An inspection of rail franchise procurement

Butler, Luke

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

Luke R. A. Butler[1]

1. Introduction

Since privatisation, successive Governments have employed franchising to deliver passenger rail in Great Britain. There are now weekly media reports of franchise failures. However, despite being a subject of considerable public interest, there has been limited legal debate.[2] The potential field of enquiry is massive given the complex network of legally responsible actors which include, among others, the DfT which procures services from the market, Network Rail which provides the infrastructure, the Office of Rail and Road (ORR) as regulator, and Train Operating Companies (TOCs).[3] The modest aim of this article is to explore 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, and 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, which is often overlooked, concerns how procurement is used as a regulatory tool to achieve other objectives which support economic management, e.g. improving public participation in the provision of rail through stakeholder consultation and increasing accountability and transparency in the design and delivery of a vital public service.[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,

[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), Richard Craven (University of Leicester) and the anonymous reviewers for comments on earlier drafts.

[2] It is difficult to pinpoint the reasons why. It may be due to the fact that this is a politically sensitive field in which the Government exercises commercial discretion. Further, the rail industry operates in a market comprising high risk. There may be a concern that legal regulation is seen as potentially inflexible, inhibiting or fettering discretion and imposing regulatory burdens on industry in what purports to be a deregulated market. In addition, there is a perception that certain aspects of rail are already heavily regulated e.g. it has its own regulator in the form of the Office of Rail and Road.

[3] Legal issues 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.

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 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 public sector bidding. Finally, it provides a vehicle for introducing wider themes into legal debate, namely the impact of post-privatisation challenges facing rail regulation.

This article argues as follows. First, domestic law and policy is generally compatible with EU law, the main body of procurement law in this field. Nevertheless, domestic law and policy reveals legal uncertainty. This renders the permissible exercise of franchising powers unclear, creates a risk of legal challenge and 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. An analysis of UK implementation of EU law also confirms that this uncertainty is, in part, a result of general uncertainty in EU law and policy that must be resolved. Second, it is argued that the DfT has taken some action in response to recent franchise failures but there remain potential areas for reform. Third, the DfT should think more strategically not just in terms of how the procurement process is regulated but also how procurement is used to respond to post-privatisation challenges. These include: increasing supra-national influences on rail, an evolving model of rail service provision including devolution, and growing expectations for greater public scrutiny of all forms of public contracting.

2. Context

2.1. Rail Franchising

Franchising comprises the following key aspects.[5] The Secretary of State (SoS),

[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

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 TOC, the DfT generally conducts a competitive procurement process through an invitation to tender (ITT). In conducting this process, the SoS and TOCs 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. A franchise agreement is then concluded with the winning TOC. The franchise agreement includes details of performance standards, penalties and termination in the event of failure. TOCs must also obtain licences from the DfT and the ORR to operate and pay track access charges to Network Rail. At the time of writing, there were sixteen franchises in England and Wales and two in Scotland.[8]

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 4.4.2, 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 in the procurement process and the Brown Review examined franchising more generally.[9] 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".[10] This included a number of recommendations, certain of which are explored in this article. There have also been regular Transport Committee, Public Accounts Committee and

---

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.

[8] 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.

[9] *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.

[10] *Brown Review*, p.8, para.1.11.

National Audit Office inquiries.[11]

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.[12] A second aspect concerns tendering, prescribing matters to be taken into account when issuing a tender and the circumstances in which no adequate tenders are received.[13] 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.[14] A final aspect concerns the SoS' duty to provide services where a franchise is terminated or ends.[15] Ancillary provisions in other sub-parts include orders for compliance and penalties for contravention of the terms of a franchise agreement.[16]

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.[17] Until recently, it was unclear to what extent rail services contracts, and, thus, rail franchises, must be procured in accordance with the Directives. It was possible to argue that franchises constituted Part B "non-priority" services under the 2004 Public Contracts Directive. These were not subject to the Directive's full application but certain provisions did apply, including technical

[11] 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; *Rail franchising in the UK*, Twenty-Fifth Report of Session 2017-19, 27 April 2018. At the time of writing, there is an ongoing inquiry into the Inter City East Coast franchise.
[12] S.23; S.24; S.24A; and S.25.
[13] S.26 and S.26ZA.
[14] S.27; S.28; S.29; and S.31.
[15] S.30.
[16] §55-58.
[17] 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.

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.[18] Historically, concessions were excluded for 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.[19] 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.[20] The Directives were recently reformed. Further, a new Concessions Directive was adopted filling an "important lacuna" in the Directives' coverage.[21] Some anticipated that the Concessions Directive would bring rail services within its scope.[22] However, all Directives now expressly confirm their exclusion.[23]

Rail contracts have been excluded because they now fall principally within the scope of other targeted EU secondary legislation, namely the Regulation on public service obligations for public passenger transport services by rail and road (PSO Regulation) adopted in 2007.[24] DfT policy and practice confirms this position domestically.[25] At the outset, it must be acknowledged that the PSO Regulation's impact has been very limited but nevertheless requires discussion given its relatively

---

[18] 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)).

[19] S Arrowsmith, *The Law of Public and Utiltiies Procurement, Regulation in the EU and UK: Volume I* (3rd ed. Sweet & Maxwell London 2014), para. 6-58.

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

[21] 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 (as implemented in The Concession Contracts Regulations 2016, S.I. 2016, No.273). See Arrowsmith, *The Law of Public and Utiltiies Procurement*, para.6-59.

[22] R Boyle, "The 'Fiasco' of the West Coast Rail Franchise and the European Public Procurement Rules" (2013) 6(22) International In-house Counsel Journal, 9.

[23] 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).

[24] 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.

