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Partners

Response to the Plan for Rail Legislative Consultation

August 2022

1. Summary

Legislation must be an enabling framework for success and enshrine the right checks and balances in statute

About Rail Partners

Rail Partners exists to make the railway better by harnessing the expertise and creativity of private sector operators for the benefit of those who use the railway, passengers and freight customers, and those who pay for it, including taxpayers. Our members are international transport companies delivering passenger and freight services globally.

They have been vocal in calling for change, and several of the key components of the white paper and proposed legislation reflect what we identified as priorities: a new arms-length public body (Great British Railways) to coordinate and simplify the industry; a new contractual model to replace franchising, a reformed fares system and a regulatory regime fit for the new industry structure. It is now essential to get the detailed design of those elements right.

Summary of response

The industry's original submission to the Williams Review argued that a new body should bring together the coordination of track (infrastructure) and train (passenger and freight services) – exactly the task that has been set for GBR. The Plan for Rail states that GBR will plan and run the network, providing ticketing and information, bringing together parts of Network Rail, the Department for Transport, and cross-industry services currently delivered by the Rail Delivery Group. Significantly, it will bring together infrastructure management and specification of passenger train services to align incentives for the benefit of customers, communities, and the wider economy.

However, the key difference between the industry's original proposals and the Plan for Rail is how GBR will be structured and its scope. Passenger and freight operators called for a new body to sit above

both infrastructure and operations to create an equal partnership between the two. This is not what is described in the Plan for Rail and legislative consultation, with Network Rail being subsumed into GBR as well as GBR acting as the contracting authority with private train operators. This structure poses questions about the size and scale of GBR relative to both passenger and freight operators – with the Plan for Rail acknowledging there is a risk it becomes too powerful and inadvertently makes decisions not in the public interest.¹

To avoid what could potentially become a large and overcentralised body, it will be critical that GBR is set up from the outset with a customer-focused culture and that the right relationships are created between GBR at the centre, GBR regions, train operators and ORR. As Chief Executive of Network Rail, Andrew Haines has said himself, GBR should not become “Network Rail 2.0” – with an engineering-led railway prioritising infrastructure management over the needs of customers, local communities, and governmental goals.

Avoiding this will mean drawing upon the best of the public and private sectors, by ensuring that those operating rail services have the levers in their contracts necessary to respond to customer needs, driving revenue growth and reducing industry cost. This in turn will involve giving both GBR regional divisions and private operators the freedom to act within a framework and look outward to customers, and not constantly inwards and away from the customer to the central bureaucracy of GBR. Setting the right culture within GBR will be critical and wherever possible the legislation should support a strong role for private sector train operators in delivering for customers and taxpayers. This could be done, for example, by providing a duty for GBR to foster innovation and promote investment from the private sector.

¹ Williams-Shapps Plan for Rail: “Great British Railways will be a powerful body. That is necessary to bring about change, but there is, of course, a risk that it may become in some ways too powerful, or at least empowered to make decisions that are not in the public interest.” p35

Furthermore, the relationships between GBR and ministers and civil servants are critically important. Once government has set its vision, objectives, funding allocation for the railway and signed-off the Whole Industry Strategic Plan (WISP), GBR must be given the space to deliver, with political leaders avoiding the urge to micro-manage the railway – often leading to decisions that do not consider the whole system and blur accountabilities, ultimately adding time and cost into the delivery of a better railway.

The Plan for Rail and proposed legislation has the potential to deliver the most significant change in a generation – both for industry and its customers. However, there is still much work to ensure that the detail that sits behind the legislation is right. Whether it is ensuring that the new body does not turn into a political football, that the best parts of the public and private sector are properly harnessed, or the right customer-focused culture is embedded in GBR; the task ahead is challenging but critical to ensure the sector can play its fullest role in supporting economic recovery as the nation builds back from the impact of the Covid pandemic.

Our three key tests for the legislation

In order to achieve the ambition set out in the Plan for Rail, Rail Partners and its members believe legislation should meet three key tests. It should:

- 1. Empower private sector operators to deliver for customers:** the operational and commercial expertise of operators must not be blunted, and operators must be provided with the levers and incentives to enhance the customer experience and reduce costs to the taxpayer – as envisaged in the white paper.
- 2. Provide ORR with the power to hold GBR to account effectively:** the ORR must not be hamstrung in its ability to challenge GBR on decisions and delivery to ensure it is performing in the interest of operators, passengers, freight users and taxpayers. As well as having the legislative powers, ORR must be a confident regulator to exercise its independent role effectively and ensure that it has the right capabilities to do so.
- 3. Ensure GBR is sufficiently arms-length from government to deliver for customers and taxpayers:** a key pillar of reform was to create clear accountabilities and end the micromanagement of the past, therefore GBR must be truly arms-length to deliver the reform needed. Strong independent regulation can provide comfort that GBR will be held to account to deliver on government's objectives.

1. The legislation should empower private sector operators to deliver for customers

The Plan for Rail is clear in wanting to get the best from the private sector – across passenger and freight – by requiring demanding targets to be achieved on performance, reliability, customer satisfaction and so on.

It proposes doing this by utilising revenue incentives to increase passenger numbers, leveraging commercial expertise to drive efficiencies and reduce costs, and creating an environment that supports private sector investment to unlock freight growth and provide a better customer experience. However, in some areas the legislative consultation signals a direction of travel that could potentially diminish rather than enhance the role of the private sector. We believe legislation should:

- **Place a statutory duty or duties on GBR through the license to maximise the strengths of private sector train operators** – when provided with the incentives and levers to do so, private sector train operators have demonstrated in the past their ability to innovate to deliver better outcomes for customers, significantly grow revenues and keep costs under control. They can do so again with the right framework. Duties referenced in primary legislation could include promoting innovation and investment from private sector train operators. Without a commitment in primary legislation to duties of these kind there is a risk that GBR becomes overly centralised and the role of private sector train operators becomes purely a transactional one.
- **Not contain new powers to issue direct awards to a public sector operator** – we believe putting Passenger Service Contracts (PSCs) out to competition to the private sector will always deliver better value for money, whatever the circumstances. A power to give a direct award to a public sector operator is not reflective of the vision set out in the Plan for Rail given the focus on competing all PSCs and harnessing private sector innovation in order to deliver better outcomes for customers and taxpayers. In the examples set out in the consultation of where this power might be appropriate, for instance if there are large

infrastructure projects, we do not believe it is difficult to create contracts and adjust risk profiles to accommodate these, whilst incentivising private sector operators to deliver better outcomes. There are already examples of this, including during the Thameslink and London Bridge major programmes.

