

Rail Transport 2021

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Lexology Getting The Deal Through is delighted to publish the third edition of *Rail Transport*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on the European Union and Singapore.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Matthew J Warren of Sidley Austin LLP, for his continued assistance with this volume.



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GENERAL

Industry structure

1 | How is the rail transport industry generally structured in your country?

Operation of the national rail network in Great Britain comprising all regional and intercity routes, and most urban heavy rail routes is split between infrastructure and rolling stock.

The rail infrastructure is owned and operated by Network Rail, a company limited by guarantee that does not pay dividends. Although notionally a private company, since 2014 it has been classified as a public sector organisation owing to its government debt support.

Train services are separately operated by passenger train operating companies (TOCs) and freight operating companies (FOCs).

This chapter focuses on the national rail network in Great Britain, but there are also several mainly urban regional networks where other structural models can be found. Examples include the Edinburgh Tram, owned and operated by Transport for Edinburgh; the Blackpool Tram network owned and operated by Blackpool Borough Council; and Sheffield Supertram, whose infrastructure is publicly owned by South Yorkshire Passenger Transport Executive and privately operated under a concession by Stagecoach. In addition, the London Underground network is owned and operated by Transport for London and railways in Northern Ireland are vertically integrated, with track and rolling stock operated by Northern Ireland Railways.

Ownership and control

2 | Does the government of your country have an ownership interest in any rail transport companies or another direct role in providing rail transport services?

The UK government has no ownership interest in the national rail network in Great Britain, or in TOCs or FOCs. However, rail franchising authorities (the Scottish Ministers in Scotland, the Welsh government in Wales, and the Secretary of State for Transport) have a duty under section 30 of the Railways Act 1993 (RA93) to provide or secure the provision of passenger services where a franchise agreement in respect of those services ceases and is not replaced by another franchise agreement. This obligation has become relevant in recent years following, for example, the failure of the East Coast passenger rail franchise in 2018. The government has created a wholly owned public sector entity to act as the 'operator of last resort' to take over the franchise while preparations are made for a new private sector franchisee to be appointed. An operator of last resort is also currently responsible for operating the Northern franchise.

Franchising authorities are also responsible for specifying franchised services, and, as counterparty to franchise agreements, are closely involved in managing the performance of franchisees.

The Secretary of State for Transport provides grant funding to Network Rail and has a role in setting its priorities. There is also a 2014 framework agreement between Network Rail and the Secretary of State for Transport dealing with, among other things, governance and financial management.

The Secretary of State for Transport has also entered into Emergency Measures Agreements with TOCs in connection with the covid-19 pandemic to provide TOCs with financial protection and ensure continuity of service during this period. In late July 2020, it was announced that, partly as a result of these agreements being put in place, TOCs were to be reclassified by the Office for National Statistics as public non-financial corporations. At the time of writing, the implications of this reclassification are not entirely clear, but it is likely that the reclassification could lead to TOCs becoming subject to certain elements of public law.

3 | Are freight and passenger operations typically controlled by separate companies?

Track access rights are granted to operators for passenger or freight services, not both. Most passenger services are operated by TOCs that have a franchise agreement with the rail franchising authority. Freight operators, in contrast, are open access operators that have no contract with the public sector, and negotiate track access rights with Network Rail.

Regulatory bodies

4 | Which bodies regulate rail transport in your country, and under what basic laws?

The Office of Rail and Road (ORR) was established under the Railways and Transport Safety Act 2003, and its powers and duties are set out in the RA93. It is responsible for the public interest and economic regulation of Network Rail and (to a lesser extent) of TOCs and FOCs. It is also responsible for competition regulation and for regulation of access to railway facilities (track, stations and depots). In discharging its functions, the ORR must comply with its general duties under section 4 of the RA93, which include promoting improvements in railways service performance and promoting the use of the railway.

The ORR's main functions are the following:

- Licences: the grant, modification and enforcement of licences to operate trains, networks, stations and light maintenance depots. This includes Network Rail's network licence.
- Financial regulation: regulation of the monopoly power of owners of rail infrastructure, most particularly of the monopoly owner and operator of the national infrastructure in Great Britain, Network Rail.
- Access: rail facility access agreements are void without the ORR's approval, and it can also direct mandatory access to railway facilities and enhancement of existing railway facilities.
- Competition: the ORR has certain powers concurrently with the Competition and Markets Authority.

The government also has key regulatory functions, as follows:

- Track access charges: there is a periodic review process under which the ORR reviews and fixes Network Rail’s track access charges for each five-year control period. This process is guided by the Railways Act 2005, under which the Secretary of State for Transport (in respect of England and Wales) and Scottish Ministers (in respect of Scotland) are required to define the high-level outputs they require and provide a statement of the funds available from the government, each of which informs the charges the ORR ultimately sets.
- Franchising authority: the franchising authority is responsible for establishing which rail passenger services should be delivered under a franchise agreement, and for appointing franchisees to operate those services under a franchise agreement with the authority.
- Competent authority for the purposes of the Railway (Interoperability) Regulations 2011: in Great Britain this the Secretary of State for Transport. In Northern Ireland, this role is fulfilled by the Department for Regional Development until the final day of the implementation period following the UK’s exit from the European Union on 31 January 2020 (IP Completion Day). After IP Completion Day it will be the Department for Infrastructure (DFI). The competent authority’s functions in relation to interoperability include determining applications for derogation from the need to have authorisation for placing rolling stock and other subsystems into service.

MARKET ENTRY

Regulatory approval

5 | Is regulatory approval necessary to enter the market as a rail transport provider? What is the procedure for obtaining approval?

In most cases rail transport providers must have an operating licence and a related statement of national regulatory provisions (SNRP).

In Great Britain the licensing authority is the ORR, and licences (currently known as European Licences and to be called Railway Undertaking Licences after IP Completion Day) and SNRPs are granted pursuant to the Railway (Licensing of Railway Undertakings) Regulations 2005.

In Northern Ireland the licensing authority is the Department for Infrastructure, and licences (known as European Licences) and SNRPs are granted pursuant to the Railways Infrastructure (Access, Management and Licensing of Railway Undertakings) Regulations (Northern Ireland) 2016.

