

**Responses to June 2021 consultation on ORR's PR23
review of the Schedule 8 train performance regime**



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Will Holman
Office of Rail and Road
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8th September 2021

Dear Sir/Madam,

Re: PR23 – Review of the Schedule 8 Train Performance Regime

Thank you for the opportunity to respond to the recent technical consultation on the review of Network Rail's Schedule 8 train performance regime for PR23.

It is a challenging task for the ORR to start the periodic review process (PR23) particularly at a time of significant change and uncertainty as a result of the Covid-19 pandemic. Furthermore, the industry is in anticipation of further change in the structure and operation of the railway that the Williams-Shapps Plan will bring in the future, and as such, this has created a degree of complexity for the periodic review as the Plan is still high level and short on detail.

This response represents views on behalf of Abellio Group and its subsidiary train operating companies (East Midlands Railway, Greater Anglia, Merseyrail and West Midlands Trains). We structure our response based on your consultation document published on 17th June 2021 and also include some general observations.

Our responses to the specific questions on which we have views are set out below.

Chapter 2: ORR's proposed approach and priorities

- 1. Do you have any views on the objectives and benefits of a mechanism such as Schedule 8, for the range of different industry parties, both in the current contracting model and once the Rail Transformation Programme has been fully implemented*

There needs to be a mechanism such as Schedule 8 to incentivise different industry parties to reduce delays and improve punctuality and reliability, both in the current contracting model and once the Rail Transformation Programme has been fully implemented.

Schedule 8 was designed to compensate train operators for the long term revenue impact of delays they did not cause and to create incentives to improve performance on the network. However, the Covid-19 pandemic has in some instances changed the commercial effect of Schedule 8; its revenue protection function is redundant when franchised train operators are put under concession-style agreements i.e. EMA / ERMA without taking revenue risk. It is relevant to note, however, our Merseyrail operation remains in a franchise agreement and therefore at this time Schedule 8 retains all of its key incentive properties in respect of this franchise.

Having said that, there remains a need to have a regime that influences operational performance and brings both Network Rail and train operators closer together to focus and deliver improved and better performance through joint incentives.

Moreover, Schedule 8 is currently designed just as a revenue compensation mechanism, but cost compensation is potentially now a bigger issue for train operators operating under the concession-style agreement. Therefore, having a simple, formulaic cost compensation under Schedule 8 (as suggested in Proposal F - Option F1) is welcomed and our detailed comments are outlined under question no.9 in this response.

2. Do you have any views on whether we should make no changes to Schedule 8 in PR23, or pursue a small number of incremental reforms to ensure it remains fit for purpose as a baseline regime?

Whether or not proposed changes are radical or incremental, we must get the detail right at the outset to ensure Schedule 8 continues to fulfil its key functions, provide incentives for Network Rail and train operators to continue working closely to improve performance and thereby bring benefits to all rail users. However, we are still at a time of uncertainty with regard to recovery and changing demand in rail travel and there is still much of the detail to be revealed from the Williams-Shapps Plan for rail. It is still unclear what steps the government is taking to implement the policies set out in the Plan and clarity on how the industry will transition to these new arrangements is urgently needed.

Therefore, it is Abellio's view that now is not the right time to pursue any of these changes for PR23; it would be best achieved and delivered through the Rail Transformation Programme when their plans for new industry frameworks become clearer. In the meantime, we should make no changes to the Schedule 8 framework at all, with the exception of updating Schedule 8 metrics in the usual way.

Abellio is in agreement with some of the principles of the proposals identified in the consultation document that will make Schedule 8 more flexible and reflective of changing circumstances. However, we are concerned that developing any of these proposals further will increase industry costs unnecessarily. Some of the principles of these proposed changes are ostensibly straightforward, but at this stage are high level. The development of methodologies both for implementation and operation in practice will be costly to industry and the benefits, if any, would be only for a potentially very time limited period. In our opinion, the focus should be on any regime to accompany the Passenger Service Contracts instead. The process, even for incremental reform, will require significant resources and incur costs at a time when the industry needs to focus on operating in an efficient manner. Focusing more on longer term development would be a better investment; given that the risk/benefit is not borne by train operators.

As the financial incentive properties of Schedule 8 for train operators have become ineffective since the replacement of franchises with concession-style agreements during 2020, the industry should consider simply updating the current regime i.e. recalibration of key parameters using new data.

During national lockdown periods, train operators reduced the level of train services as a result of the significantly reduced passenger demand, and passenger revenues have fallen sharply. As a consequence, current benchmarks, payment rates and performance points in Schedule 8 that were calibrated during PR18 and fixed for five years are now inaccurate, as they do not reflect either current or predicted CP6 level of performance. Thus, in Abellio's view, it is of paramount importance to revise and update these key parameters as the main focus of PR23 outputs to ensure that the regime remains fit for purpose during the interim period and the GBR in future. A review of Schedule 8 metrics is usually undertaken (whether in totality or otherwise) during a periodic review. Therefore, doing this would not necessarily import any additional costs over and above what would normally be incurred and the outputs would deliver greater value for industry than any other reforms could in the relatively short interim period prior to implementation of the Rail Transformation Programme.

3. Do you agree with the areas we have identified as priorities for PR23? Are there any other significant issues that we should seek to address?

Abellio agrees with some of the areas identified in the consultation document as priorities for PR23. The main drawback with the current mechanism is the lack of flexibility. We agree that there would be some benefit to building into Schedule 8 some more flexibility, so that changes to the metrics can be made during the control period. It is important that necessary changes are made to ensure that the mechanism remains fit for purpose during the interim period and until the Plan is fully implemented.

We do recognise the need for these regimes to continue for open access and freight. The incentives for freight need to reflect the impact of failures and delays on passenger services – noting that the low margins for these sectors of the industry require a different treatment to the regular passenger operators.

Chapter 3: Proposals: Cross-cutting changes across sector regimes

4. Would you support Proposal A [to base Network Rail's benchmarks only on past performance]? Do you have any views on the proposed methodology set out?

Abellio does not support Proposal A.

If Network Rail's performance benchmarks were based on historical data alone without adjustments for forward-looking regulatory trajectories, it would weaken the incentive for Network Rail to work closely with operators to maintain focus on the delivery of performance and targets that align with performance objectives set by the DfT and concessions. Train operator performance targets with the DfT are forward-looking and Network Rail's Schedule 8 benchmarks must logically incorporate a similar trajectory based on forecast industry performance levels.

Forecasting, to some extent, provides certainty of the level of improvements expected for the routes across the boundaries and improve working together overall. It also takes into account the development, implementation and expected delivery of any major infrastructure projects on the network into the performance trajectories. The benchmarks must reflect the delivery of expected upsides from any investment being made in Network Rail's assets.

Therefore, this proposal does not appear to support long-term investments to the infrastructure and totally discounts factors like risks, opportunities and investments etc on the network. This approach can act as a major hindrance to improving performance.

The industry will need to agree which year(s) data to be used for calibration as being appropriate and reflective of the expected performance that train operators are expected to deliver and improve. However, the circumstances or market situation might be short-lived and temporary, which could cause inaccuracy if benchmarks were based only on past performance.

5. Would you support Proposal B [to annually update benchmarks to make benchmarks more flexible]? If benchmarks were to be updated annually, do you favour achieving this through a rolling update (Option B1) or through a modelled approach (Option B2)?

Whilst Abellio welcomes the concept of an annual review of benchmarks, we believe the timing of such introduction now would be wrong, as per our comments and response to question no. 2.

There is value in updating benchmarks on an annual basis, as it will allow for benchmarks to be more responsive to current performance levels and therefore to reflect changing circumstances. The regime could be adapted to be reflective of forecasted levels of performance that are reviewed and agreed by all parties on an annual basis to provide expected levels of performance over the PR23 timeframe.

Both Options B1 and B2 have their own merits. However, in the case of Option B1, it could be challenging to recalibrate the average outturn performance during a set period of time if the circumstances / market situation are extraordinary and temporary e.g. the Covid-19 pandemic. Abellio believes Option B2 is more appropriate, as it recognises a direct link between capacity utilisation and performance and will provide incentives for Network Rail and operators to work together to monitor and improve performance. Having said that, further studies and detailed analysis would be required to fully develop the concept and methodology to ensure that the parameter is reflective of what it is intended to capture i.e. benchmark for the network performance. We also have reservations about introducing annual benchmark updates at this time as it would add complexity and additional administration in calculating annual adjustment values with DfT in relation to “no net loss no net gain” provisions under the Merseyrail franchise agreement.

If benchmarks are recalibrated every year, all parties would need to be involved to discuss the targets for the following year. This would, however, involve additional management resource and considerable ongoing administration costs for parties to review, revise and agree the benchmarks on a yearly basis. Also, we need to be mindful that Option B2 will require a substantial amount of work before it can be reviewed by the industry. In our opinion, this proposal constitutes a fundamental reform rather than an incremental reform as it is described in the consultation document. Therefore we would not support its introduction of it at this time.

6. *Should Proposal C [to implement joint or shared allocation of delay minutes within Schedule 8 itself] be a priority for reform in PR23? If you would like us to consider Proposal C further, please set out how it can best be implemented (e.g. including incident types that should be subject to joint or shared responsibility).*

Abellio does not agree that this proposal should come under the scope of Schedule 8 for reform.

Incidents can have multiple contributory factors, but recovery from a delay event or major incidents could be hindered by a number of factors. In our opinion, one source should own the allocation and as part of wider collaborative working to improve recovery and reduce these types of incidents. We need to be clear on accountability for performance; allowing the share of accountability could create perverse behaviours and unintentionally lead to more disputes to be reconciled, as TOCs might argue for causes that are not attributed to the root cause.

The approach for forecasting links with the delay attribution for Schedule 8. So, changing the joint/shared responsibility and other concepts will again lead to significant and extensive work on re-benchmarking, including re-aligning TOC-on-Self delay minutes / TOC-on-Self cancellations annually to inform re-negotiation of NRC benchmarks. Again we believe this constitutes fundamental reform, not incremental change.

Chapter 4: Proposals: Passenger regime

7. *Would you support Proposal D [to more accurately incentivise TOCs to limit delay to other operators], implemented through Option D2 [to update payment rates annually through a rolling update of the TOC responsibility matrix]? Do you have any views on the options set out?*

We totally disagree with Option D1 under Proposal D.

Moving from TOC-on-Self to TOC-on-TOC as a base for train operator performance measure will not necessarily reduce reactionary delay because the main increase in reactionary delay is not due to the prime cause of TOC-on-TOC incidents. It is Network Rail's responsibility to manage the infrastructure and regulate train services running on the network; it is virtually impossible for operators to influence and reduce reactionary delay outside the routes upon which they operate. It is more sensible for train operators to focus resources on reducing their own TOC-on Self delay which in turn helps reduce reactionary delay across the network.

We acknowledge that joint industry working is important for the industry to continue improving performance. However, we are concerned that Network Rail will be insouciant to minimising the impact of delay and reactionary delay on the network if Schedule 8 is used as a tool to manage the increase in reactionary delay.

The train operator community does not have any tools to capture/retrieve data for the measure of TOC-on-TOC delay, and therefore, makes it very difficult for train operators to manage delays caused to other operators. To achieve this would require considerable investment in a very short window of opportunity to implement for CP7. We are also

concerned with the impact of this proposal further downstream such as changes to industry systems including PEARS, and modification to the Network Operations Code-Train Regulation and the National System Operators.

It is an unproven thinking that Option D1 could incentivise operators to take decisions that minimise adverse impacts on other operators and mitigate reactionary delay. Train operators have no control over service regulation and have only minimal influence on the wider system, beyond recovery of their own services. In fact, we believe that this Option D1 would create an additional administrative and financial burden on the industry as it would create an increase in delay attribution disputes and an increase in delay attribution staff to review incidents and challenge Network Rail on train service regulation.

8. Should Proposal E [to change the allocation of unidentified delays between Network Rail and operators] be a priority for reform in PR23? Are you able to provide evidence on the benefits and costs of the proposal or to inform the allocation of unidentified delays?

It has not been made very clear what the proposal for change is under Proposal E with regard to the allocation of unidentified delays. We do not agree that Proposal E should be a priority for PR23 as we cannot see any value that will be added into the reform.

While Abellio fully supports doing more to understand the causes of unexplained delays, in particular sub-threshold delays, as an industry, changing this for Schedule 8 will not incentivise improved performance. The current benchmarks are set based on the current attribution split, so if the current allocation of unidentified delays is to be changed, the recalibration of benchmarks must take this change into consideration to ensure consistency. It will also change the balance of TOC-on-Self delay and will require train operators to re-negotiate contractual targets already set with the DfT.

Furthermore, the current reporting systems that Abellio train operators use do not capture sub-threshold delays. As such, we do not have any data to conduct the analysis and would need to invest unbudgeted funds to procure the system and potentially additional resource to monitor these unidentified delays in order to determine the primary cause. In the current economic climate, the industry is trying to keep costs under control; reduce costs in the near and long-term and deliver customer satisfaction. This proposal would require more resource for carrying out investigation which would increase industry costs for no benefits to the customers of the railways.

Therefore, Abellio has concluded this proposal would create more costs for the industry in shifting delay and modifying systems and is not an appropriate approach to take further at the current time.

9. Should Proposal F [to reflect the wider financial impacts of delays in Schedule 8 compensation] be a priority for reform in PR23? If this proposal was taken forward, would you favour formulaic recovery (Option F1) or actual sums recovery (Option F2) to achieve it?

Schedule 8 payment rates are derived from the PDFH framework which only reflects the impact of service disruption on future revenue. Therefore, Schedule 8 compensation takes no account of costs associated with delay e.g. delay repay, and on this account we welcome Proposal F which would align the Schedule 8 regime with the cost impacts on operators from delay.

While a formulaic methodology (Option F1) may not be perfect, it will be a lot less problematic than Option F2 for the actual sums recovery which would result in higher ongoing administration costs and risks long delay in resolving claims and a risk of adding another barrier to working harmoniously with Network Rail. History shows that recovery of actual sums from Network Rail is extremely difficult. Option F2 in reality could take many months (if not years) of management efforts to settle the claim; it will require significant additional management time from train operators and Network Rail to collate evidence, verify and agree the compensation due between the parties.

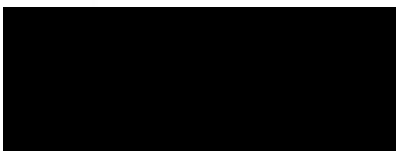
We would prefer Option F1 for formulaic recovery as it should broadly give the right result, provide greater certainty and save management resource. However, it is not clear in the consultation document what the formulaic solution might look like and we would need to ensure that it is fit for purpose and understand the proposed calculations first before we fully support the proposal.

ORR notes in 4.31 Network Rail has observed that incorporation of cost compensation would allow for the SPP mechanism to be removed. Abellio believes this is not the case. Whilst we agree that formulaic cost compensation would mitigate some losses and potentially avoid the need for a future claim, removal of SPP provisions altogether does not take into account that the value of revenue loss and elements of direct costs are substantially different when comparing the impact of a single incident with the impact of continued poor performance levels over a sustained period of time.

We note that the calibration would be a lengthy and expensive exercise. So, we would stress our views yet again that it is not the right moment in time to implement this proposal in the interim period; it would be best achieved in a coordinated rail reform programme in line with the vision set out in the Williams-Shapps Plan.

We hope above inputs are useful. If you have any further queries or would like to discuss any points from the above, please feel free to get in touch.

Yours faithfully,



Dave Kaye
Chief Operating Officer, Rail
Abellio Group



Response to ORR’s technical consultation on the PR23 review of the Schedule 8 train performance regime

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

Please send your response to performance.incentives@orr.gov.uk by **10 September 2021**.

Please contact Will Holman at ORR with any queries: will.holman@orr.gov.uk.

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Chapter 2: ORR’s proposed approach and priorities

We welcome views on our questions regarding ORR’s proposed approach to PR23.

Question 1: Do you have any views on the objectives and benefits of a mechanism such as Schedule 8, for the range of different industry parties, both in the current contracting model and once the Rail Transformation Programme has been fully implemented?

As the Williams-Shapps’ Plan for Rail highlights, “before the pandemic, passengers’ biggest priority for improvement was punctuality”. The Plan for Rail highlights the need for collaboration between Network Rail and Operators if Performance improvements are to be secured while also highlighting the need for Network Rail and Operators to be incentivised and held to account for their delivery of Performance improvement.

All of these observations point to the need for a mechanism such as Schedule 8 to be part of the industry contracting model now and once the Rail Transformation Programme has been fully implemented.

The Objectives laid out by ORR in Annex 1 of the Schedule 8 Technical Consultation align well with addressing this need but could be expanded. In particular, Arriva would like to see a more explicit focus in the construction of Schedule 8 on enabling and incentivising:

- collaboration between Network Rail and Operators and between Operators

- cost effective and accurate identification of the root causes of primary and reactionary delay

Arriva agrees with ORR's observation that a mechanism such as Schedule 8 should "be resilient to changing circumstances (for example to developments in rail reform)". In this context, Arriva sees it as vital that the Performance incentivisation arrangements in the Track Access Contract (Schedule 8) are aligned with the Performance incentivisation arrangements in the contracts Operators have with client bodies including Great British Railways (GBR). Concerns relating to the lack of a process to ensure this alignment strongly influence Arriva's concerns with regard to some of the ORR's proposals – particularly those relating to the setting of Network Rail Benchmarks.

The Network Performance Board has recommended that the rail industry should develop and deploy timetables that are robust and recoverable in order to enable the delivery of good operational Performance. The timetable changes implemented during the COVID crisis have demonstrated that such timetables can be delivered and that they do enable consistent delivery of good performance primarily by reducing reactionary delay. At present, the operation of Schedule 8 does not provide effective incentives to encourage the industry to build on these lessons learnt. Arriva suggests that work should be done to explore how such incentives could be established.

Question 2: Do you have any views on whether we should make no changes to Schedule 8 in PR23, or pursue a small number of incremental reforms to ensure it remains fit for purpose as a baseline regime?

While Schedule 8 can and should be developed to address real and perceived weaknesses, it has remained a valuable central element in the cross-industry work to manage and improve operational Performance. As ORR has highlighted, Schedule 8 has provided strong incentives in this area. Arriva therefore believes that reforms should be progressed that focus on:

- Improving the completeness and effectiveness of the incentives on Network Rail and Operators to improve Performance
- Simplifying the regime to make it more understandable and cost effective
- Increasing the flexibility of the regime making sure on-going alignment with other Performance incentives acting on Network Rail and Operators
- Ensuring cost effective and accurate identification of the root causes of delay
- Enabling and incentivising collaboration between Network Rail and Operators and between Operators.
- Supporting the short-term elements of business cases for investments and activity aimed at longer-term improvement of Performance.

Arriva also notes the role that Schedule 8 could play in supporting ORR in delivering the task laid out for it in the Plan for Rail to independently scrutinising the delivery of Performance. This is particularly important to Operators given their dependence on Network Rail in providing good service to passengers and fulfilling the contracted expectations of Transport Authority clients.

The current Schedule 8 regime does not address many of these requirements well and often works against them. Therefore, change to Schedule 8 is necessary and should be progressed as part of PR23.

However, the proposals that ORR are consulting on here reflect minor amendments to the existing structure of Schedule 8, many of which have been considered before. However, the proposals do not appear to be linked to an overarching statement of purpose either for Schedule 8 itself or for the individual proposals.

With a major reform of the structure of the UK Rail industry and its associate contractual and incentives regimes underway but not yet completed, Arriva believes that it would be appropriate to pause reshaping of Schedule 8

until more clarity is available on the role that Schedule 8 or an equivalent regime will need to make in the context of the new industry structures.

It is already clear that the new industry structures will include:

- A clear expectation from funders and client bodies that specific and improved performance targets will be delivered
- Network Rail and Operators should work collaboratively to believe those targets.

The ORR's proposals either do not address these expectations or work against them.

Question 3: Do you agree with the areas we have identified as priorities for PR23? Are there any other significant issues that we should seek to address?

Arriva has some concerns with a number of the priorities for action set out by ORR. In particular, Arriva is concerned that the proposal to:

- Calculate Network Rail Benchmarks on the basis of past performance as this could lead to a misalignment with the expectations of the 30-year strategy for rail and “would remove the link between Benchmarks and any performance trajectories that might be established” by funders and client bodies.
- Update Network Rail Benchmarks annually as this could reinforce the misalignment identified above
- Arriva does not agree with the ORR's analysis that there is currently a gap in Operator's incentives in how TOC-on-TOC delay is handled as most of the financial impact of the Operator regime is driven by the costs created by TOC-on-TOC delays.

In addition, Arriva would like to see additional focus on reforms which:

- Enable and incentivise greater collaboration between Network Rail and Operators and between Operator in order to improve Performance
- Ensure accurate and cost-effective delay attribution
- Ensure on going alignment across all aspects of the rail contractual framework.
- Reduce the “transactional” costs of Schedule 8.
- Create direct alignment for Operators and Network Rail back to outputs expected by funders and client bodies.

Chapter 3: Proposals: Cross-cutting changes across sector regimes

We welcome views on the cross-cutting proposals in this chapter.

Question 4: Would you support Proposal A [to base Network Rail's benchmarks only on past performance]? Do you have any views on the proposed methodology set out?

Arriva is aware of the challenges that have been experienced when Network Rail's Benchmarks have been set based on aspirational Performance targets. However, Arriva is concerned that setting benchmarks solely on the basis of past performance could lead to an ongoing downward spiral of under delivery – particularly if benchmarks were reset annually.

As ORR highlight in their letter launching PR23, “Network Rail’s plans for CP7 must align with the 30-year strategy for rail...”. Arriva would therefore expect there to be a link between the expectations of funders and Transport Authority clients and Network Rail’s Benchmarks. Further, as stated in the ORR consultation document, setting Network Rail’s benchmarks on past performance “would remove the link between Benchmarks and any performance trajectories that might be established” – despite the suggestion that Network Rail’s incentives to improve performance would remain strong, this could lead to misaligned targets which will not enable effective collaborative working.

Therefore, regardless of what process is used to set Network Rail’s benchmarks, the process must result in benchmarks that maintain alignment with the Performance trajectories assumed in the contracts between Operators and Transport Authority clients including GBR. This could be achieved by setting Network Rail’s benchmarks in line with these funder/client trajectories or vice versa.

Question 5: Would you support Proposal B [to annually update benchmarks to make benchmarks more flexible]? If benchmarks were to be updated annually, do you favour achieving this through a rolling update (Option B1) or through a modelled approach (Option B2)?

As outlined above, Arriva strongly believes that Benchmarks should be set to align with performance targets set by funders and client bodies.

Arriva is aware of the challenges that have been experienced when Network Rail’s Benchmarks have been set based on aspirational Performance targets. However, Arriva is concerned that setting benchmarks solely on the basis of past performance could lead to an ongoing downward spiral of under delivery – particularly if benchmarks were reset annually based on immediately past performance.

As ORR highlight in their letter launching PR23, “Network Rail’s plans for CP7 must align with the 30-year strategy for rail...”. Arriva would therefore expect there to be a link between the expectations of funders and Transport Authority clients and Network Rail’s Benchmarks. Further, as stated in the ORR consultation document, setting Network Rail’s benchmarks on past performance “would remove the link between Benchmarks and any performance trajectories that might be established” – despite the suggestion that Network Rail’s incentives to improve performance would remain strong, this could lead to misaligned targets which will not enable effective collaborative working.

Therefore, regardless of what process is used to set and adjust Network Rail’s benchmarks, the process must result in benchmarks that maintain alignment with the Performance trajectories assumed in the contracts between Operators and Transport Authority clients including GBR. This could be achieved by setting Network Rail’s benchmarks in line with these funder/client trajectories or vice versa.

If annual recalibration of Benchmarks were to be adopted despite the observations made above, then Arriva would recommend using an approach based on rolling historical Performance in order to reduce the costs and complexity of implementing such an arrangement.

Question 6: Should Proposal C [to implement joint or shared allocation of delay minutes within Schedule 8 itself] be a priority for reform in PR23? If you would like us to consider Proposal C further, please set out how it can best be implemented (e.g. including incident types that should be subject to joint or shared responsibility).

If collaboration between Network Rail and Operators and between Operators is to be enabled and incentivised, then the introduction of shared and/or joint attribution would be beneficial. Arriva would also support the use of a 50/50 split for “joint responsibility” and a variable split for “shared responsibility”.

Arriva does not recognise the concern that ORR highlight relating to a potential to create a break between delay attribution and Schedule 8. If a delay category is recognised as being jointly caused and mitigated or be shared, then that could and must be reflected in the delay attribution process as well as Schedule 8.

The greatest challenge in progressing this proposal would be determining what delay causes are joint or shared and determining the proportion of “sharing”. As a starting point, in order to maintain alignment across the industry, these arrangements should be consistent across the Network and across Operators. However, the arrangements would need to remain flexible as the establishment of new industry structures develops and progresses. For example, the scenario laid out in the consultation document relating to the management of stations will need to address the situation where GBR “manages” stations as laid out in the Plan for Rail.

Chapter 4: Proposals: Passenger regime

We welcome views on this chapter’s proposals for the passenger regime.

Question 7: Would you support Proposal D [to more accurately incentivise TOCs to limit delay to other operators], implemented through Option D2 [to update payment rates annually through a rolling update of the TOC responsibility matrix]? Do you have any views on the options set out?

Arriva does not agree with the ORR’s analysis that there is currently a gap in Operator’s incentives in how TOC-on-TOC delay is handled as most of the financial impact of the Operator regime is driven by the costs created by TOC-on-TOC delays. This is reflected in the setting of the Operator payments rates. Arriva would support this arrangement being made more accurate through a process of annually updating the TOC responsibility matrix as laid out in Option D2.

Question 8: Should Proposal E [to change the allocation of unidentified delays between Network Rail and operators] be a priority for reform in PR23? Are you able to provide evidence on the benefits and costs of the proposal or to inform the allocation of unidentified delays?

As unidentified delay has become an issue which is undermining confidence in the Schedule 8 regime and is therefore undermining efforts to deliver collaborative performance improvement activity, Arriva does agree that addressing this issue should be a priority for PR23.

In considering unidentified delay, Arriva believes that it is important to distinguish between sub-threshold delay and unexplained delay. These two elements of unattributed delay have different causes and need to be managed separately.

By the very nature of sub-threshold delay, any efforts to attribute sub-threshold delay are bound to fail. However, analysis of sub-threshold delay suggests that the originating delays are highly geographically clustered and strongly related to the detail of timetable construction and local Network congestion rather than being within the control of Network Rail or any specific Operator.

Therefore, Arriva suggests that sub-threshold should be managed outside the Schedule 8 regime as part of the overall industry Performance improvement process.

In the case of unexplained delay, there should continue to be incentives applying to all parties to seek root cause attribution. This could be achieved by treating unexplained delay as “joint” responsibility.

Question 9: Should Proposal F [to reflect the wider financial impacts of delays in Schedule 8 compensation] be a priority for reform in PR23? If this proposal was taken forward, would you favour formulaic recovery (Option F1) or actual sums recovery (Option F2) to achieve it?

With changes in the allocation of risk on Operator costs and passenger revenue being progressed in line with the Plan for Rail, it is a priority that the way that the financial impacts of delays are reflected in Schedule 8 payment regimes. However, it remains unclear what the final position on these matters might end up being. For example, while the Plan for Rail lays out arrangements for Concession type contracts, there remain options for some Operators to be provided with incentives to grow revenue. In addition, while it is clear that the new contracts will include incentives relating to Performance improvement, it is not clear how these arrangements will address Network Rail's contribution to the delivery of such improvements.

Regardless, in order to control industry transaction costs, Arriva would endorse a formulaic recovery approach as outlined in proposal F1 which is strongly aligned to the mechanisms in the contracts Operators will have with Transport Authority clients.

Arriva agrees that a fully aligned Schedule 8 financial recovery regime coupled with a revised approach to the setting of Benchmarks could allow for a review of the requirement for an additional Sustained Poor Performance Regime. However, this conclusion remains to be on the proviso that the arrangements in Schedule 8 are fully aligned with the arrangements in in the contracts Operators will have with Transport Authority clients.

Chapter 5: Proposals: Freight and Charter regimes

We welcome views on this chapter's proposals for the freight and charter regimes.

Question 10: Do you agree with our preferred high-level approach for the freight regime, to keep the current regime broadly unchanged for CP7? Are there other elements of the freight regime or its calibration that should be considered for reform in PR23?

The freight regime in Schedule 8 appears to have been broadly effective and has sat alongside the passenger regime successfully for some years.

Question 11: Would you support Proposal G to update the evidence base underpinning the calibration of the freight payment rate?

It does appear sensible to update the evidence base underpinning the calibration of the freight regime.

Question 12: Should Proposal H, to revisit the calibration of caps, be a priority for reform in PR23? Can you provide evidence demonstrating whether or not the supplements and caps are currently calibrated appropriately?

Arriva has no comment on this other than to observe that the cap arrangements seem to have worked as expected over the years.

Question 13: Do you agree with our preferred high-level approach for the charter regime, to keep the current regime broadly in place for CP7? Are there other elements of the charter regime or its calibration that should be considered for reform in PR23?

The charter regime in Schedule 8 appears to have been broadly effective and has sat alongside the passenger regime successfully for some years.

Are there any other comments you would like to make?

It is clear from Williams-Shapps' Plan for Rail that there will be significant diversity in the detail of the incentives bearing on different Operators with some having additional incentives relating to passenger revenue growth and Open Access and Freight Operators still being directly exposed commercially to the impacts of Performance delivery levels.

It is therefore vitally important that the structure and calibration of Schedule 8 reflects this diversity of commercial arrangements.

The future Schedule 8 arrangements should also enable and encourage local "overlay" arrangements between Network Rail and individual operators reflecting their specific circumstances. However, these arrangements should be subject to overview to ensure that they do not undermine the cohesion of the Schedule 8 arrangements overall and for other specific operators.



Response to ORR’s technical consultation on the PR23 review of the Schedule 8 train performance regime

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

Please send your response to performance.incentives@orr.gov.uk by 10 September 2021. Please contact Will Holman at ORR with any queries: will.holman@orr.gov.uk.

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Chapter 2: ORR’s proposed approach and priorities

We welcome views on our questions regarding ORR’s proposed approach to PR23.

Question 1: Do you have any views on the objectives and benefits of a mechanism such as Schedule 8, for the range of different industry parties, both in the current contracting model and once the Rail Transformation Programme has been fully implemented?

A high performing and reliable railway is now, more than ever, a vital requirement for freight operators on an increasingly congested network if they are to continue to grow their businesses, particularly in those markets that demand ‘just in time’ delivery. Maintaining high levels of performance and reliability is essential in ensuring existing rail freight customers continue to use rail and that new customers are attracted to the mode.

The Schedule 8 Performance Regime (“the regime”) remains one of the key mechanisms in ensuring that continued focus on good levels of performance and reliability are achieved and maintained. Consequently, DB Cargo (UK) Limited (“DB Cargo”) considers that the regime continues to be extremely important to freight operators as it provides a mechanism to ensure a level of compensation for unplanned disruption whilst at the same time providing key incentives for continuing improvements in performance. Not only does the regime ensure that the party who is allocated responsibility for any disruption on the network is held to account, with a level of compensation flowing to those affected by that disruption to/from and via Network Rail, it

also incentivises and rewards improvements on expected levels of performance through the benefit of financial bonuses.

It is essential, therefore, that the regime remains in place for open access freight operators in Periodic Review 2023 (“PR23”) and even more so following any restructuring of the industry through the Rail Transformation Programme when it is likely that the majority of the passenger services on the network will be operated under Government concession contracts.

Question 2: Do you have any views on whether we should make no changes to Schedule 8 in PR23, or pursue a small number of incremental reforms to ensure it remains fit for purpose as a baseline regime?

Normally, the five-yearly Periodic Review process provides the perfect opportunity to consider whether the mechanisms and metrics contained in the regime remain appropriate or whether changes are required to rectify issues that have become apparent since the previous Periodic Review. However, with the publication of the Williams-Schapps Plan for Rail earlier this year, significant work will be undertaken by the rail industry over the coming years to develop and implement the Rail Transformation Programme which will change significantly the face of the rail industry in the UK. As acknowledged by ORR in its consultation document, this work will carry on in parallel to PR23 and therefore its recommendations will not likely be available in time to be taken fully into account by ORR when making its PR23 determination.

Consequently, to undertake a full review of Schedule 8 Performance Regime at this time would, in DB Cargo’s view, be counterproductive as any major changes proposed through that review may not prove to be consistent with the subsequent outcomes of the wider Rail Transformation Programme. In any case, the regime should continue to be based on the ‘Star Model’ as DB Cargo cannot conceive of any other workable approach at least until the outcomes from the Rail Transformation Programme become known.

DB Cargo is therefore of the strong view that the regime should be left as is unless there are any clear and identifiable incremental changes that, if implemented, would bring immediate benefits.

Question 3: Do you agree with the areas we have identified as priorities for PR23? Are there any other significant issues that we should seek to address?

Given DB Cargo’s view expressed above (i.e. that the regime should be left as is unless there are any clear and identifiable incremental changes that, if implemented, would bring immediate benefits), it is not convinced that the areas identified by ORR in respect of the regime are in fact priorities for PR23. Whilst some of the proposals may appear at first glance to be beneficial, DB Cargo believes that they may also have downsides were they to be adopted (e.g. resetting Network Rail’s benchmarks to reflect historic performance).

Consequently, whilst DB Cargo remains to be convinced that the changes outlined by ORR in the consultation document will prove beneficial at this stage in advance of the outcomes of Rail Transformation Programme, it would nevertheless be willing to explore them further in case it can be persuaded otherwise.

Chapter 3: Proposals: Cross-cutting changes across sector regimes

We welcome views on the cross-cutting proposals in this chapter.

Question 4: Would you support Proposal A [to base Network Rail's benchmarks only on past performance]? Do you have any views on the proposed methodology set out?

DB Cargo does not support the proposal to base Network Rail's benchmarks in CP7 on historical performance (presumably from CP6) rather than using forward-looking regulatory performance trajectories, which has been the approach adopted in each of the recent Periodic Reviews.

ORR has set out three main benefits that would be derived from its proposal:

It allows Network Rail's benchmarks to benefit more completely from steps to improve flexibility (as per Proposal B below), which in turn can improve accuracy. Best expectations of future performance may be better inferred from recent past performance than from a long and progressively outdated forecast.

DB Cargo disagrees. Unlike Freight Operating Companies, Network Rail is a regulated monopoly and is funded to deliver a certain level of performance over the Control Period in question. DB Cargo submits that using historic levels of performance from a previous Control Period would result in Network Rail's benchmarks being based on the levels of performance it was funded to deliver in that previous Control Period and not those it will be funded to provide in CP7 which are likely to be somewhat different. In DB Cargo's view, this would create a significant inconsistency. For example, if Network Rail is funded in CP7 to provide a higher level of performance than it was in CP6, then the benchmarks would likely be set too high if based on historic performance from CP6. The reverse situation would also arise (i.e. that the benchmarks would be set too low) in the unlikely event that Network Rail is funded to provide a lower level of performance in CP7.

DB Cargo notes the concern that the break of linkage between Network Rail's benchmark and its performance trajectories is acknowledged by ORR in the consultation document. Whilst Network Rail may well be separately incentivised to meet those regulated performance trajectories, such obligation would no longer have any bearing on the operation of the regime. So, assuming Network Rail is funded to provide a higher level of performance in CP7 than in CP6, then it is likely to outperform easily benchmarks which are set on the level of historic performance in CP6. This would then lead to a large swing in bonus payments to Network Rail. However, keeping the current approach means that in meeting its performance trajectories it will likely perform at benchmark.

Furthermore, ORR states elsewhere in the consultation document the "as a general principle, benchmarks should be aligned with the best expectation of future performance in order to optimise the accuracy of the regime". DB Cargo considers that the best expectation of Network Rail's future performance is through its forward-looking performance trajectories and not in levels of performance achieved historically.

"It simplifies the process through which Network Rail's benchmarks are set, reducing resource pressures."

DB Cargo acknowledges that setting Network Rail's benchmarks using forward looking performance trajectories is more complex than if historic levels of performance are used. Nevertheless, the process has already been undertaken before in many previous Periodic Reviews so should not prove too difficult to manage for PR23. In addition, DB Cargo believes that there has been a lot of work carried out on the development of new predictive analytics,

machine learning and data technologies. Perhaps such technologies could be used to help inform the calibration of benchmarks.

“It aligns the approach to setting the benchmarks for Network Rail and train operators, which may have a benefit in its own right as the rail reform agenda seeks to align track and trains.”

As mentioned above, Network Rail is a regulated monopoly and is funded to deliver a certain level of performance over the Control Period in question. Freight Operators on the other hand are private companies so have to construct robust business cases in order to invest in measures to deliver their own performance improvements. Given the difference in funding structure between Network Rail and Freight Operators, DB Cargo does not see an aligned approach in setting respective benchmarks is necessary or appropriate.

Consequently, for the reasons given above, DB Cargo considers that Network Rail’s benchmarks should continue to be aligned to its forward-looking regulatory performance trajectories for CP7.

Question 5: Would you support Proposal B [to annually update benchmarks to make benchmarks more flexible]? If benchmarks were to be updated annually, do you favour achieving this through a rolling update (Option B1) or through a modelled approach (Option B2)?

DB Cargo does not support the proposal to update benchmarks annually as it believes such a mechanism would devalue the benefit it places on having a fixed benchmark over the length of the Control Period. A stable benchmark gives Freight Operators a reasonable degree of certainty and stability and, therefore, a platform from which they can construct business cases to make investments in resources and improvements to operational practices designed to deliver performance improvements. If such investments are to be counteracted by frequent changes to benchmarks (i.e. (1) investments are made; (2) performance improves; and (3) benchmark is adjusted), then business cases for making such investments become that much harder. This instability is also likely to extend beyond Freight Operators to their customers whose own contracts may incorporate performance improvement incentives based on a relatively long-term stable and understood performance benchmarks.

ORR suggests two possible methods to achieve its flexible benchmark approach.

“Option B1 – Rolling historical performance. This would involve updating, each year, the past performance component of benchmarks using average outturn performance during a set period of time in the past. This period would move forward by a year each time benchmarks are recalibrated. Potentially this rolling period could be for a period as long as five years, striking out the top and bottom observations as potential outliers.”

“Option B2 – Modelled approach. This would mechanistically adjust benchmarks each year based on changes in network traffic levels observed during the past year. Applying this kind of annual adjustment would cause benchmarks to increase when network traffic increases, according to a preset formula based on the historical correlation between traffic and performance.”

Given DB Cargo’s preference for the current approach of setting benchmarks across the entire Control Period, it does not find favour with either of the above options. Whilst DB Cargo acknowledges the motivation for seeking ways in which benchmarks can be updated in response to certain major events/perturbations (e.g. the network-wide reduction in traffic over the COVID-19 pandemic) adjusting the benchmark at the end of the year in which the relevant event took place would create a ‘benchmark lag’ i.e. as traffic recovers the benchmark would continue to lag behind and alignment would take some time to achieve.

Question 6: Should Proposal C [to implement joint or shared allocation of delay minutes within Schedule 8 itself] be a priority for reform in PR23? If you would like us to consider Proposal C further, please set out how it can best be implemented (e.g. including incident types that should be subject to joint or shared responsibility).

DB Cargo considers that Proposal C is not a priority for PR23 and shares ORR's reservations expressed in the consultation document (i.e. that the proposal would add complexity to the terms and calibration of Schedule 8, and in complicated incidents involving multiple operators it may not be straightforward to determine which parties should share in the allocation). This could in turn cause much confusion and lead to more disputes over calculating the appropriate percentage to allocate to each responsible party. This is, therefore, a complex area and it may not be easy in turning the idea into in to a workable contractual mechanism. DB Cargo, therefore, considers that this is more an area for the Rail Transformation Programme to consider once future contractual relationships between industry parties becomes clear.

Notwithstanding the above view, if there is any further discussion on shared allocation of delay minutes for 'on-network' delay either within PR23 or the Rail Transformation Programme, DB Cargo would also expect it to cover relevant 'off-network' delay events which are allocated under the freight regime wholly to Freight Operators.

Chapter 4: Proposals: Passenger regime

We welcome views on this chapter's proposals for the passenger regime.

Question 7: Would you support Proposal D [to more accurately incentivise TOCs to limit delay to other operators], implemented through Option D2 [to update payment rates annually through a rolling update of the TOC responsibility matrix]? Do you have any views on the options set out?

Question 8: Should Proposal E [to change the allocation of unidentified delays between Network Rail and operators] be a priority for reform in PR23? Are you able to provide evidence on the benefits and costs of the proposal or to inform the allocation of unidentified delays?

Question 9: Should Proposal F [to reflect the wider financial impacts of delays in Schedule 8 compensation] be a priority for reform in PR23? If this proposal was taken forward, would you favour formulaic recovery (Option F1) or actual sums recovery (Option F2) to achieve it?

DB Cargo considers itself not best placed to offer representations on the above questions in Chapter 4 (i.e. Q7 to Q9) as these questions are primarily aimed at passenger operators who are much better placed to respond meaningfully on the suggested proposals set out in the consultation document.

That said, given the effect changes in the calibration of the Network Rail payment rates under the passenger regime can have on the Freight Operator payment rate in the freight regime, DB Cargo would expect any material changes in this area should also be discussed with freight operators.

Chapter 5: Proposals: Freight and Charter regimes

We welcome views on this chapter's proposals for the freight and charter regimes.

Question 10: Do you agree with our preferred high-level approach for the freight regime, to keep the current regime broadly unchanged for CP7? Are there other elements of the freight regime or its calibration that should be considered for reform in PR23?

DB Cargo strongly agrees with ORR's preferred high-level approach for the freight regime (i.e. to keep it unchanged for CP7). DB Cargo considers the regime is effective, works well, is easily administered and is now well understood, not only within Network Rail and the Freight Operators but also by many freight end customers and wider industry stakeholders. The fact that the freight regime applies equally to all Freight Operators is another significant benefit. Given this, there is no pressing need in DB Cargo's view that the regime requires a fundamental overhaul in PR23, particularly now that work on implementing the Rail Transformation Programme is about to begin in earnest.

Question 11: Would you support Proposal G to update the evidence base underpinning the calibration of the freight payment rate?

DB Cargo acknowledges that there is a strong case to review the Network Rail payment rate in the freight regime given that it was last changed (other than for inflation) back in PR08. Since then there have been fundamental changes in the mixes of rail freight commodities carried (e.g. growth in 'just in time' commodities whereas ESI coal traffic has all but disappeared) and further efficiencies resulting in the amount of goods conveyed on each train increasing. However, before DB Cargo could consider its participation in taking the review forward in detail, it would wish to understand: (1) what categories of costs would be encompassed within the Network Rail payment rate (i.e. would the review maintain the status quo of a delay minute being based on short-run costs or whether other categories of cost should also be considered, such as marginal revenue effect?); and (2) how the review would be carried out both in terms of governance and how commercially sensitive information, that would inevitably be required from each Freight Operator, will be safeguarded and kept confidential throughout the review process and beyond.

Question 12: Should Proposal H, to revisit the calibration of caps, be a priority for reform in PR23? Can you provide evidence demonstrating whether or not the supplements and caps are currently calibrated appropriately?

DB Cargo does not consider that a review of the structure of caps in the freight regime is necessary in PR23. DB Cargo endorses ORR's view expressed in the consultation document that caps should be retained in their current form for CP7 as they play an important role in limiting Freight Operators' financial risks given that they typically operate on limited profit margins and are sensitive to risk exposure. Like ORR, DB Cargo is also unaware of any evidence that the calibration of the levels of supplements and caps is erroneous. It is very rare for DB Cargo to have an incident that breaches its incident cap.

The reciprocal Annual Cap in particular, provides a great deal for assurance for Freight Operators by setting a ceiling on the net liability for both parties under the regime. In doing so, DB Cargo acknowledges that it needs to be set at a level that will not ordinarily be triggered so as to avoid any perverse incentive for a party to no longer focus on improving performance once its Annual Cap is reached. This perversity is not expected to occur with Freight Operators, however, as they are already driven to improve performance through their service to customers, an incentive that continues to apply irrespective of whether or not the Annual Cap has been triggered.

Consequently, DB Cargo considers that the structure of the caps (both incident and annual) and the supplements required to fund them should remain as is for CP7 and as such a review is not required.

Question 13: Do you agree with our preferred high-level approach for the charter regime, to keep the current regime broadly in place for CP7? Are there other elements of the charter regime or its calibration that should be considered for reform in PR23?

DB Cargo also considers that the charter regime should remain unchanged for CP7. Consistent with its views on the freight regime expressed earlier in this response, DB Cargo considers the regime is effective, works well, is simple to administer and is now well understood, not only within the Network Rail and Charter Operators but also by many charter promoters. The fact that the charter regime applies equally to all Charter Operators is another significant benefit. Given this, there is no pressing need in DB Cargo's view that the regime requires a fundamental overhaul in PR23, particularly now that work on implementing the Rail Transformation Programme is about to begin in earnest.

Are there any other comments you would like to make?

Any changes to the metrics of the freight (or charter) regime (e.g. payment rates and benchmarks) can have a significant effect on the flows of money from one party to the other. It is vital therefore that before being introduced, any changes to the metrics are considered holistically to ascertain their overall effect on each party.

DB Cargo also considers it crucial that the freight and charter regimes continue to apply across all Freight Operators and Charter Operators respectively and with the prospect of further geographical devolution within Network Rail that the regimes also continue to apply equally across the entire network.

DB Cargo hopes that the comments made in this response to the ORR's consultation document are helpful and it looks forward to working with ORR and the rest of the industry to take forward any changes ORR decides to make, which given its comments in this response, DB Cargo hopes are few in number, particularly in respect of the freight and charter regimes.



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W2 1NJ

31 August 2021

Dear Will

Re: Delay Attribution Board Response to PR23

The Delay Attribution Board met on 3 August to review ORR's PR23 Consultation Document, with a view to feeding back comment to inform a decision on whether, and how best to, progress these proposals. I have been asked to write to you to explain the views of the Board on this subject and hope that the content below will be of value to ORR.

Bearing in mind the limited time available to the Board for review, the decision was taken to focus our considerations on Proposal C (and associated Question 6) relating to the potential increase in use of Joint responsibility within attribution. This is the area that relates directly to attribution principles and activities and therefore the areas of relevance to the remit of the Board – even although it is acknowledged that the Board's considerations here have expanded to include limited considerations over the downstream application of Schedule 8.

Briefer consideration was also given to Proposal D/Question 7 relating to responsibility for third-party reactionary delay, and these are the two aspects of the Consultation document that DAB are providing commentary on.

The views of the Board have been detailed on the document "Delay Attribution Board Response to PR23" which accompanies this letter. You mentioned to me that it would be acceptable to provide feedback without sticking to your template response form, and it did feel more appropriate for a detailed response on a small number of topics to be provided in this way. It should be noted that Members of the Board hold a range of views on this paper, and the commentary does not represent the unanimous view of the Board in every case. It is nonetheless hoped that this will provide ORR with a useful perspective of some of the practicalities that will be involved in progressing these proposals.

I hope this information will be useful to ORR in determining whether/how best to progress the Proposals discussed. If you have any particular follow-up questions based on this response for the Board to consider, do please let me know as the Board are committed to supporting constructive reform within the Industry and are keen to support this as best we can. However, do bear in mind that the Board are not scheduled to meet again until, 28 September 2021, well after your deadline for responses.

Yours sincerely



Richard Ashley
Secretary to the Delay Attribution Board



Delay Attribution Board Response to ORR Consultation Paper PR23

The Delay Attribution have reviewed ORR's Consultation Paper PR23 and agreed the below commentary on Questions 6 and 7 (relating to ORR Proposals C and D respectively) contained within it.

Proposal C – Joint or Shared allocation of delay minutes within Schedule 8 itself

Overview – Benefits of Reform

In an overall sense, it was felt by DAB that there is merit in pursuing limited reform of existing Joint responsibility criteria and application, particularly as the existing criteria prescribed in the Delay Attribution Principles and Rules (DAPR) can be difficult to follow for both attributors and analysts/improvement teams alike. At the time of writing, it is not clear to the Board exactly how the reformed GB Railways organisation will eventually be structured in terms of the relationship between infrastructure and train operations, but it is evident that significant changes to the existing model will occur and that changes to long-held principles of attribution may be necessary to enable a reformed industry to perform to the best of its potential.

Under the existing Industry structure, the example of a security alert at a major station illustrates the excessive complexity in applying principles of joint responsibility. Current rules require, separate joint-responsibly incidents to be generated for each operator affected in scenarios where trains are prevented from running into/out of the station and passengers are also prevented from accessing platforms.

Confusion can be exacerbated in scenarios where the above situation changes over time e.g. If a point is reached where trains are allowed to run but passenger access continues to be prevented, this requires a further series of 100% TOC-responsibility incidents to be created. Conversely, if the platforms are reopened but the infrastructure remains closed, this requires the creation of a 100%-Network Rail responsibility incident – something that is also a necessity if the incident affects trains that are not booked to call at the station.

Bearing the above in mind, it can be necessary to create upwards of 10 TRUST incidents related to the same event to satisfy DAPR principles and, ultimately, Schedule 8 billing requirements. This is, of course, linked to the fact that attribution relies on the legacy TRUST and TRUST DA systems which only have minimal capacity to present attributed data in a format that indicates how, and to what extent, different Industry parties may have been responsible for a given event.

Clearly, there is scope for simplification and improvement here.

Similarly, the Board are aware of events that they have historically asked to provide guidance for on multiple occasions due to difficulties in determining the prime cause of an event. Issues relating to train/OLE interface and damage sustained by an apparent but unconfirmed object strike are two obvious examples. If there was scope to allocate such events as Joint responsibility it could potentially reduce the time and resource that the Industry devotes to investigation and dispute procedures that ultimately cannot clearly identify a responsible party.

The point raised in PR23 that multiple parties can potentially mitigate for events that would not



currently be allocated to Joint responsibility (e.g. trespass or fatalities which do not occur at a station but where a person may have gained access to the railway via a station) is also acknowledged as an area that is not currently reflected adequately by existing attribution principles and which could potentially be improved upon..

Concerns, Risks and Challenges

Having noted the above, the Board would have to view potential widespread or excessive change with a degree of caution, particularly in terms of:

- Whether existing systems are capable of supporting such a change (and how much time and investment would be needed to develop a new application that can do so if not). In this regard it needs to be borne in mind that with some operators expected to move under the GB Railways banner in due course and others (including Freight Operators) remaining independent, it seems likely that distinct Performance regimes will need to be developed to cover the two different categories, and that systems will need to be in place to account for this.
- Some Board members have concerns that increased use of Joint Responsibility may prove financially disadvantageous to operators that will not become part of the reformed GB Railways organisation, insomuch as events that historically would have been allocated as 100% Network Rail responsibility may become classed as Joint Responsibility as part of any reform exercise. One potential solution to this would be apply different attribution rules to different train operators (e.g. an event that is classed as Joint Responsibility for one would not be for another) but this would be likely to add an additional layer of complexity to the attribution process with the associated increased risk of errors being made. It would also need to be questioned as to whether applying separate standards of attribution to different operators would be contrary to the principles of the 2016 Railway Regulations concerning the need to apply Schedule on a non-discriminatory basis (as referenced in Section 2.9 of PR23).
- Whether increased use of Joint criteria will genuinely promote and enable joint performance improvement activities in practice or simply enable a culture to develop where no party takes ultimate responsibility for an event. (This is arguably more a question of ensuring that the correct Industry structure is in place to act on data, rather than with how the data itself is presented and classified).
- There would be a need to determine exactly what codes will be subject to Joint Responsibility and to clearly define the rules for their use. If this is not done, there will be clear potential for increased levels of dispute over whether Joint Responsibility criteria have been met or not. In this context, bear in mind that it can already sometimes be difficult to prove whether criteria for applying existing Joint responsibility criteria stipulated in the DAPR have been met. Weather-related events, and whether they can be deemed “severe”, is one potential example of where the motivation to raise a dispute could increase if severe weather events become Joint responsibility whilst non-severe events remain 100% with Network Rail

ORR will, of course, be aware of the findings of the RDG Delay Attribution report of 27 May 2020, which fed back the view to ORR that *“expanding joint responsibility codes is more about risk allocation across industry parties and less about Delay Attribution”*. Whilst the same paper acknowledges that the publication of the Williams report could prove to be a catalyst for revisiting the topic (as has since



evidently proven to be the case), the fact remains that the RDG report listed considerations outside of attribution that the Industry would need to address before committing to a programme of reform. This included the need for a change to Access Contracts, and the loss of causal data (e.g. for OLE incidents) without necessarily incentivising full investigation or performance improvement.

Post-Williams, the motivation for reform may well have been renewed but the challenges raised in the RDG paper remain entirely relevant. In particular, some Board Members have supported the RDG comments by expressing doubt that increased use of Joint Responsibility would genuinely help to bring about increased and more effective co-operation within the Industry unless an effective organisational structure is in place to ensure clear accountability for reviewing and addressing issues that are classed as Joint responsibility. If changes to attribution principles are applied without equivalent assurance that the outputs of attribution will be acted upon, there is a genuine risk that these could fall through the cracks in a Performance Improvement sense.

Specific Considerations

To consider some of the key practicalities in applying a change in process, at least from an attribution point of view, the Board broke down ORR's overarching question into their own specific set of sub-queries. These are documented below:

a. Is the concept that increased use of Joint Responsibility will promote co-operation when developing improvement/mitigation plans realistic?

The Board acknowledges that its expertise lies mainly in the field of Performance Measurement rather than Performance Improvement, and that it is not best-placed to comment on how the Industry has historically collaborated to address Joint responsibility issues.

In general, however, there is a degree of scepticism that the Industry has historically taken an effective, collaborative approach to issues that have been classed as Joint responsibility (which, as noted in the Overview above, cover events where both the operation of trains and passenger access are compromised), at least on a consistent basis.

This, therefore, begs the obvious question as to why an increased use of Joint Responsibility would now bring about increased Industry collaboration and whether parties that are not currently incentivised to engage in joint improvement activities would become so?

The Board acknowledges that the obvious answer to the above, at least potentially, is that the approach to collaborative working under the new GB Railways banner will be significantly different to that under the current model. The Board accepts and hopes that this may indeed prove to be the case in the long-term, although it suspects that for truly effective mutual action to review and address these matters, a dedicated team may need to be in place within the new organisational structure that has the mandate to demand improvements that can be made by both train and infrastructure operators based on the attribution data.

