

**Which? super-complaint to the
Office of Rail and Road
Compensation arrangements in the
market for passenger rail services**

21 December 2015

Which?

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About Which?

Which? is the largest independent consumer organisation in the UK with more than 1.2 million members and supporters. We operate as an independent, a-political, social enterprise working for all consumers and funded solely by our commercial ventures. We receive no government money, public donations, or other fundraising income. Which?'s mission is to make individuals as powerful as the organisations they have to deal with in their daily lives, by empowering them to make informed decisions and by campaigning to make people's lives fairer, simpler and safer.

Which? is a designated body under Section 11 of the Enterprise Act 2002, able to make super-complaints that 'any feature, or combination of features, of a market in the United Kingdom for goods or services is or appears to be significantly harming the interest of consumers'. This document and annexes form a super-complaint to the Office of Rail and Road.

Introduction

Across Great Britain, passengers are reliant on the railway operating efficiently and services running on time for business and leisure.

Yet in 2014/15, we estimate that 47 million passenger journeys made on franchised services that were cancelled or significantly late¹. Timeliness of trains, and the time a journey takes, is a critically important aspect of a rail service to consumers – the latest complaints data shows that the punctuality/reliability of trains was the most common category of complaint, accounting for 27.9% of complaints received by all train operating companies².

When passengers experience delays, they should have access to adequate compensation. This would incentivise train operating companies (TOCs) to minimise delays to the greatest extent they are able³. Passengers' entitlements to compensation are currently restricted in their scope. Annex 1 sets out details of passengers' entitlements to compensation for delays.

In this super-complaint to the Office of Rail and Road (ORR), we set out evidence that:

- **Most delayed passengers do not apply for, or receive the compensation to which they are entitled, harming the interests of consumers and softening incentives to improve performance across the system; and**
- **Features of passenger rail markets, including conduct by TOCs⁴ and the limited competition to franchised operators on many lines, contribute to these effects.**

In particular, the evidence shows:

- **TOCs do not take sufficient steps to make passengers aware of their compensation rights when they have been delayed; and**
- **There are unnecessary complexities in consumers' rights to compensation, and the processes for claiming and receiving compensation act as barriers to consumers accessing it.**

¹ A service is defined as 'cancelled or significantly late' (CaSL) if it is cancelled, in part or in full, or arrives at its final destination late by more than 30 minutes. We calculated the Cancelled and Significantly Late passenger journeys for each TOC by multiplying each TOCs passenger journeys by each TOCs proportion of Cancelled and Significantly Late trains. We then summed the Cancelled and Significantly Late passenger journeys of all TOCs. The exact number is 46,933,523, which we rounded up to 47m. The calculation includes all franchised TOCs except London Overground. Date range: April 2014-March 2015 [TOC Key Statistics Data - Table 2.1; <http://dataportal.orr.gov.uk/displayreport/report/html/8c9834a7-7aab-4c1e-b224-de11b22c7846> (retrieved 16/07/15)]

² http://orr.gov.uk/__data/assets/pdf_file/0006/19419/passenger-rail-service-satisfaction-2015-16-q1.pdf

³ We recognise that a majority of delays are caused not by the affected TOC, but by Network Rail or another TOC. We discuss the alignment of incentives across the system in Section 6.

⁴ The majority of conduct we refer to in this super-complaint relates to TOCs. However, we present some evidence about the response of station staff to passenger queries about compensation, and as Network Rail runs a number of stations this evidence relates to it as well as TOCs.

There are steps that could be taken immediately by the regulator and TOCs to begin to address these matters. However, underlying these issues are problems in incentives - under 'Schedule 8' of Track Access Agreements - that disincentivise payment of compensation to passengers, and there is also a lack of clarity about where regulatory responsibility for protecting the interests of passengers sits.

The need for an investigation

Which? has super-complainant status under Section 11 of the Enterprise Act 2002, allowing us to make a complaint that 'any feature, or combination of features, of a market in the UK for goods or services is or appears to be significantly harming the interests of consumers'. We are using this status to request that the Office of Rail and Road (ORR) launches an investigation which addresses the following:

- **The extent to which TOCs are contributing to a low proportion of passengers securing their rights to compensation for delays;**
- **The drivers of TOCs' behaviour, and the pervasiveness of these drivers within the sector; and**
- **Changes that are needed in regulation, and ultimately by TOCs, to ensure that passengers are aware of and are able to secure their rights to compensation.**

This super-complaint outlines the main areas that should fall within the scope of an investigation by the ORR, and proposes some remedies that in the short-, medium-, and long-term could lead to increased passenger awareness and uptake of compensation for delays, and ultimately incentivise all stakeholders to deliver the best possible passenger rail network.

It is structured as follows:

- Section 1 outlines the features of the relevant markets;
- Section 2 sets out the evidence for the relevant conduct of TOCs and its effect;
- Section 3 explores the market structure of passenger rail;
- Section 4 outlines the regulatory structure of passenger rail;
- Section 5 establishes the consumer detriment;
- Section 6 provides some initial thoughts on possible remedies;
- Annex 1 shows the current high-level arrangements for compensation for delayed journeys under Delay/Repay and the National Rail Conditions of Carriage; and
- Annexes 2 and 3 summarise Which?'s original research that forms part of the evidence base of this super-complaint.

Section 1: Features of the market

The relevant market

The relevant product market for this super-complaint is passenger rail services in Great Britain. Our evidence and analysis largely relates to the national level.

Regardless of whether passenger rail services are considered as a single market or as a number of local geographic markets relating to distinct routes, the evidence provided meets the test for a super-complaint and demonstrates the overall consumer problems even if the experiences of passengers, and the conduct of the TOC(s), may differ between routes.

In 2014/15, there were 1.653bn passenger journeys on Great Britain's railways⁵. In total, passengers spent £8.89bn on rail travel in 2014/15, a figure that has risen by more than 20% since 2011/12⁶.

Summary of the features of the market

In this section we set out the particular features of the passenger rail services market that we consider are causing harm to the interests of consumers. There are three features that combine to cause consumer harm by reducing consumers' access to compensation for delays:

- The nature of the product;
- Conduct of TOCs; and
- The market structure of passenger rail services.

Time is an important feature of a passenger rail journey. For passengers on some routes, the time the journey takes can be critical in deciding to travel by rail in the first place. A delayed journey can lead to considerable hassle, anxiety, and stress for passengers, as well as in some instances additional consequences. In 2014/15, 47 million passenger journeys were made on cancelled or significantly late franchised services⁷. The importance of delays to the experience of the product is the first relevant feature of the market.

The second relevant feature of the market is the conduct of TOCs when delays occur. As we set out in Section 2, this conduct fails to ensure that consumers are sufficiently aware of their rights to compensation and fails to minimise barriers to consumers securing that compensation. As a result, a high proportion of passengers do not claim compensation to which they are entitled.

The third relevant feature of the market is its structure (see Section 3). The vast majority of passenger rail journeys are made on franchised train operators, which enjoy a high degree of market power, as there is little on-rail competition between train operators or, on many routes, effective competition with other modes of transport. This lack of competition means there are weak incentives for improving the conduct of operators that harms the interests of consumers. Consumers will frequently have little option but to continue to use the service.

While not a feature of the market per se, we also argue that the current regulatory structures harm consumers' interests, in two ways.

