THE RAIL INDUSTRY IN GREAT BRITAIN
- INSTITUTIONAL AND LEGAL STRUCTURE
2000/2001

Georgina Lawrence
Preface

The CRI is pleased to publish ‘The Rail Industry in Great Britain - Institutional and Legal Structure, 2000/2001’ in its Industry Brief Series. The author is Georgina Lawrence, a Research Officer at the CRI, and it is the first CRI brief on the rail sector since British Rail was privatised, starting in 1996. There was an earlier brief by Charles Williams, published in 1992, which reviewed the question, ‘Can Competition Come to the Railways?’, but this has been superseded, given the many changes to date.

The re-structuring of the rail industry has had two particularly notable elements. First, the separation of Railtrack, the infrastructure company, from the passenger train operating companies (TOCs), which compete to secure franchises. Secondly, the development of the regulatory framework, which started with the Office of the Rail Regulator (ORR) and the Office of Passenger Rail Franchising (OPRAF), but soon after privatisation, with the election of the Labour Government in 1997, has developed to include the Strategic Rail Authority (currently the shadow sSRA), which now incorporates OPRAF. The role of Government, ministers, the sSRA and ORR in representing customers, regulating and securing improved rail services is a complex mix, and the new Brief is intended to provide a foundation for understanding the present structures and processes. Current developments include the periodic review of Railtrack’s access prices by the Rail Regulator, Tom Winsor, and the reorganisation and renegotiating of the first set of franchises by the franchising Director, Mike Grant. Key decisions will be taken in the Autumn, and therefore this Brief focuses on the institutional and legal frameworks of the rail industry at this time.

The CRI would welcome comments on the Brief, which can be taken into account as CRI Industry Briefs have to be updated from time to time in line with developments in the Industry, and will be published as a ‘revised’ or subsequent ‘edition’. Comments should be addressed to:

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The CRI publishes work on regulation, by a wide variety of authors and covering a range of regulatory topics and disciplines, in its International, Occasional and Technical Paper series. The purpose is to promote debate and better understanding about the regulatory framework and the processes of decision making and accountability. Enquiries or manuscripts to be considered for publication should be addressed to the above. The views of authors are their own, and do not necessarily represent those of the CRI.

Peter Vass
Director, CRI
September 2000
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The railways in Great Britain\(^1\) were nationalised by the Transport Act 1947. This Act brought the railways under state ownership, and established the British Transport Commission as the government body responsible for the railways (as well as for roads, canals and ports). In 1962, the political focus changed, and the Transport Act 1962 abolished the British Transport Commission, and created separate bodies to deal with each aspect of transport. This Act placed the control of the railways with a newly created organisation, the British Railways Board, which was responsible for railways and ancillary services. This Board (commonly known as British Rail), operated as a monopoly in England, Wales and Scotland, and functioned to provide rail services on behalf of the state.

In the 1980s the Conservative government encouraged the privatisation of state assets and the operation of these assets competitively in the market. The government privatised the telecoms, water and gas industries throughout the 1980s and early 1990s. In July 1992 the government published a White Paper detailing how competition and privatisation were to be achieved in the railways.\(^2\) The Paper was called *New Opportunities for the Railways*, and announced that:

> “The Government’s objective is to extend the involvement of the private sector in the operation of the railways, ensure continuity of service, assure safety, and provide value for money. This is the best way to improve the service to customers”.\(^3\)

The legislative structures for these changes were encompassed in the Railways Act, which was introduced into Parliament on 21 January 1993. In November 1993 the Railways Act received royal assent.

**Regulators**

The Conservative government had successfully adopted the model in their previous privatisations of state utilities of creating an independent regulator responsible for the industry. The utility regulators were given extensive powers over the newly privatised industries, a degree of autonomy and freedom from political control. They were put under a statutory duty to encourage competition and economic efficiency,

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\(^1\) This paper is based on the rail industry in Great Britain. Northern Ireland has a separate state controlled railway; Northern Ireland Railways.


\(^3\) Ibid, p.21.
and a duty to protect consumers and to safeguard various social outcomes. The Railways Act was different in that it created two regulators, the Rail Regulator who headed the Office of the Rail Regulator (ORR), and the Director of Passenger Rail Franchising (Director), who headed the Office of Passenger Rail Franchising (OPRAF).

The Rail Regulator was created conventionally following the mold of earlier British regulators. Unusually for a utility regulator, the Railways Act placed the Regulator, until 31 December 1996, under an obligation to take account of guidance given to him by the Secretary of State for the Environment, Transport and the Regions. The Rail Regulator was given the duty to promote efficiency and competition in the provision of railway services, to promote the use of railway services, to protect the interests of passengers, passenger operators and freight operators using railway services, and to issue licences to the operators of rail services. The Rail Regulator was also created to approve, in line with the above obligations, contracts controlling access to the railway infrastructure. The economic control of the rail industry, such as the setting of price caps and the charges for access to the rail network, was also placed with the Rail Regulator. The Rail Regulator was to be appointed by the Secretary of State for a term not exceeding five years, and on 7 December 1993 John Swift QC was appointed as the Rail Regulator. On 1 December 1998, Chris Bolt was appointed as Rail Regulator while a permanent Regulator was sought, and on 5 July 1999, Tom Winsor was formally appointed as the Rail Regulator.

The Director was given a more restricted role. The Director was not granted the independence of the Rail Regulator and was bound to act in accordance with guidance from the Secretary of State. The Director was primarily made responsible for granting franchises to the train operating companies for passenger services and had a general role overseeing the train operating companies and their operations. The Director’s role also extended to protect the interests of railway passengers, and this was done not only by overseeing the franchises granted to train operating companies, but also by imposing minimum standards upon the franchisees. The Director was also to be appointed in the same manner and with the same time restrictions as the Rail Regulator. On 9 November 1993 John Salmon was appointed as the Director of Passenger Rail Franchising. John O’Brien was then Director from November 1996 to April 1999. Mike Grant then became Director in May 1999, and simultaneously became Chief Executive Designate of the shadow Strategic Rail Authority (sSRA). The sSRA (which is discussed later) was formed as a re-vamped OPRAF, and not only took over OPRAF’s role, but also all of the ‘customer protection’ duties of the ORR. The sSRA is operating in ‘shadow’ form, awaiting the passage of the Transport Bill. OPRAF has ceased to operate, and is currently directing all queries to the sSRA.

**Railtrack**

The process leading to privatisation and competition within the rail industry had begun before the Railways Act was passed. In April 1993 Railtrack had been established as a separate division within British Rail. Railtrack was given control of the rail network, consisting of all of the track, signaling, stations, bridges etc. Railtrack was to bear the responsibility for developing and maintaining the rail infrastructure, for controlling railway operations and for planning and operating the
national rail timetable. Following the passage of the Railways Act, and continuing
the restructuring which had already begun, on 1 April 1994 the actual ownership of
the rail network passed from British Rail to Railtrack. Railtrack commenced
operating on 1 April 1994 as a separate government owned company, whose shares
were to be held by the government until its public floatation. Railtrack was given the
objectives of preparing for privatisation, implementing a new safety regime and
reaching the financial targets set by the Government.4

Railtrack was floated on the London Stock Exchange on the 20th April 1996. The
total equity realised from the floatation was £1.99 billion.5 The floatation made
Railtrack a publicly owned company, accountable to its shareholders. Railtrack
operates within the regulated rail industry, and is therefore, like other regulated
companies, affected by regulatory policy.

Train operating companies

The Railways Act extended far beyond the privatisation and regulation of Railtrack.
The Act also created 25 Train Operating Companies (TOCs) from British Rail’s
passenger services. These were initially operated by British Rail, with the intention
that they would eventually be offered for franchise, and be transferred to private
companies. This process started in May 1995, and over the next two years, all of the
passenger services were transferred into the control of the franchise holders. By the
31st of March 1997, British Rail had ceased to operate any passenger rail services,
and all passenger rail services were operated by the private sector.6 The franchise
operating companies are licenced by the ORR, and hold franchises which have been
negotiated with the Franchising Director (from OPRAF). Most of the franchise
agreements were set for a term of 7 years, but some have been set for periods of 10 or
15 years.

Other areas of the rail industry

The reforms to the rail industry also placed the other portions of British Rail into the
private sector. Three domestic freight companies were created and privatised7 during
the period 1995-1997. Three rolling stock leasing companies (ROSCOs) were also
created from British Rail infrastructure. Each ROSCO holds rolling stock, such as
carriages etc, which they lease to train operators. The ROSCOs are not currently
under regulatory control, although the ORR has, at the request of the government,

5 ORR, The Periodic Review of Railtrack’s Access Charges: Provisional Conclusions on Revenue
Requirements, 15 December 1999, at p. 50.
6 OPRAF 1996 –1997 Annual Report, at p. 4 Foreword by John O’Brien, Director of Passenger Rail
Franchising.
reviewed this situation. The ORR’s report did not recommend a regulatory regime for the ROSCOs, and advised the government that the upcoming Competition Bill (which has now been enacted) should provide ample control over potential anti-competitive behavior of the ROSCOs. As the Competition Act has not been extensively tested, it remains unclear as to how effective this approach will be. The ORR’s report did, however, further recommend that a Code of Practice be developed for the ROSCOs, a recommendation which was accepted by the government. By February of 2000 each ROSCO had prepared and adopted its own code of practice.

The remaining components of British Rail which were ancillary to the functioning of a railway network, such as the maintenance workshops, infrastructure service companies, design offices, telecommunications systems, business systems and the works division were also separated from British Rail and privatised during the period 1994 to 1997.

The representation of passenger complaints also altered during this period, and on 1 April 1994 a Central Rail Users’ Consultative Committee (CRUCC) and regionally based Rail Users’ Consultative Committees (RUCCs) were created. The members are of these committees are appointed by the Rail Regulator (the Secretary of State appoints the chairman), and they are funded and provided with administrative support by the ORR, and report to the Rail Regulator. The committees were created to handle individual passenger complaints, and to consider passenger hardship in the case of any proposed closures. If the Committees can not resolve passenger complaints themselves, they can refer the complaints to the Regulator. These Committees have recently been re-named, see later for further discussion.

Another activity which was altered during the major re-design of the rail industry was the role played by Passenger Transport Executives (PTEs), who operate for local Passenger Transport Authorities. Passenger Transport Authorities have had a significant role to play in organising transport in Britain. These Authorities are partly funded by the local councils whose areas are represented by them, and are responsible for transport in their area. The Passenger Transport Authorities in turn operate and control the PTEs. There is one PTE in Scotland and six in England and Wales. The PTEs held responsibilities under the Transport Act 1968 to secure passenger rail services for their region. They did this by entering into contracts with British Rail for the provision of services. The Railways Act 1993 transferred the responsibility for ensuring that local areas were provided with rail services, and for entering into the necessary contracts to the Franchising Director. The PTEs did however retain a limited role, as the Railways Act required them to maintain some responsibility to their areas. The PTEs were also required (with the consent of their Passenger Transport Authorities) to be a party to the franchise agreements between the Franchising Director and the TOCs.

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9 ORR Press Notice, Cautious welcome for rolling stock companies’ codes of practice, ORR/00/04, 10 February 2000.

Rail industry issues

During the operation of the privatised and regulated rail industry, several key issues have emerged as areas of public concern, and some of these concerns have resulted in alterations to the structure of the industry. These concerns include:

- the adequacy of the maintenance of and investment in the rail infrastructure;
- the costs of the provision of railway services;
- the safety of the railways, and;
- the effectiveness of the current regulatory system in addressing these issues.  

With regard to the first of these issues, it must be recognised that the structure of the privatised industry has placed the central responsibility for maintenance and investment with Railtrack. This means that questions about the level of investment and maintenance have resulted in assessments of Railtrack’s performance in this area. These assessments have been the responsibility of the Rail Regulator. The ORR has published, and is continuing to publish, advisory documents providing guidance for Railtrack in this area, including in March 1996, the guidelines *Investment in the Enhancement of the Rail Network.* These outlined the ORR’s expectation that Railtrack would use its funds for expenditure on maintenance of the rail network.

The Rail Regulator’s main control over Railtrack rests in his powers over Railtrack’s network licence (which is the document that permits Railtrack to operate), and in September 1997 the Rail Regulator and Railtrack agreed upon a modification to condition 7 of Railtrack’s network licence. This modification placed Railtrack under a duty to maintain, renew and develop the rail network. Railtrack was also placed under an obligation through this modification to set out an annual plan to achieve these aims in a statement to be called the Network Management Statement.

The National Audit Office has recently completed an investigation into the level of maintenance and investment in the rail network. This study, titled *Ensuring that Railtrack maintain and renew the railway network* reported on Railtrack’s efforts to maintain the network, and also discussed the ORR’s effectiveness in encouraging and monitoring such investment. The report noted that Railtrack has spent over £1.7 billion annually between 1995 and 2001 on maintenance and renewal, which was about £2bn greater than the amount that was forecast as being needed to be spent at the time of privatisation. The National Audit Office observed that it is difficult to gauge whether this money has been spent appropriately, as the ORR is not currently

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11 See for instance a report in *The Guardian:* *Railtrack goes cap in hand,* 31 March 2000, where an unnamed ‘expert’ is quoted as saying “It begs the question: why was the industry privatised when it needs to be substantially underpinned by the state”.

12 ORR, March 1996.


15 Ibid, at p.5.
able to fully monitor the existing state of Railtrack’s assets, or the effects of Railtrack’s expenditure on the condition of the network. The investigation recommended that the ORR make several changes to the manner in which such information on the state of the network is gathered, and that the ORR also set clearer targets for Railtrack which set out the level of maintenance and performance expected.

The issue of the cost of rail services has been topical throughout the period in which rail has been a regulated industry, and can expect to remain topical in the future. For the British rail industry the aims of competition, economic efficiency and social benefit must be balanced against the costs of maintaining the vast infrastructure. Except for the competition provided by other forms of transport, the rail network is able to operate as a monopoly. The rail network also requires frequent costly maintenance and upgrading. The role played by the rail network is also politically important for policy reasons such as the environmental concerns and the perceived social benefits of commuter and freight transport by rail. The rail industry had been subsidised by the government prior to privatisation, and is still subsidised today. With these considerations in mind, it is unsurprising that the economic regulation of the industry requires a careful balancing act. The Rail Regulator bears the main responsibility for economic regulation of the industry, and does so via the agreements that control access to the rail network. The Rail Regulator, through the approval of relevant clauses in these agreements, has the ability to regulate the charges Railtrack imposes on the users of the rail network for their access to the network. In common with other areas of utility regulation, the Regulator applies an efficiency based RPI – X formula to certain components of some access charges to determine the annual variation that will be made to the charges. The Rail Regulator initially decided that the variation to the charges for track access by TOCs was to be set at RPI-8 for the year 1995-1996. The current formula of RPI-2 was set in 1995 to apply from 1996-1997 to 2000-2001. The Periodic Review of Railtrack’s access charges (the first after the initial five-year set period) is currently underway and is scheduled to be completed by late 2000 for implementation in April 2001.

The question of the safety of the privatised rail network has also remained topical, and events have already forced some alterations to the systems established at privatisation. When the industry was privatised, the Government’s Health and Safety Executive (HSE) retained the high level responsibility for safety on the rail network. The responsibility for network safety was designed to operate on a ‘cascade’ basis, with Railtrack having the responsibility for validating the safety cases of the rail network 16

16Railtrack is not directly subsidised by the government, but receives financial support from the public indirectly through its charges on train operators. Train operators receive public subsidy, and then use these subsidies to pay Railtrack access charges for use of the network. The amount of public subsidy provided to train operators in 1997-1998 was “nearly £1.7 billion in financial support from the public sector” (ORR, The Periodic Review of Railtrack’s Access Charges – A Consultative Document, December 1997, at p. 20). In 1998-1999 (the most recent period for which figures are available) “train operators received public subsidies of £1.5 billion” (National Audit Office, Ensuring that Railtrack maintain and renew the railway network, 12 April 2000, at p. 1).


users, and the HSE in turn validating Railtrack’s safety case. The Rail Regulator had as a general duty the responsibility to carry out his functions with regard to the need to protect all persons from the dangers of the railways.

In September 1997 a passenger express collided with a freight train in what became known as the ‘Southall’ rail crash. Seven people died in the crash, and the inquiry which followed raised concerns about the effectiveness of the safety systems used on the rail network, in light of the “fragmentation of the industry” following its privatisation.

On 5 October 1999 two passenger trains collided while approaching Paddington and 31 people died. The Paddington rail crash is to be the subject of an independent inquiry by Lord Cullen during the course of 2000. The Paddington crash also sparked a series of inquiries into railway safety, and the results of these inquiries has lead to the Minister for Transport announcing that the management of rail safety is to be altered. The government has announced that while it awaits the outcome of Lord Cullen’s inquiry it will require some improvements in rail safety which can be quickly delivered and which will not “restrict or pre-empt the recommendations of Lord Cullen’s inquiry”. It has therefore announced that it will require new safety systems to be installed, and that a new company will be created to oversee safety in the rail industry. This company will be a subsidiary of Railtrack, but its chief executive will not be appointed by Railtrack. The responsibility for setting and enforcing safety standards, and for deciding whether railway companies are safe to operate will be transferred from Railtrack to the government’s Health and Safety Executive. The Rail Regulator has published a consultation document on the modifications of Railtrack’s network licence which would be necessary to implement these initial safety changes. After the consultation process is concluded, the necessary modifications are expected to be implemented in October 2000.