In conclusion, there is potential for increased use of Joint Responsibility to benefit the Industry, but only if it devotes itself to ensuring that the correct structure is in place to effectively act on the information.



b. What events other than those already prescribed in the current DAPR could be covered by this?

As noted in the Overview, the main opportunity in terms of reforming Joint responsibility logic is considered to be the simplification of existing processes associated with use of Joint Responsibility i.e. getting to a position of “one event/one TRUST incident” for security, fatality and significant operational incidents such as (lighting failures) at a station, as this should enable clearer reporting and better visibility of the impact of such events.

Outside of this, it is felt that further reform would be dependent on a new structure being in place to effectively act on the data in a co-operative manner, as noted in the previous answer.

In this scenario, the most obvious candidates to become newly subject to Joint Responsibility would appear to be those in the X* series (relating to “External” causes).

ORR will be aware that Network Rail take 100% responsibility for “X codes” although in some cases there may be opportunity for train operators to assist with mitigation – PR23 itself cites fatalities (code “XC”) as an example of where Network Rail can mitigate through management of track infrastructure and operators may be able to do so through management of stations, although the extent to which that will be the case is likely to vary from incident to incident depending on circumstances.

Although the Board have not had the capacity to complete a code-by-code review in this respect, it does need to be recognised that a clear rationale for applying Joint responsibility would need to be documented – if the logic is based on train operators having the ability to mitigate these incidents through station management, it would need to be determined whether operators who do not manage a given station, and who perhaps do not even operate trains that call there, could legitimately be held partially responsible for such an incident.

Other External causes, such as those relating to severe weather events, are more debateable and would require further detailed consideration of how they would be applied when capacity permits.

There are system considerations associated with the use of Joint Responsibility in connection with X-codes that would need to be addressed. These will be covered under Questions d and e below.

There may also be a case to increase use of Joint Responsibility in connection with codes in the V* series (i.e. external issues that are a Train Operator’s responsibility). In practice, however, it may be more practical to think of removing some of these codes altogether if the equivalent X-codes become Joint. For example, is there any value in retaining code VC, which currently covers fatalities and injuries incurred on a platform as a result of being struck by a train if code XC is changed to become a Joint Responsibility cause?

Other specific scenarios where responsibility is known to be difficult to determine, such as OLE/train interface and object strikes would, as mentioned in the introductory comments, would be likely candidates for Joint Responsibility in cases where investigations into cause are inconclusive.

A final consideration here that was not mentioned in PR23 but may be worthy of consideration is to actually make External codes exempt from Schedule 8 (as the Board understands is the case in some other European countries) for Train Operators that become part of the GB Railways organisation. This would not preclude data from potentially being used for improvement purposes but may remove some of the emotion and commercially-motivated behaviour that Williams is keen to eradicate Since

DAB

Delay Attribution Board

this is highly unlikely to be a practical option for any operators that continue to sit outside of GB Railways (e.g. a freight operator would, presumably, still expect compensation for a severe weather incident that delays their train by several hours), an improved S8 calculation system that treats allocated delay differently depending on the operator involved would be a prerequisite for this.

Ultimately, this is an area that would need to be revisited and explored in much greater depth should any decision to expand the application of Joint Responsibility be taken. Whatever decisions are reached, it is obviously essential that clear instructions are available to practitioners as to when Joint Responsibility must be used under a reformed system. This could potentially require a major update of current DAPR principles.

c. Who would determine which delay codes become Joint responsibility?

Whilst the Board would be very willing to offer their subject matter expertise in order to inform any process of prescribing increased use of Joint Responsibility, it is not felt that it is within its gift to unilaterally determine such fundamental changes to the Industry. However, all changes in principle and practice will, of course, need to be reflected in the DAPR.

It therefore seems clear to DAB that changes of this nature will need to be dictated at ORR level, albeit in close consultation with the Industry (including, of course, The Delay Attribution Board) if required.

d. Are there technical, system-based issues with applying Joint Responsible Manager codes to delay codes that would traditionally cover Network Rail Responsibility (e.g. "XC")

ORR will be aware that, in the majority of cases (with one significant exception noted below), responsibility for an incident is dictated by the four-digit Responsible Manager code that is allocated within the TRUST system. In terms of Joint Responsibility incidents, these Responsible Manager codes are specific to individual Train Operators (with Network Rail being the de facto second responsible party) and at present are they used exclusively in connection with delay codes relating to Train Operator responsibility.

A Network Rail cause/Joint Responsible Manager combination is therefore something of a contradiction in terms at present, as systems will have no way of identifying which Train Operator(s) would be partially responsible for an incident in this case.

Incidents could, of course, continue to be allocated to the existing series of TOC-specific Manager codes (e.g. DEDA for Northern Rail) to reflect a 50/50 share but this would fail to address the existing drawback where events affecting multiple operators have to be allocated to multiple TOC-specific incidents. Increasing the range of scenarios where such an unwieldy form of attribution would be necessary would present a risk that data available for analysis would be increasingly fragmented and increase the risk of errors arising within the attribution process.

Short of developing entirely new attribution and S8 calculation tools that can account for the above, the only potential option for capturing Joint responsibility under a single incident would be to base the split of delay on the Delay Code rather than the Responsible Manager Code.

This is something that the PEARS system currently does exclusively for "Unexplained" delay in the Z* series at the present time (no cognisance is paid to the Responsible Manager used for these incidents) and it is believed that a similar logic could be applied to other designated delay codes – be



that using the same share as used in the Unexplained calculation or a different one. For example, PEARS could be programmed to divide responsibility for a given delay code as 50% Network Rail responsibility and 50% for all affected operators regardless of the quoted Responsible Manager code (which would effectively be present for reporting purposes only). Returning to the previous example of a station security alert, this would enable responsibility to be measured and shared between Network Rail and multiple operators via a single incident and multiple incidents relating to each affected party would no longer be necessary.

Although this is not necessarily a “quick fix” and will require resource to develop, it is likely to be a significantly easier option than the development of a full PEARS replacement.

As such, this is an option that DAB would recommend is at least explored as the most effective way of sharing responsibility for incidents that have historically been reported as 100% Network Rail or Train Operator responsibility. However, there are potential drawbacks of the option:

- It is essentially a Schedule 8-focused solution. Default reporting may not make it clear to analysts which operator(s) have been deemed partly responsible for such incidents if they are simply allocated to a Network Rail code within TRUST. Improved downstream filtering may therefore need to be developed to ensure that the responsibility of multiple individual parties in respect of an incident is clearly visible at the reporting stage.
- There may be considerations as to how freight delay can effectively be attributed under such a model bearing in mind that they obviously do not manage stations. However, this can be accounted for by adjusting responsibility for the incidents within the current freight regime sums that are calculated via use of spreadsheets
- In the TRUST system, Train operators would not have any mechanism for disputing their portion of responsibility of an incident nominally allocated to a Network Rail cause (dispute rights being based solely on the Responsible Manager code to which an incident has been allocated)

e. Could responsibility be spread across more than two parties using current technology?

As mentioned previously, this does happen already in limited circumstances via the creation of multiple Joint Responsibility incidents, each of which divide responsibility between Network Rail and a given Train Operator. The drawbacks of this process – particularly if applied on a more widespread basis than at present - have already been discussed.

The “Unexplained-style” code-based system of allocating responsibility discussed in Question d offers a partial solution to this. Here, each operator affected by an incident would be responsible for a pre-defined/pre-programmed portion of delay incurred to their own trains (with Network Rail responsible for the remainder).

This is considered to be the only practical mechanism available to cover multiple-operator responsibility short of developing a completely new attribution tool. However, it should be remembered in this context that this method shares out responsibility for reactionary as well as directly attributed delays, so in theory an operator could be held Jointly responsible for an incident occurring a long distance away from its own area of operations (e.g. if an incident occurs at London Euston and delays an Avanti West Coast service that goes on to cause reactionary delays to Northern and TransPennine Express trains in the Manchester area, those latter operators will effectively be held jointly responsible for the incident too).



Bearing the above caveat in mind, the code-based process may not be an entirely satisfactory long-term solution. Until new, more sophisticated, attribution software can be developed to comprehensively account for the differences in contractual requirements for different operators, however, it is the best interim solution available to allow the Industry to reflect an increased use of Joint Responsibility.

f. Is there a case to apply shares of responsibility other than 50/50 and would this have a bearing on dispute levels?

ORR will be aware of the current distinction between “Joint Responsibility” (where parties are allocated an equal 50/50 split of responsibility for an incident based on the attribution in TRUST) and “Shared Responsibility” which covers any other percentage split in responsibility between the parties.

It is worth remembering that, “Shared Responsibility” is technically a commercial rather than an attribution term – any negotiated splits in responsibility (outside of those covered by Joint Responsibility Responsible Manager Codes and the Delay Code based splits applied to Unexplained delay) are managed downstream of attribution via the process of adding edits into the PEARS system (or via manual spreadsheet-based calculations for freight operators). So the use of “Shared Responsibility” within the attribution process and the DAPR would represent a sea-change compared to existing principles.

Any move towards applying shares other than 50/50 could, again, theoretically be covered by code-based attribution. The current algorithm for allocating a share of Unexplained delay is to allocate a default 50% share of responsibility to Network Rail with the remaining 50% split between Network Rail and each operator based on the percentage of other delays that each party was responsible for. It is believed to be possible to apply different (and presumably simpler) algorithms to allow for different shares in responsibility on a code by code basis should that be required.

That said, the Board are sceptical of the value in introducing a range of different percentage shares into the attribution process. It is considered that it would add another layer of complexity to the process and, additionally, it could increase the potential for disagreement and dispute over the level of responsibility that each party takes for a given incident. This would be a particular concern if the option was left open to determine the percentage share on an incident-by-incident basis. Were such flexibility to be adopted, it is felt that this will give rise to disputes over the percentage of responsibility allocated to a party (i.e. arguments could arise along the lines that 40% of responsibility has been allocated to an operator when they feel that 35% would have been appropriate). This would obviously be contrary to the expectations of the Williams review.

Autumn-related “Neutral Zone” agreements make for a useful case-study of how a principle designed to simplify attribution by allowing for a share of responsibility can actually give rise to further dispute. DAPR Section F1.5 allows for the use of Neutral Zones which are intended as “a pragmatic approach to managing the increased level of delays experienced during the autumn period and is based upon ‘most likely’ cause principles”. Although not explicitly stated in DAPR, such incidents are generally shared between Network Rail and the relevant Operator using a percentage share that is mutually agreed between both parties and applied post-attribution using PEARS. In practice, however, this share is not always easily agreed, with issues such as the effectiveness or otherwise of Network Rail’s vegetation management in the lead-up to Autumn often being factored into negotiations. As such, it is not exceptional for “agreed” Neutral Zone incidents to remain in dispute for months after Autumn has concluded while this overall share is negotiated. Indeed, at the time of writing (August 2021) the



Board are aware that neutral zone incidents from 2020, involving multiple operators, remain in dispute.

Bearing the above in mind, it is felt that a move to specific non-standardised shares of responsibility would be likely to create more problems for the Industry in terms of attribution complexity and, particularly, scope for dispute than it will solve. Applying a simple 50/50 split based on existing Joint Responsibility principles is considered more likely to promote a culture of clear lines of reporting and mutual accountability for improvement. In other words, the more simplistic, non-negotiable and clearly defined Joint Responsibility rules are, the more beneficial they will be for the Industry.

g. What are the practicalities involved in developing systems that could account for changes of this nature?

DAB cannot provide a meaningful financial or time-based estimate of the resource that would be required to develop a new attribution tool that will replace TRUST and TRUST DA, and/or a more flexible Schedule 8 calculation and reporting tool to replace PEARS.

It can, however, suggest some of the key considerations that would need to be factored into any decision to progress such a decision:

- Fundamentally, the scope for developing TRUST and TRUST DA to accommodate any changes in attribution, beyond what has been covered in the points above, is extremely limited if not non-existent. Any other changes to the application of Joint and/or Shared Responsibility will almost certainly be dependent on creation of a new attribution application.
- Any new attribution application needs to be compatible with numerous other applications that will either feed performance data in or be used for downstream reporting (the latter category including the PEARS Schedule 8 calculation tool or equivalent replacement, of course). Based on some Members' experiences of previous Industry projects, these compatibility matters can take up a significant proportion of the resource required to bring about an effective solution and it is suggested that this point is not overlooked when considering future IT options for attribution.
- One further issue that the Board considers to have adversely impacted the development of systems related to performance measurement in recent years is the lack of subject matter expertise that is devolved to work with project and system development staff through the lifetime of the project.

It is accepted that providing a devoted resource for major projects is easier said than done – particularly in the current climate where subject matter experts are in relatively short supply and tend to have commitments that make it extremely difficult for the Industry to devolve them to a project in the medium or long term. Nonetheless, the Board do feel that if it is necessary to undertake development of a new attribution system, there should be high-level support for the need to have an experienced practitioner involved with the associated project on an ongoing basis throughout its development.



Proposal D - Treatment of TOC-on-TOC delay in Schedule 8

Time available for consideration of this Proposal was limited in comparison with Proposal C. However, the Board did consider the following points that may be of value when considering the appropriateness of this proposal.

The concept of giving operators a direct motivation to minimise disruption to third parties is a sound one that is arguably not sufficiently promoted by existing Schedule 8 principles. DAB have historically encouraged this thinking by stipulating that parties should be held responsible for delays incurred in consequence of a failure to adequately mitigate for an earlier event (as covered in Section D4 of the DAPR - "Failure to Mitigate"). In practice however, these particular principles are rarely applied within attribution, partly on the basis that it can be difficult to prove if/when a party has not taken adequate measures to recover the service following a disruptive event and partly as it may be perceived as undiplomatic or even antagonistic towards the party in question. Again, such attribution is likely to be subject to dispute under current arrangements due to the margins for interpretation.

As with increased use of Joint Responsibility, however, there is a question mark as to whether increasing the focus on third party reactionary would genuinely result in improved practice at an operational level in the longer term. This is possible, but by no means assured. An alternative scenario is that passenger operators simply change their focus to disputing reactionary attribution – at the expense of, or even in addition to, legacy practices of disputing prime cause attribution – in a similar manner to current practices followed by freight operators.

The Board Members representing Freight Operators, who have historically had more motivation than most to review the accuracy of third-party reactionary attribution due to the nature of their Schedule 8 agreements, also ventured the opinion that the current application of reactionary delay is one of the weaker areas of the current attribution process in terms of accuracy and consistency (more so than the correct use of Delay and Manager codes). They therefore see a potential risk involved in changing the regime to rely too closely on this data, although for context it should also be noted that the Board are not aware of any historical moves to reform the existing freight regime as a consequence of such concerns .

The current Augmented Attribution project being run by RSSB, which is endeavouring to develop a reliable automated process for identifying and allocating reactionary delay, may address these concerns in due course, but at this stage in its development there are no guarantees that this will happen or be effectively applied to an attribution system (be that TRUST DA or any new tool).

Bearing this in mind, it is felt that the second of ORR's two suggested options for encouraging reductions of reactionary – the more regular review and amendment of payment rates to reflect the overall level of reactionary delay incurred by a party – will be the more practical and equitable of the suggested solutions, at least in the short term.

In an email on 15 September 2021, ORR noted to DAB that ORR's proposal was that "Schedule 8 would treat certain classes of delay as joint or shared for the purpose of allocating delay minutes in the calculations that determine financial flows. Delay attribution itself would be unchanged." We wanted to check that DAB had fully understood this, and asked DAB to let us know if it wanted to add to or amend its response.

DAB responded on 4 October 2021 as follows:

The Delay Attribution Board met last week and discussed your query dated 15/09/21 on its response to PR23.

The Board acknowledged on review that some of the comments contained in our initial response to PR23 – issued on 31/08/21 – did relate to scenarios that would relate to changes to Delay Attribution principles and were not confined solely to downstream reallocation of responsibility in Schedule 8. As such, these comments may not have been pertinent to the specific proposal and request for feedback being put forward by ORR.

The Board have decided not to revise/reissue its original response paper on the grounds that it should hopefully be clear to yourself and any other readers which comments within it referred to potential changes of attribution principles. In any case, it is considered that the majority of comment provided in the paper remains relevant to PR23.

There are two observations that the Board would like to offer as a result of this second discussion, however.

- Failing to update attribution principles to take advantage of reformed downstream Schedule 8 calculation could potentially be considered as a lost opportunity. Returning to the example mentioned in the original DAB response of incidents that affect multiple operators and involve both loss of railway infrastructure and the prevention of passenger access to platforms, it should be remembered that the current convoluted attribution principles (that can involve the creation of multiple TRUST incidents to cover the same event) is borne of necessity due to the inability of the PEARS system to calculate Schedule 8 liabilities otherwise. Should a better downstream calculation tool be available that does not depend on such attribution, it would seem to be an oversight not to also simplify the attribution process (and associated reporting) to take advantage of this. NB. The Board understands that PR23 is not proposing that attribution principles must not be changed in consequence of any Schedule 8 reform – only that this is not within the scope of ORR's review at the current time. However, it feels that there are strong arguments for applying reforms to Delay Attribution and Schedule 8 concurrently where possible, due to the clear and direct dependence of the latter on the former.
- The Board has concerns that reforming Schedule 8 without any change in Attribution principles may not achieve the increase in joint Industry performance improvement work that P23 is hoping to incentivise. The reason for this is that the majority of Industry performance reporting is understood to be taken directly from TRUST – If the responsibility for, say, a trespass incident continues to be classed in Delay Attribution as a 100% Network Rail responsibility issue as has historically been the case, this is how it will be presented to

the majority of the Industry even if, in practice, responsibility in Schedule 8 does become shared amongst multiple parties. The Board would suggest that, if reformed principles for sharing responsibility are to be applied, the change needs to be clearly and obviously visible outside of PEARS/PEARS replacement Statements and financial spreadsheets. This concern is pertinent to the discussion of “Is the concept that increased use of Joint Responsibility will promote co-operation when developing improvement/mitigation plans realistic?” covered in the original paper.

I hope this helps to clarify the Board’s views and that this will be of use to you.

Regards

Richard Ashley
National Delay Attribution Specialist and Secretary to the Delay Attribution Board



Response to ORR's technical consultation on the PR23 review of the Schedule 8 train performance regime

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

Please send your response to performance.incentives@orr.gov.uk by **10 September 2021**.

Please contact Will Holman at ORR with any queries: will.holman@orr.gov.uk.

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Chapter 2: ORR's proposed approach and priorities

We welcome views on our questions regarding ORR's proposed approach to PR23.

Question 1: Do you have any views on the objectives and benefits of a mechanism such as Schedule 8, for the range of different industry parties, both in the current contracting model and once the Rail Transformation Programme has been fully implemented?

- We consider that it is vital for the approach to Schedule 8 to fully reflect the emerging sector design from the work to implement the Williams-Shapps Plan for Rail (the Plan for Rail) and is consistent with its aims.
- Under ERMA/NRCs, Schedule 8 has been substantially superseded in effect for affected TOCs, with substantial work ongoing to ensure new commercial contractual arrangements, including appropriate incentive regimes, that will more effectively deliver for passengers and taxpayers. Following the Rail Transformation Programme, we consider that a mechanism that serves a similar function to Schedule 8 will be important for the operators not contracted by DfT or Great British Railways (GBR) into the future.

(e.g. open access, charter and freight operators). We consider that the ORR should particularly focus its work on performance regimes for those parties.

Question 2: Do you have any views on whether we should make no changes to Schedule 8 in PR23, or pursue a small number of incremental reforms to ensure it remains fit for purpose as a baseline regime?

- The ORR should use PR23 to make as much progress as possible on the Plan for Rail, consistent with current legislation. This should include making proportionate improvements to Schedule 8, recognising that operators not contracted to DfT will need to be covered by Schedule 8 or a similar mechanism after the reform programme has been implemented.
- Specific opportunities for Off- or GBR-contracted operators to opt-out of Schedule 8 payments should be included in any PR23 changes, alongside any appropriate such mechanism for devolved authorities. During PR23, the ORR should also undertake its regular monetary assessments connected to Schedule 8 and make incremental improvements to Schedule 8 for the operators that continue to be covered by it.

Question 3: Do you agree with the areas we have identified as priorities for PR23? Are there any other significant issues that we should seek to address?

- The policy development needed for the implementation of the Plan for Rail is underway and it will be important that the PR23 process remains flexible to accommodate this policy development. In PR23, while the policy development underpinning the reform process is ongoing, the ORR have an opportunity to make worthwhile improvements and focus on third party and devolved operators and consider where Schedule 8 can be improved.

Chapter 3: Proposals: Cross-cutting changes across sector regimes

We welcome views on the cross-cutting proposals in this chapter.

Question 4: Would you support Proposal A [to base Network Rail's benchmarks only on past performance]? Do you have any views on the proposed methodology set out?

- DfT agrees that Network Rail's (NR) benchmarks should consider performance over the previous 5 years, and that the ORR should consider applying an improving trajectory for NR performance based on previous years, consistent with the funding position that will be set out in the Statement of Funds Available when published..

Question 5: Would you support Proposal 8 [to annually update benchmarks to make benchmarks more flexible]? If benchmarks were to be updated annually, do you favour achieving this through a rolling update (Option 81) or through a modelled approach (Option 82)?

- Adjusting Schedule 8 payment and benchmark levels may have benefits as the ORR describes, but we note that doing so every year may be challenging and require significant resources and new processes. This administrative burden may be greater for devolved authorities that still contract TOCs compared to GBR-contracted TOCs. The DfT therefore does not consider this to be a priority for PR23. We note the potential

relevance in relation to the rail freight industry (as discussed at para 3.23 of the ORR's consultation). Like the ORR we consider the views of the freight industry to be of particular importance in considering this issue in relation to rail freight.

Question 6: Should Proposal C [to implement joint or shared allocation of delay minutes within Schedule 8 itself] be a priority for reform in PR23? If you would like us to consider Proposal C further, please set out how it can best be implemented (e.g. including incident types that should be subject to joint or shared responsibility).

- Current contractual arrangements effectively neutralise Schedule 8 for operators contracted to DfT, and these mechanisms are likely to be replicated in future commercial contracts. Again, this illustrates why there should be a clear opportunity for DfT- or GBR-contracted TOCs to opt out of the regime.
- DfT is, however, content to explore this proposal for TOCs not operating under a contract, doing so in a proportionate manner, as it could address some of the problems that have historically been encountered where delays caused by certain incidents (such as trespass and suicides) have been allocated to a single party in situations where joint responsibility was held.
- We would like the ORR to consider the steps it can take to improve the way the attribution of delays functions in the current system. The DfT would support improvement to the DA system to ensure it can be utilised effectively for contracts to which CP7 terms and conditions apply post-reform, provided it better delivers tangible benefits for taxpayers and passengers.

Chapter 4: Proposals: Passenger regime

We welcome views on this chapter's proposals for the passenger regime.

Question 7: Would you support Proposal D [to more accurately incentivise TOCs to limit delay to other operators], implemented through Option 02 [to update payment rates annually through a rolling update of the TOC responsibility matrix]? Do you have any views on the options set out?

- We consider that there should be a clear opportunity for DfT- or GBR-contracted TOCs to opt out of the regime where a decision is taken to do so.
- We support this proposal for non-DfT contracted train operators. When delays occur, passengers expect that train operators and NR will work collaboratively to reduce the impact of such delays. We do consider that NR, as network manager, have significant responsibility for network performance and the timetable; they control the signalling and design regulation policy, have powers to instigate service recovery plans, can bill for rescue locomotive usage, change the Plan of the Day, define expectation upon operators for disruption response, design and implement seasonal preparedness/key route strategy, and are the defining Controller in the ROC. If the timetable is robust and the infrastructure and on-the-day running of the service are managed appropriately, the TOC-on-TOC performance is good; TOC-on-TOC delays are not (and cannot) be

eradicated. Recovery and mitigation of TOC-on-TOC does, however, depend upon train operators working closely with NR on all aspects of the management of the network from timetable design to day-to-day operational priorities when things go wrong. In terms of implementation, we can see the merits of Option D2 in principle but consider it important to ensure that any changes are proportionate and do not create significant burdens.

- Any such improvements should remain in alignment with the Plan for Rail and we would be keen to retain visibility of the ORR's work. The ultimate aim of these improvements should be to bring positive change to the experience that all customers have of the railway.

Question 8: Should Proposal E [to change the allocation of unidentified delays between Network Rail and operators] be a priority for reform in PR23? Are you able to provide evidence on the benefits and costs of the proposal or to inform the allocation of unidentified delays?

- We consider that the current allocation of the causes of unidentified delays should be reviewed as part of PR23.

Question 9: Should Proposal F [to reflect the wider financial impacts of delays in Schedule 8 compensation] be a priority for reform in PR23? If this proposal was taken forward, would you favour formulaic recovery (Option F1) or actual sums recovery (Option F2) to achieve it?

- The ORR should consider the opportunity to improve existing processes for third party operators in PR23 and align wider reform plans with the ambitions of the Plan for Rail. We therefore support the ORR's proposal to consider this change for CP7.

Chapter 5: Proposals: Freight and Charter regimes

We welcome views on this chapter's proposals for the freight and charter regimes.

Question 10: Do you agree with our preferred high-level approach for the freight regime, to keep the current regime broadly unchanged for CP7? Are there other elements of the freight regime or its calibration that should be considered for reform in PR23?

- We strongly agree on the importance of an effective freight regime and consider that there would be merit in keeping the current well understood regime substantially intact. We would however encourage the ORR to explore with freight operating companies (FOCs) incremental improvements where there is a clear case for doing so.

Question 11: Would you support Proposal G to update the evidence base underpinning the calibration of the freight payment rate?

- We consider that this would be appropriate to account for the latest available evidence to ensure the effective working of the regime and reflect changes in the operation of the freight market in recent years. However, it will be important to complete this exercise in a

proportionate manner, with effective working between NR and FOCs to complete the necessary analysis.

Question 12: Should Proposal H, to revisit the calibration of caps, be a priority for reform in PR23? Can you provide evidence demonstrating whether or not the supplements and caps are currently calibrated appropriately?

- We consider that liability caps are an important feature of the freight regime and agree with ORR that they play an important role in limiting financial risk to the FOCs in the context of an industry which operates with limited profit margins.
- We understand that there are concerns that the regime may potentially have an impact on FOCs' incentives to reduce the delay caused to other companies. At the present time, however, we do not have a clear sense as to the scale of the problem. We consider that a limited exercise to better define and evidence the concerns would have merit. However, it will be absolutely necessary, before any changes to caps are contemplated, that a clear cost and benefit analysis, including regarding the impacts of any changes on the FOCs, are clearly taken into account.

Question 13: Do you agree with our preferred high-level approach for the charter regime, to keep the current regime broadly in place for CP7? Are there other elements of the charter regime or its calibration that should be considered for reform in PR23?

- We agree on the importance of an effective charter regime and consider that there would be considerable merit in keeping the current well understood regime substantially intact. We would encourage the ORR to explore any opportunities for improvements to the current regime where there is a clear case for doing so.

Are there any other comments you would like to make?

N/A



Response to ORR’s technical consultation on the PR23 review of the Schedule 8 train performance regime

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

Please send your response to performance.incentives@orr.gov.uk by **10 September 2021**.

Please contact Will Holman at ORR with any queries: will.holman@orr.gov.uk.

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Chapter 2: ORR’s proposed approach and priorities

We welcome views on our questions regarding ORR’s proposed approach to PR23.

Question 1: Do you have any views on the objectives and benefits of a mechanism such as Schedule 8, for the range of different industry parties, both in the current contracting model and once the Rail Transformation Programme has been fully implemented?

Generally, DRS support the retention of objectives and benefits within PR23 and the Rail Transformation Programme as over a prolonged period the incentives for freight have proven to be beneficial. A priority for Rail Transformation should be dealing with the culture and perverse incentives of the existing delay attribution process.

Question 2: Do you have any views on whether we should make no changes to Schedule 8 in PR23, or pursue a small number of incremental reforms to ensure it remains fit for purpose as a baseline regime?

DRS believe small incremental reforms have previously applied to aspects of Schedule 8 in past Periodic Reviews, often driven by the consultation process and issues identified by the end users rather than the regulator. These changes often leading to improvements in appropriateness and accuracy. DRS supports the consideration of a similar approach for PR23. Significant chal-

challenge exists to realign the cornerstones of the regime with both (Network Rail and FOC) benchmarks and both payment rates requiring considerable work to address the reforms already stated and a changed industry environment post-COVID and pending transition to GBR. DRS believes a cautious approach is needed with the number and scope of any incremental reforms in what is an already challenging task for PR23.

Question 3: Do you agree with the areas we have identified as priorities for PR23? Are there any other significant issues that we should seek to address?

DRS agree to the priorities identified, with one exception. Concern at the levels of volatility potentially resulting from updating benchmarks annually. Recent years have seen the demise of coal traffic by rail and then the impact of the pandemic and the considerable changes this generates to the regime. Fluctuations of this nature do not aid certainty of financial viability for freight traffic and encouragement of modal shift to rail in order to aid decarbonisation. Suggest greater long-term certainty and visibility required for rail freight commercial needs built into any changes. DRS also support the need for substantial changes to Schedule 8 and delay attribution, which may prove to be an important step in assisting capacity planning to increase modal shift to rail.

Chapter 3: Proposals: Cross-cutting changes across sector regimes

We welcome views on the cross-cutting proposals in this chapter.

Question 4: Would you support Proposal A [to base Network Rail's benchmarks only on past performance]? Do you have any views on the proposed methodology set out?

DRS has little evidence that using a performance trajectory approach for Network Rail benchmarks has not achieved the aspirations of the Schedule 8 regime. However, item 3.13 identifies the very risk generated if a change to historical performance returns. DRS believe discussions relating to the perverse incentive stated in item 3.13 was a part of the decision-making process in PR18 to move to the use of FDM projected performance in CP6.

DRS believes the challenge of generating benchmarks on past performance taken forward into CP7 when the rail economic environment and the behaviours and capabilities of the emerging GBR organisation are untested must provide sufficient levels of assurance on their appropriateness and accuracy.

Question 5: Would you support Proposal B [to annually update benchmarks to make benchmarks more flexible]? If benchmarks were to be updated annually, do you favour achieving this through a rolling update (Option B1) or through a modelled approach (Option B2)?

DRS has already raised concerns over volatility addressed in response to question 3.

Considering Proposal B, a rolling historical performance approach would be favoured by DRS due to ability to mitigate extraordinary potential outliers. However, DRS believes even this approach will require further levels of complexity. For example, the impact of the pandemic on passenger services was not only the reduction in services but also a significant fall in passenger numbers per train service ran with the resultant improvement in performance. A rolling historical performance approach could perhaps consider such impacts and put in place suitable

fluctuation controls to mitigate volatility but maintain appropriate benchmarks over the longer term.

Question 6: Should Proposal C [to implement joint or shared allocation of delay minutes within Schedule 8 itself] be a priority for reform in PR23? If you would like us to consider Proposal C further, please set out how it can best be implemented (e.g. including incident types that should be subject to joint or shared responsibility).

Whilst there are undoubtedly some aspects of Proposal C which meet the aspirations of Schedule 8 for all parties to mitigate delays the complexity of what, when and how these types of incidents could be built in to the already massively complex mechanisms supporting the Performance Regime as part of PR23 appears very challenging. DRS suggests consideration by the Rail Transformation Programme and alignment to the emerging concession-style agreements and changes required to DAPR may be a more feasible avenue to progress this approach.

Chapter 4: Proposals: Passenger regime

We welcome views on this chapter's proposals for the passenger regime.

Question 7: Would you support Proposal D [to more accurately incentivise TOCs to limit delay to other operators], implemented through Option D2 [to update payment rates annually through a rolling update of the TOC responsibility matrix]? Do you have any views on the options set out?

DRS has no comments on Proposal D or Option D2 as we have insufficient visibility and transparency to enable sufficient understanding of TOC Schedule 8 arrangements.

Question 8: Should Proposal E [to change the allocation of unidentified delays between Network Rail and operators] be a priority for reform in PR23? Are you able to provide evidence on the benefits and costs of the proposal or to inform the allocation of unidentified delays?

DRS has no comments on Proposal E as we have insufficient visibility and transparency to enable sufficient understanding of TOC Schedule 8 arrangements.

Question 9: Should Proposal F [to reflect the wider financial impacts of delays in Schedule 8 compensation] be a priority for reform in PR23? If this proposal was taken forward, would you favour formulaic recovery (Option F1) or actual sums recovery (Option F2) to achieve it?

DRS has no comments on Proposal F (Options F1 or F2) as we have insufficient visibility and transparency to enable sufficient understanding of TOC Schedule 8 arrangements.

Chapter 5: Proposals: Freight and Charter regimes

We welcome views on this chapter's proposals for the freight and charter regimes.

Question 10: Do you agree with our preferred high-level approach for the freight regime, to keep the current regime broadly unchanged for CP7? Are there other elements of the freight regime or its calibration that should be considered for reform in PR23?

Other than concerns over volatility previously stated in responses to question 3 and question 5, DRS support the approach to keep the current regime broadly unchanged for CP7. DRS believes the challenges within the existing regime to set benchmarks and payment rates alone within the timescales available will be considerable and reform on any other aspects could be to the detriment of the more fundamental aspects of the regime.

Question 11: Would you support Proposal G to update the evidence base underpinning the calibration of the freight payment rate?

DRS recognise the lack of a sufficiently robust evidence base or rationale behind existing freight payment rates. DRS support a collaborative industry wide approach to update the evidence underpinning freight payment rates appropriate to CP7. DRS believes this will also require clarity to confirm inclusion or otherwise of short-term and long-term costs and a robust methodology for the evidence to ensure the appropriateness for each rail freight sector to enable road to rail modal shift.

Question 12: Should Proposal H, to revisit the calibration of caps, be a priority for reform in PR23? Can you provide evidence demonstrating whether or not the supplements and caps are currently calibrated appropriately?

DRS do not believe a calibration of caps is a priority of PR23. However, DRS suggests consideration of the potential enhancement outlined below. As stated in clause 5.6 of the technical consultation document these caps are a form of insurance. DRS suggests the consideration of some form of 'no claims' adjustment mechanism. For example, where incident caps when not generated by a freight operator within a defined period some form of rebate given, with corresponding increases to insurance charges where an operator significantly surpasses cap protection levels. Such a mechanism would address the unsubstantiated Network Rail suggestion identified in clause 5.7 and offer incentives in line with Schedule 8 principles.

Network Rail are the sole custodian of data covering payments and capped incident costs for the rail freight sector. Hence, DRS are unable to provide the necessary evidence. DRS would strongly recommend any consideration of the data by individual operator and across the rail freight sector collectively. The justification for such an approach being if the suggestion made by Network Rail in clause 5.7 has any validity it may not necessarily be an industry wide issue. The added incentive stated earlier in the DRS response to question 12 would help address the issue whilst maintaining a common set of parameters across the whole network applicable to all FOCs.

Question 13: Do you agree with our preferred high-level approach for the charter regime, to keep the current regime broadly in place for CP7? Are there other elements of the charter regime or its calibration that should be considered for reform in PR23?

DRS agree. No further elements of the charter regime identified for reform in PR23.

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Are there any other comments you would like to make?

No further comments from DRS.



Response to ORR’s technical consultation on the PR23 review of the Schedule 8 train performance regime

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

Please send your response to performance.incentives@orr.gov.uk by **10 September 2021**.

Please contact Will Holman at ORR with any queries: will.holman@orr.gov.uk.

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Chapter 2: ORR’s proposed approach and priorities

We welcome views on our questions regarding ORR’s proposed approach to PR23.

Question 1: Do you have any views on the objectives and benefits of a mechanism such as Schedule 8, for the range of different industry parties, both in the current contracting model and once the Rail Transformation Programme has been fully implemented?

Beyond NR and TOCs into GBR, it is inevitable that there remains some form of incentive regime for commercial operators to ensure good performance and reduce third party delay and cancellation. For the instances where IM’s have boundaries with NR, there must be some form of control to incentivise on time presentation of services from one IM to another.

Question 2: Do you have any views on whether we should make no changes to Schedule 8 in PR23, or pursue a small number of incremental reforms to ensure it remains fit for purpose as a baseline regime?

There are existing gaps within the regime ‘as is’, so doing nothing is not an optimal option. Therefore pursuing incremental improvements is the correct approach. However, those IM’s that interface with NR/GBR and operators who go across one or more IM must have an interface arrangement in place.

Question 3: Do you agree with the areas we have identified as priorities for PR23? Are there any other significant issues that we should seek to address?

The areas identified as change are accurate, but changes to make delay attribution the start of a national performance improvement process are absent.

Chapter 3: Proposals: Cross-cutting changes across sector regimes

We would welcome views and further discussions on the cross-cutting proposals in this chapter.

Question 4: Would you support Proposal A [to base Network Rail's benchmarks only on past performance]? Do you have any views on the proposed methodology set out?

We welcome ORR's fresh thinking regarding this proposal and would be keen to explore it, with ORR, over the next few months.

Question 5: Would you support Proposal B [to annually update benchmarks to make benchmarks more flexible]? If benchmarks were to be updated annually, do you favour achieving this through a rolling update (Option B1) or through a modelled approach (Option B2)?

It is difficult to assess which option is better than the other; if industry models the future performance (option B2) it could be conservative rather than realistic to avoid the possibility of failure to meet target. On the other hand using historical data is a look back and is not necessarily a guide to the future. However, a long time period of look back (10 years) with an annual refresh is long enough to capture the impacts of timetable changes, rolling stock introductions and other significant industry changes. Option B1 is preferable in our opinion.

Question 6: Should Proposal C [to implement joint or shared allocation of delay minutes within Schedule 8 itself] be a priority for reform in PR23? If you would like us to consider Proposal C further, please set out how it can best be implemented (e.g. including incident types that should be subject to joint or shared responsibility).

Option C lends itself to the GBR end state, where there are greater integrations between track and train. Ultimately attribution should form the start of a performance improvement process, rather than for blame and compensation. There is a need for compensation – (i) to protect truly commercial operators and (ii) to incentivise improvement. The types of joint responsibility areas are typically those in the X* or Z* series of attributions, where there is not any clear owner. It does not necessarily follow that the infrastructure provider is responsible for bird strikes, vandalism or trespass. The thresholds for attribution are ignored, as is the compounding effect of sub threshold delays into a delay that is considerable. More work must be done relating to the veracity of data captured at source rather than wait for reactive investigation.

Chapter 4: Proposals: Passenger regime

We welcome views on this chapter's proposals for the passenger regime.

Question 7: Would you support Proposal D [to more accurately incentivise TOCs to limit delay to other operators], implemented through Option D2 [to update payment rates annually through a rolling update of the TOC responsibility matrix]? Do you have any views on the options set out?

We support this in principle as it seems capable of better reflecting the actual impact that TOC caused delays have on other train operators. We also consider that a TOC should not be incentivised to reduce any particular type of delay to the exclusion of any other type of delay. They should be incentivised to work to reduce all delay.

Question 8: Should Proposal E [to change the allocation of unidentified delays between Network Rail and operators] be a priority for reform in PR23? Are you able to provide evidence on the benefits and costs of the proposal or to inform the allocation of unidentified delays?

Question 9: Should Proposal F [to reflect the wider financial impacts of delays in Schedule 8 compensation] be a priority for reform in PR23? If this proposal was taken forward, would you favour formulaic recovery (Option F1) or actual sums recovery (Option F2) to achieve it?

Chapter 5: Proposals: Freight and Charter regimes

We welcome views on this chapter's proposals for the freight and charter regimes.

Question 10: Do you agree with our preferred high-level approach for the freight regime, to keep the current regime broadly unchanged for CP7? Are there other elements of the freight regime or its calibration that should be considered for reform in PR23?

Question 11: Would you support Proposal G to update the evidence base underpinning the calibration of the freight payment rate?

Question 12: Should Proposal H, to revisit the calibration of caps, be a priority for reform in PR23? Can you provide evidence demonstrating whether or not the supplements and caps are currently calibrated appropriately?

Question 13: Do you agree with our preferred high-level approach for the charter regime, to keep the current regime broadly in place for CP7? Are there other elements of the charter regime or its calibration that should be considered for reform in PR23?

Are there any other comments you would like to make?

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AVANTI
WEST COAST



11th August 2021

First Trenitalia West Coast Rail Ltd (FTWCRL) response to ORR Technical Consultation: PR23 – Review of the Schedule 8 Train Performance Regime

Thank you for the opportunity to respond to ORR’s “PR23 – Review of the Schedule 8 Train Performance Regime” Technical Consultation (dated 17 June 2021). This letter constitutes the formal response of FTWCRL, representing Avanti West Coast (AWC) and West Coast Partnership Development (WCPD).

Please see our comments below:

Question 1: Do you have any views on the objectives and benefits of a mechanism such as Schedule 8, for the range of different industry parties, both in the current contracting model and once the Rail Transformation Programme has been fully implemented?

FTWCRL agrees that for today’s operational structure, a regime such as Schedule 8 is required to protect operators from loss of revenue caused by disruption outside their control, and to incentivise all parties to improve industry performance. It is also a powerful proxy for the impact of performance on revenue and therefore long term passenger demand, and as such is important for informing business cases for performance improvement investment

Once the Rail Transformation Programme has been completed, the need for a regime for the purposes of protecting against revenue loss may not be required. However, the requirement for a performance incentive regime (providing the ability to understand the revenue impact of different delays, attributed to cause) will remain following implementation of the Williams-Shapps reforms. A key question is whether a regime like Schedule 8 will have a role to play alongside KPIs in Passenger Service Contracts.

In the interim period, we believe Schedule 8 is still required, but in a form that allows it to be flexible enough to accommodate and reasonably reflect the changing and uncertain circumstances we are seeing currently, that may well continue for some time.

With current CP6 payment rates and benchmarks that were set pre-Covid, the regime is not effectively achieving its purpose, as payments are no longer accurately reflecting the changes in revenue resulting from corresponding changes in performance.

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Registered in England No. 10349442



Looking ahead, the industry should consider whether adjusting the regime to support a shared TOC/NR benchmark in future (possibly beyond CP7) would strengthen the role of the regime as a joint incentive consistent with the shared objectives and regulatory framework of GBR. Delay attribution to root cause and quantifying the impact on customers will remain critical to drive future improvement. However, this presents an opportunity to remove some of the complexity and perverse incentives from the regime, as well as fostering collaboration and a whole-system approach.

Question 2: Do you have any views on whether we should make no changes to Schedule 8 in PR23, or pursue a small number of incremental reforms to ensure it remains fit for purpose as a baseline regime?

FTWCRL agrees that a small number of reforms are necessary to ensure Schedule 8 remains fit for purpose, particularly given the abrupt changes in timetables and passenger demand we have seen as a result of Covid-19. Fixing benchmarks and payment rates for a five-year period no longer seems viable; the regime needs more flexibility if it is to stay relevant.

Question 3: Do you agree with the areas we have identified as priorities for PR23? Are there any other significant issues that we should seek to address?

FTWCRL agrees with the three cross-cutting and passenger specific priorities for incremental reform. However, we also believe it is worth considering updating the payment rates annually, as well as the benchmarks. This would enable the regime to more accurately reflect the circumstances in the event of abrupt and major changes, such as those in customer demand and timetables seen during Covid. These have demonstrated how inflexible and complex the regime is, and therefore reduced its value as an incentive.

Although FTWCRL supports a provision for changes to be made annually, subject to agreement between operators and NR, we believe this will only be achievable if the model is simplified so changes can be made in a timely manner without additional administrative burden and cost to the taxpayer.

Question 4: Would you support Proposal A [to base Network Rail's benchmarks only on past performance]? Do you have any views on the proposed methodology set out?

We recognise that given the current levels of uncertainty, frequently changing timetables and fluctuating demand, long term future performance trajectories become less relevant. Also given the next proposal to update the Network Rail benchmarks annually, which we agree would be beneficial in the current climate, there is a need for a simplified benchmark calculation method to more easily achieve this.

We also agree that the methodology should consider past performance, but have some concerns about basing the benchmarks only on this. We believe future risks and opportunities should also be considered, as well as best estimates of what the timetable and passenger demand will be in the following year, to ensure the benchmarks are relevant to the expected circumstances. Basing benchmarks on past performance alone could drive unrepresentative swings in the regime if performance levels are not reflective.

It is reasonable for the methods of calculating Network Rail and TOC benchmarks to be aligned. However, Network Rail is funded to deliver performance enhancements, and TOC plans committed to

funders and specifiers also promise performance improvements. Joint target setting each year takes into account past performance as well as future risks and opportunities. It's important to reach an agreed position on TOC/NR future performance to create sufficiently ambitious improvement trajectories.

Question 5: Would you support Proposal B [to annually update benchmarks to make benchmarks more flexible]? If benchmarks were to be updated annually, do you favour achieving this through a rolling update (Option B1) or through a modelled approach (Option B2)?

FTWCRL would support this proposal. Although the rolling update Option B1 would be simpler to implement, we would favour the modelled approach of Option B2. This would allow for more consideration of expected circumstances, and we believe would give a more relevant result

These would be small adjustments to the five year performance trajectory, which should have the risks and opportunities considered already, and would help preserve the value of the regime as incentive. These adjustments would need to be standardised and as straightforward as possible to minimise administrative burden, delays on agreements resulting in retrospective wash-ups, and cost to the taxpayer. There is a risk that unless a standard method can be identified that accurately represents the bearing of timetable adjustments on performance, the model would be too simplistic or rely too heavily on bespoke NR/TOC agreements. We also note that there is a risk in the transition between timetable changes – with B2, the model may need an element of change risk applied, for example proportionate to the number of timetable adjustments expected, rather than a simple transformation relative to train service levels.

Question 6: Should Proposal C [to implement joint or shared allocation of delay minutes within Schedule 8 itself] be a priority for reform in PR23? If you would like us to consider Proposal C further, please set out how it can best be implemented (e.g. including incident types that should be subject to joint or shared responsibility)

FTWCRL agrees this is worthy of consideration, but does not see it as a key priority for reform. The argument for proposal C is that at present operators may lack incentives to invest in mitigation initiatives to recover the service. However, FTWCRL already has several initiatives focussed on service recovery, aimed to give improvements for all responsibility incidents not just ones attributed to TOC on Self.

Parties should have a shared objective to meet joint targets and not exceed benchmarks. Alongside this, retaining accountability for individual incidents supports identification of root cause and adoption of lessons learned and improvement plans.

If certain types of incidents were to be automatically split in a certain ratio (e.g. fatalities, weather related incidents and TO coded incidents), we believe this would present challenges with incentivisation, because one party could improve their share of the incident but still be attributed responsibility for it.

For certain incidents, where it is agreed both parties have some responsibility for the delay, it could be useful to have a simpler method in which to split the incident in a proportion which is not necessarily just 50:50. However, this can already be achieved with the current Schedule 8 regime, using an Edit Set. Trust would not accommodate such changes for delay attribution, so the split would

likely take place purely within Schedule 8, which has the disadvantages described in paragraph 3.31 of the consultation document.

Question 7: Would you support Proposal D [to more accurately incentivise TOCs to limit delay to other operators], implemented through Option D2 [to update payment rates annually through a rolling update of the TOC responsibility matrix]? Do you have any views on the options set out?

FTWCRL agrees this makes sense when implemented through Option D2. There is little change to the regime when done this way, with the TOC responsibility matrix updated every year instead of every five, keeping it more relevant. We agree with the advantages and disadvantages of both options detailed in section D in the paper.

The custodian of recovery of the system is Network Rail, especially on a multi-operator route such as WCML, and reactionary delay being part of the Network Rail pot should incentivise the coordination of robust contingency and recovery planning activities.

However, we appreciate that updating payment rates is extremely complex, with TOC A's Payment Rate being designed to reflect the Network Rail payment rates for TOC B/C/D/E etc, based on split of forecast TOC on TOC delay – for this reason it is likely to be less easy to achieve than annual updates to the Benchmarks. FTWCRL recommends that if the key objective is to ensure the regime is reflective through annual updates, updates to Benchmarks should be prioritised over Payment Rates.

Question 8: Should Proposal E [to change the allocation of unidentified delays between Network Rail and operators] be a priority for reform in PR23? Are you able to provide evidence on the benefits and costs of the proposal or to inform the allocation of unidentified delays?

FTWCRL agrees it should be a consideration, but not a priority for reform. We are not currently of the opinion that the split of unidentified delay minutes is incorrect, but agree that it should be based on evidence.

Although it is stated Network Rail is responsible for only 55% of 3 minute delays, and possibly a lower percentage of sub-threshold delays, this could easily vary by operator and service group. For example, for FTWCRL, Network Rail and other operators are generally responsible for around 86% of overall attributed delay, and approx. 88% of overall reactionary delay. A lot of investigation goes into delays we are attributed as TO (TOC unexplained), to get them recoded as unidentified delays, and we are still left with some that we would consider to be unidentified, but are coded to TOC on Self. When they are reattributed, often the evidence found shows that the delay was caused by restrictive signals, so is effectively a reactionary delay to other disruption on the day. Approx. 30-40% of our payable unidentified minutes were allocated to TOC on Self initially.

A key priority area for us is therefore establishing systems for accurately attributing sub-threshold delay, including the technological and system advances required for this to be possible.

In summary, as the document notes, the current method places an incentive on NR to establish primary cause. Greater focus is required on improving data quality to enable identification of root cause.

Question 9: Should Proposal F [to reflect the wider financial impacts of delays in Schedule 8 compensation] be a priority for reform in PR23? If this proposal was taken forward, would you favour formulaic recovery (Option F1) or actual sums recovery (Option F2) to achieve it?

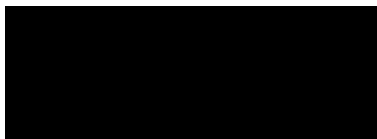
This offers potential to increase the role of the regime as an incentive, because further payment would be received to cover estimated costs of customer compensation such as Delay Repay, and other disruption costs such as onward taxis for customers during disruption. For the reasons described in paragraphs 4.33 and 4.35 of the paper however, we would recommend this does not need to be a priority for reform. If it was taken forward, we would favour option F1 due to the increased resources that would be required to achieve F2.

FTWCRL believes the focus should be on ensuring the regime is more reflective through being more adaptable to change, including service level and customer demand. To achieve this, we must work together to reduce the complexity and interfaces involved.

As we continue to work closely with industry colleagues to pursue joint efficiencies alongside recovery customer demand, incentives to deliver strong performance will be key to restoring customer confidence in rail. As such consideration of the role of performance regimes will remain central to development of reforms as part of the Rail Transformation Programme has been fully implemented.

We look forward to working with ORR and other industry partners as these concepts are developed in the run up to CP7 with respect to the Schedule 8 regime, and would be happy to provide any more information.

Kind Regards



Sue Rhymes

Track Access Manager, Avanti West Coast



Response to ORR’s technical consultation on the PR23 review of the Schedule 8 train performance regime

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

Please send your response to performance.incentives@orr.gov.uk by **10 September 2021**.

Please contact Will Holman at ORR with any queries: will.holman@orr.gov.uk.

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*This information will not be published on our website.

Chapter 2: ORR’s proposed approach and priorities

We welcome views on our questions regarding ORR’s proposed approach to PR23.

Question 1: Do you have any views on the objectives and benefits of a mechanism such as Schedule 8, for the range of different industry parties, both in the current contracting model and once the Rail Transformation Programme has been fully implemented?

The purpose of Schedule 8 is to both improve overall performance as well as protecting operators from loss of revenue caused by events outside of their control.

Such a system, in some form, will always be required where there are operators who bear any degree of revenue risk. The advantage of Schedule 8 is that it provides an effective “liquidated damages” regime without recourse to lengthy & costly legal disputes.

The Rail Transformation Programme may possibly result in a weakening of the case for Schedule 8 for GBR TOCs (although the scope of this cannot be known at present), but performance incentive mechanisms will still be required for TOCs to fulfil their performance requirements without being subject to perverse behaviours by infrastructure providers which could then import onerous operational, reputational or financial risk onto those TOCs.

For Open Access and Freight operators, access to a performance regime that ensures their business continuity is paramount. Necessarily formulaic, it needs to be easy to use and give clear incentives on both sides. Schedule 8 or a slimmed down equivalent will still be required for those operators.

The importance of independence in reviewing the structure and overall operation of any future regime cannot be understated. As access to and operation of the network is a monopoly activity, the ability to judge whether performance matters are being carried out fairly and that the compensation levels are appropriate would seem to need an independent player (such as the ORR) to act as both a determinant of the high-level structure and as an ultimate appeals body.

Question 2: Do you have any views on whether we should make no changes to Schedule 8 in PR23, or pursue a small number of incremental reforms to ensure it remains fit for purpose as a baseline regime?

FirstGroup supports the “no change” approach in advance of the Rail Transformation Programme to Schedule 8 in PR23 and small reforms should be kept to only those that are necessary.

The Rail Transformation Programme is likely to require the time of the same operator resources as those employed on PR23 to ensure it is successful. Therefore, any PR23 debates outside of the Rail Transformation Programme should be kept to an absolute minimum.

Question 3: Do you agree with the areas we have identified as priorities for PR23? Are there any other significant issues that we should seek to address?

FirstGroup agrees with the areas that the ORR has listed as priorities for PR23. However, as most of these have either been previously identified or considered during PR18, we would welcome a “light touch” review, pending decisions on the future structure and arrangements for the industry.

Chapter 3: Proposals: Cross-cutting changes across sector regimes

We welcome views on the cross-cutting proposals in this chapter.

Question 4: Would you support Proposal A [to base Network Rail’s benchmarks only on past performance]? Do you have any views on the proposed methodology set out?

The proposal to base NR’s benchmarks on previous performance is not acceptable. This will engrain perverse performance behaviours and the “forward look” should be retained.

Once GBR decide how they will approach this issue in respect of any proposed jointly owned performance benchmarks, this proposal can again be looked at, but clear safeguards need to be deployed in any regime should past performance be part of any benchmarking.

Question 5: Would you support Proposal B [to annually update benchmarks to make benchmarks more flexible]? If benchmarks were to be updated annually, do you favour achieving this through a rolling update (Option B1) or through a modelled approach (Option B2)?

We do not support this. Annually updating benchmarks introduces a degree of financial instability into the framework and would lead to an onerous demand on operator’s time in the process of updating and validating the new benchmarks.

It would add a further complexity to the management of the regime and concentrating on annual benchmarks may hinder the development of long-term performance improvement measures.

For operators who depend on non-governmental investment this annual change could have an adverse effect on funding.

Question 6: Should Proposal C [to implement joint or shared allocation of delay minutes within Schedule 8 itself] be a priority for reform in PR23? If you would like us to consider Proposal C further, please set out how it can best be implemented (e.g. including incident types that should be subject to joint or shared responsibility).