First a lack of clarity about where the responsibility for protecting consumers' interests sits may have hindered the delivery of a timely and effective response to consumer harm associated with delays. The ORR has a duty '*otherwise to protect the interests of users of railway services*'⁸, including rail passengers, but compensation provisions related to delays have been incorporated

⁵ This figure includes all TOCs, including London Overground and Open Access operators
<https://dataportal.orr.gov.uk/displayreport/report/html/02136399-b0c5-4d91-a85e-c01f8a48e07e>

⁶ This figure includes all TOCs, including London Overground and Open Access operators
<https://dataportal.orr.gov.uk/displayreport/report/html/a578fd7d-bd90-4e28-bfbc-da153157e196>

⁷ See footnote 1

⁸ Section 4 of the Railways Act 1993

in franchise agreements and the National Rail Conditions of Carriage, neither of which fall under the ORR's jurisdiction. This lack of clarity may have contributed to the continuation of low compensation take-up.

A second way relates to how TOCs affected by delays caused by Network Rail and other TOCs (which together constitute 72% of delays⁹) are compensated under Schedule 8 of Track Access Agreements. The level of compensation determined under Schedule 8 is not linked to the level of compensation paid to passengers, but relies on estimates of the long-term impact of these delays on passenger demand and TOC revenues. This increases the disincentive on the affected TOC to promoting access by passengers to compensation.

⁹ <http://www.networkrail.co.uk/about/performance/>

Section 2: Evidence for the relevant conduct of TOCs and its effect

The primary relevant conduct relied upon in this super-complaint is the failure of TOCs to take appropriate steps to:

- Make passengers aware of their rights to compensation for delays; and
- Remove unnecessary barriers in the process of securing compensation.

Failure to make passengers aware of their rights

All passenger rail operators in Great Britain are subject to one of two sets of minimum standards of compensation for delayed services¹⁰:

- Approximately 65% of passenger journeys¹¹ are now covered by Delay/Repay, which provides passengers with compensation for any unplanned delay of 30 minutes or more, regardless of the cause;
- The remaining 35% of journeys are subject to the minimum compensation provisions in the National Rail Conditions of Carriage¹² (NRCoC). These provide for lower minimum levels of compensation, available after a longer time period, and only when the delay was caused by circumstances within the industry's control¹³;
- The Department for Transport (DfT) is moving all franchises over to Delay/Repay as they come up for renewal. This will apply to all nationally franchised operators¹⁴ from 2021¹⁵.

TOCs are able to offer higher levels of compensation in their Passenger Charters than these if they so wish, and a number subject to the NRCoC (rather than Delay/Repay) have lowered the threshold for compensation to 30 minutes¹⁶.

Currently, with some exceptions, passengers are required to make a claim for compensation themselves. There are moves by some operators towards implementing automatic compensation, but these currently only apply to some passengers of a small minority of operators¹⁷ (see Section 6). Therefore, until automatic systems of compensation are universal, passenger awareness of their rights to claim compensation when delayed is essential.

Yet passenger awareness of compensation rights is low. In 2014, the sector regulator published a survey dated August 2013, of a representative sample of 1,110 adults in the UK¹⁸:

- 79% of respondents said they knew 'nothing at all' or 'not very much' about their compensation rights for delays;
- 18% said they knew 'a great deal' or 'a fair amount'; and
- 83% said they 'rarely' or 'never' claimed compensation when delayed, compared to 11% who said they 'always' or 'usually' did.

¹⁰ Excluding London Overground, which operates under a separate set of Conditions of Carriage. See Annex 1 for details of Delay/Repay and NRCoC schemes.

¹¹ Assuming Merseyrail does not operate Delay/Repay.

¹² www.nationalrail.co.uk/static/documents/content/NRCoC.pdf

¹³ This exemption from liability would be removed if the Government implemented Article 17 of Rail Passengers' Rights and Obligations Regulation (EU Regulation 1371/2007) but it has signalled its intention to maintain its exemption from this until at least 2019.

¹⁴ Merseyrail's franchise is awarded by the local Passenger Transport Executive, not DfT, and expires in 2028.

¹⁵ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/478018/nov-2015-rail-franchise-schedule.pdf

¹⁶ These include First Transpennine Express and Arriva Trains Wales, which both offer some compensation for 30-minute delays.

¹⁷ Virgin West Coast automatically compensates advance ticket holders who have booked through their website or app, and c2c passengers using a smartcard will soon have compensation refunded automatically to the card - see Section 6

¹⁸ http://orr.gov.uk/__data/assets/pdf_file/0014/10670/passenger-compensation-and-refunds-report-2014-02-21.pdf

The ORR set out a number of actions that were being taken by the Association of Train Operating Companies (ATOC) and some individual TOCs with the aim of improving awareness and take-up. However, there does not appear to have been monitoring of any increases in awareness or compensation claims stemming from these actions, and as such it is impossible to assess their effectiveness.

Another survey from 2013, conducted by Transport Focus, also found low awareness of compensation rights¹⁹. It surveyed 500 passengers who had been delayed by 30 minutes or more²⁰ in the last six months, and found that for their last delayed journey:

- Only 12% said they had made a claim for compensation;
- 44% said they had not even considered claiming, while 30% said they had considered it but did not think they were eligible; and
- 14% said they thought they were eligible but decided not to claim²¹.

We are aware that Transport Focus intends to publish an update of this research in 2016²².

New research from Which? carried out in November 2015 has found that only 34% of passengers who were delayed on their last journey by 30 minutes or more said they claimed compensation²³. This is not directly comparable to the Transport Focus figure, but may indicate an improvement in the situation. However, this still leaves almost two thirds of passengers who may be eligible for compensation who say they do not make a claim.

The data shows that reported propensity to claim also varies by length of delay and type of journey. Only 40% of commuters delayed by 30 minutes or more said they had claimed compensation, and just 29% of leisure travellers.

Twenty-seven per cent of passengers delayed for between 30 and 59 minutes said they claimed compensation, while 56% said they did so for delays of 60 minutes or more. This could suggest that consumers are more aware that a claim is likely to be valid after 60 minutes, or that the value of a claim (which is higher after 60 minutes) is an important factor – or simply that a longer delay sufficiently frustrates more passengers into taking action.

It is often straightforward for the TOC to identify when compensation for a delayed rail journey is due²⁴, and the passengers are physically present on the service at the time. There are then various means the TOC could employ immediately to make passengers aware of their rights, including on-board announcements, handing out compensation forms, and, in some circumstances, text or email.

With some searching, it is possible for a passenger to inform themselves about their compensation rights for a given TOC and work out whether their delay makes them eligible for compensation. However, this is clearly insufficient to resolve the problem, given the low levels of awareness and exercise of rights; a passenger will only know to search if they think they might be eligible. Other contributors to this low level of awareness include the existence of multiple compensation schemes, with significantly different eligibility criteria, and an apparent lack of knowledge among station staff (see research results later in this section).

¹⁹ <http://www.transportfocus.org.uk/research/publications/understanding-rail-passengers-delays-and-compensation>

²⁰ Some of these respondents might not have been eligible for compensation - for example, if their train operator only paid compensation for delays of an hour or more.

²¹ This could be because the potential gain was small, or because the process was considered too complex to be worth it.

²² <http://www.transportfocus.org.uk/research/coming-soon>

²³ Which? Train Satisfaction Survey 2015. In November 2015, Research Now surveyed 6,986 members of the UK general public about their journeys by train in the last 12 months.

²⁴ There are exceptions, such as where the cause of delay is not yet known and would be relevant in determining whether compensation was due. But only a minority of TOCs take the cause of delay into account when determining compensation eligibility.

We have identified evidence of a number of barriers to passengers developing awareness that could easily be lowered by TOCs, which we set out below.

Failure by many TOCs to take adequate proactive steps to inform passengers of their rights

As noted above, TOCs have a range of methods at their disposal to communicate to passengers that they are, or could be, eligible for compensation as a result of a delay.

