



OFFICE OF RAIL REGULATION

# The Rail Delivery Group

## Consultation on the formalisation of the Rail Delivery Group

July 2012



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# Foreword

1. The Rail Delivery Group (RDG) was established in June 2011 by Great Britain's major passenger and freight train operator groups and its main infrastructure manager, Network Rail. This implemented a key recommendation of Sir Roy McNulty's review of how the efficiency and value for money of the railway could be improved for users and taxpayers. The review identified a number of barriers to improved efficiency across the railway and considered that many of these could be addressed by the formation of a leadership body charged with driving forward change across the industry.

2. So far the group, under the chairmanship of Tim O'Toole, has been operating in an informal capacity. It has done much valuable work to take forward key recommendations of the McNulty review, for instance about whole industry asset management and programme management. The rail industry has given the group strong support in this. ORR is keen that this industry engagement and cooperation should continue and be strengthened. This is supported by both the UK and Scottish Governments.

3. RDG has now concluded that the group should be put on a more formal basis to take forward its leadership role in the industry and to ensure the continued strong commitment of key industry people and companies in a time of change. ORR agrees.

4. The aim of this consultation by ORR, which has been produced in consultation with RDG, is to seek the views of industry stakeholders on proposals to support the group through the implementation of a new condition in licences held by Network Rail and train operators. ORR believes this will strengthen the ability of RDG to lead change that will benefit the whole industry and improve the value for money the industry delivers to passengers, freight customers and funders.

5. RDG and ORR both recognise that giving RDG this formal status in the industry is only part of the story. If RDG is to meet the challenges it faces it will need to build on the start it has made, deliver results, and gain real influence and buy-in across the industry.

6. Your views on how RDG should be structured, funded and operated are important to its success, and ORR and RDG look forward to hearing them.

# 1. Introduction

## Background

1.1 The Department for Transport (“DfT”) and the Office of Rail Regulation (“ORR”) commissioned a study, led by Sir Roy McNulty and published in May 2011,<sup>1</sup> to examine the opportunities and barriers to improving the value for money of Great Britain’s railway for taxpayers, passengers and freight customers. Recognising that the wider industry had already identified a need for a more authoritative focus, one of the key recommendations of the study was that the industry establish a Rail Delivery Group (RDG) to provide high-level cross-industry leadership.

1.2 In summary, the McNulty study considered that RDG:

- (a) should reflect the views of the industry to ensure cross-industry buy-in of ideas;
- (b) should be populated by the most senior members of the industry, providing credible leadership for a range of cross-industry issues; and
- (c) could add value in such areas as:
  - (i) operational performance;
  - (ii) safety performance;
  - (iii) culture change;
  - (iv) cross-industry planning; and
  - (v) addressing system-wide issues.

1.3 RDG came into being in June 2011 with members drawn from the owning groups of the passenger and freight train operators and from Network Rail.<sup>2</sup>

1.4 RDG has agreed that its purpose is to provide leadership for the railway industry as a whole, and to ensure that the industry maximises its efficiency and capability to support the case for future growth. It will achieve its purpose by formulating strategy and guiding its implementation. Where existing railway industry structures or competing priorities weaken the implementation of strategy, RDG has said it will propose an optimum response for the benefit of the whole industry. Proposals may take the form of a revision to strategy, or initiating changes to structure, or identifying how competing priorities can be resolved.

1.5 RDG has carried out a wide range of activities since its inception including the following:

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<sup>1</sup> Sir Roy McNulty’s report entitled ‘Realising the potential of GB Rail’ is available at: <http://www.dft.gov.uk/publications/realising-the-potential-of-gb-rail/>.

<sup>2</sup> More information about RDG can be found on the RDG website at <http://www.raildeliverygroup.org/Home.aspx>.

- (a) agreeing the priorities of the group for taking forward the McNulty recommendations and beginning to identify opportunities to reduce industry costs and to develop implementation plans for those reductions;
- (b) holding regular meetings with the Secretary of State, the Scottish Ministers, and with the ORR, trade unions and other industry parties;
- (c) reviewing key industry issues such as the Initial Industry Plan and ORR's passenger information licence obligations;
- (d) providing written evidence to the Transport Select Committee in respect of industry reform;
- (e) establishing a number of working groups to consider industry issues, in areas such as:
  - (i) asset, programme and supply chain management;
  - (ii) industry contractual relationships;
  - (iii) train utilisation issues; and
  - (iv) technology and innovation;
- (f) taking responsibility for giving direction and guidance to existing cross-industry groups:
  - (i) Planning Oversight Group;
  - (ii) National Task Force; and
  - (iii) Technical Strategy Leadership Group;
- (g) introducing a new cross-industry graduate training scheme; and
- (h) carrying out stakeholder engagement on a variety of issues, including:
  - (i) a workshop on train utilisation;
  - (ii) an industry forum on 21 November 2011 providing an opportunity for RDG to listen to the wider industry community and give an update on the group's priorities; and
  - (iii) presentations to a number of bodies on the remit, priorities and perspective of RDG and the rail industry.

1.6 Government, as indicated in the 2012 Command Paper for railways in England and Wales,<sup>3</sup> has welcomed the establishment of the RDG, and its response to the recommendations of the value for money report by taking and shaping the industry's agenda for a sustained programme of improved management and running of the rail network.