The licensing authority must be satisfied that the licence applicant meets requirements as to good repute, financial fitness, professional competence and insurance cover for civil liability, and there are detailed guidelines about what must be taken account of in determining if those requirements are met.

Each rail facility operator (whether the facility is track, a station or a light maintenance depot) will also need to have an operating licence for that facility granted by the ORR pursuant to the RA93, or an exemption from the need to obtain one.

Any rail transport provider will, in addition to obtaining relevant licences, also need to obtain a safety certificate (where operating services) or an authorisation (where operating infrastructure).

The Secretary of State for Transport operates a streamlined pre-qualification questionnaire (PQQ) passport process for rail franchises in England and Wales. Franchise bidders must also have a PQQ passport issued under this process.

6 | Is regulatory approval necessary to acquire control of an existing rail transport provider? What is the procedure for obtaining approval?

Licences and SNRPs may be terminated if control of the licence holder changes and the ORR has not approved the change of control, or the change of control does not cease within three months of a notice from the ORR that it served within one month of becoming aware of the change of control.

An approval application form must be submitted, and the ORR will usually make its decision to approve or reject the change of control within four weeks.

Passenger operator franchise agreements typically contain change of control restrictions that require consent of the Secretary of State for Transport (or equivalent) before a change of control arises.

The acquisition of a franchisee may also have implications for its PQQ Passport. It will constitute a change in circumstances that must be notified to and approved by the Department for Transport.

A change of control, whether in respect of a passenger or freight operator, could also trigger a competition investigation.

7 | Is special approval required for rail transport companies to be owned or controlled by foreign entities?

There are no specific additional approval criteria that arise where the owning or controlling entity is non-UK based. However, the licensing, control and competition restrictions identified above would equally apply in this case. In addition, it may be more time-consuming to show compliance with some of the specified criteria for obtaining a PQQ Passport.

The UK government can intervene in transactions involving foreign entities that raise at least one of the public interest issues: national security, financial stability, media plurality and, as of 23 June 2020, public health emergencies. Additionally, the UK government has greater powers to intervene in transactions that potentially raise national security concerns due to the target’s involvement in the following sectors: military and dual-use technologies, certain categories of advanced computer technology, artificial intelligence, cryptographic authentication technology and advanced materials. Such transactions will be reviewable by the government on public interest grounds if the target: (1) has UK revenues of at least £1 million; or (2) has a UK share of supply exceeding 25 per cent. This is a significant change from the current regime, under which a transaction is reviewable only if the target has UK revenues of more than £70 million or if it results in the creation or enhancement of the parties’ combined share of supply of 25 per cent or more.

The UK government is proposing to introduce a new standalone foreign direct investment (FDI) regime through the forthcoming National Security and Investment Bill (the NSI Bill). The current proposals for the new regime include allowing the UK government to intervene in FDI transactions in any sector on national security grounds without reference to turnover, if there is a ‘UK nexus’. Certain sectors are more likely to pose a national security risk, such as national transport infrastructure, including the rail network, although the government’s proposals to date have not identified rail as a ‘core area’ in this regard. The timescale for publication of the draft NSI Bill is not yet clear, and the exact details of the new regime are therefore still unknown.

8 | Is regulatory approval necessary to construct a new rail line? What is the procedure for obtaining approval?

Approval is required to construct a new rail line, with different regimes applying in England, Wales and Scotland.

The process for obtaining approval for the construction of a new rail line in England will depend on whether or not it is a nationally significant rail scheme. A rail line will only fall within this classification if it involves the laying of a continuous stretch of track of more than 2km, and meets other defined criteria under section 25 of the Planning Act 2008 (as amended by the Highway and Railway (Nationally Significant Infrastructure Project) Order 2013), including that it will be operated by Network Rail.

A nationally significant rail scheme requires development consent under the Planning Act 2008. The consent takes the form of a statutory instrument (a piece of secondary legislation), termed a development consent order (DCO). A DCO can grant planning consent for the works, but also include other powers, for example, the power to acquire land compulsorily and the disapplication of local legislation.

The process is heavily front-loaded at the pre-application stage. Applicants have a statutory duty to consult on their proposals prior to submission; the length of time to prepare and consult on an application will vary depending on its complexity and scope. An application for development is submitted to the Planning Inspectorate, which, on behalf of the Secretary of State, then has 28 days to determine whether the application meets the required standards to proceed to examination.

If it is accepted, members of the public can then apply to make representations on the application and a preliminary meeting will be held, setting the examination timetable. This stage usually takes around three months. Covid-19 has, however, resulted in pending applications taking much longer to reach this stage. Up to five independent inspectors appointed by the Secretary of State for Transport examine the application over a six-month period. The development consent process is focused on written submissions, but hearings will be held on specific topics (eg, compulsory acquisition). The examiners will issue a recommendation to the Secretary of State for Transport within three months of the close of the examination. The Secretary of State then has a further three months to issue a decision, but has the power to extend that deadline and has done so in a number of recent cases.

If the proposed new rail line is not nationally significant then this can be consented, most usually, via an order under the Transport and Works Act 1992. Again, the consent takes the form of a statutory instrument. Applications are made to the National Planning Case Work Unit that processes the application on behalf of the Secretary of State for Transport in England or the Welsh government (as applicable). Like a DCO, the order can also include compulsory acquisition powers.

Decisions on both DCO and Transport and Works Act order applications can be challenged by judicial review in the High Court within six weeks of the date of the decision.

The DCO regime for rail does not extend to Scotland or Wales. In Wales an application for a rail line with a stretch of track of more than 2km would be made to the Welsh government.

In Scotland, it is likely that an order will be required under the Transport and Works (Scotland) Act 2007 (a TAWS order), with an application being made to the Scottish Ministers. Prior to the 2007 Act coming into effect, guided transport schemes were normally authorised by way of a private Act of the Scottish Parliament, but a TAWS order can grant similar rights and powers, and it is now unlikely that the Scottish Parliament would entertain a private bill for matters that can be authorised by a TAWS order. There have been no private bills for rail projects since the 2007 Act came into force.