Once the future contractual architecture for the industry becomes clear, this proposal could be considered as a mechanism to jointly “own” performance but, at present, PR23 should not deal with this issue outside of the Rail Transformation Programme.

Chapter 4: Proposals: Passenger regime

We welcome views on this chapter’s proposals for the passenger regime.

Question 7: Would you support Proposal D [to more accurately incentivise TOCs to limit delay to other operators], implemented through Option D2 [to update payment rates annually through a rolling update of the TOC responsibility matrix]? Do you have any views on the options set out?

Once the future contractual architecture for the industry becomes clear, how GBR will manage the overall network and the recovery incentives involved will be established.

Therefore, any work in this area is premature and option D1, which would reduce incentives on NR (or GBR in future), is unacceptable, considering most of the significant delay control mechanisms will always remain with the infrastructure provider.

Question 8: Should Proposal E [to change the allocation of unidentified delays between Network Rail and operators] be a priority for reform in PR23? Are you able to provide evidence on the benefits and costs of the proposal or to inform the allocation of unidentified delays?

FirstGroup strongly believes that this is an area that should not be investigated. The incentive to maximise attribution should be maintained for as long as Schedule 8 in its current form remains in operation.

Question 9: Should Proposal F [to reflect the wider financial impacts of delays in Schedule 8 compensation] be a priority for reform in PR23? If this proposal was taken forward, would you favour formulaic recovery (Option F1) or actual sums recovery (Option F2) to achieve it?

Actual sums recovery is a contentious area which the formulaic regime was designed to avoid. There is no agreed methodology for calculating actual sums other than use of PDFH, which is equivalent to a formulaic methodology while being an onerous task. Calculation of actual losses due to poor performance is not possible, given the imperfect knowledge of actual numbers travelled on a particular train on a particular day, the individual value of their tickets and the impact of performance on individuals’ travelling behaviour.

In a commercial claims' environment, a move to actuals would mean a public body requiring absolute proof before public funds are dispersed, which, in the absence of a contractual formula, would lead to problems in ever settling operators claims.

For operators who wish to pursue actuals recovery in appropriate circumstances there should be the option to do so but, to avoid monopoly abuse and delay, no such option should continue to be made available to the infrastructure provider.

Chapter 5: Proposals: Freight and Charter regimes

We welcome views on this chapter's proposals for the freight and charter regimes.

Question 10: Do you agree with our preferred high-level approach for the freight regime, to keep the current regime broadly unchanged for CP7? Are there other elements of the freight regime or its calibration that should be considered for reform in PR23?

n/a

Question 11: Would you support Proposal G to update the evidence base underpinning the calibration of the freight payment rate?

n/a

Question 12: Should Proposal H, to revisit the calibration of caps, be a priority for reform in PR23? Can you provide evidence demonstrating whether or not the supplements and caps are currently calibrated appropriately?

n/a

Question 13: Do you agree with our preferred high-level approach for the charter regime, to keep the current regime broadly in place for CP7? Are there other elements of the charter regime or its calibration that should be considered for reform in PR23?

n/a

Are there any other comments you would like to make?

None at this stage.

Executive summary

- Freightliner welcomes the opportunity to respond to ORR’s initial proposals for incremental reform of Network Rail’s Schedule 8 train performance regime for Control Period 7 (CP7).

Proportionate and targeted changes

- Freightliner agrees that the regime is largely ‘fit for purpose’ and that any changes should be limited to those that are of demonstrable value. Changes to the freight Schedule 8 regime in PR23 should be proportionate and targeted, noting that rail reform will consume significant industry bandwidth over the months and years ahead.

Rail Reform

- Freightliner strongly welcomes the comments in the consultation that after rail reform *“there remains a role for a mechanism such as Schedule 8 to provide revenue protection to fully commercial services such as freight”*. Freightliner considers that rail reform makes the performance regime even more important for operators outside the remit of GBR, given that the majority of operators will be contractually aligned with GBR.

Setting of benchmarks

- Freightliner does not support the proposal to set Network Rail’s benchmarks on historical data alone. The benchmark should be set on the basis of the outputs that Network Rail has been funded to deliver. To set on a different basis risks a misalignment, potentially leading to Network Rail being funded to deliver a performance target, which is out of kilter with the benchmark.
- Freightliner suggests that it is unnecessary to seek alignment in methodology for calculating the Network Rail and Freight Operating Company (FOC) benchmarks. Network Rail, as a regulated monopoly supplier is funded to deliver a specified output from Government. The freight operators, as commercial entities, must build their own business cases to make performance improvements. This distinction should drive different approaches in the setting of benchmarks.

Flexibility

- Freightliner welcomes the intention of the proposal by the ORR to improve the flexibility of the Schedule 8 regime. Covid-19 has meant that the regimes have been operating outside their calibrated parameters for much of the control period, with no ability to adjust.
- The proposal to adjust benchmarks annually is worthy of consideration, however we would urge the ORR to consider how such an approach would have operated during the Covid-19 crisis. Freightliner is concerned that the proposal could create a see-sawing of the benchmarks, exacerbating the calibration issues rather than improving the outcome.
- While benchmarks are identified as an area that would benefit from additional flexibility in the regime, the issues with the calibration of Schedule 8 over the last 18 months have not been limited to benchmarks. The Incident Cap – Access Charge Supplement rates and the FOC payment rates have not been correctly calibrated. We ask ORR to consider how the additional flexibility that is sought in PR23 could be extended to these areas of the regime.
- Freightliner does not support the proposal that would see benchmarks being set on a rolling historical performance basis. Updating the benchmarks annually based on average performance over a rolling recalibration period would significantly reduce the influence that Schedule 8 has in

driving investments to outperform benchmarks. If such investments are made and were they to deliver improved performance then the result would be a tougher benchmark within 12 months. That would significantly reduce the attractiveness of making the investment.

Shared allocation

- Freightliner does not support the proposal to see joint or shared allocation of delay minutes within Schedule 8 and would not consider it to be a priority for PR23. It is difficult to see which incidents, currently attributed to Network Rail would have improved outcomes were they to be shared by the freight operators. For incidents currently attributed to Network Rail, it is not clear what course of action the freight operators could take to improve outcomes and therefore not clear what types of behaviour such a proposal would lead to. It is also likely that service recovery and regulation would have to be challenged if freight operators were taking shared responsibility as generally prioritises passenger services are usually prioritised over freight traffic. To have any influence on Network Rail behaviours, Freight Operators would have to increase their resources in this area further.
- In relation to FOC-attributed incidents, Freightliner did raise concerns about increasing Delay Per Incident (DPI) in our PR18 representations. We raised a suggestion that Network Rail could be exposed to a percentage of FOC-attributed delay minutes to reflect Network Rail's role in managing FOC-attributed incidents that occur on the network. This could be achieved by setting the FOC Payment Rate at 90% of the full calculated value to provide such an incentive.
- Given industry's limited bandwidth currently, Freightliner does not consider it to be a priority for the PR23 consideration.

Network Rail on FOC payment rate

- Freightliner agrees that the Network Rail on FOC payment rate should be recalibrated given that it is nearly 14-years since it was last calculated. Over that time freight trains have become longer and heavier meaning that the impact of a delay is greater. Crucially as well, the commodity mix has changed with a wider representation of the customer base moving to a Just In Time (JIT) model, meaning the downstream impact of delays is far greater.
- Freightliner suggests that before any process to update the payment rate begins, the industry agrees on the appropriate framework and specifically the basis of setting that payment rate, to ensure that the basis of the calculation is appropriate and so that the work to update the payment rate is focussed correctly.

Passenger payment rate

- Freightliner is concerned at the ORR's proposal to widen the scope of financial impacts within Schedule 8 compensation for passenger operators. These payment rates are already very high and such expansion would seemingly increase them further. Such a widening also seems inconsistent with revenue risk moving from the operator to Government under the new contractual relationships likely implemented with Rail Reform.

Capping arrangements

- Freightliner agrees that the provision of caps (both annual and incident caps) provides an *"important role in limiting FOCs' financial risks in the context of FOCs being directly exposed to the cost of delay caused to other operators"*. While structurally the caps are fit for purpose, Freightliner expects that the levels of caps themselves to be recalibrated. Freightliner does not consider that any structural changes to the capping arrangements should be a priority for PR23.

1.0 Introduction

This is the response of G&W UK, which includes Freightliner Limited and Freightliner Heavy Haul Limited (together “Freightliner”), to the Office of Rail and Road’s (ORR) Periodic Review 23 (PR23) Schedule 8 consultation. Freightliner welcomes the opportunity to respond to ORR’s initial proposals for incremental reform of Network Rail’s Schedule 8 train performance regime for Control Period 7 (CP7).

2.0 Rail Reform

The proposed reform of the railways as outlined in the Williams-Shapps Plan for Rail represents the largest restructuring of the rail industry since privatisation. The reform agenda will consume significant amounts of industry’s time and resources over the months and years ahead. Freightliner therefore welcomes the ORR’s proposed approach to the periodic review that recognises the limited bandwidth of the industry to engage across multiple issues, and will therefore limit wholesale changes to the charging and incentives regimes. Freightliner agrees that any changes should be proportionate and targeted, and limited to where there is a demonstrable value in doing so.

3.0 Importance of performance incentive regime

While the reform of the railways will likely result in a change to the contractual and regulatory mechanisms, Freightliner strongly supports the need for the continuation of a performance incentive regime. Although the changes to the contractual and regulatory frameworks will not be known for some time, what is clear is that freight operators will sit outside the direct remit of Great British Railways (GBR). While most passenger operators will operate under a concession-style model, freight operators will remain under an open access model where they continue to bear revenue risk for the services that they operate.

The current Schedule 8 regime is an important mechanism that provides some financial protection to freight operators over the impact of performance issues that are outside their control and provides incentives to parties to maintain reliability. Therefore, we strongly welcome the comments in the consultation around the importance of the regime and that *“there remains a role for a mechanism such as Schedule 8 to provide revenue protection to fully commercial services such as freight”* that sit outside the remit of GBR. It is very important, therefore, that this intent is maintained in all of the proposed changes.

The rail freight sector is known to operate with small margins and delays caused to freight operators can have a significant financial impact. This financial impact of delays will not change even if the Schedule 8 regime does, but the economics of rail freight means that such financial impacts cannot just be absorbed. Therefore, any changes being made to the regime need to consider the sector’s wider economics and particularly be cognisant of the limited ability for operators to internalise the financial impact that delays have on their businesses.

It is also important to recognise that the current regime serves a secondary purpose, with investigation and the dispute/resolution process ensuring that correct delay causation is identified. Without time being spent to carry out this investigation it would be far more challenging to drive performance improvements as it would be far harder to maintain the data integrity required to do this.

Following the reform of the railways, the new contractual arrangements will likely see much closer alignment between most passenger operators and the infrastructure manager and therefore for operators, like freight operators, that sit outside this arrangement a strong performance regime that

incentives parties to provide a reliable service becomes more important. Therefore the ORR commentary in the consultation that even after reform, there will need to be a “financial incentive regime” is particularly welcome.

4.0 Current structure of the regime

Freightliner agrees that the regime is “largely fit for purpose”. It is well understood by operators, Network Rail and freight customers and incentivises parties to deliver a reliable service and strive to make improvements. That said, where there is demonstrable value, we support the ORR view that targeted and incremental improvements should be considered.

5.0 Proposed Changes

The following sections respond to the proposals for change that the ORR has identified in its consultation.

5.1 *Base Network Rail’s benchmarks only on past performance*

Freightliner does not support the proposal to set Network Rail’s benchmarks on historical data alone, without adjustment for forward-looking regulatory trajectories. Network Rail is funded to deliver a series of outputs determined by Government priorities and should be held account on both a time and cost basis. Those outputs include the performance of the railway. Setting the Network Rail Benchmark solely on past performance means that in Network Rail were to miss targeted performance improvements for which it was funded, there is no penalty for non-delivery (as the Benchmark will not consider what Network Rail has been funded to deliver, but rather what it did deliver in the recalibration period).

The freight operators, as commercial entities, have always built their own business cases to make performance improvements, and part of this investment is against the performance regimes provided in schedule 8. This distinction is important and suggests the need to set the benchmarks on a different basis.

It is also important to recognise that the freight operator benchmark is not solely set based on past performance. While this is the basis of the CP6 Freight Operating Company (FOC) Benchmark there are adjustments that are applied to consider the impact of forecast traffic levels and associated congestion, which have a significant effect on performance.

Ultimately the benchmarks should be set on the basis that provides the best indication of future performance and Freightliner considers that for freight operators that is likely on the basis of past performance, with appropriate forward-looking adjustments applied, and for Network Rail on what they have received funding to deliver.

5.2 *Annually updating Schedule 8 benchmarks*

We welcome the intention of the second proposal by the ORR to improve the flexibility and calibration of the regime. The Covid-19 crisis and the steep drop in network train mileage has resulted in many parameters of the regime not being calibrated appropriately. That issue is not limited to the benchmarks, but also includes the payment rates and the Incident Cap – Access Charge Supplements (IC-ACS). While the issue with the benchmarks is discussed in the consultation, the payment rates are set on an assumed number of passenger journeys that are disrupted when a delay is caused and the future lost revenue as a result of that disruption, and therefore when passenger numbers fall below the assumed number (which clearly has been the case over the last 18 months), then the payment rates will be too high. Similarly the IC-ACS is modelled on the assumed

frequency and impact of large incidents on the network. When network mileage falls the impact that incidents have will also fall – i.e. Delay Per Incident (DPI) and reactionary delay falls and therefore the IC-ACS level will be too high, if not adjusted.

We note that the proposal by the ORR to create a more flexible regime only considers flexibility around the benchmarks and not other aspects of the Schedule 8 regime that should also be considered. If the rationale of the ORR proposal is to create a regime that can better respond to events that mean the regime is not calibrated correctly then only focussing on changes to the benchmarks will miss other important areas. Freightliner considers that all areas should be assessed to avoid changes being made to some parameters but not others, meaning that the totality of the regime becomes misaligned.

The ORR proposes two different methodologies for annually updating the benchmarks, which are considered below in reverse order.

5.21 Option B2 – Modelled approach

Option B2 – Modelled approach – would see annual adjustments based on the previous year’s network mileages. While there are merits in considering this approach, it is important to note that such an approach would not provide a flexible regime to better respond to significant events, similar to the events that we have seen over the last 18 months. The annual adjustment would always mean there is a 12-month lag in updating benchmarks and the updated benchmarks would respond to the previous year’s mileages and not the current mileage and therefore not respond to the event as it is happening.

Applying such an approach to address the events of the last 18-months would see a significant see-sawing of the benchmarks, and the 12-month lag would mean that they are never appropriately set during that time. For example in 2020/21, when Covid-19 hit, the parties would have full benchmarks. Even though passenger traffic volumes were significantly lower the benchmarks would be set on the assumption of full traffic operating. Only in year 2021/22 would the benchmark be lowered to reflect the lower mileage in the preceding year. However by 2021/22 network mileages have largely begun to recover and therefore the benchmark would now be too low for what is actually operating on the network. Therefore if such an approach is designed to address some of the calibration challenges seen since Covid-19 then this approach would not do so and would likely exacerbate and compound further the effect of inappropriately calibrated benchmarks because of the lag-effect.

Notwithstanding the comments above, this is an approach that was part of the Schedule 8 regime in prior control periods. In CP5 adjustments were applied to the FOC Benchmark when changes to network mileage met a certain threshold. Should this approach be reintroduced, Freightliner would suggest that it should equally apply to the Network Rail Benchmark, otherwise an event such as Covid-19 or even changes in network mileage, would result in significant swings in the FOC Benchmark but the Network Rail Benchmark remain unadjusted for those events.

Annual adjustments to the Network Rail Benchmark would still be feasible, even if the Network Rail Benchmark was to continue to be set on a forward-looking trajectory, as we suggested in Section 5.1. The Network Rail business plans contain assumptions on traffic levels and it is these traffic levels that are used to frame the expected level of Network Rail performance. Should the actual traffic level differ, beyond an agreed tolerance, from what was assumed in the Network Rail business plans (either higher or lower) then the benchmark could be adjusted accordingly.

5.22 Option B1 – rolling historical performance

Freightliner would be opposed to Option B1 – rolling historical performance, which would update the benchmarks based on average performance over a rolling recalibration period (possibly five years). Such an approach would not provide flexibility to adjust for significant changes in the operating environment, but rather would adjust for *all* factors, including improvements in performance that have been driven by investment.

Freightliner supports the need for additional flexibility in the regime, but the flexibility should be limited to adjust for external factors that were not assumed when the regime was calibrated – e.g. sharp declines in network mileages. Applying such a reset mechanism to adjust for good or poor levels of performance that are in the gift of the operator, or Network Rail, would not be appropriate and risks rewarding poor performance and penalising good performance.

Such an approach would likely have a significant impact on the ability of freight operators to build investment cases to improve performance. Currently we use the Schedule 8 regimes to support business cases to improve performance – in full knowledge that if we improve to outperform the benchmark there is an associated financial bonus. Were benchmarks to be reset annually on the basis of previous performance that would undermine the business case for improvement, as any improvement would very quickly result in a tougher benchmark. As such it would completely change the investment landscape and consequently result in worse outcomes for the entire industry. We urge the ORR to consider the impact that such an approach would have on the ability for the private sector to make investments where such investments would very soon sway the benchmarks.

5.3 Joint or shared allocation of delay minutes within Schedule 8 itself

Freightliner does not support the proposal to see joint or shared allocation of delay minutes within Schedule 8 and would not consider it to be a priority for PR23. Such a proposal would only be appropriate where it is able to drive improved outcomes and influence behaviours. For freight services, which are usually a significant minority of the services across many Routes and Regions, it is not clear how the outcome of incidents currently attributed to Network Rail would be improved were the freight operators to share allocation.

Where there is a failure to support the recovery of a train service following an incident, there is already the ability to set up a new incident – Failure to Mitigate – and allocate those minutes to the operator. It is not clear how outcomes would be improved were incidents, currently attributed to the infrastructure manager, be jointly allocated to the freight operator as a matter of routine.

Only where there is a course of action that the freight operators can take to improve outcomes would such an approach be appropriate and it is not clear to Freightliner what incidents would benefit from that approach.

There were of course very similar discussions in PR18. Network Rail proposed during those discussions that freight operators should be exposed to a percentage of minutes where an incident did reach a cap. The ORR decided not to adopt such an approach as there is no evidence to support that the *“proposal would provide to freight operators is something that they are able to respond to effectively”*.

Freightliner did raise concerns about increasing Delay Per Incident (DPI) in our PR18 representations. We continue to be concerned about DPI and note that we are very much reliant on the effective management by Network Rail of incidents across the network to minimise overall delay minutes and keep reactionary delay as low as possible when a FOC-attributed incident does occur. To respond to

this and create a stronger incentive, Network Rail could be exposed to a percentage of FOC-attributed delay minutes. In PR18 we suggested that the FOC Payment Rate could be set at 90% of the full calculated value to provide such an incentive.

While the issues with DPI are still very much a concern, we do acknowledge that this is an area of significant complexity and would drive substantial work for the industry. Given the limited bandwidth currently, Freightliner does not consider it to be a priority for the PR23 consideration.

5.4 Industry to update evidence base underpinning calibration of freight payment rate

The consultation proposes that freight operators, working closely with ORR and Network Rail, begin the process of updating the 'freight payment rate'. Freightliner seeks clarification that it is the proposal for freight operators to update the Network Rail payment rate rather than the FOC payment rate. The FOC payment is based on a weighted average of the NR on TOC payment rates and considers the average interactions and delays caused to those TOCs by freight operators. The FOC payment rate is one of the final parts of the regime to be calibrated and there is little that the freight operators can do to support its calculation.

Freightliner understands that this proposal seeks freight operators to begin the process of updating the Network Rail payment rate. The consultation identifies that this payment rate has not been calibrated since PR08 and therefore needs to be assessed again in order to consider changes in costs or efficiency improvements.

Freightliner agrees that this payment rate needs to be recalibrated based on up-to-date information. The freight industry has made significant step-changes in the productivity of services over recent years, with much longer and heavier trains operating on the network. Therefore each delay minute has more of an impact on each service, given the greater amount of freight being transported. When this payment rate was calculated 14 years ago the assumption on the length and weight of trains would differ very considerably with what is operating on the network today.

The other key change over the past 14 years is the commodity type being transported. 14 years ago coal represented by far the largest commodity transported by rail. Today coal has virtually disappeared from the rail network and intermodal and construction volumes make up around two-thirds of rail freight volumes. Unlike coal, which was often transported to power stations and added to a stockpile of coal, today's commodities being transported by rail are very time-sensitive. Intermodal containers are often transported with same-day delivery to customers on the import-leg, or booked onto a specific vessel on the export leg. Construction materials are transported to urban receiving terminals to discharge materials for immediate use on and around the site. Many of the receiving terminals have a small footprint and therefore the reliable operation of train services is fundamental to the efficient functioning of the sector. Biomass, which has replaced some previous coal traffic, is very different from coal from a time-sensitivity perspective as it cannot be stored like coal could be, making the reliable running of train services absolutely essential. These changes mean that the impact of delays to train services downstream are now much greater than they were when this payment rate was initially calculated.

The changes above do support the need to reassess the payment rate to consider these new dynamics. However, before the freight operators can begin engaging with other parties to recalculate the rate we need to understand the future framework and basis for setting the payment rate. Currently the Network Rail payment is based on short-run costs of a delay minute to a freight operator. The changes in the time-sensitivity of the commodities being transported by rail and the impact that a delay minute has on downstream customers impacts the relative attractiveness of rail

freight and therefore suggests the need to consider a different basis for calculating the payment rate, perhaps more like the NR on TOC methodology. While short-run costs will remain an important consideration in the calculation, long-run revenue implications of delay minutes should also be considered.

While an expansion of the payment rate calculation is considered in the passenger regime there does not appear to be a suggestion of such an expansion in the freight regime. Given the changes in the commodity mixes, as highlighted above, Freightliner would urge the ORR to consider the appropriate framework for the setting of the Network Rail on FOC payment rate. Otherwise we could see an inappropriate situation where the Network Rail on FOC payment rate is based only on short-run costs, yet the freight operators are bearing full revenue risk of the services that they run, however the passenger operator payment rates do consider revenue impact of delays, yet the passenger operators under the new contractual models are not bearing revenue risk of the services that they run.

Before the freight operators begin the process to update the payment rate, we suggest that the industry agrees on the appropriate framework and specifically the basis of setting that payment rate, particularly in the context of the above changes in the freight market and considering contractual changes introduced by the rail reform agenda.

5.5 *Passenger operator payment rates*

Freightliner notes that the ORR is proposing to consider a change to widen the scope of financial impacts within Schedule 8 compensation for passenger operators. There is a view that parties are under-incentivised over financial impact when making decisions that affect performance. There is a suggestion that short-run costs and compensation paid to passengers could be considered to provide a rate that covers the full costs and losses associated with delays.

Freightliner is concerned that such a proposal would see the further increase in the passenger operator payment rates. Those rates are important for freight operators as they then form the basis for calculating the FOC payment rate. Recent control periods have seen very significant increases to those payment rates, driven by modelling over the impact that a delay minute has to long-run lost revenue. In PR18 we raised concerns over this modelling, which seemed to be driving these payment rates up at a very significant rate and we queried whether the model was appropriately calibrated. In light of the impact that Covid-19 will continue to have on passengers' use of the rail network, and the split between leisure, business and commuting passengers, we continue to be concerned at the calculation.

Furthermore there are considerations necessary around rail reform. The change in most passenger operators' contractual model, with revenue risk likely moved to Government, raises questions over the appropriateness of compensating passenger operators based on long-run revenue loss. The passenger operator payment rates should be reconsidered in the context of the new contractual arrangements that are put in place.

5.6 *Revisit calibration of caps in freight regime*

Freightliner agrees that the provision of caps (both annual and incident caps) provides an *“important role in limiting FOCs' financial risks in the context of FOCs being directly exposed to the cost of delay caused to other operators”*. The consultation rightly highlights the sensitivity to exposure to risk for freight operators given the small margins of the industry. Freightliner considers the current capping mechanisms to be fit for purpose.

While structurally the caps are fit for purpose, Freightliner expects that the levels of caps themselves will be recalibrated. The annual caps themselves will likely be subject to the usual bilateral negotiation between the freight operators and Network Rail once the parameters of the regime have been set. The incident caps should be recalibrated based on the frequency and size of incidents over the recalibration period to ensure that the rates are calculated appropriately. This should give comfort to Network Rail that the IC-ACS rates will cover the cost of over-cap incidents (+10% premium) on expectation of performance.

Freightliner does not consider that any changes to the capping arrangements should be a priority for PR23, noting that changes were proposed in PR18 but not taken forward after significant debate. Given the limited bandwidth of the sector, this should be an area of the regime that remains in its current structure, subject to appropriate recalibration.

6.1 Further discussions

Freightliner would be happy to discuss or clarify any of the points made in this response in more detail.



Response to ORR's technical consultation on the PR23 review of the Schedule 8 train performance regime

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

Please send your response to performance.incentives@orr.gov.uk by **10 September 2021**.

Please contact Will Holman at ORR with any queries: will.holman@orr.gov.uk.

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Chapter 2: ORR's proposed approach and priorities

We welcome views on our questions regarding ORR's proposed approach to PR23.

Question 1: Do you have any views on the objectives and benefits of a mechanism such as Schedule 8, for the range of different industry parties, both in the current contracting model and once the Rail Transformation Programme has been fully implemented?

In any railway industry model, including the new Rail Reform programme, there is absolutely a need to have a performance regime, similar to the current one, based on financial payments. The financial driver is, unfortunately, the only one that actually focuses attention within many parties to actively contribute to a high-performing railway every day.

It is vital that the incentivising aspect of the current regime is kept for all sides, not least as it incentivises Network Rail to keep freight services moving in times of disruption and also protects FOCs from some of its revenue loss in times of disruption.

The benefits of the current Schedule 8 regime are as follows:

- It easily allows GBRf to calculate the cost of failure.
- It incentivises GBRf internally to look at removing repeat failures from the plan.

- It allows GBRf to agree and contractualise performance regimes with its customers and suppliers generating an all-round focus on performance within freight terminals and thus improving performance on the network.
- It strongly incentivises Network Rail to offer better than expected service. This vital incentivising effect must not be lost.
- It allows GBRf and its customers to build stable financial business cases for long term investment in assets.

These behaviours and incentivising effects will be every bit as important in any future new set-up as now and it is vital that these effects remain in place to ensure that the rail freight market is not de-stabilised going forward.

Question 2: Do you have any views on whether we should make no changes to Schedule 8 in PR23, or pursue a small number of incremental reforms to ensure it remains fit for purpose as a baseline regime?

With the significant amount of change in the industry at the moment, and with freight operating companies about to become very involved in a detailed Rail Reform programme, it would be a prudent option to leave “as is” for PR23. GB Railfreight would prefer a “leave as is” option on this occasion.

If there must be change to Schedule 8, it needs to be minimal at this point as we all focus on the full Rail Reform detail.

Question 3: Do you agree with the areas we have identified as priorities for PR23? Are there any other significant issues that we should seek to address?

GB Railfreight does not agree with the priorities proposed. GBRf sees no reason to move away from how Network Rail’s benchmarks are set and also does not see the need for annual adjustments. These areas are discussed in more detail later in this response.

GBRf believes that moving the TOCs to a new regime will only increase the amount of administration already carried out in what needs to be as simplified a process as it can be.

GB Railfreight will support the investigation of any proposal that simplifies areas of the regime that currently cause issues and would also support updating the evidence base that underpins the calibration of the freight regime. However, GBRf believes that the available time is very limited to do this and do it properly.

As previously mentioned, GBRf also proposes a “hands off” approach to changing the regime at this point considering the other major changes that are happening in the industry.

Chapter 3: Proposals: Cross-cutting changes across sector regimes

We welcome views on the cross-cutting proposals in this chapter.

Question 4: Would you support Proposal A [to base Network Rail's benchmarks only on past performance]? Do you have any views on the proposed methodology set out?

GB Railfreight strongly opposes this approach and also believes that other TOCs and FOCs do not support this approach. Network Rail is a funded organisation that should deliver value-for-money for its customers as approved by ORR as part of a Control Period settlement.

By setting Network Rail's benchmark on historical data alone (as stated in the consultation document), perverse circumstances may occur. For example, it would be admitting that any future network enhancements or additional maintenance opportunities would not be expected to deliver any improvement in network performance, which is clearly not the case.

A flyover replacing a flat-crossing across four lines will obviously lead to improved performance after perturbation and this has got to be factored into future Network Rail benchmarks.

Network Rail benchmarks should be based on their expected, agreed performance in the period concerned. Although this is technically difficult to get 100% accurate, the current methodology does do this and is a widely accepted as a good method within the industry.

Basing the benchmark on past performance in no way incentivises Network Rail to continually deliver high performance. All parties must be kept incentivised to reach and exceed their performance targets.

Question 5: Would you support Proposal B [to annually update benchmarks to make benchmarks more flexible]? If benchmarks were to be updated annually, do you favour achieving this through a rolling update (Option B1) or through a modelled approach (Option B2)?

GB Railfreight opposes this proposal as making the process this much more granular would de-incentive long-term performance improvements on all sides. Some simple examples to illustrate the point are as follows:

Example 1 – “When things go wrong”

A freight customer has been having loading issues at a terminal for the past 3 months. Investigations show that we continually delay other operators and on average each delay costs GBRf £2,000.

GBRf concludes that it is due to aging customer loading equipment. Under the current 5-years approach, GBRf may choose to part fund improvements to customer equipment as it would be able to recoup that investment over a period of up to 5 years.

If benchmarks were to be recalibrated each year, GBRf may find itself in a better financial position if it did nothing to fix the problem and benefited from the enhanced benchmark a few months later. That is not an incentive for all to continuously improve performance and cannot be right for the industry.

Example 2 – Business case for investment

GB Railfreight will always use “savings due to performance improvements” when writing any business case for investments. Be it new locomotives or new software, GBRf always considers how much money could be saved in Schedule 8 payments. If that potential saving is cut from a maximum of 5 years to a maximum of 1 year, then some investment cases (including other 3rd party investments), might no longer stand up.

Carrying out the benchmark calibration every five years also allows all parties to adequately and thoroughly scrutinise the data and methodology to ensure all-round agreement. There would just not be the time for this valuable verification work to be carried out were the change to have to occur each year. A recent example of where this proved invaluable was the error found in over capped minutes during the PR18 process. This took over 12 months to be resolved.

GB Railfreight can understand why the proposal to annually update benchmarks might seem attractive however a consistent but more accurately formed benchmark figure, held over a five-year period, gives freight operators adequate certainty for contractual stability with its own customers. Many of our commercial contracts have a back-to-back performance incentive included and GBRf would not want to have to re-negotiate that every year where figures would change. The increase in administrative processes in dealing with annual updated benchmarks would also be a burden to commercial entities such as open-access freight operating companies.

Consistency and stability in this field allows GBRf some certainty in how it invests in improvements over the course of a five-year period rather than on a piecemeal year-by-year basis. This is where Option B2 doesn't work for GBRf. It would risk undermining the ability of freight companies and their customers to invest in performance improvement schemes as any improvement in performance would soon be become reflected in new benchmarks set for the next year.

In Option B1, were you to adjust the annual benchmark from network mileages each year, there would likely be a lag in the actual traffics data meaning the accuracy would not necessarily be as expected. Freight traffic throughout the Covid outbreak is a good example of this, where some freight traffic initially dropped but then recovered quite quickly. On this basis, Option B1 would not provide the flexibility and ensure a properly calibrated benchmark.

Question 6: Should Proposal C [to implement joint or shared allocation of delay minutes within Schedule 8 itself] be a priority for reform in PR23? If you would like us to consider Proposal C further, please set out how it can best be implemented (e.g. including incident types that should be subject to joint or shared responsibility).

GB Railfreight does not believe that Proposal C should be a priority for reform nor should it be considered any further, especially with the Rail Reform programme on the way.

The freight operators and Network Rail already have some bi-laterally agreed Schedule 8 sharing arrangements. Examples of these would be the small value “FO” agreement and the autumn railhead treating agreements.

Furthermore, there is already the ability to attribute any incidents to more than one party, e.g. using the “D” code approach pre-day 8, or agreeing a suitable % split post day 8, the latter being used on less than 0.1% of incidents.

GBRf, therefore, really does not see any benefit in changing the current approach. Any change to the current approach would lead to a more complex calculation of periodic benchmarks as well as disincentivising the main party responsible for the delays. It would also take a significant amount of FOC time to ensure we reach an appropriate result. There is not that time available at the moment to devote to this particular subject.

Chapter 4: Proposals: Passenger regime

We welcome views on this chapter’s proposals for the passenger regime.

Question 7: Would you support Proposal D [to more accurately incentivise TOCs to limit delay to other operators], implemented through Option D2 [to update payment rates annually through a rolling update of the TOC responsibility matrix]? Do you have any views on the options set out?

The passenger and freight regimes are inextricably linked and GB Railfreight is clearly of the opinion that any changes to the Schedule 8 passenger regime should not result in a significant swing (up or down) in the current payment rates. Stability is key.

Question 8: Should Proposal E [to change the allocation of unidentified delays between Network Rail and operators] be a priority for reform in PR23? Are you able to provide evidence on the benefits and costs of the proposal or to inform the allocation of unidentified delays?

The passenger and freight regimes are inextricably linked and GB Railfreight is clearly of the opinion that any changes to the Schedule 8 passenger regime should not result in a significant swing (up or down) in the current payment rates. Stability is key.

Question 9: Should Proposal F [to reflect the wider financial impacts of delays in Schedule 8 compensation] be a priority for reform in PR23? If this proposal was taken forward, would you favour formulaic recovery (Option F1) or actual sums recovery (Option F2) to achieve it?

The passenger and freight regimes are inextricably linked and GB Railfreight is clearly of the opinion that any changes to the Schedule 8 passenger regime should not result in a significant swing (up or down) in the current payment rates. Stability is key.

Chapter 5: Proposals: Freight and Charter regimes

We welcome views on this chapter's proposals for the freight and charter regimes.

Question 10: Do you agree with our preferred high-level approach for the freight regime, to keep the current regime broadly unchanged for CP7? Are there other elements of the freight regime or its calibration that should be considered for reform in PR23?

GB Railfreight agrees with ORR's high-level approach to keep the freight regime broadly the same for Control Period 7, as previously mentioned in this response. Most importantly, it currently gives all the parties the right incentives to continue to deliver a high-performing railway and is effective in doing this.

Question 11: Would you support Proposal G to update the evidence base underpinning the calibration of the freight payment rate?

GBRf would definitely support this approach however believes this may not be possible in the current timeframe. With significant change within the industry about to commence, this activity could be an area that is left until after PR23, leaving operators and Network Rail enough time to focus on this part of the regime.

A review of the freight payment rates will be beneficial to ensure better accuracy across the whole process and that the rates more accurately reflect the value and time-sensitivity of cargoes being carried by rail.

Question 12: Should Proposal H, to revisit the calibration of caps, be a priority for reform in PR23? Can you provide evidence demonstrating whether or not the supplements and caps are currently calibrated appropriately?

GB Railfreight does not see the need to recalibrate freight incident caps and certainly not as a priority at this time. The methodology is sound, provokes no issues and provides a revenue stream for Network Rail and therefore the taxpayer. GBRf see these caps as integral to the whole Schedule 8 process, giving FOCs some financial stability whilst simultaneously maintaining incentives to perform well.

In the past, GBRf has financially benefited from purchasing these caps in some years, however most of the time GBRf will pay more for the facility than it saves. GBRf sees no evidence that the calibration of the levels of supplements and caps is erroneous.

Question 13: Do you agree with our preferred high-level approach for the charter regime, to keep the current regime broadly in place for CP7? Are there other elements of the charter regime or its calibration that should be considered for reform in PR23?

GB Railfreight agrees with ORR's high-level approach to keep the freight regime broadly the same for Control Period 7, as previously mentioned in this response. Most importantly, it currently gives all the parties the right incentives to continue to deliver a high-performing railway and is effective in doing this.

Are there any other comments you would like to make?

GB Railfreight has the current Schedule 8 performance regime fully embedded into its organisation. It has contractual agreements with customer and suppliers that incentivises and refer to the Schedule 8 regime and its agreed figures to date. Any significant changes to the scope or scale of the regime could significantly financially penalise GBRf.

Another cornerstone to the freight part of the Schedule 4 regime is the need for the freight section to only have one set of rates/benchmarks for all operators. Historically, there have been talks arounds given each freight operator their own personal benchmarks. This would lead to some operators then having a competitive advantage over others, which would be anti-competitive. This cannot be allowed to re-occur.



Response to ORR's technical consultation on the PR23 review of the Schedule 8 train performance regime

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

Please send your response to performance.incentives@orr.gov.uk by **10 September 2021**.

Please contact Will Holman at ORR with any queries: will.holman@orr.gov.uk.

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Chapter 2: ORR's proposed approach and priorities

We welcome views on our questions regarding ORR's proposed approach to PR23.

Question 1: Do you have any views on the objectives and benefits of a mechanism such as Schedule 8, for the range of different industry parties, both in the current contracting model and once the Rail Transformation Programme has been fully implemented?

LSER and GTR agree that Schedule 8 currently has a role in the industry in ensuring all parties are exposed to the impact of performance on the farebox (under the Franchise arrangement: TOCs directly and Network Rail (NR) through Schedule 8). Its other key benefit is allowing the industry to translate performance-based business cases into financial revenue benefits allowing a commercial input into railway investment decisions.

Before any decision is taken to continue Schedule 8 into CP7 there needs to be careful consideration of how this would fit into the new industry financial and contractual framework and how it can be simplified.

The Williams-Shapps review paper was critical of the amount of resource used on attribution / Schedule 8, but the proposals do not address this or look for alternatives to Schedule 8 that could require fewer industry resources being used to manage the regime and associated

attribution processes. Thus, careful consideration is particularly needed when there is sufficient clarity over farebox risk policy as part of the Rail Transformation Programme. LSER in particular believes that the main objective for a 'Schedule 8'-type regime is to have aligned benchmarks across NR and TOCs, which incentivise both TOCs and NR to continuously improve performance.

Note: the ORR's description of Schedule 8 in Section 1 of the Technical Consultation is incorrect. NR and TOCs pay for their respective impacts on train lateness not delay; delay causation is used to allocate this lateness between each party. This lateness then provides the link to revenue loss as described in PDfH.

Question 2: Do you have any views on whether we should make no changes to Schedule 8 in PR23, or pursue a small number of incremental reforms to ensure it remains fit for purpose as a baseline regime?

It is not clear that tweaking Schedule 8 at the edges will provide any benefit particularly if all the issues identified are incorporated in the recalibration. Any recalibration will be a considerable challenge in identifying a base position which is representative of a net neutral position for the start of CP7. The effort involved and risks to the functioning of the regime appear to outweigh the benefits.

In addition to the issues described in our response to question one we believe the ORR needs to understand the administrative cost of the regime: the use of a legacy Access-based PEARS system, both in maintenance and usage; the preparation of period statements; and the adjustments that this impacts downstream particularly on neutralising impacts on Franchise Agreements. This has been ignored for too long with little sign of the new version of PEARS coming online soon.

From LSER's perspective, the view is that substantial reforms or a complete overhaul of the regime is required to make Schedule 8 fit for purpose, rather than a small number of incremental reforms. The current regime removes incentives for NR to invest in performance enhancement projects. The lack of financial liability, should NR's performance be poor, is prejudicial to TOCs. This discourages joint-working on performance improvements, and results in TOCs being dis-advantaged should NR perform at or below target.

Question 3: Do you agree with the areas we have identified as priorities for PR23? Are there any other significant issues that we should seek to address?

We do not understand the rationale for these priorities for which the benefits do not appear to be clearly substantiated and may add additional complexity in advance of the Rail Transformation Programme.

We do not feel that there is a need to change how TOC-on-TOC delay is handled, or that there is a gap with incentives between TOCs or barriers to industry collaboration caused by Schedule 8. We are also concerned about how unexplained delay would be handled.

In particular, GTR's view is that the annual updating of benchmarks will only increase industry transaction costs, which have a ripple effect across other contracts, and allows for poor delivery to be neutralised from one period to the next.

It will also undermine the business case, and delivery pressure, for any long-term investment in performance improvement set for the Control Period. Such changes would therefore undermine

the purpose of Schedule 8 as a way of incentivising NR's delivery so need to be reconsidered. This is only likely to import additional risk to the functioning and recalibration of the regime.

We also believe that diverging the split of delay causation between measured performance and Schedule 8 is unnecessary and only likely to increase confusion and administrative costs. If changes to delay ownership is to be pursued it should be consistent in both areas, with principles set out clearly in the TAC, and implemented by DAB into the DAPR.

We believe it would be better to improve the quality of the underlying inputs into the regime:

- The relationship between performance and revenue and how this may have changed with the increase in home-working following Covid-19 lockdowns (possibly making demand more elastic to performance issues). Improving research and understanding in this area, will help ensure NR bear an appropriate share of the farebox.
- Passenger demand during CP7 is likely to be incredibly uncertain, particularly due to the time lapse between recalibration and the start of the regime.

So rather than updating benchmarks it would be better to concentrate on the accuracy of the payment rates and how these will evolve across the five years. The exception to this would be if benchmarks were updated annually that we would want to see NR held accountable to the improvement metrics set out for the CP7 plan.

Chapter 3: Proposals: Cross-cutting changes across sector regimes

We welcome views on the cross-cutting proposals in this chapter.

Question 4: Would you support Proposal A [to base Network Rail's benchmarks only on past performance]? Do you have any views on the proposed methodology set out?

Our concern as expressed in Q3. is that there is a risk that NR could under deliver in one year with minimal financial incentive to improve year on year. Therefore, we would need to see a mechanism in place to avoid disincentivising improved performance and how NR will be held accountable to the delivery they specified in the control period plan to make us view this proposal more favourably.

Question 5: Would you support Proposal B [to annually update benchmarks to make benchmarks more flexible]? If benchmarks were to be updated annually, do you favour achieving this through a rolling update (Option B1) or through a modelled approach (Option B2)?

It is worth pointing out that there are already contractual mechanisms to allow NR/TOCs to request a recalibration within a Control Period in response to 'shocks'.

If this was implemented GTR would prefer a pre-defined modelled approach (Option B2) with a traffic-based adjustment methodology agreed prior to the start of the Control Period.

Overall, LSER supports benchmarks being more flexible during control periods. We agree that this approach would create a more realistic output and would allow benchmarks to be more aligned with industry changes and current performance, however we do have concerns that an annual review would be a resource intensive task.

LSER has concerns that if we were to move forward with a modelled approach, this would be influenced by a multitude of factors, requiring more resources and potentially creating less realistic output. It therefore currently views Option B1 more favourably.

Question 6: Should Proposal C [to implement joint or shared allocation of delay minutes within Schedule 8 itself] be a priority for reform in PR23? If you would like us to consider Proposal C further, please set out how it can best be implemented (e.g. including incident types that should be subject to joint or shared responsibility). GTR believes that there is some merit in ensuring the joint ownership of external incidents such as suicides and trespass to reduce attribution time and possibly incentivise joint working. If this was implemented the allocation should be consistent and pre-defined across the whole industry (i.e. across all TOCs and NR Routes)

However, we believe that this should be consistent between delay attribution and Schedule 8 to ensure incentives and ownership are aligned. Although we note the 2016 Regulations, these can be changed as part of a reform of the industry. We would highlight in turn the principles in the TAC which has joint ownership as the default position unless it can be attributed to NR or the train company.

LSER does not view this as a priority for reform in PR23. The DAPR already has clear guidelines on resolving incidents that require joint or shared responsibility.

Implementing this proposal would mean that all current benchmarks would need to be re-written, as well as new delay codes created for delay attribution. There are already mechanisms in place which allow straightforward splits of delay minutes in instances of TOC-on-TOC delay, and workable plans in place for more difficult scenarios such as Autumn Agreements.

Chapter 4: Proposals: Passenger regime

We welcome views on this chapter's proposals for the passenger regime.

Question 7: Would you support Proposal D [to more accurately incentivise TOCs to limit delay to other operators], implemented through Option D2 [to update payment rates annually through a rolling update of the TOC responsibility matrix]? Do you have any views on the options set out?

Firstly, it should be highlighted that the TOC regime is not intended to be a TOC incentivisation regime: its function is as part of the Star Model and ensure NR's risk to TOC-on-TOC delay/cancellations is neutralised.

We do not understand the ORR's justification for this change. The TOC payment rate is based on the NR payment rates with which that train service group interacts for each minute of TOC lateness during the calibration period to ensure neutrality within the Star Model. Any change in the TOC payment rate needs to be done alongside the TOC benchmark.

The TOC responsibility matrix calibration is the most difficult and time-consuming part of the overall recalibration (and has been done in error in the past) so an annual update has the potential to massively increase administrative costs. For many TOCs, with little interaction (e.g. Merseyrail and C2c) the TOC regime money flows are extremely small and the expense is likely to dwarf the resulting change in financial flows.

If there is a substantive change to TOC interaction, such as a change in franchise boundaries, any party is already able to request a recalibration. Given the ORR appears to be unclear of the justification of this change, and the likely associated increase in admin costs, we would recommend this change is not pursued.

Question 8: Should Proposal E [to change the allocation of unidentified delays between Network Rail and operators] be a priority for reform in PR23? Are you able to provide evidence on the benefits and costs of the proposal or to inform the allocation of unidentified delays?

We have concerns over how NR will be incentivised to investigate unexplained delays if Proposal E was implemented. We also believe that it is within NR's remit to analyse unidentified delays as a large majority of unidentified delays are due to NR regulation or other NR causes such as the accuracy of Train Planning Rules. Therefore, we feel that NR is best equipped to investigate them and monitor their regulations.

We would highlight that these unidentified delays are a relatively small part of the overall delay picture and this should be treated as a low priority. We would also point out that small delays are more likely to not impact on lateness, as they are absorbed by excess station dwell times or other timetable allowances.

Given TOCs already share some of the impact of these delays (and that they currently do not have the chance to investigate or dispute them), and that any change would need to be reflected in a recalibration, then we do not believe this is a worthwhile change, which would only absorb more industry resources in the attribution process.

Question 9: Should Proposal F [to reflect the wider financial impacts of delays in Schedule 8 compensation] be a priority for reform in PR23? If this proposal was taken forward, would you favour formulaic recovery (Option F1) or actual sums recovery (Option F2) to achieve it?

We have concerns about boundaries of financial penalties if Proposal F were to be implemented, as well as how this would be managed internally due extensive resource requirements resulting in higher industry costs.

Proposal F does not meet enough criteria to counterbalance the increased costs, complication and use of resources.

However, we do think that the Sustained Poor Performance mechanism within the Schedule 8 regime that currently exists to capture these costs should be reviewed because the current mechanism is not fit for purpose.

Chapter 5: Proposals: Freight and Charter regimes

We welcome views on this chapter's proposals for the freight and charter regimes.

Question 10: Do you agree with our preferred high-level approach for the freight regime, to keep the current regime broadly unchanged for CP7? Are there other elements of the freight regime or its calibration that should be considered for reform in PR23?

No comments

Question 11: Would you support Proposal G to update the evidence base underpinning the calibration of the freight payment rate?

No comments

Question 12: Should Proposal H, to revisit the calibration of caps, be a priority for reform in PR23? Can you provide evidence demonstrating whether or not the supplements and caps are currently calibrated appropriately?

No comments

Question 13: Do you agree with our preferred high-level approach for the charter regime, to keep the current regime broadly in place for CP7? Are there other elements of the charter regime or its calibration that should be considered for reform in PR23?

No comments

Are there any other comments you would like to make?



Response to ORR's technical consultation on the PR23 review of the Schedule 8 train performance regime

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

Please send your response to performance.incentives@orr.gov.uk by **10 September 2021**.

Please contact Will Holman at ORR with any queries: will.holman@orr.gov.uk.

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Chapter 2: ORR's proposed approach and priorities

We welcome views on our questions regarding ORR's proposed approach to PR23.

Question 1: Do you have any views on the objectives and benefits of a mechanism such as Schedule 8, for the range of different industry parties, both in the current contracting model and once the Rail Transformation Programme has been fully implemented?

It is essential that a performance regime is in place that incentivises all parties to deliver high performance and invest in areas that need improvement.

Where industry partners (such as TfL, OA and FOCs) are exposed to the revenue risk caused by disruption, it is essential that they continue to receive appropriate levels of compensation.

Where operators are no longer on revenue risk, a fresh look at the current regimes should be explored.

Should compensation for industry partners who remain on revenue risk be removed, this will negatively affect their business models, resulting in less investment in performance improvement activities and less funding available for maintaining existing levels of service and developing new flows.

The volatility of payments, magnitude of cost and complexity are all key issues with the schedule 8 regime. MTREL would encourage simplification, allowing better understanding and implementation of all elements. The significant sums of money do not always correlate to the amount of disruption caused and can result in operators being rewarded for failure.

The principle of a regime whereby delays are allocated to a party is an effective methodology of ensuring that all parties are held accountable for managing industry performance, however, Schedule 8 is hugely complex and no longer appropriate for today's railway.

The significant amount of money that changes hands between TOCs, OA, FOCs, TfL and NR has led to a significant workforce being built to manage the process and relationships are commercially focussed rather than collaborative.

There are many instances where relationships have been broken or made combative due to the costs that are involved in the process.

Much of the time spent on reallocating delays or interpreting the rules and principles provides no benefit to customers, but a financial "win" for the party that successfully argues their case.

The financial costs are significant and can drive the wrong behaviours, at times damaging relationships within operators and between the operator and NR, whereby the focus can be on moving delays, rather than solving the root cause.

Significant thought will need to be given to how GBR are incentivised to improve performance. One suggestion would be to allocate budgets for performance improvement purposes. These Performance Funds could be used to solve local "route" issues and for funding cases to be agreed as part of the existing performance management process.

Any changes to the process should be with the onus on delivering performance improvement, rather than financial penalties and ensure that any financial penalties do not remove funding away from performance improvement activities.

The background mechanisms of schedule 8 (such as benchmarking and calibrations) do not provide passenger benefit and examples can be found where operators have been penalised for delivering improved performance.

For those operators no longer on financial risk, the principle of Schedule 8 (compensating operators for loss of revenue resulting from disruption) no longer applies. Operators (such as TfL, OA and FOCs) who remain on revenue risk must be adequately compensated for the cost of disruption and subsequent loss of passenger revenue.

Any changes will have to be well thought through with regards to Open Access and Freight Operators, which in theory will remain at revenue risk.

Question 2: Do you have any views on whether we should make no changes to Schedule 8 in PR23, or pursue a small number of incremental reforms to ensure it remains fit for purpose as a baseline regime?

For those still on revenue risk (TfL, OA and FOCs), compensation for delays and the resultant revenue loss must remain.

However, for Operators no longer on revenue risk, Schedule 8 payments need reviewing.

There will be complexities involved in incremental changes and for simplification, it may be easier to "switch" the industry over to any new regime at one time.

Question 3: Do you agree with the areas we have identified as priorities for PR23? Are there any other significant issues that we should seek to address?

For those operators on revenue risk, compensation and incentives must remain.

These appear to be light touch approaches.

Simplifying the process for setting benchmarks and allowing them to be changed at more regular intervals will be a welcome change and must work together hand in hand with

simplification (if the process remains complex, yet the frequency is increased, any savings will likely be swallowed in consultancy/legal fees).

Changing schedule 8 to a similar model of TfL's schedule 7 regime*, whereby there is clear ownership of delays and the financial penalties are clear. This model encourages collaboration and performance improvement, rather than a shifting of delays.

*The TfL/MTREL schedule 7 regime provides a flow of payment from MTREL to TfL for delays experienced by the operator (excluding those caused by other operators). Where stations are not served, payments are made, based on the time of day and station footfall.

Chapter 3: Proposals: Cross-cutting changes across sector regimes

We welcome views on the cross-cutting proposals in this chapter.

Question 4: Would you support Proposal A [to base Network Rail's benchmarks only on past performance]? Do you have any views on the proposed methodology set out?

In principle, this is a sensible suggestion, but a preferred approach would be to remove the benchmarks for TOCs whilst retaining a simplified version for FOCs.

TOC payment rates could be either a fixed amount for all trains or, based on historical passenger counts and reviewed at the annual passenger counts.

Benchmarks should be accurately calculated and not based purely on historical look backs as this provides a negative incentive to TOCs to drive performance improvement.

Forecasts should be used based on proposed performance improvement activities (such as infrastructure improvements, new trains, methods of work, etc), what benefits they are intended to bring and other external factors, such as planned disruption through engineering projects (e.g. HS2).

The impact of Covid (and any other unforeseen major disruption to services) is not discussed. The creation of Covid related schedule 8 overlays has resulted in significant expenditure on consultants and the creation of another layer of contracts.

Question 5: Would you support Proposal B [to annually update benchmarks to make benchmarks more flexible]? If benchmarks were to be updated annually, do you favour achieving this through a rolling update (Option B1) or through a modelled approach (Option B2)?

For operators are not at revenue risk, the need for benchmarks is removed, noting that benchmarks would need to remain for those at revenue risk, such as TfL, OA and FOCs.

Proposal B/B1 is the more sensible approach, using a modelled approach, which would incorporate historical trend and future potential impacts (B1) is the preferred option.

Consideration must be given to how a franchisee could bid for a contract, knowing the likely financial impact could change throughout the contract period, which could then lead to an attempted financial renegotiation, meaning wooden dollars get pushed around between GBR and the operator.

It must be made simpler and more straightforward. The creation of supplemental agreements only benefits lawyers and consultants.

Question 6: Should Proposal C [to implement joint or shared allocation of delay minutes within Schedule 8 itself] be a priority for reform in PR23? If you would like us to consider

Proposal C further, please set out how it can best be implemented (e.g. including incident types that should be subject to joint or shared responsibility).

The splitting of incidents will add more complexity to the management of the regime. Where operators are on revenue risk (such as OA, FOCs and TfL) a simpler methodology would be to include some external incidents in the benchmarks (e.g. fatalities).

Where Operators are not on revenue risk, bonus payments (see - Are there any other comments you would like to make? Suggestion 6) would incentivise operators not on revenue risk to work with GBR on preventing external incidents.

Chapter 4: Proposals: Passenger regime

We welcome views on this chapter's proposals for the passenger regime.

Question 7: Would you support Proposal D [to more accurately incentivise TOCs to limit delay to other operators], implemented through Option D2 [to update payment rates annually through a rolling update of the TOC responsibility matrix]? Do you have any views on the options set out?

