

The Rail Ombudsman – ORR proposals to modify licence conditions to require membership of an Alternative Dispute Resolution scheme

26 February 2019

Introduction

In September 2017, we first consulted on complaints handling guidance and on the proposal to introduce an Alternative Dispute Resolution scheme (**ADR scheme**) and the consequential changes that would be required to rail companies' Complaint Handling Procedures¹.

Following that consultation, on 8 February 2018, we published our decision letter² stating that ORR was “minded to” mandate membership of an ADR scheme through the licence six months after the start of a voluntary ADR scheme. We consider having a single ADR scheme and making this a mandatory requirement of the model licence is the most effective way of ensuring that customers have adequate and uniform redress from rail companies. We consulted on these proposals and the results of these consultations are set out in more detail in this document below.

After our February decision letter, RDG continued to work with its members to develop and implement a voluntary ADR scheme with an independent ombudsman. RDG members have now been members³ of a voluntary ADR scheme since November 2018.

In July 2018⁴ we consulted on our proposals to modify the model licence to require membership of an ADR scheme. ORR's proposals meant that franchise rail companies, Open Access Operators and Network Rail would have their licences modified to mandate membership of the ADR scheme by 1 April 2019 and that other rail companies would have to join the ADR scheme at a later date.

ORR's public interest arguments for the proposed licence modification were set out in the following consultations:

- Changes to Complaints Handling Guidance: Decision letter, dated 8 February 2018;
- Modification to Passenger Licence Condition 6 (Complaints Handling) a consultation, dated 26 July 2018; and

¹ https://orr.gov.uk/data/assets/pdf_file/0018/25623/changes-to-complaints-handling-guidance-consultation-2017-09-26.pdf

² https://orr.gov.uk/data/assets/pdf_file/0005/26699/consultation-on-changes-to-complaints-handling-guidance-decision-letter-2018-02-08.pdf

³ <https://www.raildeliverygroup.com/media-centre/press-releases/2018/469773891-2018-11-26.html>

⁴ https://orr.gov.uk/data/assets/pdf_file/0006/28419/2018-07-26-consultation-on-licence-condition-6-complaints-handling-modification.pdf

- The Rail Ombudsman – ORR proposals to modify licence conditions to require membership of an Alternative Dispute Resolution scheme, dated 19 December 2018.

The key public interest arguments for the proposed licence modification set out in the above consultations were that:

- **Modifying the licence to require all passenger licence and station licence holders to be members of an ADR scheme will protect dissatisfied customers:** consumer satisfaction with complaints handling in the sector is poor; levels of trust are low; and consumers will benefit from the long-term certainty of the ability to obtain a free and binding means of independent redress;
- **The licence modification to require rail companies to join the ADR scheme (the Rail Ombudsman), procured by RDG** provides customers with a simple route to a redress scheme which meets the high standards they should expect;
- **The requirement to be a member of the scheme by 1 April 2019** for franchise rail companies (TOCs), Open Access Operator (OAOs) and Network Rail, provides the members who joined at commencement in November 2018 sufficient time to address any issues with the operation of the new scheme;
- **The requirement to be a member of the scheme by 1 June 2019 for all other rail companies allows all other passenger and station licence holders adequate time** to make arrangements to join smoothly; and
- **Mandating membership of the ADR scheme for all rail companies** would help the scheme to drive up industry standards, utilising information from cases to help individual businesses improve complaints handling and looking across the sector to make wider improvements.

On 19 December 2018, we published our decision document⁵, in which we confirmed that we would proceed with our proposal to modify passenger and station licences to mandate membership of the ADR scheme, known as the Rail Ombudsman⁶. The December decision document also confirmed that:

- (i) TOCs, Open Access Operators and Network Rail would have to become members of the ADR scheme by **1 April 2019**;
- (ii) all other rail companies would have to become members of the ADR scheme by **1 June 2019**; and
- (iii) the ADR scheme should be a single scheme, and namely the scheme that had been procured by RDG.

The December decision document also contained our responses to submissions from industry stakeholders on our proposals contained in the July 2018 consultation document.

⁵ https://orr.gov.uk/data/assets/pdf_file/0013/40036/response-to-adr-consultation-and-draft-wording-for-licence-modification-2018-12-19.pdf

⁶ http://orr.gov.uk/data/assets/pdf_file/0013/40036/response-to-adr-consultation-and-draft-wording-for-licence-modification-2018-12-19.pdf

Alongside our December decision document, we sought views on draft wording for the proposed licence modification, prior to proceeding with the statutory notice process required to modify the licences. As stated in our July consultation and December decision document, we considered that having a mandatory ADR scheme remained in the public interest for the same reasons as those set out in our July consultation.

In response to our December decision document, we received 15 responses to our request for comments on the draft wording of the licence modification; ten from train companies, four from independent bodies, and one from a consumer. Within these replies we also received a number of comments relating to the ADR scheme. Responses will be published on the ORR website.

Respondents made comments on how the wording of the modification could be amended to provide greater clarity to the requirements. These have been taken into account in the revised draft of the modification. The revised draft is contained in the Annex B of the Statutory Notice, which is Annexed to this Statutory Consultation.