Where a scheme is of national importance a hybrid bill could be used. Procedure requires that to do so the rail line must affect the general public but would also have a significant impact on a specific group (eg, a particular geographical area will be impacted). Such bills have been used in the development of both Crossrail and High Speed

2. Hybrid bills are a combination of public and private bills and subject to parliamentary process, involving debates in the House of Commons and House of Lords.

Theoretically, it would also be possible to authorise a new rail line in Scotland by way of a hybrid bill, but the Scottish Parliament has only considered one hybrid bill to date and that was not for a rail project.

Any structural subsystem such as a new railway line must, before being put into use on or as part of a rail system, be granted authorisation under the Railways (Interoperability) Regulations 2011 by the ORR (or, in Northern Ireland the DRDNI/DFI).

MARKET EXIT

Discontinuing a service

9 What laws govern a rail transport company's ability to voluntarily discontinue service or to remove rail infrastructure over a particular route?

The Railways Act 2005 sets out statutory procedures concerning proposals for the closure of passenger services, passenger networks and stations.

Certain minor modifications, such as those that are determined not to affect the use of a station, require additional changes or increase journey times, are exempt from the closure regime. Services that have been designated as experimental for up to five years, which run through the Channel Tunnel or that are not regular scheduled services are also exempt. In addition, networks or services may be exempted by order.

If the closure regime applies, the operator that intends to discontinue or close a passenger service, passenger network or station must first assess whether the proposal satisfies criteria set out in closures guidance published by the Office of Rail and Road (ORR). After that, the proposal is submitted to the relevant national authority (the Secretary of State for Transport or the Scottish Ministers) for them to form an opinion on whether to allow the closure after consulting about it. If the national authority concludes that the closure should be allowed, this decision must be ratified by the ORR.

The closure must not be implemented while the consideration set out above is being carried out. If it is concluded by the national authority or the ORR that the closure should not go ahead, the national authority must secure the continued operation of the service, network or station concerned.

The Secretary of State for Transport and Scottish Ministers are required to publish guidance outlining how closure proposals should be assessed and processed.

The closure regime does not apply to services required to be secured by the government, such as franchised services. However, franchised passenger operators are contractually obliged to deliver a defined service level.

10 On what grounds, and what is the procedure, for the government or a third party to force a rail transport provider to discontinue service over a particular route or to withdraw a rail transport provider's authorisation to operate? What measures are available for the authorisation holder to challenge the withdrawal of its authorisation to operate?

There are customary default provisions in each track access contract that can lead to suspension or early termination of a track access agreement by Network Rail.

European licence holders (in Great Britain after the IP Completion Day, Railway Undertaking licence holders) are subject to ongoing monitoring of whether they satisfy the requirements as to good repute, financial fitness, professional competence and insurance cover for civil

liability. The licence may be revoked if they do not, or if specified circumstances of insolvency arise.

In addition, each operating licence includes provisions dealing with its revocation.

The ORR may (after consulting with the franchising authority if the operator has a franchise) revoke the licence:

- at any time by agreement with the operator;
- on three months' notice if it has made an enforcement order under the RA93 in respect of any contravention or apprehended contravention of a licence condition that the licence holder has not complied with within a period of three months;
- if the licence holder has not started licensed activities within a given period of the licence coming into force, or if the holder ceases to carry on its licensed activities for a given period;
- if control of the licence holder changes;
- if the licence holder is convicted under section 146 of the RA93 of making false statements in its application for a licence; or
- by notice of not less than 10 years, but the notice must not be given earlier than 25 years after the date that the licence takes effect.

If the ORR has made any enforcement order against a licence holder it may apply to court for the order to be overturned on the grounds that it was not within the ORR's powers under the RA93, or that procedural requirements have not been complied with.

An operator's safety certificate may be revoked if the operator is in breach of its conditions and a significant risk arises, or if the operator has not operated as intended pursuant to the certificate for a year after it was issued. Before revoking the certificate, the ORR must notify the operator and allow at least 28 days for it to make representations.

The operator may appeal to the Secretary of State for Transport if it is aggrieved by a decision of the ORR to revoke its safety certificate. The revocation shall be suspended pending the final determination of the appeal.

Insolvency

- 11 | Are there sector-specific rules that govern the insolvency of rail transport providers, or do general insolvency rules apply? Must a rail transport provider continue providing service during insolvency?

There is a special railway administration regime that overlays the general rules of insolvency. The regime only applies to a protected railway company, which is defined as a private sector operator that holds a network licence, a passenger licence, a station licence or a depot licence. Differences between an ordinary administration and a railway administration include that the purpose of a railway administration is more limited. Its purpose is solely to transfer to another company as much of the undertaking as is necessary to ensure that the relevant licensed activities may be properly carried on, and to carry on those activities until the transfer is made. The transfer of the business to the new operator will occur under a statutory transfer scheme.

COMPETITION LAW

Competition rules

- 12 | Do general and sector-specific competition rules apply to rail transport?

The ORR's general duties under section 4 of the RA93 also include the duty to promote competition in the provision of railway services for the benefit of users of such services, and to protect the interests of users of railway services.

The ORR is required to consider whether the use of its competition powers is more appropriate before using its sectoral powers (including licence enforcement) to promote competition.

The prohibitions under the Competition Act 1998 (CA98) apply to rail transport: Chapter I prohibits agreements between businesses that prevent, restrict or distort competition; and Chapter II prohibits the abuse of a dominant position in a market. Where an agreement or conduct has an effect on trade between EU member states, articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) will apply instead.

Under the Enterprise Act 2002 (EA02), it is possible for the Office of Rail and Road (ORR) to make a market investigation reference (MIR) to the Competition and Markets Authority (CMA) where any features of a market for goods or services relating to railways in the UK prevents, restricts or distorts competition. An MIR may be preceded by a market review, or formal market study under the EA02.

Market distortions, discrimination and undesirable competition developments are also regulated by the ORR under the Railways (Access, Management and Licensing of Railway Undertakings) Regulations 2016 (RAMs), which transpose relevant aspects of Directive 2012/34/EU establishing a single European railway area.

