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Franchising Policy Statement

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Statement of Policy by the Scottish Ministers in exercise of the power in section 26(1) of the Railways Act 1993

Background

1. The impact of the Covid-19 pandemic on Scotland's people, communities and economy has been significant. Rail passenger franchises are no exception to this and the Scottish Ministers have had to take difficult decisions in relation to travel in Scotland in order to minimise the spread of Covid-19. It is difficult to predict how the ongoing impact of Covid-19 on travel patterns and demand for rail passenger services will develop and its longer-term effects. However, what was already known, and what the pandemic has further underlined, is that the current franchising system requires significant reform.

2. The UK Government has indicated an intention to publish a White Paper on the reform of Great Britain's railways. As of March 2021, no date has been announced for publication. It is anticipated the White Paper could lead to significant changes in the way in which the provision of passenger rail services will be arranged in the future.

3. Meantime, the Scottish Ministers have to work within the relevant current legislation, principally the Railways Act 1993, which neither they nor the Scottish Parliament have powers to change. A period is approaching where key decisions will be taken on the future of rail passenger services provision. In light of this, and given the exceptional circumstances that continue to arise as a result of the Covid 19 pandemic, the Scottish Ministers have reviewed and amended their Statement of Franchising Policy and set out their revised Policy here.

Statement of Policy

4. Section 26(1) of the Railways Act 1993 ("the 1993 Act") provides that the appropriate franchising authority may select the person who is to be the franchisee in relation to a franchise agreement from among those who submit tenders in response to an invitation to tender for the right to provide, or to secure that a wholly owned subsidiary provides, services for the carriage of passengers by railway under that franchise agreement. The Scottish Ministers are the appropriate franchising authority in relation to Scottish franchise agreements for the provision of rail passenger services within the ScotRail and Caledonian Sleeper franchises.

5. Under section 26(4A) of the 1993 Act, the Scottish Ministers are required to publish a statement of policy about how they propose to exercise their powers under section 26(1) of that Act. Under section 26(4B), the statement must in particular include their policy about:-

- a) when their selection of the person to be a franchisee under a franchise agreement is likely to be from those submitting tenders in response to an invitation to do so,
- b) when it is likely such an invitation will not be issued, and
- c) the means by which they propose that selection will be made in cases where there is no such invitation.

When it is likely an invitation to tender will be issued

6. In line with the relevant legal frameworks (including Regulation (EC) 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport by rail and by road and domestic legislation including the 1993 Act) the Scottish Ministers intend to select the person who is to be a franchisee under a Scottish franchise agreement from among those who submit tenders in response to an invitation to tender, except where:

- any of the circumstances specified at paragraphs 9 and 10 apply; or
- section 26ZA(1) of the 1993 Act applies (either because no tender is received in response to an invitation, or a tender is received but it is considered that the services would be provided more economically or efficiently if they were provided otherwise than under a franchise agreement entered into in response to the tender) and the Scottish Ministers decide to use their powers under section 26ZA(2):
 - (a) to issue a new invitation to tender,
 - (b) to secure the provision of the services under a franchise agreement with a person who did not submit a tender, or
 - (c) not seek to secure the provision of the services under a franchise agreement.

7. Where a franchisee is selected from among those who submitted tenders in response to an invitation to tender, the Scottish Ministers' decision will be based on an analysis of those tenders in relation to criteria set out in the invitation to tender and associated documents.

When it is likely an invitation to tender will not be issued

8. As an exception to the principle outlined in paragraph 6, the relevant legal frameworks prescribe certain circumstances in which the Scottish Ministers may select a person to be the franchisee in relation to a franchise agreement without issuing an invitation to tender (in other words, by making a direct award of the agreement to that person). Accordingly, the Scottish Ministers will only consider making such a direct award where they are satisfied that this is permitted under the relevant legal frameworks (including any restrictions which prohibit

overcompensation) and that the award can be made in accordance with the procedures prescribed by law.

9. Subject to the parameters described in paragraph 8, it is likely that the Scottish Ministers will not issue an invitation to tender (and will make a direct award) where, in their reasonable opinion, disruption to rail passenger services or the immediate risk of such disruption means that it would not be practicable to issue an invitation to tender.

10. In addition, and again subject to the parameters described in paragraph 8, it is likely that the Scottish Ministers will not issue an invitation to tender (and will make a direct award) where, in their reasonable opinion,

- there are circumstances which mean that it would not be appropriate to issue an invitation to tender, including but not limited to situations where there are other market conditions which could affect the number or quality of bids likely to be received if the agreement were the subject of a competitive tendering procedure, such as uncertain or unpredictable rail travel market conditions or where a number of competitive tendering procedures are already being run (by the Scottish Ministers, the Secretary of State or the Welsh Ministers).

Or,

- issuing an invitation to tender would not be conducive to the fulfilment of the Scottish Ministers' policy objectives for rail services and as such would not be appropriate for the time being. These objectives include:
 - Ensuring the on-going, stable delivery of high performing rail services;
 - Maximising the contribution that rail services can make to tackling climate change;
 - Improving industry alignment and service integration, where possible, to increase effectiveness, reduce costs and place the rail industry on a sustainable financial footing;
 - Supporting an environment where the whole rail system can respond swiftly and effectively to proposals for rail reform.
 - Ensuring value for money for tax payers and fare payers through the ability to engage the rail services market with clarity on requirements for the delivery of future rail services;

Means by which selection will be made if no invitation to tender is issued

11. Where any of the circumstances set out at paragraphs 9 or 10 apply and subject to paragraph 13, the Scottish Ministers may decide to directly award a franchise agreement. In determining whether and to whom to make a direct award, the Scottish Ministers will have regard to all requirements and obligations under the relevant legal frameworks and the policy objectives set out in paragraph 10.

12. Where a direct award is made, the Scottish Ministers will look to issue an invitation to tender in relation to the services subject to that direct award as soon as appropriate, in accordance with their obligations under the relevant legal frameworks.

Section 30 of the 1993 Act

13. Where a franchise agreement in respect of the provision of rail passenger services is terminated or otherwise comes to an end and no further agreement has been entered into in respect of those services for whatever reason, including where the Scottish Ministers:

- are unable to enter into or conclude negotiations with any operator; or
- otherwise consider that the award of a franchise agreement would not for the time being be appropriate having regard to all relevant factors (including the objectives set out in paragraph 10 and their obligations under the relevant legal frameworks),

they will act in accordance with operator of last resort duties under section 30 of the 1993 Act.

Revisions to this policy statement

14. The Scottish Ministers may at any time alter or replace this statement, following such consultation as they consider appropriate.



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