GREAT BRITISH RAILWAYS

The Williams-Shapps Plan for Rail

The numbers that tell the story

On 20 May 2021, the government finally published its white paper for the railways in Britain after an 18-month delay due to the pandemic – 'Great British Railways: The Williams-Shapps Plan for Rail' (the Plan).

The government dubs it the biggest change to the railways in 25 years. The Plan promises 10 outcomes achieved through meeting 62 commitments. There is lots of white paper in this white paper, and detail will only emerge over time and following more detailed consultation. At this early stage, we pick out some of the numbers and statistics from the Plan to trace the thread behind the government's thinking, and offer some initial analysis.

£12bn spent keeping trains running during the pandemic

rail makes up more than **50%** of public spending on transport

passenger numbers only back to **35%** of pre-COVID levels

only **47%** of passengers feel journey offers value for money

2/3 of passenger journeys' facing permanent change

75 different types of trains on passenger service network

almost **400** full-time staff employed to argue about delays

On its face, the changes do look significant – most notably, regulation and management of track and train finally brought under one roof after the previous failure to achieve this with the Strategic Rail Authority. The trailed change to track access, when coupled with longer tenures, could finally lead to operators (or third parties through them) being able to make long-term investments in the railway. The promise to develop a comprehensive environment plan by 2022 and within that, to bring forward costed options to decarbonise the whole network, is really positive to hear. Open data will really improve performance, usage and maintenance understanding. And the prominence of freight in the Plan, might finally see it realise its potential.

The Plan majors on bringing simplification to the railways – its complexity being a perennial criticism – and a move away from the "contractual spider's web", 1,000-page contracts and many different players. We have long wondered what the collective noun for a group of lawyers and consultants is. Now we know it is a 'battalion'. We've heard worse.

proposing the biggest change to the railways in **25** years

An initial analysis of the Department for Transport's white paper: 'Great British Railways: The Williams-Shapps Plan for Rail'.

Great British Railways (GBR) is at the heart of the simplification message. While intended to be one guiding mind for the railway, it will be divided into five regional divisions (Eastern, North West & Central, Scotland, Southern, Wales & Western) with a central leadership. Key strategic decisions will be taken by that leadership, with the regions letting and managing Passenger Service Contracts with operators and leading operational matters.

62 commitments to deliver **10** outcomes

Some effort has already been expended in making clear the plan is absolutely not nationalisation, even though putting a 'Great' in front of 'British Railways', and subsuming most of the railway within an agency of the government with direct accountability to Ministers invites the obvious comparison. GBR will absorb Network Rail, parts of the DfT's and ORR's rail functions, the RDG and National Rail Enquiries. It will be a sort of national TfL for rail.

1 guiding mind – GREAT BRITISH RAILWAYS – with **5** regional divisions

GBR will be so determinative of every decision in the railways, from infrastructure upgrades to the 0715 out of Manchester Piccadilly to paper clips, it could very much amount to de facto nationalisation, depending on how GBR exercises its powers, particularly in relation to what remains of the private sector, and how much latitude Ministers give it. However, there is another take. That not a lot will change in practical terms.

railways matter. Road traffic around **90%** of pre-pandemic levels

responsible for a **30** year strategy

Beneath the new architecture and behind the soundbites, you realise how much of the existing structure will remain. That will be reassuring to many, while others might wonder (if that conclusion is right), whether the Plan and what follows, will really solve the problems that have dogged the industry for years. The proof will be in the pudding.

Tellingly, the government will continue to contract via GBR with the private sector to operate passenger services, and the supply chain will also continue in private hands. Although at one point, the Plan does say that GBR will not operate "most" trains directly. That is probably meant to be reassuring and alarming in equal measure.

likely established by **2023**

We continue to work our way through the alphabet labelling the agreement under which the government procures passenger services: from FAs to EMAs to ERMAs to NRCs and now to PSCs, Passenger Service Contracts. At their core, they will still contract a fixed term service level to be operated, for payment in return and various financial incentives to drive performance, which look for now to be upside (bonus) only. Termination remains the ultimate sanction although we will have to see whether the risk proposition will be the same as for franchise agreements. Come what may, the government (through GBR) will retain its 'operator of last resort' duty should that sanction be imposed.