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

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.[26] The PSO Regulation's purpose is to define how authorities may guarantee provision of transport services of general interest (i.e. those subject to specific public service obligations) by laying down conditions under which they will compensate operators for costs incurred and grant exclusive rights in return for their discharge.[27] In 2016, the Regulation was amended.[28]

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. [29] This concerns the attempt to introduce competitive tendering to enable monopolies to provide public services whilst continuing to preserve the integrity of those services. In the absence of a "communitised" definition and minimum content of services of general economic interest and public service obligations, it is difficult to attain any degree of meaningful harmonisation across Member States. [30] This has resulted in fairly general rules which retain considerable freedom of action for Member States. Further, in part, 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 to prevent unlawful State aid, rather than opening markets to competition.[31] This has 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".[32] However, it is questionable whether all franchises actually satisfy these definitions. 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 that the rationale for rules on

[26] 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).
[27] Article 1(1).
[28] 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.
[29] See generally, C. Maczkovics, "The Railways at the Crossroads of Liberalisation and Public Service" (2009) 4 E.P.P.P.L.R. 26.
[30] Maczkovics, "The Railways at the Crossroads of Liberalisation and Public Service", 36.
[31] 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.
[32] 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."

award is to address both disparities in procedures and the need for "common rules on award".[33] However, as indicated above, absent a consensus on a common definition and organisation of such services, the rules at best set minimum requirements as opposed to a framework for harmonisation. Far from constituting a "framework for public procurement" [34] 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.[35] For instance, as will be discussed in Section 3, the PSO Regulation requires competitive tendering but the amended PSO Regulation has considerably expanded the circumstances permitting direct awards and whose sheer number risks displacing competitive tendering as a general rule.[36] Further, to counter-balance this, it has introduced rules aimed at improving transparency regarding publication of contracts and reasons for decisions but 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. [37] For instance, the PSO Regulation states that review and remedies should be comparable, "where appropriate", to provisions under the procurement Remedies Directive.[38] It has been criticised 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.[39] Domestic law and policy do not 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."[40] However, domestic law appears to impose few constraints on stakeholders' ability to obtain standing for judicial review.[41] Further, as

[33] Recital 6 and Recital 24 amended PSO Regulation.
[34] Olykke, "Legislative Comment: Regulation 1370/2007 on public passenger transport services", 87.
[35] Arrowsmith, *The Law of Public and Utiltiies Procurement,* para. 6-70.
[36] Article 5(3); 5(3a); 5(3b); 5(4); 5(4a); 5(4b); and 5(5).
[37] 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 Contracts Directive which is of general application.
[38] 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 provisions relating to the application of review procedures to the award of public supply and public works contracts OJ L 395/33.
[39] 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.
[40] Department for Transport, *Franchise Competition High Level Process Map*, 24 April 2013.
[41] 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),

will be discussed in Section 4.4.2, violation of EU Treaty principles provides sufficient legal grounds for challenging the procedural conduct of the award process. An issue open to debate concerns whether there are other sufficient grounds under domestic law on which to challenge wider aspects of the procurement process, e.g. concerning public consultation. In addition to permitting judicial review and the application of EU Treaty principles, domestic policy also provides for certain review and remedies available under the procurement Directives. For example, 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.[42] 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,[43] ineffectiveness[44] and an express claim for damages[45] are not provided.

In light of the above, unsurprisingly, the PSO Regulation has been "poorly implemented". [46] As a directly applicable instrument that is highly generic, 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

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

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.

[42] Department for Transport, *Passenger Services: Franchise Competition Guide*, 4 February 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.

[43] 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.

[44] Ineffectiveness is unlikely to be significant in practice as it requires breaches which include breach of the standstill period which, as indicated, is routinely observed in the UK.

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

[46] 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).

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.[47] The SoS must publish a statement of policy in this regard.[48] In 2008, the DfT published a statement which was subsequently revised in 2013 in response to the Brown Review.[49] 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.[50] These provisions now seem largely redundant given that the PSO Regulation formally requires competitive tendering.[51]

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.[52] This is broadly compatible with the Public Contracts Directive which requires a minimum of three bidders.[53] 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.[54]

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; further, the procedure may involve negotiations in order to determine how best to meet specific or complex requirements.[55] The initial proposal for a Regulation provided for a procedure according to which the operator would be selected on the basis of a comparison of the quality of the

[47] S.26(1).
[48] S.26(4A).
[49] 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.
[50] Statement, 4, para.7, stating further that selection will be in accordance with the SoS' obligations under EU Treaty principles of equal treatment, non-discrimination and transparency.
[51] Article 5(3).
[52] 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.
[53] Article 65.
[54] *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.
[55] Recital 22 and Article 5(3).

proposal; however, this was not included in the final text.[56]

3.2. Direct awards

Whilst the assumption should be that direct awards are the exception to the general rule of competitive tendering, circumstances in England have been complicated by the suspension of the franchising programme mentioned 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.[57] 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.[58] However, for reasons that will be explained, there has since been a profusion of direct awards both for strategic reasons 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.

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 competitive tendering as a policy preference. 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.[59] 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.[60] 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

[56] *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.
[57] *Brown Review*, p.60, para.8.5.
[58] *ibid*., paras.8.4 and 8.5.
[59] Recital 26 and Maczkovics, "The Railways at the Crossroads of Liberalisation and Public Service", 34.
[60] 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.

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.[61]

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.[62] In response to the DfT's consultation on the proposed revised 2013 policy statement following Brown's recommendation, TOCs also expressed concern 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.[63]

The SoS was "strongly encourage[d]" to make it clear "beyond reasonable doubt" the circumstances when a direct award will be made.[64] 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.[65] 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).[66] 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.[67] However, aside from the fact that (a) and (b) are easily conflated, TOCs have criticized its open-endedness, anticipating flexibility without prescribing any

[61] Recital 30.
[62] S.26(4B).
[63] Greater Anglia and Northern Rail consultation responses to the draft policy Statement, 28 February 2013, para.18. The authors are grateful to the DfT for providing the consultation responses pursuant to a Freedom of Information Act request (responses retained on file).
[64] *ibid*., para.5.
[65] According to the 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.
[66] 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.
[67] *Brown Review*, p.21, para.3.4.