TOCs are already incentivised to limit delays to other operators, by reducing their own delay, they reduce their impact and the cost.

Radically changing the system and removing payments from GBR to TOCs would mean there is no financial incentive for most operators to be "disrupted" and would therefore ensure that they assist with robustly recovering the service.

Options D1/D2 both appear to add complexity to the process and there is uncertainty as to whether the various systems could cope with such an approach.

Moving to a similar model as the TfL schedule 7 agreement but making the operator responsible for their cause TOC on TOC delay would encourage the right behaviour.

The use of "fail to mitigate" where there is a clear case that an incident has been handled poorly would also ensure that operators have good quality service recovery processes in place.

The STAR model should remain in place, its removal will add to the complexity and number of people involved in the process. Where parties (such as TfL, OA and FOCs) remain on revenue risk, they should be adequately compensated when delayed by other operators.

Question 8: Should Proposal E [to change the allocation of unidentified delays between Network Rail and operators] be a priority for reform in PR23? Are you able to provide evidence on the benefits and costs of the proposal or to inform the allocation of unidentified delays?

Does this refer to sub threshold or unidentified delay? In either case, this should not be a priority.

However, on train technology can be used to improve the identification of delays (OTMR data, GPS, etc) and using those sources of data for delay attribution purposes (and making them easily available) should reduce the amount of unallocated delay.

Funding should be made available for improving access to these systems and make it part of the concession agreement that this information be made available for the internet of things.

In genuine instances where the cause of delay cannot be found, payments should not be made by either party (noting that this would need to be robustly managed and fail to mitigate should apply for larger delays).

Question 9: Should Proposal F [to reflect the wider financial impacts of delays in Schedule 8 compensation] be a priority for reform in PR23? If this proposal was taken forward, would you favour formulaic recovery (Option F1) or actual sums recovery (Option F2) to achieve it?

MTREL does not consider this to be a priority in PR23. The Sustained Poor Performance regime should ensure that adequate compensation continues to be paid to those on revenue risk, such as TfL, FOCs and OA. Compensation should not flow back to GBR when operators exceed performance targets.

Schedule 8 isn't designed to compensate operators for passenger compensation and Williams/Shapp isn't clear whether operators retain responsibility for Delay Repay costs (it is assumed that removing revenue risk will also remove delay repay risk). A simpler mechanism be that operators have a cap on delay repay costs and any payments above that are at GBR's risk, therefore incentivising both parties to reduce delays, but removing the need for reflecting these costs in the schedule 8 regime.

Chapter 5: Proposals: Freight and Charter regimes

We welcome views on this chapter's proposals for the freight and charter regimes.

Question 10: Do you agree with our preferred high-level approach for the freight regime, to keep the current regime broadly unchanged for CP7? Are there other elements of the freight regime or its calibration that should be considered for reform in PR23?

Rather than a delay minutes/cancellation-based regime, an overall performance target for flows could be created, whereby the overall impact of trains is penalised, with penalties flowing into a performance fund.

Question 11: Would you support Proposal G to update the evidence base underpinning the calibration of the freight payment rate?

We would propose a complete review of the incentivisation/penalty regime for freight. The current system, where costs are capped, does not provide FOCs with the incentive to improve performance. It is acknowledged that any system must take into consideration the commercial model that FOCs operate under.

Question 12: Should Proposal H, to revisit the calibration of caps, be a priority for reform in PR23? Can you provide evidence demonstrating whether or not the supplements and caps are currently calibrated appropriately?

We would propose a complete review of the incentivisation/penalty regime for freight. The current system, where costs are capped, does not provide FOCs with the incentive to improve performance. It is acknowledged that any system must take into consideration the commercial model that FOCs operate under.

Question 13: Do you agree with our preferred high-level approach for the charter regime, to keep the current regime broadly in place for CP7? Are there other elements of the charter regime or its calibration that should be considered for reform in PR23?

We would propose a complete review of the incentivisation/penalty regime for freight. The current system, where costs are capped, does not provide FOCs with the incentive to improve performance. It is acknowledged that any system must take into consideration the commercial model that FOCs operate under.

Charter operators must be sufficiently incentivised not to cause delays to other operators.

Are there any other comments you would like to make?

A radical approach is needed to replace an overly complex process which does not incentivise operators and NR to improve performance and costs the industry millions per year in administrative costs.

The proposed approach does not appear to be one of significant change that will drive the financial savings and performance improvement that is required.

A proposed approach could be:

- 1) Continue to provide compensation for revenue loss caused by delays to those parties that are on risk for revenue, such as TfL, OA and FOCs.
- 2) Move to a system aligned to the TfL schedule 7 process for Train Operators, where operators are incentivised based on the service type they operate (metro, long-distance, rural, etc) and stations they serve (based on footfall)
- 3) Noting that some operators (such as OA, FOCs and TfL) will remain on revenue risk, payments from GBR to non-revenue risk operators should stop (as the operators will be under contract to GBR to run the service on their behalf). This would require a review of the approach to TAC. It must be remembered that schedule 8 is not significantly changed from when Railtrack was a shareholder owned organisation
- 4) Retain the STAR model
- 5) Penalties should be based on how critical the trains are (i.e. peak and first/last trains of the day costing more)
- 6) A different approach must be taken to incentivise GBR to improve performance and work closely with operators and funders. Targets that provide a financial incentive at the end of the year, whereby if an operator achieves its performance target, a bonus payment be made and any financial penalties be allocated to performance and customer experience improvement funds
- 7) One size does not fit all. Freight, OA and TOCs are all different types of operators. TfL will be significantly exposed if schedule 8 is removed. Williams/Shapps discusses removing DAB (it is not discussed in this proposal). Simplifying the approach will reduce the number of contentious issues, there will always be points of clarity that will need to be agreed. Regional (MD level) and National (Industry level) Performance Boards could adjudicate on the rules of delay attribution. Disputed incidents should never be escalated above Level 4 (Route/Operator MD level) based on the principles agreed in a simplified DAPR (owned by NPB).



Response to ORR's technical consultation on the PR23 review of the Schedule 8 train performance regime

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

Please send your response to performance.incentives@orr.gov.uk by **10 September 2021**.

Please contact Will Holman at ORR with any queries: will.holman@orr.gov.uk.

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*This information will not be published on our website.

Chapter 2: ORR's proposed approach and priorities

We welcome views on our questions regarding ORR's proposed approach to PR23.

Question 1: Do you have any views on the objectives and benefits of a mechanism such as Schedule 8, for the range of different industry parties, both in the current contracting model and once the Rail Transformation Programme has been fully implemented?

The volatility of payments, magnitude of cost and complexity are all key issues with the schedule 8 regime. MTRUK would encourage simplification, allowing better understanding and implementation of all elements. The significant sums of money do not always correlate to the amount of disruption caused and can result in operators being rewarded for failure.

The current schedule 8 regime reflects the railway structure that existed following railway privatisation, with Railtrack operating the infrastructure as a private entity and a majority of TOCs operating under franchise agreements.

The principle of a regime whereby delays are allocated to a party is an effective methodology of ensuring that all parties are held accountable for managing industry performance, however, Schedule 8 is hugely complex and no longer appropriate for today's railway.

In its current form, it does not incentivise TOCs to work with NR (and likewise NR to work with TOCs) to improve performance due to the flow of payments between organisations.

The significant amount of money that changes hands between TOCs, OA, FOCs and NR means that a significant workforce has been built to manage the process and relationships are commercially focussed rather than collaborative.

There are many instances where relationships have been broken or made combative due to the costs that are involved in the process.

Much of the time spent on reallocating delays or interpreting the rules and principles provides no benefit to customers, but a financial “win” for the party that successfully argues their case.

The removal of revenue risk for most operators allows a fresh look at the process with much of the complexities removed, especially around the benchmarking and payment rates.

The financial costs are significant and do drive the wrong behaviours, at times damaging relationships within operators and between the operator and NR, whereby the focus can be on moving delays, rather than solving the root cause.

GBR awarding franchises provides an opportunity to remove much of this complexity and cost, moving to a simpler model, with payments flowing in one direction from operator to GBR.

Significant thought will need to be given to how GBR are incentivised to improve performance. One suggestion would be to allocate budgets for performance improvement purposes. These Performance Funds could be used to solve local “route” issues and for funding cases to be agreed as part of the existing performance management process.

Any changes to the process should be with the onus on delivering performance improvement, rather than financial penalties and ensure that any financial penalties do not remove funding away from performance improvement activities.

The background mechanisms of schedule 8 (such as benchmarking and calibrations) do not provide passenger benefit and examples can be found where operators have been penalised for delivering improved performance.

With Operators no longer on financial risk, the principle of Schedule 8 (compensating Operators for loss of revenue resulting from disruption) no longer applies.

Any changes will have to be well thought through with regards to TfL, Open Access and Freight Operators, which in theory will remain at revenue risk.

Question 2: Do you have any views on whether we should make no changes to Schedule 8 in PR23, or pursue a small number of incremental reforms to ensure it remains fit for purpose as a baseline regime?

There will be significant complexities involved in incremental changes and for simplification, it may be easier to “switch” the industry over to the new regime at one time on the introduction of GBR.

Question 3: Do you agree with the areas we have identified as priorities for PR23? Are there any other significant issues that we should seek to address?

These appear to be light touch approaches.

Simplifying the process for setting benchmarks and allowing them to be changed at more regular intervals will be a welcome change and must work together hand in hand (if the process remains complex, yet the frequency is increased, any savings will likely be swallowed in consultancy/legal fees).

Changing schedule 8 to a similar model of TfL’s schedule 7 regime*, where there is clear ownership of delays and the financial penalties are easily understood. This model encourages collaboration and performance improvement, rather than the shifting of delay minutes.

*The TfL/MTREL schedule 7 regime provides a flow of payment from MTREL to TfL for delays experienced by the operator (excluding those caused by other operators). Failing to call at a stations also results in payments being made, based on the time of day and station footfall.

Chapter 3: Proposals: Cross-cutting changes across sector regimes

We welcome views on the cross-cutting proposals in this chapter.

Question 4: Would you support Proposal A [to base Network Rail's benchmarks only on past performance]? Do you have any views on the proposed methodology set out?

In principle, this is a sensible suggestion, but a preferred approach would be to remove the benchmarks for TOCs whilst retaining a simplified version for FOCs.

TOC payment rates could be either a fixed amount for all trains or, based on historical passenger counts and reviewed each year, following the DfT annual passenger counts.

If benchmarks are to remain, they must be accurately calculated and not based purely on historical data, as this provides a negative incentive to TOCs to improve performance.

Forecasts should be used based on proposed performance improvement activities (such as infrastructure improvements, new trains, methods of work, etc), intended benefits and other external factors, such as planned disruption through engineering projects (e.g., HS2).

The impact of Covid (and any other unforeseen major disruption to services) is not discussed. The creation of Covid related schedule 8 overlays has resulted in significant expenditure on consultants and the creation of another layer of contracts.

Question 5: Would you support Proposal B [to annually update benchmarks to make benchmarks more flexible]? If benchmarks were to be updated annually, do you favour achieving this through a rolling update (Option B1) or through a modelled approach (Option B2)?

If operators are not at revenue risk, the need for benchmarks is removed.

If benchmarks remain, proposal B/B1 is the more sensible approach, using a modelled approach, which would incorporate historical trend and future potential impacts (B1) is the preferred option.

Consideration must be given to how a franchisee could bid for a contract, knowing the likely financial impact could change throughout the contract period, which could then lead to an attempted financial renegotiation, meaning wooden dollars get pushed around between GBR and the operator.

It must be made simpler and more straightforward. The creation of supplemental agreements only benefits lawyers and consultants.

Question 6: Should Proposal C [to implement joint or shared allocation of delay minutes within Schedule 8 itself] be a priority for reform in PR23? If you would like us to consider Proposal C further, please set out how it can best be implemented (e.g. including incident types that should be subject to joint or shared responsibility).

Incidents are not always binary and for some instances, shared responsibility would make sense. This would require a fuller review of the DAPR, but some examples could be vandalism (when in network sidings), station delays and police attention to trains (as both GBR and Operators will own the relationship with BTP).

This would only work if the incident itself was deemed a split responsibility and overcomplicating incidents as 60/40, 70/30, 50/50 etc would make the situation worse.

The example of fatalities does not mention the penalties for operators when platforms remain closed post incident. Again, penalising both operators and NR for instances that are outside of their control does not support improvement.

Simplified target setting would be a preferred methodology for instances where the operator or NR have limited control (such as fatalities, bovine incursions, etc) would ensure improvements, but without perversely penalising an operator or infrastructure owner.

This could be based on historical trends and forecasting against planned improvements/degradations.

Chapter 4: Proposals: Passenger regime

We welcome views on this chapter's proposals for the passenger regime.

Question 7: Would you support Proposal D [to more accurately incentivise TOCs to limit delay to other operators], implemented through Option D2 [to update payment rates annually through a rolling update of the TOC responsibility matrix]? Do you have any views on the options set out?

TOCs are incentivised to limit delays to other operators, by reducing their own delay, they reduce their impact and the cost.

Radically changing the system and removing payments from GBR to TOCs would mean there is no financial incentive for an operator to be "disrupted" and would therefore ensure that they assist with robustly recovering the service.

Options D1/D2 both appear to add complexity to the process and there is uncertainty as to whether the various systems could cope with such an approach.

Moving to a similar model as the TfL schedule 7 agreement but making the operator responsible for their cause TOC on TOC delay would encourage the right behaviour.

The use of "fail to mitigate" where there is a clear case that an incident has been handled poorly would also ensure that operators have good quality service recovery processes in place.

Question 8: Should Proposal E [to change the allocation of unidentified delays between Network Rail and operators] be a priority for reform in PR23? Are you able to provide evidence on the benefits and costs of the proposal or to inform the allocation of unidentified delays?

Does this refer to sub threshold or unidentified delay? In either case, this should not be a priority.

However, on train technology can be used to improve the identification of delays (OTMR data, GPS, etc) and using those sources of data for delay attribution purposes (and making them easily available) should reduce the amount of unallocated delay.

Funding should be made available for improving access to these systems and make it part of the concession agreement that this information be made available for the internet of things.

In genuine instances where the cause of delay cannot be found, payments should not be made by either party (noting that this would need to be robustly managed and fail to mitigate could apply for larger delays).

Question 9: Should Proposal F [to reflect the wider financial impacts of delays in Schedule 8 compensation] be a priority for reform in PR23? If this proposal was taken forward, would you favour formulaic recovery (Option F1) or actual sums recovery (Option F2) to achieve it?

Schedule 8 isn't designed to compensate operators for passenger compensation and Williams/Shapp isn't clear whether operators retain responsibility for Delay Repay costs (it is assumed that removing revenue risk will also remove delay repay risk).

A simpler mechanism be that operators have a cap on delay repay costs and any payments above that are at GBR's risk, therefore incentivising both parties to reduce delays, but removing the need for reflecting these costs in the schedule 8 regime.

Chapter 5: Proposals: Freight and Charter regimes

We welcome views on this chapter's proposals for the freight and charter regimes.

Question 10: Do you agree with our preferred high-level approach for the freight regime, to keep the current regime broadly unchanged for CP7? Are there other elements of the freight regime or its calibration that should be considered for reform in PR23?

Rather than a delay minutes/cancellation-based regime, an overall performance target for flows could be created, whereby the overall impact of trains is penalised, with penalties flowing into a performance fund.

Question 11: Would you support Proposal G to update the evidence base underpinning the calibration of the freight payment rate?

We would propose a complete review of the incentivisation/penalty regime for freight. The current system, where costs are capped, does not provide FOCs with the incentive to improve performance. It is acknowledged that any system must take into consideration the commercial model that FOCs operate under.

Question 12: Should Proposal H, to revisit the calibration of caps, be a priority for reform in PR23? Can you provide evidence demonstrating whether or not the supplements and caps are currently calibrated appropriately?

We would propose a complete review of the incentivisation/penalty regime for freight. The current system, where costs are capped, does not provide FOCs with the incentive to improve performance. It is acknowledged that any system must take into consideration the commercial model that FOCs operate under.

Question 13: Do you agree with our preferred high-level approach for the charter regime, to keep the current regime broadly in place for CP7? Are there other elements of the charter regime or its calibration that should be considered for reform in PR23?

We would propose a complete review of the incentivisation/penalty regime for freight. The current system, where costs are capped, does not provide FOCs with the incentive to improve performance. It is acknowledged that any system must take into consideration the commercial model that FOCs operate under.

Are there any other comments you would like to make?

A radical approach is needed to replace an overly complex process which does not incentivise operators and NR to improve performance and costs the industry millions per year in administrative costs.

The proposed approach does not appear to be one of significant change that will drive the financial savings and performance improvement that is required.

A proposed approach could be:

- 1) Move to a system aligned to the TfL schedule 7 process, where operators are incentivised based on the service type they operate (metro, long-distance, rural, etc) and stations they serve (based on footfall)
- 2) Payments from GBR to Operators must stop (as the operators will be under contract to GBR to run the service on their behalf). This would require a review of the approach to TAC. It must be remembered that schedule 8 is not significantly changed from when Railtrack was a shareholder owned organisation
- 3) Retain the STAR model
- 4) Penalties should be based on how critical the trains are (i.e., peak, and first/last trains of the day costing more)
- 5) A different approach must be taken to incentivise GBR to improve performance and work closely with operators. Targets that provide a financial incentive at the end of the year, whereby if an operator achieves its performance target, a bonus payment be made, and any financial penalties be allocated to performance and customer experience improvement funds
- 6) One size does not fit all, freight, OA and TOCs are all different types of operators
- 7) Williams/Shapps discusses removing DAB (it is not discussed in this proposal). Simplifying the approach will reduce the number of contentious issues, there will always be points of clarity that will need to be agreed. Regional (MD level) and National (Industry level) Performance Boards could adjudicate on the rules of delay attribution. Disputed incidents should never be escalated above Level 4 (Route/Operator MD level) based on the principles agreed in a simplified DAPR (owned by NPB).



Peter Swatridge
Head of Regulatory Economics
Network Rail

Daniel Brown
Director, Economics, Markets and Strategy
Office of Rail and Road

10 September 2021

Dear Dan,

Network Rail's response to ORR's technical consultation on the PR23 review of the Schedule 8 train performance regime

This letter sets out Network Rail's response to ORR's technical consultation on the "PR23 review of the Schedule 8 train performance regime", issued on 17 June 2021. The main body of this letter summarises the key points which Network Rail considers that ORR should factor into its review of train performance incentives, and a high-level overview of our response to the priority areas for incremental reform proposed by ORR. The annexes contain detailed responses and supporting evidence for each of the proposed reform areas and our views on a number of the 'other options considered' by ORR.

The remainder of this letter is structured as follows:

- Summary
- Context of the PR23 review – Network Rail view
- Additional high-level Network Rail comments on ORR's proposed reform priority areas
- Suggested next steps
- Annex 1 – Detailed argumentation and legal advice sought on the need to have Schedule 8 in operation for all operators
- Annex 2 – Network Rail's response to ORR's detailed incremental reform proposals
- Annex 3 – Network Rail's response to 'other options considered' by ORR

Summary

Performance is one of the most important drivers of passenger satisfaction. A high-performing railway cannot be delivered by the Infrastructure Manager (IM) or Train Operating Company (TOC) alone and needs to be a joint endeavour with well aligned incentives that are geared towards delivering passenger outcomes. Passengers do not care which party is to blame when they experience delays, but they expect high quality information when delays do occur, and that the railway 'pulls together' to get them to their destination as soon as possible.

Reasonable levels of compensation for fluctuations in performance are appropriate to protect commercial operators' businesses and to reduce passenger discontent. Historically, Schedule 8 has largely focussed on the former. PR23 presents an opportunity to rectify this in the interest of



passengers and freight users such that all parties, both IM and operators, are incentivised in a way that directly links to passenger outcomes (and passenger recompense). To this end, we propose that Delay Repay costs are reflected in performance regime going forward, and as part of our response put forward specific proposals on how this could be implemented in practice.

COVID-19 has accelerated change in the railway – leading to the replacement of The Department for Transport’s (DfT’s) franchises with Emergency Recovery Measures Agreements (ERMAs) i.e. management contracts - and could possibly lead to a long-term reduction in railway patronage. The combination of the recently published Williams-Shapps Plan (the Plan) and the start of ORR’s PR23 periodic review, represents a unique opportunity to radically improve the industry’s performance framework, both in the near-term and to advance the aims of the reformed railway through the Plan. Whilst it is recognised that ORR will need to work within the current legal and regulatory structure for PR23, it is important that it is also mindful of the broader industry Plan and works closely with those setting the direction of travel for performance arrangements in future: ORR should use the PR23 process to support and complement wider industry reform.

Context of the PR23 review of train performance incentives – Network Rail view

Since privatisation, Schedule 8 has provided a compensation mechanism for commercial operators against fluctuations in performance outside of their control. Schedule 8 was also aimed at providing an incentive mechanism to Network Rail and operators to reduce the delays that they cause, with the aim of improving system wide performance, though these incentive effects are generally regarded as second order to the primary aim of providing revenue compensation.

Whilst the Schedule 8 mechanism was arguably historically necessary, we must now recognise that things have moved on. As a result of Covid-19 and the wider aims of the rail reform programme (as set out in the Williams-Shapps Plan), a large majority of operators no longer hold the revenue risks associated with fluctuations in demand. It is likely to remain this way for the foreseeable future with the introduction of concession style Passenger Services Contracts (PSCs). Furthermore, the Plan has clearly outlined the need for better whole-industry outcomes through increased alignment of track and train to deliver benefits to passengers, and to reduce the tensions associated with Delay Attribution – a key driver of the existing Schedule 8 incentive regime.

In its PR23 review of train performance incentives, we firmly believe that everything ORR does should be aiming to progress the reform agenda as far as possible. This direction should come from the Plan and the direction set out by DfT in its response to this consultation. Our response, we believe, reflects the aims of the reform programme. We will continue to work hard to further align these views as we move through the PR23 process.

Following the direction of travel of the reform programme, we agree with the notion that DfT specified operators (in due course PSC operators) should no longer face Schedule 8, as they no longer face the revenue fluctuations associated with performance. However, we disagree that Schedule 8 needs to remain ‘switched on’ for these operators even where resultant money flows are ‘a passthrough’ to funders. In fact, we consider that this could cause problems as this could lead to leakage of Schedule 8 monies from the industry (back to DfT and vice versa), and a need for



continued trading arrangements (which are often complex and time consuming) between Network Rail regions. We also note that calibrating the regime for these operators would require significant investment of industry time and financial resource, a cost which will ultimately be borne by the taxpayer. We believe it would be inappropriate for ORR to require the taxpayer to bear that cost in the absence of any clear benefit of doing so. Leaving Schedule 8 'on' for DfT operators also impedes the opportunity for industry culture change if the performance arrangements are perceived to be similar to what they are now and if incentives are distorted by having multiple regimes – something that the Plan is actively trying to avoid in a future railway. Further to this, we also provide, in Annex 1, further detail of our views on why Schedule 8 should not apply to DfT specified TOCs in CP7, and how the removal of Schedule 8 for these operators could work in practice and in the bounds of the existing legal framework.

Whilst we are of the view that Schedule 8 should no longer apply to DfT specified (ERMA/NRC/future PSC) operators, we agree with ORR that commercial operators (namely open access and freight) will need a compensation mechanism to protect them from performance fluctuations outside of their control due to the revenue exposures they face. It is this residual Schedule 8 regime that ORR should focus on in PR23 to ensure that the regime is fit for purpose both now, and enduringly as the industry structure changes. This should support the aims of the Plan, in advance of new railway legislation and in the interest of passengers. Furthermore, if the reformed PR23 regime is successful in driving strong performance and passenger outcomes, then GBR may wish to consider 'replicating' the regulatory regime through PSC contracts if revenue risk is reintroduced for some operators.

Additional high-level Network Rail comments on ORR's proposed reform priority areas

Based on ORR's incremental reform proposals:

We endorse:

- ORR's ideas around making benchmarks more mechanistic, on the basis of historical data and making them more flexible through annual updates. Our preferred option is to do this on the basis of historic data across a four-year period, 'knocking out' the best and worst years (to remove the effects of any extreme events e.g., Covid) and averaging performance in the remaining years to derive a benchmark. This benchmark would then be updated annually for the latest data. This would significantly reduce forecasting errors and their resulting inappropriate money flows from the system and retain the existing approach of using two years' worth of data to recalibrate the benchmark (albeit with more frequent recalibrations).
- The proposal to make payment rates "full and final" for all operators and to therefore justifiably remove the SPP mechanism in respect of passenger operators. This ought to improve relations between Network Rail and operators by removing the rancorous claims process, whilst also ensuring that operators are satisfied with the level of compensation provided.
- The proposal to introduce sharing of the financial consequences for certain delays through Schedule 8, i.e. delays of a certain nature would be split in a set proportion (e.g. 60/40, 70/30) between Network Rail and operators. We support this idea as we think that it is consistent with the reform agenda which is trying to improve collaboration in the industry to the benefit of passengers.



- The proposal to update Schedule 8 payment rates annually to reflect new evidence of the relationship between TOC-on-self and TOC-on-TOC delays. We agree that this is the right thing to do for passengers as it will make operators more focused on whole-system delay. We prefer this option over the proposal to measure ‘in year’ TOC-on-TOC delays as this will likely require data and systems changes beyond the timescales of PR23.
- That the freight regime needs a full recalibration as this has not been done since PR08 – we agree with this and will support ORR and the freight operators in doing this. The freight regime is already much simpler than its passenger counterpart and is based on measures of TOC-on-TOC delay, so we believe that it has the intended incentive effects, subject to the parameters being fully updated to reflect actual responsibilities for delays.
- That the freight annual and incident caps are worthy of a review. We consider that this is necessary to make sure that freight operators take responsibility for larger incidents that they cause. Our view is that the cap on financial liability may be necessary to protect freight operators’ businesses. However, we consider that the current caps are not representative of the true costs imposed by operators, and that this has ultimately led to perverse incentives during significant incidents where the cap has been reached – with freight operators not financially encouraged to resolve delays that they have caused.
- That ORR is broadly accepting of ‘overlay’ agreements. Overlays have shown some early signs of benefiting the industry greatly in recent years, and we are keen for this to continue.

Though many of the overlay agreements are in the early stages (therefore it’s too early to report back in detail on their efficacy), Network Rail entered into an overlay formally known as the East Coast Partnership (ECP) almost two years ago. This collaborative agreement has reported:

- That there are ‘quick wins’ available which will improve performance and revenue growth which the ECP was able to promote and deliver, unlocking ideas sat dormant for years;
- That the change of money flows removed much of the emotion around major incidents, as the financial issues between each organisation diminished;
- That the overlay has accelerated collaboration and culture change with ideas generated from the front line being delivered and those benefits being felt ; and
- That more generally, there is much improved engagement and collaboration between Network Rail and LNER teams.

ORR’s acceptance of overlays is positive, however we would further encourage ORR to be supportive of overlay agreements in CP7. In particular, we would like ORR to reconsider its position on the legal enforceability of overlay agreements given that it is a bespoke contract between Network Rail and operators (i.e. a contract to which ORR is not party to) akin to those contracts between funders and operators to which ORR has no powers over.

We have differing views on:

- ORR’s statements in its consultation about Schedule 8 being a success and “working as intended”. Whilst this may have been true in earlier control periods, this is now against a backdrop of declining performance and passenger dissatisfaction in recent years and the various issues with performance cited in the Plan.



- The Review of Delay Attribution (DA). ORR has tasked industry to review DA, which we agree with, however there is no backstop offer from ORR to get involved if the industry fails to reform DA on its own. We strongly believe that ORR does have the power to step in and will be encouraging ORR to do so if necessary. In fact, we believe that, as a result of ORR's statutory duty to promote performance, it should step in if doing so is in the interest of improving performance of the railway. Finally, DA reform should also be cognisant of the reform programme and seek input from DfT to support this.
- Whether ORR is right in its interpretation of the legislation in that all operators need to be covered by Schedule 8, including nascent PSC operators. We have sought further legal guidance on this point and present this (along with additional argumentation for the removal of Schedule 8 for DfT specified TOCs) in Annex 1.
- The view that Schedule 8 must continue operating for operators funded by other governments (Transport Scotland, Transport for Wales, Merseytravel, Transport for London etc.). We would like ORR to recognise that bilateral performance arrangements between funders may be a better way forward than Schedule 8, and that it should be up to GBR to determine these arrangements (in a reformed railway). These arrangements are likely to be less about financial flows and more around working together to deliver a high-performing railway, with some payments in specific circumstances. ORR should support such agreements. Again, we provide some additional detail on this point in Annex 1.

Generally, we are supportive of many of the reforms proposed by ORR and the context of its review. Annex 2 provides further information on Network Rail's view on each of the priority areas of reform, supported by evidence in support of ORR's proposals where we agree, and evidence to counter ORR's proposals where we disagree. We also discuss, in Annex 3, the 'other areas considered' in ORR's consultation, and whether we think that there is further merit and evidence to suggest that these areas should be taken forward or dismissed at this early stage of the review.

Safety

In considering changes to Schedule 8, Network Rail is committed to assessing the extent to which each change improves or impacts on safety and will report any safety concerns as soon as they arise. We strongly encourage ORR to also consider safety factors throughout its PR23 programme.

Suggested next steps

Once ORR has taken note of the feedback from its consultation, we believe that some sensible next steps may be as follows:

1. ORR should continue its engagement with the industry on Schedule 8. One way to do this could be to set up an industry working group towards the end of 2021 and into 2022, to address the issues raised in stakeholders' responses to ORR's consultation. In due course, this group could then help oversee recalibration of any Schedule 8 parameters that need resetting for CP7. Network Rail would welcome continued and early engagement of this sort.
2. It would be very helpful if ORR could provide greater clarity on how it will take account of the PDFC review of passenger demand in the recalibration of Schedule 8 parameters, and the timings of this work.



3. Network Rail would welcome early sight of ORR's emerging views on the Schedule 8 regime before it publishes its second consultation on performance. This will enable us to work with industry in a collaborative way to ensure a smooth recalibration process despite the condensed timescales to achieve this.

If you would like to discuss the content of this letter in more detail, please contact myself or my colleague Rachel Grashion ([REDACTED])

Yours sincerely

Peter Swatridge



ANNEX 1 – DETAILED ARGUMENTATION AND LEGAL ADVICE SOUGHT ON THE NEED TO HAVE SCHEDULE 8 IN OPERATION FOR ALL OPERATORS

Schedule 8 should be removed completely for DfT-commissioned operators

1. This section makes the case for full removal of Schedule 8 for operators in CP7, and how this aligns with the legal requirements of a performance regime set out by the Railways (Access, Management and Licensing of Railway Undertakings) Regulations 2016.¹

What are the reasons for turning off Schedule 8 for DfT funded operators in CP7?

2. Network Rail considers that ORR's position in respect of the retention of Schedule 8 for DfT-commissioned operators is not well founded. This is primarily due to DfT funded operators no longer being subject to revenue risk.
3. Historically, ORR has stated that the primary role of Schedule 8 is to compensate train operators for the financial impact of unplanned service disruption caused by Network Rail and other train operators². However, the introduction of ERMAs (and NRCs) has removed this revenue exposure to these operators, eliminating the primary role of the Schedule 8 regime. Over time, DfT operators are expected to transfer to PSC contracts, which are also not expected to involve operators taking revenue risk (although different markets may be treated in different ways). Therefore, Network Rail considers that Schedule 8 should be removed for DfT commissioned operators in CP7.
4. It is acknowledged that there may be circumstances in which revenue risk is reintroduced for some operators. In that case, Network Rail accepts that it may be appropriate to 'replicate' Schedule 8 (or something similar) for such operators as the performance regime contained in PSC contracts. The proposals set out later in this paper allow for this to be done easily.
5. Although, Network Rail's position is that Schedule 8 should be turned off for DfT-funded TOCs who are not exposed to revenue risk, to the extent that data collection currently associated with Schedule 8 is used to help improve performance and make investment decisions, collection and analysis of such information should be retained. Similarly, other incentives (such as regulatory targets and reputational incentives) on Network Rail and operators should also help maintain incentives to perform, as set out below.

¹ The Railways (Access, Management and Licensing of Railway Undertakings) Regulations 2016: <https://www.legislation.gov.uk/uksi/2016/645/made>

² <https://www.orr.gov.uk/sites/default/files/om/sch-4-8-consultation-2012.pdf>



Removing Schedule 8 for DfT funded operators will result in other benefits for the industry

6. Removing Schedule 8 for DfT funded operators will likely lead to several additional benefits for the industry. These benefits are set out below:

It will result in a reduction in 'leakage' of funds away from their intended purpose, which is contrary to the interests of passengers and taxpayers

7. Under the ERMA, DfT receives farebox revenue and pays most operating costs incurred by operators: train operators are not exposed to revenue risk³. For the purposes of Schedule 8 however, ORR's position appears to be that payments rates would be set as if the operators were still on revenue risk. Therefore, any Schedule 8 flows between the operators and Network Rail are simply passed back to DfT - the operators no longer need, and no longer enjoy the protections provided by, Schedule 8. Moreover, there is currently no mechanism that would allow these financial flows between Network Rail and DfT (via operators) to subsequently be returned to the original source. This means, if Schedule 8 is retained by ORR for DfT commissioned operators:
- a. Should Network Rail outperform benchmarks in CP7, such that an operator incurs a liability to Network Rail under the terms of Schedule 8, that liability would be passed on to the DfT (via ERMA) resulting in an increased and unbudgeted cost to the taxpayer of the railway; and
 - b. Should Network Rail underperform benchmarks, it will incur payments to operators through Schedule 8, which will ultimately be returned to DfT. Since there is no direct mechanism to return the funds to Network Rail, this would represent a reduction in investment in the railway which would harm passengers and freight users.
8. Removing Schedule 8 for DfT-commissioned operators would resolve this problem, ensuring that funds are retained for their intended purpose. It would avoid the taxpayer incurring unnecessary and unhelpful liabilities to Network Rail. Likewise, it would avoid leakage of funds from the railway through payments from Network Rail to DfT, allowing Network Rail to effectively plan business operations and decisions, and permitting investment in the railway to take place in the way that is intended in the interests of railway users.

Removing Schedule 8 will help avoid the conflicts between Network Rail and operators, which is at the heart of the Williams-Shapps plan

9. Furthermore, removing Schedule 8 could provide incentives for TOCs and Network Rail to dispute fewer delays. Around 40% of delays are disputed (87% of which are by DfT commissioned operators⁴), which consumes a significant amount of industry resources and time, has a considerable impact on industry relationships, and can take lengthy periods of time after extensive escalation processes. Despite the creation of ERMA (and NRCs) where TOCs no longer take on any revenue risk, we understand that disputes have *not* been reduced (as would be expected). Shifting incentives for the industry to collaborate – rather than engage in disputes – is at the heart of the Williams-Shapps plan. Failing to take the opportunity to remove a

³ DfT payments to passenger rail operators under emergency agreements, <https://www.gov.uk/government/publications/dft-payments-to-passenger-rail-operators-under-emergency-agreements>

⁴ Network rail analysis, data on number of incidents and number of disputes between 2019/20 P05 – 2021/22 P04, including DfT, TS, TfW,



major source of conflict is likely to be seen as a significant regulatory error that would be contrary to wider rail reform. It should be noted that the PSC regime will create incentives for the industry to collaborate: retaining Schedule 8 would directly conflict with this new incentive.

Saving industry costs and time, and reducing financial risk

10. Schedule 8 is costly to both calibrate and maintain. The current system follows a “bottom-up” approach to calibrating the regime, whereby calculations are undertaken at a very granular level and consequently very significant resources are consumed (both in terms of the industry’s time and expenditure on detailed external modelling). An example of this is the creation of a ‘responsibility matrix’ which sets out how each Service Group tends to disrupt every other Service Group and is needed to set the operator payment rates. Historically, this matrix has needed to be ‘full’ in the sense of relating every operator’s impact on every other operator. This approach is both costly and complex, requiring a high amount of industry resources and time. For instance, the costs of industry resources and consultancy (such as in PR18 and the regular within Control Period recalibrations that are necessary to maintain the regime) could be avoided to a significant extent if Schedule 8 was removed for DfT-commissioned operators.
11. Likewise, significant industry resources are expended on administering the regime. Costs are incurred in everything from populating contracts, calculating liabilities, administering payments, undertaking bespoke recalibrations following changes (e.g. as a result of enhancements, changes to services or timetable changes) and disputing liabilities. Much of these costs could be eliminated by removing Schedule 8.
12. In addition, the significant complexity of undertaking the full calibration analysis (especially the work involved in the responsibility matrix) increases the risk of errors, resulting in incorrect or inappropriate financial flows within the regime. The CP5 regime, for example, subsequently had to be reset and financial adjustments were undertaken, following an error in the responsibility matrix. Rectifying this error was incredibly complex and time-consuming. Removing Schedule 8 for DfT commissioned operators would significantly reduce the risk of calibration errors, the financial risk created, and the time and effort needed to address such errors.

The regime can still provide appropriate protections and incentives for non-DfT operators

13. Removing the regime for DfT commissioned operators – for which the regime is no longer relevant – does not mean detrimental effects to the regime for non-DfT commissioned operators, provided it is designed and calibrated appropriately. Indeed, it will mean that the focus of efforts going forward can be on ensuring that the regime is as accurate as possible in respect of operators which continue to be subject to the regime (especially freight operators, for example, in respect of which the payment rate has not been updated for several control periods).
14. Section 5, below, sets out our proposals for how the regime should be calibrated so that it still provides appropriate protections and incentives for non-DfT commissioned operators.



Removing the regime lays the groundwork for the Williams-Shapps Plan and the PSC contracts

15. Under the Williams-Shapps Plan, it is anticipated that track access agreements – including the Schedule 8 regime – will be “overhauled”, with a “new rules-based track access regime underpinned by legislation”⁵. Instead, Passenger Service Contracts between GBR and operators will govern the provision of train services and include provisions on train performance. The removal of Schedule 8 in CP7 for DfT-commissioned operators would help the industry to move forward and focus on getting the future regime right, rather than dwelling on a legacy mechanism that is largely redundant given recent developments. For example, it would allow the industry to focus on calibrating a new regime – especially for non-DfT commissioned operators which going forward will be the main participants of the regime – that not only works under the existing legislative arrangements, but would be equally applicable under new arrangements which implement the Williams-Shapps plan.

Importantly, its removal will not undermine Network Rail’s incentives for performance or ability to make decisions.

The removal of Schedule 8 for DfT-commissioned operators will not undermine Network Rail’s incentives on performance or ability to make decisions. Supporting evidence is provided below:

Other, more relevant and powerful, mechanisms will continue to incentivise performance

16. The removal of Schedule 8 for DfT-commissioned operators will not undermine incentives for good performance. In respect of Network Rail, the reality is that incentives to deliver good performance are driven by its overall regulatory targets, reputational incentives, duties as a public entity, compliance responsibilities with licence conditions⁶ set by ORR in the public interest, and local arrangements with operators (rather than Schedule 8). Network Rail is, after all, a public body charged with the stewardship of the nation’s railway and providing a safe and reliable service to railway users. It is not a private company driven by profit – in contrast to the arrangements in the sector under privatisation when Schedule 8 was established and contrary to some other regulated sectors in the UK – and has no substantive role in the organisation’s governance, managerial or remuneration structures. Additionally, the incentive mechanisms built into senior colleagues’ remuneration packages could continue to incentivise performance, as well as the reputational risk of poor performance, and strong regulatory incentives.

17. In respect of DfT-commissioned operators, it must be recognised that they are no longer exposed to the effects of Schedule 8 under the ERMA. As such, it is difficult to see how its removal could reduce incentives on those operators to produce good performance.

⁵ Paragraphs 20 & 45 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/994603/gbr-williams-shapps-plan-for-rail.pdf

⁶ Office for Rail and Road, ORR: „ Network licence conditions”, <https://www.orr.gov.uk/monitoring-regulation/rail/networks/network-rail/network-licence/conditions>



18. In addition, in the longer term, GBR will internalise any money flows resulting from performance increments or decrements: the purpose of which is precisely to create the appropriate financial incentives on GBR to manage performance efficiently. ORR themselves expect that Schedule 8 will be neutralised for DfT-commissioned TOCs⁷, and thus turning off Schedule 8 should have no real detriment to Network Rail's incentives on a like for like basis. Indeed, Network Rail will also still be exposed to Schedule 8 net money flows to OA, freight and 3rd party operators, which will continue to incentivise good performance.

The removal of Schedule 8 does not undermine Network Rail's ability to make appropriate decisions

19. Its removal will not undermine Network Rail's ability to make appropriate decisions since those decisions are best informed by local engagement which will continue under Network Rail's Putting Passengers First strategy. To the extent that data collection currently associated with Schedule 8 is used to help improve performance and make investment decisions, collection and analysis of such information will be retained.

20. Again, as the system transitions over the coming years as part of the rail reform programme, the industry's incentives and ability to make decisions from a 'whole-system' perspective – in the interests of railway users and taxpayers – will be substantially enhanced. This is because fares revenues and costs across the track-train interface will be internalised within GBR, with decisions made in a joined-up way and coherently.

Current legislation around Schedule 8

21. Network Rail's legal advice on the current legislation is set out below. This has been signed-off by the Network Rail Legal team.

22. ORR has proposed that all TOCs should be included in its Schedule 8 regime in CP7. This is in spite of the DfT-commissioned TOCs not being exposed to Schedule 8 money flows through passthrough arrangements in their contracts with DfT. ORR has made this proposal based on its interpretation of the legal framework that it is currently operating in. This section explores whether ORR's proposal is appropriate or necessary, and outlines Network Rail's position on whether DfT specified TOCs should face Schedule 8 in CP7, and if the current legal framework can accommodate this.

23. Current legislation, notably, The Railways (Access, Management and Licensing of Railway Undertakings) Regulations 2016⁸, requires the IM to establish a performance scheme to encourage the IM and TOCs to minimise disruption and improve performance of the network. ORR expects DfT commissioned train operators to have a performance regime that is set out in the IM-TOC track access contract (TAC - which ORR approves).

⁷ Exec Summary <https://www.orr.gov.uk/sites/default/files/2021-06/schedule-8-technical-consultation-june-2021.pdf>

⁸ [The Railways \(Access, Management and Licensing of Railway Undertakings\) Regulations 2016 \(legislation.gov.uk\)](https://www.legislation.gov.uk/uksi/2016/1004/contents/made)



24. Network Rail's position on the matter of the legal framework and the requirement to have a performance regime in the TAC between all operators (including DfT specified ones) and Network Rail is as follows:

- We note ORR's position but suggest that other approaches are possible.
- We welcome ORR being keen to use PR23 to make as much progress on the Williams-Shapps Plan, consistent with its current powers and duties.
- The detail of the Williams-Shapps Plan is still being worked up.
- Therefore, we consider that it would be best for ORR not to 'close down' options too early in PR23, so that it can contribute to the Williams-Shapps Plan reform agenda.
- We agree with ORR that the CP7 performance regime will need to work for Open Access, freight and potentially other non-DfT train operations.
- We note that freight operators' performance arrangements today are substantially different to those that apply to passenger train operators
- We note that ORR's current proposals seem to rely on there not being any "discrimination" in the performance arrangements. We would like to explore with ORR how those proposals have been built up, particularly the requirement for the regime to apply in a "non-discriminatory manner".
- We consider that it is evident that ERMA/NRC/PSC train operators have very different operational and financial features to other passenger train operators, most notably that they are not exposed to fare revenue risk in the same way. Therefore, ORR should consider the possibility of different performance arrangements applying to these train operators. We note that as the rules stand, the purpose of a performance regime is to encourage the IM and TOCs to minimise disruption and improve performance of the network.
- We would welcome exploring this area with ORR, over the next few months, as the details of the Williams-Shapps Plan become clearer.
- We also consider that if ORR were to impose the same performance arrangements (Schedule 8) on DfT-commissioned train operators through PR23, the differences in their fare revenue exposure could manifest itself in the detailed Schedule 8 parameters (notably the payment rates designed to reflect revenue losses) that would apply to them, through the recalibration process.

How would Schedule 8 would work in practice?

Overall principle of Schedule 8 for third-party operators

25. As previously outlined, Schedule 8 should stay in place for non-DfT operators (OA, Freight, and potentially third-party operators), to protect them from revenue losses outside of their control. However, there is an opportunity to introduce a simpler and less complex approach to Schedule 8 for these operators, in terms of their interactions with DfT commissioned operators, that improves upon the current approach. Indeed, as noted above, the



removal of Schedule 8 for DfT-commissioned operators provides an important opportunity to refocus industry efforts on the regime for non-DfT operators i.e. the ones that will be affected by the regime going forward.

26. The fundamental principle of the proposed performance regime for non-DfT operators is that it would be established to mirror Schedule 8's current high-level principles. Network Rail would still compensate non-DfT operators for lost revenue (and/or potentially costs going forward should the definition of losses be changed by the means of the PR23 process) caused by Network Rail, as the combined impact on non-DfT commissioned operators would be the same through Schedule 8. Likewise, it will be appropriate that non-DfT operators are also incentivised to avoid causing disruption to DfT commissioned operators and compensate for any losses associated with that disruption. By taking this approach, the regime would still be simple and internally consistent.

27. It is acknowledged that there may be circumstances in which revenue risk is reintroduced for some operators. In that case, Network Rail accepts that it may be appropriate to 'replicate' Schedule 8 (or something similar) for such operators as the performance regime contained in PSC contracts. The proposals set out here allow for this to be done easily.

Interaction with devolved administrations

28. This annex has spoken in terms of DfT-commissioned services. However, the proposal is that Schedule 8 could also be removed in respect of services commissioned by devolved administrations too (in particular, in respect of services commissioned by Transport Scotland (TS), Transport for Wales (TfW) and Transport for London (TfL). All of the above arguments continue to apply in respect of devolved services. In addition, especially in Scotland and Wales, doing so could be an important part of 'internalising' track-and-train under TS and TfW respectively. It is recognised that there are important nuances around 'cross-border' services e.g. West and East Coast services and Sleeper services, whereby the farebox revenues and responsibility for funding the infrastructure are not held by the same entity. In respect of such services, a bespoke agreement may be appropriate between Network Rail and the relevant entity. The content of those agreements will depend on the features of the services in question but are likely to include: principles setting out how such services will be treated and protected and provisions for any financial adjustments, if appropriate.

Calibration of the regime

29. Assuming that the principle of mirroring Schedule 8 as described above is adopted, it must then be considered *how* the regime should be calibrated in the absence of Schedule 8 for DfT-commissioned operators.

30. Network Rail proposes a more "top-down" approach to calibrating the new regime. This would mean undertaking the calibration analysis at a more aggregated level of granularity. For example, the freight payment rate would be established by considering the historic extent to which freight affected



the average passenger service and the value of that average service (rather than assessing the historic interaction of freight with each passenger Service Group and then averaging across all Service Groups).

31. This could lead to cost and resource savings, reduce the risk of calibration errors, and make the regime more proportionate to the magnitude of revenues at risk with the current circumstances of DfT-commissioned operators through ERMA's and NRCs. Given the possibility that the industry will move to a regime whereby responsibility matrices are updated annually rather than at the beginning of each control period (see ORR'S consultation), the cost savings and reduced risk from a simplified calibration process could be magnified significantly going forward.



ANNEX 2 – NETWORK RAIL’S RESPONSE TO ORR’S PROPOSED ‘PRIORITY AREAS FOR INCREMENTAL REFORM’ AND THE SMALLER ADDITIONAL CHANGES PROPOSED

For each proposed reform, identified in ORR’s consultation document, we provide a more detailed and evidenced response to the views set out in our covering letter above (which covers our response to ORR’s questions on its proposed approach and priorities, **i.e. consultation questions 1 to 3**). The views expressed, below, reflect the overall view of Network Rail as a result of internal stakeholder engagement exercise across the business. This is something that we will continue to do throughout the consultation process, and we will continue to update ORR ‘in real time’ as far as possible to ensure that any emerging views across Network Rail are captured and considered.

The tables, below, provide a detailed response to each of the reforms proposed by ORR. We have structured our responses in line with ORR’s consultation questions as follows:

Table A – priority areas for incremental reform	Table B – Small additional changes:
<p>Proposals cross-cutting across the passenger and freight regimes:</p> <ul style="list-style-type: none"> • Benchmark setting (ORR Consultation question 4) • Annual updates to benchmarks (ORR Consultation question 5) <p>Proposal specific to the passenger regime</p> <ul style="list-style-type: none"> • TOC-on-TOC incentives (ORR Consultation question 7) <p>Proposal specific to the freight regime</p> <ul style="list-style-type: none"> • Recalibration to reflect the latest evidence (ORR Consultation questions 10 and 11) 	<p>Proposals cross-cutting across the passenger and freight regimes:</p> <ul style="list-style-type: none"> • Shared allocation of delay (ORR Consultation question 6) <p>Proposal specific to the passenger regime</p> <ul style="list-style-type: none"> • Unidentified (unexplained) delays (ORR Consultation question 8) • ‘full and final’ compensation (ORR Consultation question 9) <p>Proposal specific to the freight regime</p> <ul style="list-style-type: none"> • Review of incident and annual caps (ORR Consultation question 12) <p>Proposal specific to the charter regime</p> <ul style="list-style-type: none"> • High-level approach (ORR Consultation question 13)

Finally, this annex concludes with a short section on the anticipated ongoing costs to Network Rail associated with the changes proposed by ORR.



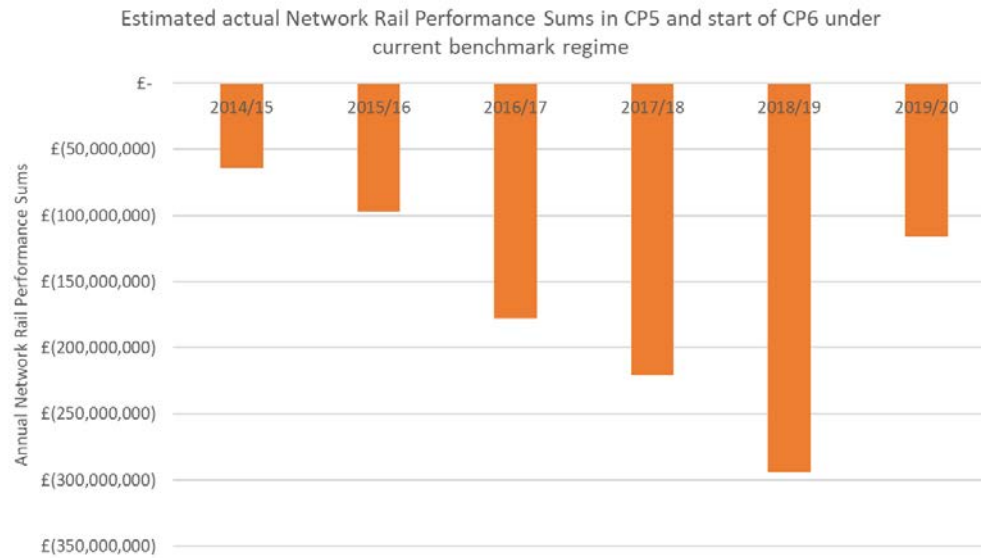
Table A – Priority areas for incremental reform

Reform area	Network Rail Response
Proposals cross-cutting across the passenger and freight regimes	
Benchmark setting	<p data-bbox="320 416 2179 488">ORR is proposing to base the Network Rail Schedule 8 benchmark's solely on historical data, without any adjustment for forward-looking performance trajectories (as is the case today).</p> <p data-bbox="320 517 2179 552">Network Rail strongly endorse this proposal as it will:</p> <p data-bbox="320 587 2179 622">Remove the need to try and forecast performance up to 7 years ahead of time through the recalibration process :</p> <p data-bbox="320 657 2179 794">Forecasting performance so far into the future is inherently problematic as it is difficult to account for all internal and external factors that can impact Network Rail's performance. For example, shocks from climate, unforeseen maintenance and renewals of infrastructure, and timetable changes are difficult and unreliable to predict so far ahead. Similarly, the performance of Network Rail and operators are intrinsically linked, and it is difficult to predict how these relationships will manifest over the long term.</p> <p data-bbox="320 829 2179 967">Furthermore, the non-linearity in the relationship between train volumes and performance, and track capacity interactions is also difficult to account for over time. As such, while there are factors within Network Rail's control, forecasts will be inherently flawed over such a time horizon. This leads to benchmarks which, over time, have historically contained compounding forecasting errors over a control period and grow further from reality.</p> <p data-bbox="320 1002 2179 1203">This is demonstrated in Figure 1 which shows how an estimate of the aggregated Network Rail Performance Sums under the current benchmark regime have evolved over time.⁹ A negative Network Rail Performance Sum means that Network Rail is paying out to TOCs on aggregate.¹⁰ As the benchmarks are calculated and set for CP5 (2014/15 to 2018/19) the chart shows that the further we move into the control period, the more the payment flows to TOCs grow, until they are recalibrated for the start of CP6 (2019/20). While it is recognised that the payments are in part caused by Network Rail missing its targets, this is also in part difficult to disentangle from the inherent difficulty in determining a challenging but achievable level of performance many years in advance.</p>

⁹ This analysis focuses only on the Network Rail Performance Sum and not the impact on the TOC (or other operator) Performance Sums.

¹⁰ This analysis reflects the passenger benchmark regime and so these flows are between Network Rail and TOCs, and as such exclude the Freight Performance Sum.

