Working Paper

An Inspection of Rail Franchise Procurement: First-Class Regulation for Privatised Passenger Rail?

Luke Butler[1]

1. Introduction

Since privatisation, successive Governments have employed franchising as a regulatory strategy for delivering passenger rail in Great Britain. The Department for Transport (DfT) procures services from private sector Train Operating Companies (TOCs), the delivery of which is formalized in a contract.

There are now weekly media reports of franchise failures. Despite being a subject of considerable public interest, there has been limited legal debate on rail franchising.[2] The potential field of enquiry is massive given that rail franchising is just one aspect of a multi-faceted system for the provision of rail.[3] The modest aim of this article is to explore certain issues in relation to just one regulatory aspect, procurement. Regulation has two senses in this context which can overlap and cause conflict. The first concerns the law and policy applicable to how contracts are advertised, bidders selected, bids evaluated and challenged in pursuit of certain objectives e.g. non-discrimination, equal treatment (and transparency) to achieve an EU internal market and/or to obtain value for money for the UK taxpayer. The second often overlooked aspect concerns how procurement is used as a regulatory tool to achieve other fundamental objectives which support economic management e.g. increasing public participation in the provision of rail through stakeholder consultation.[4]

Rail experts may rightly point out that a focus on procurement neglects other more systemic and pressing issues such as poor contract management. However, poor procurement is a prelude to poor management. Further, inquiries have specifically identified a need for significant improvement in procurement. This focus also fills important gaps in the literature. First, it

[1] Birmingham Law School. The author is grateful to the Birmingham Law School Peer Review Panel (in particular, Catherine Mitchell), Tony Prosser (University of Bristol), Mark Wilde (University of Reading), and the anonymous reviewers for comments on earlier drafts.

[2] It is difficult to pinpoint the reasons why. Fundamentally, many of the criticisms of franchising are not attributable to the procurement process but derive from systemic concerns about the DfT's ability to manage franchises, Network Rail's role in providing infrastructure and the configuration of a concentrated industry. Further, this is a politically sensitive field in which the Government exercises commercial discretion. There is a risk that regulation could inhibit or fetter that discretion. In addition, other aspects of rail are heavily regulated e.g. all those areas regulated by the Office of Rail and Road as regulator. More generally, the UK places a particular emphasis on "deregulation" across sectors.

[3] This could include *inter alia*: the legal design, management and enforcement of franchise agreements; the respective regulatory functions of Network Rail and the Office of Rail and Road; merger control of TOCs, including the role of the Competition and Markets Authority; and procurement by Network Rail and TOCs, which has resulted in several reported cases.

[4] See generally, T. Prosser, *The Economic Constitution* (OUP Oxford 2014) Ch.9 and citations therein. Legislation governing the process for awarding contracts is also increasingly designed to achieve objectives other than buying services e.g. ensuring regulatory compliance with social and other standards. See P. Telles and G. S. Olykke, "Sustainable Procurement: A Compliance Perspective of EU Public Procurement Law" (2017) 3 E.P.P.P.L.R. 239.

provides a first critical evaluation of the extent to which the DfT has responded to recent recommendations for reform in light of recent inquiries. Second, it provides a useful case study for future comparative analysis. The UK's model of competitive tendering for rail services has been identified as one to emulate across the EU. Of course, such analysis has a new significance as Brexit will necessitate international agreements on reciprocal access to EU and global markets for the procurement of rail services. Third, it contributes to the perennial debate on the role of the public sector in privatised rail given the prohibition on bidding by public sector operators. Finally, it provides a vehicle for introducing wider themes into legal debate, namely the impact of certain post-privatisation challenges facing rail regulation generally.

This article argues as follows. First, domestic law and policy is generally compatible with EU law, the main body of law governing procurement in this field. Nevertheless, at the domestic level, UK law and policy reveals legal uncertainty. This renders the permissible exercise of the Government's franchising powers unclear, creates a risk of legal challenge but which also limits the possibility for effective judicial review. It has also resulted in commercial uncertainty for TOCs that require predictability in procurement cycles for the franchising programme. At the EU level, an analysis of UK implementation of EU law also confirms uncertainty in EU law and policy that must be resolved. Secondly, it is argued that the DfT has taken some action in response to recent franchise failures but there remain potential areas for reform. Thirdly, the DfT should think more strategically not just in terms of how the procurement process is regulated but also how procurement is used as a regulatory vehicle to respond to post-privatisation challenges. These include: increasing supra-national influences on rail, an evolving model of rail service provision including devolution, and increasing expectations for greater public scrutiny of all forms of public contracting.

2. Context

2.1. Rail Franchising

At its most basic, franchising as a regulatory strategy comprises the following key aspects.[5] Franchising provides competition for the market. The Secretary of State (SoS), acting through the DfT, grants exclusive rights to a private sector TOC to provide services. In return, the TOC has a right to charge fares typically, but not always, retaining revenue.[6] However, many franchises also require the payment of substantial premia to the DfT. [7] The DfT may also pay subsidies in respect of socially necessary services which are otherwise commercially unprofitable. As will be discussed in Sections 3 and 4, to select a

[5] On franchising as a regulatory strategy generally, see R. Baldwin, M. Cave and M. Lodge, *Understanding Regulation: Theory, Strategy and Practice* (2nd ed Oxford University Press, Oxford), Ch.9. For an introduction to debate on rail franchising as a regulatory model, see T. Prosser and L. Butler, "Rail Franchises, Competition and Public Service" (2018) 81(1) Modern Law Review, 23. For a useful overview of the main features of rail franchising, see L. Butcher, Passenger rail services in England, House of Commons Library Briefing Paper, Number CBP 6521, 9 January 2018.

[6] The Thameslink, Southern and Great Northern (TSGN) franchise has been described as a "management contract". The TOC receives a fixed payment for delivering services but gives all fares revenue to the DfT.

[7] In 2015/16, TOCs made a net contribution of £877 million to the Government compared to £400 million paid in 2011/12. See Office of Rail and Road, 2015-16 Annual Rail Finance Statistics, 12 October 2016.

TOC, the DfT generally conducts a competitive procurement process through an invitation to tender (ITT).[8] A franchise agreement is concluded with the winning TOC. The franchise agreement includes, *inter alia*, details of performance standards, penalties and termination in the event of failure. TOCs must also obtain licences from the DfT and the Office of Rail and Road (ORR) to operate and pay access charges to Network Rail which is responsible for the infrastructure such as the track. At the time of writing, there were sixteen franchises operating in England and Wales and two in Scotland.[9]

There have been several recent high-profile franchise failures. In 2012, the InterCity West Coast (ICWC) competition was cancelled. As will be discussed in Section 4.4.1, this was principally due to lack of transparency of information provided to bidders with respect to capital requirements, lack of equal treatment in the application of evaluation criteria, and erroneous exercises of discretion. This precipitated the temporary suspension of the franchising programme, two inquiries and a number of interim direct awards to incumbents pending new competitions. The Laidlaw inquiry into the ICWC competition found significant errors and the Brown Review examined franchising more generally.[10] Brown devoted an entire Chapter to procurement finding that, although the bidding process is not fundamentally flawed, there was "significant scope to improve it further".[11] This included a number of procurement-related recommendations, certain of which are explored in this article. There have also been regular Transport Committee, Public Accounts Committee and National Audit Office inquiries.[12]

2.2. Legal framework

The Railways Act 1993 (1993 Act) provides the legal foundation for privatisation. It regulates, *inter alia*, franchising, licences for operation, track access agreements, and enforcement. The 1993 Act has subsequently been amended in parts but the sub-part on franchising remains substantially unchanged. Regarding franchising specifically, a first aspect concerns scope of coverage prescribing: the SoS' powers for determining which services are subject to franchise agreements; services which are exempt; and the prohibition on bidding by public sector operators.[13] A second aspect concerns

[8] The SoS and TOCs also enter into a franchise process letting agreement to enable cooperation, prevent collusion and ensure controls on publication, access to, and disclosure of, confidential information during the procurement process.

[9] For a useful overview of individual franchises, see L. Butcher, Railway passenger services, House of Commons Library Briefing Paper, Number CBP 1343, 18 January 2018.

[10] Report of the Laidlaw Inquiry into the lessons learned for the Department for Transport from the InterCity West Coast Competition, 6 December 2012; Department for Transport, Response to the Report of the Laidlaw Inquiry, 6 December 2012; The Brown Review of the Rail Franchising Programme, January 2013, Cm8526; and Government Response to the Brown Review of the Rail Franchising Programme, July 2013, Cm8678.

[11] Brown Review, p.8, para.1.11.

[12] National Audit Office, Lessons from cancelling the InterCity West Coast franchise competition, Report by the Comptroller and Auditor General, HC 796, Session 2012-12, 7 December 2012; House of Commons Transport Committee, Cancellation of the InterCity West Coast competition: Government update on the Laidlaw and Brown reports, Fifteenth Special Report of Session 2013–14, 10 February 2014; House of Commons Committee of Public Accounts, Reform of the rail franchising programme Twenty-first Report of Session 2015–16, 3 February 2016; Rail franchising, Ninth Report of Session 2016-17, 30 January 2017; and Rail franchising in the UK, Twenty-Fifth Report of Session 2017-19, 27 April 2018.

[13] S.23; S.24; S.24A; and S.25.

tendering, prescribing matters to be taken into account when issuing a tender and the circumstances in which no adequate tenders are received.[14] A third aspect concerns financial and administrative matters such as: the transfer of franchise assets and shares to the TOC; fares; other terms and conditions in the franchise agreement; and leases.[15] A final aspect concerns the SoS' duty to provide services where a franchise is terminated or comes to an end.[16] Ancillary provisions in other sub-parts include orders for compliance and penalties for contravention of the terms of a franchise agreement.[17]

Whilst, as indicated, the 1993 Act contains provisions on tendering, it does not provide detailed procedural rules for award comparable to those under the EU procurement Directives.[18] Until recently, it was unclear to what extent rail services contracts, and thus, franchises must be procured in accordance with the Directives. It was possible to argue that rail franchises constituted Part B "non-priority" services under the public sector Directive. These were not subject to the Directive's full application but certain provisions did apply, including technical specifications, contract award notices and applications to a court for remedies. Alternatively, such contracts could be classified as "concessions" which were excluded from the Directive.[19] Historically, concessions were excluded from a number of reasons. One reason was that, in the legal systems of some Member States, concessions were not regarded as "ordinary procurement" but as a different kind of legal relationship necessitating alternative arrangements.[20] In any event, the DfT always applied EU Treaty principles (e.g. non-discrimination, equal treatment and transparency) on the assumption that franchises are contracts of cross-border interest.[21] The Directives were recently reformed. Further, a new Concessions Directive was adopted filling an "important lacuna" in the Directives' coverage.[22] Some anticipated that the Concession Directive would bring rail services within its scope.[23] However, all Directives now expressly

[14] S.26 and S.26ZA.

[15] S.27; S.28; S.29; and S.31.

[16] S.30.

[17] §55-58.

[18] See The Public Contracts Regulations 2015, S.I. 2015, No.102 implementing Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC OJ L 94/65; and The Utilities Contracts Regulations, S.I. 2016, No.274 implementing Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC OJ L 94/243.

[19] The then Public Contract Services Regulations 1993 S.I. 1993 No. 3228 (implementing Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts OJ L 209/1) provided that a "public services contract" did not include a contract under which "consideration includes the right to exploit the provision of services" i.e. a services concession (reg. 2 PCSR). For a discussion of the legal position at that time, see S P Norris, 'The proposed extension of rail franchises – an E.C. procurement law perspective (1999) 5 P.P.L.R. 151. Council Directive of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts OJ L 134/114 confirmed an express exclusion (Article 1(4) and reg. 2(1) as implemented in The Public Contracts Regulations 2006 S.I. 2006 No.5 (reg.6(2)(m)).

[20] S Arrowsmith, *The Law of Public and Utiltiies Procurement, Regulation in the EU and UK: Volume I* (3rd ed. Sweet & Maxwell London) para. 6-58.

[21] HL Deb 01 July 2004 vol 663 c48WA: Railways: Franchises, Question by Lord Berkley [HL3379]; response by Lord Davies of Oldham.

[22] Arrowsmith, *The Law of Public and Utiltiies Procurement*, para.6-59.