The questions surrounding the effectiveness of the current regulatory system for the rail industry led to the Labour government investigating the structure and operation of the system. In March 1998 the Select Committee on the Environment, Transport and Regional Affairs published a report titled *The Proposed Strategic Rail Authority and Rail Regulation*. This report identified the overlapping functions of the ORR and the OPRAF as having the potential to create problems and recommended that a body to


23 ORR, *Proposed modifications to condition 3 of Railtrack’s network licence, and to other operator licences*, June 2000.
be known as the Strategic Rail Authority (SRA) be created. It was proposed that this body would have a role in supervising the railways and provide strategic planning and oversee the disbursement of public funding. The report also recommended that this body be accountable to the Secretary of State. In response to the Committee’s report, the Government published the paper *A New Deal for the Railways*,\(^{24}\) which affirmed the notion of the SRA, but which also saw the SRA as gaining the sole responsibility for customer service standards. This would leave the ORR responsible for the economic aspects of regulating the industry. During this period the government also published a White Paper which dealt widely with the transport industry, but which also included specific sections on the rail industry. This paper was titled *A New Deal for Transport: Better for Everyone*,\(^{25}\) and discussed the remodeling of OPRAF into the SRA, as well as re-vamping the role of the ORR, and modifying the system of access contracts, licences, and the manner in which penalties are imposed on rail operators.

Following these reports, the SRA was formed on 1 April 1999, yet as the legislative basis for these changes had not been passed, the organisation is initially to be known as the shadow SRA. As was noted above, Mike Grant was made the Chief Executive designate of the shadow SRA in May 1999, while Sir Alistair Morton was made the Chairman. The Transport Bill, which establishes the SRA and abolishes OPRAF and the British Railways Board, as well as implementing other changes flagged in the various White Papers is before Parliament at the time of writing.\(^{26}\)

This paper aims to provide an overview of the structure of the rail industry in Britain as it currently exists. The roles and duties of the major participants in the industry are outlined, as are the various legal relationships between the participants. The paper also examines some of the issues currently affecting the rail industry. The focus is primarily on the legal structure of the industry, as the financial aspects of the industry are complex and are currently being reviewed. They will be the subject of a future paper.

\(^{24}\) July 1998, Cm 4024.

\(^{25}\) July 1999, Cm 5930.

\(^{26}\) The Transport Bill was placed before the House of Commons on 1 December 1999. Prior to this a Railways Bill had been formulated and placed before the House in an effort to deal with many of these issues. The Railways Bill had its Second Reading on 19 July 1999, and a Committee report was published on 10 November 1999. Following the Committee’s report, the Government concluded that: “We consider that that revised provisions in the Transport Bill are the best way of giving a clear, coherent and strategic programme for the development of the railway.” The Committee’s scrutiny [of the Railways Bill] has been of great help to the Government in revising the railway provisions now contained in the Transport Bill”. Department of the Environment, Transport and the Regions, *The Government’s Response to the Environment, Transport and Regional Affairs Committee’s Report. “Railways Bill”*, 17 December 1999.
STRUCTURE OF THE RAIL INDUSTRY

The structure of the rail industry is dictated by various acts of Parliament, as well as by regulations and guidelines. These set out how the responsibility to control and regulate the rail industry is distributed, and how the various players in the industry inter-relate.

The central document which shapes the current structure of the rail industry is the Railways Act 1993. It is this Act which sets out the main duties and powers of the key regulatory players:

- the Secretary of State for the Environment, Transport and the Regions;
- the Health and Safety Executive;
- the ORR and the Rail Regulator;
- the Rail Users’ Consultative Committees;
- the Central Rail Users’ Consultative Committee;
- OPRAF and the Director of Passenger Franchising.

The structure of the industry is to be altered by the new Transport Bill (as has been discussed earlier). The current situation is also complicated by the fact that there is a ‘shadow’ government organisation in existence (the shadow SRA), which is being operated by OPRAF and the British Railways Board within their existing powers in anticipation of the enactment of the Transport Bill.

The regulatory bodies of the industry control all the participants in the rail industry: Railtrack, the passenger service operators and freight service operators. The rights and obligations of the participants are set out in various licences and contracts, or exist as statutory rights to which the regulatory bodies must have regard.

Relationship between participants and regulatory bodies in the rail industry

A chart showing the lines of control between the bodies involved in the rail industry is set out in Figure 1. The following two chapters examine the powers and responsibilities of the various bodies shown in this chart in more detail.
Figure 1: The main lines of control in the rail industry
THE KEY REGULATORY BODIES IN THE RAIL INDUSTRY, THEIR POWERS AND DUTIES

Each of the regulatory bodies shown in Figure 1 has various powers and obligations. These mainly arise from the provisions of the Railways Act, although there is other legislation which also affects this area. The proposed Transport Bill will also significantly alter the powers and obligations of many of the participants in the industry. The changes anticipated by the Transport Bill are therefore incorporated into the discussion. The duties and the powers of the significant regulatory players are outlined below.

The Secretary of State

The duties of Secretary of State in relation to the rail industry are primarily derived from the Railways Act (in the following discussion, all powers are derived from this source unless stated otherwise). The Railways Act provides that the Secretary of State must implement his orders or regulations by means of a statutory instrument.

Powers of appointment

The Secretary of State has significant powers of appointment and control over the significant regulatory posts, including the power:

- to appoint the Rail Regulator. The Secretary of State also has the power to remove the Rail Regulator on the grounds of incapacity or misbehavior, and sets the level of his remuneration and allowances;
- to appoint the Director of Passenger Rail Franchising. The Secretary of State also has the power to remove the Director on the grounds of incapacity or misbehavior, and sets the level of his remuneration and allowances, (the office of the Director will cease to exist following passage of the Transport Bill);
- the Secretary of State also appoints, after consulting with the Rail Regulator, the Chairman of the Rail User’ Consultative Committees and the Central Rail Users’ Consultative Committee (the nature of these bodies are to be altered by the Transport Bill, see below);
- under the proposed terms of the Transport Bill, the Secretary of State will appoint the chairman of the SRA, as well as the members of the SRA. The Secretary of State will also be given the power to give directions and guidance to the SRA.

Power over decisions of the Rail Regulator

The Secretary of State is also given some limited power over the decisions of the Rail Regulator. Any decision of the Rail Regulator regarding rail closures can be appealed
to the Secretary of State, who may, after consideration, substitute his decisions for that of the Rail Regulator.

The Rail Regulator is under a duty to review the provision of rail services and to collect information to aid this review. The Secretary of State may give directions to the Rail Regulator guiding the priority which is to be given to certain matters for this review.

The Transport Bill proposes to give the Secretary of State the power to issue guidelines to the Rail Regulator. The Regulator will be obliged to take account of these guidelines in all aspects of his work. Up until 31 December 1996, the Rail Regulator had been under such an obligation (and the Secretary of State had published guidance to the Rail Regulator), but this obligation had since expired.

Duty to take account of advice of Health and Safety Executive

The Secretary of State has a general duty concerning rail safety (see below), but in all his activities with regard to rail safety the Secretary of State must take account of any advice concerning health and safety given by the Health and Safety Executive.

General duties

The Secretary of State also has general duties (which are also held by the Rail Regulator). These duties are:

- to protect the interest of the users of railway services;
- to promote the use of the railway network;
- to promote efficiency and economy on the part of people providing railway services;
- to promote competition;
- to promote through ticketing;
- to impose minimum performance requirements on operators;
- to enable persons providing railway services to plan the future of their business with assurance;
- to protect the interests of users of passenger services;
- to protect the interests of passenger operators and freight operators in respect of the price and quality of railway facilities;
- to take into account the need to protect all persons from the dangers arising from the operation of railways;
- to have regard of the effect railway services have on the environment.

Licence powers

The Secretary of State also has the power (after consultation with the Rail Regulator) to grant licences authorising the operation of railway assets, and also to grant operators an exemption from the statutory obligation to possess a licence in order to

27 Guidance to the Rail Regulator issued by the Secretary of State was published in March 1994.
operate railway assets. The Secretary of State also has the ability to consent to the assignment of a licence (this power is also given to the Rail Regulator depending upon which of them is specified in the licence as the party holding the power).

If a licence condition is not complied with, the Secretary of State has the power to revoke the licence.

**Powers of exemption**

The Secretary of State has the power to grant various exemptions from the areas controlled by the Rail Regulator and the Director. He can exempt certain services from being available for franchising, even if the Director has already designated these services as being available for franchising. The Secretary of State also has the power (after consultation with the Rail Regulator) to grant exemptions from the requirement for the Rail Regulator to approve the terms of each railway access contract or railway installation access contract.

The Transport Bill proposes to give the Rail Regulator the power to order that new railway facilities be provided, and that existing facilities be developed. The Bill proposes that the Secretary of State (after consultation with the Rail Regulator) be empowered to grant an exemption from such an order.

**Closures**

The Transport Bill proposes to remove all powers relating to railway closures away from the Rail Regulator and give them to the Secretary of State. The fate of major closures is to be determined by the Secretary of State.

**Powers over the Competition Commission and powers concerning anti-competitive conduct**

The Rail Regulator has the ability to refer possible licence modifications to the Competition Commission for an opinion on whether a certain situation could be avoided by a licence modification. The Secretary of State has the power to over-ride this reference, and to order the Competition Commission not to proceed with the matter. The Secretary of State also has the power to prevent the Competition Commission from publishing a report following a reference.

In instances where a monopoly situation exists in the terms of the Fair Trading Act 1973, or where there is anti-competitive conduct in the terms of the Competition Act 1998, the Secretary of State may refer the matter to the Competition Commission for investigation. In such a situation, the Secretary of State may also, by order, provide for the modification of a licence.

**Miscellaneous powers**

The Secretary of State may petition the Court in relation to the winding up of a protected railway company such that the Court will make a ‘railway administration’
order (which is a special type of order allowing for the preservation of assets and the continuation of services).

The Secretary of State may also give directions to the British Railways Board in relation to the formation of companies and the disposal of property.

The Secretary of State also has wide powers to give instructions to all persons concerned with the rail industry (up to and including the Rail Regulator and the Director of Passenger Franchising) in times of war, severe international tension or great national emergency, or when there is the threat of violence.

The Secretary of State may make various regulations and orders including:

- regulations with respect of the production of tickets by passengers;
- regulations concerning the payment of penalty fares;
- orders with respect of the Transport Police.

The Secretary of State is the competent authority for:

- the railways financial status regulations;
- public service obligations for the passage of goods by rail;
- regulations concerning public service obligations for passenger operations (this is a duty currently also held by the Director of Passenger Rail Franchising).

The Secretary of State may make grants and payments to operators for the passage of goods by rail.

Many of the practical alterations in the system that the Transport Bill requires are also to be dealt with by the Secretary of State.

- The Secretary of State will be given the ability to create a scheme to separate the sections of existing licences dealing with consumer protection from the remainder of the licence, to enable the consumer protection provisions to be enforced solely by the SRA.

- The Secretary of State is also to be given residual powers to transfer any property, rights or liabilities necessary in order to assist in the implementation of the new regime.

The Rail Regulator

The Rail Regulator also derives much of his power from the provisions of the Railways Act (in the following discussion any reference to a duty of the Rail Regulator is based upon the provisions of the Railways Act, unless otherwise stated). The Transport Bill also proposes to alter the duties and roles of the Rail Regulator, including strengthening the Rail Regulator’s powers of enforcement. The main changes proposed by the Bill have been discussed above, and involve the removal of the Rail Regulator’s responsibilities for consumer protection (these responsibilities
include telephone enquiries, through-ticketing, passenger security, the protection of the interests of the disabled and penalty fares). These consumer protection responsibilities will be granted to the SRA. Any responsibilities for consumer protection that were given to the Rail Regulator in railway operating licences will also be transferred to the SRA. The consumer committees, the RUCCs and the CRUCC, will also be transferred from the Regulator’s responsibility to the SRA.

**Duty to have regard to guidance issued by the Secretary of State**

The Rail Regulator is under a duty to keep under review the provision of railway services in Great Britain and elsewhere, and to collect information with respect to the provision of these services. The Regulator must obey any directions given by the Secretary of State regarding the order of priority in which matters are to be reviewed.

The Transport Bill also proposes that the Rail Regulator be placed under a general duty to take account of guidance published by the Secretary of State.

**Duty to take account of advice of Health and Safety Executive**

In respect of the Rail Regulator’s duty concerning rail safety (see below in the list of general duties), the Rail Regulator must act taking account of any advice concerning health and safety given to him by the Health and Safety Executive.

**General duties**

The Rail Regulator has some of the same duties as the Secretary of State:

- to protect the interest of the users of railway services;
- to promote the use of the railway network;
- to promote efficiency and economy on the part of people providing railway services;
- to promote competition. The Transport Bill proposes to slightly amend this duty to place the Rail Regulator under a duty to promote competition only ‘for the benefit of users of railway services’;
- to promote through ticketing;
- to impose minimum performance requirements on operators;
- to enable persons providing railway services to plan the future of their business with assurance;
- to protect the interests of users of passenger services;
- to protect the interests of passenger operators and freight operators in respect of the price and quality of railway facilities;  

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28 See the *Transport Bill, Explanatory Notes*, House of Commons, 1 December 1999.

29 To help achieve these ends, the Rail Regulator has published: *Regulatory objectives for passenger train and station operators*, ORR June 1997, and *Regulatory objectives for rail freight*, ORR October 1997.
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• to take into account the need to protect all persons from the dangers arising from the operation of railways;
• to have regard of the effect railway services have on the environment;
• to act in a manner which will not render it difficult for licence holders to fund their activities.

The Transport Bill proposes that the Rail Regulator be also placed under duties:

• to facilitate the furtherance by the SRA of any strategies which it has formulated;
• to contribute the development of an integrated system of transport of passengers and goods;
• to contribute to the achievement of sustainable development.

The Rail Regulator is also under a duty to have regard to the interests of disabled passengers, and to prepare and publish a code of practice for protecting the interests of disabled railway users. The Transport Bill proposes to remove this duty with respect to the disabled, and to transfer it to the SRA.

Powers concerning rail users’ committees

The Rail Regulator also has the power to establish the Rail Users’ Consultative Committees and its members (following consultation with the Secretary of State). The Rail Regulator also has the power to appoint the members of the Central Rail Users’ Consultative Committee (again following consultation with the Secretary of State).

The Transport Bill will re-name these committees, making them the Rail Passengers’ Committees and the Rail Passengers’ Council respectively, and will transfer the responsibility for them from the Rail Regulator to the SRA.

Powers concerning licences

The Rail Regulator also has extensive powers concerning licensing. Those who wish to operate a railway asset must hold a licence enabling them to do so, and the Regulator has the power to grant licences (following consultation with the Secretary of State). In order to make the exercise of this power more transparent, and to assist potential licence applicants, the Rail Regulator has published a comprehensive set of guidelines on licensing, and the requirements which are involved. The Rail Regulator also has the power to grant exemptions (again following consultation with the Secretary of State) from the obligation to possess a licence in order to operate railway assets.

30 The ORR published a new draft code for disabled passengers on 31 May 2000, titled Train and Station Services for Disabled Passengers, and simultaneously instigated a consultation regarding this code. The revised code, incorporating the consultation process is expected to be published in late 2000.

31 See the Guidance on licensing of operators of railway assets, ORR, September 1995, which is a set comprising 13 parts.
A licence may not be surrendered without the consent of the Rail Regulator. If a licence condition requires the consent of the Rail Regulator before the licence can be assigned, the Rail Regulator has the power to approve or refuse such assignment.

The Rail Regulator has powers with regard to the modification of licence conditions. If the licence holder consents to a proposed modification of the conditions of a licence, the Regulator has the power to so modify the licence. If a licence holder does not consent to a proposed licence change, the Regulator has the power to make a reference to the Competition Commission to request a report into whether factors operating against the public interest could be prevented by a modification of the licence. If the Competition Commission reports that a licence modification should be made in the public interest, the Regulator is under a duty to modify the licence, and, in so doing, to “have regard”\textsuperscript{32} to the modifications specified by the Commission.

The Transport Bill proposes to reduce the Rail Regulator’s powers to modify licences. This would mean that the Rail Regulator not be permitted to modify the conditions of a licence which relate to consumer protection unless the SRA also consents to the modifications.

The Rail Regulator is under a duty to investigate allegations made concerning breaches of licence conditions. Where it appears that a licence condition or requirement is being contravened, or is likely to be contravened by an operator, the Rail Regulator may make a final or provisional order requiring the operator to do, or to retain from doing, certain things. If a condition of a licence is breached (and the Rail Regulator is listed in the licence as the relevant person), the Rail Regulator has the power to revoke the licence.

