

## Guidance note

WILLIAMS SHAPPS PLAN FOR RAIL

# Consultation on legislative reform

The Department for Transport has launched a [public consultation](#) (the “**Consultation**”) on the legislative reform required to effect the proposals and commitments in the [Williams-Shapps Plan for Rail](#) (the “**Plan for Rail**”). The consultation closes to responses at 11.45pm on 4 August 2022.



The legislative changes are grouped under three headings:

- establishing Great British Railways;
- establishing a new sector structure; and
- reform of wider industry structures and processes.

### ESTABLISHING GBR

Great British Railways is a central component of the Plan for Rail, and it is planned to bring together activity from a range of organisations (including Network Rail, DfT, Rail Delivery Group, and the Great British Railways Transition Team) under one public body.

Network Rail Infrastructure Limited (NRIL) is to be used as the corporate entity that will become the main operating company of GBR, avoiding the need for large-scale workforce transfer or transfer of assets/contracts, which could otherwise cause delay.

### Core functions of GBR

GBR’s core functions include the following:

- to plan and manage access to, and ensure safe and effective use of, the Great British Railways Network, consistent with Secretary of State guidance;
- to manage Great British Railways infrastructure; and
- to manage and secure delivery of high quality, reliable passenger services, and be accountable for the customer offer.

GBR will have an overarching duty to perform its functions and act in the public interest, in a way that balances a range of considerations (to be set out in the Great British Railways Licence).

Ultimate accountability for the framework for the railways in Great Britain will remain with the Secretary of State for Transport (or Devolved Administrations where applicable).

### New Passenger Service Contracts

The new contracts are intended to enable operators to be held to account for trains running on time, delivering passenger satisfaction, and controlling costs. GBR will oversee, procure, and deliver these contracts.

The commercial parameters of these contracts and the allocation of responsibilities to TOCs is not constrained by legislation, so these will not be covered by the Consultation. A separate market engagement programme is underway, however.

### Amendments to Secretary of State as the franchising authority

DfT propose that most of the powers and responsibilities held by the Secretary of State as the franchising authority under the [Railways Act 1993](#) are transferred to GBR.

Ultimate accountability for the railways in Great Britain will still sit with the Secretary of State for Transport. The Secretary of State will remain responsible for defining which services GBR will be responsible for providing via Passenger Service Contracts

(PSC), and will also outline the process GBR must follow in awarding PSCs.

The existing role of Devolved Administrations (DA) will remain unchanged, but the DfT propose to enable through legislation the ability for DAs to delegate their contracting authority to GBR.

[Section 25](#) of the Railways Act 1993 is proposed to be amended to allow for direct award to a public sector operator in specific circumstances to be outlined in the franchising policy statement published by the Secretary of State following a consultation process.

### Amending Retained EU Regulation 1370/2007

Currently, passenger rail contracts are considered ‘public services contracts’ by this Regulation, which takes them outside the scope of mainstream procurement rules.

The following amendments are proposed to this regime:

- a reduction of the limitation period for the challenge remedy for awards;
- the introduction of a recovery remedy to align with the UK subsidy regime;
- a reintroduction of [Articles 5\(6\)](#) and [7\(3\)](#) permitting direct awards to ensure flexibility and transparency of direct awards; and
- amendment of [Article 7\(2\)](#) which details the notice period for publishing a Prior Information Notice prior to an ITT or Direct Award.

## Securing better use of the network

DfT propose the following access reforms:

- reform of industry processes (GBR to consult across the industry on its policies on this point);
- a new duty for ORR to facilitate the furtherance of GBR's policies on matters of access and use of the railway; and
- a power to amend access-related EU-derived railway regulations through secondary legislation, subject to the affirmative procedure.

## Effective competition and collaboration

### Widening ORR's duty to promote competition

ORR's general duty to promote competition in the provision of railway services for the benefit of users of railway services under [s.4](#) of the Railways Act 1993 is proposed to be widened so that it also takes into consideration public sector funding of rail services.

### Removing barriers to collaboration between PSC operators

PSCs will require and incentivise operators to cooperate and work collaboratively, such as through coordination of timetables and joint working during disruption or emergencies.

Legislation is needed to enable this collaboration and give the operators a degree of confidence that collaboration and sharing of information will lead to benefits. Particular concern is with potential issues under [Chapter I](#) of the Competition Act 1998 where GBR issue directions to TOCs to share information. Directions issued by Great British Railways would have to be accompanied by appropriate reasoning, be published and go no further than is necessary to achieve the benefits from collaboration.