- **Not dilute ORR's competition duty to the extent it will likely mean no new passenger open access application will be approved in the future** – the value that passenger open access operations bring not only to customers but to previously under-connected communities and local economies is significant – helping to meet Government decarbonisation and levelling-up objectives. We appreciate concerns over revenue abstraction, but over time, previous ORR analysis showed that revenues grew overall at a faster rate at stations with open access competition than at stations with a similar size catchment area but without competition. Further, ORR already has a duty to have regard to the funds available to the Secretary of State and takes this into account when assessing open access applications.

The fact that there are so few open access services demonstrates how difficult it already is to get applications approved and the weight that ORR has attached to this duty. Investment in the railway, for example HS2, will create extra capacity in the future that could be utilised commercially by open access operators and so thinking should not be constrained by today's infrastructure. However, if the ORR's competition duty is changed, it should not indirectly capture the assessment of freight operator access applications, for example if there are competing access applications between passenger and freight operators on capacity constrained parts of the network.

- **Ensure GBR directions on collaboration and data sharing are not anti-competitive and does not stifle innovation** – the private sector has invested at risk and cost to improve the customer proposition and demonstrated, most notably during the pandemic, an ability to collaborate when there are common goals. However, there needs to be a careful balance between collaboration and data sharing on the one hand and promoting an innovative culture within train operators on the other. There should be sufficient structures in place to encourage at

risk innovation whether that is at the PSC competition interface or by allowing operators to retain certain ownership rights for investments in-life.

It should be explored whether collaboration and data sharing can actually be achieved through good contracting and regulation, rather than via mandates. A mandate to share what train operators would consider to be commercially sensitive data and initiatives could stifle investment if rewards are shared but costs are not. Further, operators outside of the PSC landscape, particularly open access operators who are in direct competition with each other and with contracted operators, would likely be compromised through the advent of information asymmetry. Finally, train operators must not be put at risk of breaching Competition Law. Operators need to be sure that at no stage in the process are they exposed to this risk as a result of expectations of collaboration and sharing data.

2. The legislation should provide ORR with strong powers to hold GBR to account effectively

The Plan for Rail acknowledges that GBR cannot morph into simply a larger Network Rail – creating a railway where engineering takes primacy over delivering for passengers and freight customers. GBR will hold many levers – managing access, stewardship of the infrastructure, procurement of passenger services and many elements of the customer offer.

History shows us that monopolistic suppliers must have strong and effective oversight. That is why ORR's role is crucial to ensure GBR is held to account on delivery for passengers, freight customers and taxpayers. Effective regulation is not just about holding GBR to account though. It can also encourage a collaborative approach between industry players where this is of mutual benefit. We believe legislation should:

- **Ensure that ORR retains its strong regulatory powers to hold GBR to account** – ORR already has strong regulatory powers over Network Rail and these should be retained over GBR. ORR needs to use its powers confidently and have the right capabilities to do so. It needs to be transparent, publishing all key decisions and the reasons for those decisions and it should regularly publish data on the performance of GBR.

Some Rail Partners' members agree that financial penalties would not be appropriate to be levied on GBR because it is money lost to the railway with, they believe, only a marginal incentive property given the corporate structure of GBR. However, other members believe that it is one of the few tools ORR has to enforce compliance with licence obligations and that the threat of financial penalties can act as a powerful incentive on management. If financial penalties are removed, it will make it even more important that there are strong reputational incentives on GBR's board and management. It will also be important that any GBR executive bonuses are tied to demanding performance targets, including cost efficiency.

- **Retain ORR's power to require remedies/recovery plans from GBR when things go wrong** – it is important that GBR can be challenged by ORR to secure a railway that delivers for customers, taxpayers and operators as envisaged in the Plan for Rail. Currently ORR can require Network Rail to develop a recovery plan when it falls short (e.g. infrastructure failures leading to a worsening of performance) which serves as a deterrent to underperformance through a strong reputational incentive. When required, recovery plans provide comprehensive detail on how any shortfalls will be rectified providing greater confidence to passengers and freight customers. ORR should retain the ability to require recovery plans and this should be explicit in legislation. This power should not be limited to infrastructure issues but should cover whole system problems.
- **Continue to provide ORR with the power to approve and where appropriate direct access applications** – it is vital that operators who retain revenue risk and significant commercial operations, including freight operators, can be confident that they will be treated with parity to those operators directly procured by GBR through Passenger Service Contracts. A robust and stable access and charging framework is fundamental to any train operator retaining commercial risk and helps to unlock investment to grow markets and deliver improvements for customers.
- **Promote competition on the rail network** – proposed changes to the ORR's competition duty to consider public funding of rail services would create an unfair playing field for open access operators regarding access to the network, undermining private sector confidence and foregoing the investment and the benefits they bring to customers and communities. As said above, the ORR already has an existing duty to have consideration for the Secretary of State's funds and therefore an expansion of this duty seems unnecessary. The proposed duty also only considers the funding of passenger rail services and fails to account for the substantial amount of taxpayer money spent on infrastructure and the need to use the network optimally to maximise the return from rail services to UK PLC.

3. The legislation should ensure GBR is sufficiently arms-length from Government to deliver for customers and taxpayers

Whilst there will always be a key role for Government in setting out its strategic objectives for rail, approving the 30-year Whole Industry Strategic Plan and setting out the public funds available, the Plan for Rail sought to create an arms-length body with clear accountabilities, away from government. It needs to have sufficient freedom to take day-to-day decision making out of the hands of politicians and let the rail industry get on with delivering.

However, unconstrained political powers, such as the power for the Secretary of State to issue mandatory directions to GBR on any item at any time, passenger services being funded via fiscal events and so forth risks reintroducing the ad-hoc decision making that has held back the railway in years gone by. We believe legislation should:

- **Provide industry, including private sector operators, the space to deliver** – the Secretary of State will have the power to issue GBR's license, sign-off the WISP, define PSC procurement and issue five-yearly output specifications and the funds being made available for the infrastructure to deliver those outputs. Any further directions, including licence changes, must be issued sparingly in specific circumstances and there must be a transparent process associated with the issuing of directions.