Figure 1: Estimated Network Rail Performance Sum under the current regime



Source: Analysis of PEARS data, CP5 and CP6 performance benchmarks and payment rates

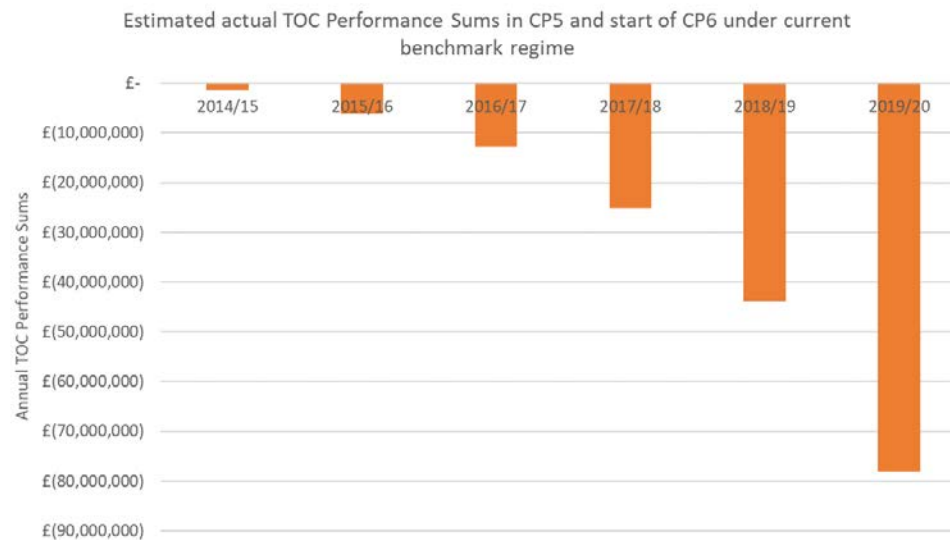
Furthermore, this pattern is not unique to Network Rail's benchmarks. As

shows, the estimated TOC Performance Sum outflows to Network Rail, generated as a result of TOC-on-Self disruption similarly grow over time. Crucially, TOC benchmarks are based on historic performance only and are set at a fixed level for the entirety of the 5-year control period. These two figures taken together reflect that the large financial flows – especially as the forecast period lengthens – may be partially related to the issue of forecasting so far in advance (rather than it simply being a case of underperformance of regulatory targets).¹¹



¹¹ While the recalibration of TOC benchmarks for CP6 occurred, FY2019/20 (the first year of CP6) faced large operator outflows on aggregate to Network Rail driven by several operators facing underperformance due to major timetable issues, strikes and staff availability.

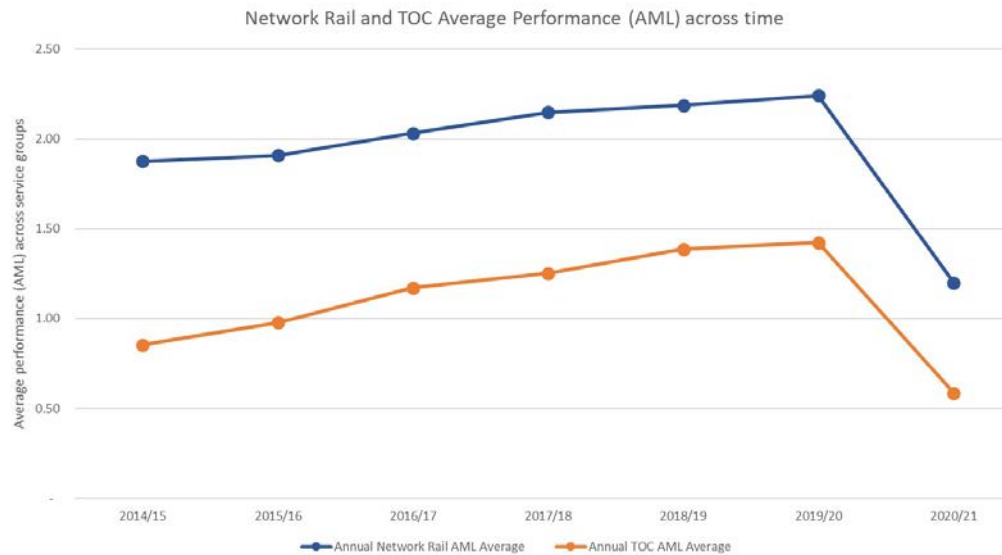
Figure 2: Estimated TOC Performance Sum under the current regime



Source: Analysis of PEARS data, CP5 and CP6 performance benchmarks and payment rates

As Figure 3 illustrates, it is recognised that the aggregate outflows of both Network Rail and TOC Performance Sums have occurred in part due to the average performance AML of both parties worsening year-on-year over CP5. However, the parallel trends in the chart also illustrate that the decline in system performance over time is misaligned with what was forecasted (or fixed regarding TOCs) to have occurred, with or without a performance trajectory.

Figure 2: Network Rail and TOC Average Performance (AML) across time



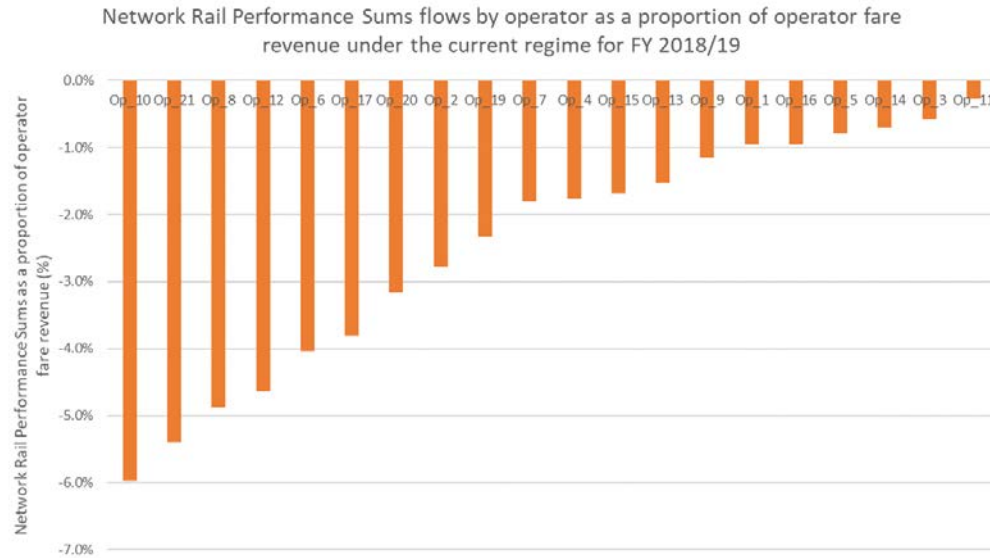
Source: Analysis of PEARS data

Removes the windfall gains and losses associated with the current regime:

Figure 3 breaks the aggregate Network Rail Performance Sums down to the operator level for FY 2018/19 (the final full year of data available pre-COVID). Here we can see large variability in the payment flows across operators during the final year of CP5. This illustrates how difficult it is to predict this far in advance, both at the aggregate and operator levels. It is extremely difficult to gauge the accuracy of forecasts; where they will be too high, and where they will be too low. As such, the payment outflows associated with poor forecasts may be distributed unevenly across operators (as well potentially as Network Rail regions) leading to windfall gains and losses. This uncertainty creates serious challenges for Network Rail and operators.



Figure 3: Network Rail Performance Sums under the current benchmark regime at the operator level as a proportion of operator fare revenue for FY 2018/19



Source: Analysis of PEARS data, CP5 performance benchmarks and payment rates, and operator revenue data from ORR¹²

Similarly, a corresponding effect is observed for the TOC performance sum in FY 2018/19 as show in

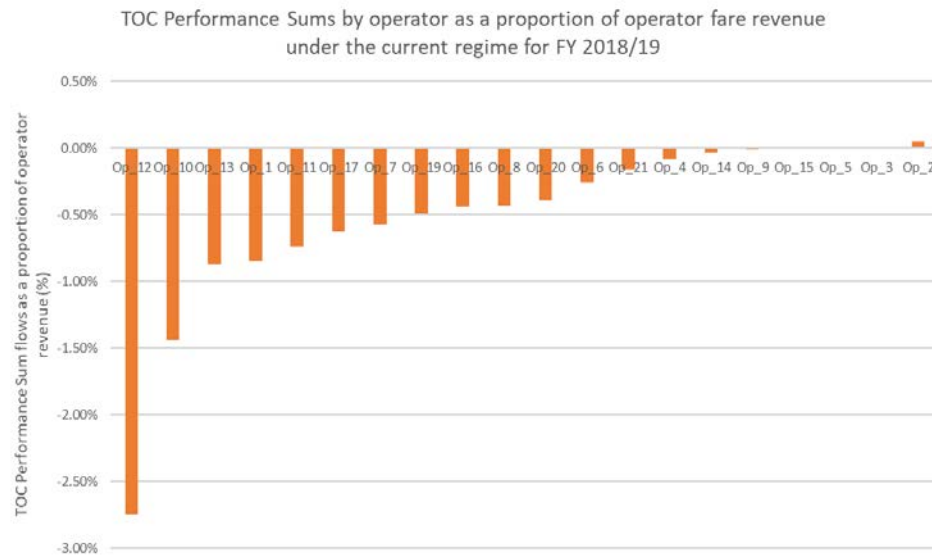
- 1.
- 2.



Figure 4. Although the payment flows are smaller (due to the absence of forecasted performance trajectories) there is still significant variability in payments flows at the operator level, resulting in a fixed benchmark regime in which there will be winners and losers.

¹² Revenue data for the range 2015/16 to 2019/20 covering 21 operators. See ORR ["Rail Industry Finance"](#).

Figure 4: Estimated TOC Performance Sum under the current regime by operator



Source: Analysis of PEARS data, CP5 and CP6 performance benchmarks and payment rates, and operator revenue from ORR

Overall, there appears to be evidence that the forecasts of future performance are difficult to estimate and that basing the benchmarks on more recent information could be beneficial.

Simplify the recalibration process significantly:

The current recalibration process involves the use of a Network Rail performance trajectory, which is essentially a 'target' level of performance that Network Rail is expected to achieve in each year of the control period. This requires planning at a level of detail which is not accurate due to many unknowns at the time at which the plan is required to set Schedule 8 benchmarks, which inherently leads to incorrect benchmarks and inappropriate money flows through Schedule 8. Moving to a mechanistic benchmark setting process would remove the need to forecast the unknowable. This should also allow the five-year planning within the industry to be done in a more cooperative and considered way without it being polluted by considerations of resultant (inappropriate) money flows from Schedule 8. The calculations involved in setting benchmarks based on historical data would also be much simpler, less time intensive and will require less resource. The use of factual data



will remove scope for disagreements between Network Rail and TOCs during the recalibration phase – something that has historically caused tension between parties in what is supposed to be a collaborative railway.

Align with the TOC side of the regime:

The current Schedule 8 regime incentives are misaligned as the ‘TOC side’ of the regime, where the operator is incentivised to minimise the disruption it causes to others, is based on historic performance, whereas the ‘Network Rail side’ of the regime is based on a stretching performance trajectory imposed on Network Rail. This has meant that historically TOCs have only had to perform better than they have in the past to receive a bonus, whereas Network Rail has had to perform better than their targets (which are more stretching) to get the same benefit. Aligning both sides of the regime will incentivise both Network Rail and TOCs in the same way, which in turn should lead to a more collaborative railway in which both parties have a reasonable chance of success.

In relation to some of the concerns outlined by ORR:

Though this proposal detaches Schedule 8 from the Network Rail performance trajectory, this would not mean that Network Rail would no longer have an incentive to perform against the trajectories and other targets imposed on it through the wider periodic review process.

Similarly, the proposed move towards targets set on the basis of past performance alone is highly unlikely to lead to Network Rail underperforming against its benchmark so that it can outperform in future years. In fact, the opposite could be true in that a more realistic target (based on actual performance in recent years) could be perceived to be more attainable by Network Rail, providing an incentive to beat the target in a more realistic and incremental way year-on-year.¹³ This is in contrast with current arrangements whereby the expectation is that Network Rail performance will improve, with this improvement ‘baked in’ to the benchmark such that Network Rail has to improve by even more than the expected improvement levels to achieve a bonus payment. Further to this, it is highly unlikely that Network Rail performance would decline through ‘gaming’ the new way of setting benchmarks due to the application of broader regulatory targets, rules and frameworks. This will mean that Network Rail will be continually held to account for its actions through the various mechanisms highlighted in the previous paragraph.

¹³ Although the literature has not reached a consensus on what form of goal (e.g. attainable, stretch, unattainable) is optimal in maximising performance, a study by [Garland \(1983\)](#) showed that if goals are not realistic, fair or perceived to be attainable, they can be detrimental to their efficacy on overall performance. Building on this work, [Fan, Gómez-Miñambres, and Smithers \(2020\)](#) showed how goal setting is a more effective motivator if people were able to achieve previous goals.



Finally, if ORR proceeds with this proposal then it must be cognisant of the associated funding arrangements. For example, if benchmarks are based on historic performance, then Network Rail would need to be allowed sufficient funding to at least maintain (or exceed) current performance levels. If Network Rail receives a significantly reduced CP7 funding settlement it could result in the backward-looking benchmarks being less achievable. However, this approach will always be more attainable than the use of a stretching performance trajectory, therefore we retain our strong support for this proposal, and recommend that ORR takes the funding arrangements into account in determining its approach to performance benchmarking.

Annual updates to benchmarks

ORR is proposing to introduce annual updating of the Schedule 8 benchmarks to reflect the latest evidence of performance.

Network Rail strongly endorse this proposal as it will:

Reduce the amount of work required:

If benchmarks are set in a mechanistic way on the basis of historic data, then Network Rail will be able to implement a formulaic process/model to calculate benchmarks. Once this process is in place an annual refresh will simply require the model owner to input the latest data to obtain a new benchmark, and some basic auditing and confirmation with each respective operator. This process will be far simpler to administer, less contentious and allows benchmarks to 'auto-adjust' to the latest evidence.

Incentivise continuous performance improvement:

As mentioned previously, benchmarks set on the basis of historic performance, provide an incentive for parties to continuously improve in an incremental way. Annual updates to reflect the latest performance data will further encourage this as any improvements in performance year-on-year will be captured in the benchmark. This will continuously reward parties until the point at which performance reaches an economically efficient level of performance i.e. the point at which the cost of performance is exactly equal to the benefits. At this point parties will be incentivised to perform at benchmark with little to no Schedule 8 payments, and a level of performance that should be optimal to both passengers and freight users, as well as funders. Furthermore, if a party performs worse than expected, then it will face an in-year penalty, but its benchmark will decrease. Annual benchmarking will capture any poor performance much quicker than existing methods, and quite quickly give an incentive for parties to recover, in the next year, from any poor performing years. The benchmark will realistically reflect the realities of the railway at a point in time.

React more quickly to shocks and other changes that impact on performance:



Following similar arguments to those listed above, setting benchmarks annually will allow the benchmark to reflect the current situation more accurately. This is particularly important where there are material changes to the railway as the annual reset will quickly capture the impacts if they are permanent, and include the impacts of any changes that have influenced performance (e.g. new services) not long after the change occurs.

ORR has outlined 2 methods of annually updating benchmarks:

Rolling historical performance:

This would involve annually updating the benchmarks to include the latest years' performance data. One suggestion is to take the last 4 years of performance data, 'knocking out' the top and bottom figures (in case of any outlier years) and averaging the remaining 2 years on a rolling basis. We strongly endorse this approach as it would provide a simple mechanism to update benchmarks for the latest evidence each year such that benchmarks are accurate and realistic. Furthermore, we also endorse the proposed method of calculating the rolling average as it has the benefit of removing any 'outlier' years whilst also having the ability to accurately capture any permanent changes in performance. For example, as we have seen recently, the Covid-19 pandemic has significantly impacted on performance levels due to the changes in traffic and passenger numbers. 2020/21 performance data will reflect these extreme fluctuations, and under this method would be considered an 'outlier' to be excluded from the benchmark. However, we anticipate that some of the pandemic's impacts on the railway will become permanent. If this is true, then eventually these impacts will become a permanent feature of the rolling benchmark.

As part of its final determination for PR18, ORR required Network Rail to propose performance trajectories at a Service Group level for their expected contribution to overall delays.¹⁴ These trajectories, which require significant resource to forecast future performance, are scrutinised by ORR to ensure they are stretching but realistic targets, as well as by the operators. This can lead to significant industry time and resource spent on predicting and debating future levels of delay contribution due to the financial impacts these have. While these trajectories would still be produced, a move to a historic data approach would simplify the Schedule 8 regime considerably, making it more transparent and aligned with the TOCs benchmarking regime.

Network Rail proposes to move to a system of an annually updated mechanistic rolling average benchmarks based on historic data only, using a 4-year top and tail approach to remove outliers in the data. This would be calculated at the service group level.

¹⁴ See ORR ["2018 Periodic Review Final Determination: Summary of conclusions for England and Wales"](#)



A top and tail 4-year (TT4Y) approach would use an average of 2 years of annual data to calculate the benchmark, after the highest and lowest averages have been removed. In using the most recently available four years, we are not incorporating data that would be too far from the present reality of the structure of the railway, moving away from a system of forecasting, reducing uncertainty and risk.

To illustrate the simplicity and benefits to a mechanistic rolling historic average approach we have taken two alternative benchmark methods and applied them to historic data:

- Simple rolling average (SR): This approach applies a rolling average to a fixed number of previous financial years' worth of AML performance data at a Service Group level. As part of our analysis, we vary the number of periods of AML data used from 13 (1 financial year) to 52 periods (4 financial years).
- Top and Tail rolling average (TT): This approach follows the simple rolling average approach; however, it removes the highest and lowest average annual AML performance from the calculation. As part of our analysis, we show this approach using 3 financial years (leaving median value after top and tail) up to 5 years of financial data (leaving an average of three years of performance data).

Each benchmark has a lag of 13 periods, meaning that the 13 periods of AML data immediately preceding the calculation of the benchmark are not used.¹⁵ These benchmarks are calculated mechanically at the Service Group level for each financial year. Also note that the data available in PEARS only goes back to 2014/15 and as such, the data limitations mean that we cannot illustrate the impact of a given variation of benchmark for all financial years.

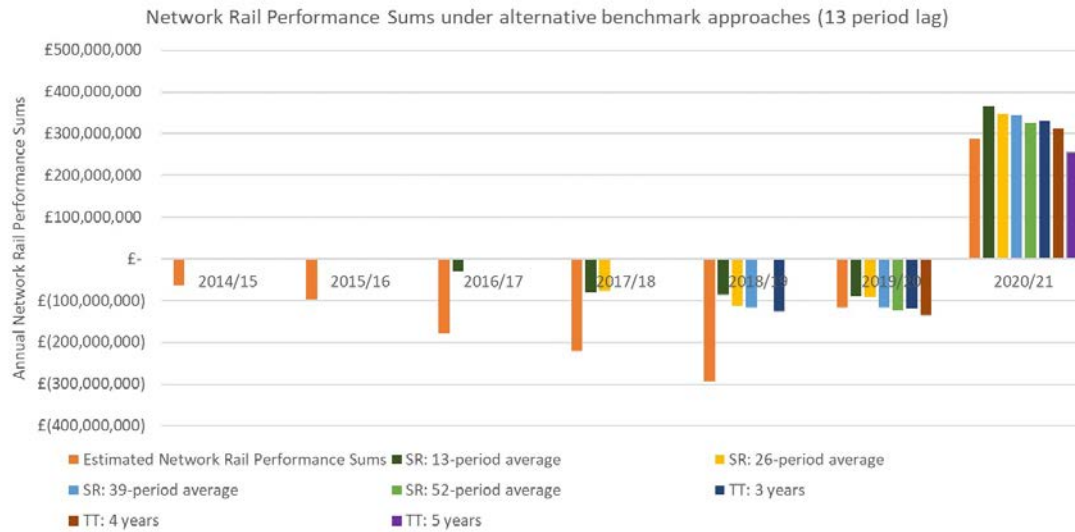
It is recognised that to the extent that there are changes to the railway in the future, for example new infrastructure or operators, it will not be possible to use a historic approach to calculate benchmarks. Bespoke analysis will be required to develop a benchmark until there is sufficient historic data.

Error! Reference source not found. 6 presents the results of this analysis which is only focused on demonstrating the impact to the Network Rail performance sum calculation. Compared to the estimated actual Network Rail performance payments under the current regime, both SR and TT performance approaches are lower in magnitude across all years except 2020/21. This reflects that the benchmarks are updated for more recent performance data, making payment flows more consistent over time. In comparison, by 2018/19 under the current regime the benchmarks, made more stringent under performance trajectories, are now out of line with actual performance with payments compounding overtime.

¹⁵ Alternatively, more recent AML data could be used to calculate benchmarks such as that available 42 days after the end of a period (once payment flows have been calculated), representing performance targets that could reflect an even greater relevance to the current performance reality.



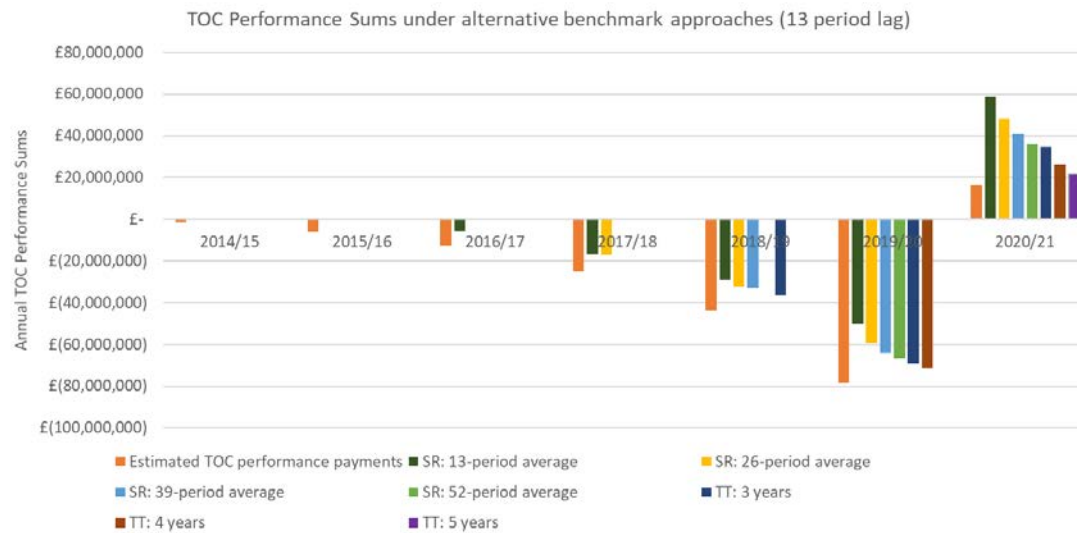
Figure 5: Estimated Network Rail Performance Sums under alternative benchmark approaches



Source: Analysis of PEARS data and CP5 and CP6 payment rates, combined with alternative benchmarks. Note that due to PEARS limitations SR and TT benchmarks cannot be shown for all years, and an absence of a column means that insufficient data was available (it does not mean the Performance Sum is zero).

This effect can equally be seen when applied to the TOC Performance Sum (see Figure 7).

Figure 7: Estimated TOC Performance Sums under alternative benchmark approaches



Source: Analysis of PEARS data and CP5 and CP6 payment rates, combined with alternative benchmarks. Note that due to PEARS limitations SR and TT benchmarks cannot be shown for all years, and an absence of a column does not mean the Performance Sum is zero.

While both approaches have the benefit of smoothing fluctuations in historic performance, the top and tail approach provides the extra benefit of dealing with extreme observations in a mechanistic way. For example, this can deal with temporary shocks to the system by removing this outlier from the benchmark calculation. Both approaches however can reflect persistent shocks to the system by reflecting recent data in its calculation of the average over time. As such, this mechanistic approach would remove the need for cyclical debate on what's in scope of the benchmark calculation in the instance Network Rail or an operator experience a temporary shock within a given financial year.

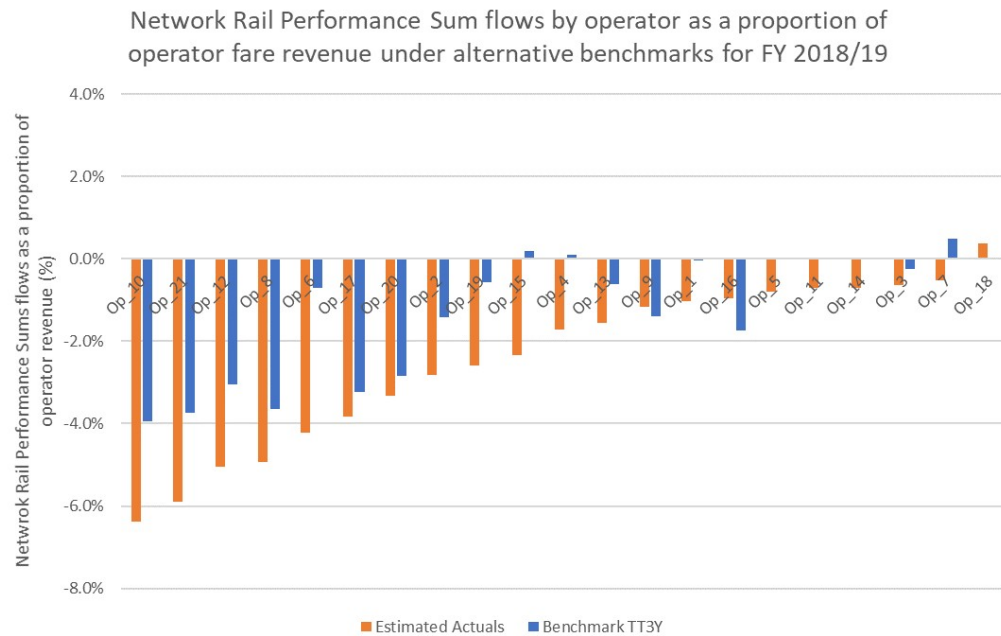
The proposal to move to a historic rolling average updated annually also reduces the likelihood of windfall gains and losses as:

At the operator level under the current regime, many operators have benefitted from inflexible performance targets. For most operators, Network Rail Performance Sums flows have been going to TOCs in ever increasing magnitude the further into the control period you are, except during COVID.



The mechanistic rolling average approach shrinks the payment flows across operators, making a less volatile and more conducive system. Figure **Error! Reference source not found.** demonstrates this for FY 2018/19 where we can see how the annual payment flows as a proportion of fare revenue are reduced for nearly all operators under a 3-year top and tail benchmark. The 3-year top and tail benchmark is shown in Figure 8 below as opposed to the top and tail 4 year as there is insufficient data to illustrate the latter for CP5, however it demonstrates the impact of changing method.

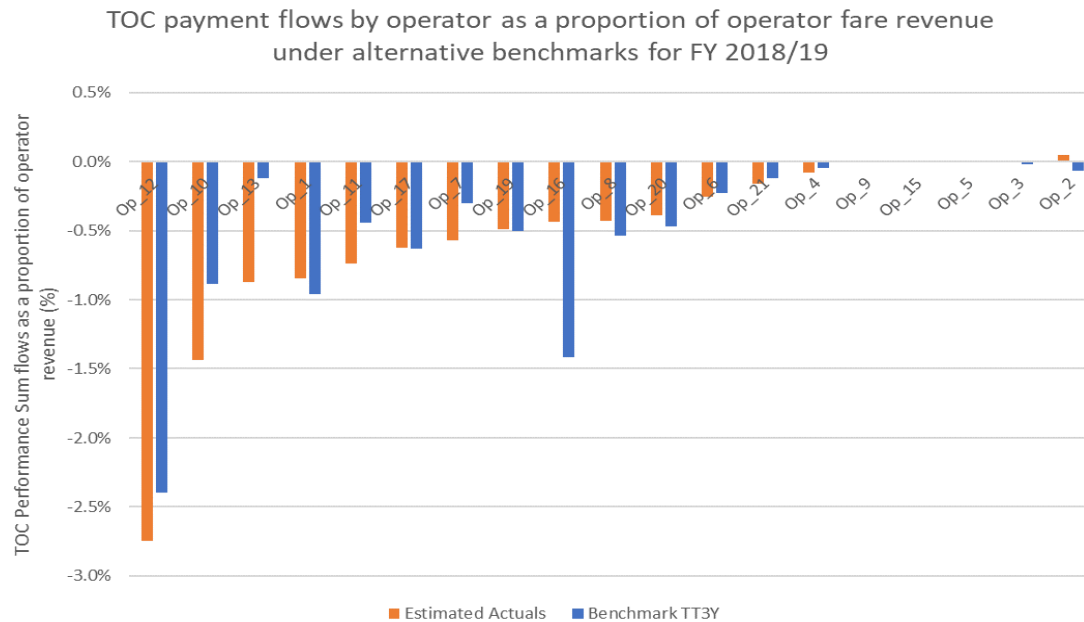
Figure 8: Network Rail Performance Sum flows by operator as a proportion of fare revenue under alternative benchmarks for FY 2018/19



Source: Analysis of PEARS data and CP5 and CP6 payment rates, combined with alternative benchmarks.

Similarly, this effect can be seen when applied to the TOC benchmark calculations (see Figure 6 9). Similar to the Network Rail Performance Sum this chart shows how payment flows are reduced in magnitude under the alternative approach, except in the cases of a couple of operators.

Figure 6: TOC Performance Sum flows by operator as a proportion of fare revenue under alternative benchmarks for FY 2018/19



Source: Analysis of PEARS data and CP5 and CP6 payment rates, combined with alternative benchmarks.

The proposal to move to a historic rolling average updated annually provides consistency with the current approach and can generate consistency more widely:

This approach could also be equally applicable in providing consistency of approach to other issues in ORR’s consultation by aligning how TOC benchmarks, FOC benchmarks and both Network Rail and operator payment rates are calculated. Following the same approach keeps internal consistency of methods and parameters being updated regularly. This could also be used with calculating Delay Repay forecasts (as opposed to moving to a system of actuals).

Modelled approach:

This involves adjusting benchmarks for changes to traffic levels observed in the past year. We do not endorse this approach as it will require significant resource to model the relationships between traffic levels and expected performance, which is inherently complex and incredibly difficult to do accurately.

Though traffic levels impact on performance, it is highly unlikely that the relationship is linear, with the relationship likely to vary across different parts of the network. The relationship would also involve the existing traffic levels and network capacity/capability. This modelling exercise would need to be carried out by subject matter experts and would likely be costly and time consuming and could well be beyond the time constraints of PR23.

Furthermore, the model would need to be updated periodically for the latest evidence as network capability and service patterns change. This is far more complicated and intensive than the alternative rolling average method proposed and seems likely to introduce new forecasting errors.

To illustrate the likely impact of this approach, we have conducted regression analysis on Service Group level train volumes and performance AML data across CP5 (see Table 1). These regressions are only intended to illustrate correlations and are not considered to be causal in any way: clearly there are a number of other factors beyond volumes which impact delay, and these have not been considered in the modelling.

A number of specifications were considered and are presented in Table 1. The pooled OLS regression provides a base estimate of the association between performance AML and train volumes. However, this baseline specification assumes that service groups are homogenous (i.e. a common constant), which is quite restrictive. The random effects specification allows us to estimate the impact of time invariant characteristics on performance AML, however it is potentially biased if we fail to control for the fixed effects of service groups. Therefore, the fixed effects specification is preferred as it allows us to control for unobservable time invariant Service Group specific effects – this is equivalent to having a 'dummy variable' for each Service Group to capture statistically capture any intrinsic features of each Service Group (that do not vary over time). The implications of these results are explained below.

Note that all of the regressions have been undertaken in natural logarithms. For this reason, the coefficients on train volumes can be interpreted as elasticities.

Table 1: Regression of operator level performance AML on volumes of trains run (covers CP5 2014/15 to 2018/19)

	(1) Pooled OLS log-log	(2) Fixed Effects log-log	(3) Fixed effects log-log	(4) Random effects log-log
Train Volume (logged)	-0.213*** (0.009)	-0.086 (0.158)	0.009 (0.133)	0.521*** (0.000)
Constant	2.444*** (0.077)	1.429 (1.261)	0.192 (1.057)	-3.301*** (0.000)
Further controls			Fixed effects with time dummies – all significant	Interaction between Service Group and Train Volume – all significant
Observations	6947	6947	6947	6947
Overall R²	0.069	0.069	0.067	0.721
Robust standard errors were used; Statistical significance shown* p<0.10, ** p<0.05, *** p<0.01				

Source: Analysis of PEARS data and traffic volumes data

Table 1 shows mixed results for the relationship between train volume and performance AML across the specifications. For example, specification 1 (Pooled OLS) suggests that if train volumes were to increase by 1%, AML would decrease by 0.2%. This is a counterintuitive result, albeit not surprising given that so many other factors influence delay. Specifications 2 and 3 – which account for intrinsic Service Group specific effects – suggest that statistically speaking there is no significant relationship between traffic volume changes and AML. Specification 4, which controls for the interaction between service groups and train volumes, however, suggests that increasing train volumes by 1% would lead to a 0.5% increase in performance, and is statistically significant.

Furthermore, the R^2 of specifications 1, 2 and 3, suggest that volume of trains alone can only explain less than 7% of the variation in AML across time and service groups. In other words, over 93% of the variation in AML at a service group level across time is left unexplained. Overall, this illustrates that the relationship between performance and volumes is by no means a simple one: volumes by themselves –



especially at the aggregate level – explain relatively little delay and there is very significant uncertainty around the nature of the relationship (and even its sign).

3. Furthermore, a one-size-fits-all approach is unlikely to be appropriate. To the extent that train volumes are important, the relationship is not linear, and it will vary considerable across the network. For example, traffic growth in and around congested cities is likely to result in very different impacts on performance than traffic growth in uncongested parts of the network. This is borne out in the analysis: once we control for the interaction between Service Groups and the volume of trains (

4.

A number of specifications were considered and are presented in Table 1. The pooled OLS regression provides a base estimate of the association between performance AML and train volumes. However, this baseline specification assumes that service groups are homogenous (i.e. a common constant), which is quite restrictive. The random effects specification allows us to estimate the impact of time invariant characteristics on performance AML, however it is potentially biased if we fail to control for the fixed effects of service groups. Therefore, the fixed effects specification is preferred as it allows us to control for unobservable time invariant Service Group specific effects – this is equivalent to having a ‘dummy variable’ for each Service Group to capture statistically capture any intrinsic features of each Service Group (that do not vary over time). The implications of these results are explained below.

Note that all of the regressions have been undertaken in natural logarithms. For this reason, the coefficients on train volumes can be interpreted as elasticities.

Table 1, specification 4), the analysis demonstrates a significant variation across Service Groups. For example, in this specification a 1% increase in traffic volumes appears to be associated with an increase in performance AML for Service Groups at the higher end and are negative at the lower end. Similarly, capacity charge calibration analysis for Network Rail and approved by ORR produced in 2013 illustrate how as Capacity Utilisation Index increases, adding another train results in an ever greater impact on delay.¹⁶ In other words the relationship is not linear and the underlying capacity utilisation is an important driver of performance.

Whilst, as a minimum, taking account of local nuances would be necessary for meaningful adjustments, in practice doing so in a way that is complete and uncontentious is likely to be difficult.

Proposal specific to the passenger regime

¹⁶ See [FTI \(2013\)](#), and [Arup \(2013\)](#)



TOC-on-TOC incentives

ORR is proposing to increase the level of 'TOC-on-TOC' incentives on passenger operators. This effectively means that the regimes incentives should further reflect the impact that an operators' delay causes to other operators, rather than encouraging operators to focus only on the delays that they cause themselves.

ORR has outlined 2 methods to increase TOC-on-TOC incentives in Schedule 8:

1. **Directly measuring TOC-on-TOC delays:** This involves measuring the actual delays that an operator causes to other operators against a benchmark which is also based on the expected level of TOC-on-TOC delay. Though we agree with this idea in principle, we do not currently have the data and systems capability to implement this in time for CP7 as the current system PEARS (Paladin Data Extraction and Reporting System) is not capable of understanding how the split of TOC-on-TOC minutes should be distributed between affected TOCs.
2. **Annual update to the TOC-on-Self to TOC-on-TOC relationship in the payment rate:** This would involve updating the payment rates each year to reflect the latest evidence around the relationship between the delays an operator causes to itself and the delays caused to other operators as a result. We support this method as it would not require any changes to the underlying systems and the existing approach, but what it would do is encourage operators to reduce the delays that they cause to others. This method would also reduce the overall liability on Network Rail for TOC-on-TOC delays which they did not cause, whilst still exposing Network Rail to some reactionary delays as was intended.

Overall, we agree with ORR that the second option is preferable at this stage, however we are open to discussing the first option as a longer-term goal for performance regime measurement, as this is the purest way to sharpen TOC-on-TOC incentives.

How do the 2 methods proposed perform against one another?

Directly measuring TOC-on-TOC delays:

- The first approach set out by ORR is to move to a full TOC-on-TOC regime. In an ideal scenario without limitations, direct measurement of TOC-on-TOC lateness is the optimal way to structure TOC incentives insofar as it provides the right balance of incentives and encourages operators to limit delays that they cause to others. ORR themselves have stated that they remain of the view "that TOC-on-TOC



measurement has the potential to improve outcomes and to align operator incentives with the interests of users across the network”, and “we will be looking to ensure that the necessary reforms are delivered over CP6 to introduce this approach in PR23”.¹⁷

- Such a regime would also minimise financial risk to Network Rail as the ‘clearing house’ under the STAR model, as well as internalise to operators the impacts (for example in terms of lost revenue) they impose on other operators, and therefore encourage them to manage delay in the interests of all railway users (rather than just their own).
- However, whilst this approach remains a reasonable long-term aspiration, it is not likely to be appropriate for CP7. In part, this is because a new performance system would be required. As outlined above, the significant practical barriers include the capability of Network Rail’s PEARS system, that would not practically be able to support a full TOC-on-TOC regime with its current capability (as it is not possible to say how the split of TOC-on-TOC minutes should be distributed between affected TOCs in PEARS). Reform to this system would be both costly and resource intensive, would likely take several years to implement, and would entail the material delivery risks associated with major IT upgrades of this scale. It would also need to work across the whole industry, requiring Network Rail and TOCs to be on one platform, to ensure transparency and accuracy of data collection, an exercise involving significant industry consultation and cooperation.
- In previous consultations (such as PR18¹⁸), a small number of operators raised concerns over the limitations in tracing impacts of delays caused by one party on other parties, and the potential ‘unintended consequences’¹⁹ of this approach. Concern was expressed that larger operators might seek to exert undue influence over how the system is operated, and that the system may operate to benefit larger operators on each route.
- Given the high fixed costs of overhauling IT systems, and the changing role of Schedule 8 in the context of the ERMA/NRCs (and later PSCs) and the Williams-Shapps plan reducing the number of operators affected, there is also a question as to the time taken to realise benefits from such a system, and the proportionality of the benefits when considering these costs.
- Finally, a direct TOC-on-TOC measure may potentially expose TOCs to financial risk over which they may have limited control over, given that “TOCs have only partial influence on the wider system beyond recovery of their own services”, as acknowledged in ORR’s June 2021 Schedule 8 consultation document.²⁰

¹⁷ Paragraph 4.7 <https://www.orr.gov.uk/sites/default/files/2021-06/schedule-8-technical-consultation-june-2021.pdf>

¹⁸ <https://www.orr.gov.uk/sites/default/files/om/conclusions-on-consultation-on-charges-and-contractual-incentives-june-2017.pdf>

¹⁹ Paragraph 85 <https://www.orr.gov.uk/sites/default/files/om/conclusions-on-consultation-on-charges-and-contractual-incentives-june-2017.pdf>

²⁰ Paragraph 4.13 <https://www.orr.gov.uk/sites/default/files/2021-06/schedule-8-technical-consultation-june-2021.pdf>

- Thus, there may be benefits of changing the measure of operator performance from a TOC-on-Self proxy to a direct TOC-on-TOC measure. However, there are substantial challenges with the practical implementation of this approach in terms of data and systems capabilities. Indeed, there is a risk that even with a financially costly move to a new system of TOC-on-TOC delay, the system is not successfully implemented due to a number of the factors outlined above. This option is therefore unlikely to be appropriate.

Annual update to the TOC-on-Self to TOC-on-TOC relationship in the payment rate:

- An alternative approach would be to recalibrate the operator payment rate more regularly in the existing TOC-on-Self regime, to improve the accuracy of the current system. Recalibrating the responsibility matrix between operators more frequently, and using the latest available data, would improve the accuracy of the system, as more recent evidence is likely to be a better proxy of current relationships between operators than older evidence (especially compared to the current system where data can be up to seven years old).
- This could result in improved incentives for TOCs to avoid disruption to railway users outside of their own services, as the improved accuracy of the approach should encourage TOCs to better mitigate delay they are responsible for to other TOCs than under the current approach. Network Rail's incentives will also still be maintained (a point that TOCs and ORR stress the importance of), as Network Rail will still be exposed to the cost difference between TOC-on-Self and TOC-on-TOC delay, and hence encourage Network Rail to help the system recover quickly from delays caused by TOCs. Compared to the current approach, this would reduce Network Rail's financial risk from operating as a clearing house in the STAR model.
- Although in principle the STAR model balances the amount that is paid between Network Rail and TOCs (both in and out of the 'clearing house') through TOC-on-Self and TOC-on-TOC delay payments, in practice, calibration of the model is not perfect, and mismatches subsequently arise. Thus, Network Rail would both be positively and negatively impacted by this, but should not expect the net position to adversely affect them. Network Rail would however have to be prepared to absorb the financial risk associated with the nature of this approach.
- This approach would also be less time intensive and costly than a move to a direct TOC-on-TOC measurement approach, whilst still seeing improvements over the current system, as this reform would require minimal changes to the underlying data and systems capabilities at present, not requiring the substantial costs of upgrading PEARS and other IT systems.



- It is recognised that this approach may have some perceived disadvantages, especially from the TOCs perspective. Operators may be uncomfortable that their payment rates will be subject to annual changes, whilst the Network Rail rate remains constant in real terms over the course of a control period (as this change would apply to TOCs, whereas the Network Rail rate will continue to be set on a five-year basis). This has the potential to lead to an increased number of disputes from operators who may feel that the recalibration has disproportionately negatively affected them. Network Rail would be open to mitigating this perceived effect by also introducing annual updates to the Network Rail payment rate to reflect the latest evidence.
- It is important to note however, that despite the perceived disadvantages of this approach, it **does not** make adjustments to the fundamental economics of the regime; updates to operator payment rates would take place **solely** to ensure that the evidence on the relationship between TOC-on-Self and TOC-on-TOC disruption was as accurate as possible. In addition, movements in operators' payment rates over time would represent improvements in the accuracy of the regime (in contrast, the current approach of using information at the time of the Schedule 8 calibration period prior to each Control Period 'bakes in' errors from any uncertainty around the relationship, for the whole Control Period). The details of this calibration are explained below.
- Overall, this option offers significant improvements to the accuracy of the regime and the incentives of Network Rail and TOCs when compared to the current approach, without the issues of high costs and lengthy timeframes associated with a direct TOC-on-TOC measurement approach.

How will our preferred solution (method 2) work in practice?

- As outlined above, the current approach to calibration 'bakes in' errors, and so a different approach should be considered, that allows for movements in operators' payment rates over time, which would represent improvements in the accuracy of the regime.
- An annually updated mechanistic 'top and tail' 4 year rolling average approach could be used as a consistent approach to recalibration, in a similar way to that proposed for the recalibration of benchmarks, which we discuss earlier in this annex, and as is also outlined in ORR's June 2021 Schedule 8 consultation.²¹ Although this would be a change to the system requiring annual recalibration, it would provide consistency across different aspects of the calibration of Schedule 8 (e.g. benchmarks), would be a simpler and more transparent approach, and would still use two years' worth of data akin to the current system, and so would not be disproportionately more burdensome when the benefits are taken into account.

Proposal specific to the freight regime

²¹ <https://www.orr.gov.uk/sites/default/files/2021-06/schedule-8-technical-consultation-june-2021.pdf>



Recalibration to reflect the latest evidence

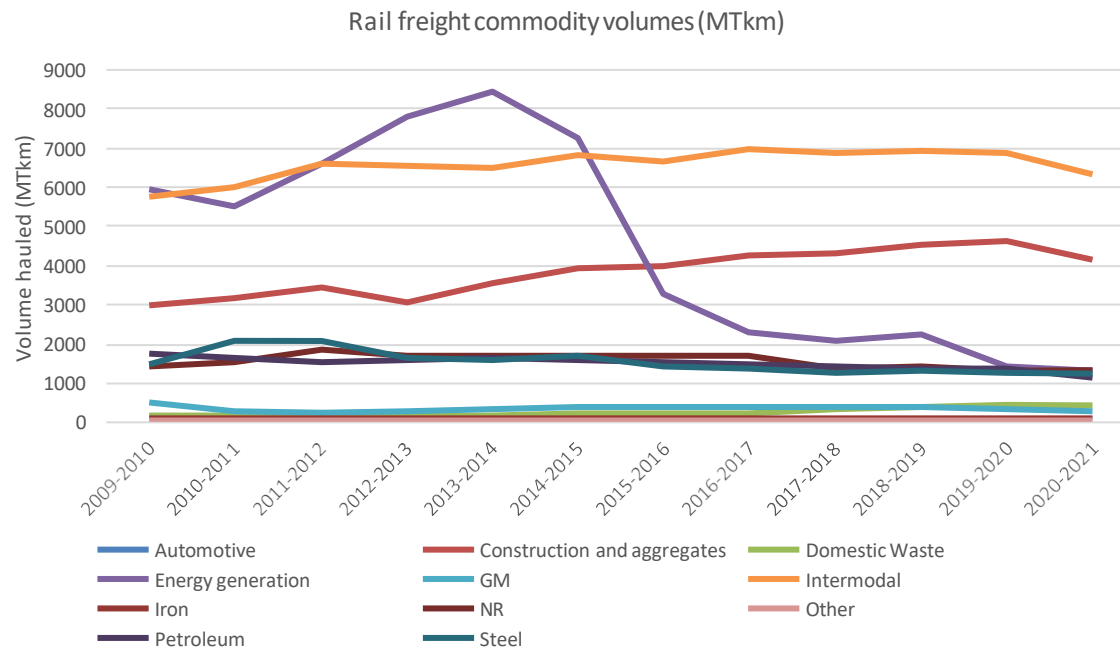
ORR is proposing to retain much of the freight regime in its current form (subject to the changes to benchmarks proposed earlier in its consultation) but recognises the need for the regime to be recalibrated to reflect the latest evidence.

We agree with the arguments set out by ORR in its consultation in that the freight regime is broadly 'fit for purpose', but that it requires updating for the latest evidence, which has not been done since PR08. We will support the freight operators through the recalibration process and provide any necessary evidence that they may need.

Network Rail broadly supports ORR's position that the Schedule 8 Freight Network Rail Payment Rate (the "Network Rail Payment Rate") is in need of recalibration. This is because:

- the provenance of the current rate is unclear; and
- there have been significant changes to the rail freight industry over the past decade. In particular, there may have been a shift away from commodities that are less delay-sensitive (such as coal) towards goods that are more delay-sensitive (such as intermodal), and this may justify a change in payment rate (see Figure 10).

Figure 10: For each financial year, the total volumes hauled (Mtkm) are shown for each market segment. Note that some minor segments have been omitted for presentation



Source: DfT and ORR volumes data

There are numerous key characteristics shown in Figure 10 that outline the dynamic nature of the freight sector:

- i) The industry's volumes are dominated by a small number of prominent segments including intermodals and construction & aggregates, and to a lesser extent petroleum and metals.
- ii) Of these, construction & aggregates and intermodals have been steadily rising in volumes.
- iii) There have been large movements in the energy sector over the last decade, with coal dramatically falling in prominence since 2013 and with biomass rising, albeit to a far lesser extent, in response. Nuclear fuel is also transported by rail freight, though volumes are very low at present.



- iv) There are a number of other smaller segments that comprise a low proportion of market volumes, including domestic waste, automotive and General Merchandise.

The implication of these trends is that the scale and composition of each operator's business could vary markedly. It is unlikely that the full extent of freight dynamics were understood when the existing Network Rail Payment Rate was created, and it is evident that the composition of FOCs' operations have changed significantly since the payment rate was last set. To treat operators properly, the regime could be updated to reflect the impact of these dynamics on the revenue impacts of poor performance.

Considerations for recalibration

The industry should collaborate to update the Network Rail payment rate for the latest information available on the business impacts of lateness and cancellations on FOC services.

However, the key constraint faced by the industry in recalibrating the payment rate will be availability of robust evidence to ensure that any revised payment rate is appropriate and evidence-based. Existing evidence available, for instance volumes data and historical incidents, is likely to be insufficient to make a representative approximation of actual financial loss to FOCs.

Freight operators have previously expressed a desire to revisit the evidence underpinning their Network Rail Payment Rates. Whilst Network Rail has previously offered to part-fund any study to that end, the research has not been forthcoming.

Overall, in order to update evidence and recalibrate in a way that best represents the financial impacts, FOCs should participate in the recalibration process from the outset and release information that will ultimately aid them, whether this is to Network Rail or an independent 3rd party (if this is the preferred option). Information released by FOCs can be treated confidentially and could be governed by contracts containing Non-disclosure Agreements (NDAs).



Table B – Small additional changes

Reform area	Network Rail Response
Proposals cross-cutting across the passenger and freight regimes	
Shared allocation of delay	<p data-bbox="320 416 2159 523">ORR is proposing to increase the extent of ‘sharing’ of delays between Network Rail and operators through the Schedule 8 regime. This sharing would likely not be 50:50, but instead 80:20, 70:30, 60:40 etc. on the basis of which party caused the delay and the ability of other parties to aid in the recovery from that delay.</p> <p data-bbox="320 564 2159 671">We agree with ORR in that it is better to implement such reform through the allocation of delay minutes in Schedule 8 rather than through changing the way in which delays are attributed in the delay attribution system. A separate review of delay attribution is however necessary for other reasons, which we have highlighted in our covering letter.</p> <p data-bbox="320 713 2159 930">There are numerous incident types where the potential to share delays would be beneficial, for example externally caused incidents, weather related incidents, and incidents where multiple causes are identified. There could also be merit in having some level of sharing for most if not all delays (e.g. 90/10), such that all parties face some exposure to all delay types, giving them an incentive to focus on system-wide performance. We also believe that the agreed splits should be set by incident type to prevent any disagreements over the proportion of splits for each particular incident. This ought to remove the risk that both TOCs and Network Rail see this as a chance to dispute the proportion of cause as well as the reason code.</p> <p data-bbox="320 971 2159 1078">At present, the delay attribution process generally allocates a delay to a single industry party (be that Network Rail or a TOC), through the rules set out in the Delay Attribution Principles and Rules guide.²² Joint responsibility applies under very limited circumstances and only allocates delay minutes 50/50 between parties (i.e. no other splits of sharing exist other than 50/50).²³</p> <p data-bbox="320 1136 2159 1206">Network Rail considers that the current approach does not give enough consideration to situations where sharing is appropriate. There are three broad areas in which this applies:</p> <ul data-bbox="365 1264 2159 1326" style="list-style-type: none"> <li data-bbox="365 1264 2159 1326">○ Incidents and circumstances where the relationship between revenue and performance (that Schedule 8 compensation is built upon) breaks down, so that industry revenue losses are likely to be zero or materially lower than those implied by Schedule 8. The clearest

²² Latest version of this is April 2021 http://www.delayattributionboard.co.uk/documents/dag_pdac/Current%20Delay%20Attribution%20Principles%20and%20Rules.pdf

²³ As above

examples of this are incidents such as severe weather, fatalities, and trespassing.²⁴ When these types of events occur, passengers recognise that they are often out of the industry's control to a significant extent, and only so much can be done to mitigate them. Thus, they do not change behaviour in the same way or to the same extent as other delay incidents.

- Incidents and circumstances for which it is inherently difficult to determine the root cause.²⁵ The clearest examples of this are Overhead Line Equipment (OHLE) and 3rd rail incidents, and unknown object strikes. For OHLE incidents for example, there are a wide range of factors that can cause an incident which makes it difficult to determine a root cause (e.g. weather, vandalism, trespass, power supply failure, vegetation obstructions, animal strikes, etc).
- For the majority (if not all) of other incidents and circumstances, but especially reactionary delay, a level of sharing (e.g. 60/40, 80/20 etc) such that all parties face some exposure to all delay types could be of value, giving all parties an incentive to focus on system-wide performance and recovery.
- For each of the points above, the level of sharing could be reviewed on a regular basis, to consider the availability of new evidence that may suggest adjustments to the split between Network Rail and TOCs.

Incidents where the relationship between revenue and performance breaks down

As explained above, for these types of incidents, 'typical' passenger reactionary behaviour is not applicable. Indeed, for the industry, the financial 'penalty' of having to pay any compensation through Schedule 8 does little to influence the ability of parties to mitigate the frequency or severity of these incidents.

These types of incidents are significant in terms of their scale when looking at the number of minutes of delay and cost of this delay in the system, as shown by the examples below.

²⁴ For example, PDFH 5.1 says that some delays are caused by circumstances that passengers understand and hence these will probably not cause the scale of impact the values would forecast; examples include snow and flooding where other modes of transport can be even more adversely affected.

²⁵ Section R4 of the DAPR gives a more detailed list of these types of incidents

http://www.delayattributionboard.co.uk/documents/dag_pdac/Current%20Delay%20Attribution%20Principles%20and%20Rules.pdf

Table 2: Examples of codes where revenue and performance relationship may break down - Total minutes. Financial Year 2014/15 Period 1 – Financial Year 2020/21 Period 4

	Code	Code Description	Delay Allocation	Total minutes (million)	Total costs (£ millions)
1	XC, VC	Fatalities	NR/TOC	2.8m	£191.8m
2	XA, VA	Trespassing	NR/TOC	5.3m	£280.2m
3	VW, XT, XU, XW, X1, X2, X3, X4, X9	Severe weather	NR/TOC	3.2m	£158.6m

The current evidence, as described above, does not support a strong relationship between revenue and performance. Thus, for these incidents, Schedule 8 should not apply for these specific codes in a binary 0/100% way.

An effective and pragmatic way in which to implement this could be through sharing of the delay minutes associated with these codes, in a 50/50 split between Network Rail and TOCs. This would neutralise the current situation whereby Network Rail is generally assigned more of these types of incidents, but still incentivises all parties to mitigate these types of incidents as much as possible. Indeed, it could be appropriate for a financial investment ‘pot’ to be created that would be funded through the revenue collected under a 50/50 split, that was then used to pay for initiatives to reduce such delays. This would also ensure that parties still have financial incentives to mitigate delays and face consequences for not doing so.

Network Rail acknowledges that there may be concerns from operators for this proposal, given that this proposal potentially allocates minutes currently allocated to Network Rail, to TOCs. However, by introducing principles and rules which govern how these types of incidents would be classified and ensuring that this is part of the formal PR23 process, this should mitigate against the risk of operators disputing both the designation and frequency of these types of incidents. This could be done through an amendment to the model contract that ORR publishes.²⁶

Additionally, as discussed for unidentified delay, Network Rail recognises that benchmarks would need to be adjusted to reflect any change to the allocation of minutes, most likely a commensurate tightening of Network Rail’s benchmarks (and a loosening of operators’ benchmarks) given the evidence described above.

²⁶ <https://www.orr.gov.uk/guidance-compliance/rail/operator-access-network/track-access/forms-model-contracts-general-approvals>

Incidents for which it is inherently difficult to determine the root cause

It is well established that certain types of incidents are inherently difficult to allocate and understand the root-cause of. As discussed in the Delay Attribution Principles and Rules²⁷, where a cause is not initially apparent and requires formal investigation, a significant amount of industry resource and time is devoted to trying to attribute this delay to a code in the current system.