The Transport Bill proposes that the Rail Regulator be given the power to impose a penalty on an operator who is breachng a licence condition or who is contravening a final or penalty order. The amount of the penalty is not fixed, but the amount of the penalty must be within the range of the Rail Regulator’s own policy on penalties. The Rail Regulator will also be under a duty to publish such a policy.

\textit{Powers concerning access contracts}

The Rail Regulator has extensive powers with regard to railway access and railway access contracts. The Regulator is obliged to approve the terms of all railway access contracts and installation access contracts. The Rail Regulator must also approve all amendments to access contracts. Any such contract or amendment that was not approved by the Rail Regulator is void. The Regulator has published guidelines which set out the criteria which will be applied when deciding whether passenger and freight track access agreements and station access agreements will be approved.\textsuperscript{33}

The Rail Regulator also has the power to require a railway facilities owner to enter

\textsuperscript{32}Railways Act 1993, section 15(2).

\textsuperscript{33} See Criteria and procedures for the approval of freight track access agreements, ORR, December 1994, and Criteria for the approval of passenger track access agreements, 2\textsuperscript{nd} ed., ORR, March 1995, and Station access guidance notes, ORR, May 1998.
into an access contract with any person, and the power to require an installation owner
to enter into an installation access contract with any person.

The Rail Regulator also has the ability to prepare and publish model clauses for
inclusion in access contracts. The Rail Regulator is currently exercising his powers in
this regard for the first time, and since January 2000 has been undertaking a
consultation process regarding model clauses for track access agreements.34
Provisional conclusions about the model clauses have been published,35 and the
model clauses are expected to be published in Summer 2000.36

The Regulator also has the power (after consultation with the Secretary of State) to
grant an exemption from the requirement for access contracts to be approved by him.

The Transport Bill proposes that the Rail Regulator be given some new powers in
respect of access contracts including:

- the power to give general approvals for access contracts of a certain type;
- the power to direct that an access contract or installation access contract be
  amended to permit more extensive use of the facility in question;
- the power to make directions to prospective facility owners and installation
  owners concerning railway facilities which are proposed to be constructed.

**Powers regarding closures**

The Rail Regulator also has the power to decide whether any proposed closure of rail
assets or withdrawal of rail services should be allowed to take effect. The Rail
Regulator may also choose to certify a closure as ‘minor’, which will enable it to take
place. The Regulator may also revoke or vary any condition imposed with respect of a
closure.

The Transport Bill proposes to remove all powers relating to closures from the Rail
Regulator and to place these powers with the Secretary of State.

**Power to order improvement of facilities**

The Transport Bill also proposes that the Rail Regulator be given the power to direct
the operator of a station, network or light maintenance depot to provide a new
network facility; or to give a person with a right over an existing network facility a
direction to develop the facility. Such a direction will not affect existing obligations
such as licences.

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34 See the ORR’s publications on this topic including, Model clauses for track access agreements, a
consultation document, ORR, 7 January 2000. The submissions made by Railtrack and other
participants in the industry have all been made publicly available by the ORR.

35 ORR, Model Clauses for Track Access Agreements, Provisional Conclusions, 25 July 2000.

Powers with regard to anti-competitive conduct

The Rail Regulator also has the power to exercise the functions of the Director General of Fair Trading. This power arises under certain sections of the Fair Trading Act 1973 concerning anti-competitive conduct or the operation of a monopoly in the rail industry. The Competition Act 1998 also provides the Rail Regulator with specified powers to exercise the functions of the Director General of Fair Trading with respect to anti-competitive conduct and the abuse of a dominant market position in the rail industry. These powers are obviously considerably wider than the Rail Regulator’s powers under the Railways Act, and in the case of the Competition Act include powers to:

- impose interim measures to prevent damage;
- give decisions on the application of the Competition Act;
- grant exemptions to the prohibition on agreements which distort trade within the UK;
- carry out investigations (which includes wide powers to search premises and require the production of documents);
- impose financial penalties.

The Transport Bill proposes to emphasise that the Rail Regulator may exercise his functions under the Competition Act 1998 concurrently with the Director General of Fair Trading.

The exercise by the Rail Regulator of his powers under the Competition Act is also governed by any guidelines issued by the Director General of Fair Trading. Among the guidelines issued by the Director General of Fair Trading include guidelines in relation to this concurrent application of the Competition Act. These guidelines state that “In general, an agreement or conduct which falls within the industry sector of a regulator will be dealt with by that regulator”. The Rail Regulator has also noted that: “a commercial agreement or business conduct relating to the supply of railway services will generally be dealt with by my Office”. The exercise of the Rail Regulator’s powers in this area will also potentially be restricted by any commitments made by the Rail Regulator.


38 Ibid, at p 4.


40 See for instance “The Director General and the Rail Regulator have given their commitment to avoid a matter being investigated by them both (unless working jointly) and will make it clear in each case whether it is the Rail Regulator or the Director General who will consider a case”. From Office of the Rail Regulator, Draft, The Competition Act 1998 : Application to Railway Services, ORR, 2000, at p.11.
Powers regarding penalty fares

The Secretary of State may give the Rail Regulator the power to set conditions concerning the imposition of penalty fares.

The Transport Bill proposes to remove the ability of the Rail Regulator to act in this area, and to place these powers with the SRA.

Miscellaneous duties

The Rail Regulator is also under an obligation to maintain a register containing details of licences, access agreements, closures, experimental passenger services and railway administration orders. The Rail Regulator must also prepare an annual report each year.

The Director of Passenger Rail Franchising/The Strategic Rail Authority

The roles of these two entities will be discussed together, as the SRA has been broadly conceived by the Transport Bill to replace the functions of the Director of Passenger Rail Franchising, (the references to the duties of the Director of Passenger Rail Franchising (Director) will, as above, be based upon the provisions of the Railways Act, unless otherwise stated). The SRA is already operating in a ‘shadow’ form. The SRA will take its powers from four main sources:

- powers previously held by the Franchising Director (the Franchising Director and his office will no longer exist once the Transport Bill is passed);
- the Rail Regulator;
- the British Railways Board (which will no longer exist once the Transport Bill is passed);
- powers which will be newly created in the Transport Bill for the SRA.

Duty of Director to obey guidance issued by the Secretary of State

The Director is obliged to perform his duties in accordance with instructions and guidance given to him by the Secretary of State. The Secretary of State issued his most recent guidance to the Director in September 1999.\footnote{Initially the Director was given \textit{Objectives, Instructions and Guidance for the Franchising Director}, 28 November 1996, but this was replaced in 1997 by \textit{Objectives, Instructions and Guidance for the Franchising Director}, 6 November 1997. In September 1999 the Director was issued with new \textit{Instructions and Guidance for the Franchising Director}, which instructed that there should be close cooperation between the Director and the SRA.}
**Power over franchises**

The Director’s functions relate primarily to the provision of railway passenger services by franchising. The Director has the power to designate railway services for the carriage of passengers as eligible to be provided by franchise holders under franchise agreements. The Director also has the duty to issue invitations to tender for the franchise of a passenger service (and must consult with the Rail Regulator before issuing such invitations). The Director must consult with the Passenger Transport Authorities and the Passenger Transport Executives before issuing any invitation to tender.

The Director is required (unless directed otherwise by the Secretary of State) to select the person who is to be granted a franchise from the tenders submitted. Before a franchise agreement is entered into, the Director is under a duty to satisfy himself that the franchise assets are to be vested in the person who will be the franchise operator, and that if a subsidiary of the franchise operator is to be used, that the subsidiary is wholly owned by the franchise operator. After a franchise agreement is entered into, but before any property etc. is vested in the franchise operator, the Director is under a duty to satisfy himself that the property will be vested in the franchise operator.

The Director has the power to consent or to withhold consent for any dealings or change in the status of the franchise assets. No such changes are permitted without the consent of the Director.

The Director is under a duty to ensure that franchise agreements contain provisions which allow the amounts to be paid for franchise assets to be determined at the end of the franchise period. The Director must ensure that franchise agreements contain provisions ensuring that franchise assets are adequately maintained during the life of the franchise agreement. The Director is further required to ensure that franchise agreements contain provisions which require franchise assets to be delivered up to the Director at the end of the franchise. The Director has the power to enter into franchise agreements which either require payment to the Director, or which involve payments to the franchise operator. The Director may include any terms in a franchise agreement which he thinks fit, (there are however, some terms that must always appear in a franchise agreement, such as the length of the franchise term).

If a franchise agreement is terminated or otherwise ends without a new franchise agreement being in existence, the Director is under a duty to ensure that the services in question continue to be provided until they can be provided again under a franchise agreement. If in the opinion of the Director, adequate alternative railway services are already available, he is not obliged to ensure the continued provision of the previously franchised services.

Where it appears that a franchise condition, or requirement is being contravened, or is likely to be contravened by an operator, the Director may make a final or provisional order requiring the operator to do, or to retain from doing, certain things.
Powers regarding fares

The Director has various duties with regard to the setting of fares and is required to include in franchise agreements provisions to ensure that certain fares are set at levels which would be reasonable for the passengers using or are likely to use the service. The Director is also given the power to approve schemes for discount fares (and each franchise agreement must contain a provision requiring the franchise operator to participate in every fare discount scheme).

Powers regarding closures

The Director also has some duties with respect to closure or discontinuance of services which have not been certified as a ‘minor closure’ by the Regulator. If the Director is of the opinion that the closure should not take effect, then he is under a duty to secure the ongoing provision of the services. If the Director believes that the closure should take effect, he is under a duty to publish notices with details of the closure, and to ensure the ongoing provision of the services until the end of the notice period.

Miscellaneous powers

The Director also has powers under the Transport Act 1962 relating to the provision of road passenger transport services, and powers under the Transport Act 1985 relating to the provision of bus substitution services in relation to services which have been temporarily interrupted.

The Director also has powers to enter into agreements for the purpose of securing the provision, improvement or development relating to railways services or assets. The Director also has the power to enter into agreements for the purpose of encouraging investment in the railways, and power to enter into agreements for railway related purposes.

The Director also has substantial enabling powers in order to be able to fulfill his duties, including powers relating to the formation of companies and the payment of monies.

The Director also has powers in relation to railway administration orders, and can make application for such orders (with the consent of the Secretary of State).

The Director is also under an obligation to maintain a register containing details concerning franchise agreements and the decisions made concerning franchise agreements. The Director must also produce an annual report each year.

All of the duties and powers listed above for the Director will be transferred by the Transport Bill to apply to the SRA.
General duties of the SRA

As was noted above, the Transport Bill will also impose a number of ‘new’ duties upon the SRA as follows:

- the Transport Bill proposes to place the SRA under an obligation to perform its functions in accordance with any directions or guidance issued by the Secretary of State;
- the Transport Bill further proposes that the SRA be placed under an obligation to comply with directions or guidance issued by the Scottish Ministers in relation to passenger services in Scotland, as long as these directions are not inconsistent with any directions given by the Secretary of State;
- the Transport Bill also proposes that the SRA be placed under a duty to take into account any advice given by the Health and Safety Executive.

The SRA will operate under the Transport Bill subject to a large number of duties which are:

- to protect the interests of the users of railway services;
- to contribute to the achievement of sustainable development;
- to promote efficiency and economy on the part of persons providing railway services;
- to promote measures designed to facilitate the making by passengers of journeys which involve the use of more than one passenger service (such as through ticketing);
- to impose on the operators of railway services the minimum restrictions which are consistent with the performance of the SRA’s functions;
- to enable persons providing railway services to plan the future of their businesses with a reasonable degree of assurance.

The Transport Bill proposes that the SRA should be under a duty to exercise its functions with a view to furthering its purposes. Its purposes are:

- to promote the use of the railway network for the carriage of passengers and goods;
- to secure the development of the railway network;
- to contribute to the development of an integrated system of transport of passengers and goods;
- to formulate and review strategies which relate to its purposes.

When exercising its functions under the Transport Bill, the SRA must have regard to:

- the need to protect all persons from dangers arising from the operation of railways;
- the interests of persons who are disabled;
- the effect on the environment of activities connected with the provision of railway services.
THE RAIL INDUSTRY IN GREAT BRITAIN

Powers of the SRA

The Transport Bill will also give the SRA new powers including:

- the power to make uniform by-laws for the whole rail network;
- the power to promote or oppose in Parliament bills relating to railways;
- the SRA will also be given ancillary enabling powers, such as the power to transfer property to a wholly owned company, and powers in relation to the ability to enter into agreements and deal with monies.

As was noted above, the Transport Bill will also grant to the SRA some of the Rail Regulator’s powers.

- The SRA will be granted the powers previously held by the Rail Regulator in relation to the consumer protection aspects of licences. The SRA will be responsible for the content of a licence as it refers to consumers. The SRA will also be empowered (subject to the approval of the Rail Regulator) to enforce and modify the consumer protection provisions in a licence, and to act to revoke a licence where the licencsee has contravened the licence provisions.
- The SRA will be given the administrative responsibility for the renamed RUCCs and the CRUCC.
- The SRA will also be given the Rail Regulator’s responsibility for protecting the interests of disabled rail users and for maintaining a code of practice in relation to disabled rail users.

The Transport Bill will also, as was noted above, grant to the SRA powers previously held by the British Railways Board.

- The SRA will be granted the powers of the British Railways Board in relation to the British Transport Police.
- The SRA will also be granted all of the other rights and liabilities of the British Railways Board.

The Competition Commission and the Director General of Fair Trading

The Competition Commission (CC) was known as the Monopolies and Mergers Commission until the passage of the Competition Act 1998. The CC consists of two ‘branches’, and both of these branches play a role in the control of the rail industry. The CC functions over a very broad area, but for the purposes of this paper will be considered only in the context of the rail industry.

‘Reporting branch’ of the CC

The CC has a ‘reporting branch’ which holds the responsibility for investigating and providing reports on the activity of monopolies and also on any proposed mergers.
This branch of the CC also has the responsibility to investigate matters which have been referred by the Rail Regulator. As was discussed above, the Rail Regulator has the power to make a reference to the CC, requiring it to investigate and report on whether a certain situation operates against the public interest, and whether this outcome could be remedied by the modification of a rail licence. This branch of the CC is yet to exert major influence over the rail industry, and the Rail Regulator has not, to date, exercised his power to make a reference to the CC. The CC has only published two investigatory reports concerning the rail industry; these were both reports on proposed mergers involving companies providing rail services.\(^{42}\)

**‘Judicial branch’ of the CC**

The CC also has a judicial role by acting as an appeals tribunal (with an equivalent status to that of the High Court) for appeals against decisions made by the Director General of Fair Trading (DGFT) or the Rail Regulator in relation to the Competition Act. The Competition Act contains two main provisions: firstly a prohibition upon agreements which may prevent, restrict or distort competition and affect trade in the United Kingdom, and secondly a prohibition on the abuse of a dominant position in a market in the United Kingdom. All participants in the rail industry in the UK must abide by these prohibitions, or risk investigation and sanctions being imposed by either the Rail Regulator or the DGFT. As has been noted above, the Rail Regulator shares with the DGFT the power to enforce the provisions of the Competition Act in relation to the rail industry. The concurrent relationship between the powers of the Rail Regulator and the DGFT, and the manner in which this is to be dealt with in practice by the two entities has been discussed above in relation to the Rail Regulator’s powers.

The CC is yet to exercise its judicial role in relation to the rail industry. The ORR has published *The Competition Act 1998: Application to Railway Services*\(^{43}\) which notes that some aspects of the rail industry; such as: the railway passenger market, track and station access, the provision of maintenance services and the agreements in place between train operators may potentially contravene the provisions of the Competition Act. If the Rail Regulator (or the DGFT) took action regarding any such contravention of the Competition Act, and an appeal against this action was made to the CC, the CC’s appeals function would be able to significantly shape the rail industry. As the Rail Regulator has stated that “my Office will actively pursue potential breaches of the Competition Act”,\(^{44}\) it may be that the CC will play a significant role in the rail industry, depending upon the willingness of industry members to appeal to the CC.


\(^{43}\) ORR, 2000.

\(^{44}\) ORR, Press Notice, 10 February 2000.
The Transport Bill proposes to give to the CC additional powers to act as an appeals body for decisions made by the Rail Regulator about access charges during a periodic review. If a party to an access agreement disagrees with the outcome of a review, they may object. The Rail Regulator may then perform a new review, or may refer the matter to the CC. The CC will then report on whether any aspects of the review act against the public interest, and whether this could be prevented by changes to the review. If the CC concludes that the public interest could be protected by changes to the review, then the Rail Regulator must alter the review with regard to the relevant changes specified in the report of the CC. The Rail Regulator must give notice to the CC of the changes he proposes to make, and the CC will be able to veto these changes, if they “do not appear to them requisite for the purpose of remedying or preventing the adverse effects specified in their report”. The CC may then make the changes they believe to be necessary themselves (after giving notice and hearing representations about the changes).