1.7 ORR believes that the industry should take responsibility for developing policies and strategies to improve its effectiveness and efficiency. RDG, formalised as proposed in this document, should play a key role in this. It needs to be supported by the active and meaningful involvement of stakeholders across the industry. ORR considers that the proposals set out within this document will facilitate such engagement.

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<sup>3</sup> 'Reforming our Railways: Putting the Customer First', published March 2012, can be found on the DfT website at <http://www.dft.gov.uk/publications/reforming-our-railways>.

## Purpose of this document

1.8 Whilst RDG has been established as an informal industry body for around 12 months, RDG, ORR, DfT and Transport Scotland recognise that a more permanent form and constitution is needed for it to lead the rail industry effectively and articulate a powerful and convincing voice on its behalf. More information about the purpose of the group can be found at paragraph 2.3.

1.9 This document is therefore a consultation, reflecting discussions between ORR and RDG, seeking comments from rail industry stakeholders and other interested parties on the proposed approach for achieving this aim.

## Structure of this document

1.10 A range of areas are covered within this consultation including the overarching purpose of the group, governance arrangements, structure, leadership, voting and dispute resolution arrangements, and proposals for funding. An impact assessment setting out ORR's evaluation of the various options considered for formalising RDG can be found at Annex C.

## Responding to this consultation

1.11 We welcome responses on any aspect of this consultation but we also raise a number of specific questions. Please send your responses in electronic (or if not possible, in hard-copy format) **by 14 September 2012** to:

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Office of Rail Regulation  
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London WC2B 4AN  
Email: [andrew.eyles@orr.gsi.gov.uk](mailto:andrew.eyles@orr.gsi.gov.uk)  
Tel: 020 7282 2026

and copy them to:

Graham Smith  
Secretary, Rail Delivery Group  
4<sup>th</sup> Floor  
King's Place  
90 York Way  
London N1 9AG  
Email: [info@raildeliverygroup.org](mailto:info@raildeliverygroup.org)  
Tel: 07515 627082

1.12 Please note, when sending documents to us in electronic format that will be published on our website, we would prefer that you email us your correspondence in Microsoft Word format. This is so that we are able to apply web standards to content on our website. If you do email us a PDF document, where possible please:

- (a) create it from the electronic Microsoft Word file (preferably using Adobe Acrobat), as opposed to an image scan; and

(b) ensure that the PDF's security method is set to no security in the document properties.

1.13 If you send a written response, you should indicate clearly if you wish all or part of your response to remain confidential to ORR. Otherwise, we would expect to make it available on our website and potentially to quote from it. Where your response is made in confidence, please can you provide a statement summarising it, excluding the confidential information, which can be treated as a non-confidential response. We may also publish the names of respondents in future documents or on our website, unless you indicate that you wish your name to be withheld.

## **Next steps / formalisation timetable**

1.14 Once the consultation is closed, all responses will be reviewed and, unless you request otherwise, published on our website. We and/or RDG will then discuss any particular concerns with stakeholders in order that issues can either be explained more fully or addressed so that the structure and organisation of RDG reflects as far as possible the wishes of the industry. We recognise that a high level of industry buy-in is necessary to enable RDG to achieve the level of standing and influence it needs to be able to fulfil its purpose.

1.15 Following this consultation we plan to write again to stakeholders in October 2012:

(a) setting out our conclusions on the formalisation of RDG;

(b) formally consulting on the finalised proposed licence condition (if we conclude that the formalisation measures should include the introduction of a licence condition), giving 28 days notice for licence holders to confirm that they are content to have their licences changed; and

(c) as part of this formal consultation, circulating the final version of the RDG articles of association. RDG intends to publish the articles on its website in advance of this.

1.16 Providing that we receive confirmation that licence holders are in agreement we will implement the licence changes during November.

## 2. Proposals for formalisation

2.1 This chapter sets out proposals for formalising RDG which have been developed by RDG in consultation with ORR. It is proposed that RDG be established as a company limited by guarantee. Its purpose, roles, structure, powers and governance will be defined in its articles of association (the 'RDG Articles'), with membership of RDG required through a new train operator and Network Rail licence condition. Leadership of RDG will be provided by the main train operator groups and Network Rail as they are the industry participants with the most important and direct relationships with users and funders of the railway. But RDG will engage other bodies for their views on those issues that directly concern them and reflect them in its discussions and decision making. This chapter outlines the general principles of the proposed RDG Articles; RDG will be publishing them in full in advance of our formal licence condition consultation which is planned for October 2012.

2.2 In considering the best way to take this formalisation process forward RDG and ORR have considered a number of alternative options. This document sets out what we believe to be the most suitable approach. Whilst we welcome comments on each section of this chapter, we have included specific questions where we would appreciate consultees' views. A full list of the questions can be found at Annex A.

### Purpose of RDG

2.3 Reflecting the McNulty study conclusions, RDG proposes that its purpose should be to:

- (a) lead Great Britain's rail industry in providing a safe, efficient and high-quality service for its users and for taxpayers;
- (b) be the leadership body and collective voice of the rail industry on cross-industry issues; and
- (c) develop, promote and establish policies, strategies and plans for the rail industry,

and to do so in an open and transparent manner (subject to confidentiality appropriate to achieving these purposes in an effective and timely way).

