of the rail industry, passenger organisations and others including one individual member of the public.

The consultation document set out a number of questions related to the proposed approach to the implementation of the Regulation and this document sets out the key elements of the responses to those questions along side how the Government proposes to respond in turn.

Question 1. Will the proposal to enforce the Regulation through licensing and Statements of National Regulatory Provisions be effective? (Questions shown in this document are a shortened form of those shown in the original consultation document).

Respondents were in agreement that enforcement through licensing and Statements of National Regulatory Provisions (SNRPs) would be appropriate.

A number of respondents made the case to exclude various services. Also many made the point that there were a considerable number of practical details to be dealt with in implementing this Regulation and that care should be taken to avoid overlapping or conflicting requirements given that both the Department for Transport and the Office of Rail Regulation have responsibilities in respect of licence conditions.

There were also three specific concerns raised.

Firstly, there were concerns was also expressed over the ORR taking on responsibilities for personal security (Article 26 of the Regulation) as the ORR currently has no experience in this area.

Secondly, a concern was expressed that the enforcement regime would not properly catch the operators of stations on the HS1 infrastructure, which are not required to be licensed.

Thirdly, enforcement should be proportionate and should recognise that some aspects of the Regulation are technically challenging making the early stages of implementation difficult.

Government response

The Government plans to proceed with the approach on enforcement as set out in the Consultation and the draft Statutory Instrument. Detailed changes have been made in the final SI .

It accepts there are issues to be dealt with regarding the exact wording of licence conditions arising and the ORR will be consulting informally on the detail (see question 2 below).

The issue of exemptions from the non mandatory elements for domestic services is still being considered.

The Government has taken account of the comments on personal security by removing the responsibility of the ORR in respect of enforcement of Article 26. Instead, the rights of passengers in that respect will usually be protected through Part 3 of the Railways and Transport Safety Act 2003 and the British Transport Police (Police Services Agreement) Order 2004 (SI 2004/1522), under which many rail operators are legally obliged to enter into and maintain a Police Services Agreement (PSA) with the British Transport Police. In those

cases, it will be a criminal offence not to have such a PSA. Both the British Transport Police and the Secretary of State have, under the Act, a duty to ensure the effective policing of the railway. In cases where the relevant operator has not been designated under the 2004 Order, new regulation 15 in the SI will impose on the Secretary of State an obligation, when making a security direction under section 119 of the Railways Act 1993, to ensure that Article 26 is properly enforced.

The concern about HS1 stations has been met by the introduction of new regulation 16, under which breach of the Regulation by station operators on HS1 can be subject to the same enforcement action as a breach of a licensing condition.

The industry will be responsible for its compliance with licence conditions and can face enforcement action if it fails to meet these conditions. However, enforcement will always be proportionate.

Question 2: Do you agree with the detail of the process to change existing licensing conditions and SNRPs?

Respondents were content with the principle of the enforcement process but had two concerns. Firstly, licence conditions should not be changed now or subsequently without consultation with the industry.

Government Response

The Office of Rail Regulation will be seeking industry views on drafting before varying licence conditions and therefore addressing the industry's concerns about consultation. It is the intention of the Government and the ORR to have a workable set of licence conditions which reflect the Regulation and input from the industry will help in achieving this.

Q3. Do you agree with ORR being designated as the enforcement body, and with Passenger Focus and London TravelWatch being designated as complaint handling bodies reporting to ORR?

Respondents were generally in favour of this approach, though there were a few reservations expressed. Most respondents considered that allocating responsibilities to existing organisations within existing frameworks was the best way forward.

It was suggested that were tramways to fall within the scope of the Regulation, their passenger complaints body should be the Bus Appeals Body. One respondent stated its view that various London services (such as London Underground) should be outside the scope of the Regulation as a) Transport for London already has policies and procedures in place that comply with the spirit of the Regulation and b) the suburban rail network in London is primarily focused on serving the London area and as such should be managed at the local level rather than by European wide regulation.

The industry was keen that there was clarity over the roles of both complaints handling organisations so that they would both be working to very similar remits to ensure consistency. There were also concerns that there could be resource implications arising from either a lack of clarity over the roles of the

bodies or simply from having to deal with complaints regarding European railways outside the UK.

There was also concern over who should deal with complaints first – the train operator or the complaints handler? On the one hand operators were keen to have the opportunity to deal with a customer's problem as soon as possible and on the other, they did not want to be forwarded cases by the complaints handling body when the complaints handling body could see that there was no case to answer.

With regard to the role of the ORR, one respondent specifically stated that they would expect them to apply the existing Economic and Enforcement Policy and Penalties Statement (April 2009), not a different penalty regime

This reflected a general concern for proportionality and predictability with respect to enforcement.