### Fares, ticketing, and retail – ensuring fairness for third party retailers

DfT propose to use the governance framework discussed below and the structure of GBR to ensure that GBR's online retailing activities are independent of its wider decision-making about retail strategy.

## ESTABLISHING THE NEW SECTOR STRUCTURE

The Plan for Rail intends to simplify and clarify lines of accountability and join up leadership and decision-making.

The structural changes (along with the legislation that implements them) are intended to facilitate the ambitions of the Plan for Rail.

GBR will be structured to create a balance between taking a national view and paying heed to more local issues. DfT will take on a more strategic role, defining the policy and vision for rail together with other transport services, and providing funding for rail in line with govt. policy. There will also be changes to the responsibilities of other bodies, including ORR, Transport Focus, GBR, and the TOCs.

## GBR's relationship with government

GBR will be an arm's-length body, with a clear separation between its organisation and the government. DfT will be responsible for sponsoring GBR, as will the Scottish government. The Scottish government will have powers in relation to GBR in Scotland that mirror its current powers in relation to Network Rail.

The formal corporate relationship between GBR and DfT will be set out in a Framework Agreement. GBR's articles of association will outline its internal organisational rules. Both documents will be publicly available.

## A new governance framework

A new governance framework is proposed to clarify the roles and responsibilities of each of the key organisations in the rail sector, including the Secretary of State.

Government's focus will be on setting requirements and directions to GBR for the medium and long term. A 30-year strategy will be an element of the framework, providing a long-term vision for the railway.

The governance framework will comprise the following:

- **Statute:** primary legislation will set out the essential requirements for the establishment of GBR and the statutory framework for governance.
- **Great British Railways Licence:** will be consulted on and issued by the Secretary of State to GBR. This will be redesigned from today's Network Rail network licence to reflect GBR's integrated responsibilities across track and train.
- **Note:** GBR will be expected to inform ORR at the earliest opportunity if it has become aware of any actual or



potential licence breaches. ORR will retain enforcement powers in relation to licence breaches, and will be the independent decision-maker on whether GBR has breached, or is at risk of breaching, its licence conditions.

- **Directions and guidance:** will allow the Secretary of State to set additional requirements on GBR where a more direct or bilateral relationship is considered appropriate. These will need to be consistent with the licence and statute.
- **Business planning and funding process:** GBR will be required to produce a five-year Business Plan, setting out planned activity across track and train, in response to high level outputs issued by the Secretary of State and Scottish Ministers. This Plan must align with the five-year infrastructure funding settlements from government, and other income GBR will receive during the Plan's period. Funding for passenger services will continue to be set through government fiscal events.

## Independent Scrutiny

ORR will retain independent regulatory oversight and holds GBR and other railway businesses to account. ORR will continue to monitor and enforce licences, and will also monitor and scrutinise GBR's delivery of its objectives against the Secretary of State-issued Licence and GBR's Business Plan.

GBR will transparently report on its own delivery and performance of the railway.

ORR will also remain visibly independent from government in order to promote trust in the system. To preserve ORR's independence, DfT propose to provide ORR with the statutory powers to levy a fee on GBR to cover the costs of ORR's functions which are currently funded from the Network Rail licence fee, rather than these costs being directly funded by government.

## REFORM OF WIDER INDUSTRY STRUCTURES AND PROCESSES

This section of the consultation focuses on wider rail industry reforms needed to deliver the Plan for Rail, and also includes discussion on the ratification of the Luxembourg Rail Protocol.

### Transport Focus – ‘Passenger Champion’

Transport Focus is the independent watchdog for transport users and represents rail passengers in a range of ways.

In the new rail industry model, GBR will be accountable for the ‘customer offer’ on its contracted services. The role of passenger champion will principally be to advise, monitor, and hold GBR to account on this point. This role will be taken up by Transport Focus.

The duties and roles of Transport Focus will not be changed in relation to any other mode of transport besides rail.

#### Scope of the role

The passenger champion role can be viewed through four broad themes:

- **Passenger advocacy:** ensuring that the voice of the passenger is heard by GBR and other contracting authorities and working with these bodies to resolve issues.
- **Strategy development:** providing ministers and GBR with advice on passenger priorities to feed into five-year business plans, and holding GBR to account through reporting to the Secretary of State on how GBR is deploying its funding against passenger priorities.
- **Monitoring:** engaging with passengers on their experience, monitoring GBR’s performance in relation to passenger experience, and monitoring passenger complaint volumes and themes.
- **Passenger watchdog:** investigating matters relating to rail passengers and station services generally to understand if commitments to passengers have been met, conduct investigations on the Secretary of State’s request, on receipt of a complaint, or proactively, and pass the matter to ORR if necessary.