In the remainder of this Statutory Consultation, we summarise, and respond to, the points made by respondents in response to our December decision document, and which did not relate to the draft wording of the licence modification itself.

Attached to this Statutory Consultation are the following documents:

- **Annex A:** Statutory Notice of statutory consultation on changes to modify the Complaints Handling condition in the licences and SNRPs listed in Annex C
- **Annex B:** containing the proposed modifications to the Complaints Handling condition of the passenger licence/SNRP and station licence. The proposed modification is set out in red; and
- **Annex C:** containing a table of passenger licence/SNRP and station licence holders and showing the condition of their licence where the modification is to be inserted.

Industry responses to December decision document

1. Mandating membership

We received support from some operators for our decision to mandate membership of the ADR scheme. Other operators expressed concern that mandating membership would change the perception of the scheme and the proactive approach from industry. Alternatives proposed included mandating through franchise agreements or membership terms for RDG or to only consider mandating membership of the ADR scheme should it become clear that there was a problem to solve.

GTR considered that it is too soon for industry to have worked through the fine details of case handling and scheme rules for the ADR scheme to be mandated in the model licence. It added that the ADR scheme needs to be developed into a fully scoped, tested and fair ADR scheme. GTR suggested that the proposal to modify the licence potentially creates, due to ORR's enforcement regime, an additional liability for train operators.

First Group proposed that implementation of the modification to the model licence be paused. If ORR decided not to pause the date, it could see no justification for the date being sooner than for those ORR propose join on 1 June 2019. It added that ORR has given no reasons why membership should be from 1 April 2019 and suggested that will be contrary to the public interest to have such a limited time before 1 April 2019. First Group stated that it would be more rational and sensible to resolve issues with the current scheme rules. It suggested that there is a structural mismatch with the scheme and other industry mechanisms, (notably the Claims Allocation and Handling Agreement) and whether claims under the Equalities Act should be in the scheme.

RDG noted that other licence holders that have not yet joined the scheme were engaging with them. RDG suggested that smaller operators should be afforded time to see how the scheme operates over the year, evaluate it, and to join voluntarily. Heathrow Express requested a start date of 1 June 2019 as per the consultation which would allow them to plan entry to the scheme.

ORR response

In our 8 February 2018 consultation⁷, we set out our intention to introduce a licence modification that would oblige rail companies to be members of an approved ADR scheme within six months of the start of the voluntary scheme. In our July 2018 consultation, we also stated that there should be a fixed date by which rail companies are required to be members of the ADR scheme and that the licence should be modified to reflect this fixed implementation date to provide certainty for consumers and industry. We anticipate that for TOCs, OAOs and Network Rail, the implementation date for the ADR scheme will be 1 April 2019, as TOCs OAOs and Network Rail began participating in the ADR scheme on a voluntary basis in November 2018. This will mean that:

- from 1 April 2019 onwards TOCs, OAOs and Network Rail will not be able to withdraw their participation in the ADR scheme;
- RDG and rail companies will be able to continue with their current arrangements for delivering the ADR scheme; and
- rail companies will have had adequate time to address any teething issues which may have arisen before the obligation becomes enforceable in the licence, and they will have benefitted from any feedback on the ADR scheme (given that they have been members of an ADR scheme on a voluntary basis since November 2018).

Our July consultation set out in detail why it is in the public interest to mandate membership of the ADR scheme via a modification to the complaints handling licence condition. We stated, amongst others, that mandatory membership is required to protect dissatisfied consumers and that it benefits consumers and the industry. In addition, since the July consultation:

⁷ http://orr.gov.uk/_data/assets/pdf_file/0005/26699/consultation-on-changes-to-complaints-handling-guidance-decision-letter-2018-02-08.pdf

- Transport Focus has published the results of the latest National Rail Passenger Survey⁸. This showed passenger satisfaction at its lowest level for a decade;
- The CAA was informed by Ryanair of its decision to terminate its membership of the voluntary ADR scheme⁹. We noted this issue in our December decision document as a further reason for mandating membership of the ADR scheme through the licence.

We consider that mandating membership of the ADR scheme through the licence is the most effective way to implement the scheme. Other methods available, such as requiring membership via franchise agreements, would not be suitable, as TOCs are at different points in the franchise cycle and consequently the ADR scheme would (i) take longer to implement, and (ii) rail operators would have various different implementation dates.

We consider that the ADR scheme that has been procured by RDG is the most appropriate scheme for the following reasons:

- The ADR scheme has been approved by the relevant Competent Authority (Chartered Trading Standards Institute) under the ADR Regulations. In order to achieve approval the Competent Authority must be satisfied that the body meets the required standards including expertise, independence, impartiality, effectiveness, and fairness;
- The Rail Ombudsman has also been granted membership of the Ombudsman Association which requires it to show the highest standards of independence, governance and objectivity - we will amend the Complaints Handling Procedure Guidance to reflect the Ombudsman Association approval; and
- The ADR scheme is an industry developed scheme. The industry itself has determined the scheme rules. RDG has lead discussions over many months with industry, and representatives from Go Ahead and First Group train operators have been active participants throughout the development and procurement of the scheme and the drafting of its rules. GTR has also represented industry as a member of wider Rail Ombudsman TaskForce alongside RDG, the ORR, the DfT, Transport Focus and London TravelWatch.