Government Response

The Government proposes to retain as much of the existing processes for complaints handling as is possible. This means that passengers should first complain to the train operator and then appeal to the complaints handler only if there is still an issue with the response from the operator. It would not normally deal with individual complaints, but would intervene only when there were serious or systematic failures.

The ORR will continue to apply its existing policies with regard to enforcement and penalties when dealing with non compliance: the only difference would be that, as provided for in the SI, the Regulation overrides the ORR's application of its duties under section 4 of the Railways Act 1993 to the extent that there may be a conflict with ensuring compliance with the Regulation. ORR continues to be committed to the principles of good regulation: proportionality, accountability, consistency, transparency and targeting.

The Regulation only applies to journeys and services provided by undertakings licensed under Directive 95/18/EC, which many local transport operators, including London Underground, are not.

Question 4. Should enforcement against independent ticket vendors be by provisions similar to those in the Railways Act 1993 for breach of licensing conditions?

There was no consensus on the application of the Regulation to independent ticket vendors.

There was a general acceptance that third party vendors should be subject to some form of regulation as otherwise it would create a situation where passengers buying from an independent vendor had different rights to passengers buying from a railway operator. However, there were a number of concerns expressed over the way that this would work in practice.

Firstly, there was a concern that the whole Regulation was large, complex and for some small vendors its application would simply make it not worth continuing in the business of selling tickets. This could lead to a loss of ticket vendors making it harder for passengers to buy tickets and leading to a reduction in competition in the vending market.

Secondly, the vendors were entirely dependent on the operators to provide information and this would make them vulnerable to enforcement when they were unable to comply due to problems with the operators not the vendors themselves.

Thirdly there was a view that since the independent vendors were all in some way acting as agents of the operators, enforcement should be against the operators rather than the vendors.

Government Response

The EU Regulation imposes obligations on independent ticket vendors, and does not allow for exempting independent vendors from their responsibilities and so the only question is how enforcement should work in the event of failure to honour these obligations.

We have considered the consultation responses and propose to continue along the lines set out in the consultation document. We have therefore introduced, as regulation 16, a provision whereby a breach by ticket vendors of their obligation will be treated in the same way as breaches of rail licensing conditions and SNRPs. The powers to deal with these are generally to secure compliance, and will therefore not be exercised to penalise for the sake of penalising. It will be for the industry, including the independent vendors, to work through the practical implications to ensure that passengers' rights are protected whoever sells the ticket.

Question 5. Do you agree with the way the rights of disabled persons and persons with reduced mobility will be enforced?

Respondents generally agreed with the approach which avoids the risk of overlapping or conflicting requirements with existing legislation.

There were a number of concerns expressed concerning the lack of a cap on compensation due in the case of injury to feelings. Respondents wanted to see the same prescribed amount in this Regulation as is already included in the legislation it replaces.

Some respondents expressed concern that it would be difficult to provide information on access to trains outside the UK noting that the standards of access vary considerably throughout the EU.

Finally, some respondents were keen to emphasise that their support was conditional on there being no diminution of the existing rights of people with disabilities.

Government Response

The objective of the Regulation is to make it easier for passengers with reduced mobility (including people with disabilities) to use rail services.

As regards the theoretical cap on compensation, it had no material effect as no prescribed amount has ever been defined. There are issues as to whether it would secure an effective protection of the EU rights of passengers, and the Equality Bill currently progressing through Parliament has no reference to a power to impose a cap. We have therefore decided not to refer to a cap either.

With respect to the practical difficulties of providing information regarding accessibility from across the EU, the Regulation seeks to drive action by the industry to ensure that this situation improves both in respect of providing services and providing information about those services. It will be for the industry to seek solutions to the problems of information provision noting that the same obligations will be imposed on all European railways as this is a mandatory part of the Regulation.

We have noticed that the wording of the SI circulated for consultation would have had the effect of removing the power of the Equality Commission to make arrangements for the provision of conciliation services in respect of claims by disabled persons for enforcement of their rights under the Regulation. We apologise for this oversight. We did not intend to remove such power, and, if we had, we would have asked specific consultation questions. We have therefore introduced new regulation 11, which restores the power of the Equality Commission, and extends it to persons of reduced mobility who are not disabled, thereby creating, in respect of the EU rights of those persons, a regime that is similar to that of the equivalent domestic regime in respect of disabled persons. There is therefore consistency between EU and domestic rights.

Question 6. Any further comments on the enforcement regime?

One respondent said that it was important that penalties are set at a level that does not increase the financial risks faced by rail operators.

