

Williams-Shapps Plan for Rail: legislative changes to implement rail reform

Personal details

Q1. Your (used for contact purposes only):

name Bruno Muller

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Q2. Are you responding:

on behalf of an organisation?

Organisation details

Q3. Your organisation's name is?

Porterbrook Leasing Company Limited

Q4. Your organisation is:

a rolling stock company?

Q5. Describe what your organisation does.

Porterbrook owns almost a quarter of the national passenger rail fleet and currently has around 4,000 vehicles on lease or on order. To date we have invested £3bn in new passenger and freight vehicles and are actively looking to invest a further £1bn in UK rail in the coming years.

Engineering excellence is central to our role as a leading railway asset owner and manager. Porterbrook is a delivery partner, supporting improved industry performance and reliability across the network. Our 30 to 35-year whole life asset management approach optimises value to passengers & taxpayers and aims to minimise environmental impact.

We have an established reputation for delivering new technologies, such as battery, hybrid and hydrogen powered trains. These innovations support the government's commitment to Net Zero by 2050 ambitions, improve air quality, reduce emissions, and enhance network resilience.

In 2020 we introduced 'HydroFLEX', the UK's first hydrogen-powered train. A fully productionised version of this innovative train was showcased at Glasgow in November 2021 during COP26.

In collaboration with our industry partners, we project manage the delivery of regular upgrades to our rolling stock fleets. Each year we invest over £100m in our existing assets, supporting over 100 UK-based companies and supporting c.7,000 jobs.

Porterbrook employs over 170 people, of which three quarters are engineers and project managers. In addition, 32% of Porterbrook's workforce is female which compares favourably to the UK rail industry average of 16%.

Q6. Your location is:

multiple regions?

Q7. Your size of organisation is:

26 to 250 employees?

Core functions of Great British Railways

Q8. In your view does the proposed role of Great British Railways appropriately capture what you would expect to be delivered by an effective guiding mind for the railways?

Yes, I agree with the proposed core functions listed but think additional functions are needed

Additional core functions

Q10. What other functions do you think are needed?

We agree with the core functions listed.

In addition, we believe that Section 30 of the Railways Act 1993 plays an important role in ensuring that passenger rail services are maintained if a passenger rail contract terminates and is not immediately replaced.

We believe that similar duties should be retained going forward. They could either remain with the Secretary of State as is the case today, or be transferred to Great British Railways through primary legislation.

Proposed factors for Public Interest Duty

Q13. Do you agree with the proposed factors that Great British Railways must consider as part of its public interest duty?

Yes, I agree with the proposed factors completely

Option to delegate devolved contracting authority to Great British Railways

Q18. Do you support including a primary legislation power to enable:

	Yes	No	Don't know
Scottish ministers to delegate their contracting authority to Great British Railways?	X		
Welsh ministers to delegate their contracting authority to Great British Railways?	X		

Direct award to public sector operator

Q19. What, if any, views do you have on allowing appointment of a public sector operator by Great British Railways by direct award?

We support 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 the specific circumstances described at 2.8.

Facilitating passenger service contracts (by amending EU Regulation 1370)

Q20. Do you support the proposed amendments to Regulation 1370/2007, which are:

	Yes	No	Don't know?
reducing the limitation period for the challenge remedy?	X		
introducing a remedy of recovery to accord with the new UK subsidy regime?	X		
clarifying who may bring a claim?	X		
retaining the ability to make direct awards under Article 5(6)?	X		
clarifying the PIN notice period?	X		

Office of Rail and Road duty to facilitate the furtherance of Great British Railways' policies on matters of access to and use of the railway where these have received Secretary of State approval

Q21. Do you support the proposed statutory duty on ORR to facilitate the furtherance of Great British Railways' policies on matters of access to and use of the railway where these policies have received Secretary of State approval?

Yes

Proposed statutory duty on ORR reasoning

Q22. Why?

We recognise the need for ORR to play an active role in enabling Great British Railways as it plans and manages the network in the public interest, particularly as it identifies opportunities for greater efficiencies and simplification. We believe that the proposed new duty on ORR to facilitate the furtherance of Great British Railways' policies on matters of access to and use of the railways will enable this.

