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TSSA Response to Draft Franchising Policy Statement

Background

1. The Covid-19 pandemic has had a significant impact on TSSA members across Scotland who have continued, at significant risk to their own health and safety and the disruption to normal ways of working, to plan and provide frontline services ensuring that essential journeys can be taken, and key workers are able to attend their workplace. This has been performed against a backdrop of great uncertainty for the long-term future of the industry caused, in part, by COVID-19 and the mooted reform of the franchising system expected to occur following the publication of the Williams Review.
2. It has been reported that the UK Government will publish a white paper based on the recommendations of the Williams review when the course of the pandemic became clear¹. In the interim, most franchise services are provided under a concessionary “Emergency Measures Agreement” (EMA) arrangement while Network Rail continues with its “putting passengers first” re-organisation focusing on route devolution and the opening of an internal market within Network Rail itself. It should not be overlooked or considered as coincidental that many of these, or similar, proposals are expected to be contained within the final publication of the Williams Review itself²
3. The TSSA, and other trade unions, historic position is clear; that passenger services are a vital public service and should be in public ownership. The reasons for and benefits of public ownership are multitudinous with the case being set out in the Trade Unions jointly commissioned “Rebuilding Rail” report³. The current franchising system is broken with higher costs, less efficiency, lower punctuality, insufficient investment in infrastructure and a higher financial risk to taxpayers in taking on the ever-increasing number of failing franchises.
4. There is a clear demand for public ownership of the railways in Scotland with consistent support of over 50%⁴. The UK Rail Minister, Grant Shapps, is recorded as stating “*The model of privatisation adopted 25 years ago...has proven that it is no longer working*”⁵. This view is shared by the Scottish Government Cabinet Secretary for Transport, Infrastructure and Connectivity, Michael Matheson, who is on record as stating that the current franchise model is no longer “*fit for purpose*”⁶.

¹ <https://www.theguardian.com/business/2020/sep/21/uk-covid-19-rail-rescue-measures-dft-franchising>

² <https://commonslibrary.parliament.uk/the-williams-review-the-future-of-rail/>

³ <https://www.tssa.org.uk/en/campaigns/better-rail/better-rail-resources/rebuilding-rail-report.cfm>

⁴ <https://yougov.co.uk/topics/politics/trackers/should-train-operating-companise-be-brought-back-into-public-ownership?CrossBreak=scotland>

⁵ <https://www.bbc.co.uk/news/business-54232015>

⁶ <https://beta.parliament.scot/chamber-and-committees/written-questions-and-answers/question?ref=S5W-34114>

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5. The current operator, Abellio Scotrail Ltd, took over the Scotrail franchise in 2015 for a ten-year term which was originally due to expire on 31 March 2025. It was announced by the Cabinet Secretary Michael Matheson in December 2019 that the Franchise Agreement between Abellio Scotrail Ltd and the Scottish Government would end three years early on 31 March 2022 due to the utilisation of a “break clause” in the contract rather than immediately strip Abellio of the Franchise Agreement. This is despite clear contract breaches⁷ and repeated failures by Abellio in key metrics such as performance⁸, value for money⁹, passenger satisfaction¹⁰, staff retention¹¹ and safety¹².
6. The COVID-19 pandemic has decimated the public transport industry in Scotland with only 65% service levels and 10% passenger loadings compared to pre-pandemic levels within Scotrail¹³. The work of TSSA members and Scotrail staff during the pandemic has not been recognised with the failure to award a pay increase for 2020/21 and the removal of rest day working payment for most grades. This has been blamed, in part, due to a loss in revenue caused by the pandemic with that loss currently underwritten by Scottish and UK taxpayers. The fortunes of the Abellio Group, in contrast, have reversed as they are expected to share in up to £13 million pounds in profit under the EMA by the end of January 2021¹⁴ having previously requested additional finance through rebasing of the contract to make continuation of the Franchise Agreement financially viable for them.
7. Abellio Scotrail will point to improved performance since the beginning of the EMA as a justification for renewing or extending the EMA but the reality of the situation is that it is easier to meet performance targets with fewer trains running or passengers travelling. Current operational performance should not be used as a true indicator as to whether Abellio can operate a service competently.
8. The picture of the current rail industry in Scotland is one of uncertainty: Scotrail was a “failing franchise” at the point the pandemic hit Scotland; the franchise system itself was at the point of collapse before it was replaced with the concessionary management type contracts; the rail infrastructure operator is currently undertaking a fundamental re-organisation the end product of which has not been clearly defined; the UK government is expected to overhaul the existing franchise model following the recommendations of the Williams Review which has not yet been published and passenger numbers have plummeted in the course of the pandemic with no