2.4 In order to deliver this purpose RDG proposes to perform the following roles:

- (a) to lead the development and implementation of policies, strategies, plans and reforms that it considers necessary to accelerate and influence change across the GB rail industry;
- (b) to identify, propose and promote the necessary reforms, changes to industry architecture and actions required by others;
- (c) to be the key resource for the governments of the UK, Wales and Scotland, ORR and other industry stakeholders in promoting change in the industry. Over time RDG will seek to take back to the industry from government key roles and responsibilities;

(d) to pursue efficiency opportunities and better ways of serving the industry's passengers and freight customers; and

(e) to resolve industry-wide issues by guiding, directing and focusing the activities of the key rail industry cross-industry groups and subject-specific working groups, which RDG creates to pursue specific topics and initiatives.

2.5 In delivering these duties RDG:

(a) will not be a trade association;

(b) will not be a commercial organisation with financial interests; and

(c) will not duplicate existing industry relationships, structures or bodies, including duplicating or overriding the primary accountability for delivery in the GB rail industry (which remains with the individual companies in the industry) or the widely accepted need for much stronger collaboration between these companies at a local level.

Membership of RDG will not affect the legal obligations of individual industry companies and their directors and employees, including under competition law and as duty holders under health and safety legislation.

**2.6 Question 1 – Please comment on whether you consider that the purpose of RDG will drive the changes and improvements envisaged by the McNulty study.**

## Powers

2.7 RDG will not gain any special powers or authority as a result of this formalisation. Nor will it have any statutory role. It does, however, recognise that its authority will come from the ability of the most senior industry executives (who will also act as its directors) to lead the industry in:

(a) developing policies and promoting their implementation to industry participants and stakeholders, including where those policies would lead to proposals to change existing industry architecture, whether by way of legislative change or otherwise;

(b) developing strategies for the purpose of promoting its policies and recommending the implementation of those strategies through its members, including where those policies require changes to the industry architecture;

(c) influencing other cross-industry bodies in relation to the activities they carry out; and

(d) establishing and directing industry sub-groups that report to RDG to help it develop and implement its strategies and policies.

The UK Government has indicated that, over time, and as RDG's capacity and confidence grows, and where the long term interests of passengers, freight customers and other railway users would be enhanced, it should be in a position to transfer other key roles and responsibilities to the industry. RDG will then have an important role in taking these forward.

2.8 Whilst it is right that RDG should develop, agree and promote policies and strategies that, in its opinion, would improve the efficiency and performance of the rail industry and its stakeholders, RDG recognises that the implementation of those strategies will be subject to the normal industry implementation processes (including the Network Code and track access contracts) to ensure that the contractual rights of individual operators and other stakeholders are not compromised. Thus RDG strategies and policies will not bind

individual members, but having already secured a high level of industry backing as part of the development process will have the status and significance that goes with being an RDG statement.

2.9 Should RDG consider that these implementation processes themselves could be improved it will be able to suggest changes to ORR or the UK Government as appropriate, or, in the case of the Network Code or Access Dispute Resolution Rules, submit a proposal for change through the usual industry mechanisms. RDG proposes to lead improvements to the Dispute Resolution Process to ensure that it is used effectively and in support of improved efficiency.

## Governance and structure

2.10 It is proposed that RDG will be a not for profit organisation and incorporated as a company limited by guarantee. This follows the approach taken to establish the Rail Safety and Standards Board (RSSB). It will allow RDG to retain the funding it receives from industry members and use it to achieve its purpose and objectives. No dividend or return will be paid to RDG members. Any surplus in one year will be offset against the following year's charges on a pro rata basis.

2.11 Consequently RDG will comprise members who will provide a nominal guarantee against any unfunded debt, rather than shareholders participating in financial returns.

## RDG membership

2.12 It is proposed that RDG will have different types of membership. There will be leadership members, drawn from Network Rail and the main train operator owning groups, both passenger and freight, who will provide RDG's board of directors. RDG and ORR believe it is important that these key industry players, who have the key links with end customers, government funders and suppliers, take the lead in RDG and that the most senior leadership group is kept to a manageable size.

2.13 Train operators who are not represented on the leadership body will be consulted on the work of RDG and on new policies and strategies.

2.14 RDG recognises the vital role of industry suppliers, and other stakeholders such as railway funders in delivering a better and more efficient railway. So it will invite them and other key stakeholders to be associate members and involve them in its work, for instance through participation in specialist sub-groups and consideration of proposals for new and revised policies and strategies.

2.15 The proposed different types of RDG membership are explained further in the following paragraphs.

## RDG leadership

2.16 It is proposed that RDG will be led by a board of directors drawn from Network Rail and active GB train operator owner groups – the **leadership members** – at executive director or senior executive level. The board of directors will initially consist of the chief executives / senior executives of its founder members,<sup>4</sup> and be supplemented over time by other directors (as and when their groups meet the qualification criteria). Directors will remain as part of RDG's board for so long as they meet the membership criteria set out in paragraph 2.17.