[23] See The Concession Contracts Regulations 2016, S.I. 2016, No.273 implementing Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts OJ L 94/1. For this view, see R Boyle, "The 'Fiasco' of the West Coast Rail

confirm their exclusion.[24]

Rail contracts have been excluded because they now fall principally within the scope of other targeted EU secondary legislation undr the EU Regulation on public service obligations for public passenger transport services by rail and road (PSO Regulation) adopted in 2007.[25] DfT policy and practice confirms this position domestically.[26] At the outset, it must be acknowledged that the PSO Regulation's impact has been very limited but nevertheless requires discussion given its relatively new significance in the field. The PSO Regulation is part of the EU's "Railway Package", a set of instruments intended to: progressively open up rail transport service markets to competition; increase interoperability of national railways systems; and develop a single European railway area.[27] The PSO Regulation's purpose is to define how authorities may guarantee provision of transport services of general interest by laying down conditions under which they will compensate operators for costs incurred and grant exclusive rights in return for discharging public service obligations.[28] In 2016, the Regulation was amended.[29]

Fundamentally, it has been argued that there is a tension underlying the PSO Regulation that is difficult to resolve and no attempt to do so will be made in this article.[30] The tension concerns the attempt to introduce competitive tendering to enable monopolies to provide services of general interest i.e. those subject to specific public service obligations whilst continuing to preserve the integrity of those services. This tension is present in all systems of rail both where rail is largely state owned or operated and in privatised rail. However, an attempt to reduce or balance it at the EU level through harmonisation is complicated when there is no "communitised" (i.e. shared EU consensus) definition and minimum content of services of general economic interest and public service obligations.[31] This has largely resulted in fairly general rules which retain considerable freedom of action for Member States. Further, because of the close relationship between the state and operators in certain Member States, the PSO Regulation's primary focus is on preventing over-compensation of operators to safeguard against unlawful State aid rather than

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Franchise and the European Public Procurement Rules" (2013) 6(22) International In-house Counsel Journal, 9.

[24] Recital 27 and Article 10(i) Directive 2014/24/EU (as implemented in reg.10(1)(i) PCR 2015); Recital 21 and Article 10(3) Directive 2014/23/EU (as implemented in reg.10(4)(b) CCR 2016); and Recitals 20 and 35 and Article 21(g) Directive 2014/25/EU (as implemented in reg.21(1)(g) UCR 2016).

[25] Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulation (EEC) Nos 1191/69 and 1107/70 OJ L 315. For general commentary, see G. S. Olykke, "Legislative Comment: Regulation 1370/2007 on public passenger transport services" (2008) 3 P.P.L.R. 84; and D. van de Velde, "A new regulation for the European public transport" (2008) 22 Research in Transportation Economics 78.

[26] See Department for Transport, *Passenger Services Franchise Competition Guide*, January 2016.

[27] Details of the fourth Railway Package can be found at: https://ec.europa.eu/transport/modes/rail/packages/2013_en (last accessed 20 April 2018).

[28] Article 1(1).

[29] Regulation (EU) 2016/2338 of the European Parliament and of the Council of 14 December 2016 amending Regulation (EC) No 1370/2007 concerning the opening of the market for domestic passenger transport services by rail (Text with EEA relevance) OJ L 345/22.

[30] See generally, C. Maczkovics, "The Railways at the Crossroads of Liberalisation and Public Service" (2009) 4 E.P.P.P.L.R. 26.

[31] Maczkovics, 'The Railways at the Crossroads of Liberalisation and Public Service', 36.

opening markets to competition.[32] As will be discussed, these issues have particular implications for rules on contract award.

Regarding coverage, the PSO Regulation applies to the award of a "public service contract" meeting "public service obligations".[33] However, it is questionable whether all franchises actually satisfy these contract definitions under the PSO Regulation. The orthodox understanding of a public service obligation is the undertaking of socially desirable but otherwise commercially unprofitable services in return for the grant of a subsidy. As indicated in Section 2.1, many franchises provide record premiums to Government.

Regarding the nature of procurement rules, the PSO Regulation states the rationale for rules on award as being to address both disparities in procedure and the need for "common rules on award".[34] However, as indicated above, in the fundamental absence of a consensus on models for delivering public services, the rules at best set minimum requirements as opposed to a framework for harmonisation. It has been observed that, far from constituting a "framework for public procurement" [35] in terms of detailed rules governing advertising, selection of the bidder, evaluation of the bid and review and remedies, its provisions have been described as "skeletal" when compared to the detailed rules under the procurement Directives.[36] As will be discussed in Section 3, the PSO Regulation requires competitive tendering; however, the amended PSO Regulation has considerably expanded the circumstances permitting direct awards and whose sheer number now arguably risks displacing competitive tendering as a general rule.[37] Further, to counter-balance this, it has introduced rules aimed at improving transparency regarding publication of contracts and reasons for decisions; however, there are no other detailed provisions.

Finally, as will be discussed throughout this article, it is now unclear to what extent it is possible to draw on the procurement Directives analogously as well as existing EU Treaty principles in applying the PSO Regulation.[38] Recent franchise contract notices have expressly stated that the DfT does not undertake to carry out the tender process in line with the Directives for contracts covered by the PSO Regulation.[39] However, the PSO Regulation states that review and remedies should be comparable, "where appropriate", to provision under the procurement Remedies Directive.[40] It has been criticised

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[32] See generally, Case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH* [2003] ECR I-7747. For the corresponding provisions see Recital 6 and Article 1.

[33] Article 2(e) broadly defines "public service obligation" under a "public service contract" as: "a requirement defined or determined by a competent authority in order to ensure public passenger services in the general interest that an operator, if it were considering its own commercial interests would not assume or would not assume to the same extent or under the same conditions without reward."

[34] Recital 6 and Recital 24 amended PSO Regulation.

[35] Olykke, 'Legislative Comment: Regulation 1370/2007 on public passenger transport services', 87.

[36] Arrowsmith, *The Law of Public and Utiltiies Procurement,* para. 6-70.

[37] Article 5(3); 5(3a); 5(3b); 5(4); 5(4a); 5(4b); and 5(5).

[38] In Case C-292/15 *Hörmann Reisen GmbH v Stadt Augsburg, Landkreis Augsburg* ECLI:EU:C:2016:817, paras.12, and 45-47, the Court referred to the PSO Regulation provisions on award of contracts in terms that such rules "derogate from EU public procurement law" but are also "*lex specialis*" taking precedence over the public sector Directive which is of general application.

[39] See also the contract notice for the East Anglia franchise: http://ted.europa.eu/TED/notice/udl?uri=TED:NOTICE:65248-2015:TEXT:EN:HTML (last accessed 20 April 2018).

[40] Recital 21; Article 5(7) and Recital 27 amended PSO Regulation. See generally Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative

that Member States appear to provide general judicial or administrative review mechanisms as if rail contracts are awarded outside the Directives and that this mechanism does not present the same advantages as the Remedies Directive.[41] Neither the 1993 Act nor the Franchising Competition Guide refer to review and remedies in detail. A franchise competition high-level process map simply refers to the possibility to "arbitrate on and resolve any disputes that arise."[42] However, stakeholders are able to obtain standing for judicial review.[43] Further, as will be discussed in Section 4.4.2, EU Treaty principles are capable of providing sufficient legal grounds for challenging the procedural conduct of the award process; however, it is debatable whether the current legal and policy framework otherwise provides sufficient legal bases or "hooks" on which to bring effective judicial review claims concerning wider aspects of the procurement process e.g. concerning public consultation. Further, the DfT issues letters to unsuccessful bidders notifying intention of award, conveying key information regarding scoring of all bids and offering an opportunity to attend a feedback meeting.[44] The DfT also provides a standstill period, preventing conclusion of the contract during that period, enabling economic operators to assess any basis for challenge. However, other remedies available under the Remedies Directive such as automatic suspension,[45] ineffectiveness[46] and an express claim for damages[47] are not provided.

In light of the above, it is unsurprising that the PSO Regulation has been "poorly implemented".[48] As a directly applicable instrument, Member States have little incentive to take further implementing measures domestically and the EU Commission has limited scope for enforcement action.

3. Competitive tendering and direct awards

provisions relating to the application of review procedures to the award of public supply and public works contracts OJ L 395/33.

[41] DLA Piper, Study on the implementation of Regulation (EC) N° 1370/2007 on public passenger transport services by rail and by road, Final Report, 31 October 2010, p.38.

[42] DfT, Franchise Competition High Level Process Map, 24 April 2013.

[43] It has been observed judicially that any ideological objection to privatisation is not a bar to standing for a claim that a project should have been tendered. In *R (on the application of: (1) National Union of Rail, Maritime and Transport Workers; (2) Transport Salaried Staffs' Association; and (3) Associated Society of Locomotive Engineers and Firemen v Secretary of State for Transport* [2014] EWHC 3030 (Admin), Cranston J at para.22 was persuaded that the unions were arguably within the class of persons with a genuine interest and expertise in ensuring the SoS's compliance with the PSO Regulation. For useful commentary in this context, see S. H. Bailey, "Reflections on standing for judicial review in procurement cases" (2015) 4 P.P.L.R. 122.

[44] *Franchise Competition Guide 2016*, para.4.39. The PSO Regulation also provides that, for certain direct awards, it is possible to request an assessment of the decision which must be made publicly available: Article 5(7)(h) amended PSO Regulation. In addition, if requested, reasons must be given: Article 7(4). Domestically, the direct award process guide is silent on the giving of reasons; however, its stated commitment to EU Treaty principles should require it.

[45] As a matter of domestic law, it is possible to apply for interim relief to obtain an injunction to suspend the procurement, which principles broadly align with those concerning interim relief under the Directives.

[46] Ineffectiveness is unlikely to be significant in practice as it requires a number of breaches including of the standstill period which, as indicated, is routinely observed in the UK.

[47] The ability to suspend and rewind a procurement process before a contract is concluded is likely to be a far more valuable remedy than for damages.

[48] Steer Davies Gleave, *Study on economic and financial effects of the implementation of Regulation 1370/2007 on public passenger transport services*, Final Report, February 2016, p.15: "it was not possible to identify a single contract or piece of legislation as the best practice […]". See also DLA Piper, *Study on the implementation of Regulation (EC) No.1370/2007 on public passenger transport services by rail and road, Final report* (October 2010).

A first major decision concerning franchising is whether to open the procurement process to competition or make a non-competitive direct award.

3.1. Competitive tendering

The DfT is generally committed to competitive tendering. The 1993 Act prescribes a franchising power by which the SoS may select a franchisee from those submitting tenders in response to an ITT.[49] The SoS must publish a statement of policy in this regard.[50] In 2008, the DfT published a policy Statement which was subsequently revised in 2013 in response to the Brown Review.[51] However, it simply states that the SoS intends to select a franchisee by issuing an ITT except where a direct award is made or where no adequate tenders are received.[52] These provisions now seem largely redundant given that the PSO Regulation formally requires competitive tendering.[53]

Regarding numbers invited to bid, neither the 1993 Act, policy Statement, nor the PSO Regulation specify a minimum number. The DfT has stated that it prefers to have three bidders but is prepared to accept that, on occasion, there may only be two genuine bidders.[54] This is broadly compatible with the public sector Directive which requires a minimum of three bidders.[55] It is also to be expected in a market involving concentrated share ownership of TOCs, high entry costs and inherent risk involved in such contracts. The European Commission has identified the UK as attracting a relatively high number of bidders.[56]

Regarding the choice of tendering procedure, again, neither the 1993 Act, policy Statement nor PSO Regulation prescribe open, restricted or negotiated forms comparable to those under the Directives. The PSO Regulation simply provides that whatever procedure is adopted must be: open to all operators, fair, and observe the principles of transparency and non-discrimination.[57] The procedure may involve negotiations in order to determine how best to meet specific or complex requirements.[58] The initial proposal for a Regulation provided for a procedure requiring advertising but not tendering in which the operator would be selected on the basis of a comparison of the quality of the proposal; however, this was not included in the final text.[59]

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[49] S.26(1).

[50] S.26(4A).

[51] Department for Transport, *Statement of policy on the exercise of the Secretary of State's power under section 26(1) of the Railways Act 1993*, March 2013.

[52] Statement, 4, para.7, stating further that selection will be in accordance with the SofS' obligations under EU Treaty principles of equal treatment, non-discrimination and transparency.

[53] Article 5(3).

[54] Railways Procurement: Written Parliamentary question 126116 asked by Jonathan Edwards (Carmarthen East and Dinefwr) asked on 1 February 2018; Answered by Rail Minister Joseph Johnson on 12 February 2018.

[55] Article 65.

[56] Commission Staff Working Document Impact Assessment Accompanying the documents Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1370/2007 concerning the opening of the market for domestic passenger transport services by rail, Brussels, 30.1.2013 SWD(2013) 10 final, 30, fn53.

[57] Article 5(3).

[58] Recital 22 and Article 5(3).

[59] Proposal for a Regulation of the European Parliament and of the Council on action by Member States concerning public service requirements and the award of public service contracts in passenger transport by rail, road and inland waterway (2000/C 365 E/10) C 365 E/169, Article 8.

