

## **DELEGATED POWERS MEMORANDUM: RAIL REFORM BILL**

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## **SUMMARY**

### **Introduction**

1. This memorandum has been prepared by the Department for Transport (DfT) for the Delegated Powers and Regulatory Reform Committee (DPRRC) to assist with its scrutiny of the draft Rail Reform Bill (“the Bill”). The Bill was published in draft on [DATE]. This memorandum identifies the provisions of the draft Bill that confer powers to make delegated legislation. It explains in each case why the power has been taken and explains the nature of, and the reason for, the procedure selected.

### **Defined terms**

2. This memo refers to several persons and bodies. These are referred to as follows:
  - IRB: the Integrated Rail Body
  - ORR: the Office of Rail and Road, the regulator for the rail industry.
  - TOCs: train operating companies
  - DfT or ‘the department’: Department for Transport
  - CMA: Competition and Markets Authority

### **Purpose and effect of the Bill**

3. The Bill brings together the primary legislative measures required to deliver the vision set out in the government’s white paper, Great British Railways: The Williams-Shapps Plan for Rail (Plan for Rail). The Plan for Rail seeks to simplify the railways to ensure a better and more reliable service for passengers, supporting economic growth nationwide and ensuring the survival of the railways.
4. The Bill makes the necessary legislative reforms to bring about reform of the rail sector, revising the role and functions of the Secretary of State and the Office of Road and Rail, and enabling the establishment of a new Integrated Rail Body (the “IRB”). The Bill enables the transfer of some Franchising Authority functions from the Secretary of State to the integrated rail body (to combine with the infrastructure manager function) and makes other changes to facilitate and support this core reform. The rail policy that supports these measures have received collective agreement through the government response to the consultation on legislation to implement rail transformation, on 6 November 2023.

### **Delegated powers**

5. To support these policy objectives, the legislation includes several legislative delegated powers. Many of these powers are not completely new and are similar to powers in other legislation.
6. The Bill also confers a number of powers which we do not consider to strictly constitute new delegated powers for the purpose of this memo as they cannot be said to be legislative in character, or simply amend delegated powers of a legislative nature. However, given the effect of such powers, we thought it important to both justify, and explain the ways in which these powers are likely to be used, for both transparency and completeness.

7. Accordingly, this memorandum has been separated into three parts: Part A which details delegated powers of a legislative nature, Part B which details delegated powers which are not legislative in character and Part C which details amendments to existing legislative delegated powers.
8. The powers are drawn as narrowly as possible, and we have clearly demonstrated the purposes for which the Ministers are expected to use them. The department has considered the use of powers in the Bill as set out below and is satisfied that they are necessary and justified.

## **Part A – Delegated powers of a legislative nature**

1. The key functions of the delegated powers are:

- a. Designation of the IRB

To empower the Secretary of State to designate an Integrated Rail Body (the “IRB”) to act as both the Franchising Authority and Infrastructure Manager for the rail network.

- b. Amendment of the Rules on Access to and Management of Railway Infrastructure

To enable the Secretary of State to amend the Railways (Access, Management and Licensing of Railway undertakings) Regulations 2016.

- c. Secretary of State Transfer Scheme

To empower the Secretary of State to make schemes for the transfer of property, rights and liabilities from and to certain specified persons, including an IRB, a proposed IRB and a former IRB (depending on the context). *[This provision has not yet been developed but will be included should this draft Bill be formally introduced in a future parliamentary session.]*

*While provisions in this respect do not appear in the current iteration of the Bill, the core principles of such a scheme are known – it will be designed to facilitate establishment of an IRB and provide for possible future transfers of the IRB function between entities. As such, the purpose and justification of the anticipated provisions are outlined in this memorandum.]*

- d. Consequential provision

To empower the Secretary of State to make consequential arrangements through supplementary, incidental, transitional and saving provisions, including the power to amend primary legislation.

- e. International interests in railway rolling stock

To enable the Secretary of State to make regulations which implement the Luxembourg Protocol in the UK.