Government must avoid day-to-day political involvement and let GBR, train operators and the wider supply chain get on with delivery, determining the best and most efficient way of delivering the outputs. As well as the 5-yearly infrastructure spending cycles, we note that budgets to cover train operator costs will be set through HMT fiscal events. If PSCs are to provide the basis for success in delivering for customers and taxpayers, there needs to be a degree of certainty through the life of the contracts such that there is not a constant cycle of cost challenges.

- **Clearly set out GBR's core responsibilities and requirements in legislation (rather than through the GBR licence) to ensure stability** – GBR's proposed core functions as set out in the consultation document should be included in primary legislation to ensure a long-term, strategic vision for the railway. We recognise they need to be reasonably high-level so that GBR can respond to change but we believe that three proposals in the consultation document are suitable in that regard. As legislation is not easily changed, it will provide stability in terms of the railway's priorities which will give greater confidence to private sector operators to make long-term investment decisions to deliver on the objectives of the Plan for Rail. We believe that a fourth core function should be added to those proposed in the consultation document, that is for GBR 'to provide infrastructure services to enable high quality, reliable freight and commercial passenger services including open access passenger'.

The consultation proposes putting a requirement in primary legislation for the scope of GBR's licence to include duties relating to accessibility, freight and the environment. We believe the freight duty should include a requirement for GBR to have a freight growth target and, as discussed above, we propose an additional duty to promote innovation and investment from private sector train operators.

By enshrining GBR's core responsibilities in legislation, it will allay to some extent concerns of potential political micromanagement as the Secretary of State will not be able to issue ad-hoc directions and guidance which are at odds with the responsibilities of GBR. However, the consultation gives considerable scope for the Secretary of State to issue directions and guidance and therefore core functions and duties on their own might be insufficient to curtail this power to circumstances only where it is absolutely necessary (dealing with the impact of a pandemic is a good example). Therefore, GBR core functions and duties should be coupled with the legislation setting out the broad circumstances where directions and guidance could be provided. Furthermore, there should be industry consultation on directions and guidance and ORR should be asked to publish an impact assessment.

- **Enshrine a requirement to set an ambitious rail freight growth target in legislation** – the commitment in the Plan for Rail to set a rail freight growth target has been well received by the rail freight sector. Growing the rail freight market is not just important to existing and potential freight customers, but it will also help to expand the sector's contribution to UK PLC, support the levelling up of the economy, and help to meet the Government's net-zero commitments. While it is right that the size of the target itself should be supported by government, as discussed above, the requirement for a rail freight growth target should be enshrined in legislation, so that it is a binding commitment. This will ensure that GBR, both centrally and regionally, works with industry in order to ensure that the right processes, incentives and infrastructure are available to unleash the significant opportunities available to move more goods by rail in the UK.



2. Technical response

Rail Partners' submission to the Plan for Rail legislative consultation

Question 1: Does the scope of the proposed designation of Great British Railways as an integrated rail body appropriately capture what you would expect for an effective guiding mind for the railways? (paragraph 2.6) Please explain.

Independent owning groups and freight operator's original proposals to the Williams Review called for a new body to sit above both infrastructure and operations to create an equal partnership between the two. The Plan for Rail and legislative consultation ultimately chose a different structure, with Network Rail being subsumed into GBR as well as GBR acting as the contracting authority with private train operators. This structure and GBR's proposed core functions as outlined in the consultation document pose questions about the size and scale of GBR relative to train and freight operators – with the Plan for Rail acknowledging there is a risk GBR becomes too powerful and inadvertently makes decisions that are not in the public interest. That is why key elements of Rail Partners response to this consultation focuses on the role of the Office of Rail and Road to properly regulate and oversee GBR in its new role as the guiding mind for the railway.

In relation to GBR's core functions, we believe that the integration of contracted passenger operations and infrastructure management, amplifies the need for GBR to act in a non-discriminatory manner. The loss of separation between infrastructure and contracted passenger operators presents a particular risk to rail freight and open access passenger services (and is discussed in detail in this consultation response). Given that open access services will not be contracted directly by GBR, it is imperative that GBR's core functions reflects all rail services. To overcome this, we believe that a fourth core function should be added for GBR 'to provide infrastructure services to enable high quality, reliable freight and commercial passenger services including open access passenger'. Further, these functions should be established on a statutory basis, with the requirements that are placed on these core functions (2.8 of the legislative consultation) also put into legislation.

We further recommend that the Public Interest Duty specifically states that GBR should act transparently (in question 2) to help address some concerns that the loss of separation between infrastructure and contracted passenger services give rise to.

Question 2: Are there any other factors Great British Railways should balance and consider as part of its public interest duty? (paragraph 2.9) Please explain.

We believe the final factor 'benefits from promoting efficiency, affordability and value for passengers, taxpayers and rail funders' should be expanded to include references to demand/revenue growth and rail freight customers. Without factors of these kind there is a risk that GBR becomes overly centralised, and the role of private sector train operators becomes purely a transactional one. The private sector has contributed significantly over the past generation to transform the railway's finances, and it is important that this is duly considered as part of the factors within GBR's Public Interest Duty. This will help to promote innovation and investment from the private sector to increase patronage and accelerate the restoration of the railway's finances.

Rail Partners is supportive of the rail freight factor within the Public Interest Duty however it is noted that there are two factors that make reference to rail passengers but no mention of freight customers. Therefore, we believe that the 'promoting efficiency, affordability and value for passengers, taxpayers and rail funders' factor should also be expanded to include rail freight customers. Due consideration of the benefits to freight customers, particularly where improvements to the efficiency and affordability of freight services are referenced, is important to secure private sector investment from customers and third parties, which will help to drive modal shift and unlock further freight growth opportunities.

Alongside amended factors, the Public Interest Duty should maximise environmental value. The consultation document states that GBR must act in a way that maximises the social and economic value derived from the rail network. In recognition of the government's commitment to decarbonise the UK economy by 2050, Rail Partners believes that GBR should also seek to maximise environmental value, rather than simply consider it as part of its assessment of trade-offs through the factors within the Public Interest Duty as is proposed within the consultation document. This environmental consideration should not just seek to minimise carbon emissions from rail services, though important, it should also consider the wider impacts of how the rail network is used on the whole transport sector's environmental performance. Rail is already a carbon efficient way to move people and goods across the country, and with the right infrastructure and incentives in place can credibly commit to decarbonising by 2050. A commitment to maximise environmental value through the Public Interest Duty will help to further rail's contribution to a low-carbon transport system.