3.2. Direct awards

Whilst the assumption must be that direct awards should be the exception to the general rule of competitive tendering, circumstances in the UK have been complicated by suspension of the franchising programme as discussed in Section 2.1. Brown expressly recommended interim extensions to existing contracts (which would otherwise require a new competitive award) to stabilise the programme pending resumption of a revised schedule.[60] This included a recommendation to revise the policy Statement to identify the circumstances in which the SoS will consider making direct awards, having regard to the applicable EU and domestic law framework.[61] However, for reasons that will be explained, there has since been a profusion of direct awards both for strategic reasons that will be discussed and because of the practical reality that there are only a limited number of TOCs capable of, and interested in, running particular routes. By 2014, seven out of sixteen franchises were direct awards, anticipating a further six up to 2020. Further, the policy Statement has not been revised since 2013 in light of this experience. This raises questions as to whether there is currently effective regulation of direct awards. It is argued that this is not the case for the following reasons.

Firstly, as indicated in Section 2.2, the PSO Regulation as amended has added several new direct award grounds which are so broad as to question whether competitive tendering is the general rule. The EU's purported rationale for these, namely, to respect differences in the way Member States organise their territory for rail, has been described as terse and in need of clearer explanation.[62] However, some Member States have indicated that competition is incompatible with vertically integrated models of rail provision whereby the infrastructure manager and TOCs are owned by a single holding company and competitive tendering may be difficult to sustain.[63] Indeed, this is the position in Member States such as Germany, France and Italy. It is therefore difficult to reconcile the EU's claims that direct awards in this context are "derogations" or "exceptions" under EU law with the perception in practice. As will be discussed, even Great Britain, which favours competitive tendering, views direct awards as legitimate alternative means of ensuring the long-term stability of a competitive franchising programme. It is therefore unsurprising that the PSO Regulation's compromise is to focus on improving publication of, and justification for, direct awards instead of restricting their scope, acknowledging that direct awards have lacked transparency.[64]

Secondly, there is very limited domestic law and policy on direct awards. The 1993 Act does not contain designated direct award provisions. It simply provides that the policy Statement must state when it is likely that an ITT will not be issued.[65] TOCs have recognized Brown's rationale for continuing to enable direct awards. However, in response to consultation on

[60] Brown Review, p.60, para.8.5.
[61] *ibid*., paras.8.4 and 8.5.
[62] Recital 26 and Maczkovics, "The Railways at the Crossroads of Liberalisation and Public Service", 34.
[63] Letter from Baroness Kramer (Minister of State for Transport) to Lord Boswell (Chairman of the European Union Committee) 18 March 2015 and Letter from Rail Minister Claire Perry to Lord Boswell, 2 October 2015.
[64] Recital 30.
[65] S.26(4B).

the proposed revised 2013 policy Statement, they also stated that:

> [I]n a sector in which political principles are also very often the reason for suspending or altering franchise programmes, we are very nervous about the implications of such an open and overarching definition for the exercise of powers.[66]

The SoS was "strongly encourage[d]" to make it clear "beyond reasonable doubt" the circumstances when a direct award will be made.[67] The Dft did not make such clarifications in the final policy Statement and it has not been revised since the amended PSO Regulation was adopted.

The policy statement only identifies two circumstances permitting direct awards.[68] The first is where, in the SoS's reasonable opinion, issuing an ITT would not be conducive to: (a) the effective administration of a sustainable and well-resourced programme of franchising competitions; or (b) the fulfillment of government objectives in relation to rail transport (including as to the remapping of franchises).[69] Such awards derive a justification from the Brown Review which observed a need to avoid all franchises being awarded at the same point in an economic cycle to ensure that not all are subject to the same risk and for a more efficient use of DfT and bidder resources.[70] However, in aside from the fact that (a) and (b) are easily conflated, TOCs have criticized its open-endedness, anticipating flexibility without prescribing any "boundary conditions" for use.[71] Similarly, the amended PSO Regulation has added a circumstance permitting a direct award where there are a number of competitive tendering procedures being run which could affect the number and quality of bids likely to be received if the contract is subject to a competitive tendering procedure.[72] Again, it is difficult to determine how the possible effect on the number and quality of bids can be shown. During negotiations of the amended PSO Regulation, the UK expressed concerns about broad direct award grounds generally but favoured a direct award in this circumstance.[73]

The policy statement also provides that a direct award will be made where, in the SoS's reasonable opinion, the disruption, or an immediate risk of disruption, of services means it is not practicable to issue an ITT.[74] Again, TOCs and Passenger groups have criticised the lack of certainty of meaning and the addition of "reasonable opinion" as generic and subjective.[75] The PSO

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[66] Greater Anglia and Northern Rail consultation responses to the draft policy Statement, 28 February 2013, para.18 (retained on file). The authors are grateful to the DfT for providing the consultation responses pursuant to a Freedom of Information Act request.

[67] *ibid*., para.5.

[68] According to the policy Statement, awards will only be made where the SoS considers it is permitted under the applicable domestic and European law frameworks: p.5, para.9.

[69] Statement, para.11. Controversially, Arriva Cross Country secured a three-year direct award to continue operating the Cross Country franchise until 2019 on this basis.

[70] Brown Review, p.21, para.3.4.

[71] Greater Anglia and Northern Rail consultation response, 28 February 2013, para.17.

[72] Recital 21 and Article 5(3a) amended PSO Regulation.

[73] See Explanatory Memorandum on European Union Legislation (rail package), submitted by the Department for Transport 14 February 2013, p.15. See also letter from Baroness Kramer to William Cash, 18 March 2015; Letter from Claire Perry to Lord Boswell, 20 Nov 2015; and Letter from Claire Perry to Lord Boswell, 2 May 2016.

[74] Statement, para.10.

[75] Northern Rail consultation response to the draft policy Statement, 28 February 2013, para.5 and Transport for London consultation response, 28 February 2013, para.3.

Regulation provides for a direct award as an "emergency measure" in the same circumstances but omitting reference to reasonable opinion or practicability.[76] In 2014, a judicial review application was brought by the rail unions against a direct award for the Thameslink Southern Great Northern franchise under the PSO Regulation emergency ground.[77] The application was denied for being out of time but it was argued *inter alia* that this ground should be interpreted as strictly analogous to circumstances permitting direct awards under the public sector Directive, thereby requiring use of a competitive procedure.[78] As indicated in Section 2.1 and above, it is debatable whether direct awards should be conceptualized as "derogations" (which are ill-defined under EU law) and whether direct awards in this context should be treated as analogous to those under the public sector Directive. A more nuanced argument is required than simply to plead the need for consistency across all areas of procurement covered by EU law where this is not necessarily merited. The lack of domestic law and policy (necessitating recourse to arguments under EU law) also risks a perception that it is difficult to challenge preferential awards made under the pretext of a questionable "emergency".

The 1993 Act also equivocally states that the policy Statement must identify the "means" by which selection on the basis of a direct award will be made.[79] According to the policy Statement, the SoS will consider all relevant factors including EU Treaty principles. A list of very broad factors are identified.[80] However, it is unclear whether these means could be construed as award criteria. This risks fettering the SoS' discretion and exposure to judicial review but with limited prospect of success given that these factors are stated at such a high level of abstraction. These have been criticized as lacking definition and in need of criteria to ensure that awards are made in a "structured and transparent way".[81] The DfT did not clarify such criteria in the final text. As will be discussed in Section 5, these factors are also relevant to the determination of whether to appoint a public sector operator of last resort.

Further, the DfT has recently stated that it has an "established and tested system of Direct Award".[82] However, the reality is that, whilst the fact that it makes so makes so many direct awards may mean it has an internally

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[76] Article 5(5). The period for which a public service contract is awarded, extended or imposed by emergency measures must not exceed two years. This presumes that, at the end of the period, there will be a new award: Recital 24. The InterCity West Coast mainline franchise was awarded on this basis.

[77] *R (on the application of: (1) National Union of Rail, Maritime and Transport Workers; (2) Transport Salaried Staffs' Association; and (3) Associated Society of Locomotive Engineers and Firemen v Secretary of State for Transport* [2014] EWHC 3030 (Admin).

[78] These include: Article 31(1)(b) and (c) Public Sector Directive concerning technical reasons and exclusive rights, and urgency, respectively. Further, reliance was placed on Case C-388/12, *Comune di Ancona v Regione Marche* [2013] ECR I-0000 on the basis of which it might be argued that the DfT was required to consult other interested operators before making a decision and provide a clear explanation for the direct award. See Cranston J's judgment, paras.21 and 22.

[79] S.26(4B).

[80] Para.14. These are divided into three: (a) business and service continuity; outcomes for passengers; value for money; affordability; delivery risk; and the continued quality of the franchise proposition; (b) broader market or programme considerations; the delivery of major projects and investment; franchise remapping; impacts on the wider UK rail network; and impacts that extend beyond or arise after the term of the franchise agreement in question; and (c) the wider government objective of enabling the continued provision of passenger rail services by private sector operators.

[81] See TUC, Rail future, RMT and Northern Rail consultation responses to the draft revised 2013 policy Statement.

[82] Department for Transport, *Short-term Intercity East Coast train operator 2018 options report*, May 2018, Cm9617, p.11.

established and tested system, there is little published detail on the process of direct award. The PSO Regulation and 1993 Act do not prescribe rules for the conduct of a direct award process. In 2013, the DfT published a high-level direct award process guide.[83] However, the direct award process guide only provides a basic process diagram. It appears that the only publicly available information concerns a Ministerial Response to a Transport Committee question. It is understood that the DfT uses a comparator of the previous contract based on its out-turn costs and revenues which may be challenged to ensure value for money.[84] The extent of any challenge appears to be purely internal amongst those decision-makers within the DfT and TOC.

It was already clearly apparent but an examination of practice in Great Britain confirms that it is difficult to substantiate the EU's assessment that the PSO Regulation direct award grounds are "precise, restrictive and objectively formulated".[85] It has been suggested that the inclusion of broad circumstances does not represent a progressive step for the EU railway sector.[86] The UK pressed for limiting and subjecting direct awards to objective criteria when negotiating the amended PSO Regulation.[87] However, the UK has refrained from taking further domestic initiative. Ultimately, unless a consensus is reached as to the compatibility of competitive tendering with existing models of rail provision across Member states, attempts to limit direct awards through EU regulation are likely to achieve limited results. This does not necessarily preclude individual efforts by Member States to take a lead in formulating direct award policies.

4. Procurement

As identified in Section 2.2, the 1993 Act and PSO Regulation contain limited rules concerning the award of contracts. The DfT has published guides to franchise procurement which, following the Brown Review, were replaced by a Franchising Competition Guide in 2013 setting out in more detail the general process followed in procuring franchises and demonstrating how assurance and approval is built into the system.[88] However, these generally only provide a high-level process overview. Ultimately, the DfT has reserved the right to conduct the procurement process according to the specific terms of each ITT.

4.1. Publication of contract opportunities and awards

The 1993 Act does not prescribe requirements for publication before and after award. Regarding publication before award Brown recommended that, in order to ensure earlier planning and engagement, the DfT should regularly seek to

[83] Department for Transport, *Direct Awards High Level Process Guide*, 3 December 2013.

[84] Simon Burns letter to Louise Ellman as cited in HC Briefing CBP 6521, 9 January 2018.

[85] Brussels, 24.10.2016 COM(2016) 689 final 2013/0028 (COD) Communication from the Commission to the European Parliament pursuant to Article 294(6) of the Treaty on the Functioning of the European Union concerning the position of the Council on the adoption of a Regulation amending Regulation (EC) No 1370/2007 concerning the opening of the market for domestic passenger transport services by rail, p.3.

[86] Grith, Legislative Comment on Regulation 1370/2007, 89.

[87] Mr Robert Goodwill (Parliamentary Under Secretary of State for Transport). EU Transport Council: Written statement - HCWS19.

