



## Response to ORR's consultation on outstanding matters in the Schedule 8 performance regime

This pro-forma is available to those that wish to use it to respond to our consultation. Other forms of response (e.g. letter format) are equally welcome.

Please send your response and any queries to [performance.incentives@orr.gov.uk](mailto:performance.incentives@orr.gov.uk) by 9 January 2023.

### About you

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*\*This information will not be published on our website.*

### Scope of application of Schedule 8

**Do you agree with ORR's proposal to insert new sub-paragraphs into Schedule 8 which would allow ORR to 'switch off' the majority of Schedule 8 payments for GBR-contracted operators if the required legislative change is implemented?**

**Do you agree that the proposed new Schedule 8 sub-paragraphs should apply only to GBR's contracted operators?**

**Do you have any comments on the proposed approach to this issue and the drafting of the proposed new sub-paragraphs under Schedule 8?**

Rail Partners recognises the need for additional flexibility to account for future reform, particularly as the legislative programme to establish Great British Railways is likely to continue into the next Control Period.

The Plan for Rail White Paper outlines that in future GBR will be responsible for the specification and procurement of most passenger rail services through Passenger Service Contracts (PSCs). The Department for Transport envisages that these PSCs will include performance measures through which passenger operator performance will be assessed. Whilst we recognise that this could make requirements for further

performance incentives through the Schedule 8 regime an unnecessary administrative burden given GBR will have dual responsibilities for managing infrastructure and specifying passenger services, we remain concerned that the ability to switch off the Schedule 8 regime for GBR operators in future could result in a worse performing railway if there is not a strong alternative incentive regime in place. A high performing railway is critical to attracting passengers back to rail and growing revenues following the pandemic. It will remain critical for all commercial operators – open access passenger and freight operators and other operators with revenue incentives switched on within National Rail Contracts and in the future Passenger Service Contracts – given the strong link between performance and revenue.

Private sector open access passenger and freight operators have invested significantly to both create and expand markets, yielding significant economic and environmental benefits to society. It is right that they remain exposed to payments through the Schedule 8 regime as it provides a strong incentive to make investments and refine operational practices to improve performance and exceed their benchmarks thus contributing to a high performing railway. There is a risk that should Schedule 8 be switched off for some operators, without alternative strong incentives, all parties will not face the equivalent drive to improve performance. Open access passenger and freight operators represent a small proportion of all traffic on the rail network. Should Schedule 8 be switched off for most operators and services, there is a considerable risk that the regime no longer strongly incentivises the future infrastructure manager to deliver a high performing railway. Any future regime must ensure that the signal around Schedule 8 is not weakened for those operators that remain in scope of this regime.

We note that that ORR does not intend to issue a notice that enables elements of the Schedule 8 regime to be switched off for GBR operators unless it is satisfied that there are reasonable incentive structures in place. To date, little detail has been shared by DfT on what the performance incentives within PSCs may look like. Rail Partners members would welcome further information on what future performance structures ORR may consider appropriate.

There has rightly been a strong emphasis on the need for greater collaboration between industry partners in a reformed railway, something that Rail Partners and its members strongly support. However, it will need to be considered how this ambition could be undermined should some operators be exposed to Schedule 8 and others opted out, as incentives for all operators will not be aligned. This could potentially make it more difficult to establish a cross-industry approach between all operators and the infrastructure manager. It is essential where multiple different performance regimes co-exist in a new industry structure, that they all point in the same direction and incentivise the same outcomes. Without close alignment between the regimes, it is likely that the incentive properties of Schedule 8 will be significantly diluted.

It was reassuring that the consultation on the legislation required to establish GBR outlined a continued role for a strong, independent regulator. It is vital that ORR is able to challenge GBR and its funders in a robust manner to ensure that any

amendments to the performance regime work for all operators. Any assessment on changes to the performance regime proposed by GBR should be conducted transparently and should include consultation with industry.

Rail Partners supports ORR's decision to keep the delay attribution process which will continue to play a pivotal role in identifying and mitigating performance risks to deliver the high performing railway envisaged in the Plan for Rail, even if elements of Schedule 8 are turned off in future. For passenger operators that have performance incentives through fees within their National Rail Contracts or Passenger Service Contracts, retaining a clear process to determine the party responsible for impacts and incidents will be important so that cause can be apportioned fairly between operators and the infrastructure manager. This will ensure that operators are fairly assessed against the performance related criteria in their contracts.