Finally, as noted in question 1, GBR should act transparently in its assessment of the factors within the Public Interest Duty. Within a constrained environment there will inevitably be trade-offs between these different factors as GBR allocates capacity and makes planning or investment decisions. The process for assessing the benefit of each factor must be robust and transparent such that it provides train operators with confidence that GBR is making decisions in a non-discriminatory way. As such, we believe that in addition to a requirement to maximise the economic, social and environmental value of the railway through the Public Interest Duty, the duty should also explicitly require GBR apply it in a transparent way. This will also make it easier for ORR to scrutinise GBR's decision making as appropriate.

Question 3: Do you support the proposal to include a power in primary legislation to enable Scottish and Welsh Ministers to delegate their contracting authority to Great British Railways, subject to the terms of delegation being mutually acceptable to ministers in the Devolved Administration(s) and the Secretary of State? (paragraph 2.17) Please explain.

Rail Partners broadly supports a power being included in legislation that allows for Ministers to mutually agree to delegating powers to GBR. However, this raises questions around other devolved authorities and whether such provisions will be included or may become necessary in the future.

As a wider point, there is limited information contained within this consultation on the relationship between the devolved administrations and GBR. We would welcome additional detail on this matter, as it is particularly important for passenger and freight services crossing the Anglo-Scottish and Anglo-Welsh borders. It is also not yet clear whether the rail freight growth target will be GB-wide, if this is not the outcome further consideration should be given to how each nation's aspirations for rail freight can be delivered in a coordinated way.

Question 4: Do you have any views on the proposal to amend Section 25 of the Railways Act 1993 to enable appointment of a public sector operator by Great British Railways by direct award in specific circumstances? (paragraph 2.18) Please explain.

Rail Partners does not support this proposal and does not recognise the need for its inclusion, particularly given that the white paper does not seek the inclusion of such a power. The white paper is clear about its intention to compete all contracts and leverage the commercial expertise of the private sector. Any overuse of this power would curtail the competitive market for operator contracts and is not in keeping with the Plan for Rail's desire to create a vibrant and competitive market for Passenger Service Contracts (PSCs) – driving down costs, growing patronage and enhancing the customer experience.

Over the past 25 years private rail operators have played a critical role in improving the customer experience, more than doubling passenger numbers and increasing farebox revenue to deliver a return for the taxpayer. While there is still significant detail to work through to develop the future passenger service contractual landscape, the Plan for Rail does not envisage the use of a public sector operator in any circumstances. EU Regulation 1370 already allows for an operator of last resort where necessary and the white paper's focus on competing all PSCs would suggest that this change is not needed.

Although the consultation outlines that a direct award will only occur when a competitive tendering process would represent poor value for money (namely during major infrastructure projects or a major reform programme), we would argue that even in those circumstances the private sector can be

incentivised to drive down costs and push efficiencies. Good procurement and contracting can create scenarios and incentives that adjust risk profiles, attract bidders and meet the needs of clients during challenging periods. There are already examples of this, including during the Thameslink and London Bridge major programmes. The railway is used to weathering difficult periods and the scope for determining whether an infrastructure project or the level of reform is significant enough is likely to be vague, making use of this power quite wide and prone to overuse.

Rail Partners believes that this power is not needed, and that good contracting can provide better value for money for the taxpayer. Use of this power, particularly without clear constraints set out in legislation, will likely lead to a significant reduction of competition for passenger rail contracts, foregoing opportunities for cost efficiencies and revenue growth and incentives for operators to deliver a high-quality customer experience to passengers.

Question 5: Do you support the proposed amendments to Regulation 1370/2007, which are i) reducing the limitation period for the challenge remedy, ii) introducing a remedy of recovery to accord with the new UK subsidy regime, iii) clarifying who may bring a claim, iv) retaining the ability to make direct awards under Article 5(6), and v) clarifying the PIN notice period? (paragraph 2.20) Please explain.

(i/ii) Overall, we agree with the principle of a clear time limit that will provide certainty for awarding authorities and winning bidders, however, Rail Partners would recommend a longer period than one month given the complexity of rail contracts, particularly those that contain some element of revenue incentives or risk. There needs to be adequate time for an aggrieved party to obtain information and so be able to take an informed view of whether it challenges.

Member experience suggests that information exchanges take time, and the current proposal could incentivise pre-emptive action. Should the tendering authority behave reasonably with respect of information exchange around a challenge, three months would be a reasonable timeframe – although still short. Further, this period should be extendable in the event that the tendering authority does not reasonably cooperate with regards to information sharing. For that reason, we recommend a longer period than one-month and would suggest a minimum of three months.

(iii) Providing further clarification in support of existing rules regarding what it means to be “interested” or “affected” are likely to be welcomed. However, we seek clarity on the approach and would recommend that any clarification does not create a situation where evidently tangential parties can claim/challenge a procurement decision.

(iv) Given present circumstances, continuing the current potential for direct awards is welcomed by industry.

(v) Given the business planning commitments of large undertakings like transport owning groups, as a minimum maintaining the current one-year period would be preferable and appropriate. It takes time and significant resource to establish teams, and it is therefore in the interest of clients to provide the market with adequate time to ensure the benefits of the private sector are ultimately leveraged.

Question 6: Do you support the proposed statutory duty on ORR to facilitate the furtherance of Great British Railways’ policies on matters of access and use of the railway, where these have received Secretary of State approval? (paragraph 2.38) Please explain.

Rail Partners is concerned that this duty will affect the independence of the ORR and its ability to scrutinise GBR appropriately on the application of its policies – including relating to access to the rail network. Significant further information is sought on what the future access policy will look like and the role of the ORR in relation to overseeing the application of the policy and approving subsequent amendments. Should appropriate checks and balances be in place to protect ORR’s independence it is not immediately clear what this duty is seeking to achieve.