The Health and Safety Executive

Railway safety in Great Britain is primarily governed by the provisions of the Health and Safety at Work etc Act 1974. The Act is intended to protect people’s health and safety at work, and to protect people who may be harmed because of the way work is done. This includes the safety of people who travel as passengers on trains. The Secretary of State for the Environment, Transport and the Regions has the responsibility for the administration of this Act. This responsibility is delegated to a body called the Health and Safety Commission, which consists of ten people appointed by the Secretary of State. The Health and Safety Commission forms an operational body called the Health and Safety Executive (HSE) which consists of three board members and approximately 4000 members of staff.

The HSE is made up of many separate divisions and directorates. The division of HSE which oversees the rail industry is HM Railway Inspectorate. This Inspectorate has increased in size considerably since the privatisation of the rail industry. The health and safety legislation and the supporting regulations place many duties relating to railway health and safety upon the HSE. These responsibilities are carried out through the work of HM Railway Inspectorate, and include:

- approving and inspecting new railway works and railway stock, and ensuring that they meet acceptable safety standards;
- ensuring that any proposed amendments to works or stock meet safety standards;
- performing inspections of railways and railway stocks;
- monitoring compliance with railway safety cases;
- monitoring railway accident trends;
- investigating safety breaches (such as trains passing signals without the authority to do so);
- where necessary, issuing enforcement notices for safety breaches;
- investigating accidents (when requested to do so).

45 Transport Bill, Schedule 24 section 13(3).

The Injuries, Disease and Dangerous Occurrences Regulations 1995 also place on the HSE the responsibility to annually report railway safety statistics. These statistics are compiled through the work of the HM Railway Inspectorate. The HSE (through HM Railway Inspectorate) also performs a number of functions which are not statutorily required, but which fall within the scope of the HSE’s responsibilities regarding safety. These include producing monthly reports on when a train has passed a ‘Signal at Danger’ without the authority to do so.\(^{47}\) HM Railway Inspectorate also prepares and publishes various research reports on issues relating to railway safety.

The method of railway safety which was chosen for the privatised industry is the so-called ‘railway safety case’ method (which has been briefly discussed above). The statutory basis for this method is the Railway (Safety Case) Regulations 1994,\(^ {48}\) which were made under the provisions of the Health and Safety at Work etc Act 1974. Under this system, the HSE has the duty and responsibility to accept the railway safety case which is proposed by Railtrack, which is the controller and manager of the entire rail infrastructure. HM Railway Inspectorate performs this function for the HSE. Railtrack’s ‘safety case’ is a document which contains a policy statement on safety, as well as various safety standards and criteria that Railtrack applies to its own operations. Railtrack’s safety case also sets out the safety standards that Railtrack applies to all the train operators who contract with Railtrack to use the network. The safety case system also requires Railtrack to ensure that all train operators who contract to use the rail infrastructure have their own adequate safety case, and that these safety cases complement and comply with Railtrack’s own safety case. See later for a further discussion of the operation of safety in the rail network.


\(^{48}\) A series of other regulations concerning rail safety were also made at this time. These included the Railways (Safety Critical Work) Regulations 1994, the Carriage of Dangerous Goods by Rail Regulations 1994 and the Transport Systems (Approval of Works Plant and Equipment) Regulations 1994.
THE KEY PARTICIPANTS IN THE RAIL INDUSTRY, THEIR POWERS AND DUTIES, AND THE MANNER IN WHICH THEY ARE REGULATED

Railtrack

Railtrack plc (Railtrack) is the largest participant in the rail industry. Railtrack owns the rail infrastructure\(^{49}\) which includes railway tracks, bridges, signaling systems and stations. Railtrack maintains this network, and directly operates the fourteen major stations in its portfolio. Railtrack also holds extensive property interests some of which branch beyond the railway network. For the financial year ended 31 March 1999, Railtrack had a turnover of £2,573 million.\(^{50}\) Whilst Railtrack operates under the statutory obligations which affect all businesses in the United Kingdom (such as health and safety and corporate legislation), Railtrack is not primarily governed by statute. The Railways Act and other pieces of legislation allow the regulatory participants in the rail industry, such as the Rail Regulator, to regulate Railtrack. Railtrack, however, gains the majority of its own rights and duties from the series of contractual relationships which govern its existence, its operations and its interaction with other entities. Railtrack holds a network licence under which it gains the power to operate the rail network, and it is this licence which sets out Railtrack’s main duties. Railtrack also has contracts with franchise operators and freight operators which allow these operators access to Railtrack’s network. Railtrack is also party to a number of contracts with various companies for repair and maintenance, and these contracts also set guidelines for Railtrack’s behavior, in that Railtrack must abide by the terms of the contracts. Railtrack’s licence and series of contracts that surround and control Railtrack will be examined in this section.

*Railtrack’s network licence*

On 31 March 1994 Railtrack was granted a network licence for a term of 25 years. The licence can be revoked provided 10 years notice are given, however the licence can be revoked “forthwith”\(^{51}\) if Railtrack commits a serious breach of the Railways (Safety Case) Regulations. The licence can also be revoked on three months notice in specific circumstances if various conditions are fulfilled. The licence entitles Railtrack to operate the rail network, and to operate trains on the network, subject to a series of conditions (19 in total) which are set out in Part III of the licence. The

\(^{49}\) According to the information on Railtrack’s web page (http://www.railtrack.co.uk/) at the time of writing, Railtrack owns 20,000 miles of track, 9,000 level crossings, 750 tunnels, 2,500 stations and 40,000 viaducts and bridges.


\(^{51}\) Railtrack Network Licence granted to Railtrack plc, schedule - section 2.
conditions of the licence obviously restrict only Railtrack plc, not the wider Railtrack group.

The first condition in the licence requires Railtrack to maintain insurance against third party liability. The licence further requires that such insurance be held on terms approved by the Rail Regulator. The Rail Regulator has set out guidelines on the types of insurance that will be approved, and has published these guidelines as *Guidance on insurance against third party liability.*

Another condition requires Railtrack to be a party to the claims handling agreements of railway asset operators (the operators of railway assets have entered into various agreements with third parties to allocate liabilities to the third parties, and to have any claims handled by these third parties on their behalf).

Railtrack’s licence requires it to establish a directorate responsible for safety and standards. This directorate is to focus solely on these areas, is to be adequately funded by Railtrack, and is to have a head that reports directly to the chairman of Railtrack’s board of directors. The directorate of safety and standards must, in consultation with relevant railway operators, prepare a Railways Group Standards Code. The code’s purpose is to “ensure the safe operation of [Railtrack’s] network and railway assets used or to be used on or in connection with [Railtrack’s] network…”. The licence conditions further state that the Code is to be prepared having regard to a list of factors. These factors are the need:

- to promote the use of the network;
- to promote efficiency and economy;
- to promote competition in the provision of railway services;
- to impose minimum restrictions on Railtrack and persons providing railway services;
- to enable Railtrack and other persons to plan the future of their business with a reasonable degree of assurance.

The Code is also required to establish procedures for the creation and amendment of Railway Group Standards, and to provide for representatives of various railway groups to participate in any decision about amending the Standards. The Code must also allow for full consultation with the Health and Safety Executive about any proposed amendment of the Standards. The Code is also to allow for any railway operator aggrieved by a decision of the Railtrack’s safety and standards directorate to have the matter reconsidered by the Rail Regulator following consultation with the Health and Safety Executive.

Railtrack, along with the other users of the rail network, is obliged to comply with the Railway Group Standards Code.

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52 This guidance has been updated several times, and the most recent version published is ORR, *Guidance on insurance against third party liability*, 4th ed., January 1998.

53 Department of Transport, *Network Licence granted to Railtrack plc [modified up to October 1999]*, at condition 3.3, at p.6.
Railtrack’s licence also places Railtrack under obligations relating to the environment. Railtrack is obliged to take account of any guidance issued by the Rail Regulator, and to formulate a policy designed to protect the environment from Railtrack’s activities. A copy of the policy is to be provided to the Rail Regulator. Railtrack is required to act with regard to the policy. Railtrack is also obliged to formulate arrangements and objectives to give effect to the policy, but the licence specifically states that Railtrack is not obliged to “undertake any action that entails excessive cost taking into account all the circumstances”.

Under the terms of its licence, Railtrack is also obliged to obtain core police services from the British Transport Police.

Railtrack’s licence also requires it to carry out its activities and functions (unless the Rail Regulator otherwise consents) without discrimination between people or certain classes or descriptions of people.

By agreement between the Railtrack and Rail Regulator, Railtrack network licence condition number 7 (discussed above in the History chapter) was inserted into the licence on 25 September 1997. The purpose of this condition is to secure:

(a) the maintenance of the network;
(b) the renewal and replacement of the network; and
(c) the improvement, enhancement and development of the network.

Railtrack is under a duty to carry out its activities to achieve the purpose of this condition, having regard to the extent to which this is practicable. Railtrack is required to develop, publish and continue to update a set of criteria which it will apply in order to comply with this condition.

Railtrack is further obliged by this condition to publish an annual statement in a form approved by the Rail Regulator, which sets out the manner in which Railtrack expects to fulfill the purpose of this condition, and to satisfy its own set of criteria. The statement must contain projections of future network quality and capability requirements, details of any planned modifications to the network and the projected effect of these amendments on the quality and capability of the network and the quality of network services and services provided to rail customers. The statement must also contain cost estimates and financing methods for such improvements and requirements, and a progress report of the works carried out each year. The statement

54 Details of Railtrack’s current strategies for implementation of this policy can be found in Railtrack’s 1999 Corporate Responsibility Report.

55 Network Licence granted to Railtrack plc, condition 4.1 at p.10.

56 For a general discussion of the background to this new licence condition (which replaced the previous licence condition number 7 in its entirety), see the publication by the Rail Regulator: Railtrack’s investment programme: implementation of new licence condition: Rail Regulator’s response to consultation on proposed modification to Railtrack’s Network Licence, ORR, September 1997.

57 Network Licence granted to Railtrack plc, condition 7.1 at p.13.
must also set out details of the extent to which aims set out in the preceding statement have been achieved, or the reason for any changes to the previous year’s plans. The statement must further contain Railtrack’s targets for reducing delay to train operations.

Since this licence condition was introduced Railtrack has managed to reduce the amount of delay its operations cause to both passenger and freight services. In November 1999, using this licence condition, the ORR made an order against Railtrack requiring Railtrack to reduce the delays caused to trains in the year ending 31 March 2000 by 12.7% compared with the preceding year. If this target was not met, the ORR would fine Railtrack £4 million for each percentage by which the target was missed. Railtrack achieved a 10% reduction in delays, leading to the Rail Regulator imposing a fine of £10 million on the 25 November 1999. In January of 2000, Railtrack applied to the High Court under section 25 of the Railways Act 1993 to have the order revoked. The Rail Regulator has currently indicated that he plans to impose a target for the year 2000 to 2001 of achieving a 5% reduction in delays, in addition to requiring Railtrack to make up the shortfall from the year 1999-2000. The total reduction which would have to be made by Railtrack for the year 2000-2001 would therefore be around 7.7%. The penalty will be £2 million per percentage point, with the potential or it to rise to £4 million per point depending upon the Regulator’s judgement and assessment of the management action taken by Railtrack to meet the target.

Railtrack is also required to publish a national timetable of railway passenger services, and to grant access to this timetable to the holders of passenger and station licences, and to their telephone enquiry services. Railtrack is obliged to provide twelve weeks notice of any changes in the timetable resulting from maintenance and upgrading of the rail network. Railtrack is also obliged to consult with train operators when forming its plans about when it is to carry out such maintenance and upgrading.

The licence also prohibits Railtrack from giving or receiving any unfair cross subsidies from its affiliates or related undertakings (except in the case of access charges). Railtrack is also required to ensure that there is no unfair cross subsidy between the network business (‘network business’ is providing and operating the rail network and related ancillary service) and permitted non-network business (‘permitted non-network business’ is business other than network business which was transferred to Railtrack prior to privatisation). Railtrack is also required to maintain separate accounting records for network business and permitted non-network business.

58 The most recent statement made by Railtrack in accordance with this condition is the Railtrack Network Management Statement 2000.

59 National Audit Office, Ensuring that Railtrack maintain and renew the railway network, HC 397 Session 1999-2000, 12 April 2000, at pages 4 and 22. See also the ORR’s Press Notice, Rail Regulator launches enforcement action against Railtrack, ORR/99/34 dated 19 August 1999 for a discussion of the history behind this enforcement order.

60 ORR, Annual Report 2000, at p. 15.

business, and to maintain any other reasonable accounting records which the Rail Regulator may require in order to assess compliance with this licence condition.

Railtrack is obliged to maintain such accounting records in relation to its network business as the Rail Regulator may reasonably require for the purpose of assessing or determining access charges. The Rail Regulator may order that these accounts be audited by a person approved by the Regulator at Railtrack’s expense.

The activities and businesses in which Railtrack can involve itself are curtailed by its licence. The licence prohibits Railtrack from conducting any business other than permitted business (business which was transferred to Railtrack at its inception) without the Rail Regulator’s consent. Railtrack is also prohibited from acting as guarantor, creating an encumbrance over an asset, or dealing in an asset which may prevent Railtrack from meeting an obligation under an access contract, unless the Rail Regulator consents to any such dealing.

Railtrack is also prohibited from being directly or indirectly interested in the ownership or operation of any railway vehicle in Great Britain. This prohibition does not apply to any railway vehicle forming part of the royal train.

Railtrack is also obliged to co-operate with London Regional Transport with regard to matters that affect Railtrack and London Regional Transport’s provision of railway services.

Railtrack is obliged to supply the Rail Regulator with any information that that the Regulator may reasonable require for the purpose of carrying out his functions under Part 1 of the Railways Act, (Part 1 of the Railways Act imposes the Regulator’s general duties, such as the duty to promote efficiency etc). Railtrack is however not under any duty to supply the Rail Regulator with information which it could not be compelled to produce to the Court in civil proceedings.

Railtrack is also placed under obligations with respect to the Rail User’s Consultative Committees by virtue of the licence. Railtrack is obliged to furnish the Committees with reasonable amounts of requested information, and is obliged to attend (upon request of a Committee) up to two meeting annually involving any Committee and any passenger service operator.

Railtrack’s licence also requires Railtrack to pay an annual licence fee to the Secretary of State. This fee is made up of an fixed amount set in accordance with the Rail Regulator’s published scale of fees, and of an amount determined by the Regulator as a proportion of any sums incurred by references to the CC in relation to determinations about this licence. The first annual fee imposed upon Railtrack was £2,740,000, and the set amount of the fee is adjusted each year based on Railtrack’s turnover.

Railtrack is also restricted in its ability to disclose certain information about persons gained in connection of any agreements or proposed agreements authorised under the Railways Act.
If any persons gain control of Railtrack, Railtrack is under a duty to notify the Secretary of State as soon as possible.

Railtrack is also under an obligation, in consultation with network users who are likely to be affected, to prepare a System Code that must be approved by the Rail Regulator. Once it is approved, Railtrack is required to comply with this Code (unless relieved of this obligation by the Rail Regulator). Railtrack may amend the System Code with the prior approval of the Rail Regulator. The System Code is to be used to develop code systems (which are computer applications containing the data that is needed in connection with the operation of trains on, or access rights to Railtrack’s network). The System Code must be developed with regard to:

- the duties imposed on the Rail Regulator under section 4 of the Railways Act (these are the general duties to promote efficiency etc discussed above);
- the Railway Group Standards (see above);
- the need to facilitate the use and development of new code systems;
- the need to improve code systems;
- the need for Railtrack when setting charges for the use of code systems to prevent unfair cross subsidy.

The System Code must also contain certain details prescribed in the licence.

The licence issued to Railtrack differs substantially from the licences issued to major players in the other British regulated industries because Railtrack’s licence does not contain any price control mechanisms. As Tom Winsor has observed “licences are important for what they do not contain, as well as for what they do”. Railtrack’s licence may be amended in two main ways. Firstly, voluntarily by agreement between the Rail Regulator and Railtrack. Secondly in the case of a disagreement about proposed licence changes, the Rail Regulator may refer the matter to the CC, and following the CC’s report, may make amendments to the licence, having regard to the CC’s recommendations. As price control clauses are not included in Railtrack’s licence (and because Railtrack has no right of appeal to the CC for changes by the Rail Regulator to the agreements where the price control mechanisms are placed), disputes over price control amendments made by the Rail Regulator are not able to be investigated by the CC. It must be noted that the Transport Bill, as has been mentioned above, is proposing to allow the CC to review periodic price reviews of the Rail Regulator, when these decisions are referred to it.

Railtrack’s rights and obligations are not only contained in its network licence, but are supplemented by many other documents to which it is a party. A significant category of these documents are the access contracts which govern the conditions and manner in which train operators and other persons can access and use Railtrack’s network.