"boundary conditions" for use.[68] 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.[69] 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.[70]

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.[71] Again, TOCs and passenger groups have criticised the lack of certainty of meaning and the addition of "reasonable opinion" as generic and subjective.[72] The PSO Regulation provides for a direct award as an "emergency measure" in the same circumstances but omitting reference to reasonable opinion or practicability.[73] In 2014, the rail unions brought a judicial review against a direct award for the Thameslink Southern Great Northern (TSGN) franchise under the PSO Regulation emergency ground.[74] The application was denied for being out of time but it was argued that a competitive procedure should have been followed, on the basis that there was no emergency because this ground should be interpreted as strictly analogous to circumstances permitting direct awards under the Public Contracts Directive.[75] As discussed in Section 2.2, it is debatable whether the PSO Regulation grounds should be treated as analogous to the "derogations" under the Public Contracts 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

[68] Greater Anglia and Northern Rail consultation response, 28 February 2013, para.17.
[69] Recital 21 and Article 5(3a) amended PSO Regulation.
[70] 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.
[71] Statement, para.10.
[72] Northern Rail consultation response to the draft policy Statement, para.5 and Transport for London consultation response, para.3.
[73] 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.
[74] *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).
[75] These include: Article 31(1)(b) and (c) 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.

recourse to arguments under EU law in this case) also risks a perception that preferential awards may easily be made under the pretext of an "emergency".

The 1993 Act also equivocally states that the policy statement must identify the "means" by which selection will be made on the basis of a direct award.[76] According to the policy statement, the SoS will consider all relevant factors including EU Treaty principles; a list of very broad factors is identified.[77] However, it is unclear whether these means could be construed as award criteria. This risks both 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".[78] The DfT did not clarify such criteria in the final text. As will be discussed in Section 5, the policy statement suggests that these factors are also relevant to the determination of whether to appoint a public sector operator of last resort, even though the 1993 Act makes no reference to the basis on which an operator of last resort will be selected.

Further, the DfT has recently stated that it has an "established and tested system of Direct Award".[79] However, it is only established and tested to the extent that there have been so many direct awards. There is little published detail on what this "established" process actually entails. 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.[80] However, it only provides a basic process diagram. It appears that the only publicly available information concerns a Ministerial Response to a Transport Committee question. This is no more detailed than a general statement to the effect 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.[81] Any "challenge" appears to be purely internal amongst those decision-makers within the DfT and the TOC responsible for delivery.[82]

---

[76] S.26(4B).

[77] 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.

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

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

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

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

[82] The DfT has been similarly vague in its explanation of how it proposes to test the option of a direct award for the Inter City East Coast franchise (the other option being an operator of last resort).

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".[83] It has been suggested that the inclusion of broad circumstances does not represent a progressive step for the EU railway sector.[84] The UK pressed for limiting and subjecting direct awards to objective criteria when negotiating the amended PSO Regulation but has itself refrained from taking any domestic initiative. Ultimately, unless an EU-wide consensus is reached on 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 Member States from taking a lead in developing transparent and accountable direct award policies domestically.

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 (not to be confused with the policy statement) setting out in more detail the general procurement process and demonstrating how assurance and approval is built into the system. 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

The 1993 Act does not prescribe requirements for publication of contract opportunities and contract award decisions. Brown recommended that, in order to ensure earlier planning and engagement, the DfT should regularly seek to inform the market about upcoming competitions through the use of Prior Information Notices (PINs).[85] The Government has responded to this recommendation.[86] Passenger Services now

[83] 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.
[84] Grith, "Legislative Comment on Regulation 1370/2007", 89.
[85] *Brown Review*, p.40, para.5.14.
[86] *Government Response to the Brown Review of the Rail Franchising Programme*, p.17, paras.4.2-4.3.

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.[87] 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.[88] 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.[89]

Both the Franchise Competition Guide and direct award process guide also refer to the publication of a contract award notice issued through the OJEU.[90] 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.[91] 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.[92] The DfT also publishes directly awarded franchise agreements.[93]

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.[94] Tighter specifications leave little room for innovation by bidders but are easier for the DfT to evaluate; looser

[87] In accordance with Articles 5(6) and 7(2) PSO Regulation.
[88] 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).
[89] Article 5(3b) amended PSO Regulation.
[90] *Franchise Competition Guide*, para.4.41.
[91] Articles 5(3a) and 4(4b) amended PSO Regulation. See also Article 7(3).
[92] para.11.
[93] 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).
[94] *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.

specifications may invite innovation but requires greater expertise to evaluate.[95] For inter-city franchises, flexible specifications have usually been considered more 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.[96] TOCs have criticised an increasing tendency to include specifications which are too prescriptive in terms of focusing on inputs rather than outputs,[97] thereby increasing micromanagement and reducing flexibility.[98] Brown recommended that: inputs should be specified only for very specific purposes;[99] specifications should give flexibility for bidders to offer more resource efficient ways of delivering services;[100] and the DfT should engage with industry to agree a framework for specifying train service requirements.[101] 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.[102] The Government has since stated that it is testing a wider use of outcome-based specifications.[103]

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 prescriptive specifications to meet.[104] 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 task 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

---

[95] *Brown Review*, p.38, para.5.7.
[96] *ibid*., pp.15-16, para.2.11.
[97] 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 Review*, p.16, para.2.12.
[98] *ibid.*, p.15, para.2.9 and 2.10.
[99] *ibid.*, p.38, para.5.8: "[f]or example to protect socially necessary and economically important services or realise the benefit of Government investment".
[100] *ibid*., para.5.9: "for instance by allowing flexibility in the distribution of stops between different service groups operating on the same route."
[101] *ibid.*, pp.39 and 40, paras.5.9 and 5.10.
[102] *ibid.*, pp.10 and 15-16.
[103] 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.
[104] House of Commons Transport Committee, *Rail franchising*, Ninth Report of Session 2016–17, 30 January 2017, p.34.