[88] The latest version is Department for Transport, *Passenger Services: Franchise Competition Guide*, 4 February 2016.

inform the market about upcoming competitions through the use of Prior Information Notices (PINs).[89] The Government has responded to this recommendation.[90] Passenger Services now publish *inter alia* an Annual Programme Prior Information Notice (PIN) and Rail Franchise Schedule and the ITT which is accompanied by a press notice. The direct award process guide also states that direct awards will comply with the requirement for a notice to be published in the Official Journal of the European Union (OJEU) at least one year before the direct award is entered into.[91] The UK also appears substantially to comply with publication requirements under the PSO Regulation, according to which authorities must ensure that prescribed information is published in the OJEU at least one year before the launch of the ITT procedure or direct award.[92] Operators may express their interest within a period fixed by the authority which must not be less than sixty days, following the publication of the information notice.[93]

Regarding publication after award, both the Franchise Competition Guide and direct award process guide refer to the publication of a contract award notice issued through the OJEU.[94] The amended PSO Regulation also provides that, for the new direct award grounds, authorities must publish concluded contracts and make public certain prescribed information within one year of award.[95] According to the policy Statement, the SoS must be able to comply with any applicable requirements regarding the publication of information in relation to direct awards.[96] The DfT also publishes directly awarded franchise agreements.[97]

4.2. Specifications

Unlike the procurement Directives, the PSO Regulation and 1993 Act do not contain express provisions on specifications. Similarly, the Franchise Competition Guide refers to the "specification phase" but does not provide any detail aside from references to how it consults on specifications, which is discussed in more detail in Section 4.3. A particular concern is what Brown has described as a difficult "trade off" between ensuring basic quality of public services and enabling TOCs to evolve and adapt services to ensure best value for money for taxpayers.[98] Tighter specifications leave little room for innovation by bidders but are easier for the DfT to evaluate; looser specifications may invite innovation but requires greater expertise to evaluate.[99] For inter-city franchises, flexible specifications have usually been considered more

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[89] Brown Review, p.40, para.5.14.
[90] Government Response to the Brown Review of the Rail Franchising Programme, p.17, paras.4.2-4.3.
[91] In accordance with Articles 5(6) and 7(2) PSO Regulation.
[92] Article 7(2) PSO Regulation and Article 5(3b) amended PSO Regulation This does not apply to the emergency direct award ground in Article 5(5).
[93] Article 5(3b) amended PSO Regulation.
[94] *Franchise Competition Guide*, para.4.41 and *Direct award process guide*.
[95] Articles 5(3a) and 4(4b) amended PSO Regulation. See also Article 7(3).
[96] para.11.
[97] See e.g. the Cross Country Direct Award Agreement dated 28 September 2016: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/614717/cross-country-direct-award-franchise-agreement.pdf (last accessed 20 April 2018).
[98] Brown Review, pp.15-16, para.2.11. See more generally, R Gladding, 'Rail Regulation in the UK: The Role of Quality in the Passenger Rail Franchises' (2005) 14(4) *Utilities Law Review* 151.
[99] Brown Review, p.38, para.5.7.

appropriate being closer to commercial enterprises (facing competition from airlines and motorways) but many cities and communities also view inter-city services as an important public service, requiring a measure of safeguarding in specifications.[100] TOCs have criticised an increasing tendency to include specifications which are too prescriptive in terms of focusing on inputs rather than outputs,[101] thereby increasing micromanagement and reducing flexibility.[102] Brown recommended that: inputs should be specified only for very specific purposes;[103] specifications should give flexibility for bidders to offer more resource efficient ways of delivering services;[104] and the DfT should engage with industry to agree a framework for specifying train service requirements.[105] Overall, there should be a greater focus on outcomes to give bidders more flexibility to bid more resource efficient timetables and to facilitate Government initiated changes.[106] The Government has since stated that it is testing a wider use of outcome-based specifications.[107] However, it must be acknowledged that outcome-based specifications are not free from problems. For example, the Transport Committee has suggested that outcome-based specifications would reduce the burden on a prospective operator in the bidding process presumably on the basis that it has fewer prescribed specifications to meet.[108] Yet, it is suggested that it can just as easily increase the burden on both TOCs that have to prove how they meet such requirements and the DfT which have the difficult take of demonstrating that they have evaluated bids objectively in light of less clearly defined specifications. Further, it is by no means clear that TOCs are, in fact, capable of offering innovation to the extent claimed.

Whilst striking the appropriate balance will be an ongoing process for the DfT, there remains a fundamental issue as to whether the procurement process is able to ensure that even the most basic train service requirements can be accurately set by the DfT and met by bidders. For instance, in the TSGN failure, the DfT specified a minimum number of required train services in the ITT but also encouraged bidders to suggest how they could provide additional trains. However, Network Rail expressed significant concerns about bidders' proposals which did not comply with its planning rules. Starkly, the DfT considered that this would be addressed subsequently during Network Rail's negotiation of operator's access rights to the network and subsequently resolved through an amendment to the contract.[109] Of course, this runs

[100] Brown Review, pp.15-16, para.2.11.

[101] For instance, first and last train times, and ticket office opening hours – rather than outcomes, such as the levels of passenger satisfaction actually achieved. Brown, p.16m para.2.12.

[102] Brown Review, p.15, para.2.9 and 2.10.

[103] Brown Review, p.38, para.5.8: "[f]or example to protect socially necessary and economically important services or realise the benefit of Government investment".

[104] *ibid*., para.5.9: "for instance by allowing flexibility in the distribution of stops between different service groups operating on the same route."

[105] Brown Review, pp.39 and 40, paras.5.9 and 5.10.

[106] Brown Review, p.10, Recommendation 1.19 and pp.15-16.

[107] One example has been the use of an alternative approach to specifying service quality in the East Anglia franchise. See House of Commons Transport Committee Rail franchising: Government Response to the Committee's Ninth Report of Session 2016–17, Tenth Special Report of Session 2016–17, p.8.

[108] House of Commons Transport Committee, Rail franchising, Ninth Report of Session 2016–17, 30 January 2017, p.34.

[109] See generally, C Gibb, *Changes to improve the performance of the Southern network and train services, and restore passenger confidence*, Department for Transport, June 2017 and, more recently,

contrary to a fundamental need for clarity on the specifications to be delivered before contracts are concluded. Contract amendments should be exceptional, not a substitute for effective contract planning. This also raises the question of whether or not there is currently effective consultation and alignment between key parties during the bidding process. For instance, the 1993 Act requires the SoS to first consult the ORR before preparing an ITT.[110] However, there are no express provisions regarding consultation of other parties at this stage or after prior to contract award and conclusion. It has been admitted that the alignment of incentives between Network Rail through the Periodic Review and operators through the franchise process is "sub-optimal".[111] Section 6.2.4 considers some of the potential ways in which consultation may improve the process for designing specifications.

4.3. Consultations

An important, but often overlooked potential of the procurement process is to improve the role of public deliberation in the design of public services.[112] For a host of possible reasons that are not explored in this article, the EU procurement Directives and PSO Regulation do not include designated provisions on stakeholder consultations. The 1993 Act provides that the SoS must first consult the Office of Rail Regulation before issuing an ITT.[113] At the point the Bill was debated, it had been questioned why consultation was exclusively confined to the Regulator.[114] As will be discussed in Section 6.2.4, the issue of who should be consulted in relation to what aspect of the franchising process remains a live issue. The DfT also conducts formal public consultations outlining proposals for a new franchise before issuing an ITT. A stakeholder briefing document is also published which includes analysis of public responses, explaining how the DfT has taken account of their views in developing the final specifications. In addition, bidders are also further consulted once the formal tendering procedure has commenced. Brown recommended that once the DfT had short-listed its bidders, it should open its data site to make available the draft ITT which it has already developed to allow dialogue between bidders and the DfT on specific areas such as calibration of the risk-sharing mechanism, the train service specification and the quality measures to be applied in the evaluation and in the contract.[115] The DfT has since implemented this recommendation for largely practical reasons, namely to reduce the number of clarification questions.[116] To this extent, the UK achieves a fair degree of stakeholder participation which enhances transparency and accountability.

However, again, consultations are not without problems. Consultation

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House of Commons Committee of Public Accounts, Rail franchising in the UK, Twenty-Fifth Report of Session 2017-19, 27 April 2018, p.5, para.5.

[110] S.26(2).

[111] Network Rail, System Operator Strategic Business Plan, February 2018, p.132.

[112] On the importance of this aspect in the context of public sector contracting generally, see P. Vincent-Jones, "The New Public Contracting: Public Versus Private Ordering?" (2007) 14(2) Indiana Journal of Global Legal Studies, 259.

[113] S.26(2).

[114] HL Deb 05 July 1993 vol 547 cc1145-96.

[115] Brown Review, p.41, para.5.16.

[116] Government Response to the Brown Review, p.18, para.4.7.

response rates vary considerably for different franchises.[117] A particular criticism has been the size of consultation documents (60-70 pages) rendering it difficult to understand how to engage as well as irregular consultations with transport groups for some franchises but not others.[118] Further, there is uncertainty regarding how the consultation process should be properly conducted. For example, one issue at the heart of the recent TSGN failure has concerned the inclusion of Driver Only Operation. It has been acknowledged that this was not included in the public consultation on the franchise despite being included in the specification and which the DfT did not discuss.[119]

In terms of legal issues, in 2016, Enfield Borough Council brought a judicial review concerning the East Anglia franchise against the DfT's decision to exclude from the ITT a service that was initially proposed during consultations.[120] On appeal to the Court of Appeal, Enfield argued *inter alia* that, as a result of correspondence assuring it as a stakeholder that the service would be included, it had a procedural legitimate expectation that, if a decision was taken not to include it, it could make further representations. The judicial review failed. Ultimately, the Court considered that general correspondence could not create a legitimate expectation.[121] However, it did identify "inept performance" by the DfT in assuring that the service would be included thereby undermining public confidence in its competence and the communications of its officials."[122] Concerning another aspect of the challenge based on irrationality of the DfT's decision, the Court also confirmed that the 1993 Act has conferred a broad discretion in a "complex, technical, quasi-commercial field" to determine what ought to be provided by way of conditions in franchise agreements.[123] Again, the challenge failed but it raises several issues.[124] One is that it demonstrates how difficult it is to try to rely on franchise specifications stated in DfT documents with the Court tending to treat them as "aspirational".[125] Further, the Court also identified but did not express a definitive view on whether it was fair and lawful for the DfT to have given the local authority a "reliable private insight" in advance of publishing the ITT and the briefing document.[126] Similarly, in the failed *NUM* challenge referred to in Section 3.2, it was argued that there had been a failure to re-consult stakeholders before issuing an ITT where there had been a change of government policy during a franchise procurement process. The claim would have failed for lack of specificity and definiteness in DfT statements sufficient to give rise to a duty to consult on the back of a promise. On the one hand, a dismissal of such applications is understandable as there is a legitimate

[117] More than 3,000 for TSGN to fewer than 100 for Essex Thameside and East Coast. See Transport Committee, Rail franchising, p.30 citing at fn188 evidence submitted by Campaign for Better Transport.
[118] *ibid*., pp.30-31 and evidence cited therein.
[119] House of Commons Committee of Public Accounts, Rail franchising in the UK, Twenty-Fifth Report of Session 2017-19, 27 April 2018, p.5, para.2.
[120] *R (on the application of London Borough of Enfield) v Secretary of State for Transport* [2016] EWCA Civ 480.
[121] Paras 52-56.
[122] Para.49.
[123] Para.61, referring, in particular to S.23; S.26(2) and S.29(5).
[124] See P Henty, "Case Comment: Judicial Review of the substantive contents of a specification based on administrative law principles and on the Public Services (Social Value) Act 2012: R (on the application of London Borough of Enfield) v Secretary of State for Transport" (2016) 5 P.P.L.R. 161.
[125] Para.70.
[126] Para.54.

concern of courts to respect discretion in the formulation of ITTs and they should not require a re-run of consultations which could delay a vital public service. On the other hand, the DfT's apparent ineptitude, privileged pre-ITT consultations with select public bodies and policy changes impacting consultation expose grey areas in the process that may be susceptible to legal challenge. Section 6.2.4 considers the extent of uncertainty among stakeholders as to the most effective regulatory responses for improving public consultation.

4.4. Qualitative selection

Another aspect that has proven to be problematic concerns qualitative selection. Qualitative selection enables the authority to assess the bidder as opposed to the bid, in terms of whether there are any grounds for excluding them e.g. for deficient past performance, their economic and financial standing, and their capability and experience. However, the 1993 Act contains limited provision on qualification. It simply provides that the SoS must not issue an ITT (or entertain such a tender from) any person unless of the opinion that the person has, or is likely to have on commencement, an appropriate financial position, managerial competence, and is a suitable person.[127] Further, the PSO Regulation does not contain express provisions on qualitative selection.

4.4.1. Pre-Qualification

Whilst legal provision on qualitative selection is limited, as a matter of general policy, the DfT has, for a number of years, used "pre-qualification questionnaires" (PQQ) to assess bidder's attributes for each competition. Brown observed that the PQQ process added unnecessary duplication and costs as the exercise has to be repeated for every new franchise and focused excessively on assessing future competence. It was recommended that the PQQ should focus on proven competence based on past performance and the bidder's financial strength and technical ability.[128] In response, in 2015, the DfT introduced the PQQ Passport. The Franchise Competition Guide links it expressly to the 1993 Act provision on suitability.[129] TOCs must make an application for a Passport by completing a PQQ questionnaire following the procedure identified in a Passport Process Document.[130] The PQQ questionnaire is confined to assessing grounds for mandatory and discretionary rejection, capability and technical ability and health and safety; questions in respect of economic and financial standing are asked subsequently as part of the franchise expression of interest.[131] Once the application is complete, the Passport is valid for four years enabling TOCs to express interest without repeating a managerial competency test each time they wish to bid. However, Passport holders will be required to answer additional PQQ questions tailored to the specific franchise.