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<sup>4</sup> The RDG founder members are: Abellio; Arriva; DB Schenker; Directly Operated Railways, First Group; Freightliner; Go-Ahead; National Express; Network Rail; Stagecoach; and Virgin Rail.

2.17 Each owning group that qualifies to be a leadership member will be required to appoint one director and one alternate. These appointments will be from the executive directors or senior executives of the owning group. Network Rail will appoint two directors, one of them its Chief Executive. Leadership members will be determined on the basis of transparent and objective criteria based on prospective annual (April to March) licensed GB railway activity related turnover, applied separately to the licensed passenger and freight operating companies that they own. The initial qualifying turnover threshold will be £250 million although, in order to provide stability of membership during RDG's early life, founder members whose turnover falls beneath this figure but remains in excess of £100 million may retain membership for a period ending in April 2015. The RDG Articles will provide for periodic updating of the turnover threshold. ORR will provide the RDG secretariat with the relevant turnover details provided through the annual railway safety levy round.

2.18 The RDG Articles will also provide for leadership members to join and for membership to lapse as and when either potential leadership members satisfy the threshold or existing leadership members fall below it. In the case of passenger TOCs (or their owning groups), this is most likely to happen as they win or lose passenger franchises which impact on their qualifying annual group turnover. In the latter case the owning group would cease to have a nominated director with immediate effect (subject to the 2015 stability period for founder members outlined in paragraph 2.17).

2.19 A new owning group that is assessed as meeting the membership criteria - either through existing or projected turnover - will automatically be accepted as a leadership member.

2.20 As the success of RDG policies and strategies will potentially be dependent upon them being implemented widely across the whole industry it is important that licensed operators from all sectors are continually represented on the board of directors. There is a specific risk that a situation might arise where as a result of growth in the number of freight operators, none of them meet the turnover criterion for membership. If this is likely to happen, RDG will need to consider how the involvement of freight operators can be assured. One option might be to stipulate within the RDG Articles that the largest two freight operator groups will be leadership members irrespective of turnover.

2.21 We believe that this structure will enable initiatives to be proposed and considered quickly by those most able to influence, facilitate and deliver change across the industry.

2.22 In terms of governance, only leadership members will provide RDG's formal guarantee and be liable to pay the annual membership levy required to fund RDG's budget.

2.23 The individual leadership members will be the only members of RDG for company law purposes. They will be responsible for the conduct of RDG's formal business and have the right to nominate, and to vote on the appointment and removal of directors in accordance with the criteria described above. The RDG Articles will provide that active participation by nominated directors on the RDG board is an obligation of membership.

2.24 In fulfilling their roles, each director would owe the usual directors' duties to RDG under company law (for example, duties to promote the success of RDG, to avoid conflicts of interest, to exercise independent judgment and to declare any interest in a proposed transaction or arrangement with RDG).

**2.25 Question 2 – Are you content with the proposed structure of the RDG board, particularly in terms of scope of representation and the criteria for membership?**

## Wider RDG membership

2.26 To ensure that all parties in the industry have appropriate access to and influence over RDG's decision making process, all licensed train operators will be classified as **licensed members** through the introduction of a new licence condition. Licensed members would have the right to:

- (a) participate in all RDG consultations and contribute to the working of RDG;
- (b) attend the RDG annual forum; and
- (c) be consulted on the content of RDG's annual report and receive a final copy.

2.27 A further category known as **associate members**, will include other key industry stakeholders (such as the full range of railway suppliers, rolling stock leasing companies (ROSCOs), funders, representative organisations, trade unions) who would be invited to join by reference to criteria that will be set out in the RDG Articles. Associate members may be invited to participate in the work of RDG, particularly its specialist sub-groups, but would not have any specific rights in respect of representation at meetings or voting. The sub-groups would be charged with responsibility for determining change or efficiencies in a given aspect of the industry, and would be chaired by an RDG director and report to RDG.

2.28 Whilst London Underground Limited (LUL) does operate over some short stretches of network owned and managed by Network Rail, we do not consider that any proposals made by RDG, which will be aimed at improving the operation of the mainline railway, will impact significantly on its activities. As a licence holder LUL will be asked to adopt the new licence condition, but the small percentage of its annual turnover relating to activities on the Network Rail network will not qualify it to nominate a leadership member. It will, however, be classed as a licensed member.

2.29 High Speed 1 and Eurotunnel fall outside of RDG's scope, which will be focused on the Network Rail network, but they will be entitled to be associate members.

**2.30 Question 3 – Please comment on how you consider RDG could best engage with licensed and associate members.**

## Licence condition

2.31 To give effect to these arrangements ORR and RDG have agreed that a new condition be added to Network Rail's network licence and the licences of train operators using Network Rail's network to require the licence holders to be licensed members of RDG, and in the case of train operators, if the turnover threshold is met, to require that their owning groups become a leadership member, and to nominate an executive director or senior executive as director (and alternate) to sit on the RDG board. Draft licence conditions (one each for Network Rail and train operators) are attached at Annex B for consideration. It is our intention, subject to responses received to this consultation, to formally consult on these licence conditions in October 2012 with a view to incorporating them into existing licences during November 2012.

