



DfT consultation on updating rail markets regulations:

Implementing the market pillar, EU Directive 2016/2370, and preparing rail markets legislation for EU Exit.

June 2018

1. The Associated Society of Locomotive Engineers and Firemen (ASLEF) is the UK's largest train driver's union representing approximately 20,000 members in train operating companies and freight companies as well as London Underground and light rail systems. We appreciate this opportunity to share our views on how the UK should implement Directive 2016/2370 (the Directive), part of the Market Pillar of the Fourth Rail Package, into UK law.

**Question 2: We have assessed the approach of not using copy out as being the least burdensome and the least costly to businesses. Do you agree with this assessment?**

2. ASLEF lobbied to prevent the fourth railway package passing into law in order to prevent the mistakes of privatisation in Britain from being rolled out across Europe. At the time of privatisation, the sale of the railways was justified to taxpayers on the basis that competition would increase efficiency, reduce taxpayer subsidy, and reduce fares while also improving services. ASLEF never believed that competition would achieve this on the rail network and we were right: What we now have is a series of private sector monopolies and the only competition is every 7 to 15 years when franchises are up for tender. Billions are pumped into the pockets of the privateers and passengers pay the highest rail fares in Europe.
3. Unfortunately, our lobbying was not successful and Directive 2012/34/EU4 was transposed into law in 2016, establishing a single European railway area with common rules based on the guiding principle of extending competition to domestic rail markets. Now Directive 2016/2370 introduces part of the Market Pillar of the Fourth Rail Package. We agree with the consultation document that overall this Directive will actually have little impact on our rail market because Great Britain has already had a liberalised rail market for a number of years. Our domestic rail market is already open to competition, open access is already available, and Network Rail is already independent of train operating companies. Nevertheless,

we continue to lobby for what is right for our railways and hope to make the case for mitigating the impact of this legislation, and prevent more damaging and irreversible decisions from being made.

4. Using a “copy out” approach to the transposition of European requirements, using the language of the Directive with modifications only where necessary, is a simple and straight-forward way of transposing agreements that we are committed to and which are relevant and desirable. In this case, since a strict copy out approach was not followed in the 2016 Regulations, it makes sense not to use copy-out to implement the Directive. Hopefully the points we raise in this consultation will be taken into consideration when decisions are made about what we commit to legislation. The outcome will determine what arrangements apply to us in relation to EU legislation once the UK has left the EU.

**Question 3: Do you agree with our initial assessment that introducing the new requirements in Theme 1 will have zero impact?**

5. The Directive introduces new requirements designed to ensure the independence and impartiality of the infrastructure manager, whilst still enabling alliancing and joined up working between infrastructure managers and train companies. This Directive should have little impact here as we already have a liberalised market and the UK's lead infrastructure manager, Network Rail, is already aligned with the independence and impartiality requirements being introduced.
6. The Directive focuses mainly on vertically integrated structures, where the rail infrastructure and rail passenger services are operated and owned by a single body. In Great Britain the Railways Act 1993 provides for rail franchising on designated routes and section 25 of that Act prohibits state-controlled train operating companies from bidding for rail passenger franchises in England and Wales. While ASLEF is opposed to vertical operation in a privatised system where the main operator would have a vested interest in prioritising the busiest and most profitable paths and squeezing out other operators, we believe that a publically-owned single unified, vertically integrated system would offer the best value to passengers and the taxpayer. Public-sector monopolies do not lack the incentive to be efficient if run properly. However, the current system also makes it impossible to run a publicly-owned railway, even in cases when this is by far the best option: The East Coast mainline, for example, was nationalised in 2009 and was run extremely successfully until it was reprivatized, following which the franchise collapsed and the operators were forced to give up the franchise early.

**Question 4: Do you agree with our initial assessment that introducing the new requirements in Theme 2 will have a negligible impact?**

7. ASLEF agrees that if UK policy is already aligned with the new financial transparency requirements for infrastructure managers then the impact of implementing them should be negligible. The Office of Rail and Road (ORR) plays an important role in assessing the activities Network Rail needs to undertake to efficiently operate, maintain and renew the national rail infrastructure, and what the cost of these activities should be. As a union we have called for improvements to ORR reviews of Network Rail's performance, to properly identify whether all work required to maintain a safe and reliable network is completed on time and to the highest possible standard, as well as to identify possible improvements in value for money and to inform future planning where possible efficiencies could be made. This is particularly important given the current economic pressures on budgets for public spending.

**Question 5: Do you agree with our initial assessment that introducing the new requirements in Theme 3 will have negligible impact?**

8. ASLEF is supportive of efforts to improve coordination and ensure that infrastructure managers and railway undertakings are able to co-operate on issues such as interoperability and access conditions. Infrastructure managers are already required to co-ordinate and consult on a number of the new requirements and the UK's regulatory body for rail, the ORR, already cooperates with the French regulator in respect of international services through the Channel Tunnel, so new requirements should have a negligible impact on infrastructure managers and regulators.
9. The Secretary of State for Transport's strategic vision for rail sets out proposals for closer, more joined up working. ASLEF supports efforts to develop more collaborative working practices between Network Rail, TOCs, FOCs and other stakeholders. Better coordination between Network Rail and operators is needed for planning improvements to the network but also on a day to day operational basis. A large part of the lack of communication between Network Rail and train operators results from the lack of alignment between control periods and franchising schedules (e.g. complications when franchise-led activity, tied to the franchising timetable, conflicts with collaborative activities). We believe that the use of financial incentive mechanisms to foster collaboration has been unsuccessful and an alternative is needed. Unfortunately, the Transport Secretary also advocates devolution to more autonomous route businesses and a new generation of rail schemes, with local partners designing, financing and funding rail capacity and new lines. ASLEF fundamentally opposes the privatisation of rail infrastructure and we disagree with the Transport Secretary's assumption that collaboration should be more industry-led.