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[127] S.26(3).
[128] Brown Review, p.40, para. 5.15.
[129] Franchise Competition Guide, para.3.40.
[130] Department for Transport, Passport Pre-Qualification Questionnaire, September 2015 and Department for Transport, Rail Franchising Passport Process Document, September 2015.
[131] Process Document, para.2.5.

The DfT considers that the PQQ Passport is similar to a qualification system under the Directives but does not commit to operating it in accordance with their qualification provisions.[132] However, certain provisions directly import their wording e.g. there is discretion to reject an applicant if found guilty of grave professional misconduct[133] or there have been significant and persistent deficiencies in the performance of a substantive requirement under a prior contract which led to early termination, damages, or comparable sanctions; this includes *inter alia*: enforcement action taken under s.55 of the 1993 Act.[134] If so, the Applicant has to provide information regarding the conduct, payment of compensation and whether measures have been taken to prevent recurrence.[135] If the authority considers that any information in a Passport Application is no longer correct, it may exclude them from further participation in any franchise competition and consider cancellation or suspension of the Passport.[136] This domestic EU-inspired initiative has been a qualified success. PQQ passports have been awarded to TOCs from both the UK, EU and internationally.

However, questions have recently arisen as to whether its process for assessing deficient past performance provides an effective disincentive against the risk of a TOC overbidding and defaulting. In 2018, it was announced that the current Virgin Trains East Coast (VTEC) franchise will be terminated.[137] VTEC overbid in promising to deliver £2.3bn of premium payments based on higher revenue forecasts than have materialised. This is estimated to cost VTEC £186 million.[138] VTEC is currently a PQQ passport holder. However, the SoS has been advised that there are "no adequate legal grounds" to restrict it from bidding on future franchises but would keep its future eligibility under constant review; the consortium was otherwise meeting its financial obligations with support from its parent company and operating services successfully.[139]

Ultimately, it is difficult for the procurement process to effectively test bids based on projections of future revenues from passenger growth such as to manage the risk of over-bidding and default. There are many endogenous and exogenous risks which vary from the general e.g. economic downturn through to the specific e.g. increased uptake in use of other modes of transport such as road due to lower fuel costs etc. In this regard, the DfT has stated that it has refined the way it tests bids against a "downside scenario".[140] However, the DfT maintains that this does not remove the possibility of future default and that, following Brown's recommendation, it is not sensible to design franchise structures that seek to eliminate completely the risk of default.[141] Notwithstanding, serious questions must be asked about whether the DfT has

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[132] However, the *Franchising Competition Guide* at p.25 states that the PQQ process must observe EU Treaty principles.

[133] Cf Recital 101 and Article 57(4)(c) Directive 2014/24/EU.

[134] See C1.7. Cf Recital 101 and Article 57(4)(g) Directive 2014/24/EU.

[135] PQQ, p.22.

[136] Process Document, paras.5.2, 5.8 and 5.9. Similarly, para.5.4 states that Passport Holders are required to notify the authority if any event occurs that impacts on the information provided in the Passport failure to do which may result in cancellation of the Passport.

[137] Statement by Chris Grayling, 05 February 2018, Hansard, Volume 635, Column 1238.

[138] Department for Transport Short-term Inctercity East Coast train operator 2018 options report, p.1.

[139] *ibid*. See also Report, p.2, para.3.

[140] Report, p.3, para.5.

[141] *ibid.*

done enough to reduce, or is, indeed, complicit in a conspiracy of optimism. Moreover, recently, the campaign group Bring Back British Rail has argued that that Brown did not simply suggest that franchises should be allowed to fail subject to payment of compensation and, even then, only on the basis that the DfT must also be judged on its ability to deal with that failure. [142]

A number of other issues arise. A broader policy issue that concerns procurement in all contexts, is if, and to what extent, the procurement process should be used as a deterrent. [143] On the one hand, the DfT appears to consider that the £186 million loss incurred by VTEC sends a "strong message" to deter overbidding.[144] On the other hand, there have been calls for more concrete action. Bring Back British Rail has argued that the SoS has acted unlawfully and/or irrationally in refusing to impose consequences e.g. revoking or suspending PQQ passports and ensuring adequate investigations to limit VTEC's ability to bid for future franchises. [145] The case seems speculative as the legal and policy framework is presently configured in such a way that the SoS exercises consideration discretion. It may be difficult to argue that the SoS must cancel or suspend a passport on issues that involve acute discretionary judgments. The corresponding qualitative selection provisions of the Directives also provide that rejection on this kind of issue is discretionary not mandatory. Further, the SoS is clearly presented with a dilemma. The decision to revoke or suspend is subject to a practical market constraint: there are already too few bidders in the market; exclusion may actually have the undesired effect of limiting future competition even further.

Other issues concern how to identify and investigate conduct meriting sanctions. It is unclear what constitutes a significant deficiency in performance of a substantive requirement rendering them unsuitable and entitling cancellation or revocation of passports. It has been criticised that there is little guidance on the comparable ground for rejection under the Directives.[146] It has also been argued that there is no evidence that the SoS suspended the Passports pending a full investigation and which should require the consortium to provide a justification, nor evidence that the SoS required them to re-submit relevant parts of their Passport application for wider consideration of their past performance in the last three years. Therefore, there are concerns about accountability and transparency in a number of respects, including due process from the TOC's perspective given the reputational and resource implications of an investigation. Section 6.2.4 revisits some of the potential issues facing the use of qualitative selection in this context.

4.4.2. Capital requirements

[142] Leigh Day, Pre-action Letter Bring Back British Rail re: a proposed claim for judicial review, 16 April 2018. Available at: http://bringbackbritishrail.org/eastcoast/preactionletter.pdf.

[143] P Telles and G S Olykke, 'Sustainable Procurement: A Compliance Perspective of EU Public Procurement Law , p.246 identifying the exclusion grounds as provisions inducing regulatory compliance, for example, through deterrence.

[144] Options Report, p.2, para.2.

[145] Leigh Day, Pre-action Letter, Bring Back British Rail re: a proposed claim for judicial review, 16 April 2018. Available at: http://bringbackbritishrail.org/eastcoast/preactionletter.pdf.

[146] See e.g. Cabinet Office procurement policy note, Taking Account of Bidder's Past Performance (Action Note 09/12).

Another major issue that has arisen concerns the design and assessment of capital requirements required of bidders to demonstrate financial capacity. These include requiring the TOC to provide parent company guarantees to cover the TOC's losses during the franchise and performance bonds to cover the DfT's cost of running services and re-letting a franchise.

To illustrate, in 2012, the DfT awarded a franchise for the West Coast line to First Group. Virgin Rail, the incumbent, challenged the award and issued a judicial review. The main issue concerned the complex process for determining the level of a "subordinated loan facility (SLF)", a type of parent company guarantee. Before it was heard, the DfT admitted fault and cancelled the competition. However, it has been observed that three matters could have, in principle, founded a challenge.[147] First, there was a lack of transparency. Starkly, the DfT did not have a method for calculating the SLF. Bidders requested clarification on the method. In response, the DfT issued guidance as to how it would be calculated but not the full model because it contained assumptions about the TOCs' behaviour which it did not wish to share.[148] Bidders therefore remained unable to calculate the SLF.[149] Secondly, there was inconsistency and inequality. A NAO investigation could not confirm whether answers to clarification questions were consistent and communicated to all bidders.[150] Further, the DfT used data to derive one factor to risk-adjust bids but applied a different factor.[151] In addition, it was unclear whether the DfT's approach to evaluation complied with that outlined in the tender documentation concerning agreement on revenue projections.[152] Thirdly, there was an erroneous exercise of direction resulting in unequal treatment.[153] The tender stated that the DfT would 'determine' the size of the SLF. However, legal advisors raised concern that the subsequently issued guidance on calculating the SLF may have limited its discretion but the Contract Award Committee went on to apply discretion notwithstanding.[154]

Following the InterCity West Coast failure, Brown concluded that large SLF facilities combined with significant bonding were unrealistic to expect of lenders and borrowers and should be unnecessary with appropriate risk allocation. Such requirements can restrict competition for franchising due to the sheer amount (examples including in excess of £200 million) and are more onerous than for foreign state-owned enterprises which have different risk capacity and cost of capital.[155] Brown recommended: simplified liquidity requirements; an on-demand bond for each franchise; and a default indemnity supported by the franchisee's parent company.[156] In response, the Government undertook a review of capitalisation in franchise bidding. The

[147] R Boyle, 'The 'Fiasco' of the West Coast Rail Franchise and the European Public Procurement Rules' (2013) 6(22) *International In-house Counsel Journal*, p.8.
[148] NAO, Lessons from cancelling the InterCity West Coast franchise competition, para.4.10.
[149] *ibid*., para.4.11.
[150] *ibid*., para.4.13.
[151] *ibid*., para.4.18.
[152] *ibid*., paras.4.22-4.24.
[153] It has been suggested that any DfT failure to follow its own rules was primarily a failing under English law, in failing to follow an implied contractual obligation owed to bidders to follow published rules (citing *Blackpool & Fylde Aero Club v Blackpool Borough Council [1990] EWCA Civ 13*).
[154] NAO, Lessons from cancelling the InterCity West Coast franchise competition, paras.4.25 and 4.26. See also Boyle's observations at p.9.
[155] Brown Review, p.22, para.3.5.
[156] Brown Review, pp.29-31.

DfT's revised policy has not been published but it has indicated that it: no longer uses formal SLF requirements; requires that a portion of the total amount of capital will be backed by a bond provided by a financial institution of a certain minimum credit quality; and the whole amount must be supported by a parent company guarantee.[157] Such requirements have been included in recent franchises with requirements for up to fifty percent of the guarantee being bonded by a suitable provider.[158] The Transport Committee has recently endorsed the parent company guarantee as crucial in protecting the public purse and which should not be removed or amended significantly.[159] The Government has further indicated that a new Forecast Revenue Mechanism will address the tendency of the transitional risk transfer mechanisms to generate "unsustainably large" parent company support requirements.[160] Section 6.2.4 discusses whether there is scope for imposing further regulatory controls on capital requirements.

4.5. Award criteria

A final aspect of the procurement process concerns the award criteria against which a bid is assessed. The PSO Regulation and 1993 Act do not expressly refer to award criteria such as price or any concept of "Most Economically Advantageous Tender" (MEAT) comparable to that provided in the Directives.[161] The policy Statement merely states that selection will be on the basis of an analysis of tenders in relation to criteria set out in the ITT and associated documents.[162] The Franchising Competition Guide is slightly more detailed in stating that bids are ranked in descending order to identify the MEAT but does not identify any specific criteria comprising MEAT or general weighting of price to quality and other factors.[163] This lack of detail is unsurprising. As Brown observed, there is no "one size fits all" evaluation framework.[164] For example, inter-city franchises and regional franchises may weight quality differently; it is generally weighted higher for regional franchises given intercity franchises already have greater incentive to deliver quality via passenger revenue earned.[165] Nevertheless, in consultation on the draft 2013 policy Statement, the transport watchdog Passengerfocus "strongly believed" that even this "high level policy statement", should make explicit reference to evaluation criteria and also confirm the SoS's intention to ensure that assessment and/or award decisions place quality factors at the heart of the decision-making process.[166]

Brown observed that, before 2013, price was the exclusive evaluation criterion in most franchise competitions; this was measured as the Net Present Value (NPV) of the premia or franchise support payments offered. In theory,

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[157] Government response to the Brown Review, p.14, para.3.6.

[158] See for example, Department for Transport, South Eastern Rail Franchise Prospectus, Shaping the Future, March 2017, p.26.

[159] Transport Committee, Rail franchising, p.43.

[160] Government response to Transport Committee, p.2.

[161] Cf Article 67 Directive 2014/24/EU.

[162] Franchising Policy Statement, p.4, para.8.

[163] Franchise Competition Guide, pp.35 and 44.

[164] Brown Review, pp.42-42, para. 5.25.

[165] *ibid*.