Most straightforwardly, they could make an announcement on board the train or at the station, or hand out claim forms at either. Similar actions are already required in other transport sectors: flight operators in the EU must provide delayed passengers with a statement of their rights once the delay reaches a certain threshold²⁵.

In many cases, TOCs will also have contact details for passengers through the booking process – whether an email or postal address, or a phone number. Where those details are available, passengers could be contacted if their train is cancelled or delayed²⁶.

We recognise that there have been industry developments on raising awareness and/or improving access to compensation. In particular, Virgin West Coast began to automatically compensate delayed passengers who are travelling on advance tickets²⁷ bought through their website or app²⁸.

We are also aware of anecdotal evidence that some TOCs do regularly make on-board announcements or hand out claim forms. We asked TOCs about the steps they took, when delays occur, to inform passengers about their rights to compensation. Examples of what some TOCs told us they do included:

- Making announcements on-board;
- Handing out claim forms or other documentation with details of how to claim;
- Emailing or texting delayed passengers where possible; and
- Working to develop automatic alerts and/or compensation systems for passengers using their smartcard systems.

These statements of good practice are welcome, and were reflected in some - but not all - TOCs Passenger's Charter when we checked in November 2015.

The available evidence also suggests that these practices are not widespread across the rail network, or are not proving effective. Survey data from Transport Focus and Which? suggests that a minority of delayed passengers are told about their right to claim. Transport Focus found that only 15% of passengers who said they were aware they could claim compensation for their last delay had first learnt of their right to do so through proactive TOC activity at the time²⁹, while Which? found that only 36% of passengers³⁰ delayed by 30 minutes or more on their last journey remembered being told of their right to compensation.

It therefore appears that despite claims and examples of good practice, a large majority of passengers who experience a delay to their journey are not told or do not become aware of their right to compensation. If TOCs are indeed taking measures to tell passengers, they are not proving effective.

²⁵ Denied Boarding Regulation (EU Regulation 261/2004)

²⁶ In practice this method may be limited to those passengers with advance tickets that specified the service to be travelled on. Across the rail sector these represent 3.6% of tickets, although this proportion may vary on particular routes.

²⁷ Advance tickets are limited to travel on a specified service. Non-advance tickets include off-peak, peak, anytime, and season tickets.

²⁸ <https://www.virgintrains.co.uk/delayrepay/automatic>

²⁹ <http://www.transportfocus.org.uk/research/publications/understanding-rail-passengers-delays-and-compensation>

³⁰ Which? Train Satisfaction Survey 2015. In November 2015, Research Now surveyed 6,986 members of the UK general public about their journeys by train in the last 12 months.

Multiple compensation systems³¹

While each of the two underlying schemes for passenger rail compensation is relatively straightforward, the time it is taking for the industry to move to a single minimum compensation scheme for all journeys means that a degree of complexity in compensation arrangements will continue for several more years.

Compensation arrangements can even vary within a single journey from a passenger's perspective. For example, a passenger travelling from Birmingham New Street to Blackpool North would travel on Virgin Trains and then Northern Rail. If that journey was delayed by 45 minutes on the leg operated by Virgin Trains compensation would be due – but not if the same delay occurred on the Northern Rail leg, as Northern Rail only provides compensation for delays of an hour or more whereas Virgin provides compensation for delays of 30 minutes or more.

There are also still some TOCs that do not pay compensation if a delay is deemed to be caused by factors outside of the rail industry's control. This introduces a further complexity to determining eligibility, as a passenger cannot reasonably be expected to know when the cause of a delay is inside or outside of the rail industry's control. It's likely that this causes confusion for some passengers, and uncertainty about eligibility could put them off from making a claim at all.

In some cases a passenger might not find out until after going to the effort of submitting a claim that a delay was outside of the industry's control, and so they are not eligible for compensation. Such an experience could put a passenger off making the effort to claim in the future, whether for that operator or others.

These discrepancies are slowly being removed from the system. Since 2007, it has been government policy that all new franchise agreements should contain a commitment to introduce Delay/Repay³², which in time will provide a single minimum compensation scheme for all passengers.

Having a single scheme will reduce complexity for passengers, but simply introducing Delay/Repay does not address the key issue in this super-complaint: that levels of awareness and take-up of compensation are low.

We have not assessed how reasonable the provisions of Delay/Repay are, but we do note that the Government's decision to phase out reliance on the NRCoC conditions implicitly recognises that the system of compensation provided by the NRCoC is no longer appropriate.

So there are a range of benefits to completing the roll-out of Delay/Repay, but the process which began in 2007 is not scheduled to be completed for all nationally franchised operators until 2021, when the new franchise for the Chiltern service will be signed³³. At present, 35% of all passenger journeys are made on services that still do not operate Delay/Repay³⁴.

Failure of station staff to provide accurate information

We conducted a mystery shopping exercise in September 2015 to examine whether passengers were given the correct information about their compensation rights by staff at rail stations.

³¹ See Annex 1 for detail

³²

<http://webarchive.nationalarchives.gov.uk/20110509101621/http://www.dft.gov.uk/pgr/rail/passenger/franchises/em/emfranchise>

³³ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/441862/july-2015-rail-franchise-schedule.pdf

³⁴ Analysis of rail franchises and ORR passenger volume statistics

Our fieldworkers visited 102 manned rail stations in England and Wales, posing as customers asking about rail compensation for an elderly relative. In particular, we wanted to know whether each fieldworker was given accurate information³⁵ about:

- The delay length thresholds for compensation;
- The level of compensation; and
- The manner in which the compensation could be provided (i.e. that compensation in a method other than vouchers was available).

The stations included stations operated by TOCs and Network Rail. Our fieldworkers found very varied levels of knowledge by station staff, and in some cases the information provided was incorrect. In the majority of instances in which the information was not provided the member of staff simply said they didn't know, and in some cases told our fieldworkers to contact the train company's head office.

Each of these pieces of information about compensation is important when a delayed passenger is thinking of making a claim for compensation. If a passenger does not know the minimum delay for which their TOC pays compensation, they can't know if they are eligible.

When we asked station staff about how long a delay needs to be before compensation would be due, in more than a third (37%) of cases, our fieldworkers were either not given any information at all, or only part of the information they needed, or in a very small proportion of cases were even given inaccurate information about how long a delay needs to be before compensation would be due. Even once a passenger knows that they might be eligible for compensation, the decision on whether to submit a claim depends on the value of compensation to the passenger – both the amount and the method of payment. A passenger is only likely to submit a claim if they think that the amount they will receive is worth the effort, and the likelihood of submitting a claim may be affected by how easily they are able to use the form of compensation provided.

But in only 38% of cases were our fieldworkers given information about the proportion of the ticket cost passengers may receive as compensation – meaning that 62% left the station not knowing what they might be entitled to.

And despite passengers having the right to request compensation in money, fieldworkers were told in just 37% of cases that they could receive compensation in a manner other than vouchers for any value of claim. This includes cases where the fieldworker prompted the ticket office assistant.

In only 18% of cases were our fieldworkers given a full explanation of the conditions for claiming compensation even after prompting (including how long a delay needs to be to claim compensation, the proportion of the ticket cost passengers may receive as compensation, and that this compensation can be requested in a manner other than vouchers). Many station staff were simply not able to provide the information, but in some cases they gave wrong information.

Below is a selection of notes from fieldworkers:

'The assistant didn't know but checked with a colleague who thought you can only claim after a delay of about 20 minutes.'

'I asked what the compensation would be and she said it would be travel vouchers. When I asked if compensation could be received in cash she said no. I explained that my aunt didn't travel much on the trains and she suggested that maybe my aunt could swap the vouchers with someone else, a friend maybe, who did travel a lot and who could give her the cash equivalent.'