## **Part B – New powers which are not legislative in character**

1. The key functions of the delegated powers which are not legislative in character are:

- a. Direction and Guidance  
To enable the Secretary of State to issue to the IRB directions (which will be binding) and guidance (to which the IRB must have regard).
- b. Funding the ORR  
To allow the ORR to levy a fee on the IRB to fund the exercise of its non-safety functions.
- c. Licencing  
To enable the Secretary of State to issue and modify the IRB's licence.

**Part C – Powers which are arguably legislative but not new**

1. The key functions of amendments to existing delegated powers are:

- a. IRB Transfer Schemes
  - (i) To amend section 12 and Schedule 10 of the Railways Act 2005, to give the IRB, where the IRB replaces the Secretary of State as the appropriate national authority, the power to make a scheme for the transfer of relevant franchise assets at the end of a franchise period from the old franchisee to certain specified persons, and to expand the list of specified persons to include the IRB and a company wholly owned by the IRB (or jointly owned by the IRB and Scottish or Welsh Ministers).
  - (ii) To insert a new section 12A into the Railways Act 2005 and to make certain consequential changes to Schedule 10 of the Railways Act 2005, to give the appropriate national authority the power to make a scheme for the transfer of relevant service agreement assets to certain specified persons at or after the end of a services agreement entered into in accordance with Section 30 of the Railways Act 1993 to certain specified persons.
- b. Policy Statements
  - (i) To amend section 26 of Railways Act 1993 to require the Secretary of State to publish a policy statement about how the Secretary of State considers the IRB should exercise its power under section 26(1) of the Railways Act 1993 (as will be amended by this Bill), and to require the IRB to have regard to this statement of policy in making decisions with respect to franchises.
  - (ii) To amend section 57B of Railways Act 1993 to add the IRB to the lists of persons required to publish a statement of policy with respect to the imposition of penalties and the determination of their amount, and to require the IRB to have regard to its policy statement (or, if its statement has not yet been published at the time the contravention occurred, the Secretary of State's statement of policy) when deciding whether to impose a penalty and determining that penalty's amount.

## **PART A**

### **DELEGATED POWER 1: Power to empower the Secretary of State to designate a body as the Integrated Rail Body (IRB).**

#### **Clause 1: The IRB**

*Power conferred on:* The Secretary of State for Transport

*Power exercisable by:* Regulations made by Statutory Instrument

*Parliamentary Procedure:* Negative resolution procedure

#### **Context and Purpose**

1. This provision provides the Secretary of State with the power to designate a “body corporate” as the IRB. The IRB will be a new rail body, which will act as both the Franchising Authority and Infrastructure Manager for the rail network. The term “body corporate” refers to any company registered under the Companies Act 2006. The clause sets out that the IRB will not be a Crown body.
2. This power is akin to the power afforded to the Secretary of State to appoint one or more companies as highway authorities under section 1 of the Infrastructure Act 2015. However, unlike the power under section 1 of the Infrastructure Act 2015, the Secretary of State will only be able to appoint one IRB.

#### **Justification for taking the power**

3. The power for the Secretary of State to designate an IRB is required so that the body can perform its functions as both an Infrastructure Manager, as defined in the Railways (Access, Management and Licensing of Railway Undertakings) Regulations 2016, and a Franchising Authority, as defined in the Railways Act 1993. The IRB will be a distinct category of body and, in order to make specific provision for this new body, it needs to be defined in legislation.
4. There is precedent for a body to operate as a company under company law and undertake functions formerly exercised by the Secretary of State, namely the Oil and Gas Authority, which is a company on which functions were conferred by the Energy Act 2016.
5. The DfT considers that there is a strong case for making the appointment of an IRB by Statutory Instrument given the statutory functions which will be conferred upon it from the appointment. It is appropriate for the identity of an IRB to be transparent, settled and readily ascertainable, and making the appointment by Statutory Instrument provides for this.
6. The DfT considers it conceivable that the body carrying out the functions of the IRB will change in the future. This power has been designed such that it allows the Secretary of State to rescind the designation and appoint another body to be the IRB if necessary. This is why the first body to be named IRB is not included in the Bill itself.
7. There are safeguards ensuring that the power to designate an IRB is not used inappropriately by the Secretary of State. The Secretary of State will designate the IRB by regulations made by statutory instrument. Such a regulation could be annulled by Parliament and/or would be challengeable by means of means of judicial review in the event that the power was being used irrationally or in a biased way (for example, to a company in whom the Secretary of State had an interest).