In a new contractual landscape, where GBR will be responsible for awarding and managing Passenger Service Contracts (PSCs), there is a high risk that GBR is incentivised to develop access policy and act in a way which compromises the position of other train operators and other suppliers. While it is right that ORR has a constructive relationship with GBR, it is considered that this duty could weaken ORR’s capacity to

challenge GBR on matters relating to access and use of the network and may result in them having to fall in line with GBR's track access decisions.

A robust and transparent access regime is essential to any private operator with revenue risk such as freight and passenger open access operators, it underpins substantial investment in long-lived assets by providing certainty on how capacity on the rail network will be allocated, and protections to ensure that policies are applied fairly. It is not possible that operators can support this proposal when there is insufficient information available on what the future access policy will look like. Private operators will need to understand how long GBR intend to award access rights for, what mechanisms will exist within track contracts to provide flexibility and how the appeals process will function.

Before it is decided whether to progress this duty, operators should be consulted on GBR's future access policy, and there must be greater clarity on the future access regime. Otherwise, this duty will create further uncertainty for both passenger and freight operators, which could stifle investment to expedite the return of passengers to the network and prevent the realisation of freight growth opportunities.

To ensure that there are appropriate checks and balances in place, Rail Partners believes that ORR must retain the ability to always challenge GBR's access decisions. Should GBR wish to make any changes to its access policy, ORR must first be consulted before the Secretary of State issues approval otherwise there is a risk that ORR is expected to agree to amendments because of the proposed duty to support the furtherance of GBR policies.

Question 7: Noting we will consult separately on the use of the power to amend the existing Access and Management Regulations, are you aware of any immediate essential changes that are needed to these Regulations to enable Great British Railways to deliver its guiding mind function? (paragraph 2.44) Please explain.

The Access and Management Regulations provide a critical role within the rail industry, outlining how the rail network is managed by the infrastructure manager on critical areas such as access to the network, infrastructure charges, and the role of the ORR through the appeals process. This sets out a clear set of rules and processes which gives train operators, particularly those with revenue risk, including freight operators, sufficient confidence on how access decisions will be made, which in turn enables investments in assets and innovative solutions to grow markets and improve productivity. The prospect of amendments to the Access and Management Regulations would therefore create significant uncertainty for operators (particularly open passenger access operators and freight operators) and should be avoided.

The DfT reform team has shared a series of proposed amendments to the Access and Management Regulations with Rail Partners' members relating to Provision 14(9), 19(4), 16 and the Schedule 3 Performance Scheme. While it is helpful to have early sight of the Department's emerging thinking on key aspects of reform, we do have some concerns about the amendments that are being proposed and would welcome further information from the Department on how the potential risks will be mitigated.

Rail Partners believe amendments to facilitate a whole industry profit and loss between GBR infrastructure and passenger services are not needed. There are many instances, particularly on the European continent, where the Access and Management Regulations apply but both a public infrastructure manager and integrated passenger service operator are in operation. Therefore, it is not clear why any amendments are needed to enable GBR to function as an infrastructure manager while holding contracts with certain passenger operators on NRCs and PSCs in the future. Further, the disbenefits of not having governance and accounting separation are significant and could result in GBR making decisions in relation to capacity allocation and charges in a way which is discriminatory to those operators not directly contracted by GBR.

Separation of infrastructure and train operation has been a key pillar of the legislative framework for non-integrated operators. Rail Partners therefore seeks further information on how DfT intends to make sure there is appropriate separation of GBR's infrastructure and operational functions to avoid any risk of discriminatory behaviours arising. This should be assisted by stating that GBR must act in a transparent and non-discriminatory way in its application of their Public Interest Duty and an additional core function to consider freight and open access passenger services (see question 1 & 2). These details are essential in order for open access passenger and freight operators to have more confidence in the proposed changes outlined to 14(9) and 19(4).

We are also aware of proposed amendments to Provision 16 and Schedule 3 of the Performance Scheme. While it is recognised that some elements of the performance regime will have to be adjusted in the future to align with structural changes to the contractual landscape for some passenger operators, this is not considered to be something that must be ready for 'day one' in order for GBR to function. Though DfT has argued that the system will continue to run in the same way it does today for operators that retain revenue risk, it must be noted that a significant number of passenger operators will be contracted in future under PSCs with no revenue risk who might opt out. If a significant number of operators were to opt out of Schedule 8 without appropriate alternative incentives, there is considerable risk that the regime would no longer incentivise those operators and the infrastructure manager strongly enough to contribute to a high performing railway. As such, this could potentially worsen outcomes for non-GBR operators remaining in the regime. It is unlikely that a reputational incentive alone will suffice.

The performance regime is critically important for all operators on revenue risk and incentivises them to make investments to outperform their performance benchmarks. It also ensures that they are compensated for disruption to their services caused by other operators and the infrastructure manager. Due consideration should be given to how the Access and Management Regulations can continue to ensure that all parties are strongly incentivised to contribute to a high performing railway. If some operators were to sit outside of the future performance regime, the star model through which all Schedule 8 payments are made could fall apart. This would weaken the incentives of the performance regime considerably and would create significant risk to operators that continue to hold revenue risk (e.g. open access passenger and freight). Similarly, while Rail Partners agrees that some improvements to the delay attribution process are necessary, it is important that such a process is retained to identify the root cause of performance related issues, and put in place mitigatory measures to avoid reoccurrence. Any uncertainty regarding the future performance regime, and delay attribution process, could put future investments in assets and initiatives to improve performance at risk.

It is also noted in the consultation document that changes to the Access and Management Regulations would only apply to GBR managed infrastructure. This could create asymmetry in approaches to access across the different infrastructure managers on the GB rail network. Such a move would potentially introduce additional administrative costs associated with securing and managing access to the network for rail operators who operate across infrastructure boundaries. Introducing additional complexity would not be in keeping with a white paper which aimed to make industry processes better and simpler.

Question 8: Do you agree with the proposed recasting of ORR's competition duty to better reflect public sector funding? (paragraph 2.49) Please explain.

Though Rail Partners is supportive of measures to ensure that the railway delivers value for money for the taxpayer, widening ORR's competition duty does not seem necessary to deliver the reforms detailed in the Plan for Rail and could undermine confidence across operators that are outside of the passenger contracted landscape in the future. Widening the duty in this context means diluting rather than strengthening the existing duty and it would likely make it almost impossible to get open access applications approved. This is not within the spirit of the white paper that still envisaged a role for open access.