Amendments to enable Great British Railways to function as a guiding mind**Q23. What changes, if any, do you think are needed to the existing access and management regulations to ensure that Great British Railways can meet its guiding mind function?**

We have not reviewed the existing access and management regulations from this perspective. However, we support the objective.

Widening the scope of ORR's duty to promote competition**Q24. Do you agree with the proposed recasting of ORR's competition duty to better reflect public sector funding?**

Yes

Removing barriers to collaboration between Great British Railways contracted operators**Q26. What do you think of the proposal to include in legislation, a power for Great British Railways to issue directions to its contracted operators to collaborate with one another?**

We support the proposal in principle. In our view, willingness to cooperate without the proposed legislative changes will depend on the circumstances. Contracted operators will be willing to collaborate where they can see the benefits and unlikely to want to do so where they can't.

The proposed legislative changes may enable more collaborative behaviours, particularly in instances where passenger or taxpayers benefits have been identified, but there are no perceived direct benefits to individual contracted operators.

Q27. In your view would train operating companies be willing to share information and collaborate in the way envisaged without the proposed legislative provisions?

No

Risks to train operating companies

Q28. What are the risks to the Great British Railways contracted operators without the proposed legislative changes?

The risks will also depend on the circumstances, but they might include legal (including the risk of infringement of the Competition Act 1998), confidentiality, and lost opportunity.

Q29. In your view do the proposed measures help to resolve these risks?

Yes

Why?

Legislation could help reduce some of these risks, particularly legal risks. In our view, other risks such as lost opportunity are unlikely to be fully resolved by the proposed changes.

Customer offer

Q31. How, in your view, can 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?

We have no expertise in third-party online retailing and as such are not in a position to comment on this point.

Governance framework

Q32. In your view does the proposed governance framework give Great British Railways sufficient ability to act as a guiding mind for the railways while ensuring appropriate accountability?

Yes

Great British Railways duties in licence

Q34. Do you agree with the proposal for Great British Railways' new duties to be captured in the statutory licence and that primary legislation should require the licence to include specific duties in relation to accessibility, freight and the environment?

Yes

Not imposing financial penalties on Great British Railways in the event of a licence breach

Q36. Do you support the proposal to amend ORR's powers so as exempt Great British Railways from financial penalty in the event of a licence breach?

No

Against Great British Railways financial penalty exemption

Q37. Why not?

We can see the harm that the proposal is intended to address by removing the power for ORR to fine Great British Railways for breach of its license. However, Great British Railways must be accountable for its acts and potential omissions. We believe that any exclusion should be very limited and, for example, it should not extend to safety breaches.

Additionally, many publicly owned and funded bodies are currently subject to fines for breaching their obligations/duties. Setting a precedent could have unintended consequences on these bodies.

We believe that an alternative proposal could be for the ORR to retain its power to fine Great British Railways for breach of its license, whilst granting the Secretary of State a power to waive any such fine.

Great British Railways business planning and funding

Q38. What feedback, if any, do you have on the proposed business planning arrangements for Great British Railways?

We support the proposed business planning arrangements for Great British Railways.

Independent scrutiny and challenge

Q39. In your view will the proposed approach to independent scrutiny and challenge provide sufficient:

	Yes	No	Don't know
transparency?		X	
assurance that Great British Railways can be held to account?		X	

Great British Railways fee to cover the cost of ORR functions currently funded by the Network Rail licence fee

Q40. Do you support the proposal to give ORR a statutory power to levy a fee on Great British Railways?

Yes

Independent passenger champion

Q42. In your view will the proposed change to the railways act enable Transport Focus to effectively undertake the role of independent passenger champion in the new rail industry structure?

Yes

Improving accessibility

Q44. In your view how do we ensure that accessibility is integral to Great British Railways' decision making?

The proposals (including the statutory consultation requirement) set out a sensible approach to this matter.

DPTAC's remit

Q45. 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?

Yes

Promoting open data

Q47. In your view are further legal changes necessary to ensure data is open by default?

Don't know

Promoting open data

Q49. What, if any, other barriers do you think need to be addressed to promote open data?

Issues such as whole life access to operational and technical data for rolling stock are best addressed at the time of procurement, when the procurer has maximum leverage to negotiate favourable terms with the manufacturer.

The current model for procuring rolling stock works against this. This is primarily because the train operating companies leading the procurement have limited interest in dealing with such issues beyond the contracted term. This can result in subsequent lessees and other interested parties relying on the willingness of the manufacturer to ensure continued access to data.