8. The designation of the IRB does not alter the functions that are conferred on the IRB as these will be set out in legislation or the licence.
9. Further, any alternative designation by the Secretary of State would need to be done by means of a regulation laid before parliament, which the department considers to be an appropriate limitation on the power.
10. It is expected that the Secretary of State will designate Network Rail Infrastructure Limited as the first IRB, thereby transferring to this body the new franchising and strategic functions that the IRB is to undertake. Network Rail Infrastructure Limited currently carries out the central infrastructure management function for railways in Great Britain and is considered a suitable existing body from which the IRB will emerge. In addition, designating Network Rail Infrastructure Limited as the IRB will avoid the need to transfer a large number of staff, contracts and other assets that reside in this company.
11. The clause specifies that employees of the newly designed IRB will not be considered Crown servants, nor will the IRB's property be considered Crown assets. This clarifies the status of staff and assets that may be transferred to the IRB (so they will be employed or held on a basis consistent with Network Rail Infrastructure Limited's existing staff and assets).

#### Justification for the procedure

12. The IRB will be designated by statutory instrument which will be subject to the negative resolution procedure. The DfT considers this an appropriate level of scrutiny given the limited nature of the power to appoint an IRB as set out in the Bill.

**DELEGATED POWER 2: Power to enable amendments to the Railways (Access, Management and Licensing of Railway Undertakings) Regulations 2016 and associated retained EU Regulations and Implementing Acts that stem from them**

**Clause 8: Railway transport services: authorisation access and management**

*Power conferred on:* The Secretary of State for Transport

*Power exercisable by:* Regulations made by Statutory Instrument

*Parliamentary Procedure:* Affirmative procedure

Context and Purpose

1. This provision introduces a delegated power which will enable the making or amending of specific rail markets legislation to ensure it is up to date and fit for purpose. This would allow the use of the affirmative Statutory Instrument process to modify certain regulations.
2. The regulations that the power to amend will apply to are highly technical and complex, relating to the access to, and management of, the railways. As the rail markets have developed, and the roles and responsibilities of the Infrastructure Manager and the regulator have evolved, it has been necessary to amend these regulations several times over the last thirty years. The Railways (Access, Management and Licensing of Railway Undertakings) Regulations 2016 (2016 Access and Management Regulations) in particular, have historically been subject to legislative change on a relatively frequent basis.
3. While the UK was a member of the EU, amendments could be made using secondary legislation to implement EU legislation. Following the UK's exit from the EU, even minor amendments to the regulations are required to be made using primary legislation.
4. Although the Retained EU Law Act 2023 contains time-limited powers to amend relevant regulations, the power to amend in the Rail Reform Bill will enable the Secretary of State to make changes to such regulations over the longer term.
5. As the IRB is established and takes on duties as the Infrastructure Manager and the Franchising Authority, the regulations will need to continue to change as the management of the railway evolves. This power will enable government to deliver a more efficient, integrated railway, under the IRB.
6. The power would give long-term certainty that the government can amend the relevant regulations. This ensures that government can implement rail reform objectives, keep rail markets legislation current, and enable new legislative frameworks, if needed, for future rail projects.
7. The key aims are to:
  - a. enable policy objectives to be accomplished, by removing barriers to rail reform;
  - b. maintain compliance with international agreements; and
  - c. enable the government to support further reforms to the railway, by ensuring amendments can be made in a timely manner.
8. The scope of the draft power is specified in the Bill, in detail. The following existing regulations will be under the scope of this power:

- a. the Railway (Licensing of Railway Undertakings) Regulations 2005;
  - b. the Railways (Access, Management and Licensing of Railway Undertakings) Regulations 2016; and
  - c. any tertiary legislation under these Regulations.
9. The power includes the ability to make regulations or amend rail market legislation related to the following areas:
- a. the authorisation of persons to operate train services;
  - b. the operation of and access to railway infrastructure;
  - c. the management of train services operators, infrastructure operators, and ancillary services providers; and
  - d. competition in the rail markets.