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 resolved through an amendment to the contract.[105] Of course, this runs 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.[106] There are no express provisions regarding consultation of other parties at any other stage 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".[107] 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.[108] 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. As indicated in Section 4.2, the 1993 Act provides that the SoS must first consult the ORR before issuing an ITT. During debate on the Railways Bill, it had been questioned why consultation was exclusively confined to the Regulator.[109] As will be discussed in Section 6.2.4, who should be consulted in relation to what aspect of

[105] 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, 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.
[106] S.26(2).
[107] Network Rail, *System Operator Strategic Business Plan*, February 2018, p.132.
[108] 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.
[109] HL Deb 05 July 1993 vol 547 cc1145-96.

franchise procurement 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 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, service specifications and quality measures to be applied in the evaluation and in the contract.[110] The DfT has since implemented this recommendation but for largely practical reasons, namely to reduce the number of questions raised by bidders clarifying the ITT.[111] To this extent, the UK achieves a fair degree of stakeholder participation which enhances transparency and accountability.

However, consultation response rates vary considerably for different franchises.[112] Consultation documents comprising 60-70 pages have proven to be difficult to understand and there have been irregular consultations with transport groups for some franchises but not others.[113] Further, there is uncertainty regarding how the consultation process should be properly conducted. For example, one issue at the heart of the 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.[114]

In terms of legal issues, in 2016, Enfield Borough Council brought a judicial review concerning the DfT's decision to exclude from the ITT for East Anglia franchise a service proposed during consultations.[115] On appeal to the Court of Appeal, Enfield argued that, as a result of correspondence assuring it 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

[110] *Brown Review*, p.41, para.5.16.
[111] *Government Response to the Brown Review*, p.18, para.4.7.
[112] 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.
[113] *ibid*., pp.30-31 and evidence cited therein.
[114] 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.
[115] *R (on the application of London Borough of Enfield) v Secretary of State for Transport* [2016] EWCA Civ 480. 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.

expectation.[116] 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."[117] 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.[118]

This challenge raises many issues. One is that it demonstrates just how difficult it is to try to hold the DfT to franchise specifications stated in DfT documents when the Court tends to treat them as "aspirational".[119] Another is that it is unclear who is lawfully permitted to participate in consultations. The Court 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.[120] 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 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 consultations.

4.4. Qualitative selection

Another aspect that has proven to be problematic concerns qualitative selection, i.e. the assessment of the bidder as opposed to the bid. However, the 1993 Act contains limited provision on qualification, e.g. in terms of grounds for excluding bidders for past poor performance, their economic and financial standing and technical capability. It simply provides that the SoS must not issue an ITT (or entertain a tender from) any

[116] Paras. 52-56.
[117] Para.49.
[118] Para.61, referring, in particular to S.23; S.26(2) and S.29(5).
[119] Para.70.
[120] Para.54.

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.[121] Similarly, the PSO Regulation does not contain such provisions.

4.4.1. Pre-Qualification

Whilst legal provision is limited, the DfT has, for a number of years, used "pre-qualification questionnaires" (PQQ) to assess bidders' 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. [122] In response, in 2015, the DfT introduced the PQQ Passport. The Franchise Competition Guide links it expressly to the 1993 Act provision on suitability.[123] TOCs must make an application for a Passport by completing a PQQ questionnaire following the procedure identified in a Passport Process Document.[124] 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.[125] 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.

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.[126] However, certain provisions directly import their wording, e.g. there is discretion to reject an applicant if found guilty of grave professional misconduct[127] or if 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

[121] S.26(3).
[122] *Brown Review*, p.40, para. 5.15.
[123] *Franchise Competition Guide*, para.3.40.
[124] Department for Transport, *Passport Pre-Qualification Questionnaire*, September 2015 and Department for Transport, *Rail Franchising Passport Process Document*, September 2015.
[125] Process Document, para.2.5.
[126] However, the *Franchising Competition Guide* at p.25 states that the PQQ process must observe EU Treaty principles.
[127] Cf Recital 101 and Article 57(4)(c) Directive 2014/24/EU.

action taken under s.55 of the 1993 Act.[128] If so, the Applicant has to provide information regarding the conduct, payment of compensation and whether measures have been taken to prevent recurrence.[129] If the authority considers that any information in a Passport Application is no longer correct, it may exclude that party from further participation in any franchise competition and consider cancellation or suspension of the Passport.[130] This domestic EU-inspired initiative has been a qualified success with PQQ passports awarded to TOCs in the UK and internationally.

However, questions have recently arisen as to whether the PQQ process effectively dis-incentivises TOCs from overbidding and defaulting. In February 2018, it was announced that the current Virgin Trains East Coast (VTEC) franchise will be terminated.[131] VTEC overbid in promising to deliver £2.3bn of premium payments based on higher revenue forecasts than what has materialised. This is estimated to have cost VTEC £186 million.[132] 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; the consortium was otherwise meeting its financial obligations with support from its parent company and operating services successfully. The SoS will simply keep its future eligibility under constant review.[133]

Ultimately, it is difficult for the procurement process to effectively test bids based on projections of future revenues based on 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. However, the DfT has stated that it has refined the way it tests bids against a "downside scenario".[134] Despite this, the DfT maintains that this does not remove the possibility of future default and that, following Brown's findings, it is not sensible to design franchise structures that seek to eliminate completely the risk of default.[135] Nevertheless, serious questions must be asked about whether the DfT has done enough to reduce, or is even complicit in, a conspiracy of optimism. Bring Back British Rail has argued that Brown was not suggesting that franchises should be allowed to fail subject to payment of compensation; rather, failure is only justifiable on the basis

[128] See C1.7. Cf Recital 101 and Article 57(4)(g) Directive 2014/24/EU.
[129] PQQ, p.22.
[130] 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.
[131] Statement by Chris Grayling, 05 February 2018, Hansard, Volume 635, Column 1238.
[132] Department for Transport, *Short-term Inctercity East Coast train operator 2018 options report*, p.1.
[133] *ibid*. See also *Options Report*, p.2, para.3.
[134] *Options Report*, p.3, para.5.
[135] *ibid.*

that the DfT demonstrates its ability to deal with that failure.[136] The DfT continues to drip-feed information about how risk is assessed but only in response to inquiries; there is no publicly available documentation outlining DfT policy on the assessment of economic and financial risk in franchises.