³⁵ We classed information as having been provided if the staff member was able to tell the fieldworker the relevant information, or referred the fieldworker to a leaflet. See Annex 2 for details.

They thought it was only for delays over 30 minutes, but claim if less just in case.’³⁶

In some cases, station staff’s uncertainty was not helped by having apparently outdated leaflets to hand:

‘When I asked he told me that vouchers were usually offered as compensation, read the leaflet, and confirmed this. When I said that my elderly relative didn’t travel by rail very much, he suggested I or someone else buy the vouchers from her.’

Two fieldworkers were told that they would find information about whether they were eligible and the level of compensation once they have submitted a claim – i.e. it was recommended that they go to the effort of making a claim with no idea whether they were eligible, nor what they might be eligible for. This would not only make a passenger’s decision about whether to claim difficult, but mean they would not be sure of their grounds to challenge the TOC’s decision if the claim was rejected.

There seems little reason why station staff should not have information to hand – whether through training or availability of relevant leaflets – about up-to-date compensation arrangements for passenger rail services that use that station.

Providing misleading information to consumers about their rights may also constitute a breach of the Consumer Protection from Unfair Trading Regulations 2008 (CPRs). Regulation 5 of the CPRs prohibits misleading actions. Where a consumer is given incorrect information about their contractual rights, or about the trader’s contractual commitments, this will constitute a misleading action if the misinformation would cause the consumer to make a different ‘transactional decision’³⁷. The definition of a transactional decision in the CPRs is broad and includes decisions that a consumer makes about whether, how and on what terms to exercise a contractual right³⁸.

A total failure to provide important information about redress, or a failure to provide it in a clear and timely manner, may also constitute a misleading omission under Regulation 6 of the CPRs. A breach of the CPRs is a criminal offence³⁹.

Our findings suggest that a lack of knowledge, and access to information, by station staff could be a barrier to delayed passengers becoming aware of and understanding their rights to compensation. Ensuring that passenger-facing staff are trained and are able to access accurate information about compensation rights for relevant TOCs is one necessary step towards helping consumers exercise their rights.

Such a step would not alone, however, be sufficient to address the detriment set out in this super-complaint. The 44% of delayed passengers who Transport Focus found did not even think about claiming compensation⁴⁰ would be unlikely to approach station staff unless prompted by the types of proactive communication discussed earlier.

Failure to remove process barriers to claiming compensation

We have also identified obstacles in the process of claiming and receiving compensation that could put passengers off claiming. Making the process of claiming compensation easier would lead to a greater number of claims. Additionally, if compensation were generally known to be straightforward, it may encourage more passengers to become aware of their rights.

³⁶ This relates to a train company that only pays compensation for an hour’s delay or more.

³⁷ Regulations 5(2) and 5(4)(k) of the CPRs.

³⁸ Regulation 2 of the CPRs.

³⁹ Part 3 of the CPRs.

⁴⁰ <http://www.transportfocus.org.uk/research/publications/understanding-rail-passengers-delays-and-compensation>

The ORR, in its survey, found that around a third of passengers who said they rarely or never claimed compensation for delays cited issues around the process⁴¹. These included the length of time a claim takes, confusion about the process itself, and the fact that – at the time of the survey – compensation was only available in rail vouchers.

It is also likely that some of the 14% of passengers Transport Focus identified as being aware of their compensation rights but not making a claim⁴² were dissuaded from doing so by the process. Terms and conditions that place a disproportionate burden on consumers who want to exercise their rights are likely to be unfair, and therefore unenforceable, under the Consumer Rights Act 2015 (CRA)⁴³. Schedule 2 of the CRA contains a list of terms that are presumed to be unfair. That list includes terms that have the object or effect of:

- inappropriately excluding or limiting the legal rights of the consumer in the event of inadequate performance of the trader’s contractual obligations⁴⁴;
- making the trader’s commitments subject to compliance with a particular formality⁴⁵; or
- excluding or hindering the consumer’s right to exercise a legal remedy, including by unduly restricting the evidence available to the consumer⁴⁶.

The barriers to redress that are described in this section should be considered in light of these statutory presumptions of unfairness.

Processes for claiming compensation

For a consumer to make a claim for compensation in relation to a rail delay, they need to fulfil the TOCs requirements for doing so. This typically means filling out a paper or online form, and making and including a photocopy or scan of the relevant ticket.

Current arrangements place much of the effort required on passengers. But it is possible to reduce the level of effort required by passengers. In due course this should be by automatic payment of compensation via smartcard technology once this is fully rolled out. But even in the shorter-term, it seems potentially feasible to reduce the effort required by passengers to make claims. For example, it is not clear why a passenger simply presenting their (traditional) ticket at the arrival station (to a staff member or a machine) immediately following an eligible delay ought not to be sufficient to secure an immediate payment, or at the least to be counted as having made a claim.

A further barrier relates to the proof required to validate a claim. Understandably, TOCs require proof of a passenger’s eligibility in order to pay compensation, usually in the form of a scanned or photocopied ticket. But ticket barriers may ‘swallow’ a ticket when a passenger exits a station.

We were told by some TOCs that station staff would be happy to open ticket barriers when requested. While we do not doubt this, it still requires a passenger to be aware before leaving the station that they might make a claim, remember that to do so they will need to retain their ticket, and remember to request at the exit that a member of staff opens the barrier. It seems likely that a proportion of passengers will fail to do this, either by not being aware or by simply being in a hurry following the delay – and so will be unable to claim compensation if they later discovered their eligibility. One potential solution to this issue would be, as some TOCs told us they do, to open ticket barriers for a short period of time after a delayed service has arrived, allowing passengers to exit without the risk of losing their ticket.

⁴¹ http://orr.gov.uk/__data/assets/pdf_file/0014/10670/passenger-compensation-and-refunds-report-2014-02-21.pdf - made up of passengers who cited “Lack of time” (11%), “Process takes too long” (9%), “Process is confusing” (7%) and “Compensation paid in vouchers” (5%).

⁴² <http://www.transportfocus.org.uk/research/publications/understanding-rail-passengers-delays-and-compensation>

⁴³ Part 2 of the CRA, replacing the Unfair Terms in Consumer Contracts Regulations 1999.

⁴⁴ Paragraph 2, Schedule 2 to the CRA.

⁴⁵ Paragraph 17, Schedule 2 to the CRA.

⁴⁶ Paragraph 20, Schedule 2 to the CRA.

A number of TOCs also told us that they would accept proof of purchase when a passenger makes a claim. However, when we checked after receiving these responses, this option was in some cases not stated on their website or claim form. It should be made clear to passengers where this is an option; otherwise passengers who have not retained their ticket, but do have proof of purchase, will be dissuaded from claiming⁴⁷.

Other barriers to making a claim may also exist. There is scope for the industry to consider how to streamline and make as easy as possible the process for claiming compensation.

Method of compensation

Since the current version of the NRCoC came into force in July 2015, passengers have been able to request that their compensation is paid to them in money, rather than National Rail vouchers. This is a welcome development, as payment in vouchers has a number of flaws:

- The vouchers cannot always be redeemed online or at ticket machines, where many people purchase tickets and where the cheapest tickets are often available;
- The ORR asked train companies what percentage of vouchers issued are redeemed against new ticket purchases and were given estimates that ranged between 55% and 85%⁴⁸;
- It restricts the spending of the compensation to within the rail sector; and
- They may have an expiry date, which requires the passenger to use them within a certain time or forgo the compensation.

Because the marginal cost of providing a passenger journey is low provided that the service is not at full capacity, there are certain circumstances when the TOC providing the voucher will not lose out financially even if the passenger does redeem the voucher, and may in fact gain. This would happen if a passenger used the voucher to pay part of the cost of a journey they would not otherwise have made, and used their own money to make up the difference (see Section 5 for a full explanation).