Below are examples of some of the cases where it is clear that the allocation of the incident is complex and difficult to do, also showing the scale of these codes and the proportion of overall delay minutes they make up.

Table 3: Examples of codes where allocation of incidents is complex – Total minutes. Financial Year 2014/15 Period 1 – Financial Year 2020/21 Period 4

	Code	Code Description	Delay Allocation	Total minutes (million)	Total cost (£ million)
1	I1, I2, I3, I4	OHLE/3 rd Rail	NR	1.8m	£127.6m
2	JX	Object Strikes	NR	0.9m	£51.7m

Instead of expending significant amount of resource attempting to establish attribution to one particular code, the industry should acknowledge that the inherent difficulty associated with these incidents could be better solved by sharing of delay attribution minutes for these types of delay.

By allocating these minutes 50/50 between Network Rail and TOCs, these compensation payments could be put aside separately, with the resources spent on understanding root cause of these types of incidents separate to the Schedule 8 regime.

Sharing delay for other types of incidents

Under the current system, the majority of delays are assigned to a single party (i.e. Network Rail or an operator). This means that for many incidents and types of delay, industry parties are not always appropriately financially incentivised to take a system-wide view, and not financially incentivised to mitigate, and support recovery from, delay. A lack of collaboration between industry parties – for example around reporting issues to others – was identified as a key contributor to the May 2018 timetable disruption as part of ORR's independent inquiry²⁸, and was a central finding on the causes of poor performance (and other problems) set out in the Williams-Shapps review.

²⁷ Section R4 of DAPR April 2021 http://www.delayattributionboard.co.uk/documents/dag_pdac/Current%20Delay%20Attribution%20Principles%20and%20Rules.pdf

²⁸ <https://www.orr.gov.uk/sites/default/files/om/inquiry-into-may-2018-timetable-disruption-december-2018-report-grayscale.pdf>



Network Rail believes that introducing wide-ranging 'sharing' of delays, whereby allocation of delay minutes for the vast majority of incidents is shared in some proportion between both Network Rail and operators, could substantially improve incentives for all parties to ensure that delay is mitigated as much as possible. This should be a 'two-way' endeavour: Network Rail should share delay that is traditionally thought of as being associated with train operations and *vice versa*.

The current system only sees sharing between Network Rail and TOCs at either 0/100 (TOC responsibility), 50/50 (joint responsibility) or 100/0 (Network Rail responsibility). Network Rail believes that exploring other shares of allocation of delay would more appropriately incentivise parties. ORR should ensure that shares of delay are based on available evidence for different incident categories and set this share proportion as part of the PR23 process with potentially some periodic updating for the latest evidence if this is desirable. This would mean that for different types of incidents, different allocation of delays would be seen (e.g. 60/40 between Network Rail and TOCs, 70/30, 80/20 etc).

In practice, we see this calibration building on the regression analysis and/or simulation analysis outlined in the unidentified delay section of this response to help understand how different parts of the industry can help contribute to system recovery (even if the original cause was not their own).

A clear example of this is the approach to sharing which has been taken with Arriva Rail London (ARL). Train performance for ARL has declined in recent years. A joint performance summit was held in November 2019²⁹, and subsequently it was agreed that 10% of all delay minutes would be the responsibility of ARL, to incentivise a system-wide approach to mitigation and improve performance across these services. There are also a number of similar initiatives through 'overlay' agreements with multiple operators whereby the overlay gives effect to 'sharing' the costs of certain types of delays (reactionary delays, unidentified delays, trespass, suicides, TOC incidents etc.) where it is in the interest of passengers to work together to minimise them. These initiatives clearly demonstrate that there is an appetite within the industry to work in a more collaborative way and to do things differently than in the past. The proposal to formally 'share' each other's delay through Schedule 8 would further support this initiative and is conducive to the aims of the wider reform programme. Currently the overlays with similar initiatives on delay sharing are in the early stages, however, Network Rail will endeavour to share with the industry the results and outcomes of these overlay agreements later in the consultation process as they become available.

If this proposal is pursued by ORR then we would look to work with the industry as part of the recalibration process to understand the delays where sharing is most appropriate, and the correct sharing level at an early stage. We would then seek to build these changes into the benchmarks so that they reflect the new regimes principles and consider any minor system changes required (e.g., the ability for operators to dispute Network Rail attributed delays where they face some of the consequences). We will also seek to consider the potential implications of

²⁹ Network Rail Annual Return 2020 <https://www.networkrail.co.uk/wp-content/uploads/2020/07/Network-Rail-Infrastructure-Limited-Annual-Return-2020.pdf>



this reform on our current processes and systems to ensure the new approach is fair for all parties and that parties have the opportunity to review any delay minutes allocated to them in a timely manner.

Proposal specific to the passenger regime

Unidentified (unexplained) delays ORR is proposing that the allocation of 'unidentified' incidents in Schedule 8 is reviewed (that is delays where no cause has been identified). At present, Schedule 8 states that 50% of unidentified delay minutes are automatically allocated to Network Rail, and the remaining 50% is shared pro rata between Network Rail and the operator based on the split of delays on the day.

We agree with ORR that the split of responsibility for unidentified incidents should be reviewed, as it is unlikely to be the case that Network Rail actually causes the amount of delay that it pays for.

- At present, Section 5.5 of the Schedule 8 passenger regime³⁰ states that 50% of unidentified delay minutes are automatically allocated to Network Rail, and the remaining 50% is shared pro rata between Network Rail and the operators based on the split of delay on the day.³¹ This means that approximately 70% to 80% of unidentified delay is allocated to Network Rail, with the remainder being allocated to operators (dependent on Network Rail's share of delay on the day). There is, however, no evidence to support this being an appropriate approach.
- The fundamental issue with the current approach is that the allocation of unidentified delay minutes is not based on evidence – and indeed may be contrary to the evidence that is available – on which party has caused the delay. If this allocation is incorrect, it is likely to distort incentives to reduce or manage those delays effectively, which in turn may be contrary to the interests of passengers and freight customers.
- Network Rail agrees with ORR that the split of responsibility for unidentified delays should be reviewed as it seems, on the basis of available evidence, that there is a need to move towards an approach that better reflects the reality of the actual cause of such delays.

Why is a more accurate allocation of unidentified delay incidents important?

³⁰ Section 5.5 <https://www.networkrail.co.uk/wp-content/uploads/2019/03/Proposed-Schedule-8-for-Franchised-Passenger-Operators.pdf>

³¹ Formula to allocate unidentified delay minutes in Schedule 8:

total unidentified delay minutes allocated to Network Rail = 50% (of unexplained delay minutes) + (1/2 * [% of Network Rail caused attributed delay on the day])

- Unidentified delay is the sixth most frequently used code to allocate delay minutes, as shown in Table 4. Since 2014/15³², 4.7m delay minutes have been recorded (approximately 78,000 hours), with a cost of approximately £217.6m, based on the expected (PfPi) costs of these incidents.

Table 4: Top 10 Incident Category - Total minutes. Financial Year 2014/15 Period 1 – Financial Year 2020/21 Period 4

	Code	Code Description	Delay Allocation	Total minutes (m)	Total Cost of Delay
1	701D	Technical Fleet delay	TOC	14.8m	£728.2m
2	701C	Traincrew causes	TOC	8.6m	£382.9m
3	503	External fatalities and trespass	NR	6.7m	£404.9m
4	104B	Track Faults including Broken Rails	NR	5.6m	£329.6m
5	701F	External Causes (Train Operator)	TOC	4.8m	£243.2m
6	601	All Z codes – Unidentified	NR/TOC	4.7m	£217.6m
7	701E	Station delays	TOC	3.7m	£141.0m
8	302A	Signalling System & Power Supply Failures	NR	3.7m	£189.8m
9	501A	Network Rail Operations – signalling	NR	3.5m	£177.0m
10	701B	Train operations	TOC	3.3m	£127.1m

Source: Network Rail Delay Attribution Data, FY 2014/15 Period 1 – FY 2020/21 Period 4

What does the evidence say about the causes of unidentified delay?

Whilst no single source of evidence is available that can reliably determine the true split of unidentified delay amongst industry parties, a number of pieces of research have been undertaken that shed light on the question. All of the analyses that Network Rail is aware of point in a similar direction and collectively suggest that the current allocation is unlikely to be appropriate. In particular, they suggest that unidentified

³² Figure numbers are based on the following time period: Financial Year 2014/15 - Period 1 until Financial Year 2020/21 Period 3

delay is more evenly spread between infrastructure and train operations than Schedule 8 currently assumes, and potentially the significant majority of these delays may be linked to train operations (rather than infrastructure issues). A large proportion of unidentified delays are as a result of small (sub-three minutes) delays that have led to larger unexplained incidents. Moreover, these smaller incidents tend to be associated with train operations (for example problems with train doors, issues with passengers boarding at stations etc, which can often be resolved by the train crew in real time), whilst longer delays tend to be infrastructure-related (for example, many infrastructure incidents require engineering crews to travel to sites before remedial work can even be commenced). The key pieces of empirical research and their findings on the underlying causes of unidentified delays are as follows:

- Simulation modelling conducted on behalf of Network Rail³³, which although is still currently being conducted, suggests a significant proportion of small delays are caused by train operators and could be mitigated by train operators' actions.
- An analysis of timetable performance by Network Rail during Covid-19 has found that a significant amount of 30 second dwells were caused by door cycle times and a wide range of other operational factors that train operators are responsible for.³⁴ For instance, dwell times decreased when passenger numbers were low and fewer trains were operating during the pandemic, implying that a significant number of small delays are associated with train operations rather than the railway infrastructure.
- Analysis has also been carried out to explore the extent to which there is correlation between unidentified delay minutes and delay minutes associated with train operations (i.e. TOC-on-Self and TOC-on-TOC delay) versus delay associated with the infrastructure. Data on incident reasons for delays across all train operators was used for the analysis, covering the financial year 2014/15 Period 1 to financial year 2020/21 Period 4. This regression analysis found closer correlation between unidentified delay and TOC-caused delay, than between Network Rail delay and unidentified delay. The results indicate the positive relationship is significantly larger for train operations compared to infrastructure. This is consistent with the above sources of evidence and may suggest that the current Schedule 8 approach is not appropriate.

What could be a more appropriate split of responsibility between Network Rail and train operators?

As outlined, above, results from the regression analysis, combined with the historical analysis undertaken by Network Rail, suggest it is likely that rebalancing the allocation of unidentified delay minutes would make the regime more representative of reality.

³³ Simulation modelling was conducted by TRENOLab on behalf of NETWORK RAIL to demonstrate the potential savings train operators may be able to bring about if they were appropriately incentivised to do so.

³⁴ Network Rail (2021): "Timetabling Process and Timetable Performance – insights from Covid-19"



This evidence supports an approximate level of responsibility on train operations of between 50% and 80% of unidentified delay minutes. There is of course uncertainty around this estimate, and further research may be warranted to confirm the initial analysis above.

Implementation of a change to responsibility

There are a number of ways in which the implementation of a change to the current allocation of unidentified delay minutes could occur. These include:

- Assign all unidentified delay minutes on the basis of delay on the day (i.e. as is done with the remaining 50% currently).
- Instead of initially allocating 50% of delay minutes to Network Rail, allocate this proportion to TOCs. This could result in the correct approximate percentage of minutes allocated to them and should be practically simple within current systems.
- A separate 'Performance Improvement Fund' could be created, whereby Network Rail and operators could make contributions based on the overall volumes of unidentified delay (shared, for example, on a 50/50 basis), that could specifically be used to investigate the root cause of unidentified delay, and more generally fund work to mitigate this type of delay.

Regardless of the specific Schedule 8 shares that are ultimately determined and how the funds are spent, a key point is that Network Rail recognises that benchmarks would need to be adjusted to reflect any change to the allocation of unidentified delays. Given that the evidence suggests that it is likely to be appropriate to reduce the share of unidentified delay ascribed to Network Rail (and increase the share allocated to operators), it is recognised that this will likely result in a commensurate tightening of Network Rail's benchmarks (and a loosening of operators' benchmarks).

At this stage, we would urge ORR to consider the options discussed above, and we are keen to discuss this in more detail with ORR in due course.

'full and final'
compensation

ORR is proposing to review exactly what the Schedule 8 payment rates cover such that they fully reflect the impacts of poor performance. This could include revenue compensation, and compensation to cover the amount of delay repay payable by the operator.

We agree that payment rates should fully reflect the impact on passengers and the operator's business as this ought to improve passenger satisfaction and protect the interests of commercial operators' businesses. Furthermore, it could be argued that the inclusion of Delay Repay in Schedule 8 payments (which is then passed on to passengers) actually reduces the predicted revenue impacts as passengers are less likely to be unsatisfied if they're properly compensated, and therefore have a higher propensity to travel by train in future than they otherwise would.



One possibility is to move to payment rates that reflect both the cost and revenue impacts of poor performance, and the delay repay payable by the operator. This would ensure that operators are fully compensated for any directly attributable cost and revenue losses, whilst also recognising the overall detriment to passengers of poor performance. This is also a much more objective means of measuring the impacts of delay as the use of Delay Repay directly links performance to the passenger, which in turn should align the aims and incentives of operators and Network Rail with those that use the railway.

Issues with current approach

Network Rail's view is that there are two principal problems with the setting of payment rates as it stands: (a) the regime is based on evidence from a previous version of PDFH which appears to be inaccurate (i.e. this causes inaccuracies in the regime); and (b) the regime no longer reflects full financial implications of poor performance, especially as Delay Repay has become a more material to financial cost to operators over time (i.e. the coverage of the regime is no longer full). These issues are considered below.

The regime is based on evidence from a previous version of PDFH which appears to be inaccurate

Schedule 8 is based on the relationships between passenger revenue and disruption set out in the Passenger Demand Forecasting Handbook.³⁵ The Passenger Demand Forecasting Council (PDFC) recently undertook a review of the latest evidence on the impact of late time (delay) on consumer demand for rail journeys in Great Britain.³⁶ Through that review PDFC found that the version of PDFH recommendations used to calibrate Schedule 8 for CP6, based on a meta-study by Wardman and Batley (2014), are likely to be inaccurate, due to omitted selected results. Network Rail's view is that it has led to payments being made under Schedule 8 that are, typically, materially larger than the revenue effects seen by operators (see below).

The reason for the emergence of the inaccuracy in previous versions of PDFH is how the Wardman and Batley (2014)³⁷ meta-study treated results from research that showed that there was no statistically significant relationship between revenue and delay. Instead of using the information on consumer demand that those results provide (i.e. that these insignificant results may reflect reality), they were instead treated as unreliable estimates and omitted from their meta-analysis. This treatment of data had a significant impact on the recommendations for PDFH.

³⁵ The latest version of this is PDFH v6.0 <https://www.raildeliverygroup.com/pdfc/about-the-pdfh.html>

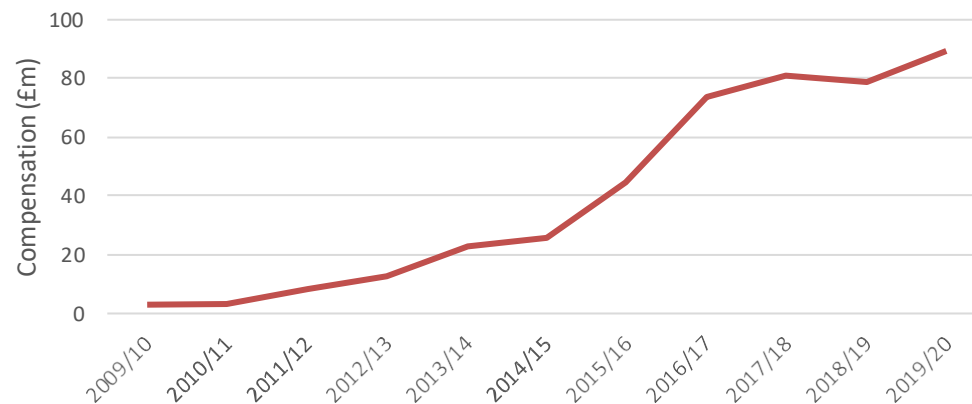
³⁶ Updates have been made in the process of delivering both PDFH v5.1 and PDFH v6.0, the latest of which was published in May 2018

³⁷ Wardman, Mark & Batley, Richard. (2014). Travel time reliability: a review of late time valuations, elasticities and demand impacts in the passenger rail market in Great Britain. *Transportation*. 41. 1041-1069. https://www.researchgate.net/publication/271659396_Travel_time_reliability_a_review_of_late_time_valuations_elasticities_and_demand_impacts_in_the_passenger_rail_market_in_Great_Britain

The regime no longer reflects all financial implications of poor performance, especially Delay Repay

When the Schedule 8 regime was established, incremental costs associated with unplanned disruption were not regarded as sufficiently material to be included in the liquidated sums aspects of the regime (although the potential for impacts on costs was recognised through the non-formulaic aspects of the regime, such as the SPP mechanism). However, over time compensation costs to passengers under the Passenger's Charter – sometimes called Delay Repay – have increased significantly, for example as the scheme has become better understood by the travelling public. Figure 11 shows that CP5 (2014/15 to 2018/19), in particular, was a turning point for Delay Repay, with compensation tripling to around £80m per annum across the industry. Delay Repay is also mostly funded by DfT and hence the taxpayer through franchise competition costs – under Network Rail's proposal, although the funding source is still DfT (through its funding of Network Rail), there would be an incentive effect as Network Rail would pay rather than it just being a passthrough from DfT to TOCs. The significant growth of Delay Repay – and the fact that pre-COVID it was giving rise to almost £100m of costs per annum – suggests that its omission from the current Schedule 8 regime may mean that coverage of payments is now incomplete.

Figure 11: Train operating companies Passenger's Charter total compensation (as of 28 Jan 2021)



Source: Department for Transport (DfT) Transparency Data³⁸

What is the solution?

This section sets out Network Rail's proposals on how the above two issues should be tackled, especially through the Schedule 8 calibration phase.



³⁸ <https://www.gov.uk/government/publications/train-operating-companies-passengers-charter-compensation/train-operating-companies-passengers-charter-compensation>

The regime should be updated to take into account the latest PDFC research

Given that the latest PDFC research suggests that the parameters used to calibrate Schedule 8 for CP6 are incorrect, potentially materially so, it is essential that the PR23 recalibration takes account of the latest and most robust research. ORR should take into account the above findings and ongoing research from PDFC and, where appropriate, other sources.

Delay repay should be incorporated into the Schedule 8 regime

The magnitude of Delay Repay costs means that it is likely to be appropriate to reflect these in Schedule 8. Doing so will help ensure that compensation for unplanned disruption is full. Moreover, linking the Schedule 8 regime with the compensation received by passenger may help the industry better align its efforts towards serving the customer because it would be a clear message to all railway colleagues that passenger delays are both important and costly.

It should be noted that the increased use of Delay Repay over time may have led to behavioural implications. For example, it could reduce revenue impacts as passengers may be less likely to feel unsatisfied with their journeys if they are properly compensated, and therefore have a higher propensity to travel by train in future than they otherwise would (with a 'halo' effect for people not directly affected, but aware of compensation arrangements). Since this could impact the revenue-disruption relationship, it will be important for future research to attempt to unpick this relationship and, if appropriate, such effects should be reflected in Schedule 8.

Network Rail notes that Delay Repay may not be the only cost incurred by train operators associated with unplanned disruption. However, Network Rail have not seen arguments or evidence put forward by operators that any other costs are material. Network Rail sees benefits to considering the inclusion of other costs in the Schedule 8 formulae but there would need to be robust evidence and analysis for their inclusion into the regime.

Comparing a formulaic or actual compensation approach

ORR has proposed two options on how the regime could operate going forward, including in respect of capturing costs associated with planned disruption:

- **Formulaic recovery:** This would be similar to today in that payment rates would be predetermined at a rate per minute (AML) above or below the benchmark and paid in a formulaic way. We agree with retaining a formulaic approach as it does not require negotiation on a case-by-case basis which would be resource and time intensive with little additional benefit in the round due to the portfolio effect of delays across Network Rail/an operators' business. This would be a relatively straightforward exercise, where TOC payment rates would be calculated through the usual process but including the above uplift for Delay Repay costs. This would ensure that operators



are incentivised to take account of Delay Repay liabilities they may cause to other operators, and that Network Rail is held neutral on expectation to operator-caused disruption under the terms of the STAR model. Similarly, Network Rail and operator benchmarks would remain at the same level, so that the regime remains financially neutral if performance reflects historical levels (see separate proposals on the setting of benchmarks).

- **Actual sums recovery:** This would require Network Rail and operators working together to agree on an appropriate level of compensation on a case-by-case basis. As stated above, we do not see merit in this approach due to the likelihood of tensions between parties and the time and resource requirements. However, if compensation for delay repay is to be part of the overall package, then case-by-case compensation may be an option (alongside formulaic revenue compensation). This could be done through a retrospective claims process which is standardised across all operators. We would however need to further explore the likelihood of being able to set this up in time for the start of CP7, and the associated administrative and running costs vs a much simpler less rancorous formulaic delay repay compensation mechanism.

Therefore, option 1 is the preferred approach, with the details of incorporating the additional elements and implementation of the approach discussed below.

Incorporating Delay Repay into Schedule 8 in practice

Aims for incorporating Delay Repay into Schedule 8

Whilst the principle of inclusion of Delay Repay in the Schedule 8 regime is sound, it is important that a robust approach is developed to incorporating it into the regime in practice. There are a number of aims which the approach to incorporating Delay Repay into the regime should adhere to:

- **Simple and transparent.** Delay Repay should be reflected in the regime in a way that is as simple as possible, whilst robustly capturing the impacts of Delay Repay, and clear for all parties to see the mechanism through which it is being taken into account.
- **Reflect incremental compensation costs to passengers caused by Network Rail and other operators (not disruption caused by that TOC).** Schedule 8 should compensate operators for Delay Repay costs to the extent that those costs are associated with disruption beyond the operator's control (i.e. by Network Rail and other operators). Operators should not be compensated for Delay Repay costs to the extent that disruption is caused by themselves, since doing so could diminish their own incentives to reduce disruption.
- **Not change the current 'net neutrality' of the regime.** The regime should remain financially neutral if parties' performance is at benchmark, and provide for compensation in the event of deviation from benchmark.



- **Work within the confines of the existing ToS regime.** Any change to Schedule 8 to allow for Delay Repay compensation should be workable within the existing regime whereby operators are liable for delay caused to themselves (ToS delay) and Network Rail is held liable for disruption caused by other operators under the STAR model (ToT delay).

Implementation of the preferred option

Network Rail considers that the above aims are best achieved by incorporating Delay Repay into the regime by increasing the Network Rail payment rate in Appendix 1 of Schedule 8 by a £ amount for each Service Group. This £ amount would be set to reflect the Delay Repay costs per unit of Average Minutes Lateness (or AML, the metric used to measure performance in Schedule 8). In doing so, it would reflect only the costs caused by Network Rail and other TOCs (i.e. it would exclude any costs associated with operators' own delay).

The rest of the regime would then be calibrated in the normal way. In particular, TOC payment rates would be calculated through the usual process, but including the above uplift for Delay Repay costs. This would ensure that operators are incentivised to take account of Delay Repay liabilities they may cause to other operators, and that Network Rail is held neutral on expectation to operator-caused disruption under the terms of the STAR model. Similarly, Network Rail and operator benchmarks would remain at the same level, so that the regime remains financially neutral if performance reflects historical levels (see separate paper on the setting of benchmarks).

The Sustained Poor Performance (SPP) Mechanism

The Sustained Poor Performance (SPP) mechanism is designed to provide protection to TOCs when performance falls to such a level that compensation under the standard Schedule 8 arrangements is considered to be inadequate³⁹.

However, there are two arguments as to why the mechanism should no longer be a necessary or appropriate component of Schedule 8 in CP7:

- **Full and accurate payments rates reduce the need for SPP.** Given the suggested improvements to payment rates outlined above, the accuracy of compensation would improve significantly. It is questionable whether such a mechanism has a justifiable place alongside a well-designed and well-functioning liquidated damages regime, especially in light of the negative experiences outlined in the next point.

³⁹ Paragraph 1 <https://www.networkrail.co.uk/wp-content/uploads/2017/02/Sustained-Poor-Performance-final-Report.pdf>



- **SPP does not work as it was intended to.** Even without the above improvements to payment rates, in its current form as a mechanism which is intended to protect against extreme poor performance, SPP arguably creates more problems than it solves, as it introduces a disproportionate burden on industry parties in a number of ways.

Issues with the SPP in its current form

Currently, the mechanism provides for a TOC to claim for relevant losses, to the extent that these are not already compensated under the standard Schedule 8 arrangements and may be invoked when performance averaged over 4 quarters (13 periods) is worse than a defined threshold. Currently the SPP threshold is set so that additional compensation could be claimed when Network Rail performance is worse than a defined percentage over 13 consecutive periods (this was raised from 10% in CP5 to 20% in CP6).⁴⁰

The following section⁴¹ outlines key observations of the SPP in its current form, demonstrating the inadequacy of this mechanism in addressing issues with the regime and remedying disputes, and hence why it should be removed from Schedule 8.

There is no evidence of ‘non-linearities’ in the revenue-delay relationship

The SPP regime would be coherent if there were ‘non-linearities’ in the revenue-delay relationship, for example if revenue losses accelerated if performance fell below a certain level. To our knowledge, there is no compelling evidence of such non-linearities that shows benefits to deviate from a linear estimate regardless of poor performance.

The system is in “SPP-trigger territory” for a significant part of the time

The frequency with which SPP is triggered is not consistent with the original intention to provide a mechanism for dealing with extreme cases and undermines the rationale for having a liquidated damages regime in the first place. Ultimately, the regime simply places a **potential unlimited and unknowable liability on the taxpayer**: this is clearly contrary to the interests of the taxpayer, and it is unclear how this serves the passenger interest.

When the SPP mechanism is triggered, it generates enormous uncertainty even before a claim is made, which may last for years, requiring significant resource and time expenditure from both Network Rail and TOCs

⁴⁰ Paragraph 1 <https://www.networkrail.co.uk/wp-content/uploads/2017/02/Sustained-Poor-Performance-final-Report.pdf>

⁴¹ This information has been gathered from engagement with Network Rail account teams



With Network Rail in “SPP-trigger territory” so much of the time, all Network Rail Regions risk a financial exposure that is not only unknown, but **unknowable**.

There is also a significant resource and time expenditure by both Network Rail and TOCs in dealing with these claims.

Proposal specific to the freight regime

Review of
incident and
annual caps

ORR is proposing to review the level of incident and annual caps that freight operators benefit from in Schedule 8.

As ORR states in its consultation, Network Rail has some concerns over the appropriateness of these caps at their current levels. Whilst we agree with ORR that smaller commercial operators need some sort of liability cap on delays to ensure their business can continue to operate, it is important that the need for, and level of, protection is reviewed for all FOCs to prevent perverse behaviours. Some of the large commercial FOCs may no longer need this protection, and therefore should have their caps removed or at the very least reviewed if they are too low. For smaller operators who require this protection, we think that the current cap levels should also be reviewed. If caps are set at a level that is too low (as we believe is the case), then freight operators will lack an incentive to recover from delays and assist in the recovery efforts more generally once the incident cap has been hit, and similarly will lack any incentive on all delays after the point at which the annual cap has been hit.

In the sections that follow we further develop our argumentation and evidence to support the need to review freight annual and incident caps in PR23.

Freight (and charter) operators have the option to implement an incident cap through Schedule 8 in return for an Incident Cap Access Charge Supplement (ICACS) insurance premium paid to Network Rail. This incident cap limits the freight operators’ financial responsibility for their attributed delay incidents, by capping the payments that operators must make for their own performance at pre-specified levels of delay minutes. The Track Access Agreements (TAAs) between Network Rail and freight operators set out a ‘menu’ of incident caps, which range from 1,000 to 10,000 delay minutes, and the associated ICACS insurance premiums that freight operators can choose from.

For any delays that freight operators cause above their Incident Cap, Network Rail is fully exposed to the Schedule 8 payments to other operators that are affected by the disruption. In addition, an annual cap limits the total exposure, and these are negotiated between Network Rail and each operator on an individual basis which are then approved by ORR.⁴²

Incident caps can generate a risk of perverse behaviour

⁴² Annual caps are reciprocal – applying both to FOCs and to Network Rail and set a threshold beyond which payments cannot pass.

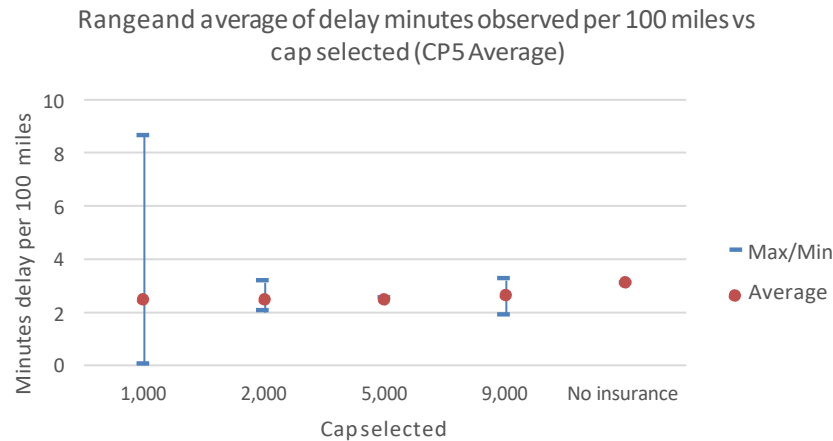


- The use of incident caps may risk incentivising perverse behaviours. In particular, there are two types of behaviours that may be of concern:
- i. **Lack of incentive to guard against poor performance (moral hazard):** As incident caps provide freight operators with a limit on their financial liabilities from a delay incident, operators may not be financially incentivised to minimise delays beyond a certain level.
 - i. **Incentive for companies with higher risk to opt-in (adverse selection):** As ICACS insurance premiums for a given incident cap are set based on an industry average, if an operator expects it may cause an above average delay, it may have an incentive to opt-in to the insurance scheme (and vice versa) potentially at the cost of the taxpayer.

While it can be difficult to disentangle between these two behaviours due to asymmetric information (companies know more about their risk profile than the regulator), potential indications of this issue can be gleaned from incident data and the level of caps chosen.

Figure 72, below, sets out the ranges of delay minutes per 100 miles by operator for each incident cap level across CP5. While there is little difference between the average delay minutes per 100 miles caused by operators across who purchased insurance caps, the highest average delay minutes by operator/period are observed for those operators who select the highest levels of insurance (e.g. 1,000 minutes incident cap)⁴³. This may indicate a risk of perverse incentives, although further investigation would be required.

Figure 72: For each financial year of CP5, each range gives the minimum, maximum and average delay minutes per mile of all operators selecting a given insurance cap (or no cap) across CP5.



⁴³ The correlation between caps selected and the average delay minutes per 100 miles is 0.02, while positive is small in value. This correlation excludes the observation where one FOC selected no insurance in one year.



Source: Network Rail analysis drawing upon incidents data and cap selections. Only the maximum, minimum and average observations for each cap are presented due to the sensitivity of the data.

Furthermore, Figure 72 illustrates how the delay minutes per 100 miles observed at each cap level varies. This data suggests that there is more variation in delay minutes per 100 miles for operators who select higher levels of insurance than there is for those operators that select lower levels of insurance. While this may reflect differences in operating conditions, it may suggest that operators which are subject to the greatest risks of creating delays tend to adopt the greatest levels of insurance.

Smaller operators tend to receive less pay-outs than paid in ICACS insurance premiums, however, still continue to participate in the scheme

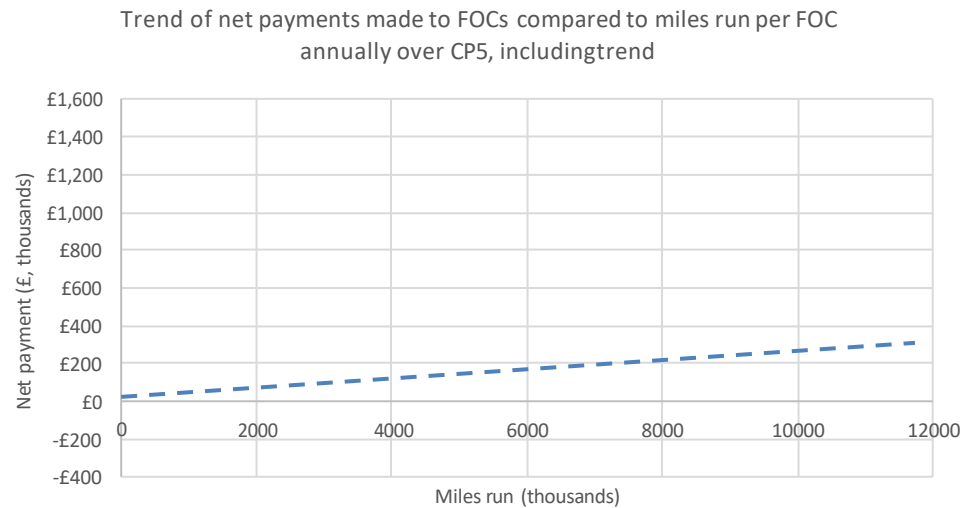
Smaller operators may be more susceptible to the financial repercussions of large unplanned delays that are attributed to them than larger operators due to limitations in financial strength as well as the criticality of maintaining the customer base.⁴⁴

Figure 13 shows the trend line from a scatter plot of annual 'net payments' to freight operators against the number of miles that operator has run for each year of CP5. Note that 'net payments' are here defined as the Schedule 8 payments avoided through selecting a cap (against the counterfactual where no cap was selected) less the ICACS paid to select the cap. A positive result shows that a FOC has gained more in above-cap savings than they paid in ICACS payments. The individual observations have been removed due to the sensitivity of the data.

The scatter plot suggests a small but positive relationship between miles run and net payment received, with an approximate correlation of 0.24. Furthermore, the spread in the underlying data suggests that as operator miles increase, the variance in the net payments increases. This suggests that operators who run more miles may not only be associated with higher net payments, but also higher volatility in net payments.

⁴⁴ Small freight operators are defined within Network Rail as those whose miles run is less than 5% of total miles run for the industry. As such, large operators are defined as those who have run at least 5% of the total industry miles run.

Figure 13: For each financial year of CP5, each observation refers to the miles run, and net payments received by an operator. Net payments are calculated as the difference between the payments saved as a result of the cap minus the ICACS payments across CP5 (negative implies that the freight operator(s) paid more through ICACS than they 'received' out of it).



Source: Network Rail analysis drawing upon payments and volumes data. The individual observations have been removed, preserving only the trend line due to the sensitive nature of the data.

Table 5 shows the aggregated net payment data and splits it by size of freight operator across CP5. This data shows that small operators, despite receiving less in insurance paid out (over cap pay-outs) compared to their ICACS premiums, continue to participate in the insurance mechanism. In fact, across CP5 all small operators unanimously opted for the 1,000-minute incident cap.⁴⁵ This potentially indicates that, despite facing losses from participation in the regime, smaller operators may be opting for high levels of insurance in order to control for uncertainty and potentially for much greater losses.

⁴⁵ This contrasts with large operators where there were some observations of cap switching.



Table 5: For each financial year of CP5, the net payments (defined as above) made by Network Rail to large operators (those with >5% of total miles run across the control period) and small operators (<5%) is displayed. Negative values indicate that operators paid more in ICACS premiums than they 'received' (i.e. saved in counterfactual above cap payments).

	2014-15	2015-16	2016-17	2017-18	2018-19	CP5 Total
Large operators	£836,642	£674,673	£65,996	£336,505	£1,659,973	£3,573,789
Small operators	-£51,829	-£2,928	-£127,105	£80,371	-£200,247	-£301,738
Total	£784,813	£671,745	-£61,109	£416,876	£1,459,726	£3,272,051

Source: Network Rail analysis drawing upon ICACS calculations and incidents data. Note that individual operators' contributions towards group totals are omitted for confidentiality purposes. The 5% mileage threshold determining operator size is a standard Network Rail assumption used for recalibration.

The current available data does not determine whether large operators need the protection of incident caps. However, Figure 13 and

Table 5 show that large operators generally disproportionately gain from taking out incident caps. This is particularly the case for one large freight operator that gained substantially over this period. The data suggests that incident caps, and the ICACS paid for access to these caps, should be reviewed and consideration should be given to caps that vary according to the specific risks taken on by Network Rail in underwriting the caps.

Network Rail's view: Proposed solution

It is not conclusive as to whether perverse incentives are at play as a result of asymmetric information in the incident caps regime. However, calculating ICACS insurance premiums to vary by operator would lead to a system that better reflects the performance risk, limit operator disincentives to minimise risk, minimise the risk to the taxpayer, and correct any potential imbalance in the current regime that may favour larger operators. Calculations could be performed using the same sources of information as used currently, but with a greater degree of disaggregation. This would increase freight operator incentives to perform well in return for future decreased premiums (reducing moral hazard). Additionally, this would also remove the issue of operators benefitting from a flat ICACS rate premium (adverse selection) by pricing insurance at a level more commensurate with the risk.

Updating on a more frequent basis, such as annually (as is typical for all other sorts of insurance schemes), would reinforce these incentives by reflecting changes in risk in the ICACS insurance premium – and would be more consistent with how insurance works in other industries. For example, this approach could follow the same annually updated 'top and tail' 4-year historic rolling average approach that is proposed for



the performance benchmarking regime. This would then allow the ICACS insurance premium to better reflect the latest information on operator risk and be more resistant to shocks (by removing the more extreme values and smoothing).

Finally, smaller operators may benefit from lower ICACS insurance premiums that reflect the lower financial risk levels based on historic data. Whereas large operators may opt for different levels of insurance that better reflect their needs, encouraged by ICACS pricing that better reflects their insurance risk to Network Rail.

Proposal specific to the charter regime

High-level approach

ORR is not proposing any changes to the current Schedule 8 regime for charter operators.

Whilst we agree that the charter regime is broadly fit for purpose, we do think there is merit in making a small number of incremental improvements to the regime. Firstly, we would like ORR to review the charter incident caps so that they are more aligned with the freight regime. Secondly, we would like to propose some minor changes to the contractual wording of Schedule 8 for charter operators such that the wording reflects the actual workings of the regime in practice, as this is not currently the case.

Historically, the charter incident caps were set at a fixed amount whereby no Schedule 8 payments were made above the agreed £ figure. In CP4 this was converted into a cap on the level of minutes (per incident) over which no Schedule 8 payments would be made. In CP4 the cap was set at 147 minutes. In CP5 this was updated to 93 minutes to reflect the latest evidence, however the 147-minute cap was also retained for operators that wanted to keep their existing cap. In CP5 and CP6 additional caps at 500, 1000 and 5000 minutes were introduced alongside the existing 93- and 147-minute caps, with lower ACS payments for the higher caps.

From 2014/15 to 2020/21 significant incidents were as follows:

Length of incident (minutes)	No. of incidents
>93 to ≤100	5
>100 to ≤200	65
>200 to ≤300	25
>300 to ≤400	13
>400 to ≤500	8
>500 to ≤600	4
>600 to ≤700	4
>700 to ≤800	3
>800 to ≤900	2
>900 to ≤1000	1
>1000 to ≤1500	3
>1500 to ≤2000	1
>2000 to ≤2500	2
>2500 to ≤3000	3
>3000 to ≤3500	0
>3500 to ≤4000	0
>4000	2
Total	141

Of these incidents 50% (70/141) were under 200 minutes, 67% (95/141) were under 300 minutes and 82% (116/141) under 500 minutes. This suggests that the current 93- and 147-minute caps are too low. Furthermore, these caps are misaligned with the freight regime whereby caps are set at even intervals (1000, 2000 etc.). There are significant number of incidents breaching the incident cap as outlined above. Once the cap is likely to be breached there is no incentive on the Operator to mitigate delay. With Charter vehicles generally being older there can



increased risk of failure. Good maintenance regimes will however mitigate this. By establishing a higher cap this will provide an incentive for the operator to put in place robust maintenance regimes - thus improving reliability and reducing 3rd party delay on the network.

We recognise that Charter operations are small and therefore require a higher level of protection than freight operators, and therefore suggest that caps are set at 250, 500, 750, 1000, 2500 and 5000 i.e. at a lower level than freight caps, but with more consistent intervals and at a level sufficient enough such that the majority of incidents are paid for (and are incentivised) in full. If this proposal is accepted then we propose retaining the existing method of calculating the incident cap ACS, applying this to the new caps.

The other small change that we propose to ORR is a review of the wording of Schedule 8 for charter operators. The various clauses in Schedule 8 do not describe the process as it actually works. This is driven by the timescales for TDA, dispute resolution etc. It is thus proposed that the wording is changed to reflect the process as it actually works, which is exactly the same as for Freight. In particular:

- Clause 3.4: This describes the timescale to submit Service Variation & Cancellation (SV&C) claims, being by the end of the period following the period in which the event happened, and thus can be up to 7 weeks after the event. However, the Freight contract stipulates that they should be submitted by 23:59 on the second working day of the following week (thus normally Tuesday). This makes sense, as it retains visibility of train running information and incidents in TRUST, which are normally only visible for 14 days after the event. **It is proposed that the charter Schedule 8 be amended to incorporate the same timescale as Freight' which is by 23:59 on the second working day of the following week.**
- Clause 3.5: This describes the reports to be sent by Network Rail to the operator. It stipulates 'within 5 working days after the end of each Week'. However, the reporting is driven by TDA and dispute resolution timescales. **It is proposed that this be amended to the same as Freight, which is 8 days after the planned origin date of the affected trains.**
- Clause 3.5.b: says that Network Rail should inform the operator of any Cancellations; however, this should be the other way round: **the operator informs Network Rail via the SV&C claim form**, as with freight.
- Clause 3.5: interim statement. There is no such thing; once the Day 8 report has been issued there is no further statement until the period sign-off. **Propose to delete this clause and associated definition.**
- Clause 4.5: Within 5 Working days. This should be changed to **8 days after the trains have run**, as with freight.
- Clause 5.2: series of related incidents. We do not understand exactly what this means: does it mean more than one delay attributed to the same TRUST incident, or all delays in TRUST incidents with some common coding? **Needs clarification or deleting.**



- Clause 6.2.c: This describes a possession overrunning due to an operator-caused incident; however according to the Delay Attribution Principles and Rules such an overrun would be attributed to Network Rail not to the operator, so such an event cannot be linked back to the operator in Schedule 8. **Suggest that this clause is deleted.**
- Clause 7.1.1: within 14 days ... this does not happen, as the period sign-off for payments are only made after all disputed TRUST incidents have been resolved. **Suggest change the wording to reflect this.**

Additional ongoing costs associated with PR23 Schedule 8 proposals

ORR has proposed a number of changes to the way in which the Schedule 8 regime is recalibrated. Key changes to the recalibration process include: the annual recalibration of benchmarks, 'delay sharing' in Schedule 8 and the annual updates to the payment rates in the passenger regime to reflect changes in the TOC-on-Self to TOC-on-TOC relationship. During the initial recalibration phase, this is likely to be similar to previous periodic reviews in terms of the implementation costs, however the annual updates required may imply additional ongoing costs to Network Rail in theory. We have considered at this stage some early estimates of any anticipated additional ongoing costs (if there are any) to Network Rail in implementing the changes proposed by ORR which we outline in this section below.

Additional costs associated with changes to the passenger regime:

- 1) *Automatic update of benchmarks on a rolling basis (taking an average of the last x years) and annual update of the TOC-on-Self to TOC-on-TOC relationship in Schedule 8 payment rates:*

We foresee that both of these annual tasks could be automated to a degree – and the cost of setting up these annual processes should be included within the initial national recalibration exercise as the process is very similar to what we have done in previous calibrations with a few additional steps. We estimate that at least two months of work would be required to set up the annual process, as part of the general PR23 recalibration – and perhaps a similar amount of time would be required to run the process once it is set up and get sign off from all parties. We anticipate that the ongoing updates will require a two-to-three-month project to do the changes in each year – though this could be shortened if a robust method is created that can be used to simplify the calibration for service groups which have been impacted by significant structural change.

- 2) *Delay sharing:*

Timescales cannot be determined at this stage as we do not know the extent of the change. The main issue we can foresee at this stage is that PEARS currently only has four ways of sharing the responsibility of a delay. The first is to allocate the responsibility 50:50 between NETWORK RAIL and TOC; the second is the approach used for Z unexplained codes; the third is to use Edit sets; the fourth is multiple incidents are set up in DA for the same event. Each of these is not ideal and has a workload requirement and our expectation is that a degree of change would be required in PEARS to efficiently do what you are seeking. PEARS development has high risk due to the age of the code – NETWORK RAIL were investigating shipping PEARS to a more modern software architecture, but this work was suspended due to funding constraint. Without a change in PEARS it is possible that the workload for DA staff could increase in the short-term, however we will seek to consider ways to accommodate this change directly in PEARS (as part of the general recalibration) to mitigate the need for additional staff workload.*

**Additional costs associated with changes to the freight regime:**

We do not anticipate any additional costs in updating the freight benchmarks annually using historical data as this can easily be done with the existing data and systems, requiring very little to no extra work which is feasible within the current resourcing that we have in our freight team. Updating benchmarks on the basis of changes to traffic levels will require significant economic modelling work to accurately calculate the relationships between traffic levels and performance as we describe in our response above. This model would need to be updated annually by a team of consultants to reflect the latest evidence before being implemented into Schedule 8. This will likely cost an amount in the hundred thousands on an annual basis, and will require additional Network Rail resourcing to manage the annual commission. The proposal to 'share' delays through Schedule 8 is likely to incur short term costs during the PR23 recalibration to create a model which can re-calculate the 'shared' amounts, however once the model is built, we anticipate little to no ongoing costs to administer the model as a component of the existing processes.



ANNEX 3 – NETWORK RAIL’S RESPONSE TO ANNEX 3 OF ORR’S CONSULTATION ON OTHER AREAS CONSIDERED

In ORR’s consultation document, Annex 3 contains a table of additional areas for reform that it has considered and that it has concluded not to progress at this stage. In the table below we outline our views on each of these areas to outline whether we agree with ORR’s proposal not to progress the proposal, or whether we believe that there is merit in continuing to pursue the proposal, and our reasoning.

Other proposal considered	Network Rail comment
Benchmarks: Exclude enhancements from Network Rail performance trajectories	<p>If benchmarks are to be set solely on the basis of past performance, then this would no longer be applicable as Network Rail performance trajectories will no longer be used to set benchmarks.</p> <p>However, if benchmarks continue to be set using the CP6 methodology then we would like ORR to pursue this option further as we believe that commercial operators should pay towards the cost of performance improving enhancements that ultimately benefit their revenues.</p>
Payment rates: Lower, more tokenistic, payment rates	We agree with ORR not to pursue this further. Commercial operators are likely to consider that they need a full revenue compensation mechanism to protect their businesses and compensate their passengers when large delays do occur.
Cross-cutting change: More aggregation in calibration	We agree with ORR not to pursue this further. If targets are set at an operator level then operators can ‘game’ the regime by offsetting the poor performance of one service group with the strong performance of another, much to the disappointment of passengers using the service that is persistently poor performing.
Cross-cutting change: Benchmarks and payment rates to be set by negotiation	We agree with ORR not to pursue this further. Negotiation can be very difficult and uncollaborative, and often takes much longer than anticipated (for example, the negotiated element of the QX management fee for CP6 was agreed after CP6 had already begun due to difficulties in negotiating the appropriate amount).



Cross-cutting change: Increase frequency of monitoring points	We agree with ORR not to pursue this further as we consider that this increases the risk of making an already complicated process even more complicated as this may necessitate additional recalibrations due to the addition of new monitoring points throughout the control period (which is time consuming, costly and with only a small marginal benefit).
Measure of delay: Dead- bands	Whilst we consider that dead-bands could be helpful to reduce industry rancour, we do agree with ORR's view around lack of incentives for small delays, and we believe that this could be quite difficult to implement. We think a good way for this to be potentially explored would be through Schedule 8 overlays. We would like to work with train operators bi-laterally on such overlays, if this is something that they are interested in pursuing.
Measure of delay: Sharing reactionary delay	We disagree with this view and we would like ORR to explore this further to improve collaboration through incentives on sharing of system wide delays. We point to the fact that we have been able to introduce some sharing through recently agreed Schedule 8 overlays. If ORR does not explore this then we will continue to do so through overlay agreements with operators.
Structure of scheme: No TOC-on-TOC payments	We strongly agree that ORR should not pursue this further. Our view is that reforms should increase the TOC-on-TOC incentives and not reduce them.
Structure of scheme: No bonuses in scheme	We agree with ORR's decision not to pursue this further as we believe that it is helpful to have both up and downside incentives and the need for a balanced star model (do not want any additional liability risk for Network Rail who sits at the centre of the model).



Response to ORR's technical consultation on the PR23 review of the Schedule 8 train performance regime

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

Please send your response to performance.incentives@orr.gov.uk by **10 September 2021**.

Please contact Will Holman at ORR with any queries: will.holman@orr.gov.uk.

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Chapter 2: ORR's proposed approach and priorities

We welcome views on our questions regarding ORR's proposed approach to PR23.

Question 1: Do you have any views on the objectives and benefits of a mechanism such as Schedule 8, for the range of different industry parties, both in the current contracting model and once the Rail Transformation Programme has been fully implemented?

No views

Question 2: Do you have any views on whether we should make no changes to Schedule 8 in PR23, or pursue a small number of incremental reforms to ensure it remains fit for purpose as a baseline regime?

Nexus is supportive of using the opportunity of the PR23 process to make incremental reforms where these are proportionate and add value.

Question 3: Do you agree with the areas we have identified as priorities for PR23? Are there any other significant issues that we should seek to address?

No additional issues suggested, however we provide comments on the TOC-on-TOC delay priority identified later in the consultation response.

Chapter 3: Proposals: Cross-cutting changes across sector regimes

We welcome views on the cross-cutting proposals in this chapter.

Question 4: Would you support Proposal A [to base Network Rail's benchmarks only on past performance]? Do you have any views on the proposed methodology set out?

This is broadly supported however the detail of how the benchmark will be set and what will be included/excluded in this setting process (i.e. calibration) will be important. For example, Tyne & Wear Metro runs on a short part of Network Rail infrastructure with the route less than 12 miles long. As a result, Network Rail performance is generally good with very few issues on a day-to-day basis, and where issues do occur these tend to cause minor delay to one or a small number of trains. This means a single large 'once in a decade' incident on one day can significantly affect the Network Rail performance outturn for the whole year. The benchmark setting process needs to take account of such operational characteristics as, in this instance, Nexus believes including such a 'one off' incident in setting future benchmarks would not be appropriate as it does not reflect the performance in a typical year.

Question 5: Would you support Proposal B [to annually update benchmarks to make benchmarks more flexible]? If benchmarks were to be updated annually, do you favour achieving this through a rolling update (Option B1) or through a modelled approach (Option B2)?

Both options have their advantages and disadvantages and Nexus does not have a view on favouring either one.

A key issue within Option B1 is potentially weakening Network Rail's incentive to manage the network effectively. For example, Tyne & Wear Metro experienced higher levels of disruption over a prolonged period of time following the May 2018 timetable implementation, which was caused by on time Tyne & Wear Metro trains being regulated for other TOCs running late as a consequence of changes made in the May 2018 timetable. The causes of being regulated for other TOCs were partly related to Network Rail issues such as clashes in the timetable and we do not consider it appropriate that sustained poorer performance as a result of such circumstances is 'baked in' to a benchmark.

Question 6: Should Proposal C [to implement joint or shared allocation of delay minutes within Schedule 8 itself] be a priority for reform in PR23? If you would like us to consider Proposal C further, please set out how it can best be implemented (e.g. including incident types that should be subject to joint or shared responsibility).

Nexus has excellent working relationships with Network Rail at a local level and works collaboratively on resolving issues regardless of responsibility. Nexus would have no objection to a joint/shared allocation of delay minutes taking place, but this would not lead to any change in the collaborative approach that currently exists to resolve such issues.

From a TAA perspective, paragraph 5.4 of Schedule 8 of Nexus' TAA sets out current arrangements for joint responsibility incidents. As Nexus' TAA falls outside the Periodic Review provisions and has its own 5-yearly review arrangements, any change that moves away from the provisions of Nexus' Schedule 8 would have to be implemented in the next 5-yearly review in Nexus' TAA rather than from PR23 implementation on 1/4/24.

Chapter 4: Proposals: Customer regime

We welcome views on this chapter's proposals for the customer regime.

Question 7: Would you support Proposal D [to more accurately incentivise TOCs to limit delay to other operators], implemented through Option D2 [to update payment rates annually through a rolling update of the TOC responsibility matrix]? Do you have any views on the options set out?

The ORR has effectively summarised the key issues with this proposal in 4.13 – i.e. Network Rail regulates services and is also responsible for timetabling. As a result Nexus cannot support this measure as this sits more within Network Rail's control.

This has been seen in Nexus' operation where, for example, since commencing Tyne & Wear Metro services in 2002, Grand Central started operating from Sunderland. If a Metro service causes delay to a Grand Central train, this could have further knock-on effect on the East Coast Main Line to London Kings Cross and therefore be 'expensive' in terms of TOC-on-TOC delay costs. Nexus has no control over the vast majority of the aspects of the delay for example:

- Avoiding/mitigating any initial delay to the Grand Central train at Sunderland (whilst a Tyne & Wear Metro train may present late onto Network Rail infrastructure, the responsibility for regulating the train before reaching Sunderland falls to Network Rail).
- Recovery time available in the Grand Central timetable.
- The regulation approach adopted by Network Rail to recover (or not) the Grand Central late running on its journey.
- The sale of capacity/timetabling on the route the Grand Central train takes that could impact on the ability to recover or exacerbate the delay.

Addition of more services that interface with Tyne & Wear Metro trains has the potential to increase this impact in the future with no ability by Nexus to control this. Furthermore timetable

changes could result in reduction in margins compared with currently, again making performance more fragile and increasing the impact of late running. Again, Nexus has no control over this.

Nexus however recognises that reactionary delays are an important performance consideration as has been experienced by Tyne & Wear Metro services following the May 2018 timetable change. Following this and subsequent timetable changes, Nexus has worked well with Network Rail and other TOCs to identify regularly occurring reactionary delays, the reasons for these and the actions/timescales to resolve or mitigate the delay. Nexus will continue to adopt this approach to improve performance for all customers.