The ORR already has an existing duty to consider the Secretary of State's funds, and this has proved an effective measure to ensure that taxpayer money is protected. Twenty-five years after privatisation there are still very few open access services due to the difficulty in getting access to the network. There has been one new open access operator (Lumo) in well over a decade. Through the tests that ORR applies to open access applications the benefits already need to significantly outweigh any cost to the taxpayer (which in any case in the medium-term there is no evidence that this is the case), such as serving under-connected communities (Hull, Sunderland and Bradford to London) or achieving mode shift from air (Edinburgh to London).

Open access services have added significant economic value to the UK, by creating new markets, supporting improved connectivity across the Union, and unlocking modal shift from more carbon intensive transport modes. Following the pandemic operators on revenue risk have been able to demonstrate their commercial expertise to accelerate the return of passengers and revenue to the railway faster than those not on revenue risk. The benefits of open access passenger operators are recognised in the Plan for Rail, therefore future legislation should promote open access services rather than create a landscape that makes them unviable.

The broad nature of the drafting of the competition duty amendment could also affect the rail freight market as one freight operating company is currently publicly owned. Though it is not the intention of the duty, as this freight operating company also competes for commercial business, the duty could result in the ORR making decisions which favour the publicly funded operator. Therefore, we do not consider that ORR's competition duty requires recasting.

Question 9: Do you support the proposal to include in legislation, a power for Great British Railways to issue directions to its contracted operators to collaborate with one another in circumstances where doing so could otherwise give rise to concerns under Chapter I of the Competition Act 1998, in particular, where this could lead to defined benefits to taxpayers and/or passengers? (paragraph 2.54)

Rail Partners believe that mechanisms for collaboration largely already exist within contracts and should remain and be enhanced at the contractual level – rather than a GBR issued direction. Without legislation, the risks transfer to individual contracts and the regulatory environment. Therefore, this becomes a procurement and regulatory issue that can be addressed via a good quality procurement process and effective regulation. This approach will also allow responsibilities to be tailored to the circumstances.

A legislative approach risks weakening the position of other operators that are outside of GBR's contractual landscape in the future. For example, if some passenger operators running services specified by GBR are mandated to collaborate on particular areas, other open access operators may not have visibility of these discussions and therefore could be put at a competitive disadvantage. Given that legislation is seeking to make GBR infrastructure and passenger services a whole entity, any sharing of information should be done in a transparent manner and clear rules for its use established – i.e. through better regulation.

It should be noted that train operators have demonstrated an ability and willingness to collaborate (e.g. safety), sharing best practice and collectively delivering initiatives to improve the railway. Collaboration through the pandemic from public messaging to timetabling has also been strong. Therefore, it is important to understand where barriers exist to collaboration and unpick those barriers through good contracting and regulation – rather than a blunt direction. A burdensome top-down approach may limit bottom-up, innovative collaboration.

Finally, it is not clear how such a direction would actually override Chapter 1 of the Competition Act whilst protecting the legitimate commercial interests of train operators. There is significant risk that exposure to this direction is factored into bids, given that it is not clear how an operator would be indemnified against Chapter 1 of the Competition Act.

Question 10: Would Train Operating Companies be willing to share information and collaborate in the way envisaged without the proposed legislative provisions? What are the risks to them without the proposed legislation? Would the proposed legislative approach help to resolve these risks?

Amendments to override competition law, as referenced in the legislative consultation document, are a blunt tool to facilitate collaboration. As mentioned under question 9, understanding where collaboration is needed and using good contracting and regulation to facilitate this is more preferable. Overburdensome collaboration requirements could be a significant drain in operator resource and could compromise the benefits brought to the railway through competition.

Question 11: Are there any particular additional safeguards (in addition to the safeguards outlined in paragraphs 2.54 - 2.55) that you consider necessary to support the interests of third parties (including freight, open access and charter operators) or to otherwise protect passengers and/or taxpayers?

There needs to be clarity on how collaboration will deliver a positive outcome for the industry and information on how the information will be used by the industry, including, where appropriate, commitments to share with operators that are outside of the PSC landscape to avoid information asymmetry.

Appropriate checks and balances should be introduced to make sure that open access and freight operators are protected and do not find their commercial offering compromised by operators working collaboratively under GBR. GBR should demonstrate how directing collaboration to its contracted operators will not lead to a competitive disadvantage to other operators.

Due consideration should be given to whether mandated operator collaboration across all areas would lead to the best outcome when the matter is of a commercial nature. Requirements to collaborate in the sharing of commercial data could discourage innovation and investment from the private sector and could impinge on the competitive environment that drives benefits for passengers and taxpayers.

Question 12: How should we ensure that Great British Railways is able to fulfil its accountability for the customer offer while also giving independent retailers confidence they will be treated fairly? (paragraph 2.61) Please explain.

The white paper is clear that GBR will create a single retail website but a level playing field for third party retailers should be ensured to encourage innovation. A level playing field between GBR and third-party retailers once GBR takes over retailing from train operators is crucial. Markets generally thrive when there is fair and healthy competition – providing choice for customers and a continued drive to innovate and improve the product offering.

For example, this will likely involve separating retail licencing under GBR from any retail operations that GBR undertakes, ensuring that GBR's retailing activity abides by the same terms and conditions as any other third party retailer. ORR does have powers under the Enterprise Act to monitor any markets where they involve services related to rail. Therefore, ORR should monitor periodically whether GBR is retailing impartially such that there is a level playing field with third party retailers. The implementation of change, including any legislative changes, must be consulted on and transparently discussed, not least to ensure that operators are not subject to risks outside of their control.

Question 13: Does the proposed governance framework give Great British Railways the ability to act as a guiding mind for the railways, while also ensuring appropriate accountability? (paragraphs 3.13) Please explain.

Statute (legislation)

Rail Partners understands that only specific GBR duties (environment, accessibility, rail freight) and the new governance arrangements are proposed to be put into legislation as license requirements. However, we believe that GBR's core functions (including our recommended fourth – see question 1) alongside its requirements to deliver those core functions should be put into legislation to provide stability and certainty around industry structures. Further, we recommend that an additional specific duty on GBR through its license is put into legislation to ensure it is not subject to ad-hoc changes that could discourage progress towards the realisation of the strategic objectives outlined in the white paper, and investment from both public and private sectors.