[166] Passengerfocus response to consultation on the draft policy Statement, 28 February 2013

quality would only be evaluated if the NPVs of bids were sufficiently close together. The winning NPV had always been far enough apart from the next placed bidder such that quality has never been a determining factor.[167] The DfT was described as an "outlier in the range of both public sector and private sector procurement approaches" and that it was not, therefore, unsurprising that there had often been criticisms of franchisees' subsequent service quality.[168] Brown recommended retention of NPV but that there should also be an overt and direct weighting for quality and deliverability.[169] A number of quality attributes were recommended for application on a franchise-by-franchise basis.[170] An overall weighting of 20-40% for quality was envisaged.[171] Brown also proposed a separate "financial assessment". This would confirm the affordability and value for money of the bid, that capital requirements have been met and that the financial strength of the parent had not deteriorated materially from the PQQ.[172]

The Government responded to most of these recommendations.[173] The Transport Committee has found that there is undoubtedly an increased emphasis on passenger experience and service quality in recent specifications.[174] Nevertheless, it is assumed across industry that cost remains the overarching factor determining the outcome of franchise competitions. The Rail Delivery Group has observed that other factors are only assessed when the cost gap between the top two bidders is small and that, since the Brown review, all franchises have been awarded on the basis of cost.[175] Section 6.2.4 considers recent reforms proposals for increasing understanding of how evaluation is conducted applying award criteria.

5. Public sector operators

A final major aspect to discuss concerns the continuing relevance of public sector operation in a privatised system of rail in Great Britain. Section 25 of the 1993 Act confirmed privatisation by providing that a designated list of "public sector operators" cannot constitute franchisees. This may prevent any attempt at re-nationalisation "through the back door". However, public sector operation is not completely excluded. Firstly, this prohibition only applies to public sector operation in England and Wales. In Scotland, public sector operators can bid for a Scottish franchise.[176] Further, the DfT has not precluded participation by TOCs from other Member States which are subject to state ownership or control. Only a limited number of rail services are operated by undertakings not involving foreign state control in Great Britain. This is so despite the fact that the PSO Regulation provides that an "internal operator" (i.e. a local authority providing rail services itself or by award of a contract to a legally distinct entity

[167] Brown, para.5.21. This has recently been confirmed by Government. See Transport Committee citing DfT at fn194.
[168] *ibid*.
[169] Brown, p.9, Recommendation 1.17.
[170] Brown, para. 5.25.
[171] Brown, para.5.33.
[172] Brown, paras. 5.28 and 5.29.
[173] Government Response, p.19, para.4.15.
[174] Transport Committee, Rail Franchising, p.31.
[175] *ibid*.
[176] S.57 Scotland Act 2016 amending s.25 1993 Act.

which it controls) must not take part in competitive tenders organized outside its territory.[177] This must be contrasted with the fact that there are no UK Government-backed public sector operators tendering for such contracts in other EU Member States; this exacerbates the historically limited success of British private TOC access to European rail markets.[178]

Secondly, s.30 of the 1993 Act contains a brief provision imposing a "duty of authority" requiring the SoS to provide services or secure their provision where a franchise agreement is terminated or ends but no further franchise agreement has been entered into.[179] The SoS is not required to do so where, in their opinion, adequate alternative services are available.[180] There is similarly sparse provision in the policy Statement. It states that the s.30 duty may include securing the services of a public sector "operator of last resort" (OLR) but only if the SoS is unable to enter into or conclude negotiations with the incumbent private sector operator or any other private sector operator and only if it would not be appropriate in light of the factors otherwise permitting direct awards as discussed in Section 3.2.[181] In other words, there are at least two options before considering a public sector operator.

An OLR has been used a number of times. For example, in 2009, in response to the failure of the National Express East Coast franchise, the Government set up Directly Operated Railways Ltd (DOR).[182] DOR successfully ran services until 2015 at which point the DfT decided to discharge the s.30 duty "in-house", wind-down DOR down and pass services to Virgin.[183] In order to discharge the s.30 duty, the DfT entered into a contract with Arup, SNC Lavalin and EY to provide advice, raising questions as to whether this function had been "privatised". However, the DfT retains responsibility for this duty; in the event of a franchise failing, it will use one of its other OLR companies, DFT OLR Holdings Ltd (DOHL), along with a subsidiary.[184] Yet, again, it is recalled from Section 4.4.1 that, in 2018, it was announced that the VTEC franchise will be terminated prematurely. The SoS has since published a report explaining the options available and the decision made between: (1) a new short-term contract with VTEC run on a not-for-profit basis with tightly defined performance requirements (and possible performance-related payments at the end) or (2) transferring the operation to

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[177] Article 5(2)(b). See generally M. Kekelekis and I. E. Ruso, "The Award of Public Contracts and the Notion of 'Internal Operator' under Regulation 1370/2007 on Public Passenger Transport Services by Rail and Road" (2010) 19 P.P.L.R. 198.

[178] Commission Staff Working Document Impact Assessment to the proposed PSO Regulation Brussels, SWD(2013) 10 final, 30.1.2013, p.31 observing that only one UK franchise operator is actively present in the continent. A UK-based railway group explained that it would be more likely to bid overseas if the EU had a more consistent approach on market access rules.

[179] S.30(1)(b).

[180] S.30(3)(a).

[181] policy Statement 2013, p.6, para.15.

[182] DOR was created by the DfT to act as the holding company for the East Coast Main Line Company Limited (ECML), which operated rail services under a Services Agreement with the DfT pursuant to Section 30 of the Railways Act 1993.

[183] DOR sold its shareholding in ECML to Inter City Railways Limited (ICRL) which then operated services under the Virgin East Coast brand.

[184] See Freedom of Information Request by Mr. G Brading: Freedom of Information Act Request – F0015795, 7 February 2018 and the DfT's response on 1 March 2018. Available at: https://www.whatdotheyknow.com/request/463455/response/1120271/attach/2/01.03.18%20F0015795%20reply.pdf?cookie_passthrough=1.

an OLR.[185] The DfT has decided to transfer services to OLR on a short-term basis pending a new competition for a long-term East Coast Partnership. The DfT did appear to consider the merits of conducting a competition. It also considered making a direct award to a different private operator (which, in competition terms, is preferable to a direct award to an incumbent) but it was not possible both because of the timeframe and it was unlikely to deliver better value for money than the other two options.[186] It is questionable whether the short-term award to VTEC on a not-for-profit basis would have ever been viable. Further, the appointment of an OLR over another private sector operator may have been politically expedient given the short time-frame, limited availability of a private sector TOC and the fact that it may assuage calls for complete renationalization.

The VTEC termination highlights several issues concerning the s.30 duty. Firstly, this report is not statutorily required.[187] Thus, at the very least it demonstrates a measure of transparency albeit *ex post*. However, it also raises the issue of why the DfT does not similarly publish reports when exploring options for a direct award between the incumbent or new TOC.

Secondly, the rationale for, and and propriety of, using an OLR in the way the DfT intends in this particular circumstance is open to criticism. The DfT has justified an OLR on the basis that it would present fewer barriers to close working collaboration between DfT and the operator pending the PPP competition and indeed, can even be instrumentalised to actively develop a "major new franchising approach" in a way that "is not typically the case".[188] As will be discussed in Section 6.2.2. this could be credited for using a public sector benchmark against which to test a competitive proposition; alternatively, it could be viewed as giving the TOC responsible for the failed franchise time to prepare a bid for a new PPP in which it is a contender.[189] The DFT attempts to further justify further the decision on the basis that, if the DfT were to make a direct award to VTEC, it may confer unfair advantages on it in the bidding process for the PPP.[190] Yet, the same can be said of any interim direct award made to a private sector operator (particularly the incumbent) pending a new franchise. The DfT has not previously mentioned risks of unfair advantage as a reason for refusing a direct award or ensuring safeguards in any ensuing competition. It is not clear why it is considered sufficient justification for appointing an OLR. Neither s.30 nor the policy Statement can be read to support the use of this jurisdiction in this way.

Thirdly, it is questionable whether the principles and criteria against which the assessment of the direct award versus public sector operator is

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[185] Department for Transport, Short-term Intercity East Coast train operator 2018 options report May 2018 Cm 9617.

[186] Options Report, p.10, para.16.

[187] The report appears to follow the NAO's recommendations "to help clarify and quantify the available options" in response to the National Express InterCity East Coast failure. See Report by the Comptroller and Auditor General, Department for Transport, The InterCity East Coast Passenger Rail Franchise, HC 824, Session 2010-2011, 24 March 2011

[188] *ibid.*, p.16, para.33.

[189] The DfT states at p.26: "OLR provides additional flexibility through the management model which could support business changes. In the run up to a commercial franchise competition, reducing barriers to policy and procurement collaboration by appointing OLR would, in the specific circumstances of East Coast Partnership development, be likely to support better long-term value."

[190] Options Report, p.16, para.33.

made are sufficiently robust. The report states that the options are considered in accordance with the key principles set out in the policy Statement.[191] The SoS also highlighted that there were a number of other criteria relevant to the assessment of value for money but which are not expressly stated in the policy Statement.[192] Yet, the report states that the assessment of options against these principles did not find strongly in favour of either option.[193] Of course, it is possible for the principles and criteria to be effective but lead to an inconclusive result. More likely, it suggests that these principles and criteria do not provide an effective means of discriminating between the options. For instance, the policy Statement principles concern factors for determining whether or not to make a direct award; they are not factors tailored to determining whether or not to appoint an OLR. Further, a cursory reading of the report's assessment of monetized versus non-monetised benefits appear somewhat arbitrary. It should be observed that in 2013 the campaign group Railfuture and the Association of Train Operating Companies (ATOC) called for clarity in the draft policy Statement as to when, and how, a public sector operator will be selected when both competitive tendering and the direct award process have failed to ensure service continuity.[194] The DfT did not provide any in response at the time. There is no other detailed guidance regarding exercise of the S.30 duty. [195] It is difficult to avoid the conclusion that what was really decisive was not these criteria but rather the fact that the OLR option provides "maximum flexibility" in order to implement the SoS long-term vision for the future operation of East coast services through a PPP.[196]

Ultimately, the report describes the OLR as an "integral part of the franchising system".[197] In which case, it is difficult to reconcile an integral feature of the franchising system with the very limited substantive provision on the s.30 duty in the 1993 Act and policy, which leaves it fundamentally unclear when, and how, this integral function will be exercised. The future role of public sector operators is discussed in more detail in Section 6.2.2.

6. Procurement Reform Post-Privatisation

The preceding Sections have shown that the domestic legal and policy framework is generally compatible with EU law and which is largely attributable to a combination of exclusion from EU procurement Directives and a generic framework under the PSO Regulation. Further, there have been attempts to use procurement to improve public participation in the design and delivery of this vital public service. Nevertheless, this article has also identified areas of legal and commercial uncertainty with implications for the exercise of franchising procurement powers, the ability to bring effective legal challenges

[191] Options Report, p.8, para.15.

[192] These were: which option returns most money to the taxpayer; the risks attached to each option; the value of any improvements in passenger services; and the effects of this decision on other franchises. See Options Report, p.8, para.15.

[193] *ibid.*, p.1.

[194] Rail future and ATOC consultation response to the draft policy Statement, 1 March 2013.

[195] The only other references to operators of last resort are contained in a now outdated 2011 guide to the railway franchising procurement process. See Department for Transport, A guide to the railway franchise procurement process, May 2011, paras.29-31.

[196] Options Report, p.1.

[197] *ibid*.

and the predictability of the franchising programme's execution. Further, whilst the DfT has introduced reforms in response to inquiry recommendations, there are areas in which procurement could be enhanced through further reforms. Based on the findings throughout this article, this section explores just some areas that could be the subject of closer inspection. It does so with a broader awareness of some of the challenges facing the provision of rail post-privatisation.

6.1. Post-privatisation Challenges

Before introducing debate on reform, it is important to situate it within a wider discourse about the challenges facing the provision of rail services post-privatisation. As explained in Section 2.2, the 1993 Act is an overarching legal framework intended to facilitate the transition to a privatised model. It remains functional and adaptable to this day, as evidenced by amendment through, *inter alia*, the Transport Act 2005 and supplementation by revised franchising policies. However, a quarter of a century into the franchising experiment, it is suggested that the 1993 Act and associated policy is, perhaps, increasingly outmoded given the need to respond to a host of post-privatisation changes and challenges which could scarcely have been anticipated at the point of privatisation. This article does not offer a serious attempt to classify these challenges but some may be proffered here.

A first aspect concerns increasing supra- and inter- national influences on domestic transport services. Whilst rail services were largely excluded from the EU procurement Directives in 1993, and which remains the case today, this article has identified numerous instances in which EU law continues to heavily influence domestic regulation. Further, in light of Brexit, it has been suggested that:

> [t]here may be new options to look more closely at franchising and investment in the industry with an evolved form of procurement law no longer dependent on the EU models which are focussed, in part, on achieving fairness in circumstances where an incumbent national operator remains dominant in the member state […].[198]

Further, globalisation of rail service provision is also evidenced by the extent of foreign TOC involvement in UK franchise competitions which extend as far as China and Japan. Yet, as discussed in Section 3, this has regulatory implications. A prime example concerns the extent to which public sector operation should be permitted in the UK generally.