### **Adding flexibility to Schedule 8 in CP7**

**Do you agree with our proposal to allow ORR to initiate a mid-control period recalibration of Schedule 8 in the event of a material change in circumstances?**

**Do you think that this should be a feature of each of the passenger, freight and charter regimes?**

**Do you have views on the circumstances under which such a power should be used?**

Rail Partners recognises the benefits of incorporating greater flexibility into the Schedule 8 regime by permitting a mid-control period recalibration of parameters. We agree that the strongest case for including this clause exists in the passenger industry where it could be particularly valuable as the industry continues to recover from the impact of the pandemic and long-term passenger numbers, and therefore service levels, remain uncertain. In extreme circumstances it could be beneficial for freight operators too.

The need for greater flexibility must be balanced against the benefits of a stable performance regime against which private sector operators have the confidence to make investments to improve performance levels and exceed the benchmarks agreed at the beginning of the control period. It is therefore essential that any re-opener should only adjust for external factors and importantly should not reward poor performance or penalise good performance. Should ORR have the ability to trigger a mid-control period recalibration without clear parameters under which this could take place, this could reduce confidence to invest in performance improvement opportunities as operators may not have a five-year horizon against which they can make informed decisions. It could also create a perverse incentive should operators consider that continued investment would result in higher benchmarks resulting from mid-period recalibrations.

To mitigate this, it is important that ORR specifies a threshold, for example, measured as a change in traffic levels, which must be exceeded before a recalibration could be initiated. This threshold should be sufficiently high to ensure that this clause is only triggered in exceptional circumstances, enabling private

sector operators to continue to have confidence to make investments. Any recalibration of Schedule 8 following the re-opener must apply equally to the operator and infrastructure manager sides of the regime and therefore not affect how the regime is geared. The threshold for commencing a recalibration should also be measured over a prolonged period of time to avoid the risk that a recalibration is not caused by a short-term shock to traffic levels.

Should a recalibration take place but further into the control period traffic levels return to a level where the initial CP7 benchmarks would be more appropriate, ORR should be able to reimpose these benchmarks and this should be kept under review. Otherwise there is a risk that the re-opener results in a regime that operates outside of its calibrated parameters for an exacerbated period of time. For example, despite the significant impact that the pandemic had on traffic levels (which we assume would have triggered a recalibration), it is certain that the benchmarks agreed at the beginning of CP6 are more representative of traffic levels currently than any adjusted benchmarks implemented in 2020 or 2021 would be. ORR could also consider conducting a recalibration if changes are made to Network Rail's funding within a control period where this would significantly change their renewal and maintenance plans, making the initial benchmarks unrepresentative.

The consultation notes that a recalibration would not be initiated based on poor performance that was under the control of industry parties – while this is often clear cut, in other cases it can be far more nuanced, for example industrial action can have a significant impact on performance but is not necessarily in the gift of train operators or Network Rail to resolve.

## **Publishing your response**

We plan to publish all responses to this consultation on our website.

Should you wish for any information that you provide to be treated as confidential, please be aware that this may be subject to publication, or release to other parties or to disclosure, in accordance with the access to information regimes. These regimes are primarily the Freedom of Information Act 2000 (FOIA), the UK General Data Protection Regulation (UK GDPR) the Data Protection Act 2018 (DPA) and the Environmental Information Regulations 2004.

Under the FOIA, there is a statutory code of practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this, if you are seeking confidentiality for information you are providing, please explain why. If we receive a request for disclosure of the information, we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on ORR.

If you are seeking to make a response in confidence, we would also be grateful if you would annex any confidential information, or provide a non-confidential summary, so that we can publish the non-confidential aspects of your response.

Any personal data you provide to us will be used for the purposes of this consultation and will be handled in accordance with our privacy notice, which sets out how we comply with the UK General Data Protection Regulation and Data Protection Act 2018.

### ***Consent***

In responding to this consultation you consent to us:

- handling your personal data for the purposes of this consultation; and
- publishing your response on our website (unless you have indicated to us that you wish for your response to be treated as confidential as set out above.)

Your consent to either of the above can be withdrawn at any time. Further information about how we handle your personal data and your rights is set out in our privacy notice.

### ***Format of responses***

So that we are able to apply web standards to content on our website, we would prefer that you email us your response either in Microsoft Word format or OpenDocument Text (.odt) format. ODT files have a fully open format and do not rely on any specific piece of software.

If you send us a PDF document, please:

- create it directly from an electronic word-processed file using PDF creation software (rather than as a scanned image of a printout); and
- ensure that the PDF's security method is set to no security in the document properties.