Regulator competition responsibilities

- 13 | Does the sector-specific regulator have any responsibility for enforcing competition law?

The ORR has concurrent competition powers with the CMA to apply and enforce Chapter I and Chapter II of the CA98, as well as articles 101 and 102 of the TFEU, where the relevant activities relate to the supply of services relating to railways in Great Britain.

Under the EA02, the ORR has concurrent powers to: undertake market studies; make an MIR in relation to the rail sector (although only the CMA can undertake a market investigation); agree undertakings in lieu of a reference; and make recommendations to the government in relation to the rail sector. It must respond to super-complaints made to it by designated consumer bodies under the EA02 if the complaint concerns the rail sector in Great Britain.

The ORR does not have concurrent powers in relation to criminal cartels, which are investigated by the CMA and the Serious Fraud Office. It does not have a formal role in respect of mergers, although in practice will advise the CMA on the implications of mergers in the rail sector.

Competition assessments

- 14 | What are the main standards for assessing the competitive effect of a transaction involving rail transport companies?

A transaction or merger between rail transport companies is subject to the UK merger control regime in the EA02. The CMA has jurisdiction to consider a merger where the business being acquired generates UK turnover of more than £70 million, or where the merged entity would create or increase a share of supply over 25 per cent in the UK or a substantial part of the UK. If the merging parties satisfy the relevant turnover thresholds in the EU Merger Regulation, they must instead notify the merger to the European Commission for clearance.

Assuming the UK jurisdictional threshold is met, the CMA will assess whether the transaction could give rise to a substantial lessening of competition within any markets in the UK.

Under the RA93, entering into a rail franchise agreement constitutes an acquisition of control of an enterprise under the EA02. The CMA's assessment of rail franchise awards will focus on the impact of the award on competition between the winning bidder's existing rail, bus, tram or coach services and the rail franchise routes. As a starting point for the analysis, the CMA will identify point-to-point journeys (ie,

flows) on which the rail services of the new franchise overlap with the existing transport services provided by the winning bidder.

The CMA will examine whether fare increases or degradation of services (or both) might arise where the successful bidder for a rail franchise already operates transport services on the same flows and routes.

Where a significant number of overlaps are identified, the CMA will apply a series of filters for prioritisation purposes to focus its analysis on the flows most likely to raise competition concerns. The CMA has published detailed guidance on its methodology for reviewing franchise awards.

PRICE REGULATION

Types of regulation

15 | Are the prices charged by rail carriers for freight transport regulated? How?

While rail freight operators are broadly free to determine the prices they charge, they are indirectly impacted by the regulatory charging framework that determines the basis on which those rail freight operators are granted access to the network. Freight shippers and customers are also able to enter into access agreements with Network Rail directly in order to secure access rights.

When setting prices, freight operators may also need to consider any potential breach of competition legislation, including the CA98.

16 | Are the prices charged by rail carriers for passenger transport regulated? How?

Around half of passenger rail fares are regulated by the government pursuant to section 28 of the RA93. They include standard returns and weekly season tickets. These fares are linked to indexation to determine the maximum amount by which they can rise.

Fares that are not regulated by the government, such as first-class tickets and advance purchase fares, are set by passenger operators. A collective agreement that those passenger operators adhere to, known as the ticketing and settlement agreement, also sets rules on how fares are created and sold. Prices are also theoretically limited by competition law, which would make it illegal for a TOC to take advantage of consumers. For example, in 2016 the CMA capped unregulated fares on certain routes to prevent a substantial lessening of competition.

17 | Is there a procedure for freight shippers or passengers to challenge price levels? Who adjudicates those challenges, and what rules apply?

Passengers can directly challenge a passenger operator if they believe they have been wrongly overcharged for a fare. If they are not satisfied with the response they can take their case to the Dispute Resolution Ombudsman who has the power to hold passenger operators to account. In 2017, several passenger operators signed up to a voluntary price guarantee to refund the difference if passengers have been forced to pay higher ticket prices owing to a lack of fare availability on ticket machines. More generally, regulated fares are controlled by the Department of Transport, which can enforce any breach of fares regulation under the terms of the relevant passenger operator's franchise agreement.

A freight shipper entering into access agreements directly with Network Rail can appeal to the ORR under Regulation 32 of the RAMs or the RA93 in relation to the level or structure of railway infrastructure charges that it is required to pay. Facility licences also contain a duty on facility owners not to discriminate and freight shippers may be able to utilise the broad appeal rights under RAMs or the RA93 in this respect

as well. The prices charged by freight operators could also be challenged under competition legislation.

18 | Must rail transport companies charge similar prices to all shippers and passengers who are requesting similar service?

Generally, passenger operators cannot discriminate between passengers when charging them for the same type of ticket. However, fares regulation distinguishes between adult and child fare prices in determining the maximum price for regulated fares. In addition, the government has created a series of discount fare schemes pursuant to section 28 of the RA93 for specific groups, including young persons, disabled persons and senior citizens. Other concessionary travel schemes also exist together with specific schemes for rail company employees. Passenger operators can also charge different prices to customers for the same service depending on how far in advance they purchase their ticket or the flexibility of their ticket.

NETWORK ACCESS

Sharing access with other companies

19 | Must entities controlling rail infrastructure grant network access to other rail transport companies? Are there exceptions or restrictions?

Access to railway facilities, including track, station and light maintenance depots, is regulated by the Office of Rail and Road (ORR) under the RA93, unless the facility concerned has been granted an exemption. This means that access contracts for a non-exempt facility entered into without ORR approval are void. The ORR also publishes model clauses for inclusion in access contracts.

Section 17 of the RA93 provides that the ORR may, upon the application of any person, give directions to a facility owner requiring it to enter into an access contract with the applicant unless the facility is exempt, performance of the access contract would necessarily involve the facility owner being in breach of another access contract, or the consent of a third party is required by the facility owner because of an obligation that arose before the RA93 came into force.

