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13 September 2012

Dear Andrew

Keolis welcomes the opportunity to contribute to the formation of the Rail Delivery Group (RDG). It is difficult for us to comment fully on some of the proposals due to the fact that we have not seen the RDG articles. We note that these will be available in the full licence consultation and would reserve our position until we have seen those articles. However, even without that full information, we have attempted to set out in the appendix to this letter our detailed responses to your consultation questions. We would also like to make a few general points and observations regarding the formation and management of the RDG – many of which are picked up in more detail in the appendix:

- Keolis is a shareholder in four franchises and is active in the bidding market for franchises (and intends to continue bidding). With the RDG involved in discussions at a high level with the DfT, ORR and other important industry bodies, parties that are not leadership members will be at a substantial disadvantage in the franchising process;
- Keolis is not convinced that a licence condition is the best way to formalise the RDG. We can see the advantage of tying in train operators and Network Rail in this way, but if the RDG is truly to be representative of the industry, a licence condition does not have the effect of bringing together other organisations. We also have concerns around licence enforcement;
- Keolis is keen that the RDG will not be "just another" industry organisation. There are a myriad of bodies representing different bodies and different interests. These take considerable time and money to manage. It is not clear to us how the RDG will work with those organisations (e.g. ATOC, RIA, RSSB etc) and/or how the RDG will streamline those organisations. To show true cost savings and efficiencies this will need to be addressed and provide genuine industry leadership; and

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- We welcome a review of the Dispute Resolution process in the railways industry. This does not always work as effectively as it could do and we believe reform is necessary.

I confirm that we are happy for all of this response to be published on the ORR website.

Please let me know whether you would like to discuss our answers to any of the questions or the content of this letter.

Yours sincerely,

A handwritten signature in blue ink, appearing to read "Alistair Gordon".

Alistair Gordon  
Chief Executive Officer

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## Response on the Consultation on the formalisation of the Rail Delivery Group

**Q1** Please comment on whether you consider that the purpose of RDG set out in paragraphs 2.3 to 2.5 will drive the changes and improvements envisaged by the McNulty study.

Keolis considers that the purposes of the RDG should be expanded to include a specific acknowledgement that the body represents the whole railway industry and not just the parties who are leadership and/or licensed members. We would like to see a purpose related to the protection of minorities in the railways industry in order to ensure that there is no bias towards the larger players in the industry – particularly given the composition of the leadership members.

Keolis is concerned about the reference to RDG taking back key roles and responsibilities from the government. It is unclear what these key roles and responsibilities would be. Particularly as it seems the RDG will not have any special powers nor gain any statutory role. The McNulty Report envisaged that the RDG would provide leadership for the industry in order to drive efficiencies. We consider that the purposes of the RDG as set out in the consultation paper are potentially much wider than was envisaged by McNulty. Rather than guiding and providing leadership to the industry, the RDG appears to be expecting a much wider remit. Keolis would like to see more clarity on this point.

There is also a reference to the RDG guiding, directing and focussing the activities of key rail industry cross-industry groups. Keolis is not clear what rights RDG would have to guide, direct or focus other rail industry organisations which have their own constitutions, responsibilities and duties. Keolis considers that more detail is required on what this would entail prior to commenting on whether such a purpose would be appropriate. There are a number of other industry organisations at the moment dealing with different issues and constituting different memberships. To be a member of the industry requires a great deal of investment and co-ordination across those bodies – something that absorbs time and money from industry participants. Introducing the RDG should not merely add another layer to that, but seek ways to streamline those bodies and make the industry more efficient/cost effective.

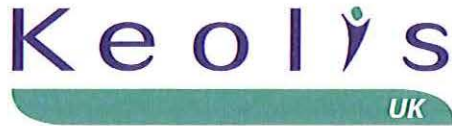
How the RDG will work with DfT, ORR and other stakeholders in the industry will also be key and should be clearer in any future consultation.

**Q2.** Are you content with the proposed structure of the RDG board set out in paragraphs 2.16 to 2.24, particularly in terms of scope of representation and the criteria for membership?

Keolis operates four large UK franchises, albeit as a minority shareholder, and was not included as a founder member. The decisions RDG makes, as well as its funding, has far more impact on Keolis than it does on its single franchise members. We would like to see a fair and transparent method for determining who should be included on the leadership board in order to ensure that Keolis and others can be included in key decisions. Keolis is also active in the bidding market for franchises. We have already seen that the RDG is involved in discussions at a high level with the DfT, ORR and other important industry bodies, but unfortunately, information gained in such discussions/engagement is not shared fully with the industry. Keolis is concerned that this would continue under the currently envisaged structure, which would lead to any new entrant being disadvantaged in any future bids for franchises – and therefore make the franchise procurements less transparent and fair than they should be.