THE 10 OUTCOMES THE PLAN PROMISES

1. Modern passenger experience
2. Retail revolution
3. New way of working with the private sector
4. Economic recovery and financially sustainable railways
5. Greater control for local people and places
6. Cleaner, greener railways
7. New offer for freight
8. Increased speed of delivery and efficient enhancements
9. Skilled, innovative workforce
10. Simpler industry structure

The government will effectively continue to regulate the price of most fares. In a departure from the original principles of franchising, GBR will retain revenue risk, so the PSC will be a concession-based contract, filled with artificial incentives to substitute for a natural revenue one. That approach merely cements the effective trend over the last few years. The government is keen to stress that this is not a 'one size fits all' approach, an attempt to address the industry criticism of the government's proposition made before announcing the Plan, that no revenue-risk transfer model would be on offer. The Plan suggests some of the long distance operators might be given commercial freedom to set some fares themselves and share revenue. But only after demand recovers, so that may be some way off yet. Whether other sizes will truly be available, will depend on the extent to which GBR will permit PSC terms to flex with the service package on offer. Certainly, in the last years of franchising, the one size came in a straitjacket.

5 year funding cycles and business plans

The headline grabber on the fares front is the introduction of flexible season tickets to recognise the expected changes to working patterns. They start in June and allow for travel on any 8 days in a 28-day period. For some, this does not go far enough to bring sufficient passengers back. The limited offer appears to be a battle the Treasury has won, preferring to wait and see what passengers do before committing more of the public purse to the railway. Of course, a more generous flexible offering might bring back demand to such an extent that it offsets the discount to the farebox. But the hesitancy is not surprising.

The operators GBR chooses will continue to be responsible for contracting with third parties for core services and assets. They will need access to the infrastructure. With the track and train under the single GBR roof, rolling the contractual workings of the new 'rules based track access regime backed by legislation' into the PSC becomes a possibility, but whatever the hopes for simplification, that risks those 1,000-page contracts pushing a thousand more. So separate track access agreements continue to seem likely, albeit with some

flexible season tickets available to travel on any **8** days in a **28** day period synergy being achievable with the structural consolidation. Whatever the form, those arrangements will continue to need to grant the operators access to the infrastructure and mandate a bi-annual timetable planning process with some delay attribution mechanics.

Those operators will still need to lease rolling stock from privately-owned rolling stock lessors as well (there being no plans to nationalise ownership). Those operators will need to be in funds from government to pay those lessors rental. That continuing commercial relationship will continue to require a legislative regime that does not cut across the ROSCOs' security in their assets, and will continue to be underpinned by direct agreements between the ROSCOs and GBR, facilitating performance of its operator of last resort duty. The reference in the Plan to there being 75 different types of train used in the delivery of passenger services looks pointed, and part of the touted simplification and efficiency drive might be about rationalising that situation.

Trainline's share price down 23% on the date of announcement of the Plan

It seems likely that the ROSCOs will need to look closely at their fleets if the government's commitment in the Plan to remove all diesel trains from the network by 2040 is to be met. That probably means retirement of some or, where financially viable, the hybridisation or electrification (through batteries or hydrogen) of others. If we are at the end of the new fleet procurement cycle for the time being, as the Plan suggests, then existing fleet longevity might be improved if they meet the government's environmental criteria and perhaps offer more, and more generous, seating to reflect our changed travel patterns. One thing we might infer from the commitment in the Plan, is that we will still be using fossil fuels in the railway in 2050 when we are meant to be at net zero. That is disappointing, but let us hope those costed options for full decarbonisation move the needle on that.

removal of diesel trains by 2040

be the only meaningful opportunity for existing freight and open access players to input to capture the high-minded safeguarding sentiments in the Plan in the ensuing legislation and contractual matrix. It will be critical to ensure that the new rules will truly be fair and non-discriminatory and that there will be independent arbitration of them given the degree of control GBR will exercise over so many of the moving parts. It is helpful to note that the ORR will continue to serve as the access appeals body and the regulator of access charging. But this may count for little if its decisions are legislatively constrained by the primacy of GBR's policy preferences. Certainly, its old economic regulatory function seems consigned to little more than casting an eye over GBR's business plans, developed from the government's five-year funding deals.

Existing devolved administrations and transport authorities will continue to exercise the powers they have as before. But it is not quite clear how GBR, or more appropriately, its five regional divisions, will interact with them.

Even less clear is the position on stations. The Plan describes the dual management arrangement of Network Rail running the big stations, and the TOCs the rest, as fragmented. It says that station management will be subsumed within GBR.