In addition, subject to what is said below:

- under the RAMs, an infrastructure manager must ensure that infrastructure capacity is allocated on a fair and non-discriminatory basis; and
- except insofar as the ORR may otherwise consent, facility owner operating licences all require that the facility owner must not in its licensed activities unduly discriminate between particular persons or between any classes or descriptions of person.

An access applicant may appeal to the ORR if it believes that it has not been granted access rights to railway infrastructure on equitable, non-discriminatory and transparent conditions, or is in any other way aggrieved by decisions of the infrastructure manager concerning the handling of requests for infrastructure capacity in accordance with the RAMs. Similar provisions apply to service providers in respect of the provision of access to service facilities.

The RAMs permit access rights for international passenger services to be restricted where they would compromise the economic equilibrium of a public service contract. In addition, after suitable consultation, and as long as suitable alternative routes for other types of services exist, an infrastructure manager may designate particular railway infrastructure for specified types of rail service. In that case, it may give priority to that 'specialised' type of service in allocating capacity. In addition, where infrastructure capacity has

been determined to be 'congested' the infrastructure manager may, after undertaking capacity analysis, set priority criteria for allocating infrastructure capacity.

In addition to the specific regulations designed to address access issues (described above), competition law may require the infrastructure owner to grant third-party access, if the infrastructure is an 'essential facility'.

Access pricing

20 | Are the prices for granting of network access regulated? How?

The general licence condition that requires the facility owner not to unduly discriminate between particular persons or classes of person is overlaid by provisions relating to reviewing and setting charges for network access in the RA93, the Railways Act 2005 and RAMs, as follows.

The ORR's template terms for access to the national rail infrastructure provide for the ORR to undertake reviews of the access charges payable by operators. Schedule 4A of the RA93 sets out procedures required to be followed by the ORR to undertake such access charges reviews. In summary, the ORR mandates a detailed framework for track access charging by Network Rail. Charges depend on whether the operator concerned operates freight or passenger services, and whether or not it has a franchise. It includes both fixed and variable elements.

Under the RAMs, the ORR must establish a charging framework and specific charging rules in relation to infrastructure for which an infrastructure manager is responsible, and must ensure that charges for railway infrastructure comply with rules set out in those regulations. It must also ensure that under normal business conditions and over a reasonable period (up to five years), the accounts of an infrastructure manager balance revenue from infrastructure charges and other sources with railway infrastructure expenditure.

Separate rules apply to charges levied by service providers in respect of service facilities.

Competitor access

21 | Is there a declared policy on allowing new market entrants network access or increasing competition in rail transport? What is it?

The ORR publishes guidelines about its approach to allocation of track access.

The ORR mandates that open access operators (unlike franchised operators) pay variable track access charges for short-run costs and do not pay fixed track access charges, unless they are an operator in the interurban market that must pay an infrastructure cost charge.

Nearly all passenger rail miles on the national rail network are operated by operators that have a franchise agreement. The ORR has calculated that non-franchise operators (open access operators) run just 1 per cent of passenger rail miles in the UK. At present, the ORR will only approve access rights for a new open access operator if the new service satisfies the 'not primarily abstractive test'. To pass the test, the new service must provide added passenger benefits on top of the benefits provided by those franchised services with which it will compete, measured as a ratio of new revenue from the open access operation to revenue abstracted from the franchisee (less any infrastructure cost charge payable) of at least 0.3 to 1. The ORR will also assess if new open access rights will compromise the economic equilibrium of any public service contract (such as under a franchise agreement), meaning that the new service would have a substantial negative impact on the profitability of services operated under the public service contract or the net cost for the competent authority.

Lines between Ashford in England and Glasgow in Scotland are part of the North Sea-Mediterranean international rail freight corridor

established pursuant to Regulation (EU) No. 913/2010 concerning a European rail network for competitive freight. The corridor's mission is to 'improve the efficiency of rail freight transport on the corridor by promoting measures to develop rail freight'. However, Regulation 913/2010 will be revoked in its entirety on the IP Completion Day, following which the UK will no longer participate in this initiative.

SERVICE STANDARDS

Service delivery

22 | Must rail transport providers serve all customers who request service? Are there exceptions or restrictions?

Under the National Rail Conditions of Travel any individual purchasing a valid ticket is entering into a binding contract with each of the passenger operators whose trains that ticket allows the individual to use. Passenger operators are not required to provide a service to individuals who do not possess a valid ticket for that service (or, if relevant, the appropriate accompanying documentation, such as a photocard).

Passengers can be prevented from travelling on services under various pieces of legislation. For example, railway by-laws enable passenger operators to refuse to allow certain individuals on their services. Any person reasonably believed by an authorised person to be in breach of those by-laws can be asked to leave the railway immediately and, if refusing to do so, may be removed by an authorised person using reasonable force. An authorised person in this context is an employee or agent of the passenger operator, any other person authorised by that passenger operator, or a constable acting in connection with their duties in connection with the railway. This right of removal is in addition to any penalty that can be levied for a breach of those by-laws.

Passenger transport operators generally cannot discriminate between customers wishing to use their services. Such operators must comply with equalities legislation, must produce a disabled persons protection policy as a requirement of their licence, and must comply with provisions in both the National Rail Conditions of Travel and their franchise agreement that relate to assisting passengers with disabilities.

In respect of freight, facility licences contain a duty on facility owners not to discriminate between potential beneficiaries and freight shippers may be able to utilise the broad appeal rights under the RAMs or the RA93 in this respect. The prices charged by freight operators might also be challenged under competition legislation.

23 | Are there legal or regulatory service standards that rail transport companies are required to meet?

Passenger operating licences contain a number of requirements relating to service standards. These include a requirement to comply with the National Rail Conditions of Travel. Regulation (EC) No. 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations (the PRO Regulation) also creates a number of passenger rights, for example relating to compensation for delays.

Passenger operators must comply with service standards set out in their franchise agreement, as mandated by the Department for Transport (or equivalent). These include general standards of service and a number of key metrics. Typically, these metrics will be split between:

- operational performance standards, covering performance in areas such as availability of service, cancellations, delays, headway between services and capacity; and
- service quality standards, covering areas such as train and station cleanliness, equipment functionality, customer satisfaction and ticket queuing times.