2.32 The model proposed is similar to the arrangements under which RSSB was established and still operates. On balance we consider that using the licensing approach provides the best solution to formalise RDG. Relying on some form of voluntary contractual arrangement with operators creates a risk of not achieving cross-industry acceptance and therefore poses a risk to the effectiveness of RDG. Formalising through the Network Code creates a number of potential enforcement issues around membership and process. A third option, use of the franchising process, would only apply to one particular group of operators, and would risk a failure to implement proposals across the industry. Each of these alternative

approaches has therefore been discounted in preference of the licensing option as it is believed that this creates the best means by which support for, and the credibility of, RDG as a leadership body can be established.

2.33 We consider that supporting the formalisation of RDG through a new licence condition is consistent with our duties under section 4 of the Railways Act 1993, and in particular the following duties:

- (a) “to promote improvements in railway service performance” (section 4(1)(zb));
- (b) “to protect the interests of users of railway services” (section 4(1)(a));
- (c) in performing our duties under section 4(1)(a), to “have regard, in particular, to the interests, in securing value for money of [users or potential users of railway services or of persons providing railway services], of the persons who make available the resources and funds [...] of the general public.” (section 4(5C)).
- (d) “to promote the use of the railway network in Great Britain for the carriage of passengers and goods, and the development of that railway network, to the greatest extent that [ORR] considers economically practicable” (section 4(1)(b));
- (e) “to promote efficiency and economy on the part of persons providing railway services” (section 4(1)(c)).

RDG’s purposes (as set out in paragraphs 2.3 to 2.5) are consistent with these duties.

2.34 We believe that by implementing the new licence conditions RDG will be provided with the necessary support to enable it to play a key role in helping to deliver a more effective and efficient railway.

2.35 The draft Network Rail licence condition requires Network Rail to become a leadership member of RDG and comply with its obligations under the RDG Articles. The draft train operator licence condition requires the licence holder to:

- (a) become a licensed member of RDG as described in paragraph 2.26 above;
- (b) comply with the RDG Articles; and
- (c) where the requirement relating to the turnover of its owning group is met (this is described in paragraph 2.17 above and will be set out in detail in the RDG Articles), to procure that the licence holder’s owning group provides a leadership member of the RDG and complies with its obligations under the RDG Articles as a member of that group. Where an owning group has more than one passenger operator it would only be entitled to have one leadership member (plus alternate).

2.36 Given the level of industry commitment to RDG we consider it unlikely that operators will fail to comply with the licence conditions. However, were this to be the case, then we would consider taking appropriate enforcement action in line with our economic enforcement policy.<sup>5</sup> In terms of the RDG Articles we would only expect to take enforcement action where non-compliance would have a regulatory or public interest impact, for instance where the credibility, function or success of RDG is damaged or where there could be an adverse impact on the GB rail industry. Such issues would be considered on a case by case basis.

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<sup>5</sup> ORR’s economic enforcement policy and penalties statement is available on its website at <http://www.rail-reg.gov.uk/upload/pdf/395.pdf>.

2.37 RDG's Articles will make provision for how to deal with circumstances in which a licence holder may have more than one owning group or is held in equal shares by different owners. Where there are contentious issues about who should become a leadership member, we expect RDG to be able to resolve these by following clear criteria set out in the RDG Articles. The RDG Articles will also include an appeal function that allows a licence holder or its owning group to appeal to ORR where it disagrees with a decision of the RDG board relating to membership. Because of these criteria we do not expect the appeal function to be engaged often.

2.38 Network Rail is to be a leadership member of RDG as of right. Potential membership issues arising from another of the McNulty recommendations, the creation of additional infrastructure providers through concessions or other mechanisms, will be considered and addressed through the RDG Articles as and when the need arises.

2.39 The RDG Articles would be binding on the key participants (leadership members, Network Rail and licensed members) and establish the key processes, including:

- (a) the structure of RDG;
- (b) membership arrangements (including membership criteria and election issues);
- (c) voting arrangements;
- (d) funding arrangements; and
- (e) the role of directors.

2.40 The draft RDG Articles are being developed and will be made available through the RDG website during the autumn. It is our intention to include a final version of these documents as part of our conclusions document and statutory licence condition consultation which we are aiming to publish in October 2012. Because the licence will require membership and compliance with the RDG Articles, those Articles will make provision regarding ORR approval of changes to them.

**2.41 Question 4 - (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?**

### **Chair, Director General and other roles**

2.42 The directors will elect a chair and vice chair, and RDG expects that they will act as the public face of the group. RDG intends to appoint through open competition a Director General to lead a small RDG secretariat. A limited amount of resources will be procured by RDG to assist in taking forward subject-specific working groups.

### **Meetings**

2.43 RDG proposes that the directors should generally meet monthly. Special meetings of the board may be called by any three directors by giving fourteen days' notice to the Director General. At all meetings there should be a minimum quorum (for making decisions) of any four directors, comprising one from Network Rail, two appointed by passenger owning groups and one appointed by a freight owner. In the event that directors are unable to attend the meeting a nominated alternate who attends in their place will be deemed a qualifying attendee for determining a quorum.

2.44 RDG must hold an AGM to deal with any formal corporate law business. There will also be an annual forum that will inform the industry of RDG's activities during the previous year and its plans for the coming year.

## Decision making

2.45 For voting purposes RDG proposes to adopt a simple majority approach modified as described in the following paragraphs.