Overall, using vouchers for compensation is not the most effective way to compensate passengers, is likely to be a disincentive to accessing compensation, and limits the incentive effect from compensation to improve rail performance.

However, in spite of these flaws, the revised NRCoC requires TOCs to make compensation available in money only if the passenger requests it. For a passenger to receive compensation in this way, therefore, they must either know that this is an option and remember to ask for money when submitting their claim or, for some TOCs, go to the effort of exchanging the voucher for money at a manned rail station. In only 37% of our mystery shopping visits, fieldworkers were correctly told that they could request their compensation in a manner other than vouchers for any value of claim, even after prompting.

The steps required to access compensation in money reduce the likelihood of passengers doing so, and mean that the flaws in voucher compensation outlined above are likely to continue to have impact.

Some TOCs have taken positive steps – for example by updating their claim forms to require passengers to choose the method of compensation they would prefer. But, when we checked TOCs' claim forms, we found this to be the case for only a minority. Making it anything less than the default to receive compensation as money, is likely to continue to harm consumers.

In a number of other transport sectors, compensation can only be provided in a form other than money with the passenger's express consent. For example, compensation for delayed air travel⁴⁹

⁴⁷ As contactless payment - whether a smartcard or a debit/credit card - becomes more prevalent, particularly on some commuter routes, we would expect appropriate evidence of a journey to be accepted.

⁴⁸ http://orr.gov.uk/__data/assets/pdf_file/0014/10670/passenger-compensation-and-refunds-report-2014-02-21.pdf

and for cancelled or delayed ferry departures⁵⁰ must be paid in money unless the passenger agrees otherwise⁵¹.

Conclusion

The research by Transport Focus⁵² and the ORR⁵³ suggests that most consumers have little awareness of their rights to compensation for delays to their journey.

We have set out evidence for conduct by TOCs that seems likely to contribute to these low levels of awareness, including:

- Failure by many TOCs to take adequate steps to proactively inform passengers of their rights; and
- Multiple minimum compensation systems.

The ORR's evidence⁵⁴ also shows that process barriers deter some consumers from claiming compensation. We have highlighted some key ways in which we consider current compensation claim processes act as barriers to consumers securing compensation, including:

- Effort required by passengers to make a claim;
- Options available to passengers to prove they have taken a particular service, and passenger understanding of the range of options available; and
- Default method of providing payment of compensation.

It is also relevant that commercial third parties have seen a business opportunity in informing passengers of their potential eligibility for compensation and helping them to make their claim⁵⁵. The existence of these companies suggests that they see an arbitrage opportunity between consumers wanting to access compensation and the difficulty of consumers obtaining it.

⁴⁹ Denied Boarding Regulation (EU Regulation 261/2004)

⁵⁰ Maritime Passenger Rights Regulation (EU Regulation 1177/2010)

⁵¹ The Consumer Rights Act requires that compensation should be paid in the method by which the original payment was made. However, the Government has signalled its intention to exempt passenger air, maritime and rail from the CRA - the scope of this exemption has yet to be determined.

⁵² <http://www.transportfocus.org.uk/research/publications/understanding-rail-passengers-delays-and-compensation>

⁵³ http://orr.gov.uk/__data/assets/pdf_file/0014/10670/passenger-compensation-and-refunds-report-2014-02-21.pdf

⁵⁴ Ibid

⁵⁵ These include Delay Repay Sniper, Delay-Repay.com, and TrainRefunds.co.uk

Section 3: The market structure of passenger rail

The passenger rail services market in Great Britain is mostly comprised of privately-owned providers who bid for the ownership of franchises on particular routes. There are currently 16 national franchises in operation⁵⁶, one awarded by a Passenger Transport Executive (PTE), and two open access providers who account for 1% of passenger miles⁵⁷.

Franchises are relatively long-term with new franchises typically running for 15 years. During the lifetime of the franchise each operator will typically face little competition from other rail services⁵⁸, and even then only on certain parts of certain routes. Genuine competition between operators therefore takes place primarily during the bidding process. Many routes also often face limited competition from alternative forms of transport⁵⁹.

Limited competitive pressure from substitutes within or outside the rail sector means many TOCs may have little economic incentive, in the absence of regulatory pressures, to ensure easy access to compensation for poor service. In effect, disgruntled passengers frequently have little option but to continue using the franchised rail service anyway.

⁵⁶ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/478018/nov-2015-rail-franchise-schedule.pdf Heathrow Express and TfL Rail have been excluded from our analysis. Heathrow Express operates a single service, while TfL is not subject to ORR regulation.

⁵⁷

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/446255/Passenger_rail_services_in_Great_Britain.pdf

⁵⁸ This applies differently on some routes, such as the East Coast Main Line, on which a relatively high proportion of journeys are provided by open access operators.

⁵⁹ http://www.racfoundation.org/assets/rac_foundation/content/downloadables/pdfh-worsley-dec2012.pdf Again, on some routes (particularly long-distance) this competition might be more significant.

Section 4: The regulatory structure of the passenger rail market

At present, consumer-related regulatory requirements on TOCs are divided between franchise agreements, licences, and the NRCoC – see the table.

Name	Owner	Relevant consumer requirements generally include	Is there a specific, legal consumer duty on the owner?	Process for amendment
Franchise agreement	DfT	<p>Commitment to Delay/Repay for newer franchises</p> <p>Requirements in newer franchises to make endeavours to improve passenger awareness of compensation</p> <p>Requirements around publishing timetables and timetable revisions</p> <p>Requirements around fares selling restrictions</p> <p>Requirements around the Passenger Charter</p> <p>Requirements around allowing cycles on trains</p>	No	Generally as franchises renew – typically every 15 years
NRCoC	ATOC	<p>Minimum compensation levels</p> <p>Conditions around personal possessions and lost property</p> <p>Conditions around train reservations</p>	No	ATOC can make amendments, which must then be approved by the Secretary of State
TOC licences	ORR	<p>Requirements regarding complaints handling procedures</p> <p>Requirements about informing passengers of disruption</p> <p>Requirements regarding Disabled People's Protection Policy</p>	Yes – to 'otherwise protect the interests of users of railway services' ⁶⁰	Can amend licences with TOC agreement, or after appeal to CMA

So some key consumer obligations are included in rail franchise agreements formulated by DfT, which has no specific, legal consumer duty, and the NRCoC drawn up by ATOC, which is the trade association for train companies.

⁶⁰ Section 4 of the Railways Act 1993

The franchise agreements are currently the location of key requirements on TOCs in relation to customer service and consumer rights. However, they are typically updated only at the start of each franchise period. This has a number of drawbacks:

- Franchise agreements are inflexible, and take a long time to update if improved thinking or new technological possibilities arise for achieving better consumer outcomes. For example, the roll-out of Delay/Repay will be completed for all franchises in 2021, 14 years since it became government policy⁶¹.
- There may be inconsistency of consumer rights between franchises that started at different times, making it harder for consumers to understand their rights.
- Franchise agreements are lengthy and complex documents, where consumer rights are not the primary focus. There is a risk that consumer requirements will not be given sufficient attention in the bidding and award process, as well as in the on-going monitoring and enforcement of the franchise conditions. For example, it is not clear that there is monitoring of the requirement in each relevant franchisee's agreement to make endeavours to improve passenger awareness of compensation.
- Open Access operators are not subject to franchise agreements, which means that if improvements to consumer rights are driven through national franchises, they will not apply to Open Access operators or those awarded through PTEs. We note however that Open Access operators are generally subject to greater competitive pressure than franchisees, and the ORR has highlighted that they generally receive higher passenger satisfaction scores⁶².