In franchise agreements, customer satisfaction is usually measured through the use of National Rail Passenger Surveys, which are conducted periodically across the industry.

Freight haulage agreements usually contain some form of performance regime. Typical measures of performance include safety performance, successful service scheduling, punctuality (but typically with less stringent arrival times than passenger services) and delivery (usually measured by goods delivered as a percentage of planned loading).

Both passenger and freight operators are separately subject to performance regimes under their track access agreements, which penalise them for delays that they cause to other passenger or freight operators or Network Rail.

Challenging service

24 | Is there a procedure for freight shippers or passengers to challenge the quality of service they receive? Who adjudicates those challenges, and what rules apply?

Passengers are entitled to compensation where services are cancelled or delayed beyond specified time limits. The current National Rail Conditions of Travel allow passengers who decide not to travel because their intended train is cancelled or delayed to return their unused ticket to the original retailer or passenger operator from whom it was purchased in exchange for a full refund with no administration fee being charged. This also applies to passengers who have begun their journey but are unable to complete it owing to delay or cancellations and return to their point of origin. If a train arrives 60 minutes late or more at a passenger's destination, the passenger is entitled to a minimum of 50 per cent of the price paid (for a single or the relevant leg of a return journey) or the discount or compensation arrangements in the relevant passenger operator's Passenger Charter (in the case of a season ticket).

Each passenger train operator is required to put in place a Passenger's Charter, which typically includes enhanced rights beyond those specified in the National Rail Conditions of Travel.

Passengers are also able to make a claim against a passenger operator under the Consumer Rights Act 2015.

Freight shippers' ability to challenge the quality of service they receive from freight operators is largely determined by the terms of their haulage agreement. Freight operators must also abide by the RAMs.

SAFETY REGULATION

Types of regulation

25 | How is rail safety regulated?

All railway operations in the UK are subject to the same general safety duties and obligations applicable to all businesses, as contained in the Health and Safety at Work Act 1974 (HSWA), and certain key safety regulations passed under it. This general safety legislation is supplemented by rail-specific safety legislation. Although, for the most part this legislation is, or transposes, European law, it will continue in force after the IP Completion Day with amendments to ensure functioning in UK law without reference to EU institutions. The key railway-specific legislation is:

- the Railways and Other Guided Transport Systems (Safety) Regulations (2006) (ROGs), which implemented Directive 2004/49/EC on safety on the Community's railways (the Railway Safety Directive);
- the common safety method on risk evaluation and assessment – EU Regulation 402/2013/EU (CSM RA), which has direct effect in UK law; and
- the Railways (Interoperability) Regulations 2011 (RIRs), which implemented Directive 2008/57/EC on the interoperability of the rail system (the Interoperability Directive).

In addition to the legislation referred to above, the railway sector is also subject to a large body of safety standards and industry rules governing specific areas of railway operation and infrastructure maintenance.

Competent body

26 | What body has responsibility for regulating rail safety?

The ORR has primary responsibility for regulating rail safety in the UK.

It is responsible for enforcing the provisions of the HSWA and of health and safety regulations insofar as they relate to the operation of a railway. This responsibility extends to enforcement of the general duties of manufacturers to ensure that articles are 'so designed and constructed . . . [to] . . . be safe and without risks to health at all times when . . . being set, used, cleaned or maintained by a person at work' when that article is to be used exclusively or primarily in the construction or operation of a railway.

The operation of a railway includes:

- activities of an entity in charge of maintenance; and
- construction work for maintenance, repair, etc., of existing infrastructure, and the extension or enlargement of infrastructure if that work is in such close proximity to the operation of a railway that it creates a risk to the health, safety or welfare of those engaged in the work.

The ORR is also the Safety Authority pursuant to the ROGs and the RIRs, except in Northern Ireland where this role is fulfilled by the DRDNI/DFI. In this role it:

- issues safety certificates to railway operators and safety authorisations to infrastructure operators; and
- grants authorisation for placing new or upgraded trains and other subsystems into service.

The competent authority for the purposes of the RIRs (ie, the Secretary of State for Transport in Great Britain and DRDNI/DFI in Northern Ireland) is responsible for:

- determining applications for derogation from the need to have authorisation for placing rolling stock and other subsystems into service;
- until the IP Completion Day:
 - determining applications for derogation from the need to apply technical specifications for interoperability (TSIs) (as issued by the European Union Agency for Railways); and
 - notifying the European Commission of those UK standards that are to be notified national technical rules, which are national rules designed to cover matters relating to local conditions that TSIs do not cover; and
- after the IP Completion Day, setting technical specifications and standards to be complied with.

Manufacturing regulations

27 | What safety regulations apply to the manufacture of rail equipment?

Structural subsystems such as command and control equipment and rolling stock may not be placed into service unless they have been authorised by the Safety Authority under the RIRs. To grant such authorisation the Safety Authority must be satisfied that:

- the equipment is technically compatible with the rail system into which it is being integrated; and
- it has been designed, constructed and installed to meet the essential requirements set out in the interoperability regulations.

Also, subcomponents (such as engines) of structural sub-systems ('interoperability constituents') for which there is an applicable technical

specification must not be placed on the market unless they comply with relevant essential requirements.

Maintenance rules

28 | What rules regulate the maintenance of track and other rail infrastructure?

General safety duties, including those under the HSWA (governing the safety management of maintenance work) and the ROGs (governing the authorisations, safety certificates and technical safety requirements associated with operations and upgrades to infrastructure), apply. Among other things, the ROGs mandate that the infrastructure manager must manage and use the infrastructure in accordance with a safety management system that meets the requirements of the ROGs. These requirements include the following:

- the common safety methods and common safety targets are met;
- the system complies with national safety rules; and
- the system ensures control of risk, including risks relating to the supply of maintenance and material, and the use of contractors.

Also, Network Rail's network licence has obligations relating to the operation, maintenance, renewal and enhancement of the network, among other things in order to satisfy the reasonable requirements of persons providing services to railways and funders.