2.46 The chair will have discretion to withhold any proposal from being put to a vote of the directors where that person considers that further consideration at that or a subsequent meeting would bring the directors closer to unanimity, and that the benefits of this outweigh the disadvantage of delay.

2.47 In terms of voting, the minimum meeting quorum requirements will apply and each director present should have one vote with proposals being decided by a simple majority of the votes actually cast. However, where a Network Rail director or a freight operator director opposes a decision the proposal will not be passed unless it is ratified by a second vote (taken after a minimum interim period to be set out in the RDG Articles – around two months) which is not opposed by Network Rail. This interim period would allow further discussions of the proposal to be held between directors in an attempt to resolve any concerns. RDG is clear that because Network Rail agreement will be essential to ensure that any proposal is fully implementable, any continuing dissent at either stage by the infrastructure manager will result in the motion not proceeding through RDG (although it may then be taken up elsewhere).

2.48 ORR is content with this approach as it is not proposed that RDG will have the power to require individual operators to comply with its strategies or policies. It will be for Network Rail and train operators to decide whether they will take forward any agreed proposals as part of their business operations. Some strategies will need be implemented through the usual industry mechanisms such as the Network Code.

2.49 There is of course a risk to RDG's reputation should there be ongoing subsequent rejection of its proposals, but ORR believes this will help to focus RDG's efforts to ensure that improvements and efficiencies are developed that will benefit (and be seen to benefit) the whole industry. Because of this, and the proposed RDG voting process, ORR does not consider that there is any need for specific dispute resolution processes to be developed to deal with disagreements over RDG decisions.

**2.50 Question 5 – Will the proposed voting and quorum arrangements provide you with assurance that decisions taken by RDG will have sufficient cross-industry support to justify implementation?**

## Competition law compliance

2.51 ORR recognises that RDG must be compliant with competition laws. RDG will be producing a competition compliance document to provide examples of the 'dos and don'ts' in conducting RDG business to avoid breaching competition law. Through their regulatory functions ORR and the government will ensure that this risk is appropriately managed and controlled.

2.52 ORR emphasises that adherence to the competition compliance document cannot guarantee compliance with competition law. Equally, nothing in:

- (a) this consultation document;
- (b) the competition compliance document;

(c) the RDG Articles; or

(d) any other document relating to RDG

constitutes the advice, approval or acceptance of ORR that the proposed or final arrangements for RDG or the current or future conduct of RDG or any of its members comply with competition law. RDG and its members should obtain legal advice if concerned about competition law compliance.

**2.53 Question 6 – Are there any specific commercial protections that you consider will need to be included within the competition compliance document?**

## Code of conduct

2.54 A code of conduct for RDG members and directors will be written by RDG to govern behaviours and rules of engagement.

## Industry relationships

2.55 RDG will initially establish relationships with the following industry groups:

- (a) National Task Force (performance);
- (b) Planning Oversight Group (industry planning and railway strategy); and
- (c) Technology Strategy Leadership group (technological developments).

RDG suggests that the alignment of the objectives of these groups with those of RDG will be facilitated if it nominates the chair of these groups.

2.56 RDG will wish to work closely with other 'formalised' industry bodies, such as RSSB. It will also consider how it can best ensure the industry dispute resolution processes are used effectively and in support of improved industry efficiency.

## Transparency and confidentiality

2.57 In order to ensure that RDG remains accountable and transparent, as well as holding an AGM and an annual industry forum, it will consult licensed members and others on draft proposals. It will also publish a communications plan setting out how it will engage with members. The RDG Articles will require it to produce an annual report, and publish relevant documents on its website.

2.58 There will be a need for confidentiality in some aspects of RDG's work, so as to enable a free and frank exchange of views as RDG develops its policies, proposals and strategies.

## Funding

2.59 Network Rail will provide transitional funding to meet RDG's ongoing costs until the end of control period 4 (31 March 2014). Onward funding will then be provided (under the RDG Articles) by an annual levy payable by its leadership members. For simplicity, and bearing in mind the relatively small perceived cost of operating RDG it is proposed that:

(a) Network Rail will fund 50% of the annual levy; and

(b) the remaining 50% will be split equally between the other leadership members.

2.60 Responsibility for calculating the annual operating budget and collecting the levy would fall to the RDG secretariat. The way that this budget will be calculated and other related issues (such as rebates and any transitional arrangements for new or leaving members) will need to be determined in accordance with the RDG Articles.

**2.61 Question 7 – Please comment on whether you consider these funding arrangements to be appropriate.**

# Annex A – Consultation questions

As well as welcoming comments on any aspect of the issues raised in this document, we would welcome views on the following specific questions:

1. 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 (*paragraph 2.6*).
2. 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 (*paragraph 2.25*)?
3. Please comment on how you consider RDG could best engage with licensed and associate members. (*paragraph 2.30*).
4. (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 (*paragraph 2.41*)?
5. 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? (*paragraph 2.50*).
6. Are there any specific commercial protections that you consider will need to be included within the competition compliance document (*paragraph 2.53*)?
7. Please comment on whether you consider the funding arrangements proposed in paragraphs 2.59 and 2.60 to be appropriate (*paragraph 2.61*).