Question 8: Should Proposal E [to change the allocation of unidentified delays between Network Rail and operators] be a priority for reform in PR23? Are you able to provide evidence on the benefits and costs of the proposal or to inform the allocation of unidentified delays?

Understanding subthreshold delays is important, as in Nexus' experience we have found these often can reduce performance resilience and on occasions cause above threshold delays when combined with other issues. Through examining subthreshold data we have identified trains regularly delayed by 1 or 2 minutes, and then been able to identify the reasons for that delay and take action on that delay. From a customer perspective, with Tyne & Wear Metro being a high frequency rapid transit system, a regularly occurring delay of 1 or 2 minutes to a train will be noticed by regular customers on that train and adversely impact on customer experience.

If this work can be carried out and then the outcome applied to unidentified delays this would incentivise all involved to mitigate subthreshold delays. In due course, a future piece of work to review unidentified delays and any change in the profile would then be required to recalibrate to take account of action taken.

The TAA impact mentioned in the response to question 6 would apply here too. Paragraphs 5.5 and 5.6 of Schedule 8 of Nexus' TAA sets out current arrangements for unidentified delays and cancellations and any change would have to be implemented in the next 5-yearly review in Nexus' TAA rather than the PR23 date of 1/4/24.

Question 9: Should Proposal F [to reflect the wider financial impacts of delays in Schedule 8 compensation] be a priority for reform in PR23? If this proposal was taken forward, would you favour formulaic recovery (Option F1) or actual sums recovery (Option F2) to achieve it?

Nexus does not consider this a priority as, as observed by the ORR, both come with high administrative costs.

Chapter 5: Proposals: Freight and Charter regimes

We welcome views on this chapter's proposals for the freight and charter regimes.

Question 10: Do you agree with our preferred high-level approach for the freight regime, to keep the current regime broadly unchanged for CP7? Are there other elements of the freight regime or its calibration that should be considered for reform in PR23?

No views

Question 11: Would you support Proposal G to update the evidence base underpinning the calibration of the freight payment rate?

No views

Question 12: Should Proposal H, to revisit the calibration of caps, be a priority for reform in PR23? Can you provide evidence demonstrating whether or not the supplements and caps are currently calibrated appropriately?

No views

Question 13: Do you agree with our preferred high-level approach for the charter regime, to keep the current regime broadly in place for CP7? Are there other elements of the charter regime or its calibration that should be considered for reform in PR23?

No views

Are there any other comments you would like to make?

The responses to questions 6 and 8 highlight that some proposals, if implemented, would require a change to Nexus' Schedule 8 however this falls outside the Periodic Review process and has its own 5-yearly review provisions. If enacted for other TAA's through the Periodic Review process but not Nexus' TAA until its next 5-yearly review, any change to Network Rail systems and processes would need to be able to work on this different basis for Nexus' TAA in the intervening period between PR23 implementation on 1/4/24 and any implementation in Nexus' TAA.



Response to ORR's technical consultation on the PR23 review of the Schedule 8 train performance regime

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

Please send your response to performance.incentives@orr.gov.uk by **10 September 2021**.

Please contact Will Holman at ORR with any queries: will.holman@orr.gov.uk.

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Chapter 2: ORR's proposed approach and priorities

We welcome views on our questions regarding ORR's proposed approach to PR23.

Question 1: Do you have any views on the objectives and benefits of a mechanism such as Schedule 8, for the range of different industry parties, both in the current contracting model and once the Rail Transformation Programme has been fully implemented?

NTL believes that Schedule 8 serves an important function in protecting revenue for franchised operators. The principle of measuring the impact on passenger numbers and therefore revenue loss due to poor performance is sound as for a passenger operator, this is the purpose of our service, however, setting a target for an acceptable level of poor performance does undermine this principle.

Indirect compensation and incentive regimes do not align passenger impact to accountable party and improvement outcome. Instead these deliver business cases that focus towards high impact, observable and measurable scenarios. The larger the regime the further away you get. E.g. Schedule 8 is based on lateness of trains at a location with the payments distributed based on allocations of delays in ratio to the accountable party. The business case to improve persistent poor performance at location is therefore composed of tackling all the various reasons why trains are late, which will have a cost that will be far greater than the incentive cost, as such business

cases to improve reliability of low frequency higher impact asset failures are completed, which may or not tackle the issue at the location where the incentive occurred but will deliver a holistic equivalent improvement. In essence, Schedule 8 incentives are traditionally focused on asset improvements such as reliability of train doors as the effect can be easily measured, this unfortunately does mean that systemic causes of delay which can be harder to identify and quantify are often not tackled.

It is worth touching on the appropriateness of Schedule 8 given the current climate. Due to the current circumstance, Schedule 8 plays a less vital role under current ERMA's and also in the proposed future operation under GBR (albeit that as an industry we don't know exactly what the operation will look like yet). Although the schedule 8 liability is currently offset due to the current funding arrangements, this may not always be the case and certainly if a franchising model was to be returned to then contractual regimes such as schedule 8 will be very important as it still is for many open access operators who do still require the revenue protection offered by Schedule 8, freight operators are also in this position.

Question 2: Do you have any views on whether we should make no changes to Schedule 8 in PR23, or pursue a small number of incremental reforms to ensure it remains fit for purpose as a baseline regime?

The long-term viability of any incremental reforms, and value they represent to the industry should be considered and weighed up against the amount of work required to implement them, and for any updated benchmarks and processes to be filtered through to internal operational models.

Making TOC's accountable for TOC on TOC can be argued both ways and neither will deliver what is desired, however as mentioned in our response to Q1, this is because the regime will not encourage a train operator to focus business cases on improving their service based on the impact it has on another, but to still focus on the impact that the largest and strongest business case can deliver. This is due to us being a fluid asset organisation. (trains don't normally fail in the same place twice, where as a set of points is always in the same place).

A regime that directly links whole system, multi-year impact against revenue forecast to an accountable organisation as capital could help change the culture of blame to responsibility.

Having benchmarks that are constantly changing would address a lack of aligned incentives but would inadvertently create a cottage industry for recalibration which is not needed. This would occur as each benchmark also depends upon the benchmarks of other operators, otherwise misalignment would occur i.e. if TOC A states performance will be worse this year, each operator that TOC A interacts with, should also need their TOC on TOC benchmark adjusting.

We don't believe that changing shared allocation in order to remove barriers to industry collaboration will deliver the benefits desired, we do, however, believe that identifying the correct accountable organisation will deliver a benefit, this could be achieved by adjusting ancillary contractual constraints such as those in station access and depot access contracts. Currently a TOC is accountable for delays when the station lighting is lost, or a train is late from a depot regardless of cause. Examples of situations such as these do not encourage industry

collaboration and performance improvement in instances like this is difficult as delay allocation is questionable.

We believe that 'changing the allocation of delay for unidentified incidents' needs a definition to be agreed for 'unidentified', as currently this includes delays that are not investigated, and this has a wider context. As an example, If Operator A is asked to investigate a delay and identifies that the train was delayed due to a signal check for a train from Operator B that is running late for reasons 'un-investigated'. The delay is then allocated to 'unidentified' holding Operator A accountable for a proportion of delay, even though it is known that the delay is linked to Operator B. but the current regime means that Operator B has no accountability under Schedule 8 - only Operator A and Network Rail feature as joint owners of the allocated delay.

Question 3: Do you agree with the areas we have identified as priorities for PR23? Are there any other significant issues that we should seek to address?

NTL broadly agree with the areas identified as priorities for PR23, however we do believe that the issue of misaligned incentives requires attention. Unfortunately, whilst there are misaligned incentives and a lack of clear accountability then the changes proposed will not fully tackle the issues, instead we will just see the issues moved to another place.

There is a broad question which we believe that the ORR must consider for PR23 and this is:

- Does the ORR want to buy a level of performance or does ORR want to incentivise Network Rail and Industry to deliver a level of performance?

CP6 demonstrated that if there is no incentive to improve when benchmarks are aligned to this. It is NTL's view that the final determination for CP6 did not incentivise Network Rail to improve due to the 'soft' targets and benchmarks that were set. The regime was such that throughout CP6, NTL have been compensating Network Rail for 'good' performance when in effect the benchmark was not set at the right level in the first place and therefore the regime provided no real incentive for Network Rail to do better for passengers.

Chapter 3: Proposals: Cross-cutting changes across sector regimes

We welcome views on the cross-cutting proposals in this chapter.

Question 4: Would you support Proposal A [to base Network Rail's benchmarks only on past performance]? Do you have any views on the proposed methodology set out?

NTL would support approach A in a static scenario, as the simplification would reduce cost and time for involved parties. However, removing the benchmark entirely and incentivising NR through other means would be preferable altogether.

Question 5: Would you support Proposal B [to annually update benchmarks to make benchmarks more flexible]? If benchmarks were to be updated annually, do you favour achieving this through a rolling update (Option B1) or through a modelled approach (Option B2)?

NTL supports the proposal to annually update benchmarks in order to make the benchmarks more flexible.

Option B1 would be NTL's preference in a normal unchanging world but looking at a period of the last 5 years is not necessarily going to be representative of the railway of next year.

Question 6: Should Proposal C [to implement joint or shared allocation of delay minutes within Schedule 8 itself] be a priority for reform in PR23? If you would like us to consider Proposal C further, please set out how it can best be implemented (e.g. including incident types that should be subject to joint or shared responsibility).

NTL agree that the proposal would cloud the relationship between Schedule 8 and delay attribution. We would be interested to find out how the ORR has assessed the benefit of making these changes and how the wider consequences of the change have been considered.

As an example, although Network Rail are responsible for fatalities, there are a multitude of scenarios where train operators feel Network Rail should be accountable for delays but due to the criteria responsibility in Schedule 8, accountability does not sit with Network Rail.

e.g. if a train operator has to use alternative transport due to a points failure to facilitate movement of passengers past the obstruction and then the train is held waiting the bus - the train operator is accountable for the delay. If passengers are diverted from one route to another due to a line closure event as part of CSL2 event - the operator of the train with the additional passenger loads is held accountable.

Chapter 4: Proposals: Passenger regime

We welcome views on this chapter's proposals for the passenger regime.

Question 7: Would you support Proposal D [to more accurately incentivise TOCs to limit delay to other operators], implemented through Option D2 [to update payment rates annually through a rolling update of the TOC responsibility matrix]? Do you have any views on the options set out?

Following on from NTL's views as outlined in the response to question 2, unfortunately neither option is perfect. However, D2 would be preferable in this instance.

Option D1, based on logic would suggest that the regime does not incentivise operators to aid service recovery by considering other operators (4.12). By creating a regime that pays out based on the delay caused, would equally create a regime that should an operator choose not to intervene via service recovery on a train running late could still receive compensation for this. As Network Rail would be financially protected, it could be assumed that Network Rail would have no vested interest to intervene and so this incentive would be lost (4.13). On this basis NTL would not support this proposal.

Question 8: Should Proposal E [to change the allocation of unidentified delays between Network Rail and operators] be a priority for reform in PR23? Are you able to provide evidence on the benefits and costs of the proposal or to inform the allocation of unidentified delays?

Following on from NTL's views as outlined in our response to question 2. In terms of evidence, due to the current regime Network Rail as the only industry party hold this dataset.

NTL is able to provide the following example:

TPE service 1K18 has lost 1 allocated minute and so the NTL train service is regulated for 5 minutes. Under Schedule 8, TPE will pay no compensation, Network Rail will be accountable for 4 minutes, NTL will be accountable for 1 minute even though NTL are not a responsible party. This comes back to the point made in our response to Question 2 in that changing the allocation of delay for unidentified incidents would need a definition of 'unidentified' to be agreed as delays not investigated have a wider context as in this example.

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System Session Edit Options RTM Help
TCTRW87 TRUST Incident Train Details 13/08/21 16:08 Page 1 of 1
Incident : 883426 1K18 5 LOST SYB ABY Created on: 13/08/21

Train Oper Section affected Delay Status Resp Train
13/08 1K18 1206 HULL EA STALYBDGE-ASHBURYS 001 ***
13/08 2S19 1334 NEWMLSCEN ED ROMILEY -ASHBURYS 005 *** YB 191K18MK13

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Question 9: Should Proposal F [to reflect the wider financial impacts of delays in Schedule 8 compensation] be a priority for reform in PR23? If this proposal was taken forward, would you favour formulaic recovery (Option F1) or actual sums recovery (Option F2) to achieve it?

NTL have made some reference to this concept in our response to Question 1. By holding the Operator accountable for the external costs of disruption they will be incentivised to manage their own costs, if these costs were to be included in compensation then some of the incentive would be lost.

Option F1 would increase the cost of TOC on TOC, and create a potential challenge and evidence culture e.g. X operator challenging Y Operator's costs for bus replacement services - Y operator is paying far more than X operator for the bus replacement service and thereby creating a situation where X operator will not compensate Y operator for the full cost incurred as the costs are considered to be more than the 'going rate'. Not every operator will have the same commercial arrangements in third party contracts and therefore there is a risk that costs incurred exceed the compensation value,

Options F2 as proposed on the other hand would create a huge industry in compensation claims, this would be resource intensive for operators and creates an element of financial risk as costs incurred may not always be successfully recovered. This is the case for Schedule 4 as an

example – not all costs incurred can be easily recovered and the burden of evidence is at times incredibly onerous.

Chapter 5: Proposals: Freight and Charter regimes

We welcome views on this chapter's proposals for the freight and charter regimes.

Question 10: Do you agree with our preferred high-level approach for the freight regime, to keep the current regime broadly unchanged for CP7? Are there other elements of the freight regime or its calibration that should be considered for reform in PR23?

NTL agrees with the preferred high-level approach and specifically only the cap principle

Question 11: Would you support Proposal G to update the evidence base underpinning the calibration of the freight payment rate?

N/A

Question 12: Should Proposal H, to revisit the calibration of caps, be a priority for reform in PR23? Can you provide evidence demonstrating whether or not the supplements and caps are currently calibrated appropriately?

NTL has a view that If Train Operating Companies went to a TOC on TOC regime - should the payment rate be capped in the same way, then the freight regime should also have a reciprocal cap i.e. TOC's could pay NR £5m in compensation for FOC 1, who only receives £2m due to the cap

Question 13: Do you agree with our preferred high-level approach for the charter regime, to keep the current regime broadly in place for CP7? Are there other elements of the charter regime or its calibration that should be considered for reform in PR23?

NTL is of the view that If Train Operating Companies went to a TOC on TOC regime - the payment rate should be capped in the same way that the freight regime has - a reciprocal cap i.e. TOC's could pay NR £50k in compensation for Charter 1, who only receives £20k due to the cap

Are there any other comments you would like to make?

NTL would welcome industry workshops in the coming months to work through the detail behind the ORR's proposals.



Response to ORR’s technical consultation on the PR23 review of the Schedule 8 train performance regime

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

Please send your response to performance.incentives@orr.gov.uk by **10 September 2021**.

Please contact Will Holman at ORR with any queries: will.holman@orr.gov.uk.

Full name	Laurence Atchison
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*This information will not be published on our website.

This response is on behalf of RDG’s freight operating company members. It does not represent the views of Network Rail or train operating companies’ owning groups.

Chapter 2: ORR’s proposed approach and priorities

We welcome views on our questions regarding ORR’s proposed approach to PR23.

Question 1: Do you have any views on the objectives and benefits of a mechanism such as Schedule 8, for the range of different industry parties, both in the current contracting model and once the Rail Transformation Programme has been fully implemented?

The Schedule 8 performance regime is an important mechanism for the rail freight industry. It provides appropriate financial incentives for Network Rail and freight operators, to each play their part in contributing to a high performing railway, helping to promote rail as a quick and reliable solution within the freight and logistics sector for customers.

When there is disruption on the network, the Schedule 8 process enables affected operators or Network Rail to hold the responsible party to account and makes sure they are compensated accordingly for the impact on their operations. This protection is critical within a largely private rail freight industry, by creating a secure and investable contractual environment for freight operators and customers. The principles of Schedule 8 are also integrated within the contracts that freight operators have through their supply chains and the financial levers of Schedule 8 help to generate a strong focus on performance across customers, ports and terminals.

As the rail industry goes through a period of significant reform, the principles and behaviours derived from Schedule 8 will remain important for freight operators who continue to bear the risk of poor performance and benefit from good performance. It is therefore imperative that the regime remains through and beyond the reform transition period.

Question 2: Do you have any views on whether we should make no changes to Schedule 8 in PR23, or pursue a small number of incremental reforms to ensure it remains fit for purpose as a baseline regime?

RDG's freight operator members support ORR's approach to only focus on incremental reforms at this point within the regulatory review. Wide-ranging change to Schedule 8 would not be appropriate at a time when the industry is focused on the wider Rail Transformation Programme and whilst there is considerable uncertainty about how the overall system will function. While some of the proposals put forward could be worthy of further discussion, there is currently little appetite from our freight operator members for substantial change.

Question 3: Do you agree with the areas we have identified as priorities for PR23? Are there any other significant issues that we should seek to address?

RDG's freight operator members agree with the collective areas identified as overall priorities for PR23 and would welcome continued engagement with ORR and industry on these. No other significant issues were identified to be addressed but it would be beneficial to understand the potential impact (including unintended consequences) of some of the proposed changes (such as the changes to benchmarks).

Chapter 3: Proposals: Cross-cutting changes across sector regimes

We welcome views on the cross-cutting proposals in this chapter.

Question 4: Would you support Proposal A [to base Network Rail's benchmarks only on past performance]? Do you have any views on the proposed methodology set out?

Basing Network Rail's benchmarks on past performance is not supported by freight operator members of RDG and the existing benchmarking process using forward-looking regulatory performance trajectories should be retained.

Basing benchmarks on past performance would be a less effective way of incentivising Network Rail to deliver a high performing railway. Network Rail is funded to deliver a certain level of performance during each Control Period. The future funding level should be consistent with the benchmark for performance targets, rather than with Network Rail's past performance which is aligned to a different funding model and set of targets.

Question 5: Would you support Proposal B [to annually update benchmarks to make benchmarks more flexible]? If benchmarks were to be updated annually, do you favour achieving this through a rolling update (Option B1) or through a modelled approach (Option B2)?

RDG's freight operator members do not support the annual updating of benchmarks. While the rationale for seeking to update benchmarks more regularly to accommodate the impact of Covid

on the network is understood, as traffic recovers there would always remain a one-year lag between the levels used to determine the benchmarks, and the actual traffic levels.

A consistent benchmark over a five-year period gives freight operators greater certainty to make investments and commitments on rolling stock, facilities and to customers. Moving to an annual process would remove some of this stability, not only disincentivising private sector investment, but also creating an administrative burden to update the contracts that operators hold with customers (where possible) based on certain performance benchmarks.

While Option B1 would adjust benchmarks in accordance with changes in network mileage, the annual lag impact would mean that the benchmarks reflect a previous operating environment. Applying such an approach to the impact that Covid has had would see adjustments made the following year, by which point traffic volumes may have largely recovered. Therefore, Option B1 would not provide the flexibility to ensure that the regime is properly calibrated, but rather would risk worsening the situation by creating an annual lag.

Option B2 risks undermining the ability of the sector to invest to outperform benchmarks, given that any subsequent improvement in performance will soon be reflected in the FOC benchmarks. If a flexible approach is to be adopted it should be limited to adjusting for the operating environment (e.g. network mileages that impact congestion) rather than adjusting for underlying performance, which is also influenced by investments made by operators. Creating tougher benchmarks where investment has been made to improve performance could negate the incentive of operators to make such investments and thereby worsen outcomes.

Flexibility in the Schedule 8 regime also needs to be considered more widely than merely benchmarks, as there are other aspects of the regime that can be mis-aligned. Adjusting one aspect of the regime, while holding other elements constant risks changing the calibration.

Question 6: Should Proposal C [to implement joint or shared allocation of delay minutes within Schedule 8 itself] be a priority for reform in PR23? If you would like us to consider Proposal C further, please set out how it can best be implemented (e.g. including incident types that should be subject to joint or shared responsibility).

RDG's freight members do not believe that Proposal C should be a priority for PR23. A better understanding of the changes in behaviours it would be expected to drive is needed before introducing such a significant change. This would also add to the demand on resources and time.

RDG is willing to work with ORR to better understand how a shared approach could incentivise better performance outcomes from both operators and Network Rail.

Chapter 4: Proposals: Passenger regime

We welcome views on this chapter's proposals for the passenger regime.

Question 7: Would you support Proposal D [to more accurately incentivise TOCs to limit delay to other operators], implemented through Option D2 [to update payment rates annually through a rolling update of the TOC responsibility matrix]? Do you have any views on the options set out?

N/A: This is RDG's response on behalf of freight members. A separate response on behalf of independent owning group members will also be submitted.

Question 8: Should Proposal E [to change the allocation of unidentified delays between Network Rail and operators] be a priority for reform in PR23? Are you able to provide evidence on the benefits and costs of the proposal or to inform the allocation of unidentified delays?

N/A: This is RDG's response on behalf of freight members. A separate response on behalf of independent owning group members will also be submitted.

Question 9: Should Proposal F [to reflect the wider financial impacts of delays in Schedule 8 compensation] be a priority for reform in PR23? If this proposal was taken forward, would you favour formulaic recovery (Option F1) or actual sums recovery (Option F2) to achieve it?

N/A: This is RDG's response on behalf of freight members. A separate response on behalf of independent owning group members will also be submitted.

Chapter 5: Proposals: Freight and Charter regimes

We welcome views on this chapter's proposals for the freight and charter regimes.

Question 10: Do you agree with our preferred high-level approach for the freight regime, to keep the current regime broadly unchanged for CP7? Are there other elements of the freight regime or its calibration that should be considered for reform in PR23?

Yes, the Schedule 8 freight regime is highly effective and creates appropriate incentives for all parties to contribute to a higher performing railway. There are few, if any, changes that should therefore be made to the regime for CP7.

Question 11: Would you support Proposal G to update the evidence base underpinning the calibration of the freight payment rate?

There is a case for reviewing the calibration of the freight payment rate to ensure rates are accurate and reflect the commodities currently being carried. However, it would be useful to have a better understanding and certainty around the calculation of the other relevant rates (e.g. NR payment rate) before proceeding with the work to update this evidence base.

RDG and freight operators would welcome further engagement on this issue.

Question 12: Should Proposal H, to revisit the calibration of caps, be a priority for reform in PR23? Can you provide evidence demonstrating whether or not the supplements and caps are currently calibrated appropriately?

RDG's freight members do not believe that any structural changes to capping arrangements should be a priority for PR23 as it remains one of the smoothest aspects of the whole regime. The caps are already high (the minimum cap is nearly £60,000 per incident), and when combined with the insurance premium paid by freight operators, are a sufficient incentive for freight operators to deliver high performance levels. While structural changes are not a priority, the actual charges for the Incident Caps should be recalibrated during the Periodic Review and the level of the annual caps agreed in the usual bilateral manner, as they are ahead of each new control period, to ensure that they are set on the correct basis.

Question 13: Do you agree with our preferred high-level approach for the charter regime, to keep the current regime broadly in place for CP7? Are there other elements of the charter regime or its calibration that should be considered for reform in PR23?

No view.

Are there any other comments you would like to make?

No view.

Catherine Williams
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25 Cabot Square
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By email: Catherine.Williams@orr.gov.uk

17 September 2021

Dear Catherine

This letter is in response to ORR's technical consultation on the PR23 review of the Schedule 8 train performance regime. This response is on behalf of RDG's train operator independent owning group members. It does not represent the views of Network Rail or RDG's freight members. A separate RDG response will be submitted on behalf of RDG's freight operator members.

The existing Schedule 8 regime has over the years provided an important mechanism to protect train operators from uncontrolled performance risk on its revenues and to incentivise train operators and Network Rail to reduce the delays caused to services. The benchmarking and calibration mechanisms of Schedule 8 were also intended to provide train operators and Network Rail with important signals for investment. Customers of rail value a high-performing, reliable and resilient railway and Schedule 8 was designed to help contribute to this.

However, the existing Schedule 8 regime is not faultless. Problems such as its complexity, the resource and time it requires, and its effectiveness at delivering its intended outcomes are regularly cited as reasons for reform (as discussed in the 2021 white paper).

However, RDG's independent owning group members do not believe that making changes to Schedule 8 now would be appropriate at a time when the wider rail transformation programme is underway with considerable uncertainty about how the overall system will function in future, including the new underlying contractual architecture. The current passenger Schedule 8 was designed to work alongside the old franchises which have now either been overlaid with Emergency Recovery Measures Agreements (ERMAs) or in some cases now moved beyond ERMAs and replaced with National Rail Contracts (NRCs). Both ERMAs and NRCs have no revenue risk for train operators. It is clear that under current contractual arrangements any changes to Schedule 8 will have no behavioural or risk impacts on train operators and it is not yet clear whether the changes ORR is considering will result in a regime that is aligned with future contracts.

NRCs will be replaced in time with Passenger Service Contracts (PSCs) but apart from some high-level descriptions in the Williams-Shapps Plan for Rail White Paper regarding different types of contracts with different risk profiles, we don't yet know the detail of those risk profiles or the obligations that train operators will be required to deliver, or the levers they will have to deliver on those obligations. The new contractual framework could fundamentally alter the

type of performance regimes that will be required. With market engagement on PSCs due to begin later in 2021, we expect to understand more over the coming months.

In future, given that GBR will be acquiring ORR's access functions it will have the opportunity to ensure that there is continued alignment between the requirements in PSCs and performance regimes in access contracts. In time, and to align with the new contractual framework once it becomes clearer, a more in-depth review of Schedule 8 will likely need to be undertaken to ensure that it (or any successor regime) provides the right incentives for collaboration between Network Rail and train operators needed to continually improve train performance for the customer. RDG (or successor trade body) and our owning group members will be keen to engage with this process. The transformation of the railway as set out in the White Paper, the creation of GBR to align the incentives of infrastructure and train operations, and a new contractual framework with different risk profiles compared with the old franchises, could provide an opportunity to rationalise and simplify Schedule 8 (alongside other industry regimes) and reduce the administrative burden whilst improving some of the key inputs to the regime, in particular accurate delay attribution.

For as long as there are operators who bear some revenue risk (and/or have revenue growth incentives) it will still be appropriate for Schedule 8 or a replacement incentive/protection mechanism to continue in some form.

ORR's identified priorities

As stated above, independent owning group members of RDG do not believe that changes to Schedule 8 are appropriate at this stage. However, if ORR does choose to go ahead and suggest changes, owning groups would make the following key observations:

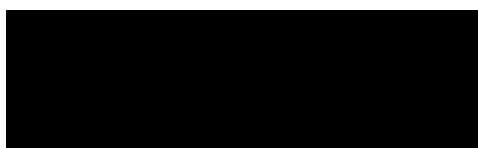
- It is not clear what the overarching statement of purpose is from ORR regarding the individual proposals and how they would be expected to change behaviours given the current contractual environment and expected future industry changes.
- Even if the current structure of Schedule 8 were to remain appropriate in the future contractual environment, it is not clear that ORR has considered the potential impact (including unintended consequences) of some of the proposed changes such as the changes to the way benchmarks are calculated.
- Independent owning group members of RDG have concerns with the calculation of Network Rail benchmarks on the basis of past performance as this could lead to misalignment with long-term industry goals and performance requirements in future PSCs and could lead to a downward spiral of under-delivery, particularly if combined with re-setting benchmarks annually. We recognise the problems with over-ambitious targets but benchmarks should be based on a reasonable assessment of what should be achievable in the future and not just what has been delivered in the past.
- Likewise, whilst we understand the arguments for updating Network Rail benchmarks annually, this could reinforce misalignment with long-term industry goals and performance requirements in future PSCs. GBR and other specifiers could re-base performance targets in PSCs to align with changes to benchmarks in order to address

the contractual alignment problem. However, this still leaves the risk of a downward spiral of under-delivery.

- Independent owning groups have differing views on the proposal to reflect the wider impacts of delays in Schedule 8 compensation. Those more supportive have voiced a preference for option F1 were this proposal to be progressed further. Those less supportive have noted that it could increase resource requirements and costs.
- Independent owning group views differ on the merits of introducing shared and/or joint attribution, and whether this would be the right time to do so. While some support it as a means of enabling and incentivising collaboration between Network Rail and Operators, others do not support it on the grounds that it would be a significant change at this time, with various subsequent changes needed as well.
- Independent owning groups do not agree with the ORR's analysis that there is currently a gap in Operators' incentives in how TOC-on-TOC delay is handled as most of the financial impact of the Operator regime is driven by the costs created by TOC-on-TOC delays. This is reflected in the setting of the Operator payments rates. However, owning groups would support this arrangement being made more accurate through a process of annually updating the TOC responsibility matrix as laid out in Option D2 in ORR's consultation paper.

RDG would welcome continued engagement with ORR and industry on this issue. As the new contractual architecture becomes clearer it will be crucial to ensure that Schedule 8, or an alternative incentive mechanism to fit with the new architecture, is in place to encourage collaboration to improve performance and to protect those operators who will still take some revenue risk in the future.

Yours sincerely,



John Thomas

Director of Policy

PR23 – Review of the Schedule 8 Performance Regime

Response from Rail Freight Group

10 September 2021

1. Rail Freight Group (RFG) is pleased to respond to the consultation on the PR23 Review of the Schedule 8 (S8) Performance Regime. No part of this response is confidential.
2. RFG is the representative body for rail freight in the UK, and we campaign for a greater use of rail freight, to deliver environmental and economic benefits for the UK. We have over 110 member companies including train operators, end customers, ports and terminal operators, suppliers including locomotive and wagon companies and support services.

General Comments

3. Freight customers, like passengers place a high value on the reliability of the service they receive from the railway. Delays, and in particular cancellations, have a high impact on customers businesses, and poor performance also brings reputational damage, which makes it harder to bring new businesses onto rail.
4. The S8 (and S4) regimes play an important role in incentivising good performance and compensating for poor performance. Although the contractual relationships between operators and customers vary, the regimes allow customers to be protected when the infrastructure goes wrong. The regimes also act to encourage good behaviour from the freight sector in helping overall network performance.
5. The proposals in the Williams – Shapps Plan for Rail infer significant changes to the S8 regime, suggesting that it may be ‘turned off’ all together for GBR operators and replaced with contractual incentives on concessionaires for poor performance. There are many questions on how this would work, and how the right incentives would apply to GBR to manage the infrastructure effectively.
6. For freight operators it is unclear what is intended in reform. We strongly agree however that the need for a financial incentive regime is likely to endure for freight operators in a future reformed industry. This is both to protect freight customers from any poor performance of the GBR infrastructure, and to encourage the right behaviours from both GBR and the freight sector in managing performance.
7. With significant changes likely to emerge through rail reform, we agree that PR23 should not seek to make radical changes to the S8 regime and focus on

incremental changes. However those changes should be cognisant of the changing structural environment and recognise that if the PR23 settlement remains in force throughout CP7, which we support, any changes must be effective in the new structure. We also note that with demand patterns in the passenger railway remaining uncertain, caution must be taken to ensure that freight operators are not unfairly affected by significant swings in payments through the resetting of benchmarks (as opposed to actual changes in behaviour or performance).

Comments on Specific Proposals

8. *Question 1* As outlined above we believe there is a strong case for the retention of a mechanism such as S8 for incentivising performance. Non GBR operators, such as freight, are still fully exposed to the commercial impacts of poor performance from the infrastructure manager, and equally GBR will want to be able to incentivise the right behaviours from all operators. Freight customers will expect to be compensated when infrastructure failures impact their business and cause additional costs.
9. It will be important to ensure that aligned incentives are set to ensure that GBR manages the freight infrastructure to reduce delay. It is unclear how the passenger regime will work, but if concession operators pay a penalty for delay, even if the incident was an infrastructure failure, the incentives on GBR will be significantly weakened, which would be a concern.
10. *Question 2* We agree that incremental changes should be considered, but their impact should be assessed both in today's structure and any structures which are likely to be established during CP7.
11. *Question 3* Subject to the comments below we agree with these areas.
12. *Question 4* We are concerned to ensure that such a move does not create perverse incentives on NR as poor performance would simply enable a lower benchmark in future years. As a regulated monopoly, the NR Benchmark should be set on the basis of what they have been funded by Government to deliver. Should Government choose to fund NR to deliver performance improvements, you would expect this level of performance to be the basis of the Schedule 8 benchmarks. FOCs must build their own business cases to make investments to deliver performance gains and therefore a commonality of approach between the FOC and NR Benchmarks is not necessary or even appropriate.
13. *Question 5* We understand why ORR is proposing greater flexibility on the Schedule 8 regime given the impact that the pandemic has had on the performance regime operating outside of its calibrated parameters. We are concerned that the proposals will not provide the necessary flexibility to respond to the type of event we have seen over the past 18 months. The approaches are

also solely focussed on benchmarks and neglect other aspects of Schedule 8 (e.g. payment rates) that have also not been appropriately calibrated during CP6.

14. We can understand the rationale for Option B1 but are concerned that it would create an annual lag impact, meaning the benchmarks reflect a previous year not the current environment. During Covid-19 that would have led to sharp swings in benchmarks, without the benchmarks ever actually reflecting the state of the network at the time.
15. Option B2 risks undermining investments made to improve performance, as any performance gain will soon be reflected in a tougher benchmark. It is important that any future flexibility on the regime is limited to adjusting for external environmental factors and not adjust for performance gains that have been unlocked by way of investment, to ensure that the Schedule 8 regime continues to promote positive investments.
16. *Question 6* This appears to be a complex change and given the potential other changes arising from reform we would not consider this to be a priority for PR23. There is significant competing demand on industry resource currently and limited bandwidth and therefore this complicated area should not be considered a priority.
17. *Question 10* We support the preferred high level approach for the freight regime, to keep it broadly unchanged for CP7.
18. *Question 11* We support the proposal to update the evidence base underpinning the calibration of the freight payment rate. This work is likely to provide useful data even if there are future changes to the regime. There have been significant changes in the commodity mix since the payment rates were last looked at, with more time-sensitive commodities now being transported by rail. That means that the impact of delays is now having a greater impact on downstream customers. Also longer and heavier trains means that each delay minute is impacting on greater volume. This suggests the rates do need to be reviewed again.
19. Before the rates are reviewed, however, it is important to establish the basis for such a review. Currently they are based on short-run cost of a delay minute, but given the changes in commodity mix, there is a case to consider whether this is an appropriate basis for the calculation in future.
20. *Question 12* We do not agree that revisiting caps should be a priority for reform in PR23. We would expect that the structure of the caps be retained for CP7, the caps themselves to be recalibrated, as they have been in previous periodic reviews. The caps themselves are fit for purpose and provide an important mechanism for freight operators to cap their liability in a regime that is associated with very high payments.



Response to ORR's technical consultation on the PR23 review of the Schedule 8 train performance regime

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

Please send your response to performance.incentives@orr.gov.uk by **10 September 2021**.

Please contact Will Holman at ORR with any queries: will.holman@orr.gov.uk.

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Chapter 2: ORR's proposed approach and priorities

We welcome views on our questions regarding ORR's proposed approach to PR23.

Question 1: Do you have any views on the objectives and benefits of a mechanism such as Schedule 8, for the range of different industry parties, both in the current contracting model and once the Rail Transformation Programme has been fully implemented?

We broadly agree that the Schedule 8 mechanism remains fit for purpose particularly with regards to the freight aspect of the regime. Broadly it has historically served to incentivise performance improvement and promote industry collaboration. We also believe that there will be a requirement for it, or a similar regime post the Rail Transformation Programme to provide financial protection and performance improvement incentives to those operators who sit outside of the proposed GBR structure.

Question 2: Do you have any views on whether we should make no changes to Schedule 8 in PR23, or pursue a small number of incremental reforms to ensure it remains fit for purpose as a baseline regime?

We broadly agree that the pursuance of a small number of incremental reforms would be welcome as part of the PR23 process and are already engaged in industry forums which have begun to look at PR23 workstreams including Schedule 8.

Question 3: Do you agree with the areas we have identified as priorities for PR23? Are there any other significant issues that we should seek to address?

We broadly agree with the areas identified as priorities for PR23.

Chapter 3: Proposals: Cross-cutting changes across sector regimes

We welcome views on the cross-cutting proposals in this chapter.

Question 4: Would you support Proposal A [to base Network Rail's benchmarks only on past performance]? Do you have any views on the proposed methodology set out?

Whilst we can see some of the benefits this approach might bring, we would welcome work to understand the potential impact of the change to benchmarking methodology. This work could simply take a previous year's results and re-work them to show the overall difference had historical performance data been used to benchmark. We agree that a risk with the current methodology for benchmarking is the lack of reflectivity associated with major industry events such as Covid-19. One significant concern around historical data benchmarking for NR would be the potential lack of incentive to outperform the benchmark with the resultant tougher benchmark arising the following year. Whilst we appreciate there will likely be regulatory performance targets under the new GBR umbrella, without financial incentives attached there is added risk.

Question 5: Would you support Proposal B [to annually update benchmarks to make benchmarks more flexible]? If benchmarks were to be updated annually, do you favour achieving this through a rolling update (Option B1) or through a modelled approach (Option B2)?

As per our response to Question 4 we would welcome work undertaken to show what impact this re-benchmarking would have had on historical data to better inform any potential impact (both positive and negative) of such a re-calibration. In terms of Proposal B, we can see merit in both options but would argue Option B1 would likely better reflect the reality of actual performance. Option B2 essentially bakes expected worsening performance with increased volumes of traffic into the benchmark thus in turn creating a greater allowance for poor performance (which isn't always a guaranteed outcome). Option B1 potentially provides a more reflective and accurate benchmark by modelling itself on historic performance.

Question 6: Should Proposal C [to implement joint or shared allocation of delay minutes within Schedule 8 itself] be a priority for reform in PR23? If you would like us to consider Proposal C further, please set out how it can best be implemented (e.g. including incident types that should be subject to joint or shared responsibility).

We agree that Proposal C has the potential to incentivise performance improvement and as such is broadly welcome. We note that Proposal C is likely to apply more to passenger operators (such as the stated example of how delay is currently attributed in the case of suicide) than freight but acknowledge there currently exists examples of where such

agreements do exist between FOC's and Network Rail. As an example, NR and FOC's often sign up to annual 'Autumn Agreements' which seek to reduce both the blame culture, often associated with delay attribution and to improve performance. In such agreements typically a pre-defined list of locations are agreed pre-leaf fall season and where an adhesion incident occurs that cannot categorically be proven to have been caused by either NR (due to railhead condition, failure of RHTT circuit and so forth) or FOC (due to lack of sand, mechanical failure and so forth) any delay is split 50/50. Such agreements also promote data sharing and inform future performance improvement strategies which is to be welcomed.

Chapter 4: Proposals: Passenger regime

We welcome views on this chapter's proposals for the passenger regime.

Question 7: Would you support Proposal D [to more accurately incentivise TOCs to limit delay to other operators], implemented through Option D2 [to update payment rates annually through a rolling update of the TOC responsibility matrix]? Do you have any views on the options set out?

We broadly support any proposal to incentivise operators to limit delay to other operators and can see some merit to Option D2. We would however argue that option D1 is likely to provide the greater incentive to TOC's to reduce their delay on other operators. Ultimately, in the freight regime FOC's are incentivised to minimise their delay impact on other operators despite often having little control or influence on Network recovery (a stated disadvantage of option D1). We would argue this often leads to Network Rail prioritising network recovery in favour of passenger operators as NR are currently financially exposed thus creating an unfair state of play. A more level playing field in which network recovery was undertaken more holistically and fairly would be very welcome. The criticality of rail freight is often lost during network recovery with passengers given priority and whilst there have been some improvements in recent years much more needs to be done to recognise rail freights wider socio-economic importance.

Question 8: Should Proposal E [to change the allocation of unidentified delays between Network Rail and operators] be a priority for reform in PR23? Are you able to provide evidence on the benefits and costs of the proposal or to inform the allocation of unidentified delays?

We believe that whilst understanding the root cause of unidentified delays is important for both a high performing network and incentivising performance improvement, we are not sure that it should be a priority for PR23. The Williams-Shapps review highlighted the excessive work undertaken between operators and Network Rail in terms of delay attribution and Proposal E has the potential to significantly increase this. Furthermore, we would argue that in many cases the cause of initial sub-threshold delays is known however the information is not widely shared between different departments within Network Rail and operators leading to the assumption that the delays cause is unidentified. An example of this would be inaccurate Sectional Running Time's (SRT's), junction margins and general inadequate, missing, or incorrect planning rules which result in regular sub-threshold delays. There has been evidence in the past of where such issues are known about within train planning departments but not known about by delay attributors leading to 'unidentified delays' which but for better sharing of information would become identifiable delays. Ultimately every delay instance has an identifiable root cause.

Question 9: Should Proposal F [to reflect the wider financial impacts of delays in Schedule 8 compensation] be a priority for reform in PR23? If this proposal was taken forward, would you favour formulaic recovery (Option F1) or actual sums recovery (Option F2) to achieve it?

As an operator covered under the freight element of the regime, we are not exposed enough to the passenger element to provide an informed view.

Chapter 5: Proposals: Freight and Charter regimes

We welcome views on this chapter's proposals for the freight and charter regimes.

Question 10: Do you agree with our preferred high-level approach for the freight regime, to keep the current regime broadly unchanged for CP7? Are there other elements of the freight regime or its calibration that should be considered for reform in PR23?

We broadly agree with the proposed approach to keep the freight regime largely unchanged for CP7. We would support updating of the evidence base underpinning the calibration of the freight payment rate.

Question 11: Would you support Proposal G to update the evidence base underpinning the calibration of the freight payment rate?

We would support Proposal G to update the evidence base underpinning the calibration of the freight payment rate. We would agree that the current payment rate and the evidence that underpins it is outdated and doesn't accurately reflect the current cost of delay to FOC's and their customers. Furthermore, with the likely emergence of premium freight flows, such as high-speed logistics which often carry their own 3rd party financial performance penalties, the payment rate needs to reflect this to aid viability of such flows. It is also reasonable to surmise that in many cases the cost of people and assets has increased since the original evidence base was created over 10 years ago. Finally, we do not believe the current freight payment rate provides enough of an incentive during periods of perturbation to not delay or cancel freight services. This is often most notable during network recovery whereby freight is often seen as less of a priority than passenger service recovery and can lead to situations whereby it becomes a financial incentive to cancel a freight service during disruption than allow it to run late.

Question 12: Should Proposal H, to revisit the calibration of caps, be a priority for reform in PR23? Can you provide evidence demonstrating whether or not the supplements and caps are currently calibrated appropriately?

We do not feel that the proposal to revisit the calibration of caps should be a priority for reform in PR23. We feel that the caps provide a critical shield to financial risk the absence of which would impact the viability of rail freight significantly. Furthermore, we would disagree with the statement that the existence of caps creates a lack of incentive for FOC's to proactively manage and promote good performance. FOC's have invested significantly in recent years to improve their performance and minimise any impact of delays to the wider railway which is evidenced by improved freight performance data when compared to historic data. Furthermore, the criticality of high performing services to rail freights ultimate end customers and users

cannot be understated. Ultimately if rail freight fails to perform then typically customers will choose to use alternative modes of transport which is often difficult to reverse. Often rail freight end customers will operate on a 'just in time' delivery mechanism for which the failure to deliver within set key times can cause widespread delays and disruption. With the potential of rail freight to serve the ever-growing e-commerce market in the form of high-speed logistics for which the competition with road is extremely tight, right time performance will be critical to the success and growth of this rail freight sector. The growth of this sector in turn is critical to the wider industry and Government decarbonisation aims.

Question 13: Do you agree with our preferred high-level approach for the charter regime, to keep the current regime broadly in place for CP7? Are there other elements of the charter regime or its calibration that should be considered for reform in PR23?

We broadly agree with the proposed high-level approach for the charter regime for CP7. We would note however that charter operators, like freight, operate on extremely tight margins and so limiting their financial exposure and risk is key to their viability. Given the critical role charters play in tourism, local economy and the ever-growing leisure market (which will likely be key to encouraging passengers in general back to rail with operators already noting increased leisure traffic) it is vital that their viability is not risked by any fundamental changes to the regime.

Are there any other comments you would like to make?

We note that in terms of delay attribution we firmly believe that the initial attribution and arbitration of any subsequent dispute should be undertaken independently from Network Rail. In the current regime Network Rail is responsible for initial delay allocation which we have seen all too often results in incorrect attribution to operator's vice Network Rail. We would question what incentive Network Rail had to attribute delay to itself given the financial consequences of doing so. We would also argue that incorrect initial attribution results in the significant administrative work highlighted in the Williams-Shapps review and would argue this resource could be better spent on identifying performance improvement plans to address the correct root causes of delay.



Response to ORR’s technical consultation on the PR23 review of the Schedule 8 train performance regime

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

Please send your response to performance.incentives@orr.gov.uk by **10 September 2021**.

Please contact Will Holman at ORR with any queries: will.holman@orr.gov.uk.

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Chapter 2: ORR’s proposed approach and priorities

We welcome views on our questions regarding ORR’s proposed approach to PR23.

Question 1: Do you have any views on the objectives and benefits of a mechanism such as Schedule 8, for the range of different industry parties, both in the current contracting model and once the Rail Transformation Programme has been fully implemented?

For the mechanism to be effective it has to offer the correct incentives, be simple to understand and operate. The current mechanism has been in operation for over 20 years and does not seem to be well understood, nor does it seem to be widely seen as a performance incentive model throughout the industry. The introduction of Emergency Measures Agreements and the move toward concession agreements potentially further calls into question the effectiveness and appropriateness of economic incentive regimes of this kind.

A strong mechanism is required to ensure NR take their responsibilities on delay attribution and performance improvement seriously. No matter what structure comes from the RTP we still see the need for an incentive regime to ensure that both the infrastructure and train operators are aligned on operational delivery and thus improved service levels to the passenger.

Within Scotland there are also a number of particular considerations that we would wish to see addressed within the future operation of and any reform to the regime:

- We note generally that the current Abellio ScotRail Franchise will expire on 31 March 2022, with ScotRail services being taken over by a publicly owned operator called ScotRail Trains Limited (SRT). Whilst this response is being submitted on behalf of Abellio ScotRail Limited we have discussed and shared our response with both Transport Scotland and the new entity. We understand however that Transport Scotland is also planning to submit a consultation response, which will add to our feedback and no doubt take into consideration their plans in respect of the mobilisation of SRT.
- Alignment of regime incentive to the performance targets set for Scotland's Railway and SRT by Transport Scotland;
- Flexibility to consider potential opportunities for Scotland specific approaches in this area as part of the further developing of Alliancing/integrated management of Scotland's Railway.

Question 2: Do you have any views on whether we should make no changes to Schedule 8 in PR23, or pursue a small number of incremental reforms to ensure it remains fit for purpose as a baseline regime?

We don't believe a small number of incremental changes will benefit anyone at this time, incremental changes will add cost and complexity to the recalibration of S8 which at this time we could not support. We would support a rollover of the current regime until the structure of the RTP is better understood.

Question 3: Do you agree with the areas we have identified as priorities for PR23? Are there any other significant issues that we should seek to address?

No, they appear to be the areas of the regime that NR have issues with but do not represent an improvement to the incentive regime. We cannot see how changing these parts will benefit the passenger or better incentivise NR to carry out Delay Investigation and attribution.

Chapter 3: Proposals: Cross-cutting changes across sector regimes

We welcome views on the cross-cutting proposals in this chapter.

Question 4: Would you support Proposal A [to base Network Rail's benchmarks only on past performance]? Do you have any views on the proposed methodology set out?

No, NR is funded to achieve an output level of performance and the benchmarks should be set at a level reflecting the outputs expected from the funding provided This proposed change will

also add cost and complexity to the regime at a time that we should all be trying to reduce costs and complexity.

Question 5: Would you support Proposal B [to annually update benchmarks to make benchmarks more flexible]? If benchmarks were to be updated annually, do you favour achieving this through a rolling update (Option B1) or through a modelled approach (Option B2)?

No, as above the trajectory of the benchmarks within the CP should be aligned by the required output level of performance. An annual change of benchmark would have to be pre-determined at the start of a CP, any other method would not allow any reasonable financial planning by the TOC and funder. S8 income/penalties are already difficult enough to forecast without adding an unknown target into the process. It could also lead to perverse incentives, poorer performance prior to a major TT change to make the benchmark easier upon the introduction of a revised timetable.

Question 6: Should Proposal C [to implement joint or shared allocation of delay minutes within Schedule 8 itself] be a priority for reform in PR23? If you would like us to consider Proposal C further, please set out how it can best be implemented (e.g. including incident types that should be subject to joint or shared responsibility).

No, this should not be a priority for reform in PR23. The system that is used to generate the S8 statements can already split responsibility by an agreed % using Edit Sets. The example given (fatalities) though not linked to S8 penalties there are clear incentives on TOC's to invest at stations to reduce or eliminate these (and there is in fact a programme of investment being made in this area within Scotland) . TOC's have a high cost in staff time when a fatality takes place, losing frontline members of staff for periods of time all gives a clear incentive to invest at stations, as well as the wider safety and societal benefits, with such things as improved AI technology for CCTV operations to highlight issues.

Chapter 4: Proposals: Passenger regime

We welcome views on this chapter's proposals for the passenger regime.

Question 7: Would you support Proposal D [to more accurately incentivise TOCs to limit delay to other operators], implemented through Option D2 [to update payment rates annually through a rolling update of the TOC responsibility matrix]? Do you have any views on the options set out?

TOC's do not control delays to other operators, they can only influence these as under the Network Code NR are clearly responsible for Network Operations and decisions on recovery etc. The current regime is misaligned whereby wholesale cancellations can result in a penalty payment to the TOC with no subsequent impact on a third-party TOC/FOC.

We cannot see how this change would benefit the passenger, we would see perverse incentives to not hold connections from our own or other operators as an increase in delay would likely lead to a much larger increase in penalties than under the current star model.

We would not support either proposal D or D2, to amend the benchmarks each year would lead to issues with financial planning for the TOC as we would have no certainty over the likely levels of compensation/penalty year on year.

Question 8: Should Proposal E [to change the allocation of unidentified delays between Network Rail and operators] be a priority for reform in PR23? Are you able to provide evidence on the benefits and costs of the proposal or to inform the allocation of unidentified delays?

The process to investigate and allocate delays sits with NR, if delays are unidentified due to a lack of investigation or information then the incentive sits with NR to improve this process to better get to root cause and thus the proper owner of the delay. If the proposal is followed through then this incentive moves from NR to the TOC, this can only increase costs within the attribution process rather than reduce and simplify them, as well as reducing the incentive on NR to investigate and allocate these delays.

If these unidentified delays are to be treated in a different way to in which they currently sit then the scope should be broadened to also include the pot of delays that sit as TOC unexplained.

Primarily these small delays take up a large proportion of time but by gaining a better understanding of these the industry can better target where things are going wrong daily rather than just concentrating on the large one-off type events that are typically well understood and have plans developed to reduce or mitigate (infrastructure and train failure etc.)

By simply re-allocating responsibility it will not improve the understanding, or the plans required to reduce and improve these types of delays.

Question 9: Should Proposal F [to reflect the wider financial impacts of delays in Schedule 8 compensation] be a priority for reform in PR23? If this proposal was taken forward, would you favour formulaic recovery (Option F1) or actual sums recovery (Option F2) to achieve it?

We cannot see the link between including costs within the S8 rates and the removal of SPP – SPP is in place to compensate for costs and revenue loss due to prolonged under performance by NR so just adding a cost portion to the rates would not replicate this mechanism.

We would support the inclusion of a modelled rate for alternative transport, delay repay and the other costs associated with passenger disruption.

One caveat around the modelled approach is that we know the S4 mechanism for alternative transport does not cover actual costs in most cases so the modelling work would require to be detailed and the approach and difficulty to achieve a suitable regime may outweigh any benefits that it brings.

Chapter 5: Proposals: Freight and Charter regimes

We welcome views on this chapter's proposals for the freight and charter regimes.

Question 10: Do you agree with our preferred high-level approach for the freight regime, to keep the current regime broadly unchanged for CP7? Are there other elements of the freight regime or its calibration that should be considered for reform in PR23?

N/A

Question 11: Would you support Proposal G to update the evidence base underpinning the calibration of the freight payment rate?

N/A

Question 12: Should Proposal H, to revisit the calibration of caps, be a priority for reform in PR23? Can you provide evidence demonstrating whether or not the supplements and caps are currently calibrated appropriately?

N/A

Question 13: Do you agree with our preferred high-level approach for the charter regime, to keep the current regime broadly in place for CP7? Are there other elements of the charter regime or its calibration that should be considered for reform in PR23?

N/A

Are there any other comments you would like to make?



Response to ORR's technical consultation on the PR23 review of the Schedule 8 train performance regime

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

Please send your response to performance.incentives@orr.gov.uk by **10 September 2021**.

Please contact Will Holman at ORR with any queries: will.holman@orr.gov.uk.

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Chapter 2: ORR's proposed approach and priorities

We welcome views on our questions regarding ORR's proposed approach to PR23.

Question 1: Do you have any views on the objectives and benefits of a mechanism such as Schedule 8, for the range of different industry parties, both in the current contracting model and once the Rail Transformation Programme has been fully implemented?

We agree there needs to be a means to provide revenue protection and incentivise performance improvement.

Question 2: Do you have any views on whether we should make no changes to Schedule 8 in PR23, or pursue a small number of incremental reforms to ensure it remains fit for purpose as a baseline regime?

Pursue small number of incremental reforms.

Question 3: Do you agree with the areas we have identified as priorities for PR23? Are there any other significant issues that we should seek to address?

Agreed.

Chapter 3: Proposals: Cross-cutting changes across sector regimes

We welcome views on the cross-cutting proposals in this chapter.

Question 4: Would you support Proposal A [to base Network Rail's benchmarks only on past performance]? Do you have any views on the proposed methodology set out?

Forward looking trajectories are based on a long and progressively outdated forecast, so we agree that NR's benchmark should be based on past performance which aligns it with operator benchmark.

Question 5: Would you support Proposal B [to annually update benchmarks to make benchmarks more flexible]? If benchmarks were to be updated annually, do you favour achieving this through a rolling update (Option B1) or through a modelled approach (Option B2)?

Yes. Agree with annual update of benchmarks. May need to consider means of excluding impact of massive *force majeure* events such as COVID, catastrophic flood or earthquake.

Needs strong mitigations against risk of NR underperforming in order to benefit from lower benchmarks in the following periods, which would not be *Putting Passengers First*.

Question 6: Should Proposal C [to implement joint or shared allocation of delay minutes within Schedule 8 itself] be a priority for reform in PR23? If you would like us to consider Proposal C further, please set out how it can best be implemented (e.g. including incident types that should be subject to joint or shared responsibility).