In terms of the safety of maintenance work itself, the safety procedures and practices that must be followed by track maintenance and other railway infrastructure workers are specialised and industry-specific. These procedures are established mainly in detailed railway standards and rules, for example the 'Rule Book' maintained by the Railway Safety and Standards Board. The Rule Book establishes detailed procedures for specific track maintenance operations, for example in relation to controlling vehicle movements within work sites and in relation to track safety practices.

29 | What specific rules regulate the maintenance of rail equipment?

General safety rules, including those under the HSWA and the ROGs, apply. In addition, the ROGs provide that no person may use a vehicle on the mainline railway unless it has an entity in charge of maintenance assigned to it that is registered in the National Vehicle Register.

The entity in charge of maintenance must ensure by a system of maintenance that the vehicle is in a safe state of running. The system must ensure maintenance in accordance with the maintenance file, maintenance rules and applicable technical specifications.

Accident investigations

30 | What systems and procedures are in place for the investigation of rail accidents?

Following any major safety incident on the railway, a number of investigations will take place, which taken together can span many years after an incident. There is likely to be a police investigation, to assess whether a serious criminal offence such as manslaughter has been committed, an investigation by the Office of Rail and Road (ORR), to assess whether there has been a breach of the HSWA and other relevant safety legislation, and in the event of a fatal accident there will also be a coroner's inquest to establish the cause of death. Following very major (national scale) incidents there may also be a public inquiry.

Also, the Department of Transport has a Rail Accident Investigation Branch (RAIB) to investigate railway accidents. Its role includes determining and reporting on the cause of an accident, but subject to that its role is not to consider or determine blame or liability. RAIB inspectors

have statutory powers to enter premises, gather evidence and require information to be provided in the conduct of investigations. The Chief Inspector of Rail Accidents may also direct persons involved in managing or controlling railway property where an accident took place, or that were involved in the accident, to conduct investigations, and the manner in which those investigations shall be conducted. Industry parties have duties to notify the RAIB of accidents and incidents.

Accident liability

31 | Are there any special rules about the liability of rail transport companies for rail accidents, or does the ordinary liability regime apply?

There are two types of liability that arise from rail accidents: civil liability to pay compensation and damages to injured parties and those affected by an accident; and criminal liability arising in connection with offences committed by the companies and individuals involved in an incident.

With respect to civil liability, the ordinary liability regime applies to the liability of railway undertakings, save that it is a standard licence condition for all railway undertakings that they accede to the claims allocation and handling agreement (CAHA).

The CAHA deals with the allocation of liability for third-party liability claims that arise in connection with the operation of railway assets or on land owned or controlled by a party to the CAHA, which was being used in connection with the operation of railway assets. This agreement provides that compensation for damage below a minimum threshold (currently £7,500) is dealt with by operators in accordance with pre-agreed allocations set out in a schedule to the CAHA. Claims above the threshold or not in the schedule are handled by a lead party and the allocation of liabilities is agreed among the CAHA members involved. Disputes can be referred to mediation, to arbitration or the courts as determined by the CAHA rules and the nature of the dispute.

The CAHA is meant to keep costs down and to provide a unified face to claimants behind which industry parties allocate liabilities between them. It should mean an injured party does not have to pursue more than one industry party.

Also, under the PRO Regulation, in the case of death or injury the passenger operator must make an advance payment no later than 15 days after the identification of the natural person entitled to compensation. The payment must enable their immediate economic needs to be met, and be proportional to the damage suffered. It may be offset against civil liability.

All licensed operators are required to hold third-party liability insurance on terms approved by the ORR. Those requirements include that the limit of cover must be at least £155 million.

With respect to criminal liability, the same rules apply to railway undertakings as to other businesses within the UK. Most breaches of duty and specific safety obligations under UK law will amount to a criminal offence, punishable by a fine imposed in the criminal courts. In the event of gross breaches of duty, in addition to health and safety offences there is the risk of liability under the law of manslaughter. As a result of new sentencing guidelines in England and Wales (the Health and Safety Offences, Corporate Manslaughter Definitive Guideline, effective from 1 February 2016), the size of fines imposed for safety breaches has increased significantly over the past few years.

FINANCIAL SUPPORT

Government support

- 32 | Does the government or government-controlled entities provide direct or indirect financial support to rail transport companies? What is the nature of such support (eg, loans, direct financial subsidies, or other forms of support)?

Some mainline passenger franchise operators receive subsidy payments under their franchise agreements, although franchisees of more profitable mainline routes pay a premium. Most franchise agreements for the mainline network contain revenue risk-sharing mechanisms. Franchise operators are also indirectly subsidised by the support provided to Network Rail. At present the government is financially supporting all TOCs during the covid-19 pandemic by placing them onto emergency measures agreements.

Open access operators receive no subsidy other than indirectly by means of their track access rights, given that Network Rail receives government support and open access operators do not pay fixed charges.

Under section 54 of the RA93, the franchising authorities are empowered to exercise their franchising functions with a view to encouraging railway investments and may enter into agreements undertaking to do so. In practice, section 54 undertakings have frequently been given to a financier of a given railway asset that, for a given period, the franchising authority will procure a replacement lessee of the asset concerned if the existing lease ends during that period.

Under section 6 of the Railways Act 2005, the government may agree to provide financial assistance for the purpose of securing the provision, improvement or development of railway services or assets, or for any other purpose relating to a railway or railway services.

The government provides financial support to Network Rail, owner of the national rail network in the form of a grant and, pursuant to powers under section 6 of the Railways Act 2005, a loan facility under a facility agreement signed on 28 March 2019. For the period 2019 to 2024, the loan facility totals £32.3 billion.

Requesting support

- 33 | Are there sector-specific rules governing financial support to rail transport companies and is there a formal process to request such support or to challenge a grant of financial support?

There is a periodic review process under which the ORR reviews and fixes Network Rail's track access charges, and which is informed by and helps set the level of government support available to Network Rail. This process is guided by the Railways Act 2005. There are also rules regarding financial management set out in a 2014 framework agreement between Network Rail and the Secretary of State for Transport.

Subsidy levels provided under franchise agreements are in effect set by the competitive process to award the franchise.