# Annex B – Draft RDG licence conditions

## ***Network Rail***

1. The licence holder shall:
  - (a) become and thereafter remain a leadership member of RDG; and
  - (b) comply with its obligations under the RDG Articles.
  
2. In this condition:

“RDG” means the Rail Delivery Group (a company limited by guarantee and registered in England and Wales under number [...]); and

“RDG Articles” means the articles of association of RDG.

## ***Licensed train operators***

1. The licence holder shall:
  - (a) become and thereafter remain a licensed member of RDG;
  - (b) comply with its obligations under the RDG Articles; and
  - (c) procure that any member of its Group that is entitled under the RDG Articles to become a leadership member of RDG:
    - (i) becomes and thereafter remains a leadership member of RDG; and
    - (ii) complies with its obligations under the RDG Articles.

2. In this condition:

“Group” has the meaning ascribed to it in the RDG Articles;

“RDG” means the Rail Delivery Group (a company limited by guarantee and registered in England and Wales under number [...]);

“RDG Articles” means the articles of association of RDG; and

“subsidiary” shall have the same meaning as in section 1159 of the Companies Act 2006.

# Annex C – Impact assessment

## Section 1: The issue

### What is the issue?

1.1 In 2009 the Department for Transport (“DfT”) and the Office of Rail Regulation (“ORR”) commissioned a study, undertaken by Sir Roy McNulty and published in May 2011 to examine the opportunities and barriers to improving the value for money of Great Britain’s railway for taxpayers, passengers and freight customers.

1.2 One of the key recommendations of the study was that the industry should develop and establish a Rail Delivery Group (RDG) with responsibility for high-level cross-industry leadership.

### Why are we intervening?

1.3 RDG came into being in June 2011 with members drawn from the owning groups of the passenger and freight train operators and Network Rail.

1.4 The purpose of the group is to provide leadership for the railway industry as a whole, and to ensure that the industry maximises its efficiency and capability to support the case for future growth.

1.5 However, this group can only be fully effective and achieve its purpose if it has the full support of, and input from, all railway operators. To achieve this RDG and ORR consider that the best way to formalise the group will be to introduce a new condition into the licences of all train operators and Network Rail requiring them to become licensed members of RDG.

### What is the desired outcome?

1.6 We envisage that through this process a structured RDG will become a key leadership body for the railway industry, developing and implementing strategies and policies for the benefit of its members and other stakeholders, passengers and customers. It will be driven by a group of key high level industry leaders with input, as necessary, from other railway parties.

1.7 We aim to implement changes to licences by the end of 2012 as part of the process of formalising RDG. This will also require articles of association setting out how RDG will operate as a company limited by guarantee. The articles will be made available separately by RDG, although the documents (and any amendments to them) will need to be approved by ORR before ORR can make the necessary licence changes.

### When will we review the success of the intervention?

1.8 The successful implementation of this proposal can be measured in three ways:

(a) through industry parties agreeing to accept the new licence condition in response to this initial consultation. This can be specifically reviewed after the close of the consultation on 14 September 2012;

(b) once the condition has been formally introduced, by licence holders taking an active role in the workings of RDG; and

(c) there is subsequently no requirement for ORR to take enforcement action for breaches of the new licence condition.

1.9 We will only be able to take a view on (b) and (c) once RDG has been formalised for a period of time.

## Section 2: The options

### Option 1: Do nothing

2.1 UK Government policy, in the light of the McNulty review, is that a Rail Delivery Group will be established to develop and drive forward policies and strategies to improve value for money across the industry.

2.2 To rely on the goodwill of industry parties to participate in and support the work of RDG through some form of voluntary contractual arrangement will present a significant risk to achieving cross-industry acceptance and therefore the effectiveness of the group. ORR therefore considers that, to achieve buy-in from key railway operators, RDG has to be formalised in some way through the industry contractual framework.

2.3 This consultation considers the most efficient way that this can be achieved.

### Option 2: Formalisation through operators' licences

2.4 One way to ensure that all operators have an enforceable obligation to be part of and contribute to RDG is to add a new condition to all operator licences that requires:

- (a) the operator to be a licensed member of RDG;
- (b) dependent upon projected annual railway-related turnover, the operator to ensure that their owning group nominates a leadership member to sit on the RDG board; and
- (c) the operator to actively participate in RDG activities when required.

2.5 This model is similar to the arrangements under which the Rail Safety and Standards Board (RSSB) was established and still operates.

2.6 ORR and RDG consider this the easiest way to ensure that:

- (a) membership of the RDG board is appropriately resourced; and
- (b) participation from all licensed operators is achieved to ensure that parties can be called upon to input into RDG's consideration of policies and strategies to ensure that a broad range of industry wide views can be considered and reflected. It is important to recognise that any policies or strategies that RDG feels should be implemented across the industry will still need to be agreed through the usual contractual change mechanisms.