As set out in our December decision document, it is in the public interest to require **all licensees**; including station, concession and charter operators to be members of the ADR scheme. Consumers using these services should be afforded the same level of protection as those using services provided by TOCs, Open Access Operators and Network Rail. This will ensure consistency in redress provision and promote understanding and awareness of the Rail Ombudsman.

As set out in our July consultation, we recognise that those companies which have not been party to the development of the ADR scheme, may require more time to implement the scheme. It is for this reason that we have proposed that all other rail

⁸ <https://www.transportfocus.org.uk/news-events-media/news/rail-passenger-satisfaction-lowest-level-decade/>

⁹ <https://www.caa.co.uk/News/UK-Civil-Aviation-Authority-begins-enforcement-action-against-Ryanair/>

companies (which are not TOCs, OAOs or Network Rail) are required by their licence to become members of the ADR scheme by **1 June 2019**, more than six months after scheme commencement. We consider that this is a reasonable period to allow these operators to make arrangements to join. As noted by RDG, companies are already engaging with them. Nevertheless, we would encourage companies to join prior to this date to enable familiarisation with new processes and to ensure a smooth transition to the licence requirement.

We have publicly noted the industry's proactive approach to establishing an ADR scheme, and the basis on which we are introducing a licence modification. We will continue to make this clear and we do not believe that mandating membership of the ADR scheme changes the perception of the scheme.

As regards GTR's comment, our published economic enforcement policy¹⁰ sets out when and why we would take enforcement action and we do not believe that mandating membership through the licence would increase liability, as suggested.

2. Network Rail's participation in the ADR scheme

We received comments from three respondents stating their belief that Network Rail should be mandated to be a full member of the ombudsman scheme, with one noting that the majority of rail delays are the responsibility of Network Rail for which train operators will be held responsible.

ORR response

The industry itself has decided and agreed upon the terms on which Network Rail participates in the ADR scheme, not ORR. The specific terms on which Network Rail has agreed to participate in the Rail Ombudsman scheme (in relation to services provided directly to consumers at its managed stations) is a matter for the ADR scheme rules. As set out in our letter of 19 December 2018, Network Rail's station operator licence will be modified to require them to be a member of the ADR scheme.

As regards the individual relationship between individual licencees and Network Rail, and the means for redress in the event of poor performance and the consequential impact on licence holders, this issue is outside the scope of this consultation.

3. A single scheme in the rail sector

Network Rail suggested that it was not appropriate to mandate membership to one specific provider, adding that competition could drive up standards and innovation.

¹⁰ http://orr.gov.uk/_data/assets/pdf_file/0018/4716/economic-enforcement-statement.pdf

ORR response

In our July 2018 consultation¹¹ we set out the reasons why we considered it to be in the public interest to have one scheme in the rail sector. The key public interest arguments were that:

- having a single ADR scheme would ensure that consumers have a clear and understandable route for redress,
- Having more than one scheme would create a risk of confusion for customers and could limit the scope for raising awareness by the scheme provider; and
- Having more than one scheme could also lead to different standards of service between additional schemes. This could result in a worse service for some consumers, particularly given it would be the rail company not the consumer who would choose the scheme. Respondents to the July 2018 consultation overwhelmingly supported this position.

In our 19 December 2018 decision document we also noted that the high standards which are a feature of the ADR scheme which has received Ombudsman Association approval may also not be replicated by an additional scheme and could lead to a worse service for some consumers. It remains ORR's position that there should be a single scheme in the rail sector.

4. Third-party retailers

One respondent suggested that membership of the scheme be extended to third-party retailers (TPR's) to provide consistency in how complaints are treated.

ORR response

TPR's do not fall within ORR's licensing regime and we cannot require them to join. As set out in our letter of 19 December 2018, we understand that the scope of the ADR scheme could be widened to include TPR's (and travel management companies) and RDG is in the process of engaging with them. We would encourage these companies to proactively consider taking up this option.

5. Network Rail licence requirements

Network Rail noted that the numbering of their licence condition for complaints differs from that of other licence holders. It also stated that Network Rail is a licence holder rather than a SNRP holder.

ORR response

We note that the complaints handling licence condition for Network Rail is Condition 5 rather than Condition 6, and it is a licence holder, rather than a SNRP holder.

¹¹ http://orr.gov.uk/data/assets/pdf_file/0006/28419/2018-07-26-consultation-on-licence-condition-6-complaints-handling-modification.pdf

This has been reflected in the Statutory Notice, attached at Annex A to this consultation and the annexes to that Statutory Notice.

6. Wider LC6 comments

We received comments from two respondents about the wording of paragraphs 1-4 of Licence Condition 6. These are existing paragraphs for which we did not propose to make any changes and are not the subject of this licence modification consultation. We will be following up separately with the respective respondents.