There is no formal process for requesting or awarding section 54 undertakings or assistance under the Railways Act 2005. However, the availability of a section 54 undertaking is sometimes expressly stated in a franchise competition invitation to tender.

Government financial support is subject to the EU state aid rules. Specific guidance exists for the rail sector.

LABOUR REGULATION

Applicable labour and employment laws

- 34 | Are there specialised labour or employment laws that apply to workers in the rail transport industry, or do standard labour and employment laws apply?

Rail transport workers are not subject to specialised employment laws in the UK. However, much of the industry is unionised, therefore collective agreements often supplement employees' individual terms of employment, and unions campaign for their members' rights. Strike action is also prevalent in certain parts of the sector. Given the safety-critical nature of some work, working time and health and safety matters are highly regulated, and alcohol and drug control is closely monitored. Long service in the industry is common, often leading to generous employee benefits under legacy schemes. The outsourcing of services or transfer of assets to third parties are both common events in the sector. This can often lead to the transfer of employees' employment, who are connected to the services or assets, to the third party. In this situation, the employees' employment and terms and conditions are preserved.

ENVIRONMENTAL REGULATION

Applicable environmental laws

- 35 | Are there specialised environmental laws that apply to rail transport companies, or do standard environmental laws apply?

In the UK, the rail transport sector does not have its own specific set of environmental laws; however, rail transport companies must comply with standard environment laws and regulations like all others. Areas of environmental law most relevant to the railway sector include waste management legislation, environmental permitting, the remediation of contaminated land, the conservation of species and habitats, and the carriage of hazardous and dangerous cargo.

In terms of the regulation of the environmental impacts of railway operations and railway land, the primary regulators of environmental laws are the Environment Agency and the local authorities. However, Natural England, Scottish Natural Heritage and Natural Resources Wales are also important as they are the relevant authorities in connection with habitats and species. The Office of Rail and Road (ORR) is not responsible for environmental regulation though it does have a statutory duty under the RA93 to contribute to the achievement of sustainable development and to have regard to the effect on the environment of activities connected with the provision of railway services. The ORR also has an obligation under the Natural Environment and Rural Communities Act 2006 to have regard for the purpose of conserving biodiversity.

The ORR complies with its statutory duty with respect to the environment principally through its licensing role. All operators are required to produce an environmental policy within six months of their licence coming into effect, and the ORR environmental guidance must be taken into account when the operator prepares its policy.

In addition to obligations imposed by the ORR, rail transport companies must operate in accordance with all other environmental legislation, including the Environmental Protection Act 1990, the Carriage of Dangerous Goods and Use of Transportable Pressure Equipment (Amendment) Regulations 2011 and the Environmental Permitting (England and Wales) Regulations 2016.

UPDATE AND TRENDS

Key developments of the past year

36 | Are there any emerging trends or hot topics in your jurisdiction?

The UK left the European Union on 31 January 2020, but EU legislation remains effective in the UK as if it were a member state until the IP Completion Day. After that, the European Union (Withdrawal) Act 2018 provides for existing EU law to continue in UK law. There is power for ministers to make regulations that alter retained EU legislation so that it continues to operate in the UK after the IP Completion Day notwithstanding the UK no longer being a member state.

The Williams Review into the structure of the rail industry and the way passenger services are delivered was established by the government in September 2018 and was due to report its findings in the autumn of 2019. Those findings have yet to be published. Press reports have suggested that the review may be considering handing greater control of the railways to Network Rail, granting them the ability to award contracts to train operating companies (TOCs). A white paper is now expected later in 2020.

On 27 July 2020, the European Commission put forward a proposal (<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=COM:2020:622:FIN&rid=5>) to authorise France to negotiate an agreement supplementing the Treaty of Canterbury (which is the bilateral agreement that underpins the arrangements for the Channel Tunnel). The proposal seeks to make amendments in relation to safety and disputes. What, if any, changes to the arrangements regarding the Channel Tunnel occur as a result is not yet clear.

Coronavirus

37 | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

Early in its response to the covid-19 pandemic the ORR indicated that, given the pandemic, it would be pragmatic in its monitoring and oversight of Network Rail and proportionate and targeted in its activities. It developed this approach in an exchange of correspondence with Network Rail in May 2020. In short, the Office of Rail and Road (ORR)'s focus will be on data and information, risk management and planning and future delivery and risk. In respect of the latter category, the ORR will place much less emphasis on holding Network Rail accountable for trajectories and targets (such as those on scorecards) agreed prior to the pandemic, where these are less relevant now. Instead, it will qualitatively assess whether Network Rail is doing everything reasonably practicable in all relevant circumstances as required by its licence and on its delivery of UK and Scottish government priorities for dealing with the pandemic.

The outbreak of the covid-19 pandemic led to the government advising against travel on public transport in several circumstances and saw many businesses close their offices. This inevitably had a significant impact on rail patronage and revenue. To address the financial implications and ensure continuity of service, the Secretary of State for Transport introduced a series of emergency measures agreements (EMAs) in March 2020, which temporarily replaced the existing franchise agreements. The EMAs transfer all revenue and cost risk to the government and provide the TOCs with a management fee for operating the service. These EMAs were originally designed to expire in September 2020 but all indications are that these may need to be extended as the covid-19 pandemic continues.



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The Office for National Statistics has also taken action to reclassify TOCs for statistical purposes as public non-financial corporations. This appears to be at least partly linked to the conclusion of the EMAs and the government support that they provide. While some commentators have asserted that this is a further step towards a wider renationalisation of TOCs, this reclassification may well be temporary for so long as the EMAs remain in place.

In relation to safety regulation, the covid-19 pandemic has given rise to new duties and obligations under existing health and safety legislation, primarily Health and Safety at Work Act 1974 (HSWA), to put in place appropriate measures to control the risk of infection to both employees and members of the public. Perhaps most important of the areas under HSWA is the assessment of covid-19 risk that operating companies will need to support the continued operations during the pandemic. In common with other sectors of the economy, the government has issued guidance with respect to the transport sector dealing with issues such as social distancing in stations and mandatory face masks on trains.

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