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We note that all leadership members of the RDG are required to give a nominal guarantee – Keolis would like to understand how that nominal guarantee will be determined, and has assumed that this would be a truly nominal amount of, for example, £1 with no rights to call for any more contribution. There is also a reference to “unfunded debt” in the paper. We would like to understand the debt that the RDG could take on and what the liability for members would be. We would consider that it would be perverse post-McNulty for either the nominal amount or the unfunded debt about to be onerous on members.

We also note that currently, the RDG leadership appears to be intended to entrench the status quo – with only the existing members included in the board. Keolis considers that leadership status should be determined solely by turnover threshold criteria, especially given that the RDG Articles have not been developed at this stage. Some particular points in this regard include:

- the inclusion of the proposal under paragraph 2.37 (to resolve contentious issues of membership) is clouding what should be a fairly straightforward and automatic determination process in relation to membership – it appears to be including unnecessary hurdles for minority shareholders for example;
- Leadership status between owning groups should not be an issue to be resolved by the RDG (especially where Network Rail (NR) appears to have the casting or deciding vote);
- We consider that the turnover threshold should be calculated on the basis of an amalgamation of all interests of a particular owning group rather than determined separately for each TOC. Therefore a minority shareholder with a number of different holdings in different TOCs would have its percentage interest in the turnover of those TOCs taken into account when determining whether it meets the threshold or not;
- We do not consider that it is necessary to grandfather the rights of the existing RDG members. The railways industry is constantly changing and there is a benefit of constituting the RDG correctly with the members who satisfy the threshold criteria; and
- We consider that, in any event, the £100m threshold for existing members has been arbitrarily set to ensure inclusion of a particular member that would otherwise not qualify. We do not see the benefit in maintaining this approach.

Keolis considers that the consultation paper is unclear/silent as to how the RDG leadership members' board intends to deal with conflicts of interest and/or declaration of an interest which have been raised by such a director. It appears to us that most of the matters under discussion at the RDG will lead to conflicts of interest as each party on the RDG will also have directors duties to their own companies. It would be helpful to gain clarity on the probable content of the RDG articles. How will these articles deviate from the model articles for private companies limited by guarantee?

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**Q3. Please comment on how you consider RDG could best engage with licensed and associate members.**

It appears that, although the RDG purports to lead and represent the whole industry, the board is actually not representative of the whole industry and does not include key parties – including open access operators, train manufacturers, ROSCOS and other key parties who will be impacted by the RDG's decisions.

If the proposed leadership structure is maintained, Keolis considers that there should be various matters that should be reserved to be voted on/determined by the licensed and/or associate members. Some examples include changes to the purposes and/or articles of the RDG; matters relating to membership of RDG; and the finances of the RDG (in particular increases in financial commitment for members). Once we have seen the articles of the RDG, there may well be other areas where it is appropriate to reserve decisions to the full membership.

The relative rights of the leadership members, licensed members and associate members are not clearly set out in the consultation document and we would need to see the RDG Articles in order to respond fully on this point. However, we note that we would expect that both licensed and associate members would be entitled to vote on matters that may impact on them, would have the right to be consulted and also would have the right to have their comments taken into account by the RDG - with reasons given if they are not and clear mechanisms for challenging or disputing decisions of the leadership members.

**Q4. (For licensed train operators and Network Rail) - in view of these proposals would you be content to agree to the introduction of the new condition at Annex B into your licence? If not, what changes would you wish to see which would allow you to provide that agreement?**

The form of the licence condition is unclear as it refers to RDG Articles (and defined terms) which we have not seen. It is not therefore possible to comment on the licence condition without understanding what those articles say.

Keolis is concerned that the RDG is becoming a licence requirement and considers that the RDG would be better formed by a contractual mechanism. In particular, Keolis is not clear what the enforcement rights and duties of the ORR would be, what the enforcement policy of the ORR would be in this circumstance and how it would monitor the compliance with the articles. Keolis would also like to understand the reference in paragraph 2.36 which states that the ORR would expect to take enforcement action where the "credibility, function or success of the RDG is damaged". This appears to be too wide and could potentially be triggered wherever a member disagrees with the RDG – thereby leading to enforcement action.

We are not clear why a contractual mechanism cannot be used. Associate members will not be subject to the licence condition and will not be therefore subject to licence enforcement should they fail to comply with the articles etc. Also, if the working of the RDG is effective and helpful to the industry, then everyone will wish to be members.