Whether that means TOCs will continue to lease and staff the majority of stations, taking portfolio-type direction from an expanded version of the existing Network Rail function, or whether all station-related management, other than train dispatch, will vest in GBR, remains to be seen. But at least some form of station access will need to continue, perhaps without an associated charging regime for the operators within the GBR tent.

comprehensive environment plan by 2022

Finally, with all the furniture moving, what about the impact on the over 240,000 people who work in the industry? According to the government, publicly at least, this is one thing that is not changing.

rail is the cleanest public transport service producing around 1% of transport emissions

In light of freight's success during the pandemic, the Plan promises something more – 'a new offer'. GBR will have a mandate to serve freight customers, as it will passengers, and freight operators are promised fair access to the network, with more flexible train path usage trailed. Most promisingly, the Plan promises joined-up thinking about pathing between freight and passenger services and a growth target for rail freight to be set, locking in a measure against which GBR can be held to account. Freight might finally have a fair shout.

Open access operation remains a thing, and the Plan does say new open access paths may be possible, but it is hard to see how any new entrants might emerge in this new world. It was difficult enough in the old. Certainly, for existing open access operators and infrastructure managers, existing legislative exemptions will need to be renewed to preserve their independence from GBR and its procurement functions.

The government promises to consult on the new rules-based access system with existing passenger, freight and open access operators and managers, so it seems that thinking is not set yet, beyond getting away from the so-called blame culture. This consultation will be important as it will

according to the RMT 1000s of jobs will be lost

On the day of rolling the Plan out, Shapps said it was, "not disguising cuts of any type". But the Plan is littered with clues that suggest there is some cognitive dissonance going on.

5 years from now, savings of £1.5bn available p.a. after simplification and efficiencies

It juxtaposes the £12 billion of funding during the pandemic with the current low ridership (ignoring the fact that early messaging helped drive that outcome) and the £1.5 billion of savings that are available according to an unpublished DfT report. The Plan asserts that 'efficiency [has] become not merely desirable, but essential. Indeed existential', that 'the current sums being paid to operate and maintain the railways are not sustainable', and calls for new transparency requirements on productivity and pay.

We know that Andrew Haines previously told Network Rail staff that,

> This [change] will be tough for every one of us

Expect cuts. Expect industrial action.

Even with cuts, GBR is going to be so large, it is likely to create its own gravity within the rail industry, such that it might draw away resources from other parts of it.

That of itself, may be problematic. As Andy Bagnall of the RDG says,

> Getting the detail right will be crucial.

Time will tell whether the government has done more than stuck a Union Jack on the double arrow symbol, but in the meantime, here are 10 questions, the answers to which may be determinative of whether those 10 outcomes in the Plan are realised.

10 QUESTIONS FOR 10 OUTCOMES

1. **Modern passenger experience:**
GBR's funding streams are conditional on delivering for passengers, so if it fails, does that mean less is spent on the railways, resulting in a double whammy for passengers?

2. **Retail revolution:**
how will complexity be taken out of the fares structure if 'turn-up-and-go' fares, tickets between any two stations, advanced booking, season tickets and off-peak pricing all remain?

3. **New way of working with the private sector:**
how will PSCs incentivise measurable collaboration and innovation in a form of an output-based, cost-plus contract?

4. **Economic recovery and financially sustainable railways:**
how does the railway drive economic recovery against the backdrop of an existential threat it has few powers in its gift to manage, while it is restructuring and looking to achieve efficiency savings?

5. **Greater control for local people and places:**
just how much autonomy will GBR's regional divisions have, given the degree of control Ministers will retain, and just what happens to cross-'border' services?

6. **Cleaner, greener railways:**
true railway decarbonisation will require extensive electrification. What assurances will government need to trust the industry to deliver, having failed previously?

7. **New offer for freight:**
with potentially competing mandates to operate in freight and passenger interests, how can GBR take decisions in the interests of freight operators, commercial enterprises outside the GBR?

8. **Increased speed of delivery and efficient enhancements:**
how will notoriously slow government procurement practices be accelerated without compromising them and how can third party investment and innovation be secured without appropriation?

9. **Skilled, innovative workforce:**
how will the railway attract skilled and innovative people against a backdrop in the short term of pay, productivity and efficiency reviews?

10. **Simpler industry structure:**
practically, many existing commercial, 'complex' relationships will continue; how much of the structure will actually be simplified?

GETTING IN TOUCH

When you need a practical legal solution for your next business opportunity or challenge, please get in touch.

JASON CHAMBERLAIN
jason.chamberlain@bclplaw.com
T: +44 (0)20 3400 2114

RUSSELL CLIFFORD
russell.clifford@bclplaw.com
T: +44 (0)20 3400 4141

JAMIE WISEMAN-CLARKE
jamie.wiseman-clarke@bclplaw.com
T: +44 (0)20 3400 4813