The overall picture creates a complex regulatory landscape, which may have impeded ensuring market rules operate in the interests of consumers. It certainly creates barriers to keeping rules up-to-date and consistent across operators.

It may have contributed to a lack of clarity about the ORR's role in protecting the interests of consumers. But we do not believe that the inclusion of certain consumer-related requirements in certain franchises prevents the ORR from taking effective action under its duty to protect the interests of users of railway services.

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<http://webarchive.nationalarchives.gov.uk/20110509101621/http://www.dft.gov.uk/pgr/rail/passenger/franchises/em/emfranchise>

⁶² http://orr.gov.uk/__data/assets/pdf_file/0018/1791/open-access-consultation-june-2013.pdf

Section 5: Consumer detriment arising from these features

The features of this market that we have identified lead to two forms of detriment:

- **Direct detriment to passengers, through missing out on compensation for poor service, and the hassle and inconvenience of claiming; and**
- **The impact of this unpaid compensation on incentives in the passenger rail sector more generally, and the attendant effect on performance.**

Providing compensation by default in rail vouchers contributes to both of these forms, which we explore later in this section.

Direct detriment

The immediate detriment to consumers is from unclaimed compensation – the ‘compensation gap’. We asked TOCs to tell us how much compensation they had paid out for delayed passenger journeys in the last three financial years, and how much compensation of this type they estimated they would have paid out had all eligible passengers claimed. None of the 12 TOCs that responded to our request were able to estimate the amount of compensation that they would have paid had all eligible passengers claimed (and not all told us how much they had actually paid out to passengers in compensation for delays and cancellations).

While we recognise the difficulties in measuring the potential amount of compensation due, particularly in regard to non-advance tickets, we think that a methodology for making reasonable estimates could be arrived at. It should be feasible to estimate the proportion of advance ticket holders who claimed compensation⁶³, and it ought to be possible to use industry passenger models to provide adequate estimates of total passenger numbers on a delayed train. That this does not appear to have been done, or has not been made public by industry, the regulator, or DfT, is indicative of the lack of attention paid to this issue by the sector to date.

Unclaimed compensation for delayed or cancelled passenger journeys runs into millions of pounds each year. We estimate 47 million passenger journeys were made on franchised services that were either cancelled, or delayed by at least 30 minutes, in 2014/15⁶⁴. As already discussed, Which? research carried out in November 2015 found that only 34% of passengers delayed by 30 minutes or more on their last journey said they claimed compensation⁶⁵.

Evidence that the amount of unclaimed compensation is significant comes from Virgin Trains West Coast. It recently introduced automatic delay compensation for passengers who have bought advance tickets from its website or app. Virgin estimates that £3.8m will be paid out in the first year of the scheme, of which only £1m would have been paid out under the previous arrangement⁶⁶. This is only for one operator, and will apply only to advance ticket-holders who have booked through certain routes; but it gives an indication of the magnitude of the value of unclaimed compensation as well as the scale of the ‘compensation gap’.

As part of its response to this super-complaint, the ORR should conduct its own analysis of the total amount of compensation that TOCs owe for delays and the compensation actually paid out. This baseline figure could then be updated periodically to enable improvements to be tracked.

⁶³ For example, the number and value of advance tickets bought for services that were then delayed or cancelled could be compared to the number and value of claims for compensation by advance ticket holders for those services.

⁶⁴ See footnote 1

⁶⁵ Which? Train Satisfaction Survey 2015. In November 2015, Research Now surveyed 6,986 members of the UK general public about their journeys by train in the last 12 months.

⁶⁶ <https://www.virgintrains.co.uk/about/media-room#/pressreleases/virgin-trains-introduce-industry-s-first-automatic-delay-repay-system-1227929>

Indirect detriment

Unclaimed compensation also affects the incentives on the industry to address the causes of delays or cancellations. The current low rates of compensation claimed therefore reduces incentives on the industry to bear down on the causes of delays.

The breakdown of attributed fault for delays in the year to 14 November 2015 is shown below:

Source of fault ⁶⁷	% of delays attributable	Estimated number of passenger journeys (millions)**
Network Rail*	59%	27.7
The affected TOC is the cause of its own delay	28%	13.1
One TOC's actions causing delays to another TOC	13%	6.1

*Approximately one third of delays in this category are due to external factors such as weather, vandalism, and cable theft

**Based on total passenger journey figures for 2014/15

If a delayed passenger is eligible for and claims compensation from a TOC, it is paid by that TOC regardless of who was at fault. So increasing pay-outs of compensation would provide a direct incentive to TOCs to reduce the 13 million delayed passenger journeys caused by the TOCs themselves. But it would not provide a direct incentive on Network Rail and other TOCs to reduce the 34 million delayed journeys caused by them⁶⁸, which represent 72% of all delays.

However, it would incentivise affected TOCs to put pressure on Network Rail and other TOCs to improve their performance on delays. It would also encourage TOCs to do everything they could to help Network Rail reduce delays on their route, including agreeing any relevant local joint ventures and investments.

Affected passengers should not be expected to chase the source of fault - they should be able to submit the claim to the TOC they were travelling with when the delay occurred, whoever was ultimately responsible. The important point is that whoever was ultimately responsible should face incentives to improve performance.

Rail vouchers

A third source of consumer detriment is that compensation paid out in rail vouchers is on average not fully redeemed, as we set out in Section 2. If consumers do not redeem the full value then they have not benefitted from the full compensation due to them. The TOC providing the vouchers has also not met the full cost and so has faced diminished incentives to improve performance.

In fact, the incentive effect on TOCs (to reduce delays) is even further diminished if payment of compensation is in vouchers. The following scenarios illustrate this:

⁶⁷ <http://www.networkrail.co.uk/about/performance/>

⁶⁸ Network Rail and TOCs that cause unplanned delays to other TOCs do pay compensation to the affected TOCs through payments under Schedule 8 of the Track Access Agreement between TOCs and Network Rail. But the calculation of Schedule 8 payments is largely based on the long-term impact of the delay on passenger numbers and revenue, and does not depend on the levels of compensation that the affected TOC pays out to passengers. The effectiveness of the current approach to calculation of Schedule 8 payments in providing incentives on Network Rail and TOCs to reduce delays are beyond the scope of this super-complaint.

- As a result of receiving a voucher, a passenger uses that voucher to make a rail journey that they would not otherwise have made with the TOC that issued the voucher. Because the marginal cost of serving that passenger may be low (TOCs do not usually need to run an extra carriage or service) the compensation might cost the TOC very little.
- A passenger uses their voucher to pay for part of a journey that they would not otherwise have made with the TOC that issued the voucher. They make up the difference with their own money. Because the marginal cost of serving the passenger is low, the TOC may gain (of the difference between the voucher cost and ticket cost) as a result of providing compensation for a delay.

Payment in vouchers therefore leads to direct harm to consumers who do not redeem the full value of rail voucher and indirect harm as a result of reducing the incentives on the rail industry to bear down on delays.

Section 6: Initial thinking on remedies

Having established our case for there being significant consumer detriment arising from features of the passenger rail market, in this section we set out our initial thinking on actions that could address this detriment. Our focus here is to improve outcomes for passengers by increasing take-up of compensation to which they are entitled, but also to improve incentives across the system to reduce the occurrence of delays in the first place.

In the short term, the ORR should introduce conditions into its licences that require TOCs to raise passenger awareness of their compensation rights. These conditions could mirror the requirements in more recent franchises that, if effectively implemented by all TOCs, could go some way towards reducing the detriment we have identified.