A broader policy issue relevant to procurement in all contexts, is if, and to what extent, qualitative selection should be used as an instrument for deterring the consequences of over-optimism, namely deficient or failed performance.[137] On the one hand, the DfT appears to consider that the £186 million loss incurred by VTEC alone sends a "strong message" to deter overbidding.[138] 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.[139] The case seems speculative, as the legal and policy framework is presently configured in such a way that the SoS exercises consideration discretion on this sensitive issue. 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.

Another issue concerns how to identify and investigate conduct meriting sanctions. It is unclear what constitutes a significant deficiency in performance of a substantive requirement, rendering a TOC unsuitable and entitling cancellation or revocation of passports. The same is the case in relation to the comparable ground for rejection under the Directives.[140] 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. At the risk of presenting an unbalanced assessment in favour of the DfT, it should be added that there is also little

[136] Leigh Day, Pre-action Letter.
[137] P Telles and G S Olykke, "Sustainable Procurement: A Compliance Perspective of EU Public Procurement Law", 246 identifying the exclusion grounds as provisions inducing regulatory compliance, for example, through deterrence.
[138] *Options Report*, p.2, para.2.
[139] Leigh Day, Pre-action Letter.
[140] For general commentary on this ground, see Arrowsmith, *The Law of Public and Utiltiies Procurement*, paras.12-104-12-106,

clarity for TOCs in terms of due process in the conduct of investigations and who may suffer reputationally. Section 6.2.4 revisits some of the potential issues facing qualitative selection in this context.

4.4.2. Capital requirements

Another major issue that has arisen concerns the design and assessment of capital requirements which bidders must meet 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. It has been observed that three matters could have, in principle, founded a challenge.[141] 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.[142] Bidders therefore remained unable to calculate the SLF.[143] Secondly, there was inconsistency and inequality. A NAO investigation could not confirm whether answers to clarification questions were consistent and communicated to all bidders.[144] Further, the DfT used data to derive one factor to risk-adjust bids but applied another.[145] 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.[146] Thirdly, there was an erroneous exercise of discretion resulting in unequal treatment.[147] The tender stated that the DfT would "determine" the size of the SLF. Legal advisors cautioned that the subsequently issued guidance on calculating the SLF may have limited its

[141] R. Boyle, "The 'Fiasco' of the West Coast Rail Franchise and the European Public Procurement Rules", 8.
[142] NAO, *Lessons from cancelling the InterCity West Coast franchise competition*, para.4.10.
[143] *ibid*., para.4.11.
[144] *ibid*., para.4.13.
[145] *ibid*., para.4.18.
[146] *ibid*., paras.4.22-4.24.
[147] 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*).

discretion in this regard but the Contract Award Committee went on to apply discretion notwithstanding.[148]

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 include in excess of £200 million) and are more onerous than for foreign state-owned enterprises which have different risk capacity and cost of capital.[149] Brown recommended: simplified liquidity requirements; an on-demand bond for each franchise; and a default indemnity supported by the franchisee's parent company.[150] In response, the Government undertook a review of capitalisation in franchise bidding. Again, the 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.[151] Such requirements have been included in recent franchises, with requirements for up to fifty percent of the guarantee being bonded by a suitable provider.[152] 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.[153] 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.[154] Again, the details of this mechanism have not been published. Section 6.2.4 discusses whether there is scope for imposing further regulatory controls in this area.

4.5. Award criteria

A final aspect 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

[148] NAO, *Lessons from cancelling the InterCity West Coast franchise competition*, paras.4.25 and 4.26,
[149] *Brown Review*, p.22, para.3.5.
[150] *ibid*., pp.29-31.
[151] *Government response to the Brown Review*, p.14, para.3.6.
[152] See for example, Department for Transport, *South Eastern Rail Franchise Prospectus, Shaping the Future*, March 2017, p.26.
[153] Transport Committee, *Rail franchising*, p.43.
[154] *Government response to Transport Committee*, p.2.

provided in the Directives.[155] 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.[156] 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.[157] This lack of detail is unsurprising. As Brown observed, there is no "one size fits all" evaluation framework.[158] 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.[159] 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.[160]

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, 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.[161] 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.[162] Brown recommended retention of NPV but that there should also be an overt and direct weighting for quality and deliverability.[163] A number of quality attributes were recommended for application on a franchise-by-franchise basis.[164] An overall weighting of 20-40% for quality was envisaged.[165] Brown also proposed a separate "financial assessment". This would confirm the affordability and value for

[155] Cf Article 67 Directive 2014/24/EU.
[156] *Franchising policy statement*, p.4, para.8.
[157] *Franchise Competition Guide*, pp.35 and 44.
[158] *Brown Review*, pp.42-42, para. 5.25.
[159] *ibid*.
[160] Passengerfocus response to consultation on the draft policy Statement, 28 February 2013
[161] *Brown Review*, para.5.21.
[162] *ibid*.
[163] *ibid.*, p.9, Recommendation 1.17.
[164] *ibid.*, para. 5.25.
[165] *ibid.*, para.5.33.

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.[166]

The Government responded to most of these recommendations.[167] The Transport Committee has found that there is undoubtedly an increased emphasis on passenger experience and service quality in recent specifications.[168] Nevertheless, it is assumed across industry that cost remains the overarching and determinative factor. 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.[169] Section 6.2.4 considers recent reform proposals for increasing understanding of how evaluation is conducted by applying award criteria.

5. Public sector operators

This article has so far examined the role of the private sector in franchise procurement. However, the important role of the public sector should not be overlooked. Consistent with an ostensible policy of total privatization, Section 25 of the 1993 Act provides 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.

First, this prohibition only applies to public sector operation in England and Wales. In Scotland, public sector operators can bid for a Scottish franchise.[170] 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.