A second aspect concerns the changing nature of contracting techniques under the franchising model. At the point of privatisation, the proposition was relatively simple: the procurement of services provided from the private sector. However, since, the DfT has trialled "deep alliances", the latest proposition being a public-private partnership which will see Network Rail and TOCs operating under a single management team better coordinating track and train operation. The purported objective is to render the railways

[198] Burges Salmon, Brexit and the rail industry, 29 June 2016: https://www.burges-salmon.com/news-and-insight/legal-updates/brexit-and-the-rail-industry/ https://www.pressreader.com/uk/rail-uk/20160730/281870117808810 (last accessed 20 April 2018).

more “responsive”. [199] Yet, there is a real sense of uncertainty as to the DfT’s regulatory strategy: the DfT refers simultaneously to PPPs as a “new” model, a “reformed” model and an “evolution”. [200] Any procurement specialist will indicate that, whilst there are some similarities, there are major differences between simply procuring services and procuring public-private partnerships. This is reflected in how these different types of contract are regulated at the domestic and supranational level. Yet, the DfT simply suggests that the new PPP contracting model will involve “a revised bid assessment process” without any indication as to whether this requires a complete rethink of how procurement legislation and policy is designed should this model be replicated as intimated.[201] It should be recalled that rail services are currently excluded from the Concessions Directive and neither the 1993 Act nor PSO Regulation regulate the defining characteristics of PPP contracts. There is scope for legal debate on the status and regulation of franchises as concessions.[202]

A third aspect discussed in more detail in Section 6.2.3 below concerns increasing calls for devolution of rail services. As will be discussed, decentralised provision is difficult to reconcile with(in) a regulatory strategy largely predicated on centralisation. The 1993 Act does not provide a ready facilitator for this change in dynamic and rail devolution is not considered at all under the PSO Regulation with the exception of limited references to local authority provision.

A final more general aspect concerns increasing public expectations for greater stakeholder engagement, accountability and transparency in all forms of public contracting, as evidenced by the many inquiries, reports and steadily increasing number of judicial review claims. These calls have largely grown in response to major failures in privatised provision. Again, it is questionable whether the 1993 Act and associated policy fully facilitates these broader expectations.

6.2. Reform

The following illustrates just some of the potential areas of reform and which is not intended to be exhaustive.

6.2.1. Responsibility

The UK has a troubled history of designating responsibility for franchising. [203] Therefore, there is scope for debate on even the most fundamental question of who should be responsible. Whilst the SoS is now formally responsible, day-to-day functions have been designated to the DfT. However, the ICWC competition was heavily criticized for the fact that there was no direct ministerial oversight and the absence of clear line of authority on key procurement decisions. The Brown Review therefore placed particular

[199] See Options Report, p.7 for an outline of the proposed East Coast Partnership.
[200] *ibid.*, p.15, paras.27 and 28.
[201] Department for Transport, Connecting people, a strategic vision for rail, Moving Britain Ahead, p.35, para.3.41.
[202] See generally, Prosser and Butler, “Rail Franchises, Competition and Public Service”.
[203] S.23(1) and (2) as amended. A Franchising Director was initially appointed. Responsibility was subsequently transferred to the Strategic Rail Authority. The Railways Act 2005 transferred responsibility to the SoS.

emphasis on clarifying roles and responsibilities.[204] In 2014, the Passenger Services Directorate was created as the new process owner within the DfT. It consolidates the procurement and management of franchises into one team headed by a Managing Director as the senior responsible owner.[205] There is little published information about this new organizational structure. It remains to be seen to what extent it will materially strengthen internal lines of responsibility.

On privatisation, there was disagreement between the DfT and Treasury as to whether the franchising and regulator functions should be combined. This was rejected on the basis that there was a risk that competition could be restricted in order to reduce franchising subsidies.[206] Debate is now shifting away from concerns about who controls competition to transparency, in particular, whether the ORR could be given the role of evaluating bids having shown its independence and in light of poor DfT competence.[207] The ORR has firmly reiterated that franchising involves the conclusion of a private law commercial agreement between the DfT and TOCs for which the ORR has no responsibility.[208] The Transport Committee has stopped short of such a recommendation but has suggested a transfer of franchise monitoring and enforcement powers to the ORR. Ultimately, it would be unusual for a regulator to award Departmental contracts in this way. In addition, it has not been considered whether this role could create a conflict of interest with regard to the ORR's other statutory functions. As indicated, Passenger Services has now been established as a focal point for the franchising function. If firm responsibility is likely to remain with the DfT, perhaps debate should then turn instead to ways in which other actors can provide input, checks and balances within the procurement process and whether their roles and responsibilities could be more clearly defined in statute and policy. An example discussed in Section 6.2.4 below concerns involvement of the Network Rail Systems Operator.

6.2.2. Public sector operators

It is recalled from Section 5 that domestic public sector operators are prohibited from bidding for franchises. It is beyond the scope of this article to fully engage what is a complex, ideologically entrenched debate opposing two absolutist conceptions: "privatisation v nationalisation". However, it is pertinent to observe the juxtaposition of the rationale for privatisation which was to roll back the State and encourage free enterprise and the ability of foreign state-owned or controlled enterprises to bid. Further, as indicated in Section 5, the OLR duty providing for public sector operation is considered an "integral" feature of the system. In addition, as will be discussed in Section 6.2.3 below, there is increasing public sector control in the form of devolved provision through Passenger Transport Executives.

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[204] Brown Review, pp.54-56, paras. 7.3-7.11.

[205] *Franchise Competition Guide*, p.5.

[206] M. Lodge, On Different Tracks, Designing Railway Regulation in Britain and Germany (Praeger Conneticut 2002), p.131.

[207] J. Alderson, Pubsect franchises, rail future 30 September 2014. https://www.railfuture.org.uk/article1513-Pubsect-franchises (last accessed 20 April 2018)

[208] Joanna Whittington, Response to Q33 in Oral Evidence, to the Transport Committee, Rail Franchising Inquiry, HC 66, 5 September 2016.

A fundamental question is whether it is possible to reconcile or accommodate public sector provision within a purportedly privatised system of rail.[209] The gradual "normalisation" or "creep" of public sector involvement in all its forms over time was not predicted during debate on the Railways Bill.

Of course, one extreme measure would be to end private sector operation altogether. For instance, in 2017, the Labour Party proposed a Public Ownership of the Railways Bill to repeal the 1993 Act.[210] However, it is submitted that this proposed strategy and others like it[211] would be as blunt as the current prohibition. Whether rail remains privatised or is renationalised, in the interim, it might be more pragmatic to allow public sector operators to compete against the private sector in order to provide a benchmark comparator against which to test the competitiveness of private sector provision, something that is absent under the current model of total privatisation. Similarly, were rail to be re-nationalised, an interim public sector operator could be used to build and test capacity for a full transition. It is recalled that the interim award to OLR is being used to build capacity for the East Coast PPP. If public sector operation were permitted more generally, the 1993 Act could be amended simply to remove the prohibition. However, it is likely that further provision would be required not least to ensure that the DfT could maintain a sufficient degree of impartiality in franchising evaluation. Depending on who would act as the operator's sponsor, this might also reopen debate on whether franchising responsibility should be transferred out of the DfT. Further, as indicated in Section 5, there is a case for reforming the legal and policy framework on the S.30 OLR duty. At the very least, there is a case for clarifying the legal status and operational role of the OLR. It is recalled from Section 5 that it has taken a Freedom of Information Act request to obtain basic details in this regard.

6.2.3. Devolution

Devolution is the first key aspect of procurement considered in the Brown Review. Brown identified a "seamless devolution" of parts of the railway to Scotland, Wales and the Borders and locally in recent years and recommended further devolution to English regions.[212] In response, the Government agreed.[213] Concerning nations, the 1993 Act as amended enables Scottish Ministers to designate Scotland-only and certain cross-border services.[214] Scottish Ministers can also publish a policy Statement concerning ITT.[215] There are currently two such franchises, ScotRail and the London-Scotland Caledonian Sleeper. Conversely, there has been more limited devolution in Wales. The Welsh Assembly Government has sought amendment of the 1993 Act to enable it to operate rail services but which was rejected. However, the 1993 Act as amended does provide that the SoS must

[209] The author is grateful to Dr. Mark Wilde for discussions on this wider theme in the article.
[210] Labour Party Manifesto 2017, pp.90-91.
[211] Rebuilding Rail, June 2012; CRESC, The Great Train Robbery: privatisation and after; Compass, All on Board: a publicly owned railway for an interconnected world; and Cooperatives UK, Cooperative rail: a radical solution.
[212] Brown Review, p.9, para.1.18 and p.37, paras. 5.4 and 5.5.
[213] Government response to the Brown review, p.10.
[214] S.23 as amended by the Railways Act 2005.
[215] S.26(4).

consult the National Assembly before issuing an ITT or entering into a franchise agreement where the services are, or include, Welsh services; further, the National Assembly must join the SoS as a party to the agreement.[216] The Welsh Government was a co-signatory to the Wales and Border franchise which it has since taken over.[217]

Concerning English regions, local transport authorities cannot directly procure franchises. However, in London, the SoS must consult Transport for London (TfL) before issuing an ITT or when entering a franchise agreement for services to, from, or within, London.[218] Similarly, the Railways Act 2005 introduced a requirement that the SoS must consult the relevant Passenger Transport Executive (PTE) before issuing an ITT or entering into a franchise concerning services in which it has an interest; the SoS can also approve a PTE becoming a party to the franchising agreement.[219] Further, on an application by a PTE, the SoS may grant an exemption of services from being designated under a franchise known as a "de-designation order".[220] This enables a PTE to award an "operator agreement" to private operators to run select services. These exemptions have taken the form of statutory instruments by order.[221] The exemption of services is subject to certain statutory controls.[222] The power to make a de-designation order is exercisable by statutory instrument subject to the negative resolution procedure as opposed to the affirmative procedure. This is considered appropriate because these are freely negotiated commercial contracts; it also has the practical consequence of allowing the SoS to determine appropriate provision in any specific case.[223]

In 2015, the Deregulation Act removed restrictions on the provision of passenger rail services by PTEs in England.[224] It also amended the 1993 Act to broaden provision which the SoS may make in a de-designation order; this includes extending the enforcement and railway asset protection provisions applicable to franchise agreements to operator agreements.[225] Whilst more regulation of exempt services seems contrary to the deregulation objective, it is intended to facilitate decentralization by enabling PTEs to take over regional services from central Government and reduce risks associated with full devolution by including certain safeguards.[226] It is also said to be consistent with the Brown Review.[227] Influential thinktanks have called for some regional

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[216] S.10(1) and (2) Railways Act 2005.

[217] See Agency Agreement 2, Pursuant to section 83(1) of the Government of Wales Act 2006 authorising the Welsh Ministers to exercise certain functions of the Secretary of State for Transport under Section 26(3) of the Railways Act 1993 (as amended).

[218] S.175 Greater London Authority Act 1999 as amended and §15 and 17 Railways Act 2005.

[219] S.13(1) and (7).

[220] S.24(1) 1993 Act as amended.

[221] See e.g. Statutory Instrument 2002 No. 1946, The Merseyrail Electrics Network Order 2002; Railways (North and East London Lines) Exemption Order 2015 (SI 2015/237); and Railways (Crossrail Services) Exemption Order 2015 (SI 2015/239).

[222] S.24(6) 1993 Act as amended.

[223] P. Cotton, Delegated Powers and Regulatory Reform Committee Draft Deregulation Bill, Memorandum by the Cabinet Committee, 18 September 2013, para.187 and 188.

[224] S.49.

[225] Schedule 8, para.8.

[226] Statements by Tom Brake, Public Bill Committee, Deregulation Bill, Ninth Sitting 11 March 2014 (Morning), 284.

[227] House of Lords Joint Committee on the Draft Deregulation Bill, Draft Reregulation Bill, Oral and Written Evidence, p.280.

transport bodies to take over franchising activities. [228] Transport for the North (TfN) has argued that the preferred legal route would be a de-designation exemption order enabling TfN to let contracts in the same way as TfL and PTEs or to devolve the SoS's franchising functions under the 1993 Act as in Scotland and increasingly in Wales.[229] Regional bodies like TfN may prefer these routes not least because they achieve a degree of devolution without requiring significant legislative reform.