10. The suggestion has been made that ORR should take a step back and its role should be limited to monitoring and supporting industry-led activity, sharing best practice across the network and ensuring that conduct is compliant with regulations. ASLEF has concerns about the introduction of a new model of collaboration being more industry-led and we feel that such an approach would be risky. Fragmentation is the first barrier to efficiency on the railways and there is a very real danger that the proposals for devolution and private investment could just make an overly-complicated system worse, not better. In 2011 the McNulty report explained that fragmentation is the first barrier to efficiency. In 2012 the Rebuilding Rail report, published by the rail unions, also found that the key reasons for the increase in the cost of the railway arose from fragmentation of the rail system into many organisations; profit margins of complex tiers of contractors and sub-contractors; and dividend payments to private investors. More recently, in 2016, the Shaw Report also rejected the wholesale privatisation and breakup of Network Rail. Instead, passengers and taxpayers would be much better off with a not-for-profit system where profits are invested in maintenance and enhancements instead of being paid to shareholders.

**Question 6: Do you agree with our initial assessment that introducing the new requirements in Theme 4 will have a negligible impact on regulatory bodies?**

11. The Directive requires that the regulatory body should have the power to ensure that discrimination against applicants is prevented, extends the circumstances in which applicants can appeal to a regulatory body if they think that they have been treated unfairly, and adds new requirements for the regulatory body to monitor competition in rail. In the UK the ORR already has an appeals process and our rail market is already open so – again - the impacts of these new requirements should be negligible.
12. One of the main objectives of the Market Pillar Directive was to “improve” competition within the EU single market and further liberalise railway markets by establishing the principle of “open access” and extending access rights into domestic passenger rail markets. The Directive is focused on facilitating open access, subject to safeguards to avoid compromising the viability of franchised routes, by enabling new rail operators to bid for access to routes which have an existing franchise operator. This is consistent with the UK approach to open access as set out in ORR guidance. Indeed, most of our passenger rail services are operated by franchisees according to specifications set out by the government, but First Hull Trains and Grand Central Railway are open access operators who receive no subsidy and apply to the ORR and National Rail for access rights to ‘slots’ in the timetable to operate their proposed services. The design of Great Britain’s rail industry currently means that there is a fairly level playing field of competition. If Network Rail were privatised, however, there would be an incentive

for infrastructure managers to discriminate in favour of particular train operators and to offer free paths to the most profitable passenger services.

13. ASLEF is not in favour of encouraging more open access on our railways because more train operators and more franchisees would lead to more complexity in timetabling, increased fragmentation and would threaten unprofitable services. Even within the current system ASLEF campaigns to remind stakeholders it is important that the rail freight sector is not constrained by a lack of path access. Rail freight reduces CO2 emissions, road congestion and road fatalities and on the intermodal side there is a lot of scope for growth but without free paths being allocated to freight, growth will be stunted.

**Questions 8 and 10: Do you agree that we should extend the exclusions from the independence, financial transparency and outsourcing requirements to the services described above?**

14. Local and regional standalone networks for passenger services, networks intended for the operation of urban or suburban passenger services, regional networks used for regional freight services and privately owned infrastructure that exists only for the use by the infrastructure owner for its own freight operations are currently excluded from the requirements in Articles 712, 813 and 1314 of Directive 2012/34. This Directive allows member states to add the exclusion of new independence, financial transparency and outsourcing requirements (themes 1 and 2). The Directive also allows member states to exclude local low traffic lines not exceeding 100km that are used for freight by a single freight operator or for local passenger services and regional low traffic networks managed by an entity other than the main infrastructure manager and used for services provided by a single railway undertaking from the theme 1 and 2 requirements. ASLEF agrees with the proposal to introduce these exclusions. From the outset we did not support the fourth railway package passing into law and also, such specific, small scale cases would be separate from mainline services, set up differently, and requirements for them would better be considered and set out on an individual case by case basis.

**Question 12: Do you agree that we should not implement the new requirements detailed in Theme 7?**

15. The Directive gives member states the option to introduce common information and integrated ticketing schemes. ASLEF agrees that doing this could potentially lead to more confusion for passengers if the legislative proposals are not compatible with existing schemes. We already have requirements in franchise and licencing agreements and we do not see a need to introduce additional legislation around this.

ASLEF fundamentally rejects the notion that there should be any profit motive on the railway and we do not support the move to open the financing and delivery of railway services to a profit-driven private sector. It is ASLEF's view that the only way to achieve long-term country-wide investment would be through all elements of the railway coming back together under a publicly-owned vertically-integrated system. As a union we campaigned against the fourth railway package because the privatised railway system doesn't work in Great Britain and won't work in the rest of Europe. Previously each member state had the freedom to choose how it wanted to run its passenger services. The Fourth Railway Package takes away that freedom, and forces a structure on the EU that has been an abject failure in this country.

Mick Whelan  
General Secretary  
ASLEF  
77 St John Street  
London  
EC1M 4NN  
Tel: 020 7324 2400