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Access agreements

Railtrack is also governed by the contracts it has with railway operators. These include contracts for track access by passenger services, track access by freight services, station access, access to light maintenance depots, as well as for a myriad of other uses of Railtrack’s infrastructure. All of these contracts (and there are many thousands) must be approved by the Rail Regulator. Railtrack is bound by the terms of these contracts, and is subject to any contractually specified penalties, as well as the usual legal outcomes, if any of the terms of the contracts are breached.

Railtrack is therefore involved in many different contracts, each tailored to a specific situation. As has been noted above, the Rail Regulator has published guidelines on criteria that he will use when assessing track access contracts for passenger and freight services, and for station access. These guidelines shape the existing agreements, and provide a certain consistency of structure. The Regulator is also currently exercising his powers under section 21 of the Railways Act by developing model clauses for track access contracts. Once these model clauses are in place, all relevant contracts which are entered into will be expected to include the model clauses, unless the Regulator agrees otherwise.

- Track access

A track access agreement is usually a simple two party agreement between Railtrack (the owner of the track) and the train operator who wishes to use the track. The contents of the track access agreements vary a great deal. Most track access agreements incorporate the Track Access Conditions, which are a set of standard rules governing Railtrack’s operation of the rail network.

In track access agreements Railtrack grants the contracting party the right to use specified network routes. The contracting party will only be allowed to use these routes on the network if a number of conditions are met. Primarily these conditions are contained in the ‘Track Access Conditions’ which are incorporated into the agreements, but the conditions can also be found in the ‘Applicable Rules of the Route’ and the ‘Applicable Rules of the Plan’ which are also incorporated into these agreements. These Track Access Conditions and Rules of the Route and Rules of the Plan also place duties upon Railtrack, but the majority set conditions which must be fulfilled by the contracting party.

The Track Access Conditions not only set out requirements for the use and the operation of the network, but also operate to achieve other ends:

- the Track Access Conditions try to ensure adequate timetabling;

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64 See discussion above and the ORR’s published consultation documents such as Model clauses for track access agreements – a consultation documents, ORR, 7 January 2000. See also the ORR’s web page for details of submissions made etc.
the Track Access Conditions help with environmental protections, by requiring contracting parties to notify Railtrack of any environmental damage or likely environmental damage caused by operations, and also by requiring the parties to notify Railtrack with details of any hazardous materials they propose to transport on the network;

• the Track Access Conditions also place requirements on Railtrack and the contracting parties to notify each other in case of disruption to the network;

• the Conditions also specify obligations in the case of disruptions from adverse weather, disruption from train failure, as well as disruption from any other cause.  

Track access agreements also place Railtrack under a duty to ensure that the network is maintained to a standard that will allow the operator using the network to provide any services specified. Railtrack is also obliged each year to provide the operator with a 5 year forward statement of its plans to maintain the relevant parts of the network.

Track access agreements also generally contain restricted mutual indemnity provisions, and the usual contractual clauses specifying default, and the conditions precedent to termination of the contract by either party. Usually neither party may transfer their rights under the contract without the consent of the other party, and without the consent of the Rail Regulator.

The track access agreements also dictate the charges that Railtrack will impose upon the operators for access to the track. These obviously differ from agreement to agreement, but usually contain the following elements:

• a fixed annual charge;

• a variable track usage charge (which is calculated with reference to the number of miles traveled by vehicles on the track);

• a variable charge for electricity, where electric traction is used. This is based on the amount of electricity used, and is meant to reflect the cost of this electricity;

• adjustments to reflect additional savings and costs made by Railtrack due to changes in the law;

• adjustments to reflect Railtrack’s costs for managing property.  

The nature of these charges, and the way in which they are calculated are currently being considered as part of the Rail Regulator’s periodic review of access charges. The access charges imposed upon franchised passenger operators were initially reviewed in 1994, and then in 1995 were set for a period of 6 years until 31 March 2001. The current and previous Rail Regulators have been participating in an extremely wide ranging consultation process relating to this periodic review of access charges, and final results of the review are expected to be announced in late 2000, with implementation to commence in 2001. The issues that have arisen during this


periodic review are primarily outside of the scope of this paper, but are discussed in some more detail later in the paper under the heading *Access charges*.

Many of the track access agreements also incorporate various types of performance regimes. There are many different types in operation, and for the passenger track access agreements alone there are 19 template regimes and 6 bespoke regimes. One important template regime for the franchised passenger operators is the performance regime. This regime is found as a template to the schedules (Schedule 8) of 19 of the 25 current franchise operator track access contracts and these agreements were uniformly amended to incorporate it during 1995. 67

The regime measures performance by Railtrack and the train operators, and assigns responsibility for poor performance between Railtrack and the operator. This regime involves financial incentives (payments or penalties). The regime operates by requiring Railtrack to record all of the delays and cancellations that occur to passenger services, and to also record whether it is the operator or Railtrack who was responsible for each event. Once every four weeks Railtrack then calculates the average time of the delays it has caused, and compares this number against the benchmark which is included in each contract. If Railtrack’s performance is better than the benchmark, Railtrack is paid a bonus by the operator, but if Railtrack’s performance is not as good as the benchmark, then Railtrack pays a bonus to the operator. The National Audit Office has observed of this scheme that “Railtrack have responded positively to the performance regime by seeking ways to reduce their contribution to train delays”. In the financial year 1998-1999, “Railtrack earned a bonus of £25 million from the performance regime”. 68 The operation of this regime, and the level at which the benchmarks are set, is being considered as part of the review of Railtrack’s access charges which is currently being undertaken by the ORR.

- Station access

Railtrack owns all of the stations in the network. All of the TOCs require access to stations in order to be able to fulfill their franchise obligations. Railtrack has maintained direct control of 14 of the major stations in the network. 69 The remainder of the stations (known as ‘franchised stations’) have been leased to TOCs. The TOC which has the greatest use of the station is generally the TOC that leases the station. The lease-holding TOC then becomes responsible for the day to day running of the station. Each station lease incorporates the National Station Access Conditions, a template of conditions applicable to all stations. The rent payable to Railtrack under a station lease generally has three components:

67 This has been inserted as Schedule 8 to passenger track access agreements, see ORR Annual Report 1995/1996 at p. 11.

68 Ensuring that Railtrack maintain and renew the railway network, National Audit Office, HC 397 Session 1999-2000, 12 April 2000 at p. 35.

• a Long Term Charge. This is a contribution towards Railtrack’s costs of repairing and maintaining the station, and is designed to provide a return on the modern equivalent asset value of the station;
• property rent from the station;
• a charge for 50% of actual rents and other payments made to the leaseholder) from activities such as car boot sales etc).  

In order to gain access rights to a station, TOCs and freight operators must then enter into access contracts with the leaseholder of a station in order to access the station. They will therefore, depending upon the station, either be entering into an access contract with a lease-holding TOC, or directly with Railtrack.

The franchised stations all operate under a ‘triangular’ series of contracts that were put in place at privatisation. In these stations, operators who wish to access the station enter into access contracts with the TOC leaseholder of the station. The operators also enter into a collateral agreement directly with Railtrack, which allow them to enforce their rights against Railtrack if the leaseholder fails to grant access.

All of the station access agreements contain certain standard provisions called the ‘station access conditions’. These cover common rights and obligations, such as arrangements for access charges, and requirements which must be followed when changes are to be made to a station. For franchised stations, the applicable access conditions are the National Station Access Conditions 1996, and these apply as a template to all franchised station access agreements. These conditions include the requirement that the leaseholder of the station maintain a station register containing detailed information about the station. For the 14 stations operated by Railtrack the access agreements incorporate as standard access conditions the Railtrack Independent Station Access Conditions.

Every station access agreement, whether between Railtrack and the operator, or a TOC and the operator, also contains station specific annexes which set out mutual obligations regarding particular issues relevant to that station.

Each station access agreement requires the user of the station to pay access charged to the operator of the station (either a lease-holding TOC or Railtrack). The nature of these charges are specified in the station access conditions for both Railtrack operated stations and franchised stations. These charges are made up of several elements:

• **Fixed station specific charges** - these charges cover the costs of maintenance and repair work to the station. In the current periodic review (which is encompassing a review of station charges) the Rail Regulator has proposed taking account of the property income which is derived from the particular station when calculating the station specific charge;  
• **Long term charge** - in franchised stations this represents a recovery of the Long Term Charge imposed in the station lease by Railtrack;

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- **Total variable charges** - these are charges which are recovered for the costs of the operation of the station and are factored to include: insurance costs, a fee for the management of the station, maintenance and renewal costs, the costs of professional advice obtained and the costs of the taxes incurred for the station.

The composition and calculation of the station access charges are currently being reviewed by the Rail Regulator as part of the periodic review, and are discussed in more detail later in the text.

- **Access charges**

Each access agreement to which Railtrack is a party also contains terms requiring the contracting party to make payments to Railtrack in return for the use of the network. For most of these agreements the access charges are not set independently by the parties, but are set by the Rail Regulator. Over 90% of the income Railtrack earns comes from access charges imposed upon franchised passenger and freight operator services for access to the network,\(^{72}\) (a more comprehensive discussion of access charges is contained later in this paper). The Regulator has determined approved charges by Railtrack for access to tracks and stations by passenger and freight operators, and a periodic review of the charges upon passenger operators is currently being undertaken by the ORR. The track access agreements contain fixed charges and variable charges, and the station access agreements contain long-term charges and variable access charges. The Regulator has ensured that a price variation mechanism is included in these agreements so that these fixed and long-term charges can be altered in accordance with an RPI-x formula.

**Train operating companies**

**Franchises**

The train operating companies who run the 25 franchised passenger operations\(^ {73}\) are significant participants in the privatised rail industry. These TOCs hold the franchises which were issued by the Director. The Director issued franchises after a process whereby prospective TOCs responded to invitations to tender, prepared tenders and agreed to meet financial and other requirements. The franchises all contain a long list of duties and obligations that are imposed on the TOCs. The franchise agreements also involve specified annual payments, and in nearly all cases the TOC receives payment (or subsidy) from the Director in return for operating the franchise. Each franchise agreement also contains a term specifying the length of the agreement,

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\(^{73}\) A list of the 25 TOCs can be found in the Appendix. Further information about the TOCs can be found via their representative body, the Association of Train Operating Companies (ATOCs), and ATOCs’ web page http://www.rail.co.uk/atoc/public/index.htm.
(usually 7 years, but it is 10 or 15 in a few agreements where the TOC has agreed to implement a substantial investment and maintenance programme).  

Each TOC has also entered into ‘franchise plans’ that bind the TOC to commitments over and above the basic requirements in the common franchise terms. These franchise plans are appended to the franchise agreements, and form part of the agreement. The Director monitors each TOCs’ compliance with its franchise plans, and publishes quarterly reports which include details of this compliance.

The franchise agreements all contain common obligations. Each agreement contains financial obligations requiring the TOC to provide the Director with a performance bond, and to provide extensive financial information to the Director to enable the Director to monitor the operation of the TOC.

The TOCs are all obliged by their franchise agreements to provide passenger services that meet the minimum specified in the passenger service requirement. In seven metropolitan areas the Passenger Transport Executives also helped to specify the conditions to be included in the passenger service requirements, and are co-signatories to the relevant franchise agreements. The passenger service requirements set minimum service levels and in some franchise agreements also include minimum load standards and capacity requirements. The minimum service levels include details such as the times of the first and last trains of the day, the frequency of trains, and the provision of weekend services. The TOCs are obliged to ensure that they develop their passenger timetable and associated services so that the passenger service requirements are met. Once the timetable and train plan has been developed, the TOC is also obliged to use all reasonable endeavours to provide its services in accordance with these plans. The passenger service requirement can be re-adjusted during the life of a franchise, and the TOC will be obliged to comply with the amended requirements.

The franchise agreements each contain detailed obligations regarding timetabling and the provision of timetable information to passengers. At each station operated by a TOC, the TOC is required to publish timetables covering all passenger trains using the station. The TOC is obliged to provide details of its own timetable to the operators of any station its own services call at. The TOC is also obliged to follow certain procedures in the event of any disruptions to the timetable.

74 Connex South Eastern, Cross Country Trains, Gatwick Express (conditionally), LTS Rail (conditionally) and West Coast Trains were all granted franchises for a period of 15 years. Great Western (conditionally) and Midland Main Line (conditionally) were granted franchises for 10 years. The remainder of the franchises were granted for 7 year periods. See OPRAF Annual Report, 1996-1997, at appendix.

75 These reports were initially published as OPRAF bulletin. Performance of the Passenger Rail Network, but now this function has been taken over by the shadow SRA, who publish the quarterly shadow SRA bulletin. The Performance of the Passenger Rail Network.


The franchise agreements also require the TOCs to participate in several network wide schemes such as through-ticketing, railcards and telephone enquiry services. The TOCs are also under a duty to participate in the schemes common to all TOCs, such as the ‘disabled persons reporting scheme’, which allows disabled passengers to pre-book assistance for a journey. These schemes tend to be administered by the Association of Train Operating Companies (ATOC), which runs the schemes on behalf of all the TOCs.

Each franchise agreement also contains a passenger’s charter. These charters contain details such as the right of passengers to receive compensation for poor performance, the manner in which customer complaints may be made, and set out the manner in which information on delays must be provided to passengers. The TOCs are obliged to use all reasonable endeavours to comply with the charter.

The franchise agreements also require the TOCs to conduct customer satisfaction surveys on certain aspects of their performance. These surveys are to be conducted at least twice a year. The results are compared against benchmarks. The TOCs are under an obligation to use all reasonable endeavours to improve the level of customer satisfaction, and if customer satisfaction levels fall below certain benchmarks, the TOC may be obliged, (having regard to the practicalities of such a matter) to take steps to raise the levels.

The franchise agreements all contain provisions relating to standards at a station directly operated by a TOC. At stations managed by a particular TOC, the TOC is required to implement and maintain minimum standards relating to communication systems, waiting areas, cleanliness, lighting and the provision of information to passengers.

In order to enable monitoring of the TOCs’ operation, the TOC is required to maintain accounts for each four week period, and the TOC is required to allow OPRAF to view these accounts. Audited annual accounts are also to be provided to OPRAF. Under the terms of the franchise agreements, the TOCs are also obliged to provide OPRAF with additional information if requested, and to allow OPRAF to audit their books. The TOCs are also required to notify the Director of any changes to the TOC or their business, and of any breaches of their franchise agreement.

Economic regulation of the TOCs is achieved by a maximum price being set for a basket of certain fares (such as season tickets, saver fares and certain commuter fares). These regulated fares are listed in the franchise agreements, and the TOCs are required to comply with the prices that are set. These fare prices were initially capped for 3 years. From by the three years from 1 January 1996, fares were not allowed to increase by more than the RPI from the capped price. For the year post January 1999, the price (with some exceptions) of the capped fares is RPI minus 1.

78 OPRAF Passenger Rail Industry Overview, OPRAF, September 1995, at p.95.

The London commuter operators are regulated by the Fares Incentive Adjustment Payment which allows their fares to vary 2% above or below the cap, dependant on performance. This news release of 22 October 1998 announced that “the average permitted increase on London commuter fares will be 1.9%”.
year commencing January 2000, fares have also been capped at RPI-1. This is again excepting London commuter services and some other services, who operate under the fares incentive adjustment payment regime which allows more variation dependant upon performance.

In areas, such as London commuter services where it was believed that the market was too weak to enable proper competition, the franchise agreements also contain clauses that allow a financial incentive regime to be implemented. These financial incentive regimes allow financial penalties to operate against TOCs whose performance is poor and who consistently overcrowd trains. They also operate to reward operators for good performance. At the time of franchising three separate regimes were introduced, which covered 19 of the 25 TOCs.

- For peak London commuter services and regional and rural services there is the ‘punctuality incentive payment’ which operates by measuring punctuality and cancellations against the timetable, and compares each four week period against the benchmark. If performance exceeds the benchmark, the TOC receives payments, if performance is below the benchmark, the TOC pays OPRAF.

- Another scheme called the ‘timetable change incentive payment’ penalises operators who make changes to the published timetable. This penalty is substituted as a lesser penalty for the penalty payable under the punctuality incentive payment that would apply if the service was cancelled without warning. This scheme is therefore designed to encourage TOCs to plan for disruption and to give notice of their intentions instead of canceling services when faced with problems.

- The TOCs who operate peak services in and out of London and some other cities (around 15 companies) are party to the ‘short formations incentive payment’. These TOCs must have a plan showing how passenger capacity will be met, and if the plan is not met, the TOC must make an appropriate payment to OPRAF. In the year 1999-2000 the TOCs paid £3.5 million in short formation penalties.

The National Audit Office has recently published a report on the effectiveness of the sSRA which included an examination of the efficiency of these incentive schemes. The report noted that in the year 1999-2000, rail operators paid penalties totaling £25.6 million, and received incentive payments totaling £22.3 million.

The report noted as one of its main findings that the sSRA, and formerly OPRAF “had applied the powers available within franchise agreements to remedy

underperformance where it could”, but that there were “some weaknesses”. The NAO observed that:

“The incentive regime for punctuality, which rewards good punctuality and punishes bad, is the only mechanism available within franchise agreements to directly promote improvement beyond the standards set by British Rail. The regime applies to some companies only and is not thought to be very effective”.