⁷ <https://www.scotsman.com/health/coronavirus/scotrail-breaches-contract-after-failing-pay-bills-time-2875229>

⁸ <https://www.transport.gov.scot/news/remedial-plan-notice-issued-to-scotrail-1/>

⁹ <https://www.transport.gov.scot/news/scotrail-franchise-to-come-to-an-end-early/>

¹⁰ <https://www.transportfocus.org.uk/news/scotrail-passenger-satisfaction-lowest-level-15-years/>

¹¹ <https://www.scotsman.com/regions/edinburgh-fife-and-lothians/scotrail-begs-train-drivers-come-out-retirement-112345>

¹² <https://www.bbc.co.uk/news/uk-scotland-edinburgh-east-fife-49464767>

¹³ <https://www.scotsman.com/news/transport/scotrail-suspend-hundreds-more-services-day-after-passengers-remain-down-90-3113794>

¹⁴ <https://www.rmt.org.uk/news/rmt-research-reveals-extent-of-scottish-rail-companies-covid/>

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current plan as to how or when these will increase to pre-pandemic levels nor if or when the UK treasury will cease underwriting revenue loss. It is against this backdrop that the Scottish Government have embarked on a consultation and review of their franchising policy statement.

TSSA position on the immediate future of passenger services in Scotland

9. TSSA believe that the Scottish Government should exercise powers under Section 30 of the Railways Act 1993 the next available opportunity. The potential opportunities for exercising these powers are as follows:
 - a) Following an immediate termination of the Franchise Agreement, as amended by the supplemental agreement to the Franchise Agreement - Emergency Measures Agreement, due to the aforementioned contract breaches on the part of Abellio Scotrail Ltd;
 - b) Following the expiry of the current Emergency Measures Agreement on 31 March 2021 and upon termination of the Franchise Agreement prior to 31 March 2022 for breach of contract;
 - c) When Abellio Scotrail Ltd cease operating passenger services in Scotland under the existing Franchise Agreement on 31 March 2022 following the implementation of the “break clause” within the Agreement.
10. TSSA would welcome a view from the Scottish Government on their understanding of their legal position on terminating the Franchise Agreement either during, or following, the period under which Abellio Scotrail Ltd is a party to the supplemental Emergency Measures Agreement for clear breaches of contract which precede the creation of the EMA's. TSSA would further welcome clarification from the Scottish Government on the reasoning behind their failure to immediately remove Abellio Scotrail Ltd from the Franchise when these breaches occurred.
11. Irrespective of the legality of terminating the existing Franchise Agreement the agreement between Abellio Scotrail Ltd and the Scottish Government to provide passenger services in Scotland will end on 31 March 2022 using a “break clause” in the Franchise Agreement. It is TSSA's view that the Scottish Government can exercise powers under Section 30 of the Railways Act 1993 to appoint a public service operator as an “operator of last resort” for the remainder of the Franchise Agreement (i.e. until at least 31 March 2025).
12. For the avoidance of doubt TSSA do not believe that it is necessary to consider an invitation to tender currently as the Franchise Agreement does not expire until 31 March 2025 and it is possible for a Public Service Operator to “take over” the remainder of the Franchise Agreement under the current legislative framework through Section 30 powers or the utilisation of a direct award.

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TSSA position of the future of rail franchising in Scotland

13. TSSA, and a majority of the public at large, agree with comments made by the Cabinet Secretary *prior* to the COVID-19 pandemic that the franchise model is no longer fit for purpose. The current Scottish and UK Rail franchising model has run its course and there no longer appears to be any appetite across the political spectrum to continue the current franchise model. The COVID-19 pandemic has served to exacerbate and expedite the political and practical necessity to move forward with a different model for the operation of passenger rail services.
14. It is clear the current circumstances as outlined above (Para 8) “mean that it would not be appropriate to issue an invitation to tender, including but not limited to situations where there are **other market conditions which could affect the number or quality of bids** likely to be received if the agreement were the subject of a competitive tendering procedure, **such as uncertain or unpredictable rail travel market conditions**”.
15. To put it simply, TSSA do not believe that the socio-economic climate created by the COVID-19 pandemic would yield a value for money bid from the private sector to provider passenger services under a Franchise Agreement. As such, TSSA do not believe it to be appropriate to issue an invitation to tender for the Scotrail franchise.