Second, 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 which it controls) may provide services but must not take part in competitive tenders organized outside its territory.[171] 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

[166] *ibid.*, paras. 5.28 and 5.29.
[167] *Government Response*, p.19, para.4.15.
[168] Transport Committee, *Rail Franchising*, p.31.
[169] *ibid*.
[170] S.57 Scotland Act 2016 amending s.25 1993 Act.
[171] 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.

of British private TOC access to European rail markets.[172]

Third, a public sector operator may be appointed as a last resort if a franchise is terminated. Section 30 of the 1993 Act contains a brief provision imposing a "duty of authority" which requires 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.[173] The SoS is not required to do so where, in their opinion, adequate alternative services are available.[174] According to the similarly sparse policy statement, the services of a public sector "operator of last resort" (OLR) may be secured 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.[175] In other words, there are at least two options before considering a public sector operator

Notwithstanding, a public sector 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).[176] DOR successfully ran services until 2015 at which point the DfT decided to discharge the S.30 duty "in-house", wind-down DOR and pass services to Virgin.[177] 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.[178] Further, 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

---

[172] *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.

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

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

[175] *Franchising policy statement*, p.6, para.15.

[176] 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.

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

[178] 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.

payments at the end) or (2) transferring the operation to an OLR.[179] 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.[180] 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 may placate calls for complete renationalization.

The VTEC termination highlights several issues concerning the S.30 duty.[181] Firstly, this report is not statutorily required.[182] Thus, at the very least, it demonstrates a commitment to some degree of transparency, albeit *ex post* given that the option has already been chosen. It is, however, anomalous as the DfT does not similarly publish a report when considering whether to make a direct award, e.g. between an incumbent or new TOC.

Secondly, the rationale for, and and propriety of, using an OLR 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 proposed East Coast public-private partnership competition and indeed, can even be instrumentalised to actively develop a "major new franchising approach" in a way that "is not typically the case".[183] 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.[184] The DFT attempts to further justify the decision to appoint an OLR on the basis that, if the DfT were to make a direct award to VTEC, it may confer unfair

[179] Department for Transport, *Short-term Intercity East Coast train operator 2018 options report*, May 2018 Cm 9617.
[180] *Options Report*, p.10, para.16.
[181] See generally, L. Butler, *Written Evidence to the Transport Committee Inquiry into the Inter City East Cast Rail Franchise*, 8 June 2018.
[182] The report appears to follow the NAO's earlier 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.
[183] *Options Report*, p.16, para.33.
[184] 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."

advantages on it in the bidding process for the PPP.[185] Yet, the same can be said of any interim direct award made to a private sector TOC pending a new franchise competition. The DfT has not previously mentioned such risks and the need to safeguard against them pending a new franchise 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 direct award versus OLR assessment is made are sufficiently robust. The report states that the options are considered in accordance with the key principles set out in the policy statement;[186] the SoS also highlighted that there were a number of other criteria relevant to the assessment of value for money.[187] Yet, the report states that the assessment of options against these principles did not find strongly in favour of either option.[188] Of course, it is possible for the principles and criteria to be sound but lead to an inconclusive result in their application. More likely, it suggests that they 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, the criteria highlighted by the SoS as relevant to the assessment of value for money are not, in fact, expressly stated in the policy statement. Moreover, a cursory reading of the report's assessment suggests that it is difficult to discern whether its findings on the monetized versus non-monetised benefits are 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.[189] The DfT did not provide any in response at the time. There is no other detailed guidance regarding exercise of the S.30 duty.[190] 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

[185] *ibid.*, p.16, para.33.
[186] *ibid.*, p.8, para.15.
[187] 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: *Options Report*, p.8, para.15.
[188] *ibid.*, p.1.
[189] Rail future and ATOC consultation response to the draft policy Statement, 1 March 2013.
[190] 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.

for the future operation of East coast services through a PPP.[191]

Ultimately, the report describes the OLR as an "integral part of the franchising system".[192] Yet the appointment and exercise of the OLR function is subject to sparse provision in S.30 and policy. 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; this is largely attributable to the fact that it is easy to ensure compliance with EU law which excludes the procurement of rail services from the Directives and subjects them to a generic PSO Regulation. Further, there have been attempts to use procurement to improve accountability and transparency in the design and delivery of rail services. 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 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 of this article, this section explores just some areas that could be the subject of closer inspection.

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 explore these challenges but some may be proffered here.

[191] *Options Report*, p.1.
[192] *ibid*.

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 various areas in which EU law has heavily influenced 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 […].[193]

Further, globalisation of rail service provision is also evidenced by the extent of foreign TOC involvement in domestic franchise competitions which extend as far as China and Japan. This may require a reconsideration of whether domestic policy on the prohibition of public sector bidders should be revisited and which is discussed in more detail in Section 6.2.2 below.

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 the East Coast PPP 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 more "responsive".[194] 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".[195] Any procurement specialist will acknowledge that there are some similarities between procuring one-off or repeat services and long-term PPPs with operating risk transferred to the operator; however, there are also major differences which must be reflected in regulation 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

[193] 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).
[194] See *Options Report*, p.7 for an outline of the proposed East Coast Partnership.
[195] *ibid.*, p.15, paras.27 and 28.

should this model be replicated as has been intimated.[196] 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 (e.g. risk transfer).

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 historically 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 and protects these broader expectations.