Government response

The ORR will only impose penalties that are proportionate as it does at present.

Question 7. Should the exemptions be used? Give evidence of costs and benefits. Should we exempt charter train operators?

and

Question 8. How should we define those to whom exemptions should apply? Comments on legal criteria to be used?

There was no consensus over the use of exemptions with the exception of charter trains where there was agreement that they should not be covered (though there was no agreement over the wording of the definition of charter trains).

The industry generally favoured full exemption of all domestic services for at least two years with some respondents suggesting exemption for the full 15 years permitted. The logic behind a relatively short extension was the need to give time to adjust systems to make them conform to the Regulation. Longer extensions were justified on the grounds that a) the UK already has substantial protections for passengers and b) there would be unnecessary costs associated with the implementation.

Most other respondents generally wanted to see the current exemption terminated at the earliest opportunity to activate the protections contained in the Regulation. It was stated that this would be in line with the Government's

aim of having a consumer regime “as good as any in the world” and setting itself the “target of reaching the level of the best.”

Some respondents asked for specific services to be excluded from the Regulation or for confirmation that their services fall outside the scope of the Regulation. Services proposed for exclusion included metros and tramways generally, all rail services in London (including main line suburban services) and heritage charter trains.

Some respondents were concerned about the potential confusion arising from having different rules applying to different services by the application of exemptions only to one category of domestic service such as urban services. This could cause confusion for both passengers and operators as for some journeys, the level of protection would vary according to which train was boarded (e.g. some trains between Luton and London could be covered, but not others).

Some industry respondents also cited high costs as a reason for continued use of wide ranging exemptions.

Government Response

The Government is still considering the removal or partial removal of the current exemption.

Q9. Do you have comments on the way of reconciling the Regulation with the Damages Act 1996?

Q10. Do you agree with the remedies and procedure provided for breach of the right to an advance payment?

and

Q11. Do you agree that regulation 7 is necessary or should the court decide the amount?

There was general support for the way of reconciling the Regulation with the Damages Act 1996. There was some concern raised regarding the possible interpretation of the Regulation as allowing for punitive damages which is contrary to Government policy.

A number of respondents emphasised that there is already a working mechanism in place for dealing with advance payments (under the Claims Allocation and Handling Agreement or CAHA). This agreement, possibly with some amendment, rendered some of the proposed Regulation unnecessary.

There was a general agreement that the SI should not be too prescriptive with regard to the amounts of compensation, which should be decided by the court

Government Response

The Government sees the benefit of making use of existing mechanisms within CAHA. It has also amended the wording of the SI to give more latitude to the courts to decide the levels of compensation where the right to an advance payment is not complied with, on the basis of the Regulation and domestic law applying to remedies. The wording of regulation 6 has been changed. The former Regulation 7 has been deleted. This dealt with the

treatment of advance payments in the event where those making the payment were not ultimately found to be 100% liable for an accident.

The revised SI has also made other detailed drafting changes to remove any ambiguity regarding punitive damages (which will not be imposed).

12. Any comments on the impact assessment, especially as regards benefits and costs?

This question led to widely varying responses. The consultation document set out some estimated cost figures supplied by the Association of Train Operating Companies (ATOC). The range of costs for the non mandatory elements was £32m – £115m per year.

There was some support for these figures and a number of train operators were concerned that smaller operators compensating longer distance passengers could be disproportionately impacted.

A number of respondents stated that the costs would ultimately fall on either the passenger through higher fares or the taxpayer through the franchising process.

Many of the respondents were extremely sceptical of the figures presented. They pointed out that many of the requirements in the Regulation are already met in the UK either across the whole network (e.g. there is a well established complaints handling process within both train operators and the established appeals bodies) or on particular operations (e.g. provision of refreshments in the case of serious delays).

The largest cost highlighted in the ATOC analysis and cited by several respondents was the transferability of train tickets. Currently, a ticket 'may only be used by the person for whom it has been bought' (National Rail Conditions of Carriage 6). Extending the right to transfer tickets to other people was estimated by ATOC to have a potential cost of up to £80m (almost 70% of the total cost of implementing the Regulation).

Several respondents challenged this figure stating firstly that the calculation was implausibly high and based on an incorrect application of the season ticket discount formula. ATOC also appeared to be assuming that 10% of weekly season ticket holders could find someone to share their ticket with which was not likely.

Some respondents queried whether there would be any additional loss at all. The Regulation says that "The ticket shall be transferable if it has not been made out in the passenger's name and if the journey has not begun." (Annex 1, Article 7, paragraph 4). As soon as a passenger starts to use a ticket (including the outward part of a return ticket or the first use of a season ticket), the journey has begun and the ticket can no longer be transferred.