The NAO also made critical observations of the short formation incentive payment regime, stating that the regime “appears to be more effective with some companies than others, probably because the penalty rates are not high enough”. The sSRA had already moved to address some of these issues, and in January 2000 published a guide to the franchise replacement process which proposed (among other suggestions) that the payments for the incentive regimes be doubled, and that the penalties for punctuality below a certain standard be increased. The NAO report welcomed these proposals, but also made further recommendations for change building on the sSRA suggestions.

The franchise agreements also all contain provisions regarding the manner in which the licence can be terminated. Persistent performance failures are one of the reasons which may lead to a franchise being terminated.

The agreements also place numerous restrictions on the TOCs’ activities with affiliates, and on the TOCs’ ability to carry out other business. The franchise agreements also restrict the TOCs from entering into certain contracts unless the contracting party enters into a direct contract with the Director. This obligation applies, for example, on lease contracts with ROSCOs and upon access contracts with Railtrack. These contracts allow the Director to assume the TOCs’ rights and responsibilities in case of the central agreement ending, or the TOCs’ franchise ending, and operate to allow the Director to attempt to maintain the provision of services when the TOCs are unable to provide them.

The franchise agreements also require the TOCs to maintain the franchise as a going concern, and contain numerous conditions controlling the end of the franchise term and the hand-over of the franchisee assets.

**Franchise replacement**

18 of the 25 franchises were initially structured to terminate by the summer of 2004, with the remainder of the franchises stretching beyond this point. This means that the rail industry was designed to be relatively static until this period. The rail industry

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83 Ibid, Executive Summary at p.2.
84 Ibid also from the Executive Summary, p.2.
85 Ibid, also from the Executive Summary, at p.4.
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has however developed far more rapidly than was predicted at the time the franchises were granted. Between 1995 and 2000 passenger miles have grown by 33%.\textsuperscript{87} The surge in passenger numbers is predicted to increase, with “current predictions of 50% further growth in passenger kilometers in the coming decade”.\textsuperscript{88} However, due to the structure of the current franchises the TOCs have “little room to earn a return on new investment, and no certainty of a franchise after 2003-2004”.\textsuperscript{89} This means that most of the franchise holders have little incentive or interest in investing in the network and infrastructure to prepare for and assist with the growth of the network. The need for investment in the rail network and growth has led to frustration at the inability of the current franchise holders to deliver these ends.

The sSRA decided that the best way to engineer a change in the current franchise holders was to start replacing franchises early, and to seek investment commitments from the new franchise holders. Accordingly, in September 1999 the sSRA publicly announced that they were opening a programme to put some of the franchises with a short time to run up for re-negotiation,\textsuperscript{90} with the franchise holders being invited to compete against external competitors. Incumbent franchise holders would either re-negotiate the terms of their franchise with the sSRA, or reach a negotiated agreement with a new franchise holder who would replace them. In November 1999 it was announced that three franchises were to be the first to be renegotiated (Chiltern, South Central and East Coast Main Line). In December 1999 the sSRA invited offers concerning franchise replacements in six further areas, and in March 2000 three further areas were opened for replacement by re-negotiation and competition. The sSRA’s strategy replacement also involved the re-drawing of some franchise areas, and cutting the number of franchises from 25 to 22. The full details of the sSRA’s strategy, and maps of the new franchise areas were published on 20 June 2000.\textsuperscript{91} The plans involve Wales and the border areas being served by one franchise holder instead of seven, and envisions creating three distinct groupings of franchise holders: those serving long distance high speed routes, London commuter services and regional services. This will replace the current ‘mixed focus’ of many of the franchises.

These changes have already begun to take effect. The rail company Prism, which owned four franchises, agreed in June 2000 to withdraw by March 2001 from its Welsh franchises.\textsuperscript{92} The remaining of Prism’s franchises, c2c (formerly called LTS) was re-negotiated to remain in Prism’s control until 2011, but with additional investment.\textsuperscript{93} In August 2000 M40 Trains successfully re-bid for its franchise over Chiltern Trains, and was allowed to continue with the franchise for up to 20 years in return for certain assurances including an additional investment of £370 million.

\textsuperscript{87} sSRA Annual Report 1999-2000, at p.3.

\textsuperscript{88} Ibid, at p.3.

\textsuperscript{89} Ibid, also at p.3.

\textsuperscript{90} sSRA Press Release, Sir Alastair Morton spells out plans for franchise replacement, 17 September 1999.

\textsuperscript{91} sSRA, The new Franchise Map for Britain’s Railways. Briefing Note, 20 June 2000.

\textsuperscript{92} The Electronic Telegraph, Railway franchise map redrawn, 21 June 2000.

\textsuperscript{93} The Guardian, Prism hands back three rail franchises early, June 16 2000.
National Express, at the same time, also successfully re-bid for its franchise over Midland Mainline, also promising improvements to the service and an investment of £238 million on trains and infrastructure in return for a franchise lasting until 2008.  

**Licences**

Each of the TOCs also holds a licence issued by the Rail Regulator (or approved by him in the case of an already existing licence). The Railways Act requires operators of railway assets to be licenced (unless they have been exempted from this requirement). Each licence places particular obligations upon the TOC holding the licence. Each TOC is required by their licence to pay an annual fee to the Rail Regulator. The fee is determined by reference to the TOCs’ turnover. All TOCs are required by their licences to enter into a number of legally binding obligations, such as:

- taking out approved third party liability insurance;
- entering into an approved agreement allowing the British Transport Police to provide services;
- entering into approved claims allocation and handling arrangements;
- adopting approved arrangements for handling complaints;
- adopting approved arrangements for through ticketing.

Each TOCs’ licence also requires an environmental policy and a policy with regard to disabled passengers to be developed and adopted by the TOC.

Any breach of a licence condition will be investigated by the Rail Regulator, and may result in substantial financial penalties being applied to the TOC.

Any change in the control of a TOC (for example by change in the TOCs’ majority shareholders) is required to be notified to the Rail Regulator, who will then review whether the licence conditions are still appropriate.

**Further contractual obligations**

In order to operate, the TOCs need access to some basic facilities: railway tracks, railway stations, railway depots and rolling stock. This access is achieved by the TOCs entering into access contracts, whereby the TOCs agree to pay the owner of the facilities in return for the access to them. All of these access contracts (except for the contracts with ROSCOs for the use of rolling stock) need to be approved by the Rail Regulator, and are void without such approval. These access contracts also contain clauses which allow the Rail Regulator to economically regulate the contracts, (this aspect is discussed further later in the paper).

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94 *The Times*, *Rail franchise winners pledge to invest £600m*, August 11 2000.

95 The Rail Regulator has published a comprehensive set of guidelines concerning licences, *Guidance on licensing of operators of railway assets*, ORR, September 1995. Applications for operating licences are also governed by the provisions of the Railways (Licence Application) Regulations 1994.
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As Railtrack is the owner and manager of all of the Railway tracks, the TOCs must enter into track access contracts with Railtrack in order to run their franchised routes. The TOCs obtain the right to operate stations and depots by leasing them from Railtrack, (a TOC who leases a particular station or depot is generally known as the ‘facility owner’ of that station or depot). These agreements impose extensive obligations on the TOC in regard to the operation of that station. A TOC who wishes to use another TOCs’ station must enter into an access contract with the other TOC for the use of that station. Railtrack has remained at the owner of fourteen major stations, and in order to gain access to these stations, the TOCs must enter into an access contract for that station with Railtrack. The nature of these contracts for track and station access has been discussed above under the heading Railtrack.

Rail Freight

The rail freight industry is another privatised and regulated aspect of the industry. The Rail Regulator has a specific duty to promote the use of rail freight. However, because of the similarity of the rail freight industry structure to the passenger industry structure, this discussion will be brief, as the topics have already been canvassed.

The company English Welsh and Scottish Railway Ltd (EWS) has acquired the control of around 85% of the rail freight market. The Rail Regulator has described EWS as having “a virtual monopoly of rail freight services across the domestic market”. 96 This means that much of the regulatory control of the freight industry is specifically directed towards EWS (and at Railtrack as the monopoly controller of the network). The company Freightline dominates around 14% of the market, leaving only about 1% of the market in the hands of other operators.

All rail freight operators, like all other operators of railway assets must hold licences granted by the Rail Regulator. These licences have tended to follow the Regulator’s model licence form, 97 and each licence varies according to individual circumstances. The Regulator has ensured that the operators controlled by EWS have licences that ensure that customer interests are protected despite the lack of competition in the market. 98 The ORR has recently been asked by coal producers and suppliers in Britain to look into EWS’s performance in the carriage of industrial coal from production sites to power stations. The Regulator concluded that that EWS’s performance was unsatisfactory for coal suppliers, but that EWS had not breached their licence conditions. The ORR has promised that the problem will be investigated across the coal industry. The ORR noted however, that any potential remedy would impact upon other participants in the coal industry and would probably “require EWS


to have more transparent criteria for the allocation of scarce resources in times of demand”.

Rail freight operators, like passenger operators, enter into Regulator approved access contracts with station operators (be they TOCs or Railtrack) in order to gain station access. The rail freight operators also enter into Regulator approved access contracts with the operators of depots. The nature of these access contracts, and the rights and obligations which they create, have been discussed above. The ORR is currently reviewing freight access charges and aiming to completely re-assess the charging policy. This review was commenced in May 2000 and conclusions are expected in late 2000.

All rail freight operators also enter into track access contracts with Railtrack. The nature of these access contracts has been discussed above under the heading Railtrack. As usual, all of these track access contracts must be approved by the Rail Regulator, but given EWS’s significance, the access contacts which involve EWS operators tend to receive detailed consideration by the Regulator; and are often the subject of open consultation processes. In March 1999 the Regulator issued a general approval that allows EWS and Railtrack to make certain changes to their access contracts without needing to obtain the Regulator’s approval for each change.

Rail freight companies also have the potential to benefit under several schemes of the Department of Environment, Transport and the Regions such as the Freight Facility and the Track Access Grant Schemes. The Freight Facilities Grant offers payments to operators who are planning to invest in freight handling facilities, and the Track Access Scheme offers assistance to operators for paying Railtrack the required track access charges. There has recently been increased interest in the freight market, and in the year 1999-2000 the ORR handled a number of inquiries and received applications for non-passenger train operator licences from two companies.


101 The Regulator’s guidelines for these contracts can be found in: Criteria and procedures for the approval of freight track access agreements, ORR December 1994.

102 See for example, Proposed track access agreements between Railtrack PLC and English Welsh & Scottish Railways Ltd. (EWS). The Regulator’s Conclusions, ORR, 17 July 1997.


The Rolling Stock Market

The rolling stock operating companies (ROSCOs) own and operate the rolling stock needed for the rail industry. They are not under any usual regulatory control, such as licences or Regulator approved contracts. As such, they are not properly the subject of any review of the regulated rail industry, but a brief description of their role and the restrictions on their operation is necessary in order to understand the rail industry.

At privatisation, three ROSCOs were created, together holding over 11,000 railway vehicles, such as trains, carriages etc. These ROSCOs were then sold. The ROSCOs operate by performing some of the maintenance required on the vehicles, and by leasing the stock to the TOCs and freight operating companies, who are the people who actually use the vehicles.

The ROSCOs differ from other operators of railway assets, as the Railways Act does not require them to be licenced. Licencees are not required by persons who just own or lease rolling stock, and who do not use such stock. This means that the basic level of regulatory control that restricts others in the industry does not bind ROSCOs.  

The ROSCOs then lease their vehicles to the TOCs and freight operators. These lease agreements contain sections on the apportionment of responsibility for repairs to the rolling stock, for insurance, maintenance and safety, and provide for a fee to be charged for lease of the vehicles. The lease periods tend to be quite long (usually eight to ten years) and can be altered to match the life of a TOCS’ franchise. The franchise agreements for the TOCs generally stipulate that they can not enter into certain contracts unless the contracting party also enters into an agreement with the Director. Lease agreements between the ROSCOs and the TOCs fall within this requirement, so each ROSCO also has a direct agreement with the Director. These agreements allow the Director to adopt the responsibilities and rights of the TOC if the TOCs’ franchise agreement is terminated, or if the lease between the TOC and the ROSCO is terminated.

The operation of the ROSCOs is of course bound by the non-regulatory controls which govern all companies in Britain, such as health and safety legislation, company law requirements etc.

Following a recent review of the ROSCOs by the Rail Regulator, in which it was recommended that the ROSCOs adopt codes of practice, the ROSCOs have also prepared and published voluntary codes of practice to govern their conduct. The

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106 Review of the rolling stock market, ORR 3 February 1998, at p.6, but see also the ORR’s conclusions in Review of the rolling stock market, ORR 15 May 1998.

107 OPRAF Passenger Rail Industry Overview, OPRAF September 1995 at p.159.


110 ORR Press Notice, Cautious welcome for rolling stock companies’ codes of practice, ORR/00/04, 10 February 2000.
codes include details on how the ROSCOs will deal with the TOCs, and their approach to subleasing, flexible leases, and maintenance and modification of the rolling stock.
REGULATORY ISSUES

The rail industry is currently ‘enjoying’ a high position in the national consciousness. Nearly every day the British media carries a report about some aspect of the industry. Rail not only provides a transport infrastructure used by passengers and freight; it is also a keen area of interest for environmentalists and transport planners, among many others. As was discussed in the History section at the start of this paper, three regulatory issues that are currently topical are:

- price controls;
- safety;
- passenger standards.

In this section of the paper each of these aspects will be discussed in turn.

Price controls\(^{111}\)

Obviously the financial issues surrounding the rail industry are extremely complex. In this industry brief the only financial issue which will be examined is the method of pricing control used by the Rail Regulator over Railtrack’s access charges. There are also obviously intricate financial and accounting aspects of the price control mechanism, and such details are similarly outside the scope of this paper.

As was noted above, Railtrack’s network licence (and indeed the licences of the 25 TOCs and other operators), do not contain any mechanisms for regulatory price control. The Rail Regulator provides economic regulation of the rail industry via the access agreements (and the financial incentive schemes that can be contained in these agreements), and by controlling the clauses in these agreements which set charges for this access.

Railtrack earns the vast majority of its income from the TOCs. In the financial year 1998-1999, about 86% of Railtrack’s income came from payments made by the TOCs,\(^{112}\) (freight income comes a very distant second, in that year revenue from freight operators accounted for around 7% of Railtrack’s income). The revenue from the TOCs and the freight operators combine to account for about 92% of Railtrack’s total revenue. The level at which access charges are fixed is therefore extremely important to Railtrack, and indeed to the industry as a whole.

The track access agreements between Railtrack and the TOCs and freight operators (which have to be approved by the Regulator) contain clauses which set the fixed components of the access charges which are payable to Railtrack. The station access

\(^{111}\) Price control is also found in the rail industry by the manner in which the Director sets financial caps for certain passenger fares. This method of control has been alluded to in the above discussion concerning the TOCs.

agreements also contain a specific ‘long-term’ access charge that is also fixed and approved by the Regulator. The accounting methods used by the Regulator to calculate each of these charges are complex. The Regulator first reviewed the charges payable under access contracts in late 1994 and early 1995, and a number of papers were published which outlined the then Regulator’s chosen method of calculating the charges.\textsuperscript{113} The Rail Regulator set the charges for track access by TOCs in 1995, and implemented a formula by which charges could be increased until 2001. At the time of writing, the access charges are still governed by this scheme. However, the Rail Regulator is currently undertaking a review of the track access charges imposed upon TOCs (and is considering the station access charges as well). The Rail Regulator is also currently considering altering the framework upon which the charges are based to make the system more incentive based, and to more clearly define the ‘outputs’ which Railtrack is expected to meet.\textsuperscript{114} This review of access charges is expected to set the level of access charges for five-year period, from 2001 to 2006. The Regulator has published various consultation documents and the conclusions of the review are currently expected in late 2000.

\textit{Railtrack’s track access charges upon freight operators}

When the Rail Regulator first reviewed the track access charges for freight access contracts in early 1995, the Regulator concluded that a particular price charge provision (like the RPI-x method) should not be applied. Individual negotiation between freight operators and Railtrack was held to be the best way to allow freight operators to share the benefits of expected efficiency improvements. The ORR stated that: “Railtrack and its customers should be free to negotiate over both the starting level of charges and the profile of these charges over the length of the contract”.\textsuperscript{115} This means that Railtrack and freight operators negotiate track access charges themselves, but these negotiations are performed with reference to the criteria the Regulator uses when assessing whether or to approve the charges. These criteria require that:

- the access charges should be equal to or greater than the ‘avoidable costs’ incurred by Railtrack, (‘avoidable costs’ are the costs which Railtrack would no longer incur (or would avoid) if the freight user stopped using the network);
- the access charges should be equal to or less than the ‘stand-alone’ cost which any efficient competitor would incur, (the ‘stand-alone’ cost is what a theoretical alternative supplier of services would charge to the freight operator (or a group of operators) for track access);
- the access charges should be equivalent to those charged to other users of the network allowing for specific factors relevant to each case;
- the access charges should reflect the value of such access to the freight operators, and the charges should allow Railtrack to recover any freight specific

\textsuperscript{113} See the ORR’s web page for details of the publications in this area. http://www.rail-reg.gov.uk/

\textsuperscript{114} \textit{The periodic review of Railtrack’s access charges: provisional conclusions on revenue requirements}, ORR 15 December 1999.

