

## Franchise agreement capacity regimes

This note aims to provide an overview of the obligations relating to capacity contained in the DfT's franchise agreements. It does not provide detail of the way in which capacity is measured or reported or describe minor variations between the agreements.

In this note, "franchisee" means franchisee and/or franchise operator.

There are broadly three types of capacity regime contained in the franchise agreements. In order of their introduction to the agreements these are:

1. The Load Factor Specification regime.
2. The Agreed Capacity Plan regime.
3. The Capacity Benchmark regime.

### The Load Factor Specification regime

There are two key obligations on the franchise operator under this regime:

1. To use all reasonable endeavours to "carry, without excessive overcrowding, all Passengers intending to travel" on any Passenger Service. In some agreements, this is limited to Passenger Services which are not subject to a Load Factor Specification or a capacity requirement under the Passenger Service Requirement.
2. To use all reasonable endeavours not to exceed the Load Factor Specifications. The Load Factor Specifications broadly require that (i) during the morning and evening peaks, the number of standard class passengers in excess of capacity shall not exceed the total number of standard class passengers by more than a specified proportion; and (ii) excess capacity "shall not be unduly concentrated on any particular route or service".

Where a franchisee breaches either of these obligations it will be in breach of the franchise agreement. The breach may be enforced in the normal way.

In addition, where the aggregate capacity provided during any Reporting Period falls below a specified proportion of the capacity required by the train plan, this is an event of default.

Some franchise agreements (e.g Gatwick Express, Virgin West Coast) include the Load Factor Specification drafting but do not actually contain any Load Factor Specifications. In these cases, the second obligation mentioned above falls away (although the first obligation and the event of default remain).

The Load Factor Specification regime is found in, among others, the c2c, Chiltern, Gatwick Express and Virgin West Coast franchise agreement.

### **The Agreed Capacity Plan regime**

There is a plan agreed between the Secretary of State and the franchisee which aims to “minimise overcrowding” and “avoid excessive overcrowding”. It assumes the “full and effective utilisation” of the rolling stock fleet.

If the plan cannot be agreed, it can be referred to an independent expert for determination.

The requirements of the Agreed Capacity Plan must be reflected in the Timetable and Train Plan and the franchisee must use all reasonable endeavours to provide services in accordance with the Timetable and Train Plan.

In addition, where the aggregate capacity provided on each train during any Reporting Period falls below a specified proportion of the capacity required by the train plan, this is an event of default.

This regime is found in the Southern franchise agreement.

### **The Capacity Benchmark regime**

Capacity is benchmarked measured on a moving annual basis against the proportion of the number of services where actual capacity is less (in some agreements, 25 seats less) than that specified in the Train Plan to the total number of services scheduled to be run.

A table appended to the franchise agreement specifies benchmark figures in respect of each reporting period during the Franchise Term. Four levels of performance are specified in respect of each period: the Target Performance Level, the Improvement Plan Performance Level, the Breach Performance Level and the Default Performance Level.

Failure to meet the Improvement Plan Performance Level or Breach Performance Level results respectively in the Secretary of State being able to require the Franchisee to implement an Improvement Plan or in a breach of the franchise agreement, to be enforced in the normal way. Failure to meet the Default Performance Level in any three consecutive Reporting Periods (or in 4 out of 13, or 5 out of 26, consecutive Reporting Periods) is an event of default.

Some franchise agreements (e.g. First Great Western) contain the Capacity Benchmark drafting but do not actually specify capacity benchmarks. The benchmarking regime will in not operate in these cases. However, there

remains a more general obligation on the franchisee to use all reasonable endeavours to operate services with at least the passenger carrying capacity specified in the Train Plan. Failure to comply with that obligation would be a breach of the franchise agreement enforceable in the normal way. Continued and unremedied failure to comply could become an event of default.