Keolis would also like to be reassured as to whether, if a licence requirement is accepted, that will mean that there will be no provisions contained in the franchise agreement and/or other contracts

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(relating to the same subject matter) as it would wish to avoid a potential double jeopardy of enforcement action under the licence and contractual enforcement under the contracts.

**Q5. Will the proposed voting and quorum arrangements set out in paragraphs 2.45 to 2.47 provide you with assurance that decisions taken by RDG will have sufficient cross-industry support to justify implementation?**

The minimum "interim period" of two months for a decision to go to a second vote seems too long especially given that it is intended that the RDG is to meet monthly. Keolis considers that two weeks may be appropriate or at the latest prior to the following meeting.

Keolis wonders why it is only NR and a freight director which forces a second vote when there may be other valid interests that may also require a second vote – for example if a number of operators representing a percentage of the industry have a particular concern.

We also query why NR should have a deciding vote. There may be circumstances where this should not be the case – for example where NR has no interest. It is also not clear what would happen if additional infrastructure providers come into being (as envisaged in paragraph 2.38). What status would those bodies have?

We note that RDG will not have the power to require "individual operators" to comply with its strategies or policies as these would be subject to normal industry implementation processes. However, Keolis is not sure how this is to work with the ORR's enforcement regime which is to be linked through the proposed licence condition to compliance with the RDG's Articles. What is to be the outcome for the leadership member where its licensed member does not comply with a strategic or policy decision agreed to be implemented by the leadership member board? There is a danger that this would make the leadership member non-compliant with the RDG's Articles, as such action could damage the "credibility, function or success" of the RDG.

**Q6. Are there any specific commercial protections that you consider will need to be included within the competition compliance document?**

Keolis welcomes and shares the ORR's commitment to ensuring that RDG and its members should be compliant with all applicable competition laws. On the whole, the organisation should be pro-competition given its objectives in identifying and leading the development of reforms which benefit the entirety of the GB rail industry. Nevertheless, we believe that the following areas will require specific attention in the light of those activities:

**Membership rules:** RDG should commit itself not to use access to membership to reserve any competitive advantage to its members. All membership criteria should be applied in a non-discriminatory manner and any restrictions on membership/access to information be objective and reasonably necessary for the purposes and good governance of the RDG. These principles will in particular need to be reflected in determining the revised structure of the RDG (see also our comments in relation to questions 2, 3 and 5 above).

**Industry standards:** whereas the RDG is not intended to be a trade association or act as a commercial organisation with financial interests, it will likely be involved in developing and promoting

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industry based standards, codes of practice and standard terms and conditions. RDG should only become involved in such matters, however, where it is confident that they are likely to genuinely improve the quality of members' products or services. No member should be allowed to use these standards to exclude competitors or raise barriers to entry, such that:

- (a) wherever possible, all relevant information (eg as to the relevant specifications) must be made available to the whole industry (including non-RDG members);
- (b) compliance is voluntary (otherwise than as required by law); and
- (c) standard terms and conditions should not attempt to harmonize any 'price-related' clauses.

**Information exchange:** any commercial information concerning the activities of members which is disseminated (in any form) amongst the RDG should be limited to the minimum necessary to facilitate its activities. As far as possible, RDG should ensure that its members only share information that is:

- (a) historical (such that it cannot be used by competitors to determine the future conduct of rivals);
- (b) anonymous;
- (c) aggregated; and
- (d) independently compiled.

Particular care will be needed during discussions at RDG meetings (whether formal or informal) to ensure these do not stray into areas involving commercially sensitive information and the compliance document should remind members of their obligations in this regard. This also means that all such meetings should be properly documented any objections to matters raised or departure from those meetings recorded.

**Q7. Please comment on whether you consider the funding arrangements proposed in paragraphs 2.59 and 2.60 to be appropriate.**

It is difficult to comment on the funding arrangements without having an understanding of what the actual finance required by RDG will be. In particular, see the points above regarding the nominal guarantee.

Keolis understands that it would need to contribute to the finances and funding of the RDG in return for more involvement at a leadership level.

Keolis wonders whether the funding of the RDG will be "relatively small" as set out in paragraph 2.59. Although it is intended that there will be a small full time staff, is it envisaged that directors from members (leadership members in particular) will give up their time for free and/or without expenses? Also, we can foresee a time, particularly if responsibilities are transferred from the DfT, that funding will need to be greater than currently envisaged. Keolis would like to see a robust mechanism put in

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place now in relation to funding that can accommodate currently envisaged change, as well as being flexible enough to be adapted in due course (rather than leaving the matter to be determined by the RDG secretariat). As set out above, Keolis see that financing of the RDG should be a matter reserved for all members and not determined purely by the leadership members.

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