However, such bodies could be bolder in arguing the case for entirely new and more comprehensive statutory powers to achieve fuller devolution. The choice of existing decentralization through de-designation of services can be criticized. The continuing treatment of regional rail service provision as an exemption to franchising as the principal regulatory strategy is to deny the growing importance of regional governance in practice as well as new ways of thinking about how rail services can be more effectively regulated. It is open to question whether simply copying and pasting regulation that applies to Inter City franchises is a blunt regulatory strategy that fails to take account of different aims, objectives and requirements of regional rail service provision. Further, it is reminded that such exemptions are granted through secondary legislation to ensure that the SoS retains overall control through continuity (rather than change) in application of the regulatory framework. [230]

Concerning procurement specifically, this also means that there is now asymmetry of legal and policy provision. The Deregulation Act 2015 seeks to extend franchise management and enforcement provisions but is silent on the exercise of franchising procurement powers. The DfT has been unclear on the issue of how procurement functions will be devolved. In 2012, the DfT published plans for rail decentralization.[231] The options proposed would have included devolution of procurement with varying degrees of control retained by the DfT but these were not subsequently developed.[232] Brown did not refer to these plans but simply stated that it is likely that the DfT will jointly procure newly devolved franchises with the DfT using the existing devolved authority's capabilities e.g. in leading consultations pre-ITT.[233] Brown also recommended that the policy Statement could include how the SoS would consider devolving responsibility as appropriate.[234] However, the revised 2013 policy Statement contains no such guidance. There are no equivalent regional franchising policy statements. On one hand, this means that regional transport bodies develop their own policies. On the other hand, this may create variation across the UK and which presents its own risks. It is unclear what, if any, incentive there is for regions to coordinate regulatory approaches to procurement to promote best practices. Thus, ultimately, therefore, it is open to debate whether the existing

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[228] Institute for Public Policy Research, Greasing the Wheels: Getting our Bus and Rail Markets on the Move, August 2014, p.5.

[229] Greater Manchester Combined Authority 29 July 2016.

[230] Cabinet Office Memorandum 2013, p.38, para.182 and p.39, para.186.

[231] Department for Transport, *Rail Decentralisation, Devolving decision-making on passenger rail services in England*, March 2012. See also Consultation responses, November 2012.

[232] Devolution would include: the announcement of intention to procure (Prior Information Notice, Official Journal of the European Union notice); pre-qualification of bidders; design of bid evaluation criteria; production and issue of tender documents; bid evaluation, contract negotiation and contract award; and mobilisation. *Ibid*., p.39. On the proposed models varying the extent of DfT involvement with respect to each of these functions, see pp.40-41.

[233] Brown Review, p.38, para.5.6.

[234] Brown Review, p.60, para.8.4.

unitary legal framework based on centralisation is sufficient to meet demands for a diverse rail system that is increasingly decentralised.

6.2.4. Procedural rules

As indicated in Section 4, rail contracts have always been subject to few procedural rules under EU law. It is beyond the scope of this article but it should be debated at the EU level whether rail contracts should continue to be excluded from the procurement Directives being subject to very limited provision under the PSO Regulation and, if not, whether the PSO Regulation is a sufficient compromise towards longer-term harmonisation.

At the domestic level, this article has demonstrated that the 1993 Act and supporting policy is largely consistent with EU law. However, on balance, this combined legal framework is, perhaps, too rudimentary. On the one hand, it is possible to argue that complex contracts involving sensitive political and commercial judgment should necessitate fewer regulatory constraints. Indeed, this is one of many arguments historically made against regulating concessions under the procurement Directives. On the other hand, these are contracts of considerable public interest. It is worth recalling Brown's general observation that fewer and larger franchises today mean that competitions are now major procurement exercises with significantly increased complexity, risk and resource that can "make or break" bidders.[235] There are many arguments for and against more detailed regulation through legislation and policy but it is difficult to deny an intuitive sense that the underlying statutory framework is very "light touch".

A further issue that has not been explored is whether the current policy framework provides effective support to the legal framework. The DfT relies extensively on "high-level" policy guidance that often lacks a clear purpose, is variable in content and is only revised ad hoc. Clearly, as indicated by Brown's recommendations focusing on policy reform, these documents are considered important. At the very least, these require re-writing and updating to clarify fundamental aspects of the procurement process discussed in this article. However, a further question then arises as to how prescriptive policy should be. For example, TOCs and Passenger Groups have complained about the DfT's use of "legalistic" language in drafting the policy Statement. Yet, both have simultaneously argued the need for it to set out in more "prescriptive" terms detailed criteria for making direct awards; in other words, to become more legalistic.[236] If stakeholders disagree as to the functions which policy is intended to serve and the form it should take, the DfT can hardly be criticised for failing to produce clear policy guidance. There are so many areas of policy that can only be discerned through Freedom of Information Act requests or Government responses to inquiries. The Government should be encouraged to clarify major areas of uncertainty. A prime example for many years has concerned how the DfT assesses financial robustness and risk.

Concerning the conduct of the procurement procedure, this article has identified several areas in which there is legal and practical uncertainty.

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[235] Brown Review, p.16, para.2.14.

[236] See e.g. Travelwatch in response to the consultation on the draft policy Statement 28 February 2013, stating that a more plain English version of the FPS should be published as a supplement to the "legal wording contained in" the statement. Of course, the statement of policy is not a statement of law.

Concerning specifications discussed in Section 4.2, it unlikely to be possible or desirable for legislation to prescribe how specifications may be designed and the factors which should be taken into account, in particular, given that specifications can vary from trains per hour to less easily definable components of quality e.g. passenger satisfaction. However, it is possible to envisage a clearer identification of responsibility for enhancing specifications through greater consultation. It is recalled that particular issues have been experienced in specifying basic service levels based on accurate forecasts of network capacity. Recently, the System Operator was established which is distinct from, but operating under the auspices of, Network Rail. One of its functions is to advise the franchising authority and bidders on the feasibility of different options for the use of future network capacity.[237] This includes provision of a formal Network Rail input and positions to the proposed Expression of Interest, ITT and the bid evaluation.[238] The objective is to develop specifications at a much earlier stage and provide clearer alignment with network rail capability and capacity.[239] It has been suggested that the System Operator's views will have greater weight because it will be separately funded and more embedded in the regulatory infrastructure of the rail industry.[240] However, Network Rail has itself stated that it has only received redacted versions of bids omitting many key commercial details and is not permitted to "sign-off" Train Service Requirements (TSRs).[241] Further, the Systems Operator does not review Network Rail's own performance. Notwithstanding, as discussed above, the involvement of other actors in the procurement process is a first step towards improvement provided that it does not lead to loss of the DfT's overall decisional responsibility and accountability. It has been suggested that Network Rail should have a formal sign-off power.[242] It is thus possible to whether this should be a formal legal requirement.

Concerning consultation discussed in Section 4.3, there is scope to revise consultation policy in light of recent judicial review challenges. In 2006, the Transport Committee recommended that a broad-based consultation with passengers should be a statutory requirement to be included in its next railways bill.[243] Its precise content and consequences were unclear. However, recently, it has suggested the publication of a rail franchising "public engagement strategy" to address the same issue. The Government has expressed its support which is unsurprisingly devoid of any enforceable commitment.[244] This shift from proposed legal reform to vague policy reform could be due to improved consultation in recent years rendering statutory reform unnecessary. However, again, it may reinforce the earlier point that

[237] Strategic business plan, p.10, p.52.
[238] *ibid*., p.71.
[239] *ibid*., p.87.
[240] See B. Gerard, Network Rail division to scrutinise franchise bids following East Coast collapse, *The Telegraph* 12/02/2018 citing Mark Carne, further stating: "If a train company submits a bid with a level of performance reliability that the System Operator didn't think was achievable, it would be able to say so as well as asking for proof from the company."
[241] Written evidence submitted by Network Rail (ECR0010) to the Transport Committee for its Inter City East Coast inquiry, March 2018, paras.2.6, 2.7 and 2.8.
[242] Oral Evidence by given to the Transport Committee for its Inter City East Coast Inquiry, HC 891 Monday 21 May 2018, Q47 (response by Nicola Wood) and Q49 (response by Iryna Terlecky).
[243] House of Commons Transport Committee, Fourteenth Report, 5 November 2006.
[244] Government response, p.5.

stakeholders are unclear about which regulatory tools (law or policy or both?) should be used to achieve reform. Caution must be exercised against placing too much weight on failed judicial review applications; however, they do highlight that policy should be much clearer on who should be permitted to lawfully participate and how proposals in consultations correspond to proposals in ITT in order that expectations about service provision are clear.

Concerning qualitative selection discussed in Section 4.4, it is recalled that the 1993 Act only contains a single provision on "suitability". It is worth emphasising that as far back as 1993 at the Bill stage, it was debated what this provision actually meant.[245] Yet, franchise failures have exposed many issues in this regard not least the many pages of PQQ passport process documentation which confer broad powers. There is scope for policy debate within DfT (and other Government Departments) about the role which qualitative selection should play as a means of deterring future conduct based on past actions. There is also scope for debate and joined up thinking about how procurement policy and management/enforcement are linked. For example, it is recalled that enforcement action under the DfT's enforcement policy is a means of identifying significant and deficient performance entitling discretionary rejection of a PQQ passport. The Transport Committee recently criticised the DfT for its handling of the Southern Rail dispute for failing to identify clearly, and take remedial action in relation to, contraventions of the franchise agreement. It recommended reform of the DfT's 2008 enforcement policy which the Government has since rejected.[246] If the DfT will is reluctant to take enforcement action, this may impact assessments of poor performance during qualitative selection.[247] There is also a broader policy and legal question of whether it is or should be possible to terminate other franchises held by the franchisee in the event of default. Regarding capital requirements, the NAO has observed that the DfT could learn from other areas of government where regulators ensure formal processes of consultation and dialogue with industry in formulating appropriate financial guarantee requirements.[248]

Concerning award criteria discussed in Section 4.5, it is recalled that, like specifications, it would be difficult to prescribe criteria and their weightings in legislation given the specific circumstances of each individual franchise. The Transport Committee has instead focused its recommendations on improving transparency of the scoring of whatever criteria and weightings are applied. For instance, it has identified that the relative scoring is a "black box" being only seen internally by the DfT and not externally, resulting in a lack of transparency constituting a barrier to trust in the system.[249] It has recommended that the DfT publish a scoring system (e.g. a weighted index) following a franchise competition, redacted to omit commercially sensitive details. This would give the public and industry a better understanding of the

[245] See HL Deb 05 July 1993 vol 547 cc1145-96.

[246] Department for Transport, Enforcement policy 2008, pp.11 and 17.

[247] There are parallels between the DfT's enforcement policy which sets out factors for determining whether or not a contravention may be considered "trivial" and whether to impose a penalty and potential factors determining whether events are significant, or persistent such as to result in suspension or revocation of a passport or rejection of a bidder at the qualitative selection stage for past poor performance.

[248] NAO, Lessons from cancelling the InterCity West Coast franchise procurement, p.30, para.4.7.

[249] Transport Committee citing Stephen Locke from London Travelwatch.

basis, in terms of quality and price, on which a franchise has been awarded.[250] The DfT has since agreed with this recommendation in principle and would investigate ways in which final scores could be presented showing the differential from the winning bid on the proviso that commercial sensitivities could be protected.[251] This is just one example in which reform could focus on enhancing transparency instead of micro-managing procedural aspects of the procurement process, although transparency inevitably has other trade-offs in terms of the cost of preparing and publishing indexes and the need to protect commercial-in-confidence information.

7. Conclusions

This article has examined procurement as a key component of rail franchising, a regulatory strategy for delivering a vital public service. It has shown that domestic law and policy which regulates the award process is generally compatible with EU law. Further, there have been attempts to use the procurement process to improve public participation in the design of franchises, and to increase accountability and transparency. However, there is legal uncertainty for the SoS' and DfT in terms of how franchising powers are exercised and which risks fettering discretion and exposure to legal challenge. There is also uncertainty for stakeholders seeking to challenge effectively franchise procurement through judicial review on the basis of domestic and EU law. Further, there is uncertainty for TOCs and passengers who expect predictability in the franchising programme and which may be compromised by unclear decisions and processes taken at the procurement stage. This article has identified just some areas for potential reform not just in terms of how the procurement process is legally regulated but also in terms of thinking about how procurement is used as a vehicle for providing rail services taking account of certain post-privatisation challenges. To be clear, this article does not advocate specific reforms nor necessarily envisage a comprehensive regulatory code for procurement and management. There would be many arguments for and against a "Rail Services Act", for example. Rather, using procurement, the exercise has attempted to begin a fundamental legal discourse on the regulation of rail franchising. The train has already left the station: it is time for legal discourse to catch up.

[250] Transport Committee, pp.31-32.

[251] Government Response to the Transport Committee, 24 April 2017, p.7. The general availability of scoring information to the public must be distinguished from specific scoring information which it is possible to obtain by way of judicial review for the purposes of legal challenge. See e.g. *R (Firstgroup Plc) v Strategic Rail Authority* [2003] EWHC 1611 (Admin).