6.2. Reform

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

6.2.1. Responsibility

The UK has a troubled history of designating responsibility for franchising. [197] 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 a clear line of authority on key procurement decisions. The Brown Review therefore placed particular emphasis on clarifying roles and responsibilities. [198] 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

[196] Department for Transport, *Connecting people, a strategic vision for rail, Moving Britain Ahead*, 29 November 2017, p.35, para.3.41.
[197] 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.
[198] *Brown Review*, pp.54-56, paras. 7.3-7.11.

one team headed by a Managing Director as the senior responsible owner.[199] 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.[200] Debate is now shifting away from concerns about who controls competition to accountability and 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.[201] 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.[202] 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 and 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. The

[199] *Franchise Competition Guide*, p.5.
[200] M. Lodge, *On Different Tracks, Designing Railway Regulation in Britain and Germany* (Praeger Conneticut 2002), p.131.
[201] J. Alderson, *Pubsect franchises*, Rail Future 30 September 2014. https://www.railfuture.org.uk/article1513-Pubsect-franchises (last accessed 20 April 2018)
[202] Joanna Whittington, Response to Q33 in Oral Evidence, to the Transport Committee, Rail Franchising Inquiry, HC 66, 5 September 2016.

gradual “normalisation” or “creep” of public sector involvement in all its forms (e.g. use of OLR and PTE involvement in regional services) over time was not predicted during debate on the Railways Bill. A fundamental question is whether it is possible to reconcile or accommodate public sector provision within an ostensible system of privatised rail.[203]

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.[204] However, it is submitted that this proposed strategy and others like it would be as blunt as the current prohibition. Whether rail remains privatised or is renationalised, 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. If this were to be considered impractical, it is recalled from Section 5 that the OLR jurisdiction is being (mis)used to appoint a public sector operator to test and build capacity for the pending 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 during the evaluation of bids. 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, the Borders and locally in recent years and recommended further devolution to English regions which the Government supported.[205] Concerning nations, the 1993 Act as amended enables Scottish Ministers to designate Scotland-only and certain

[203] The author is grateful to Dr. Mark Wilde for discussions on this wider issue in the article.
[204] Labour Party Manifesto 2017, pp.90-91.
[205] *Brown Review*, p.9, para.1.18 and p.37, paras. 5.4 and 5.5 and *Government response to the Brown review*, p.10.

cross-border services.[206] Scottish Ministers can also publish a policy statement concerning ITTs.[207] There are currently two such franchises, ScotRail and the London-Scotland Caledonian Sleeper. Conversely, there has been more limited devolution in Wales. The Welsh National Assembly had sought amendment of the 1993 Act to enable it to operate rail services but this was rejected. However, the 1993 Act as amended does provide that the SoS must 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.[208] The Welsh Government was a co-signatory to the Wales and Border franchise which it has since taken over.[209]

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.[210] 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.[211] 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".[212] 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.[213] The exemption of services is subject to certain statutory controls.[214] The power to make a de-designation order is exercisable by statutory instrument subject to the negative resolution procedure.[215] 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.[216]

---

[206] S.23 as amended by the Railways Act 2005.
[207] S.26(4).
[208] S.10(1) and (2) Railways Act 2005.
[209] 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).
[210] S.175 Greater London Authority Act 1999 as amended and §15 and 17 Railways Act 2005.
[211] S.13(1) and (7).
[212] S.24(1) 1993 Act as amended.
[213] 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).
[214] S.24(6) 1993 Act as amended.
[215] This procedure permits a Statutory Instrument to become law without full debate in Parliament unless there is an objection.
[216] P. Cotton, *Delegated Powers and Regulatory Reform Committee Draft Deregulation Bill, Memorandum by the Cabinet Committee*, 18 September 2013, paras.187 and 188.

In 2015, the Deregulation Act removed restrictions on the provision of passenger rail services by PTEs in England.[217] 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.[218] Instinctively, the extension of provisions on franchising *mutatis mutandis* to exempt services seems contrary to the deregulation objective, given that it introduces more regulation. The purported rationale is 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.[219] It is also said to be consistent with the Brown Review.[220] Influential thinktanks have called for some regional transport bodies to take over franchising activities.[221] 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.[222] Regional bodies like TfN may prefer these routes not least because they achieve a degree of devolution without requiring significant legislative reform.

It is debatable whether regional bodies could be bolder in arguing the case for entirely new and more comprehensive statutory powers. The choice of decentralization through de-designation of services can be criticized. The continuing treatment of regional rail service provision as an "exemption" to franchising denies the growing importance of regional governance in practice as well as new ways of thinking about how rail services can be more effectively regulated. Simply copying and pasting regulation applicable to inter-city franchises to regional services could be viewed as a blunt strategy that fails to take account of different aims, objectives and requirements of regional rail service provision. Further, it is recalled that such

[217] S.49.
[218] Schedule 8, para.8.
[219] Statements by Tom Brake, Public Bill Committee, Deregulation Bill, Ninth Sitting 11 March 2014 (Morning), 284.
[220] House of Lords Joint Committee on the Draft Deregulation Bill, Draft Reregulation Bill, Oral and Written Evidence, p.280.
[221] Institute for Public Policy Research, *Greasing the Wheels: Getting our Bus and Rail Markets on the Move*, August 2014, p.5.
[222] Greater Manchester Combined Authority, Report to enable GMCA to consider whether there should be a sub-national transport body (STB) in the North and whether it wishes to become a constituent authority of Transport for the North (TfN), 29 July 2016. Available at: https://webcache.googleusercontent.com/search?q=cache:xCU2qd0tCDAJ:https://www.greatermanchester-ca.gov.uk/download/meetings/id/1126/10_transport_for_the_north+&cd=1&hl=en&ct=clnk&gl=uk (last accessed 20 April 2018).

exemptions are granted through secondary legislation to ensure that the SoS retains overall control, facilitating continuity rather than enabling change. [223]

Concerning procurement specifically, this also means that there is now asymmetry of legal and policy provision. The Deregulation Act extends franchise management and enforcement provisions to exempt services but is silent on the exercise of 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. [224] The options proposed would have included devolution of procurement with varying degrees of control retained by the DfT but these were not subsequently developed.[225] 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.[226] Brown also recommended that the policy statement could include how the SoS would consider devolving responsibility as appropriate.[227] However, the revised 2013 policy statement contains no such guidance. There are no equivalent regional procurement policy statements. On one hand, this means that regional transport bodies retain flexibility to develop their own policies suited to their needs. On the other hand, this may create variation across Great Britain. 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 unitary legal framework based on centralisation is sufficient to meet demands for an increasingly diverse and decentralised rail system.