These franchise conditions require TOCs to:

- (a) Make all payments which passengers may reasonably expect to be made or provided from time to time under the terms of the Passenger's Charter (whether or not the Franchisee is legally obliged to do so);*
- (b) Use all reasonable endeavours to make passengers aware of their right to claim compensation pursuant to the Passenger's Charter including by:*
 - i. Displaying the relevant information on trains and at Stations;*
 - ii. Making appropriate announcements to passengers on trains and at Stations when the circumstances giving rise to that right occur; and*
 - iii. Making compensation claim forms readily available to passengers at Stations and on the Franchisee's website; and*
 - iv. Any other reasonable means to reflect future advancements in technology proposed in writing either by the Franchisee or the Secretary of State and agreed by both parties (acting reasonably).⁶⁹*

While these requirements are included only in newer franchises, there seems little reason for similar requirements not to apply to *all* TOCs as soon as possible. The ORR might also consider whether and how the requirements should be extended in order to ensure that TOCs take all reasonable means to raise delayed passengers' awareness of their rights to compensation, including through training of staff and effective use of other forms of communication such as text and email.

For those TOCs that are already subject to relevant requirements in their franchise agreements, it is far from clear that there is an adequate regime for monitoring and enforcement by DfT. If these requirements were incorporated in TOC licences, rather than in documents over which the ORR has no jurisdiction, the ORR would be able to ensure effective monitoring and enforcement.

There are, in our view, two approaches that might be taken to this monitoring. One would be to monitor outcomes – that is, collect data on the number and value of passenger claims for delays, and compare this with an estimate of the total due to delayed passengers, by TOC. This could be regularly - and publicly - reported, perhaps together with reporting from each TOC on the steps they are taking to meet the requirements. We would expect this reporting to provide a reputational incentive on TOCs, as it is likely that the publication of these figures would generate media and political interest, and the ORR may want to consider whether further incentives could be linked to this data. We think that TOCs also ought to engage with their passengers, in a meaningful way, to determine what steps would be effective in improving outcomes on access to compensation and on treating passengers fairly.

The second approach would be to monitor TOCs' actions. This could take the form of implementing a monitoring and enforcement regime around each requirement - for example, to make appropriate announcements.

⁶⁹ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/417807/northern-franchise-agreement.pdf

The ORR could also consider any licence requirements, or other steps, needed to ease the process for claiming compensation, and should ensure that vouchers are no longer the default method for paying compensation.

Finally, the ORR should monitor complaints data in such a way that allows clear identification of levels of complaints about claims for delay compensation. We have outlined the disincentives to paying compensation that exist under the current system, and this could lead to valid claims being rejected. But we have been unable to establish the level of complaints in this area from the ORR's current categorisation of overall complaints. Instead these categories could be designed to allow problems, whether current or emerging, to be spotted.

We recognise that the potential shorter-term actions we propose here will not lead to 100% take-up of compensation. There will be some passengers who do not consider it worthwhile to claim compensation, particularly for small amounts, however easy the process. But there is plenty of scope for short-term improvement, and the steps we propose have potential to generate large benefits to consumers even with less than 100% take-up of compensation.

These steps would mitigate immediate detriment, but we recognise that they would not address the underlying problems. Solutions to these underlying problems will take time to design and implement, but are important in ultimately resolving the issue we have identified in this super-complaint.

One such problem is the current system for compensating TOCs for delays caused by Network Rail or other TOCs. There is a case for considering revision to Schedule 8 compensation arrangements⁷⁰, so that compensation to TOCs relates to some extent to the amount the TOC has paid out in compensation to passengers for delays that they have not caused. This would reduce the disincentive on TOCs to pay passenger compensation. Such a revision could in theory be designed to be broadly overall cost-neutral to Network Rail – while the better a TOC did at paying out passenger compensation, the greater proportion of the available Schedule 8 compensation it would receive.

It also seems clear that in the longer-term that TOC licences should become the principal means for implementing and enforcing consumer-related requirements on TOCs, replacing the roles of franchises and the NRCoC in this regard. This would resolve uncertainty over responsibility for upholding consumer rights by giving the ORR unambiguous responsibility. It would remove any confusion that may have contributed to the continuation of detriment, as well as placing responsibility for consumer rights with a body with both a specific, legal consumer duty and the ability to monitor and enforce these requirements.

Over time, we expect that technological advances in smart ticketing will make it possible for all passengers to be automatically compensated for delays. There have been welcome moves from some TOCs in the direction of automatic compensation:

- In October 2015, Virgin West Coast implemented a system of automatically refunding delayed passengers who had booked an advance ticket for a specific train through their own website or app;
- From early 2016, c2c will trial automatic refunds for passengers using their smartcard system and app; and
- Recent government statements indicate that new franchises will be required to include similar automatic compensation systems as c2c's trial (which was also included in its franchise).

⁷⁰ See footnote 67

These are promising developments, and in the long-term automatic compensation is likely to address many of the issues raised in this super-complaint. But there is also a need to take action earlier.

Firstly, the current initiatives taken by some operators do not reach all passengers. Virgin West Coast's scheme does not apply to passengers travelling on non-advance tickets (96.4% of passenger journeys on average across the rail network are on non-advance tickets, or 93.7% of non-season ticket journeys⁷¹), and at present only applies to passengers who purchase through Virgin's website or app⁷². c2c's system, meanwhile, will apply only to journeys using their smartcard, although it does have a target in its franchise agreement for 88% of passenger journeys to be made in this way by February 2018⁷³. This would be a high level of penetration, but it is also comparably easier for c2c to manage this than many other operators as they primarily serve commuters. Other operators, particularly long-distance services that are used more infrequently by individual passengers, may find that passengers are unwilling to hold a separate smartcard for their service, hampering the impact of the system unless it is implemented in such a way that enables interoperability of smartcards (i.e. a passenger with a smartcard issued by c2c could use it services operated by any TOC).

Secondly, roll-out will take a long time. Even if a requirement for an automatic compensation system for all passengers, regardless of ticket type or vendor, was included in all new franchises put out to tender from tomorrow, it would take until at least 2025 for it to be included in all franchises. Providing automatic compensation for all rail passengers would require major changes to ticketing and other systems, and in particular there would need to be a way to determine exactly which service a passenger with a non-advance ticket had used. It could for example require upgrading of ticket barriers at many stations. Full roll-out of automatic compensation is likely to be a costly and lengthy exercise.

If passengers have to wait for automatic compensation to be rolled out to improve the situation, there will be a decade of detriment during which millions of passengers each year will be left uncompensated. Without the reforms we have proposed, passengers would also continue to suffer more delayed journeys than necessary because of a lack of incentives to reduce delays. Where the ORR does not have the power to directly implement relevant remedies that would protect the interests of rail users, it should work with industry and DfT to do so.

The ORR, in responding to this super-complaint, will also want to consider other possible remedies, both in the short and the long term. Whatever remedies the ORR implements, it is essential that it monitors their progress and impact in improving passengers' access to compensation, and takes further action if its initial remedies prove unsuccessful in achieving this.

⁷¹ <http://dataportal.orr.gov.uk/displayreport/report/html/fa63ce11-efe6-4605-8ab6-682df00207ce>

⁷² We would be concerned if the capability to receive automatic refunds were not to be extended to passengers who purchased advance tickets through third-party sellers, as this could limit competition in the market for ticket sales.

⁷³ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/438453/essex-thameside.pdf

Conclusion

At Which?, we believe that consumers should be compensated when a product or service falls below the standard they are entitled to expect.

This has a direct benefit to the consumers who receive compensation. But it is also good for *all* consumers of that product or service, by acting as an incentive to drive improvements in performance. This is especially important in markets such as passenger rail services, where choice is limited and the service is an essential one for millions of passengers daily.