\textsuperscript{115} \textit{Framework for the approval of Railtrack’s track access charges for freight services. A policy statement}, ORR, February 1995, p.16.
costs, as well as the costs attributable to freight from the costs which incurred by passenger and freight services together.\footnote{Framework for the approval of Railtrack’s track access charges for freight services. A consultation document, ORR, October 1994 at p.1.}

Although no RPI-x method of adjustment was required for freight access contracts, the Regulator also stated that long-term access contracts were expected to include a mechanism for adjusting the charge over time. The Rail Regulator has commenced a review of these criteria, and of freight charging policy.

**Track access charges for TOCs**

The track access charges paid by the TOCs were also considered by the Regulator in 1994 and early 1995. In January 1995 the Regulator published a policy statement which set out the basis of charges for passenger track access\footnote{Railtrack’s access charges for franchised passenger services: the future level of charges. A policy statement, ORR, January 1995.} (and for station and depot access agreements).

The manner in which the price control of track access charges for the TOCs was calculated for the period 1996-2001 was based on the ‘single till’ approach. This meant that the Regulator commenced by calculating the total amount of revenue that Railtrack would require to carry out all of its activities. This amount was calculated with reference to the fact that Railtrack was expected to become more efficient, and would therefore require less revenue over time. This amount was also calculated with regard to Railtrack’s need to obtain a sufficient return on its capital in order to be able to finance its activities. The Regulator then calculated the revenue that Railtrack would be able to earn from other sources (i.e. all revenue except that generated from track and station access charges on the TOCs). The Regulator then subtracted the amount Railtrack could earn from other sources from Railtrack’s required amount of revenue. The sum obtained then represented the amount that the TOCs would be required to pay for track and station access.

Once the ‘single till’ had been used to calculate the amount that should be charged to TOCs, the access charge in each individual agreement was set with reference to the set of access rights provided by Railtrack to the TOC in the agreement. If the level of service changes, the parties to the access agreement can negotiate an appropriate alteration of the charge (which of course needs to be approved by the Rail Regulator).\footnote{The periodic review of Railtrack’s access charges: a proposed framework and key issues. A consultation document, ORR, December 1997, at pp. 24-25.} Such an amendment to the charge can also reflect the apportionment of cost risk between the TOC and Railtrack. The charges consist mainly of a fixed component (about 90% derives from the fixed portion of the charge), which is made up of:

- the long run incremental costs that Railtrack incurs by supplying the services over the total period of access, and
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- an apportionment of the common costs Railtrack incurs.

The remainder of the charge is accounted for by two variable components, which alter with the number and type of services provided by Railtrack. These variable components are for the cost of wear and tear on the track, and for the cost of the electricity used. The variable charge for track usage represents about 3% of this total charge, and is based upon actual vehicle miles traveled. The variable charge for electricity makes up about 6% of the total charge, and is dependent upon the type of train and when where the train operates.

The fixed portion of the charge is revised annually, and the Rail Regulator chose to adopt at RPI-x formula to determine the level of this increase. This formula allows the fixed charges to be increased each year in accordance with the Retail Price Index (the ‘RPI’ of the formula). The formula is meant to encourage efficiency, as the charges do not merely automatically increase each year in line with the RPI, but increase at a rate of the RPI minus a set percentage. This fixed percentage reduction is meant to reflect the level of efficiency savings that the Regulator believes Railtrack can achieve, and to encourage Railtrack to achieve savings above this level. In 1995, the Rail Regulator set the access charges for passenger services to tracks at RPI-8 (i.e. minus 8%) for the year 1995-1996 only. For the five years from 1996 until 2001 the access charges were set at RPI-2. The level of the charges is currently being reviewed by the Rail Regulator, as part of the periodic review of access charges.

**Station access charges**

The way in which station access charges are calculated has been discussed above in the section on station access. Station access agreements for access by TOCs to stations (whether the stations are operated by Railtrack or fellow TOCs) have three elements:

- fixed station specific charges;
- Long-Term Charges;
- Total Variable Charges.

The Long-Term charge is meant to compensate Railtrack for the cost of maintaining the station over time, and for the capital costs to Railtrack in renewing the station or

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119 Ibid, at p.31.

120 Railtrack’s track access charges for franchised passenger services: Developing the structure of charges. A policy statement. ORR, November 1994 at p.13.

121 The nature of the RPI-x formula, (which is commonly used in regulation in the UK) is the subject of much academic discussion, and will not be discussed in depth here.


123 See The periodic review of Railtrack’s access charges : timetable, process and issues, ORR, 26 August 1999.
replacing its individual facilities, and provides a return on the modern equivalent asset value of a station. This Long Term Charge is annually increased at a rate of RPI-2. The nature of the station charges and the way in which they are calculated are also being considered by the Regulator as part of the current periodic review.

The current review

The ORR has published numerous papers concerning the periodic review which is currently being undertaken. The current Regulator’s predecessors published three consultation papers: The periodic review of Railtrack’s access charges: a proposed framework and key issues, The periodic review of Railtrack’s access charges: the framework and timetable and further consultation on financial issues, and The periodic review of Railtrack’s access charges: the Regulator’s conclusions on the financial framework. In June 1999, Tom Winsor, the current Regulator, stated that with regard to the work already done on the periodic review by his predecessors:

“I do not regard anything done so far as binding me in my future decisions. That includes the announcement on 10 December 1998 by the Office of the Rail Regulator on Railtrack’s rate of return and the size of its regulatory asset base.”

Tom Winsor has stated that he intends the periodic review to focus on an incentive structure. This structure will:

“encompass consideration of:

- incentives to use and develop the network, arising from the structure of charges and the form of control;
- longer term incentives to develop the network including the regulatory treatment of enhancements in the next control period and beyond;
- incentives to enhance the performance of the network which are provided by the contractual performance and possessions regimes supported by regulatory targets and incentives;
- incentives to maintain and improve the underlying long-term health of the network through appropriate monitoring of the serviceability and condition of Railtrack’s assets;
incentives to improve efficiency deriving from the ‘fixed-price’ nature of RPI-X incentive based regulation and the interaction with the periodic review process”.  

To assist in the review, the ORR is using a report published in April 1999 (prepared by consultants Booz-Allen & Hamilton) concerning Railtrack’s performance. This report assesses Railtrack’s performance (using actual data and projected data) by comparing the inputs against the various outputs delivered by Railtrack. A number of suggestions were made in this report (such as amending Railtrack’s licence to require Railtrack to maintain detailed asset registers). These recommendations have been the subject of consultation between industry participants. Booz-Allen & Hamilton were also commissioned by the ORR to review the Railtrack’s necessary expenditure to maintain the network over the period 2001 to 2006 (i.e. the period for which the access charges are to be set). These recommendations will also form part of the review process.

As part of this periodic review, the Regulator has also published papers on the electricity component and usage components of the access charges. These consult on new methods of calculating the charges, and the results from the consultations will be incorporated in the final review. In December 1999 the Regulator published The periodic review of Railtrack’s access charges: provisional conclusions on revenue requirements. In this document the Regulator sets out his provisional conclusions about Railtrack’s necessary expenditure over the next review period. The paper also sets out provisional methods of assessing this expenditure, as well as the initial conclusions on ‘outputs’ or work expected of Railtrack during that period. The paper also states that final details of the new methods will be made available in Spring 2000.

Railtrack will of course be significantly affected by the outcome of the Regulator’s periodic review, and has participated fully in the consultation process as well as publishing its own responses to the Regulator’s conclusions. In February 2000 Railtrack published its response to the Regulator’s provisional conclusions on revenue requirements. This response welcomed some aspects of the review, but also expressed some concerns and areas of dissatisfaction. With regard to the Regulator’s proposed efficiency target, Railtrack stated that it “stands by its proposals for a 2%

129 The periodic review of Railtrack’s access charges: the incentive framework, ORR 15 October 1999.

130 The periodic review of Railtrack’s access charges: electricity for traction, ORR 17 September 1999 and The periodic review of Railtrack’s access charges: usage charges, ORR, 22 November 1999.

131 ORR, 15 December 1999.

132 Ibid, at p.3.

133 Ibid, at p.7.
p.a. total efficiency savings as being appropriate”. Railtrack also questioned the manner in which the cost of capital and Railtrack’s revenue requirements would be calculated for the review.

Railtrack have published their Network Management Statement for the year 2000. This Statement contains information concerning Railtrack’s projected expenditure and Railtrack’s plans for maintaining and enhancing the network. The ORR will use the content of the 2000 Management Statement to assist in its periodic review. Railtrack used the publication of the Network Management Statement to re-iterate some of its disagreements with the provisional conclusions on revenue requirements published by the ORR in December 1999, for example re-stating that “The regulator’s assumptions of 5% annual savings in controllable costs…, and applying from 1998/1999 onwards, is not, we believe, sustainable”.

In June 2000 the ORR published The Periodic Review of Railtrack’s access charges: Provisional conclusions on station charges and consultation on the station access regime. Final conclusions on station access and station charges are also expected in late 2000. The provisional conclusions have set out options for the simplification of the contractual regime which governs station access, and detail proposed methods of altering charges for station access. These provisional conclusions also asked for further responses to consultation.

On 27 July 2000 the Rail Regulator published his draft conclusions on the periodic review. This provided draft conclusions to some of the ideas previously proposed by the Regulator, and also invited further consultation on some issues. The final conclusions of the ORR, at the time of writing, had not yet been published. Given the importance of the periodic review to all rail industry participants and the health of the industry as a whole, the conclusions of the review can be safely expected to be controversial.

Safety

The safety of the rail industry is an issue of high public concern following the Southall and Paddington rail crashes in 1997 and 1999. The government responded to these incidents by launching a series of inquiries and by announcing that the system by which railway safety is monitored is to be modified. This paper has discussed the operation of the current safety system above under the heading The Health and Safety Executive. This section will discuss the proposed modifications to the systems for maintaining rail safety.

134 Railtrack, The Periodic Review of Railtrack’s access charges. Provisional conclusions on revenue requirements: Railtrack’s response, February 2000, at p. 5.


137 ORR, June 2000.

The current safety case system

Safety in the rail industry, as has already been noted, is conducted on the basis of a cascade system. This system operates with safety cases (statements of how safety is to be achieved, details of methods to be used etc) being proposed by participants in the industry, and being considered and accepted by those at the level above them. Train operators must prepare their own safety cases (with regard to the requirements of the health and safety legislation, having regard to the safety systems, such as the safety standards and the various codes) already in place on the rail network. Railtrack must then accept the safety cases proposed by the operators, and ensure that they will be compatible with its own safety systems. Railtrack must prepare its own safety case, which is in turn validated by the government’s HM Railway Inspectorate, which is a division of HSE. The HSE is in turn a body of the Health and Safety Commission. The HSE (and HM Railway Inspectorate as its operating division in the railways sphere) therefore operates as the highest level in the safety approval scheme.

The current management of safety within Railtrack

Railtrack has a safety and standards directorate which is in charge of safety at Railtrack. The directorate reports to the Chairman of Railtrack. The safety and standards directorate is required by Railtrack’s network licence to produce and manage the Group Standards Code that governs the development of the Railway Group Standards which rail operators must follow. The safety and standards directorate also oversees the safety cases of the rail operators, and runs audits on compliance by the operators with the Group Standards Code. The safety and standards directorate also assists in the preparation of Railtrack’s own safety case, and runs audits on its compliance with the case. A Safety Advisory Board operates independently to oversee and advise the safety and standards directorate. This Board is an industry-elected group of senior managers in the rail industry, and trade union representatives. Representatives of the HSE and the SRA are present as observers at meetings of the Safety Advisory Board.

The high level control of safety for Railtrack and the other rail operators is governed by the Health and Safety and Work Act, and by the safety regulations made under this Act. Railtrack and other rail operators are also bound by the safety requirements in their own licences and contracts, as well as by the safety cases which they have produced. They are also bound by the Railway Group Standards (which are prepared according to the Group Standards Code developed by the safety and standards directorate) and by the Line Standards (prepared by Railtrack). The TOCs are also

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139 Railtrack Annual report and accounts 1998-1999 at p. 22.

140 See the Railway (Safety Case) Regulations 1994, the Railways (Safety Critical Work) Regulations 1994, (HM Railway Inspectorate, which has the ultimate duty of ensuring compliance with these regulations has published guidance on both of these regulations), The Railways and Other Transport Systems (Approval of Works Plant and Equipment) Regulations 1994, the Railway Safety (Miscellaneous Provisions) Regulations 1997 and the Railway Safety Regulations 1999.

141 See details in The Management of Safety in Railtrack: A Review by the Health and Safety Executive, HSE, HSE books.
bound by various industry wide codes of practice, such as the guidance by ATOC concerning driver training.

**The current role of the HSE**

The HSE and HM Railway Inspectorate also have a significant role to play in rail safety. Their role was discussed above under the heading *The Health and Safety Executive*. They approve Railtrack’s safety case, and also provide a high level review of the operator’s safety cases which are submitted to Railtrack “to ensure that they are properly considered”.142 HM Railway Inspectorate also inspects and approves new or altered railway vehicles, signaling or network infrastructure and investigates accidents.

**Developments**

In February 2000, following the rail crashes and a subsequent review of Railtrack’s safety and standards directorate,143 the deputy Prime Minister announced changes to the current safety systems. The safety and standards directorate of Railtrack is to end its role, and the responsibility for overseeing safety is to be transferred to a subsidiary company of Railtrack. This subsidiary company is to have representatives from the rail industry as well as representatives who are independent of the industry. The Chief Executive of the company is to be appointed by its board, and not by Railtrack.144 At the same time it was also announced that Railtrack’s responsibility for accepting the safety cases of train operators was to be removed from Railtrack and placed with the HSE. The deputy Prime Minister also indicated that further changes to the safety system may be forthcoming, stating that “I have gone as far as I can within existing legislation”.145 As was discussed earlier in this paper, these changes to the safety system have been designed to allow improvements which can be quickly delivered and which will not pre-empt the outcome of Lord Cullen’s inquiry. The Rail Regulator is also currently consulting on the modifications to Railtrack’s licence which would be necessary to implement theses safety changes.

At the time of writing, Lord Cullen is investigating the Paddington accident, and Professor Uff and Lord Cullen are preparing to conduct a joint hearing on train protection later this year. Meanwhile, other investigations have been ordered, and a report by the HSE into Railtrack’s safety management has been published, as has a report by Sir David Davies on automatic warning systems for the rail network.146

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142 The HM Railway Inspectorate’s web page at page 4. The page was updated on 22 February 2000. This web page can be found on the HSE web page (http://www.hse.gov.uk/hsehome.htm) under the heading ‘Directorates of HSE’.


145 Ibid.
The introduction of any new form of warning system is also expected to be contentious, due to the expense of any such system, and the decision of how the cost of any new automatic systems are to be met by industry participants.\textsuperscript{147} The report by Sir David Davies on automatic warning systems recommended that a system called the Train Protection Warning System (TPWS) should be installed across the system as soon as possible. The TPWS system is not fully effective for trains traveling at over 75 miles per hour, and the Davies report recommends that a pilot trial of an advanced form of TPWS which will cover trains travelling at up to 100mph be set up. The report also recommends further research and development of more advanced automatic systems.\textsuperscript{148} The Railway Safety Regulations 1999 already require the installation of TPWS, and “Railtrack has committed to speeding up the installation of TPWS with implementation starting in April 2000”.\textsuperscript{149}

Although further alterations to the current safety system seem probable, but are only likely to occur after the conclusions of the various inquiries into the safety of the rail industry.

**Passenger standards**

The maintenance and improvement of passenger standards has been a topical issue throughout the operation of the privatised and franchised rail passenger industry. The role played by the Director (and now by the Chairman of the shadow SRA), and the role which was formerly played by the Regulator in maintaining passenger standards has been discussed above. The manner in which the TOCs’ franchise agreements require passenger standards to be maintained (and the incentive regimes included in the franchises agreements), as well as the nature of passenger service obligations in their access agreements have also been discussed. The National Audit Office has recently published a report on the effectiveness of these organisations and arrangements in the paper *Action to Improve passenger rail services* (which has also been discussed above). This section considers in more detail the nature of the schemes currently in place to safeguard passengers’ interests.

**Passenger standards in licences and franchise agreements**

Railtrack and each of the TOCs are bound by their licences to take account of passenger interests and standards. The franchise agreements of the TOCs create further obligations to passengers. The franchise agreements each encompass

\textsuperscript{146} *The Management of Safety in Railtrack: A Review by the Health and Safety Executive*, HSE, HSE Books, and *Automatic Train Protection for the Railway Network in Britain, a Study by the Royal Academy of Engineering*, Sir David Davies, the Royal Academy of Engineering

\textsuperscript{147} See *The Guardian*, “The government last night landed the rail industry with a bill of almost £2.5bn to improve rail safety”, from Article titled *Protests as Railtrack keeps safety role*, 23 February 2000.