We suggest the De/lay Attribution Board is best placed to debate this; but there should be other means than Schedule 8 to incentivise all parties to mitigate risks and aid service recovery.

Chapter 4: Proposals: Passenger regime

We welcome views on this chapter's proposals for the passenger regime.

Question 7: Would you support Proposal D [to more accurately incentivise TOCs to limit delay to other operators], implemented through Option D2 [to update payment rates annually through a rolling update of the TOC responsibility matrix]? Do you have any views on the options set out?

Option D2 would be preferable because TOC-on-TOC delay is primarily within the hands of NR as the network controller; TOCs are in the hands of the signallers and the programming of automatic route setting software and NR's Train Running Controllers are responsible for instigating Service Recovery Plans and advising signallers to

override Train Regulation Statements where this will have an overall benefit on the network and reduce overall reactionary delay.

There should be other means than Schedule 8 to incentivise operators to aid service recovery.

Question 8: Should Proposal E [to change the allocation of unidentified delays between Network Rail and operators] be a priority for reform in PR23? Are you able to provide evidence on the benefits and costs of the proposal or to inform the allocation of unidentified delays?

We agree with paragraph 4.23. The current methodology places a strong incentive on Network Rail to establish a primary cause for delay and it is important that the incentive for NR to maximise the number of delays that are attributed is not diluted.

Several TOCs, including South Eastern Railway, have significantly reduced their amount of unidentified delays using the Tracsis TRACS:Hub software. This prompts train crews and station staff to explain all time loss both at stations and in intermediate sections and transmits a report to delay attributors within a few minutes of the delay occurring. Similarly, Network Rail's Quartz software includes the "Annotations" capability for front line staff to explain reasons for time loss at stations.

Investment in rolling out this software and gaining industry-wide front line staff engagement would reduce the level of unidentified delays and generate factual delay reports which enable investigation of root causes and drive performance improvement, which is the primary objective of delay attribution.

Question 9: Should Proposal F [to reflect the wider financial impacts of delays in Schedule 8 compensation] be a priority for reform in PR23? If this proposal was taken forward, would you favour formulaic recovery (Option F1) or actual sums recovery (Option F2) to achieve it?

Given that the benefits to operators on concession-style contracts would be limited, and the high cost of establishing and administering a compensation process, there would be little advantage in progressing either of these options for this reform.

Chapter 5: Proposals: Freight and Charter regimes

We welcome views on this chapter's proposals for the freight and charter regimes.

Question 10: Do you agree with our preferred high-level approach for the freight regime, to keep the current regime broadly unchanged for CP7? Are there other elements of the freight regime or its calibration that should be considered for reform in PR23?

Agree with preferred high-level approach.

Question 11: Would you support Proposal G to update the evidence base underpinning the calibration of the freight payment rate?

Yes

Question 12: Should Proposal H, to revisit the calibration of caps, be a priority for reform in PR23? Can you provide evidence demonstrating whether or not the supplements and caps are currently calibrated appropriately?

Not able to comment on what priority should be given to this.

Question 13: Do you agree with our preferred high-level approach for the charter regime, to keep the current regime broadly in place for CP7? Are there other elements of the charter regime or its calibration that should be considered for reform in PR23?

Yes

Are there any other comments you would like to make?

It would be worth considering the feasibility of financially incentivising freight operators to ensure on time starts from terminals onto the Network Rail infrastructure. It is critical that freight trains run in their allocated validated train path in order not to delay following passenger trains, which can have a wider reactionary delay impact across the rail network.

Transport for Greater Manchester Response to Periodic Rail Review 2023 (PR23) – in light of the Williams-Shapps Plan for Rail.

Greater Manchester places transport at the core of its growth agenda. Excellent transport connectivity is fundamental to our people, businesses, and communities, fulfilling their potential at the heart of a globalised and sustainable Northern Powerhouse economy.

The Greater Manchester Strategy sets out an ambitious vision “to make Greater Manchester one of the best places in the world to grow up, get on and grow old”. At the heart of the strategy is a renewed policy focus on public transport integration, so as to provide the mobility that modern commuters and business expect in a forward-looking and inclusive city region.

Now that the Williams-Shapps Plan for Rail has been released we feel it is critical for Great British Railways (GBR), reform teams and the Office of Rail and Road (ORR) to address all aspects of the commercial model and implement structural change to drive efficiency and deliver accountability and ensure transparency with all stakeholders in the decision-making process.

We therefore recognise the need for ORR to engage with the industry as part of its approach to the next Control Period, but in doing this it is crucial to acknowledge the wider industry context of upcoming structural change. As part of PR23, the ORR should be taking a holistic view of how the industry may function in the future and indeed, the ORR’s own place in that structure and how it works with stakeholders such as Transport for Greater Manchester to ensure the future rail industry structure promotes clear accountability and effective joint working that allows us to efficiently respond to future challenges and opportunities.

As a general principle, TfGM believes that the context of wider industry reform in effect negates the need for any significant changes for the next control period. In terms of promoting efficiencies, we believe that it would be preferable to focus attention on upcoming structural reform.

Whole-industry approach

The regulatory structure enforced by ORR all too often seems to focus on the financial interests of infrastructure managers and operators, rather than outputs for the end customer. In our response to the Williams review, we identified a number of areas for improvement for the regulatory regime.

There are several developments that could contribute (for example) to making the regime better – particularly linking engineering and operational impacts to the experience of passengers and freight operators:

- Delay repay: The direct financial impacts to passengers of delay should be felt by Network Rail.
- The success of engineering activity should be measured on quality (no failures on completed work), efficiency (getting the most possible done in the time available) and timeliness (prompt hand-backs).
- Engineering planning work should include both a comprehensive passenger handling plan, and an operational readiness plan, agreed with the relevant operators and effected stakeholders and where necessary include contingency plans.
- Moving to passenger (and freight) delay minutes rather than PPM as an industry metric.

We advocate a performance regime which incentivises the right passenger outcomes. In particular during disruption, for example, getting passengers to their destinations, providing accurate information and supporting vulnerable travellers.

Ultimately, we need a whole-industry approach that all pulls in the same direction: serving the needs of end customers and GM Residents. This means not just correctly apportioning blame but empowering and giving responsibility to passengers and residents across the rail network and Greater Manchester conurbation. We believe that given our past experiences and expertise we can offer the industry (GBR) a significant amount in helping them deliver their objectives across Greater Manchester and the North in terms of improving efficiency and encouraging greater multi-modal integration with other modes of transport.

Adapting to change and uncertainty

Going forwards, any existing or emerging contracting model should include the following features:

- The ability to develop a constructive relationship between industry bodies and with stakeholders and funders;
- Longer term contracts with suitable breakpoints;
- A clear and realistic acknowledgement of where risk is sitting, and who is managing (or accepting) it;
- Ability to adapt to a changing environment, including potentially re-shaping service patterns and adopting new technologies;
- Flexibility within the contracting authority to facilitate multi-modal solutions, particularly within metropolitan areas. This must include services, fares and ticketing, information provision and access to stations;
- A more holistic approach to transport funding.

The West Coast Partnership model and the announcement of the new rail service contracts, which look towards a longer-term arrangement between the operator and GBR, has covered some good ground here, and seems to be a positive step in ensuring the commercial model for the provision of rail services prioritising the interests of passengers and taxpayers.

Our experience of working with both Network Rail and Operators is that they do not 'own' the regional strategy. For Network Rail, it is because they are very asset-focused, for operators, because they do not have the resource or commercial incentive to significantly engage in longer term planning. We therefore strongly emphasise the need for local authorities and city regions such as TfN and TfGM to be key to the structural changes, as we can provide significant value to the analytical development of service provision, project delivery, operational efficiency, investment prioritisation and decision making that puts the interests of our residents first.

Supporting effective integrated decision-making

The regulatory framework also needs to recognise the needs of smaller stakeholders in the railway. As we expect GBR to be a dominant player in the industry's near future, it is vital that ORR acts to safeguard the voice of important industry partners such as rail freight and open access passenger operators. This is no less true for TfGM; we own and operate Horwich Parkway station and have plans to manage all stations across GM. Even in today's regulatory framework, our engagement from ORR can often seem like an afterthought or curiosity – but it is important that ORR takes decisions on behalf of the whole railway including smaller stakeholders with devolved powers.

TfGM and the GMCA would like to stress the importance and the need for them to be included in any conversations regarding future transport funding settlements with the government as we are entirely funded by the Rail Grant and therefore susceptible to any spending review changes.

Transport for Greater Manchester response to the Schedule 8 Review

Transport for Greater Manchester (TfGM) welcomes the opportunity to comment on Schedule 8 at an important juncture for the railway. The periodic review comes at a time of significant change, amid the challenges of recovering patronage post-pandemic, recovering railway performance, and meeting the UK's climate targets. We believe that the railway's performance regime needs an overhaul to meet these challenges. We will not be responding on all technical aspects of the consultation but instead highlight our key points regarding the future performance regime.

Schedule 8 – the need for change

TfGM recognises the good intentions behind the Schedule 8 regime. In a system where operators and infrastructure managers have been strictly separated, it has made sense for revenue loss to be compensated in alignment with the accountable party and for there to be incentives to improve performance – both for Network Rail and operators.

However, the current Schedule 8 system has deviated far from its original intention, which was to ensure that inconveniences to passengers and freight customers are minimised and that continuous performance improvements are incentivised. Schedule 8 too often drives an industry culture which does not foster collaboration, nor a customer-focussed outlook and the system fails to sufficiently incentivise all industry stakeholders to improve.

Ultimately, customers do not care who is responsible for delays and simply expect their train to be on time. It is right that the root causes of delay are correctly identified so that the industry can target drags on performance, but the ensuing commercial disputes in today's system all too often lose sight of the end customer. This was recognised in the Williams-Shapps plan which has called for an end to 'the cottage industry of costly commercial disputes over delay attribution'.

The case for a new performance regime

Poor performance and the financial effects of the pandemic have already precipitated a movement towards the Government assuming operators' revenue risks. This is set to become the default system under Great British Railways (GBR) and provides us with a real opportunity to overhaul the system. Under GBR, a new system should be set up to reflect the enhanced collaboration between track and train – there should be no need for commercial disputes between TOC and TOC, or TOC and infrastructure manager.

As we look forward to the future post Williams-Shapps, we would envisage a more radical reform of the performance regime to reflect the enhanced collaboration between track and train. This should see operators and infrastructure taking much more collective responsibility for shortcomings in performance and aligned incentives for the industry as a whole. Delay attribution should see those responsible empowered to take decisions to resolve recurring issues.

We need a system that incentivises operators and infrastructure managers to work together and share information for the benefit of customers. For example, where there is unplanned disruption, we should have information about the busiest trains and be in a position to prioritise the right services. We welcome some of the tentative steps outlined towards this, such as the proposal for shared allocation of delay minutes, however, we are concerned that these steps do not go far enough.

We encourage the ORR to think about the holistic effects of the performance regime on industry behaviours and the constraints that it can create. For example, Schedule 8 liabilities are potentially significant barriers to local control of station assets and initiatives such as tram-train in Greater

Manchester. The performance regime should be built around customer requirements rather than the industry needing to orientate itself around a rigid set of requirements.

Schedule 8 in the short term

We recognise the statutory requirements for a performance regime and with CP7 soon approaching, there is little alternative to Schedule 8 in the very short term. Despite its flaws, it remains an important aspect of maintaining accountability and driving improvements in the system we have today. As such, TfGM supports the limited continuation of Schedule 8 during the establishment of a GBR performance regime, but this should not serve as a template for the future whole industry performance regime. With this in mind, we would support only limited alterations of the Schedule 8 regime as it reaches the end of its lifecycle, to ensure consistency for with any contractual arrangements in the franchised passenger rail sector. Otherwise, it does not seem like an optimal use of resources to make significant changes to a fundamentally flawed model that is set to be replaced.

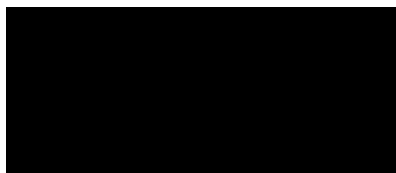
We acknowledge the value of Schedule 8 to open access passenger operators and freight, who despite representing a low proportion of rail traffic, play an outsized strategic role for the railway, our national economy and our path towards net-carbon neutrality by 2050. To this end, should freight and open access operators wish to continue the Schedule 8 system in the long term, ORR should investigate the potential for a two-stream approach to enable a freight and open access exclusive Schedule 8 legacy regime to coexist alongside the new post-GBR performance regime. Any alterations to the regime in the meantime should be considered purely in a freight and open access context.

Conclusion

As highlighted above, we believe the set of changes proposed for Schedule 8 are acceptable as a bridge to a post-GBR performance regime, but we are disappointed by the lack of ambition shown to date. To drive the collaboration and enhanced customer experience needed to bring back passengers to the railway. We cannot rely on incremental improvements to a system which is no longer fit for purpose, we need a much more transformative performance regime fit for the future.

TfGM looks forward to working with the ORR and the industry in establishing a much greater partnership that looks to tackle the efficiencies and accountability the industry currently lacks and needs in order to serve the needs of end customers and GM Residents.

Yours Sincerely and on behalf of TfGM,



Simon Elliott
Head of Rail Programme.



Response to ORR’s technical consultation on the PR23 review of the Schedule 8 train performance regime

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

Please send your response to performance.incentives@orr.gov.uk by **10 September 2021**.

Please contact Will Holman at ORR with any queries: will.holman@orr.gov.uk.

Full name	Russell Parish
Job title	Performance & Strategy Manager
Organisation	Transport for London
Email*	
Telephone number*	

*This information will not be published on our website.

Chapter 2: ORR’s proposed approach and priorities

We welcome views on our questions regarding ORR’s proposed approach to PR23.

Question 1: Do you have any views on the objectives and benefits of a mechanism such as Schedule 8, for the range of different industry parties, both in the current contracting model and once the Rail Transformation Programme has been fully implemented?

Transport for London (TfL) operates mainline rail services under its Rail for London (RfL) organisation. TfL London Underground Bakerloo and District lines also operate in part over Network Rail infrastructure. None of these services are included within the Rail Transformation Programme and thus not part of the future Great British Railways (GBR).

TfL is both a specifier and funder of services and substantial investor in the GB railway network in London and the Southeast. There are few ways by which network performance and its impact to TfL’s customers and long-term revenue flows may be reflected in the established contractual relationships. Schedule 8 is the single mechanism by which this is achieved.

TfL currently carries and will continue to carry the considerable revenue risks resulting from below par network performance. Schedule 8 compensation (and bonuses where performance exceeds benchmark expectation) from Network Rail pass through our Concession Train Operators who themselves bear no risk from revenue to TfL. It is therefore essential that the Schedule 8 mechanism is retained to ensure marginal revenue effects of performance continue

to be recognised and that bodies sitting outside the future GBR will benefit from the incentivisation this mechanism is intended to deliver.

Through their contractual performance regimes our Concession Train Operating Companies are highly incentivised to deliver excellent performance and through their track access contracts, Schedule 8 is the essential means of ensuring that Network Rail and GBR in the future can be held to account for their performance and enable our operators to deliver their performance targets. The wider benefit from TfL's Concession Performance Regimes is seen through the reduced impacts of reactionary delays to other operators that arise from our operator's caused incidents. GBR will benefit from this in the future.

TfL acknowledges there are limitations to Schedule 8; it is not a perfect regime. As an approximation of reality and if it is correctly calibrated, in its current form it is an adequate mechanism balancing the benefits of incentivisation against the costs of greater accuracy or granularity. Schedule 8 uses average service lateness at defined points on a route weighted by customers and is thus fundamentally sound in terms of providing a good representation of these effects. Conceptually there are few other representative approaches to establishing the marginal revenue effects of performance. TfL London Underground adopts a similar demand elasticity approach in its Lost Customer Hours regime.

It is essential that any regime is correctly calibrated through an agreed mechanism. It is also important that corrective action may be taken if a demonstrable deviation from reality is clearly apparent; for example, where performance benchmarks have been set at unreasonably easy to achieve levels not reflective of actual performance or any reasonable expectation from investments in infrastructure, rolling stock or other areas affecting rail performance.

TfL is uniquely exposed to this risk and is not held in any way harmless to the effects of any miscalibration that may come to light after the event.

The current 5-year period between recalibration does not cater well for service or other changes affecting performance. A more frequent review would be welcome provided the process for doing so is sufficiently agile, cost effective, maintains or improves calibration quality and is quick to deliver.

Question 2: Do you have any views on whether we should make no changes to Schedule 8 in PR23, or pursue a small number of incremental reforms to ensure it remains fit for purpose as a baseline regime?

Schedule 8 can continue to function quite adequately as it currently configured (subject to the periodic recalibration), however, sensible incremental changes that deliver better outcomes in an efficient and expedient fashion should be considered to ensure it is fit for purpose in the changing rail industry expected further to the implementation of the Williams-Shapps Plan.

It is essential that changes to the regime are evidence based in their justification.

Schedule 8 should be retained through PR23 and continue to represent a star model relationship with Network Rail at its centre. Network Rail as a monopoly provider of infrastructure and network management is best placed to manage overall network performance and the interactions of all operators.

Question 3: Do you agree with the areas we have identified as priorities for PR23? Are there any other significant issues that we should seek to address?

Some of the proposals potentially weaken the retention of incentives in the schedule 8 regime. The case for change is seemingly contradictory with some priorities removing and others adding complexity.

A priority arising from the Williams-Shapps Plan for PR23 should be to consider how the Schedule 8 regime can work effectively for those operators or organisations which will remain outside the GBR scope. This is to ensure bodies like TfL can continue to be adequately compensated for lost revenue and protected from the loss of incentives on others to be brought under one umbrella organisation with conventional Schedule 8 incentives removed.

Chapter 3: Proposals: Cross-cutting changes across sector regimes

We welcome views on the cross-cutting proposals in this chapter.

Question 4: Would you support Proposal A [to base Network Rail's benchmarks only on past performance]? Do you have any views on the proposed methodology set out?

TfL does not support Proposal A.

In general, setting Network Rail's performance benchmarks based upon past performance is sensible but is overly simplistic even if conducted more frequently and over a shorter period. TfL recognises the challenges with forecasting however, to make the regime representative, it is essential that it appropriately takes into consideration the service that will be operating during the upcoming Period – retrospective reviews simply cannot deliver this objective – for example after a significant timetable change where interactions and delays can radically differ from before.

It should also make provision for the anticipated impacts of investments of third parties like TfL; not simply in terms of railways asset enhancements but also it must take into consideration the less tangible improvements in reactionary delays that can arise from better train service management achieved under Concession regime incentives. At TfL, these have been an essential component in delivering consistently high performing services around London.

Where investments have been made to improve performance, it is essential the performance benchmarks recognise such past investments, and they should not allow historic underperformance to become normalised in the subsequent control period.

A lack of an improvement trajectory from setting benchmarks removes any incentive of improvement and the most optimistic view is that this is likely to yield maintenance of the status quo and at its worst incentivise underperformance to drive lower future benchmarks in a race to the bottom.

It is not clear from the proposal how regulatory safeguards would mitigate risk of underperformance. As defined, the proposal leaves TfL exposed to considerable risk to its reputation for delivery of high-quality services from below expected performance and thus to a loss of its revenue.

Question 5: Would you support Proposal B [to annually update benchmarks to make benchmarks more flexible]? If benchmarks were to be updated annually, do you favour achieving this through a rolling update (Option B1) or through a modelled approach (Option B2)?

Subject to establishment of a process that addresses the concerns outlined in answer 4 above, annually updating benchmarks is a sensible approach. Neither Option B1 nor B2 currently achieves this.

A rolling update modified to account for expected performance changes applied to a historic data set could potentially deliver a more flexible approach. As it stands the use of data history in Option B1 is overly simplistic.

Modelling can assist with delivering a forecast outcome but the proposed use of a mechanical relationship in B2 based on observed delay is flawed as this can change radically with a change in timetable.

Question 6: Should Proposal C [to implement joint or shared allocation of delay minutes within Schedule 8 itself] be a priority for reform in PR23? If you would like us to consider Proposal C further, please set out how it can best be implemented (e.g. including incident types that should be subject to joint or shared responsibility).

Proposal C should not be a priority for PR23. It adds complexity for example the establishment of the ratio of responsibility (50:50, 60:40 etc) for different incident types.

TfL incentivises through its Concession performance regimes, collaboration with Network Rail through the application of simple Responsibility Factors; so, whilst a delay incident may not be the Concession Train Operator's fault, it does become its problem shared with Network Rail. One possibility therefore would be to explore how this approach may be applied to the Schedule 8 regime.

The attribution process and the rules that guide it have been the source of criticism by many parties within and outside the rail industry. An appropriate use of benchmarks should allow for externally caused delay incidents (often hard to mitigate) to be built into Network Rail's performance points such that less time and resource is allocated to arguing over responsibility; simply allocate the cause and move on. This would recognise external factors as no-one's fault but would see a lead from Network Rail to mitigate and co-ordinate the industry response involving all operators. Bird strikes being one obvious example of the application of this approach. There should be no such thing as the operator versus Network Rail bird. It is such ridiculous discussion that discredits the otherwise valuable contribution delay investigation and attribution makes to driving performance improvement. Network Rail's Benchmarks should simply recognise all these delay impacts and work to reduce the reactionary delay that inevitably arises from such events.

Ultimately, the functioning of the regime is critical, but the regime should not be a barrier to obtaining a proper understanding as to the cause and allow improvement schemes to be identified and funding appropriately targeted. This is the overlooked element of delay attribution that gains little airtime but to customers is most important.

Chapter 4: Proposals: Passenger regime

We welcome views on this chapter's proposals for the passenger regime.

Question 7: Would you support Proposal D [to more accurately incentivise TOCs to limit delay to other operators], implemented through Option D2 [to update payment rates annually through a rolling update of the TOC responsibility matrix]? Do you have any views on the options set out?

TfL would not support Proposal D1 as Network Management is best achieved by Network Rail Route Control and the regime should continue to represent a star model relationship with Network Rail at its centre. Network Rail as a monopoly provider of infrastructure and network management is best placed to manage overall network performance and the interactions of all operators.

Network Rail is also best placed to bring together operators to work together during delay incidents to achieve the best overall outcomes and mitigation of delay – for example through

the establishment of train service management plans and contingency plans like those developed with the Anglia and Western Routes.

Any potential shifting of reactionary delay to the responsibility of operators diminishes incentives on Network Rail to produce high performing, robust timetables.

The rolling update Option D2 is therefore a better approach as it retains incentives on Network Rail to manage incidents and would be kept more current. TOC on TOC delays for operators as 'victims' continue to be a relatively small component of the overall delay picture. The best incentive is for an operator to manage its own delays (as incentivised under both Schedule 8 and Concession agreements) which indirectly benefits other operators from reductions in the overall impact of delay incidents.

Question 8: Should Proposal E [to change the allocation of unidentified delays between Network Rail and operators] be a priority for reform in PR23? Are you able to provide evidence on the benefits and costs of the proposal or to inform the allocation of unidentified delays?

TfL has no evidence to support a change to the allocation of unidentified delay. Proposal E should not be considered a priority for reform in PR23.

Question 9: Should Proposal F [to reflect the wider financial impacts of delays in Schedule 8 compensation] be a priority for reform in PR23? If this proposal was taken forward, would you favour formulaic recovery (Option F1) or actual sums recovery (Option F2) to achieve it?

TfL Does not consider Proposal F to be priority for reform in PR23. The Sustained Poor Performance regime should be overhauled to make it fit for purpose for situations where performance goes beyond the limits of demand elasticity. Focus should be on the qualifying criteria, the supporting evidence and a more structured/ simplified claims process.

Chapter 5: Proposals: Freight and Charter regimes

We welcome views on this chapter's proposals for the freight and charter regimes.

Question 10: Do you agree with our preferred high-level approach for the freight regime, to keep the current regime broadly unchanged for CP7? Are there other elements of the freight regime or its calibration that should be considered for reform in PR23?

TfL has no objection to the preferred approach. It is critical in any event that freight operations are suitably incentivised to reduce delays caused to the network.

Question 11: Would you support Proposal G to update the evidence base underpinning the calibration of the freight payment rate?

TfL has no objection to Proposal G. It is essential evidence underpinning performance regimes remains representative.

Question 12: Should Proposal H, to revisit the calibration of caps, be a priority for reform in PR23? Can you provide evidence demonstrating whether or not the supplements and caps are currently calibrated appropriately?

TfL has no objection to Proposal H but points out that caps may act as a disincentive for freight operating companies to manage delays caused by them to the network and can potentially lead to perverse behaviours once they come into effect.

A fair balance between incentives and commercial impacts on freight operations must be struck to ensure customers are not subject to excessive delays and to drive performance improvements.

Question 13: Do you agree with our preferred high-level approach for the charter regime, to keep the current regime broadly in place for CP7? Are there other elements of the charter regime or its calibration that should be considered for reform in PR23?

TfL has no objection to the preferred approach. It is critical in any event that charter operations are suitably incentivised to minimise delays caused to the network.

Are there any other comments you would like to make?

No further comments.



Response to ORR's technical consultation on the PR23 review of the Schedule 8 train performance regime

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Please send your response to performance.incentives@orr.gov.uk by **10 September 2021**.

Please contact Will Holman at ORR with any queries: will.holman@orr.gov.uk.

Full name	Chris Dellard
Job title	Head of Access Planning
Organisation	Transport for Wales Rail Ltd (TfWRL), also representing Transport for Wales (TfW). This is a joint TfWRL / TfW response in terms of the Wales and Borders Network Rail network only. TfW Group will be seeking a separate discussion with ORR on the potential related impacts for the CVL network TAAs.
Email*	
Telephone number*	

*This information will not be published on our website.

Chapter 2: ORR's proposed approach and priorities

We welcome views on our questions regarding ORR's proposed approach to PR23.

Question 1: Do you have any views on the objectives and benefits of a mechanism such as Schedule 8, for the range of different industry parties, both in the current contracting model and once the Rail Transformation Programme has been fully implemented?

We strongly believe that a performance incentive mechanism such as Schedule 8 can play an important role in protecting the long-term revenue receipts of devolved rail authorities including Welsh Government and to protect the experience of passengers in Wales and the Borders from disruption caused by other parties over whom Welsh Government has no control.

Therefore we would expect a mechanism such as Schedule 8 to still be required once the Rail Transformation Programme has been fully implemented, irrespective of other measures that might be developed through the Rail Transformation Programme.

Ultimately, devolved rail authorities will require that those operators that they manage have the same means available to them to collaborate with and be protected from Network Rail as those that come under the GBR umbrella.

Question 2: Do you have any views on whether we should make no changes to Schedule 8 in PR23, or pursue a small number of incremental reforms to ensure it remains fit for purpose as a baseline regime?

We are content to see incremental changes where they will add value and prepare the regime for potentially more fundamental changes in due course. We don't see this as an urgent priority, but if it can be usefully achieved as part of PR23 then that will hopefully be of benefit.

Question 3: Do you agree with the areas we have identified as priorities for PR23? Are there any other significant issues that we should seek to address?

We are content with the areas identified as priorities.

Chapter 3: Proposals: Cross-cutting changes across sector regimes

We welcome views on the cross-cutting proposals in this chapter.

Question 4: Would you support Proposal A [to base Network Rail's benchmarks only on past performance]? Do you have any views on the proposed methodology set out?

We would be open to this idea but feel that we would need to understand more about the potential methodology. We have a concern that Network Rail would not have the same focus to improve performance when seeking its Settlement if its incentives are only based on historical performance. During the Control Period, there might be less opportunity to challenge Network Rail's current and future management of performance if its incentives are not strong enough.

We would consider supporting using historical performance to create a baseline if adjusted for any anomalies to avoid baking in anything inappropriate, and we would also be interested in the feasibility of overlaying risks and benefits to performance linked to planned investment such as resignalling schemes or new fleets.

Overall, this proposal is likely to require a lot of effort to get right, and we question whether this is the appropriate time to be considering what could be quite a fundamental change to Schedule 8.

Question 5: Would you support Proposal B [to annually update benchmarks to make benchmarks more flexible]? If benchmarks were to be updated annually, do you favour achieving this through a rolling update (Option B1) or through a modelled approach (Option B2)?

We can see that this approach would have its benefits as quite often performance trajectories are assumed to improve year on year when this is not necessarily the case, particularly where major transformation projects are underway (whether infrastructure or new fleets).

This would obviously require very strong change control and governance to ensure that changes were fully justified, and even then there is a risk that annual changes could destabilise the management of the regime and require much effort from Network Rail and operators on an almost rolling basis to update the benchmarks. Again, whether this is the right time to consider such a fundamental change to Schedule 8 is questionable.

Question 6: Should Proposal C [to implement joint or shared allocation of delay minutes within Schedule 8 itself] be a priority for reform in PR23? If you would like us to consider Proposal C further, please set out how it can best be implemented (e.g. including incident types that should be subject to joint or shared responsibility).

We support this suggestion in principle as there is certainly some scope for sharing responsibility for certain delays. It could give a more accurate reflection of the role that both operators and Network Rail have in preventing/mitigating certain delays. We would favour a related change to delay attribution (i.e. to reflect shared responsibility).

In theory it could reduce the administrative burden on operators and Network Rail, but it would be important to test how any changes might work in practice.

Chapter 4: Proposals: Passenger regime

We welcome views on this chapter's proposals for the passenger regime.

Question 7: Would you support Proposal D [to more accurately incentivise TOCs to limit delay to other operators], implemented through Option D2 [to update payment rates annually through a rolling update of the TOC responsibility matrix]? Do you have any views on the options set out?

We understand why the industry might want to encourage operators to limit TOC-on-TOC delay, and not just TOC-on-self delay, but we question how this could work in practice without a fundamental reform of performance management. Operators have little control over how

Network Rail regulates trains to recover from delays, especially beyond the routes on which they operate.

Operators' role to minimise their own delays is clear and can be straightforwardly linked to their own processes and procedures. Requiring operators to also consider the impact of their delays on other operators' services would add a degree of complication that we think could cancel out any perceived benefits.

Question 8: Should Proposal E [to change the allocation of unidentified delays between Network Rail and operators] be a priority for reform in PR23? Are you able to provide evidence on the benefits and costs of the proposal or to inform the allocation of unidentified delays?

The industry would benefit from a better understanding of these delays, with more advanced analytics by Network Rail. There have been schemes in the past such as SMART data which should support the analysis of sub-threshold delays and this should be pushed across the industry if possible, to improve accuracy. However, this would come at a cost, and more work would need to be undertaken to demonstrate the industry-wide business case.

Question 9: Should Proposal F [to reflect the wider financial impacts of delays in Schedule 8 compensation] be a priority for reform in PR23? If this proposal was taken forward, would you favour formulaic recovery (Option F1) or actual sums recovery (Option F2) to achieve it?

We are generally supportive of changes to make the formulaic schedule 8 payments more cost-reflective (e.g. to include passenger taxis/buses; passenger compensation/refunds etc), but this must be proportionate and must still incentivise the correct behaviours. If larger sums are at stake, there is arguably a risk the cooperation and collaboration might reduce, so a balance must be struck.

Option F1 – formulaic recovery – would be preferable to Option F2 – Actual sums recovery. Administration costs would otherwise be prohibitive. We should try to minimise transactional burdens and avoid the risk of compensation payments being slow to materialise as can happen with existing actual sums recovery mechanisms in Track Access Contracts.

Chapter 5: Proposals: Freight and Charter regimes

We welcome views on this chapter's proposals for the freight and charter regimes.

Question 10: Do you agree with our preferred high-level approach for the freight regime, to keep the current regime broadly unchanged for CP7? Are there other elements of the freight regime or its calibration that should be considered for reform in PR23?

N/A

Question 11: Would you support Proposal G to update the evidence base underpinning the calibration of the freight payment rate?

N/A

Question 12: Should Proposal H, to revisit the calibration of caps, be a priority for reform in PR23? Can you provide evidence demonstrating whether or not the supplements and caps are currently calibrated appropriately?

N/A

Question 13: Do you agree with our preferred high-level approach for the charter regime, to keep the current regime broadly in place for CP7? Are there other elements of the charter regime or its calibration that should be considered for reform in PR23?

N/A



Response to ORR's technical consultation on the PR23 review of the Schedule 8 train performance regime

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Please contact Will Holman at ORR with any queries: will.holman@orr.gov.uk.

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Job title	Senior Policy Officer
Organisation	Rail Directorate, Transport Scotland
Email*	[REDACTED]
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*This information will not be published on our website.

Chapter 2: ORR's proposed approach and priorities

Question 1: Do you have any views on the objectives and benefits of a mechanism such as Schedule 8, for the range of different industry parties, both in the current contracting model and once the Rail Transformation Programme has been fully implemented?

There is a significant policy question as to the value of a relatively complex and resource intensive regulatory compensation regime is required for what is a relatively simple relationship for the delivery of passenger services in Scotland.

However, we do understand that there is a legal requirement to fulfil and therefore Sch. 8, in some form, is necessary under the current arrangements. However, the arrangements should evolve with industry reform and whatever is developed must align with the industry structure for Scotland agreed with the Scottish Ministers.

Any new compensation regime should be able to reflect on an evidence based analysis of the effectiveness of Sch.8 and also be shaped from a whole industry perspective. The principles underpinning any future arrangements should be simplicity, flexibility, passenger and freight user focussed and supportive of partnerships and alignment. It should also have a strong evidence base, particularly around the behavioural aspects of the regime.

Any change for the Scotland route should be in line with the Scottish Ministers' interests and not rely solely on proposals stemming from the Williams-Shapps review which ultimately may prove inappropriate in Scotland.

Currently, with the majority of funding for rail coming from the Scottish Government, it is also beneficial to ensure there are no unnecessary transactions and that the payment system is as efficient as it can be to avoid unnecessary administration burden and the costs associated with this.

Transport Scotland notes that these are “initial proposals” and would expect to provide a further response regarding Sch 8 once the refined proposals are published.

Question 2: Do you have any views on whether we should make no changes to Schedule 8 in PR23, or pursue a small number of incremental reforms to ensure it remains fit for purpose as a baseline regime?

On the basis that the feedback suggests that Sch. 8 requires review, some changes should be considered but the benefits and evidence base for the changes should be clearly identified. Any incremental changes in PR23 should not be at the expense of ensuring a fit for purpose regime is in place once the Williams-Shapps proposals are fully implemented (and in an appropriate fashion for the Scotland route). The costs of any such changes in the interim should only be if the benefits outweigh the costs.

Question 3: Do you agree with the areas we have identified as priorities for PR23? Are there any other significant issues that we should seek to address?

Yes, in particular it is important to ensure the payment rates and benchmarks are set appropriately and reflect COVID impact and recovery profile. They will likely need to be more flexible and more frequently assessed in PR23. We do not wish to raise any further areas as specific priorities at this time.

Chapter 3: Proposals: Cross-cutting changes across sector regimes

Question 4: Would you support Proposal A [to base Network Rail’s benchmarks only on past performance]? Do you have any views on the proposed methodology set out?

This proposal seems worthy of further consideration but must take into account the views of TOCs who deal with the issue on a day-to-day basis and what projects are impacting past and/or future performance. One concern is that Network Rail may not achieve the levels of performance they have been funded to achieve and poor performance becoming “acceptable” if benchmarks lowered.

In practical terms, it would not seem appropriate to set targets based upon a period of no upgrades, which could prove misleading; and planned infrastructure projects would also need to be factored in. And, if there is some specific event or incident which creates an anomaly in past data then a different year/period/etc baseline should be used with the most recent “normal” characteristics.

Question 5: Would you support Proposal B [to annually update benchmarks to make benchmarks more flexible]? If benchmarks were to be updated annually, do you favour achieving this through a rolling update (Option B1) or through a modelled approach (Option B2)?

Regular updates are sensible but payment rates should also be reviewed. The preference would probably be Option B2 as B1 would be too volatile given the last couple of years of performance but assumptions would need to be carefully considered. It would be important to ensure that option B2 is sufficiently different to B1 in practice and to assess the appropriate level of detail and complexity of the model.

Question 6: Should Proposal C [to implement joint or shared allocation of delay minutes within Schedule 8 itself] be a priority for reform in PR23? If you would like us to consider Proposal C further, please set out how it can best be implemented (e.g. including incident types that should be subject to joint or shared responsibility).

Transport Scotland would want to be clear on who would benefit (and who would lose) from this change, given the current position. It would be preferable to avoid complicating the regime further at this point. However if there is a clear case of the benefits versus the challenges which could be understood, the priority could then be better

assessed. Transport Scotland would require sight of what the new Great British Railways proposals may look like before making a formal opinion on this point.

Chapter 4: Proposals: Passenger regime

We welcome views on this chapter's proposals for the passenger regime.

Question 7: Would you support Proposal D [to more accurately incentivise TOCs to limit delay to other operators], implemented through Option D2 [to update payment rates annually through a rolling update of the TOC responsibility matrix]? Do you have any views on the options set out?

Option D2 seems to be the most sensible as NR still have much more control over network management of disruptive incidents than a TOC.

Question 8: Should Proposal E [to change the allocation of unidentified delays between Network Rail and operators] be a priority for reform in PR23? Are you able to provide evidence on the benefits and costs of the proposal or to inform the allocation of unidentified delays?

The principle seems reasonable but any change would have to demonstrate Value for Money, ie the net flow of moneys through the regime reduced. There is a danger of just moving the money flows around with no impact on performance. This would need proper justification to set out how it would improve and then be assessed against that target.

Provided evidence showed inefficiencies to be present, and the greater the inefficiencies present, the greater the case meriting further consideration.

Question 9: Should Proposal F [to reflect the wider financial impacts of delays in Schedule 8 compensation] be a priority for reform in PR23? If this proposal was taken forward, would you favour formulaic recovery (Option F1) or actual sums recovery (Option F2) to achieve it?

Neither option is perfect. Option F2 would be a more complex option, but potentially worthwhile if it were to ensure fairness and proportionality. Option F1 would reduce burden of work but option F2 could result in a more realistic appropriation of costs.

In the first instance, this doesn't seem to be a priority due to the admin cost and it would take too long to process all the individual claims. However, if there is evidence to suggest there is a degree of inefficiency, this could well become a priority for the Scottish Ministers. As stated above, the priority for reform is in areas where there is evidence of inefficiency or unintended consequences.

Chapter 5: Proposals: Freight and Charter regimes

Question 10: Do you agree with our preferred high-level approach for the freight regime, to keep the current regime broadly unchanged for CP7? Are there other elements of the freight regime or its calibration that should be considered for reform in PR23?

FOCs have to respond to customer requirements so any disruption on the network can impact on the ability to meet those demands. Margins can be tight to allow rail to compete with road so it is important that any changes to Sch. 8 do not create unintended consequences of losing rail freight traffic, which would be counter to the stated policy of the Scottish Ministers. Any changes to the freight regime, if indeed any, should not be detrimental to FOCs and should support the Scottish Ministers aspirations to grow rail freight on the Scottish network.

Freight operators are more susceptible to market changes and demand, and the stability of a regime could be preferable to them during the anticipated forthcoming period of rail reform and potential uncertainty.

Question 11: Would you support Proposal G to update the evidence base underpinning the calibration of the freight payment rate?

Yes / agree.

Question 12: Should Proposal H, to revisit the calibration of caps, be a priority for reform in PR23? Can you provide evidence demonstrating whether or not the supplements and caps are currently calibrated appropriately?

Don't believe that this should be a priority for reform. Any reform could have serious financial implications for the FOCs and requires proper consideration, for instance are FOCs incentivised sufficiently to meet their customers' requirements without any need to increase the limit on their caps? Stability (in uncertain times) is likely to be the priority.

Question 13: Do you agree with our preferred high-level approach for the charter regime, to keep the current regime broadly in place for CP7? Are there other elements of the charter regime or its calibration that should be considered for reform in PR23?

Content that charter trains, as with all trains, should be incentivised as appropriate to avoid delay and disruption.

Are there any other comments you would like to make?

n/a

Thank you for taking the time to respond.

Publishing your response

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

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

Suad Chowdhury
Network Rail Relationship Manager
Trenitalia c2c Limited
2nd Floor, Cutlers Court, 115 Houndsditch,
London EC3A

Email: [REDACTED]

Daniel Brown
Director, Economics, Markets and Strategy
Office of Rail & Road
25 Cabot Square
London
E144QZ

Sent via email to: performance.incentives@orr.gov.uk

Dear Daniel,

Trenitalia c2c Limited response to ORR's Periodic Review 23 launch letter & response to technical consultation on the PR23 review of the Schedule 8 train performance regime

Trenitalia c2c Limited ("c2c") is the passenger train operator running services between London Fenchurch Street and Shoeburyness, serving 26 stations in east London and south Essex under a National Rail Contract concession with the Department for Transport.

c2c welcomes the opportunity to comment on the Periodic Review and the objectives set out on page 2 of the launch letter.

Asset sustainability – Funding settlements for CP7 should reflect the construction costs of assets and these do not necessarily take into consideration whole life asset costs. Where maintenance of assets has historically passed between organisations in the industry and overall standards and expectations have risen, there is a backlog of essential maintenance to meet higher passenger benefits perspectives, particularly with the introduction of Stations Quality Regimes in National Rail Contracts. c2c would additionally welcome a focus on existing assets in terms of their maintenance, repair and renewal plus enhancement of existing facilities to increase accessibility, asset availability, and resilience (adaptation to climate change) to extract more value from the current asset base rather a focus on building more. In regard to infrastructure assets, c2c invites ORR to include and review management of critical spares across the network within this objective. In addition to minimising risk, good management of critical spares will aid overall asset and operational sustainability.

Efficiency – c2c welcomes the focus on efficiencies and we hope it will build on the existing work being undertaken. To achieve this, Network Rail must be empowered with a degree of flexibility to achieve industry efficiencies.



c2c includes as an attachment to this letter, its response to the initial consultation on Schedule 8. No part of this response and attachments is considered confidential and thus can be published in line with the publication guidance set out in the launch letter.

Yours Sincerely,

Suad Chowdhury
Network Rail Relationship Manager

Trenitalia c2c Limited is part of the FS Group



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Response to ORR’s technical consultation on the PR23 review of the Schedule 8 train performance regime

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

Please send your response to performance.incentives@orr.gov.uk by **10 September 2021**.

Please contact Will Holman at ORR with any queries: will.holman@orr.gov.uk.

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*This information will not be published on our website.

Chapter 2: ORR’s proposed approach and priorities

We welcome views on our questions regarding ORR’s proposed approach to PR23.

Question 1: Do you have any views on the objectives and benefits of a mechanism such as Schedule 8, for the range of different industry parties, both in the current contracting model and once the Rail Transformation Programme has been fully implemented?

As the network contains a variety of operators with differing levels of commercial exposure from direct public sector operators such as Transport for London, public sector concessionaires such as Trenitalia c2c Limited (“c2c”) then freight and open access operators on full commercial risk – Schedule 8 or preferably an equivalent, less adversarial, mechanism should remain in place at least until the Rail Transformation Programme has been fully implemented. However, c2c would like to note that as a contracted TOC on a National Rail Contract to DfT – the Schedule 8 mechanism acts as a commercial hindrance to collaboration and acting as “one railway”. Thus, consideration should be given to a performance mechanism that goes beyond the perceived revenue risk of train performance based on the franchise agreement contracting method.

Question 2: Do you have any views on whether we should make no changes to Schedule 8 in PR23, or pursue a small number of incremental reforms to ensure it remains fit for purpose as a baseline regime?

c2c supports incremental reforms of Schedule 8 to ensure it remains fit for purpose and for a transition to future arrangements underpinned by the Rail Transformation Programme. This may be prudent in terms of providing flexibility in the model in the event of future lockdowns and any other significant impacts on operator traffic that impacted performance benchmarks in CP6.

Question 3: Do you agree with the areas we have identified as priorities for PR23? Are there any other significant issues that we should seek to address?

c2c does not propose any other significant issues to be addressed.

Chapter 3: Proposals: Cross-cutting changes across sector regimes

We welcome views on the cross-cutting proposals in this chapter.

Question 4: Would you support Proposal A [to base Network Rail's benchmarks only on past performance]? Do you have any views on the proposed methodology set out?

There is a risk that Proposal A, basing NR's benchmarks on past performance, may negatively impact or potentially reduce incentive on it to deliver enhancements for continuous improvement as well scope to dampen business cases for schemes where there is no financial incentive to do so. However, c2c is aware of the challenge in forecasting rail demand at present and so, c2c would support this proposal to simplify the calibration of Schedule 8 and to keep it updated as it allows for the possibility of responding to uncertainty in market recovery.

Question 5: Would you support Proposal B [to annually update benchmarks to make benchmarks more flexible]? If benchmarks were to be updated annually, do you favour achieving this through a rolling update (Option B1) or through a modelled approach (Option B2)?

c2c would also welcome Proposal B as annual updates provide for a rounded approach responding flexibly and reflective of current performance. c2c has a small concern that this proposal may have a larger appetite for resource from the industry which would need to be addressed should this be progressed. Regarding a preferred option (B1 v B2), c2c can see pros and cons to both and would be keen to discuss these approaches in more detail before favouring one.

Question 6: Should Proposal C [to implement joint or shared allocation of delay minutes within Schedule 8 itself] be a priority for reform in PR23? If you would like us to consider Proposal C further, please set out how it can best be implemented (e.g. including incident types that should be subject to joint or shared responsibility).

c2c does not consider Proposal C a priority for PR23 given the potential complexity to implement to make delay attribution more onerous. If Schedule 8 remains as a financial

mechanism where a risk/compensation is attached to each minute of delay then it is conceivable that Proposal C could lead to perverse incentives to focus resource on attributing delays rather than performance improvement activities.

Chapter 4: Proposals: Passenger regime

We welcome views on this chapter's proposals for the passenger regime.

Question 7: Would you support Proposal D [to more accurately incentivise TOCs to limit delay to other operators], implemented through Option D2 [to update payment rates annually through a rolling update of the TOC responsibility matrix]? Do you have any views on the options set out?

As c2c has limited interactions with other TOCs, we are limited in an opinion, however c2c understands the benefits of the proposal from a wider industry perspective and therefore broadly support this.

Question 8: Should Proposal E [to change the allocation of unidentified delays between Network Rail and operators] be a priority for reform in PR23? Are you able to provide evidence on the benefits and costs of the proposal or to inform the allocation of unidentified delays?

c2c is neutral however, it is worth noting that an increase in TOC attribution activity would likely lead to resourcing issues which may be costly to resolve and if unable to resource then unresolved delays would not portray an accurate snapshot of performance.

Question 9: Should Proposal F [to reflect the wider financial impacts of delays in Schedule 8 compensation] be a priority for reform in PR23? If this proposal was taken forward, would you favour formulaic recovery (Option F1) or actual sums recovery (Option F2) to achieve it?

c2c would favour a formulaic recovery in the form of Option F1 that reflects changes in compensation terms depending on the severity of the impact of delay (perhaps after 15 mins and again after exceeding 30 mins). The Schedule 4 Restriction of Use model where the compensation terms reflect the period the network is unavailable may provide some first principles for how to have a formulaic recovery method but with flexibility for severity of delays.

Chapter 5: Proposals: Freight and Charter regimes

We welcome views on this chapter's proposals for the freight and charter regimes.

Question 10: Do you agree with our preferred high-level approach for the freight regime, to keep the current regime broadly unchanged for CP7? Are there other elements of the freight regime or its calibration that should be considered for reform in PR23?

Freight and charter regimes should be re-baselined and calibrated accordingly so they are more up to date for PR23.

Question 11: Would you support Proposal G to update the evidence base underpinning the calibration of the freight payment rate?

c2c supports this activity to recalibrate and update the payment rates of a fellow network operator.

Question 12: Should Proposal H, to revisit the calibration of caps, be a priority for reform in PR23? Can you provide evidence demonstrating whether or not the supplements and caps are currently calibrated appropriately?

No comment.

Question 13: Do you agree with our preferred high-level approach for the charter regime, to keep the current regime broadly in place for CP7? Are there other elements of the charter regime or its calibration that should be considered for reform in PR23?

No comment.

Are there any other comments you would like to make?

c2c would like to reiterate that the preferred option at the end of this consultation should not act as a commercial hindrance towards collaboration with industry partners.



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Please contact Will Holman at ORR with any queries: will.holman@orr.gov.uk.

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*This information will not be published on our website.

Chapter 2: ORR’s proposed approach and priorities

We welcome views on our questions regarding ORR’s proposed approach to PR23.

Question 1: Do you have any views on the objectives and benefits of a mechanism such as Schedule 8, for the range of different industry parties, both in the current contracting model and once the Rail Transformation Programme has been fully implemented?

- The future Great British Railways (GBR) will need to develop its own set of strong performance incentives in relation to the proposed new Passenger Service Contract concession-style contracts with a focus on operators and the infrastructure manager coming together under the new body to improve performance across the network as a whole.
- It is recognised that having a financial incentive on parties to take into account the delays they cause to the whole network can be a powerful way to ensure that they take decisions in the interests of the whole system.
- However, the scale of the structural changes to the rail industry envisaged under the Great British Railways proposals are such that a wholly new regime to replace Schedule 8 would appear to be appropriate.
- This would also address the negative, if not wholly justified, perceptions of Schedule 8 and the supporting Delay Attribution Process, which is regarded in some quarters as

unnecessarily bureaucratic and too focussed on compensation payments to/from private commercial entities rather than rather than

- There is an argument, once the new GBR contractual arrangements are in place, that Schedule 8 will need replacing with:
 - a new GBR-led performance incentive regime which is simpler than Schedule 8 and focusses on addressing the root causes of poor performance on an industry-wide level.
 - a new compensation mechanism to provide some protection to freight, open access and charter operators (and others) whose commercial risk from poor rail network (infrastructure and operator) performance is wholly (or largely) independent of GBR and its contracted services
 - an appropriate level of protection for smaller freight and charter operators (which lack the financial security of being part of a larger corporate organisation) against potential catastrophic performance compensation claims against them
- As a locally accountable rail body, WMRE currently jointly specifies and manages the franchise contract for West Midlands Trains and will have a similar role in the new National Rail Contract.

However, WMRE continues to have limited control over the experience of West Midlands passengers when this is negatively impacted by the performance of the infrastructure manager and other operators.

WMRE is already seeking earlier delivery of additional devolved powers over regional rail services under the Passenger Service Contracts which might involve a degree of exposure to commercial risk and suitable measures will need to be introduced to limit this risk.

Such measures and financial safeguards might include:

- devolution of funding from central Government to WMRE which is commensurate with the devolution of control over (and commercial risk from) local service specification and concession contract management
- caps on risk exposure for devolved organisations
- HMG or GBR underwriting the risk of significant revenue decline as a result of poor performance (or other factors such as prolonged industrial action or another global pandemic)

Question 2: Do you have any views on whether we should make no changes to Schedule 8 in PR23, or pursue a small number of incremental reforms to ensure it remains fit for purpose as a baseline regime?

- Given the uncertainty over the continuation of Schedule 8 under GBR an incremental approach with minor reforms seems sensible.

Question 3: Do you agree with the areas we have identified as priorities for PR23? Are there any other significant issues that we should seek to address?

- No Comment

Chapter 3: Proposals: Cross-cutting changes across sector regimes

We welcome views on the cross-cutting proposals in this chapter.

Question 4: Would you support Proposal A [to base Network Rail's benchmarks only on past performance]? Do you have any views on the proposed methodology set out?

- This appears to be a broadly welcome simplification of the benchmarking process, subject to the identified risks being appropriately managed

Question 5: Would you support Proposal B [to annually update benchmarks to make benchmarks more flexible]? If benchmarks were to be updated annually, do you favour achieving this through a rolling update (Option B1) or through a modelled approach (Option B2)?

- The B1 approach based on rolling historical performance seems to be preferable to a modelled approach based on changes in traffic levels.
- Rolling historical performance would better reflect external factors such as
 - uncertainty resulting from the COVID pandemic
 - more frequent extreme weather events
 - a seemingly increasing frequency of recent "bridge strike" incidents by HGVs

Question 6: Should Proposal C [to implement joint or shared allocation of delay minutes within Schedule 8 itself] be a priority for reform in PR23? If you would like us to consider Proposal C further, please set out how it can best be implemented (e.g. including incident types that should be subject to joint or shared responsibility).

- This may merit further consideration but could increase rather than reduce complexity in the Schedule 8 regime.

Chapter 4: Proposals: Passenger regime

We welcome views on this chapter's proposals for the passenger regime.

Question 7: Would you support Proposal D [to more accurately incentivise TOCs to limit delay to other operators], implemented through Option D2 [to update payment rates annually through a rolling update of the TOC responsibility matrix]? Do you have any views on the options set out?

- If this change were to be implemented, option D2 would appear to be more practicable but the annual revision would require additional administration, resource and cost.

Question 8: Should Proposal E [to change the allocation of unidentified delays between Network Rail and operators] be a priority for reform in PR23? Are you able to provide

evidence on the benefits and costs of the proposal or to inform the allocation of unidentified delays?

- This would not appear to be a priority and may be an issue which becomes less significant under a future GBR-led performance incentive regime.

Question 9: Should Proposal F [to reflect the wider financial impacts of delays in Schedule 8 compensation] be a priority for reform in PR23? If this proposal was taken forward, would you favour formulaic recovery (Option F1) or actual sums recovery (Option F2) to achieve it?

- Arguably a Schedule 8 regime which reflects costs such as passenger compensation is long overdue and would make the process take account of the performance impact on the end customer.
- Such changes would also reflect the operational full-costs borne by the operator.
- However, both options would also import additional complexity and cost to the current regime and may instead be an issue for consideration in a future GBR-led performance incentive regime.

Chapter 5: Proposals: Freight and Charter regimes

We welcome views on this chapter's proposals for the freight and charter regimes.

Question 10: Do you agree with our preferred high-level approach for the freight regime, to keep the current regime broadly unchanged for CP7? Are there other elements of the freight regime or its calibration that should be considered for reform in PR23?

- No Comment.

Question 11: Would you support Proposal G to update the evidence base underpinning the calibration of the freight payment rate?

- This would appear to be sensible.

Question 12: Should Proposal H, to revisit the calibration of caps, be a priority for reform in PR23? Can you provide evidence demonstrating whether or not the supplements and caps are currently calibrated appropriately?

- There is a strong argument for retention of caps to limit the financial exposure of freight operators on limited profit margins.

Question 13: Do you agree with our preferred high-level approach for the charter regime, to keep the current regime broadly in place for CP7? Are there other elements of the charter regime or its calibration that should be considered for reform in PR23?

- The current regime appears to work effectively in not exposing charter operators to unrealistic levels of financial risk.

Are there any other comments you would like to make?

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