



Catherine Isambard  
ARAF  
57 Bd Demorieux  
CS81915  
72019 Le Mans Cedex 2

10 December 2012

Dear Catherine

**PUBLIC CONSULTATION – INTERNATIONAL PASSENGER TRANSPORT SERVICES INVOLVING DOMESTIC SERVICES**

Thank you for the opportunity to respond to ARAF's consultation document on international passenger transport services involving domestic services. ORR's responses to the specific questions posed in the consultation document are set out below:

Principal purpose

**Question 1 - How do you understand the regulatory framework? Does the draft presented by ARAF appear to respect the spirit of Directive 2007/58/EC and/or national texts?**

ORR is the UK body responsible for assessing the international nature of a proposed new cross-border service, and whether this new service would compromise the economic equilibrium of an existing service governed by a public service contract. We believe that ARAF's proposed framework is complying with the spirit of Directive 2007/58/EC. The Directive gives a clear role to regulatory bodies which are responsible for carrying out the international purpose test and the economic equilibrium test in accordance with national legislation and once a request has been submitted by the relevant party.

**Question 2 - Do you think the procedures are clear, complete and compatible with your operations?**

We support ARAF's approach and proposed procedure of notification and request. ORR tends to combine the notification and formal request stages. Similarly to ARAF,

Mis en forme : Police :(Par défaut)  
Arial, 10 pt

Supprimé: 41353194135319

Mis en forme : Police :(Par défaut)  
Arial, 10 pt

[4135319](#)

ORR allows informal discussions to take place between the regulatory body and interested parties at an early stage. This can help to clarify the situation, facilitate the process and avoid undue cost and bureaucracy.

We also share ARAF's view on the type of core information that needs to be submitted and published regarding the proposed new service. We believe that it is important for information to be transparent and for relevant parties to be consulted at the outset of the process to ensure that the impact of a new proposed service is understood. We also believe that some flexibility should be permitted with regard to the information package, recognising that not all information may be available, or could change.

We would also recommend clarifying whether the eight days period mentioned in article 7 refers to calendar or working days. It is also not clear whether the Authority would have to continue meeting this timescale if more information is required.

**Question 3 - Is it desirable to fix a deadline by which the applying railway undertaking must refer a case to the Authority?**

We support ARAF's decision to set timescales as this provides clarity and consistency in the procedure. As far as ORR processes are concerned, we consult during our assessment of the principal purpose of the new international passenger service and whether it would compromise the economic equilibrium of a public service before reaching our final decision. We publish the consultation on our website and invite representations from interested parties. We would expect that this would generally be open for four weeks. Within two months of receiving all relevant information, and after the consultation, our decision is circulated to all parties involved and published on our website.

Article 12 mentions that the ministry of transport shall be given a period of two months starting from the date of the package to refer a case to the Authority. It may be useful to clarify the role of the Ministry in this article.

**Question 4 - Is a fixed timescale like that described in the paper desirable? Do you think the one-month deadline is sufficient?**

Yes, setting timescales is useful and provides clarity and transparency to all parties. It is also important that any interested railway undertaking, excluding the applicant railway undertaking, that refers a case is required to a reasoned justification for doing so to the Authority.

Article 19 requires the Authority to return its decision on the basis of the information gathered within two months of the date of the receipt of the referral. In the case of ORR, our decision is published within two months of receipt of all relevant information. This, in our view, ensures that decisions are properly evidenced and sufficiently robust.

Mis en forme : Police :(Par défaut)  
Arial, 10 pt

Supprimé: 41353194135319

Mis en forme : Police :(Par défaut)  
Arial, 10 pt

**Question 5 - Do you think the approach chosen in Articles 25 and 26 is appropriate? Are the threshold conditions suggested in Article 25 sufficient? Do you think the criteria set out in Article 26 are appropriate? What other, if any, criteria should be taken into consideration? Should the criteria be organised in order of priority?**

ORR has chosen not to set any strict predetermined threshold. Nevertheless, should the results of our assessment show a disproportionate amount of revenue and/or passenger volumes arising from domestic traffic, we are likely to conclude that the service fails the principal purpose test. However before reaching a final conclusion, we will also take into account other factors, such as the length of service in terms of distance and how the services are marketed.

With regard to domestic services, ORR applies the “not primarily abstractive test” (NPA). Under the NPA test, new open access services are only approved where the revenue that they are projected to take (or ‘abstract’) from franchised (ie under public service contract) operators will be more than offset by passenger benefits. Our analysis when assessing access applications is strongly focused on the impact of granting capacity to open access operators on franchise revenues. A key indicator that we use to assess the impact of open access is the ratio of generated (by open access) to abstracted (from franchised operators) revenues. We would not normally approve services with a revenue generation / abstraction ratio of less than 0.3. We would not expect to approve competing services that would be primarily abstractive of an incumbent’s revenue without providing compensating economic benefits. The operator’s application should therefore specify what benefits passengers are likely to gain and the extent to which service volume growth is expected to lead to passenger volume growth. Using a threshold ratio for the entire service of 0.3 to 1 balances our duties to promote competition for the benefit of passengers and have regard to the funds available to the Secretary of State.