Lessors have a long-term interest in securing whole-life data access for the benefit of subsequent operators. However, they currently risk getting marked down in the commercial score if they raise points on documents or try to negotiate a better deal with the manufacturer. We believe that a more direct involvement of lessors in the procurement process could help address the issue and secure access to data for the whole life of the asset.

Luxembourg Rail Protocol

Q50. Do you support the proposal to include a power in primary legislation to enable the ratification of the Luxembourg Rail Protocol?

No

Luxembourg Rail Protocol reasoning

Q51. Why not?

Based on the information currently available to us, we are not in favour of implementing the Luxembourg Rail Protocol (the "Protocol") in the UK. This is primarily because i) we don't believe that the Protocol is necessary for GB rail; and ii) we are concerned that its implementation would add additional layers of complexity and costs for GB rolling stock transactions.

In our view, the first question is whether there is potential private finance for GB rail which is being held back and will be unlocked by adopting the Protocol. Our view is that there is a lack of opportunity rather than a lack of private finance. The non-implementation of the Protocol has not held us back, with over £13 billion of private finance in new rolling stock since privatisation.

The next question is whether the Protocol will reduce the cost of finance. We agree that an aim of the Convention on International Interests in Mobile Equipment (the "Convention") is to reduce the cost of finance for large, high value mobile assets which routinely cross borders. It attempts to do this by introducing an internationally recognised system of security interests and asset registrations which gives lenders comfort that they can enforce their security interest wherever their asset is located. That helps to reduce the lenders' risk which is reflected in lower margins. Aircraft fit into the category of high value mobile assets which routinely cross borders and will therefore benefit from the Convention. We do not believe that the same is true of GB passenger rolling stock.

The Aircraft Protocol (issued under the Convention) is already in effect and is internationally well received. It benefits UK aircraft financiers and owners and provides comfort to lenders because aircraft frequently travel across international borders. Thus, where an interest that is protected by the Convention is registered against an aircraft, that interest will be recognised if the security over an aircraft needs to be enforced while it is located in another country that has ratified the Aircraft Protocol. The Aircraft Protocol attracted significant industry buy-in, owing to the related availability of cheaper export-credit finance, meaning that aircraft manufacturers have been strongly supportive; there is no equivalent industry support for the Rail Protocol.

Trains used for passenger service in GB are much more restricted and tend to remain in GB. They are less likely to be located in another country (which does not recognise UK security interests) at the time any security needs to be enforced. Consequently, at the outset of any financing transaction for GB passenger rolling stock, lenders will take advice as to the effectiveness of UK security interests, and they do not need to consider whether those interests will be recognised in other jurisdictions. In our view therefore, we don't believe that we have a problem that needs to be solved by the Protocol. We can see that the Protocol may offer more protection for trains that regularly cross borders (e.g. in Europe) than it will offer to GB rail.

In 2018 Oxera (in conjunction with the Convention's Rail Working Group, "RWG") published a study in relation to the potential impact of the Protocol (which was updated in 2020). The study suggests that ratifying the Protocol could save the UK c.£120m p.a. primarily by decreasing the cost of capital. The argument is that implementing the Protocol's internationally recognised system of security and registration in the UK will lead to:

(a) lenders charging a lower margin which reflects the reduction in risk brought about by this system; and/or

(b) more non UK based lenders entering into the market which would make it more competitive, again resulting in lower margins.

We have not seen any evidence to support Oxera's study. Our experience is that over the last few years rolling stock finance has never been cheaper and there are more potential financiers than ever. We have seen no evidence that the Protocol will result in a reduction of the margin charged on GB rolling stock finance transactions.

Of far more importance to our lenders is the rating given to us (and the other portfolio rolling stock lessors) by the Ratings Agencies. These ratings take account of the stability of the GB rail industry and do not consider the system of security interests over the financed assets. Our facilities include provisions that increase the cost of debt if our rating falls. These provisions could be triggered by market conditions. If the credit rating of the portfolio lessors fall as a result of market conditions, that will spill over into the cost and availability of funds for all financiers in the market. Facilitating stability in the GB rail market is far more important than introducing the Protocol.