2.7 Failure to comply with this new condition can be enforced by ORR as a breach of licence.

2.8 This is our preferred option.

### **Option 3: Formalisation through the Network Code**

2.9 The key rules governing contractual arrangements across the industry are contained within the Network Code<sup>6</sup> and this may therefore be an appropriate place to address this obligation. However, formalising RDG through this route would create a number of issues:

- (a) significant drafting would be required to scope out the membership and structure of the group, which for a Company Limited by Guarantee would more appropriately sit in its articles of association;
- (b) these changes in turn would need to be adopted by the industry through the usual Proposals for Change consultation and approval process, which risks there being:
  - (i) a significant delay to the formalisation process; and
  - (ii) a failure to agree; and
- (c) relying on the Network Code would open up both a number of membership and process enforcement, and potential appeal issues which, as RDG is a Company Limited by Guarantee, should properly be dealt with through company law rather than by ORR. Whilst we are content to deal with licence breaches if they arise, RDG should be responsible for managing itself and its governance processes.

2.10 Because of the potential risks to ensuring that RDG is formalised effectively and efficiently we do not believe that this approach is appropriate.

### **Option 4: Formalisation through franchise arrangements**

2.11 The possibility of including RDG membership requirements as part of the franchising process has also been considered. This approach would, however, only apply to one particular railway sector, and therefore place no obligation for membership or involvement on Network Rail, non-franchised passenger or freight operators.

2.12 Whilst RDG proposals would still seek to be implemented through the normal industry change mechanisms, there will have been no cross-industry involvement in their development. This would lead to the risk of a failure to implement proposals, and therefore to the credibility of RDG as a leadership body.

2.13 Neither ORR nor RDG considers this to be a satisfactory option.

## **Section 3: The preferred option (option 2)**

### **Impact on stakeholders / duty holders**

3.1 We can consider the impact on stakeholders in terms administrative burden and cost. In terms of administration we consider that the introduction of a new licence condition will:

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<sup>6</sup> The Network Code can be found on Network Rail's website at <http://www.networkrail.co.uk/browse%20documents/network%20code/network%20code%20and%20incorporated%20documents/the%20network%20code%2016%20march%202012.pdf>

(a) provide a consistent approach in respect of all licensed train operators and Network Rail, ensuring that they all have a say in the way that RDG develops policies and strategies for the benefit of the whole industry;

(b) provide protection for those licence holders and comfort that they will not be forced to adopt policies or strategies that have been developed and agreed by third party operators. These will be subject to usual industry change procedures under which normal consultation / decision making rights will apply.

3.2 Whilst this may result in an unquantifiable increase in the workload of some operators or owning groups, we consider that this will ultimately be for the benefit of the parties, in both making known the implications of proposals for their business / sector, and the impact of delivering RDG's purpose of improving value for money.

3.3 In terms of cost, there will clearly be some implications for RDG in terms of establishing itself as a Company Limited by Guarantee, and for others in assisting with RDG workstreams, membership of the RDG board and the small contribution to the RDG levy (for those to whom this will apply). We are unable to quantify these costs as part of this assessment as clearly they will depend upon the issues being considered by RDG and the level of involvement of each operator. However, we consider that these costs should be relatively small in relation to an operators overall business commitments, and will, in any case be a key factor in delivering a more sustainable and cost efficient railway in the future.

3.4 For these reasons we do not consider the proposed way of formalising RDG will place any additional risk or significant burden, either administrative or financial, on the licence holders affected.

### **Impact on ORR**

3.5 Although there may be a slight additional workload placed on ORR in terms of:

- (a) implementing the licence change;
- (b) identifying owner group turnover annually;
- (c) approving (and maintaining) the RDG Articles; and
- (d) potential enforcement action against licence holders,

we do not consider that this new condition will have a significant impact on ORR's activities.

### **Impact on specific consumer groups**

3.6 No such impact is envisaged.

### **Impact on health and safety**

3.7 No such impact is envisaged.

### **Impact on sustainable development**

3.8 The introduction of the new licence condition will have no direct impact on sustainable development. However, the work of the RDG is aimed at improving value for money and should in the long term lead to a more sustainable railway.

## Impact on competition

3.9 No impact on competition is envisaged. In delivering its purpose RDG leadership members must act in a way that will meet their competition law responsibilities. Also, any changes to the contractual relationships of operators will only be implemented through the normal industry framework consultation and approval processes.

## Impact on equality

3.10 We do not expect these proposals to have either a positive or negative impact on an individual with any particular protected characteristic under the Equality Act 2010.

## Geographic impacts

3.11 No such impact is envisaged.

## Statutory duties

3.12 We consider that this proposal will enable us to meet the following statutory duties:

- (a) to protect the interests of users of railway services;
- (b) to promote the use of the railway network in Great Britain for the carriage of passengers and goods, and the development of that railway network, to the greatest extent that [ORR] considers economically practicable;
- (c) to promote improvements in railway service performance;
- (d) to promote efficiency and economy on the part of persons providing railway services; and
- (e) to have regard to the interests, in securing value for money, of the users or potential users of railway services, of persons providing railway services, of the persons who make available the resources and funds and of the general public.

## Overall impact

3.13 In conclusion we believe that introducing a new RDG licence condition will :

- (a) ensure cross-industry support for the purpose of RDG;
- (b) ensure that all licensed train operators and Network Rail are involved in RDG's work to develop policies and strategies for the long-term value for money improvement of the railway; and
- (c) provide protection to those licence holders by ensuring that they are either represented on the RDG board or are obliged to participate in RDG workstreams.

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