We would support ARAF’s approach to conduct the test on the basis of a multi-criteria analysis, but would not recommend prioritising those criteria so as to ensure a robust and comprehensive analysis. It may be worth specifying in article 26 that the list of criteria listed is not exhaustive and that the Authority may also consider other factors that it may judge relevant to assessing the specific case.

In article 23, it may also be worth clarifying that information must be provided within eight days of the request to the Authority.

**Question 6 - What do you think is an appropriate period of validity of the Authority’s decision and what monitoring measures would you suggest?**

With regard to timescales, ORR will consult during its assessment of the principal purpose of the new international passenger service before reaching a final decision. The consultation will be published on ORR’s website, inviting representations from

Mis en forme : Police :(Par défaut)  
Arial, 10 pt

Supprimé: 41353194135319

Mis en forme : Police :(Par défaut)  
Arial, 10 pt

[4135319](#)

interested parties. ORR will also notify the relevant parties in writing about the consultation. In general, the consultation period on access issues will last four working weeks. Within two months of receiving all relevant information, and after the consultation, we reach a decision (providing the grounds for the decision), circulate it to all relevant parties and publish it on our website.

When making a decision, we will specify a reasonable time period within which, and the conditions under which, the relevant parties may request a reconsideration of the decision made. When ORR has received a properly made and evidenced request for reconsideration of its decision, any decision previously indicated will be suspended or will not take effect pending reconsideration. ORR will issue its final reconsidered decision within two months of the date of receipt of all relevant information. ORR does not envisage specific monitoring of its decision. It is worth noting that in GB the regulatory body is responsible for pre-approving all access track access contracts between the infrastructure manager and the rail operator before they enter into force and before services are permitted to run.

#### Economic equilibrium

#### **Question 7 - Do you think the procedures are clear, complete and compatible with your operations**

We support ARAF's proposed approach, which reflects to a certain extent the methodology in Great Britain. However, we envisage that in practice the assessment of principal purpose and economic equilibrium will take place at the same time as ORR's consideration of a track access application.

The assessment of the economic equilibrium may be one of several factors that ORR considers before approving access rights for an international passenger service. As mentioned above, the track access regime in GB requires the regulator to make an assessment of access applications prior to approving track access contracts. Considerations include, for instance, economic and efficient use of capacity and operational performance.

#### **Question 8 – If the analysis of the Authority concludes that the economic equilibrium of a public service contract will be compromised, do you think it is desirable for the Authority to recommend restrictions in its decisions? If yes, what types of restrictions can be put in place? (restricting the number of marketable tickets on domestic routes, a ban on some stops ...).**

Yes – ORR believes it would be helpful for the decision to indicate, if appropriate, any limitations to the right of access to the network for any new services. We would think that the most likely form for these limitations would be a reduction or amendment to the number of proposed stops.

Mis en forme : Police :(Par défaut)  
Arial, 10 pt

Supprimé: 41353194135319

Mis en forme : Police :(Par défaut)  
Arial, 10 pt

**Question 9 – What timeframe should be used for verifying that the public service contract is not compromised, particularly in terms of expiration of the contract?**

With regard to timescales, we would adopt a similar approach to that detailed under question 6. We would expect the period to vary in accordance with the complexity of the request.

**Question 10 - Do you think that the suggested criteria are relevant? What other aspects should be taken into account?**

Yes. ORR supports ARAF's approach to consider both quantitative and qualitative criteria. We would also expect that these criteria are non-exhaustive, and will evolve over time to reflect market developments and experience gained. To ensure that the principles of equality and non-discrimination are fully met, the decision making process and decision criteria should be clear and transparent, and published on the Regulatory Body's website.

**Questions 11 – What do you think is and appropriate validity of the Authority's decision and what monitoring measures would you suggest?**

As outlined in our reply to question 6, we expect that our decision will specify a reasonable time period within which, and the conditions under which, the relevant parties may request a reconsideration of the decision made. We consider that our decision will continue to be valid until we receive a properly made and evidenced request for reconsideration of this decision. ORR will issue its final reconsidered decision within two months of the date of receipt of all relevant information.

We do not envisage specific measures to monitor our decision. However under the access regime in Great Britain, we are responsible for carrying out an assessment of access applications prior to approving track access contracts for any train services using the national network. We would think therefore that our scrutiny of the applications would enable us to monitor changes that may lead to a reconsideration of our decision.

I hope that these comments are helpful. If you have questions about this response please do not hesitate to contact me.

Yours sincerely,

Agnès Bonnet

Mis en forme : Police :(Par défaut)  
Arial, 10 pt

Supprimé: 41353194135319

Mis en forme : Police :(Par défaut)  
Arial, 10 pt

4135319