We have raised finance from many UK and international lenders. We have a senior facilities agreement which includes several non-UK lenders (European, Canadian, Japanese and Australian). Like other portfolio businesses, we have raised finance through several United States Private Placements (which

Q51. Why not?

include US, Canadian, European and Japanese financiers). We have a Public Bond Programme which includes international bond holders. We also have a Samurai loan under which all the lenders are Japanese. We have granted security interests over all of our rolling stock and leases to a security trustee who holds them as trustee on behalf of all of our lenders. They are all comfortable with the UK system of security interests. The Protocol will not improve their position.

The consultation document suggests that implementation of the Protocol will help UK lenders in the rail sector to win business overseas. We are not sure that is the case. The Convention applies where the debtor is located in a Contracting State or the asset is registered in a Contracting State. The fact that the creditor (lender) may be situated in a non-Contracting State does not affect the applicability of the Convention. Consequently, a UK lender will benefit from the Convention where:

- it lends to a person incorporated in a Contracting State; or
- the asset which it has financed is registered in a Contracting State.

This applies regardless of whether the UK is a Contracting State and thus implementing the Protocol in the UK will not help UK lenders win business overseas.

Article XXV of the Protocol deals with rolling stock which is "habitually used for the purpose of providing a service of public importance" ("public service railway rolling stock"). It allows Contracting States to declare that it will continue to apply rules of its own domestic law which may have an adverse impact on the exercise by a creditor of any of the remedies specified in the Convention and Protocol in relation to public service railway rolling stock. Where a Contracting State exercises this power in relation to any rolling stock, it has to:

- preserve and maintain that rolling stock from the time of exercise of such power until possession, use or control is transferred to the creditor;
- pay the greater of (a) any relevant amount required to be paid under the law of the Contracting State and (b) the market lease rental in respect of such rolling stock to the creditor. (The market lease rental may be higher than the rent that would otherwise be payable under a lease entered into under a direct agreement or any of the options that the DfT has under a direct agreement.)

If it implements the Protocol, the government will need to consider whether to make a declaration under Article XXV. In this regard it will need to consider the impact of the protocol on its powers under Section 30 Railways Act which is designed to ensure that passenger services will continue to be operated regardless of an operator default. One of the main benefits of the Protocol is the ability of a creditor to repossess its rolling stock on a default, so there is a conflict. The government will therefore need to consider a declaration under Article XXV to allow it to exercise the Section 30 powers.

Our concern in relation to the Protocol is that it will add to the cost, complexity and documentation requirements in relation to rolling stock transactions. Its implementation will mean that:

- GB rolling stock will need to be registered (by vehicle) in the International Rolling Stock Registry (which is based in Luxembourg);
- agreements will need to be drafted for all GB rolling stock granting the interests to be protected by the Protocol. These agreements will need to be registered at the registry and registration fees will need to be paid;
- all leases of GB rolling stock will need to be registered at the registry and additional registration fees will need to be paid;
- all existing leases of GB rolling stock will need to be amended to include provisions dealing with the Protocol and the registrations required thereby;
- lawyers will need to be retained to draft and review the agreements/amendments referred to above;
- the government will need to consider whether to make a declaration that it will continue to apply rules of its own domestic law in relation to public service railway rolling stock.

The RWG has advised that:

- the registration fees have not been set (so far);

Q51. Why not?

- implementation of the Protocol will require the registration of: (a) all vehicles (i.e. as vehicles not as units – the RWG has indicated that it may be possible to register interests against a train set or rake, but it is not yet clear how this will work and how it will fit with registration against individual vehicles); and (b) all security interests and all leases granted in respect of those vehicles.

This will be a major task.

In light of the above, we are not in favour of implementing the Protocol in the UK.

Impact assessments

Q52. Do you have evidence relating to the impacts and risks identified discussed within the impact assessments?

No

Impact assessments

Q54. Are there, in your view, impacts or risks of the policies proposed which have not been covered by the impact assessments?

Yes

Other impacts and risks

Q55. Which impacts and risks, including any evidence you may have?

Comments:

The Impact Assessments presented do not seem to include any assessment of the proposal to include a power in primary legislation to enable the ratification of the Luxembourg Rail Protocol.

As outlined in our response to questions 36 and 37, it is not clear to us a) what problem the proposal is intended to solve b) what assessment has been made of the potential costs and benefits associated with the proposal.

We believe that this is an omission which needs to be rectified.