In addition to GBR's public interest, environment, accessibility and rail freight duties, we believe that the promotion of innovation and investment from private sector operators should be an additional duty that should be considered by GBR. When provided with the incentives and levers to do so, private sector train operators have demonstrated their ability to innovate to deliver better outcomes for customers, grow revenues strongly and keep costs under control – delivering innovative solutions across timetabling, train plans, marketing and promotions, and the wider customer experience. It is key that GBR is setup to maximise the potential for innovation by both the private passenger and freight sector.

Rail Partners' freight operator members would welcome the inclusion of the requirement for a freight growth target within primary legislation, as part of GBR's statutory duty to promote freight. This will ensure that there is due focus on delivering a step change in the rail industry's approach to rail freight, and that significant freight growth is realised. When the target itself is set, Rail Partners has called for an ambitious target to treble rail freight volumes by 2050, supported by shorter-term targets aligned with GBR's funding cycles. Growing rail freight is not just beneficial to freight customers but will also support economic growth (including supporting levelling up) and help to decarbonise supply chains.

Directions and guidance

Rail Partners recognises the important role for the Secretary of State in setting the strategic direction and priorities for GBR, which is entirely appropriate given the significant amount of taxpayer money supporting the railway. After setting out these objectives, it is important that government then takes a step back and gives GBR and the wider rail industry the space to deliver on the vision for a better railway outlined in the Plan for Rail.

The consultation document notes that additional guidance and direction could be issued by the Secretary of State on any matter. This ability to intervene on any matter risks undermining operational decisions and could see increased micromanagement. It is important that this is avoided to provide GBR with the space to deliver an improved railway by operating truly at an arms' length from government. Rail Partners would therefore welcome more information about the framework for engagement between DfT and GBR once it has set out GBR's objectives. The legislation should set out strict criteria by which directions can be given, for example around licence changes. It should also set out a transparent consultative process for doing so.

Business planning and funding process

Rail Partners is supportive of the continuation of the five-year business plan for GBR, in keeping with the existing process within Network Rail. A multi-year business plan and settlement is important for GBR and train operators as it provides clarity on the requirements of GBR in terms of the capacity and capability of the infrastructure over the medium-term. However, ORR must be set up to continually monitor GBR's performance during delivery of the business plan and intervene where necessary.

It is noted in the consultation document that passenger services will be funded through fiscal events. While the need to ensure that taxpayer funding of rail services is applied efficiently and reflects demand at the time and wider economic circumstances, a lack of alignment in business planning and funding between track and train could lead to a sub-optimal outcome. This misalignment is potentially inconsistent with letting long term Passenger Service Contracts (PSCs) where cost risk is transferred to the operator. GBR should avoid having to reopen PSCs in response to budget settlements or else it will make it difficult to deliver long term benefits for customers if there is no certainty over budgets and outputs. One of the advantages of GBR is that it can plan infrastructure and operations as a system and should be able to reallocate money between the two if necessary. Consistent 5-year funding cycles across track and train would support GBR in providing a whole-system approach.

Question 14: Do you agree with the proposal for Great British Railways' new duties to be captured in the licence and that primary legislation should require the licence to include specific duties in relation to accessibility, freight and the environment? (paragraph 3.16) Please explain.

Rail Partners is in broad agreement with the proposal to set out GBR's duties through its license and recognises that industry will be consulted separately on GBR's draft licence at a later date. However, we believe there are specific duties that should be set in legislation and remain unchanged (see question 13).

As noted in question 13, freight operator members of Rail Partners would welcome the inclusion of the concept of a freight growth target which GBR must pursue in primary legislation. The inclusion of the concept of a freight growth target in legislation would ensure that GBR and the wider industry have the strongest incentive to ensure that the freight growth target is delivered.

Similarly, passenger operator members of Rail Partners would support the inclusion of an additional duty on GBR to foster innovation and investment from the private sector. This would ensure that contracted passenger services are secured by competitive tender – harnessing the efficiencies and growth that the private sector brings to the railways.

Question 15: Do you support the proposal to amend ORR's powers to exclude the ability to impose a financial penalty on Great British Railways for licence breach? (paragraph 3.26) Please explain

Some Rail Partners' members agree that financial penalties would not be appropriate to be levied on GBR because it is money lost to the railway with, they believe, only a marginal incentive property given the corporate structure of GBR. However, other members believe that it is one of the few tools ORR has to

enforce compliance with licence obligations and that the threat of financial penalties can act as a powerful incentive on management. If financial penalties are removed, it will make it even more important that there are strong reputational incentives on GBR's board and management. It will also be important that any GBR executive bonuses are tied to demanding performance targets, including cost efficiency.

Question 16: Please provide any feedback on the proposed business planning arrangements for Great British Railways.

Rail Partners is supportive of the five-year business planning process and agrees that ORR should continue its role in setting GBR's settlement and monitoring its delivery against the business plan. A multi-year infrastructure settlement is critical for the rail industry as it provides operators with greater certainty on what the future network will look like, and it is used to inform planning and investment decisions across the private sector.

Through each business planning process, GBR should detail what it will deliver in the next five years and should be challenged to deliver improvements on the rail network as efficiently as possible to deliver value for money to the taxpayer and minimise disruption to rail services. The business plan should also clearly outline how GBR will support the delivery of government policy including how it will support freight growth.

The consultation document details that funding for rail services will occur through fiscal events. While this will allow for wider economic circumstances to be considered when funding the railway, short-term funding arrangements could lead to misalignment with long-term investment in infrastructure and other assets such as rolling stock. In particular, the Plan for Rail committed to establishing a Whole Industry Strategic Plan (WISP) for the railway, it is important that the business planning arrangements are aligned with the WISP to provide private sector operators with confidence to make considerable investments to maximise the benefits of new infrastructure.

That is why there should be contractual certainty over scope and budget for the period of a Passenger Service Contract, rather than regular budget negotiations. It is understood that GBR will want flexibility to give directions to reshape services between contracts which would likely undergo a contractual variation process, but this should be avoided in short-term instances for budgetary purposes when providing certainty for the infrastructure.

Question 17: Will the proposed approach to independent scrutiny and challenge provide sufficient transparency and assurance that Great British Railways can be held to account? (paragraphs 3.45 – 3.47) Please explain.