It seems clear that the current operation of the compensation system for passenger rail is failing passengers in this regard, and needs urgent attention. The evidence in this report shows that there are several areas of the compensation system that can be improved. The ORR now has an opportunity to champion consumer rights, and deliver lasting change to the benefit of all rail passengers.

As a result, we want the ORR to launch an investigation which addresses the following:

- **The extent to which TOCs are contributing to a low proportion of passengers securing their rights to compensation for delays;**
- **The drivers of TOCs' behaviour, and the pervasiveness of these drivers within the sector; and**
- **Changes that are needed in regulation, and ultimately by TOCs, to ensure that passengers are aware of and are able to secure their rights to compensation.**

We know that all stakeholders in the passenger rail market have as their central focus the delivery of an efficient, high-quality service to consumers. We look forward to working with industry, the ORR, DfT and other relevant bodies to address the significant issues we have highlighted in this super-complaint.

Annex 1: Compensation arrangements for delays in passenger rail

For simplicity when we refer to a 'delay' in this super-complaint we mean 'a delay that makes a passenger on a given service eligible for compensation' from a Train Operating Company, unless otherwise specified.

The details of compensation schemes for delays vary between TOCs, but all have to abide by one of two sets of minimum criteria set out in the table. All TOCs must abide by the NRCoC, and this document forms part of the contract between the consumer and the TOC.

Some TOCs subject only to the NRCoC have chosen to implement more generous compensation schemes.

Length of delay	Delay/Repay	National Rail Conditions of Carriage*
0-29m	No compensation due	No compensation due
30-59m	50% of the cost of a single ticket, or 50% of the cost of the relevant portion** of a return ticket	No compensation due
60-119m	100% of the cost of a single ticket, or 100% of the cost of the relevant portion of a return ticket	50% of the cost of a single ticket, or 50% of the cost of the relevant portion of a return ticket
120m+	100% of the cost of a single ticket, or 100% of the cost of a return ticket (i.e. both ways, not just one way)	50% of the cost of a single ticket, or 50% of the cost of the relevant portion of a return ticket

*As of 18/11/15. Compensation for delays is only paid under this scheme if the delay was caused by circumstances within the rail industry's control. This excludes delays caused by extreme weather, trespass, vandalism etc.

** 'Portion' means either the outward or the return part of a return ticket. 'Relevant' means the portion of the journey on which the passenger was delayed.

The arrangements for season ticket-holders also vary: TOCs operating Delay/Repay calculate an estimated cost of each journey and provide a proportion of that cost per delayed journey; those operating the NRCoC system follow a different approach, paying compensation related to average performance levels over a given period.

Until July 2015, compensation for rail delays was paid in National Rail vouchers. These could be redeemed at any station, but could not always be used at ticket machines or online, which is often where the cheapest tickets could be found. However, the new NRCoC mean that from 19 July 2015 passengers could request that their compensation be paid in money.

Annex 2: Which? research - station mystery shopping exercise

Between 1 September and 13 September 2015 we conducted a mystery shopping exercise at rail stations in England and Wales. Fieldworkers were recruited through our own bank of trained fieldworkers, and they were then allocated stations to visit, as well as the TOC to enquire about. In total, 20 fieldworkers visited 102 manned stations between them.

Fieldworkers were asked to role-play a scenario in which an elderly friend or relative had experienced a delay on passenger rail within the last month. The exact journey and length of delay were deliberately kept unknown, so as to elicit the most information. They were asked to request information about this passenger's rights from a member of station staff at the ticket office, and to record data on the following:

- What they were told about how the length of delay affects compensation;
- What levels of compensation might be available; and
- Whether they were told that they could receive compensation in a way other than vouchers.

Fieldworkers were first asked to record what information was volunteered to them after a general enquiry about compensation, and then if no information was forthcoming on any of the above points, to prompt the staff member. For example, if the staff member stated that compensation was paid in rail vouchers, the fieldworker would state that their friend/relative rarely travelled by rail, and ask if it was possible to receive the compensation in cash.

We took the following approach to analysing results:

- We classed the information as provided only if the fieldworker was able to get the information at the time of their visit to the station (i.e. not if they were told to ring a customer service number);
- We classed information as provided if the fieldworker was given a leaflet;
- We classed information as provided if the fieldworker was given a claim form and told to read it or told the information was there;
- We classed information as not provided if the fieldworker was given a claim form and just told to fill it out; and
- If a staff member gave information but was uncertain about it, we have considered what they indicated the likely answer was. For example, if they said 'I'm not sure, but I think you can get cash compensation' we would class the information was provided, but not if they'd said 'I'm not sure, but I don't think you can'. If they just said 'I'm not sure', we have said the information was not provided.

Our key findings from this research were:

- When we asked station staff about how long a delay needs to be before compensation would be due, in more than a third (37%) of cases, our fieldworkers were either not given any information at all or only part of the information they needed, or in a very small proportion of cases were even given inaccurate information, about how long a delay needs to be before compensation would be due;
- In only 38% of cases were our fieldworkers given information about the proportion of the ticket cost passengers may receive as compensation – meaning that 62% left the station not knowing what they might be entitled to;

- In only 37% of cases, fieldworkers were correctly told that they could request their compensation in a manner other than vouchers for any value of claim, even after prompting; and
- Overall, in only 18% of cases were our fieldworkers given a full explanation of the conditions for claiming compensation even after prompting (including how long a delay needs to be to claim compensation, the proportion of the ticket cost passengers may receive as compensation, and that this compensation can be requested in a manner other than vouchers).

Annex 3 Trains Satisfaction Survey 2015

Methodology

In November 2015, we surveyed 6,986 UK adults online about their journeys by train in the last 12 months.

To ensure we could report on as many companies as possible, as well as exploring both commuters and leisure passengers, we took a couple of steps:

- Respondents were asked about their last commuter or leisure journey but commuter journeys were prioritised. In addition, if respondents had a leisure journey that they did frequently they were asked about this rather than the last journey to aid response; and
- We used market share information from the National Passenger Survey to target commuter and leisure passengers.

Business travellers and anyone who didn't know the main purpose of their journey have been excluded from the data. All market based reporting excludes NI Railways as well as customers of airport links.

Please note, all survey figures exclude those who answered 'don't know' or 'can't remember'.

The data in this report comes from the following questions:

14. Did you experience a delay on your last journey with [*train company*]? If so, how long was this delay? (6,619 respondents exc D/K)

(S/C)

1. No, there was no delay
2. Yes, I was delayed for less than half an hour
3. Yes, I was delayed for ½ an hour up to an hour
4. Yes, I was delayed for 1 up to 1 ½ hours
5. Yes, I was delayed more than 1 ½ hours
6. Don't know / can't remember

ASK ALL WHO EXPERIENCED A DELAY

16. Were you informed of your rights to compensation as a result of this delay on your last journey with [*train company*]? Please select any that applied. (1,416 respondents; 331 were delayed by 30min+ excluding D/K)

(M/C)

No (S/C)

1. Yes, I was given a form on the train/at the station to complete
2. Yes, staff told me in person where to access a form online
3. Yes, staff told me in person where I could collect a form
4. Yes, there was an announcement at the station or on the train
5. Yes, I received an e-mail, text or social media message from the train company
6. Yes, they informed me in another way (please specify):
7. Don't know (S/C)

ASK ALL WHO EXPERIENCED A DELAY

17. Did you claim compensation from [*train company*] for the delay? (1,416 respondents; 328 were delayed by 30min+ and remembered whether they claimed)

(S/C)

1. Yes
2. No
3. Can't remember



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Which? 2 Marylebone Road, London, NW1 4DF | which.co.uk | 020 7770 7000

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