TSSA position on a “direct award” to an operator of passenger services in Scotland

16. The current policy statement explains “*the relevant legal frameworks prescribe certain circumstances in which the Scottish Ministers may select a person to be the franchisee in relation to a Franchise Agreement without issuing an invitation to tender (in other words, by making a direct award of the agreement to that person)*”. In terms of a direct award, it is unclear which organisations might be under consideration. However, these are likely to fall under one of three categories:
 - a) Abellio Scotrail Ltd;
 - b) A Different Private Operator (e.g. First Group);
 - c) Public Service Operator.
17. In terms a direct award it is extremely unlikely a direct award to Abellio Scotrail Ltd would meet the Scottish Governments objective of ensuring “*on-going, stable delivery of high performing rail services*” given their previous track record as noted previously. The history of passenger railways since the award of the Franchise Agreement to Abellio has been the opposite of “stable” and “high performing”.

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18. Given previous failures and contract breaches by organisation it is likely that any direct award to Abellio Scotrail Ltd would leave the Scottish Government open to legal challenge from other interested parties such as other private operators, public interest organisations or trade unions.
19. There would undoubtedly be significant political backlash immediately prior to the Scottish Parliament elections if contradicting the decision to exercise the break contract in the Franchise Agreement, ostensibly due to poor performance, only to issue a direct award to Abellio Scotrail Ltd who are widely known across their workforce and the travelling public as a failed operator.
20. In more broad terms it is questionable whether, in the current climate, a private operator would be able to *“support an environment where the whole rail system can respond swiftly and effectively to proposals for rail reform”* such as that expected within the expected White Paper following publication of the Williams Review, or respond to the ongoing restructure of Network Rail, given that they will be operating under a Franchise Agreement or Concessionary contract with pre-defined contract terms which are not renowned for their flexibility.
21. The objective of private operator in extracting profit under a Franchise Agreement or Concessionary Contract is conflicted with the Scottish Government objective to *“improve industry alignment and service integration, where possible, to increase effectiveness, reduce costs and place the industry on a sustainable financial footing”* given the significant reduction in revenue within the industry and the uncertainty of funding being made available in the future to cover the shortfall of passenger revenue through the Barnett Formula. This would not *“Ensure value for money for tax-payers and fare payers”* but would, in fact, have the opposite effect as profit is extracted through concessionary or management fees while revenue losses are borne by the tax payer, staff and the travelling public through increased costs, job losses and service reductions.

The case for a direct award to a Public Service Operator

22. It is expected that the Williams review will be published in the short to medium term with the real possibility of legislative changes to the 1993 Railway Act through UK parliament currently unknown. There are also similar changes through the current restructure within Network Rail which, although not legislative, will have a significant impact on the relationship between train operating companies and the railway infrastructure organisation. A Public Service Operator would be inherently more *“flexible in coping with the current volatility in the industry”* by responding positively to direction in a scenario where the owner or majority shareholder is the Scottish Government rather than shareholders of a private organisation.

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23. At the end the current Franchise Agreement (i.e. 2025) the current volatility and uncertainty created by the COVID-19 pandemic will have ended if not reduced significantly with the vaccination rollout. There is uncertainty, however, of when passenger numbers will return to pre-pandemic levels given the prevalence of home working and it is speculated that it may take as long as five years for passenger numbers and revenue to return to pre-pandemic levels. A Public Service Operator until the end of the current Franchise would leave the Scottish Government in a much clearer position with respect of long-term contracts for the provisions of passenger rail services in Scotland.
24. A transfer under Section 30 of the 1993 Railways Act or a direct award to a Public Service Operator for the remainder of the current Franchise Agreement would have the benefit of allowing the operator time to demonstrate effective management of the railway operations in Scotland at a lower cost to the public purse than a private operator. This would also provide time for an embedded Public Service Operator to develop a public sector bid if the franchise is retendered in the future, or to be in situ if a direct award is considered, both of which would be done from the more favourable position of an incumbent operator.
25. Given the current volatility and uncertainty in the UK rail industry for the reasons noted above it is clearly not the appropriate time for the Scottish Government to consider entering long term arrangements with commercial organisations for the provision of passenger rail services in Scotland. At the very least, appointing a Public Service Operator until the end of the current Franchise Agreement would allow time for the Scottish Government to ascertain possible legislative changes and to engage fully with industry stakeholders, including Network Rail, on the future shape and structure of rail franchising before entering long term contracts for the provision of rail services in Scotland.
26. Finally, A Public Service Operator would provide better value for money for tax payers and fare payers simply by removing the administrative and legal costs to the Scottish Government of the procurement process and through savings from any franchise payments, concessionary or management fee to a private operator.

TSSA position on EU legislation related to rail franchising

27. TSSA continues to reiterate that EU law may be applicable as set out in a letter to the previous Cabinet Secretary for Transport, Humza Yousaf, which is attached as an addendum to this submission.

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