It is not clear in the consultation document what levers the ORR will have so that they are able to effectively hold GBR to account if it fails to deliver. Given the corporate status of GBR meaning that standard regulatory levers – financial penalties in particular – are much less effective and lead only to less money being available to fund the industry, a key alternative is reputational incentives. GBR needs to be transparent, publishing all key decisions and the reasons for those decisions and ORR should regularly publish data on the performance of GBR. This should place strong reputational incentives on GBR's board and management. It is also important that any GBR executive bonuses are tied to demanding performance targets, including cost efficiency.

Any enforcement action that ORR takes and monitoring of compliance with that enforcement action must be made public. Depending on the size of any failings or if there are repeated failings, the Secretary of State can decide whether to use powers to remove board members. Currently, ORR can require Network Rail to develop a recovery plan when it falls short (i.e. infrastructure failures leading to a worsening of performance) which serves as a deterrent. When required, recovery plans provide comprehensive detail on how any shortfalls will be rectified providing greater confidence to passengers and freight customers. ORR should retain the ability to require recovery plans and this should be explicit in legislation. This power should not be limited to infrastructure issues but should cover whole system problems.

Changes to ORR's competition duty and a duty to support the furtherance of GBR policy could result in a framework which requires ORR to fall in-line with GBR/DfT decision making rather than scrutinising and challenging GBR where necessary. That is why ORR should maintain the power to approve and where appropriate direct access decisions. It is vital that operators who retain revenue risk and significant commercial operations, including freight operators, can be confident that they will be treated with parity

to those operators directly procured by GBR through Passenger Service Contracts. A robust and stable access and charging framework is fundamental to any train operator retaining commercial risk and helps to unlock investment to grow markets and deliver improvements for customers.

ORR must also be able to challenge GBR to ensure it is transparent in how it using data provided by rail operators. Without this GBR could use this information, for example, to make planning and timetable decisions in a way which provides preference to operators for whom it is responsible for procuring.

Question 18: Do you support the proposal to give ORR a statutory power to levy a fee on Great British Railways to cover the costs of ORR's functions which are currently funded through the network licence? (paragraph 3.48) Please explain.

Rail Partners is supportive of this proposal. Funding ORR through a statutory power, rather than including it as a license condition within GBR's license – which is ultimately controlled by DfT – will provide ORR with adequate independence. This regulatory independence will help to avoid any risk that the ORR may be required to fall in line with GBR or DfT's position. As we have stressed in our response to question 17, it is imperative that ORR has strong regulatory powers and can scrutinise GBR decision making to ensure that decisions are made in a non-discriminatory way and in the interest of passengers, freight customers and taxpayers.

Question 19: Will the proposed changes enable Transport Focus to effectively undertake the role of independent passenger champion in the new rail industry structure? (paragraph 4.8) Please explain.

Rail Partners is broadly supportive of the proposal, however adding an additional layer to dealing with passenger complaints beyond the ombudsman may add complexity. While we welcome the broader role envisaged for Transport Focus and particularly the intention that it will inform GBR's strategy and day-to-day policy, we would welcome further discussions to explore this in more detail.

Question 20: How can we ensure that accessibility is integral to Great British Railways' decision making and leads to cultural change in the rail industry? Please explain.

Rail Partners supports GBR's new accessibility duty and the aim to improve accessibility across the rail network. As noted in the white paper, GBR should prepare a national accessibility strategy that should address challenges arising from differing stations, fleet types, legacy station infrastructure and so forth. This national accessibility strategy should seek to undertake a pan-disability audit of physical and non-physical barriers to accessing the estate and services, and a business planning process that sets clear targets and provides appropriate funding.

The strategy should also consider how the railway workforce is reflective of the communities that it serves – including disabled people with lived experiences. Further, disabled people and their needs should be both considered and incorporated during policy development and decision making.

Looking forward to Passenger Service Contracts (PSCs), when putting in place relevant contractual obligations, it is paramount that local circumstances are considered to avoid a 'one-size-fits-all' approach. Further, PSCs should encourage pan-disability initiatives, building on recent progress and making travel by train an option for everybody.

Question 21: Do you support the proposal to expand DPTAC's remit to become a statutory advisor to Great British Railways, as well as to the Secretary of State, on matters relating to disability and transport? (paragraph 4.15) Please explain.

Rail Partners supports DPTAC's expanded role and it should be consulted across activities like the objectives and scope of the pan-disability audit. DPTAC's scope should not just be limited to GBR and the Secretary of State, but should seek to bring together relevant groups at a local level to leverage the knowledge of operator access advisory groups.

Question 22: In addition to providing Great British Railways with powers to make “permitted information disclosures”, are there any other revisions to the Railways Act 1993 or barriers to promotion of open data that you consider need to be addressed? Please explain.

Rail Partners is in principle supportive of open data in many areas, however, it is evident that commercially sensitive data should not form part of the open data concept. More information is required on the types of data that would be made open before a full response can be provided to this question.

It should also be noted that open data can lead to an administrative and financial cost when assuring the accuracy and quality of data streams to be made available. Where that data is being used by commercial entities to deliver products/services there should be a contribution to those costs. There is also a balance to be struck as not to stifle private sector innovation if operators are forced to make all data feeds they develop available. The incentives on operators to invest capital, time and effort into systems and data if competitors or commercial third parties have access would be undermined.

We further recognise the work already underway with projects such as the Rail Data marketplace to support enabling access to open data. We would welcome further discussions on the technical and resource costs necessary to enable data to be shared that is secure and does not impede on business operational priorities. Finally, there are parallel programmes within RDG and Network Rail requesting access to and publishing of open data from data publishers such as operators. Undoubtedly, the industry would benefit from a holistic approach to the publishing of open data.

Question 23: Do you support the proposal to include a power in primary legislation to enable the ratification of the Luxembourg Rail Protocol? Please explain.

Rail Partners regards the Protocol as a useful mechanism to leverage private sector investment in rolling stock. By lowering operating costs, the Protocol will help members provide more capacity across passenger and freight services.

Question 24: Are there impacts or risks of the policies proposed which have not been covered by the impact assessments? Please explain or provide evidence.

Please see introduction for an overview and summary of key risks and impacts.

Question 25: Do you have evidence relating to the impacts and risks identified and discussed in the impact assessments? Please provide it to us.

Please see introduction for an overview and summary of key risks and impacts.