Finally a number of respondents noted that there is currently no easy way to police the restriction on transfers so there would be no way to be sure if there were any increase in transfers were they to be made legitimate.

With regard to the second highest cost element (assistance if delayed), costed up to £17m or almost 15%, respondents pointed out that many train

operators already offer this and that taking the ATOC estimate of 600,000 people assisted, this implies an extremely high cost of £28.30 per passenger.

Respondents challenged other aspects of the costs shown in the consultation paper. One consultee estimated that the true costs would be £4.5m to £12m pa They also suggested that 89% of this 'cost' was actually a transfer from operators back to passengers of fares that had they had paid for services not properly delivered. They suggested that there would be a small increase in the 'deadweight' cost of dealing with the Regulation (extra administration etc), but this would be a relatively small sum.

A number of respondents also suggested that if costs were increased this would incentivise the industry to improve performance and reduce the current costs imposed on society by rail delays.

Fears were expressed that if the costs were as high as estimated by ATOC, implementing the Regulation could divert funding from investment to improve the services.

It was also pointed out that many of the cost estimates are heavily dependent on the way that the Regulation is interpreted and varying interpretations account for some of the large variation between the cost estimates of the different parties involved.

Government response

This is a key area which is being considered in respect of the potential removal or partial removal of the existing derogations. The Government believes that there is a good case to reduce the estimated costs as set out in the consultation document. However, it does not believe that the introduction would be cost free and since many, if not all, of the additional costs would effectively fall to the public purse, it needs to be prudent in taking implementation forward.

Q13. What areas of the regulation need clarification in guidance?

Many respondents expressed a desire for greater clarity over the interpretation of the Regulation. Some respondents saw the main guidance being produced by the ORR whilst others looked to the Department for Transport to give more detail on the interpretation of the Regulation.

A number of respondents pointed out that there would need to be changes to the suite of documents that currently set out the policies, processes and procedures relating to the way that passengers and the rail industry interact. These documents include the National Rail Conditions of Carriage and Disabled Passengers Protection Policies for each train operator.

Government Response

The Government has agreed with ORR that the Department for Transport will produce high level guidance about the approach to implementation e.g. how licence conditions and National Rail Conditions of Carriage will be amended to fit with the Regulation, and that ORR will follow normal enforcement practice.

Changing the National Conditions of Carriage and other documents is indeed part of the implementation strategy of the ORR and the Government. That process is under way.

Q14. Any other comments on the Statutory Instrument?

A number of detailed comments were received on the wording of the SI. A member of the public also commented that the use of technical language made it difficult for ordinary passengers to understand their rights and obligations.

Government response

Clarity has been one of the considerations in drafting the SI and in reviewing it after consultation. However, precision is also very important, and is sometimes impossible to achieve without recourse to technical language.

Q15. Do you agree with the overall approach to implementation?

A number of respondents reiterated their comments regarding the delaying of the implementation pending further consultation on the licence conditions and also to allow time to make practical changes to processes and procedures and aligning the railway byelaws. Others restated their case for excluding particular types of service such as heritage lines or services in London.

Government response

As mentioned above, the Government has delayed the application of the non-mandatory aspects of the Regulation to domestic passenger services, pending consideration of the evidence as to what the proper scope should be. Outside this issue, however, we are required by the Regulation to have implementation measures in place by 3rd June 2010.

Appendix 1 – List of Respondents

List of respondents

1. Arriva Trains (Arriva Trains Wales and Cross Country Trains)
2. Association of British Travel Agents
3. Association of Train Operating Companies
4. c2c Rail
5. Confederation of Passenger Transport
6. Directly Operated Railways
7. East Midlands Trains and Stagecoach South Western Trains
8. Essex County Council
9. Eurostar
10. FirstGroup (First Great Western, First Capital Connect, First TransPennine Express, Hull Trains)
11. Govia (Go-Ahead Group, Govia, Southern, Southeastern and London Midland)
12. Heritage Railway Association
13. Ian Pearson, member of the public
14. London TravelWatch
15. National Express East Anglia
16. Ministry of Justice
17. National Express East Coast
18. Network Rail
19. Office of Rail Regulation
20. Passenger Focus
21. Railway Industry Claims Allocation and Handling Agreement (CAHA) Registrar
22. Railway Industry Dispute Resolution Committee
23. Scottish Railway Preservation Society
24. Serco-NedRailways (Northern Rail and Merseyrail)
25. Trainline
26. Transport for London
27. Transport Scotland
28. TravelWatch SouthWest
29. Virgin Trains