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 to do so 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

[223] Cabinet Office Memorandum 2013, p.38, para.182 and p.39, para.186.
[224] Department for Transport, *Rail Decentralisation, Devolving decision-making on passenger rail services in England*, March 2012. See also Consultation responses, November 2012.
[225] 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.
[226] *Brown Review*, p.38, para.5.6.
[227] *ibid.*, p.60, para.8.4.

Regulation and, if not, whether the PSO Regulation is a suitable instrument for attaining the EU's objectives towards long-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 and whose procurement processes have proven to be susceptible, and subject, to legal challenge. It is worth emphasising 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.[228] There are many arguments for and against more detailed regulation through legislation and policy but it is difficult to deny an instinctive sense that the underlying statutory framework is very "light touch", all things considered.

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. Brown's recommendations focused extensively on policy reform including of key policy documents. These documents are considered to be important for a host of reasons. 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 and what reliance should be placed on it. 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.[229] If stakeholders disagree as to the intended nature and effect of policy, the DfT can hardly be criticised for producing generic guidance which offers little of substance.

Concerning the conduct of the procurement procedure, this article has identified several areas in which there is legal and practical uncertainty. Concerning specifications discussed in Section 4.2, it unlikely to be possible or desirable for

[228] *ibid.*, p.16, para.2.14.

[229] 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.

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 improve participation in decision-making on specifications. It is recalled that, in some instances, it has not even been possible to specify 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.[230] This includes provision of a formal Network Rail input and positions to the proposed Expression of Interest, ITT and the bid evaluation.[231] The objective is to develop specifications at a much earlier stage and provide clearer alignment with network rail capability and capacity.[232] 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.[233] However, Network Rail has itself stated that it continues to receive only redacted versions of bids omitting many key commercial details and is not permitted to "sign-off" Train Service Requirements (TSRs).[234] There is scope for debate on whether the 1993 Act and/or policy could formalise the System's Operator role, e.g. regarding rights to access information and to approve TSRs, subject to oversight to ensure that this does not operate as a "veto". At the very least, the involvement of actors other than the DfT in the procurement process is a first step to improving decision-making, provided that it does not lead to loss of the DfT's overall decisional responsibility and accountability.

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.[235] 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 DfT has expressed its support which is unsurprisingly devoid of any enforceable

[230] Systems Operator, *Strategic business plan*, p.10, p.52.
[231] *ibid*., p.71.
[232] *ibid*., p.87.
[233] 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."
[234] 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.
[235] House of Commons Transport Committee, Fourteenth Report, 5 November 2006.

commitment.[236] This shift from proposed legal reform to vague policy reform could be due to improved consultation in recent years rendering the case for statutory reform unnecessary. However, again, it may reinforce the earlier point that 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 in consultations at different stages and how consultation proposals correspond to ITT requirements in order that expectations about service provision are clear.

Concerning qualitative selection discussed in Section 4.4, it is recalled that the 1993 Act contains only a single provision on "suitability". It is worth emphasising that during debate on the Railways Bill in 1993, it was questioned what this provision actually meant.[237] Yet, franchise failures have exposed many issues in this regard. There is scope for policy debate on the role which qualitative selection can play when dealing with issues of deficient performance. There is also scope for more joined up thinking about how procurement policy and management/enforcement are linked. For example, the fact that a franchisee has been the subject of 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 Southern Rail in failing to clearly identify 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.[238] If the DfT is reluctant to take enforcement action, a means of identifying poor past performance during qualitative selection is necessarily limited.[239] Fundamental uncertainty as to how to deal with deficient performance has been longstanding. For a number of years, it had been questioned whether it would be legally possible and politically desirable to terminate a defaulting franchisee's other franchises ("cross-default"), as this possibility was not expressly excluded in franchise agreements.[240] Regarding capital requirements, the NAO has observed that the DfT could learn from other areas of government where regulators ensure formal

[236] *Government response*, p.5.
[237] See HL Deb 05 July 1993 vol 547 cc1145-96.
[238] Department for Transport, *Enforcement policy: Rail Franchise Agreements and Closures*, July 2008, pp.11 and 17.
[239] 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.
[240] D. Milmo, 'More National Express franchises could be nationalised' The Guardian, Thursday 2 July 2009.

processes of industry consultation and dialogue (as opposed to informal unpublicised consultations) in formulating appropriate financial guarantee requirements.[241] The DfT could also publish clear policy statements on approaches to capitalisation and risk.

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"; scoring is only seen internally by the DfT which limits transparency and acts as a "a barrier to trust" in the system.[242] 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 basis, in terms of quality and price, on which a franchise has been awarded.[243] 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.[244] 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, e.g. the cost of 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. It has shown that domestic law and policy is generally compatible with a generic regime governing public service obligations under EU law. Further, there have been attempts to use the procurement process to improve transparency and accountability in the design and delivery of franchises. However, there remains legal uncertainty. The SoS has unclear franchising powers which risk fettering discretion and exposure to legal challenge. It is also difficult for stakeholders to challenge franchise procurement

[241] NAO, Lessons from cancelling the InterCity West Coast franchise procurement, p.30, para.4.7.
[242] Transport Committee, *Rail franchising*, Ninth Report, p.31 citing evidence given by Stephen Locke from London Travelwatch.
[243] *ibid.*, pp.31-32.
[244] 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).

effectively through judicial review. There is also practical uncertainty. There is a sense that the legal and policy framework does not present clear options for the SoS and DfT to act in the event of certain contingencies which are becoming more common. Further, TOCs and passengers expect predictability in the franchising programme and which may be compromised by lack of certainty 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. Both aspects are confronted by certain post-privatisation challenges. This article has not advocated specific reforms and it does not necessarily envisage a comprehensive regulatory code for procurement and management. There would be many arguments for and against a new "Rail Services Act", for example. Rather, this article has focused on procurement in order to generate a more rigorous legal debate on rail generally. The train has already left the station: it is time for legal discourse to catch up.