Memoranda of understanding between GBR and Transport Focus and between ORR and Transport Focus will be published in due course.



#### Amendments to the general duties of Transport Focus

An amendment to [s.76](#) of the Railways Act 1993 is proposed to ensure that Transport Focus’ duty to investigate matters affecting the public interest will apply to all matters that affect passenger experience, and enable Transport Focus to make representations to the organisations that will be providing services to passengers in the future (incl. GBR).

The role and scope of London TravelWatch will not change.

#### Improving accessibility

The new National Rail Accessibility Strategy will outline a plan to improve accessibility and ensure consistency across the network. GBR’s Transition Team has already been commissioned to design and develop the Strategy in the transitional period, and the Strategy will be consulted on separately.

The Strategy is one part of a proposed package of accessibility reforms, including:

- **A new accessibility duty:** the Plan for Rail commits to a new duty on GBR to improve accessibility, in addition to the Public Sector Equality Duty which will apply to GBR. DfT are considering the best way to create and formulate this new duty. DfT’s current proposal is to require that the statutory licence issued to GBR includes an accessibility duty.

– ORR will monitor GBR’s compliance with accessibility requirements in the GBR Licence, as well as other operators’ compliance with their licences.

– Transport Focus will work closely with ORR and act as a voice for disabled passengers and passengers with additional needs.

- **Statutory requirement for GBR to consult with accessibility stakeholders:** DfT propose that the role of the Disabled Persons Transport Advisory Committee is expanded by primary legislation to become a statutory adviser to GBR. DPTAC is currently the statutory advisor to the government on matters relating to disability and transport.

– A condition will also be included in the GBR Licence to consult with disabled passengers and those with additional needs, directly and through representation organisations.

#### Promoting open data

The Plan for Rail committed to an ‘open by default’ approach to data sharing in order to better inform journeys, improve transparency, increase innovation, and bring new entrants into the rail market.

DfT is supporting the development of a new Rail Data Marketplace, where open rail data can be accessed by innovators to build new tools, and by app developers to deliver better real time information to passengers. A Digital and Data Services team, within GBR, is being established to promote this vision of open rail data.

DfT also plan to extend GBR’s powers around information and data currently granted to the Secretary of State under [s.145](#) of the Railways Act 1993. Such

decisions will require further open data sharing across the industry.

- As a general rule, the Railways Act 1993 restricts disclosure of information about any business without the consent of the business concerned, with some exceptions, including for disclosures for the purpose of facilitating the Secretary of State's functions and ORR's functions.
- Whilst information obtained by GBR will be subject to this general confidentiality obligation, GBR will be enabled to make permitted information disclosures for the purpose of carrying out its functions and activities.

GBR's functions will include developing an open data policy which will seek to publish data whilst respecting existing legislative confidentiality requirements.

Future TOC contracts will be amended to require TOCs to acknowledge and co-operate with this policy.

However, despite the above policy, the Plan for Rail does not necessarily

commit to making all information publicly available where it would not be appropriate to do so.

## Luxembourg Rail Protocol

The [Luxembourg Rail Protocol](#) aims to reduce the cost of finance for rolling stock and leasing companies by reducing the level of risk to creditors by establishing a harmonised international legal framework for the creation and registration of international interests in rolling stock, as well as legal remedies for default or insolvency.

The UK government is committed to implementing and ratifying the Protocol. New legislative powers are therefore proposed to enable the UK to give effect to its obligations under the Protocol via subsequent regulations.

The government plans to consult with the industry in due course on the options for implementation of the Protocol.

## CONCLUSION

The launch of this consultation marks the next step towards the implementation of the rail reform agenda set out in the Plan for Rail and provides an opportunity for views to be shared on the more detailed proposals which are set to transform the rail sector.

Burges Salmon has extensive experience of advising government authorities, infrastructure owners, passenger and freight operators on a wide range of rail regulatory issues. If you would like to discuss any aspect of this article, please do not hesitate to get in touch with a member of our [rail team](#).

## Who to contact

If you would like further guidance or information mentioned above, we would be happy to help.



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