\textsuperscript{148} *Automatic Train Protection for the Railway Network in Britain: A study by the Royal Academy of Engineering*, Sir David Davies, The Royal Academy of Engineering, from the “Executive Summary” pp3-4.

Passenger Service Requirements, which specify minimum levels of service that are required. Many of the Passenger Service Requirements were drawn up in consultation with Passenger Transport Executives local to the franchise area. These Passenger Transport Executives became parties to the franchise agreements in question, and participate in the monitoring of, and amendment to the Passenger Service Requirements. Some TOCs are also, by virtue of their franchise agreements, subject to incentive schemes regarding punctuality and adherence to timetables. These incentive schemes are administered by OPRAF.

The issue of the overcrowding of trains is addressed by the franchise obligations of each TOC, who are under a general obligation to provide adequate services so as to minimum overcrowding. Some TOCs who operate peak commuter services also have specific controls in their franchise agreements whereby OPRAF requires them to conduct at least one passenger count a year (usually, for the sake of consistency, in the Autumn). If, based on the formulas used, overcrowding is found, the TOC must agree with OPRAF on a plan to alleviate this overcrowding for the duration of the franchise term. Overcrowding is currently being exacerbated by the increase in passenger numbers, with the latest figures showing a 5% increase in the number of passenger miles during the period 1998-1999 over the preceding year.

The TOCs are required by their franchise agreements to participate in several industry wide schemes. One such scheme is the National Rail Enquiry Service, which operates industry wide to provide passengers with information about train services. The scheme is run by ATOC on behalf of the TOCs. In then past few years this scheme has been the subject of many complaints and investigation by the RUCCs, and the ORR in 1997 imposed an enforcement order and fines totaling £350,000 on the TOCs for failing to meet the target of answering 90% of calls. On 4 December 1998, another order was imposed. No fines have been imposed under this second order, but under the terms of the order, the ORR monitors the monthly performance of the service.

The franchise agreements of the TOCs also contain the passengers’ charter. This charter requires rail services to be provided reliably and punctually. The standards set in the charter can vary over time. The SRA (but formerly OPRAF) monitors the performance of the TOCs against the standard set in the passengers’ charter and publishes a quarterly bulletin which reports the results and grades the operators.

150 Passenger Transport Executives are statutory bodies which are controlled by Passenger Transport Authorities. The Passenger Transport Authorities are formed and funded by local authorities. Taken from OPRAF Passenger Rail Industry Overview, OPRAF, September 1995 at p.11.

151 Overcrowding is determined according the ‘Passengers in Excess of Total Capacity’ formula. On journeys of more than 20 minutes, capacity is the number of standard class seats. On journeys of less than 20 minutes, the formula allows for standing room, at about 0.55 square meters per passenger. OPRAF Annual Report 1998-1999, at p. 11.

152 Ibid, at p. 10.


154 See Shadow SRA bulletin, The performance of the Passenger Rail Network 17 October 1999 – 8 January 2000, which at the time of writing is the most recent bulletin available.
This method of monitoring allows comparisons between passenger services to be made historically and between different operators. The passengers’ charter data does not include most Sunday services or off-peak trains for commuter services, or days that the operator has declared ‘void’. In February 1999 OPRAF published a consultation paper on the merits of amending the manner in which the passengers charter data is collected.\textsuperscript{155} The paper also sought consultation on whether alternative methods of collating information on train reliability and punctuality could be used. This consultation process was then overtaken by events, and no conclusions have been published. The issues raised by the paper are still active matters of concern to passengers, as performance can only be properly assessed if adequate systems are used.

The complaints made by passengers can be an impetus to the provision of better passenger service, and in 1997 the ORR started compiling and publishing the complaints made by passengers about the service they had received. These complaints are published as the Rail Complaints Bulletin. The ORR collected the complaints from the records of passenger complaints made directly to train operators. The ORR is also developing a system for auditing the methods used by the operators to record complaints, in order to ensure that the information provided to the ORR was both correct and consistent.\textsuperscript{156}

The passenger train operating companies are required by their licences to make timetable information available for 12 weeks in advance of any day of travel. This was a general requirement of the TOCs’ franchise agreement, but in 1999 the TOCs agreed that their licences should be amended to specifically include this commitment,\textsuperscript{157} and for this commitment to be expressly enforceable by the Regulator.

The franchise agreements of the TOCs also require ticket sales to be performed in a certain way. Operators are required to ensure that they sell tickets for the whole network, and that the correct tickets (i.e. those taking advantage of any special offers, and those which use the correct available transfers) are sold for any particular journey. ATOC and the ORR surveyed ticket sales 1997, and carried out another detailed survey in May 1999.\textsuperscript{158} The most recent ticket survey was published in March 2000,\textsuperscript{159} and this survey revealed the national average for correct ticket sales was 96.8%. Another survey revealed that ticket sales to disabled customers was only correctly performed on average for 67.2% of transactions. The ORR had announced in their 1998-1999 annual report that they:

\textsuperscript{155} Improved Public Performance Measure Consultation Document, OPRAF, 25 February 1999.


\textsuperscript{157} ORR Press Notice, Rail companies agree to commit to earlier train timetable information, ORR/99/05, 2 March 1999.

\textsuperscript{158} ORR Annual Report 1998-1999 at p. 11.

\textsuperscript{159} ATOC Press Release Rail ticket selling accuracy reaches highest ever peak, ATOC, 23 March 2000.
“have been pressing ATOC to introduce an enforceable retailing benchmark and performance regime. Progress has been disappointingly slow and we have made it clear to train operators that if we cannot agree on a regime that provides incentives for continuous improvement we are prepared to consider modifying licences to achieve that objective”.  

The Transport Bill proposes to remove the area of ticket retailing from the ORR’s sphere and to place it with the SRA. At present no enforceable benchmarking scheme has been developed. It is hoped that this will be one of the areas that the shadow SRA and ATOC will address in the future.

The ability of disabled passengers to access and use the rail network is also an important area of passenger standards. The TOCs are obliged by their licence agreements to have regard to the interests of disabled passengers. OPRAF (and the shadow SRA) are under similar obligations, and the ORR is currently obliged to bear responsibility for the interests of disabled passengers, although the Transport Bill proposes that this responsibility be transferred to the SRA. At present the ORR’s code of practice on *Meeting the needs of disabled passengers* sets out the best practice expected of all rail operators with regard to disabled passengers. The ORR has commenced preparing a revised code in 1999, following consultation with industry and in line with the requirements of the Disability Discrimination Act. A draft code called *Train and Station services for disabled passengers* was published in May 2000, by the ORR, and consultation sought. The final revised code is expected to be published later this year. The responsibility for such a code will, upon passage of the Transport Bill, become the responsibility of the SRA. The interests of disabled passengers are also protected by disabled access schemes run by all of the TOCs.

**Passenger standards and committees**

Passenger standards are also upheld by the various committees which are concerned with consumer issues. There are eight Rail Users’ Consultative Committees (RUCCs) which are all regionally based and a London Regional Passengers’ Committee. The Chairman of each RUCC is appointed by the Secretary of State. There is also a Central Rail User’s Consultative Committee (CRUCC) which is based in London which monitors passenger’s rights and the operation of the rail network on a national level. The chairman of the CRUCC is similarly appointed by the Secretary of State. These Committees are funded by, and report to the ORR. The Transport Bill has suggested that the RUCCs be renamed as Rail Passengers’ Committees, and that the CRUCC be renamed the Rail Passenger’s Council. The Bill also proposes that these Committees no longer report to the ORR, but instead to report to the SRA, in line with the SRA’s role as the premier guardian of passenger rights.

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161 *Meeting the needs of disabled passengers: a code of practice*, ORR, August 1994.

162 Transport Bill section 202 and Schedules 16 and 21.
These new Committees have been established and are currently in operation, but are still reporting to the ORR. The Committees represent passenger interests and investigate complaints made by passengers, acting as a first line of contact for disgruntled consumers. Each of the Committees holds regular meetings which are open to the public. The Committees are concerned with issues that affect passengers such as:

- the quality and cleanliness of trains and stations;
- overcrowding of trains;
- fares;
- ticket retailing;
- the punctuality and reliability of train services;
- safety and security;
- timetables;
- access to the network;
- station facilities;
- facilities for disabled passengers.

The Committees monitor these issues, investigate passenger complaints or mount investigations on their own initiative, and prepare reports on their investigations.
THE FUTURE

Although the future of the rail industry can not be accurately predicted, there are some areas of potential change which can be foreseen. The operation of the SRA and the Transport Bill will significantly alter the manner in which the rail industry is managed. The new Competition Act may also have ramifications on the way the industry is structured and operated. The role played by Railtrack and by the TOCs has come under increasing scrutiny, and the opportunities for change which are opened by the expiry of franchise agreements and the periodic review of Railtrack’s access charges are likely to be seized by the Rail Regulator and by the sSRA. The future shape of the industry, the nature and holders of the franchise agreements, the level of investment and the level of financial support provided to the industry are all currently being reviewed, and are likely to substantially alter in the future.

The effectiveness of the privatised rail industry has been publicly debated ever since it was created. The efficiency and results of Railtrack, the TOCs the HSE and the regulatory bodies have all been criticized. The current Rail Regulator, Tom Winsor, has stated recently that:

“the railway industry was privatised….on the assumption of no growth, with little long term investment and the passive management of decline. It was set up with a lack of vision, poor quality contracts and a weak regulatory structure. The industry and the public have reaped what was sown”.

Many of the problems which bedevil the rail industry are undoubtedly as a result of its high level of usage, which was unforeseen and unplanned for at privatisation. The industry has grown rapidly since privatisation. In the five years to March 2000, “passenger numbers have increased such that total passenger miles traveled grew by 33%”. In the same period, “freight grew 40% per tonne per kilometre”. The rail industry was privatised on an assumption of much less growth, and investment in infrastructure and rolling stock was accordingly planned for on a much lower level of usage.

The seven year franchise agreements which are currently in place will begin to expire by 2004, and the shadow SRA has taken this opportunity as a chance to reconsider the role and nature of the TOCs. The shadow SRA has already opened negotiations to replace (and replaced some) of these franchises before they expire. The shadow SRA has also unveiled its plans to alter the size of the existing franchises and to consider using local bus services in some areas in conjunction with rail services.

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165 The Guardian, Plans to redraw rail map, 9 March 200.

The shadow SRA has further outlined the proposal to award franchises for periods up to twenty years, in order to encourage greater investment and maintenance by the operators; and is considering increasing both the penalties and the performance incentives applied to operators.\textsuperscript{167}

The issue of investment in and enhancement of the rail infrastructure is also likely to remain topical. The Rail Regulator, the Government and the shadow SRA have all expressed concern over the level of investment and development in the industry. The current review of Railtrack’s access charges is being performed with a view to encouraging investment, as is the franchise replacement programme. Among other developments, Railtrack is currently upgrading the main West Coast line, and phase one is due to be completed in May 2002. A benefit of the upgrade will be to allow Virgin Trains to operate high speed services between London and Glasgow, but many other operators will benefit by being able to offer better services once the upgrade is completed. The Rail Regulator has expressed doubt about Railtrack’s ability to meet this deadline, saying that Railtrack would have to “run very, very hard”\textsuperscript{168} to meet the phase one deadline. The ORR has published a draft enforcement order, which would be applied against Railtrack if the development was not finished in time.\textsuperscript{169} The manner in which all parties handle this development may well affect the future way in which major developments are carried out.

The level of financial support provided to the industry is also expected to become even more of a topical issue in the future. The level of financial support was initially planned to decrease over the length of the initial franchises, with a view to ultimately reducing to a low level, or being removed completely. However, Railtrack and some TOCs have indicated that financial support from the government will continue to be required.\textsuperscript{170} Railtrack has recently stated that it foresees that its revenue “would have to increase by £1 billion a year by 2006 if Railtrack [is] to carry out necessary improvements on the network”\textsuperscript{171} However, the Rail Regulator had said before this statement was made that he believed that Railtrack had over-estimated the increases that it would need. The Financial Times reported that “Mr Winsor believes the level of investment needed has been overstated and the resources available “considerably understated”.\textsuperscript{172} Railtrack’s Network Management Statement for the year 2000, containing the forward planning for the next ten years is still being reviewed by the Regulator, but even if this statement is approved, the issues surrounding the amount of financial support necessary for Railtrack and the industry will continue into the future. The National Audit Office has very recently published a paper titled Ensuring

\textsuperscript{167} Shadow SRA press release SSRA Outlines new Approach to Franchise Contracts, 27 March 200.

\textsuperscript{168} The Independent, Railtrack warned on West Coast upgrade, 28 March 200.

\textsuperscript{169} See West Coast Main Line, Modified Draft Final Order against Railtrack PLC, ORR, 27 March 2000, and West Coast Main Line-Statement by the Regulator, ORR, 5 November 1999.

\textsuperscript{170} The Guardian, Prescott seeks £2bn ‘quick fix’ for rail network, 10 April 2000.

\textsuperscript{171} The Guardian, Railtrack goes cap in hand, 31 March 2000.

\textsuperscript{172} Financial Times, Rail regulator still on track, 15 March 2000.
that Railtrack maintain and renew the railway network,\textsuperscript{173} examining the level of public funding Railtrack indirectly receives, and the manner in which these funds are spent on maintaining the network. The paper also appraises the ORR’s effectiveness in regulating Railtrack so that adequate maintenance of the network occurs. This paper can also be expected to fan the interest about the financial support required by the industry.

The future shape of the rail industry is difficult to predict. The privatised rail industry has grown in a manner that was not foreseen or planned for at privatisation. The current structure of the industry with long term contracts, lengthy franchise agreements and long term investments, means that it is difficult for the industry to respond swiftly to face new problems. An efficient and effective rail system is essential for Britain’s future. The industry operates in the private sphere under the control of independent industry regulators, and therefore cannot be readily modified in line with government policy. The industry is currently in a period of flux, and modern problems may well demand novel solutions.

\textsuperscript{173} HC 397, Session 1999-2000, 12 April 2000.
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Appendix

A list of the Train Operating Companies who hold the current 25 passenger rail franchises (as at August 2000).

Anglia Railways Train Services Limited trading as *Anglia Railways*. Franchisee is GB Railways Group plc.

Cardiff Railway Company Limited trading as *Valley Lines*. Franchisee is Prism Rail plc.

Central Trains Limited trading as *Central Trains*. Franchisee is National Express Group plc.

Chiltern Railway Company Limited trading as *Chiltern Railways*. Franchisee is M40 Trains Limited, (a company made up of Chiltern Management, John Laing plc and three other plc’s).

Connex South Central Limited trading as *Connex South Central*. Franchisee is Connex Transport UK Limited.

Connex South Eastern Limited trading as *Connex South Eastern*. Franchisee is Connex Transport UK Limited.

Virgin Trains operating as *Cross Country*. Franchisee is Virgin Rail Group Limited.

Gatwick Express Limited trading as *Gatwick Express*. Franchisee is National Express Group plc.

Great Eastern Railway Limited trading as *First Great Eastern* Franchisee is First Group plc.

Great Western Trains Company Limited trading as *First Great Western* Franchisee is First Group plc.

North Western Trains Company Limited trading as *First North Western* Franchisee is First Group plc.

Great North Eastern Railway trading as *Great North Eastern Railways* Franchisee is Great North Eastern Railway Holdings Limited (a subsidiary of Sea Containers Limited).

Island Line Limited trading as *Island Line*. Franchisee is Stagecoach Holdings plc.

c2c Rail Limited (formerly LTS Rail) trading as *c2cRail*. Franchisee is Prism Rail plc.
Merseyrail Electrics Limited trading as Merseyrail Electrics. Franchisee is ARRIVA plc.

Midland Mainline Limited trading as Midland Mainline. Franchisee is National Express Group plc.

Northern Spirit Limited trading as Northern Spirit. Franchisee is MTL Trust Holdings Limited.

ScotRail Railways Limited trading as ScotRail. Franchisee is National Express Group plc.

Silverlink Trains Services Limited trading as Silverlink. Franchisee is National Express Group plc.

South West Trains Limited trading as South West Trains. Franchisee is Stagecoach Holdings plc.

Thameslink Rail Limited trading as Thameslink Rail. Franchisee is GOVIA Limited, made up of the Go-Ahead Group plc and VIA G.T.I SA.

Thames Trains Limited trading as Thames Trains. Franchisee is Victory Railway Holdings Limited.

Virgin Trains trading as West Coast Trains. Franchisee is Virgin Rail Group Limited.

Wales & West Passenger Trains Limited trading as Wales & West. Franchisee is Prism Rail plc.

West Anglia Great Northern Railways Limited trading as West Anglia Great Northern Railways. Franchisee is Prism Rail plc.