#### Justification for taking the power

10. It is essential that the government is able to make necessary amendments to rail market regulations in a timely manner. This includes amendments to the 2016 Access and Management Regulations.
11. Without this power, the government would be required to repeatedly use primary legislation to amend rail markets legislation. Given the historic frequency with which amendments have been made, this option would create significant delays. Market or non-regulatory interventions are not applicable in this situation.
12. If amendments cannot be made in a timely manner, the government will face significant issues in the transfer of functions and responsibilities to the IRB. This would prevent the realisation of benefits from rail reform and also prevent the IRB from being able to function effectively.

#### Justification for the procedure

13. All secondary legislation that falls under this power will be subject to the affirmative procedure, ensuring full parliamentary scrutiny. In addition, we anticipate that any secondary legislation under this power will also be subject to 12-week consultation procedures. This will offer reassurance to key stakeholders, including the freight sector.



### **DELEGATED POWER 3: Power to empower the Secretary of State to make one or more schemes for the transfer of property, rights and liabilities to and from the IRB and connected entities**

#### **N/A: Transfer Schemes**

*Power conferred on:* The Secretary of State for Transport

*Power exercisable by:* Scheme

*Parliamentary Procedure:* None

#### Context and Purpose

1. *As noted in the introduction to this memorandum, the details of this transfer scheme have not yet been settled, and as such, we do not propose to include it in the version of the Bill that will be subject to pre-legislative scrutiny. However, a transfer scheme will be necessary to facilitate the aims of the draft Bill, so should the Bill be formally introduced in a future parliamentary session, such a power will be included. Work is ongoing to prepare provisions in this respect.*
2. This power will enable the Secretary of State to make transfer schemes, allowing for the transfer of property, rights and liabilities to or from specified entities. Those specified entities are the IRB (or a former IRB), a wholly-owned or former subsidiary of the IRB, a proposed IRB, or a wholly-owned subsidiary of the proposed IRB.
3. When establishing the IRB, and to ensure its continued future operation (including a proposed future IRB), the Department will need to make provision for relevant property, rights and liabilities to and from the IRB and associated entities.
4. The purpose of making these transfer schemes is principally to facilitate the transfer of assets and staff functions to the IRB as provided for elsewhere in the legislation. This power will allow the Secretary of State to ensure that transfer schemes can be made to allow the IRB (including a wholly-owned subsidiary of the IRB) to operate effectively.

#### Justification for taking the power

9. It is not possible to know at this stage what property rights and liabilities may need to be transferred to affect the transfer of the functions and other responsibilities to or from specified entities. The IRB will be the franchising body and will require the relevant property, rights and liabilities needed to operate as the IRB, and a transfer scheme is necessary to ensure that it is able to obtain these. This approach is in line with existing precedent: analogous power is found in section 15 of the Infrastructure Act 2015 (which allows the Secretary of State to make transfer schemes to and from a highways company or a former strategic highways company), and the Transport Act 2000.

#### Justification for the procedure

10. The power will not subject to any parliamentary procedure. Transfer schemes are technical and often contain information that is commercially sensitive, confidential or personal, as well as detailed references to rights and liabilities such as lists of contracts, all of which are not appropriate for parliamentary consideration.

In addition, it is not appropriate that transfers are made through Parliamentary procedure as this would cause delay, negatively impacting on the effective and efficient operation of the IRB.

**DELEGATED POWER 4: To empower the Secretary of State to make consequential changes to legislation, including supplementary, incidental, transitional and saving provisions, as well as different provision for different purposes.**

**Clause 16 – Power to make consequential provision**

*Power conferred on:* The Secretary of State for Transport

*Power exercisable by:* Regulations made by Statutory Instrument

*Parliamentary Procedure:* Affirmative procedure if the regulations made modify primary legislation, but negative resolution procedure in other cases

Context and Purpose

11. This provision allows the Secretary of State to make such consequential changes as are necessary in order to bring the reforms anticipated by the Bill into effect, and to make supplementary, incidental, transitional and saving provisions, as well as different provision for different purposes, ensuring the smooth hand-over of franchising responsibilities from the Secretary of State to the IRB.

Justification for taking the power

12. The powers conferred by this clause are limited by the fact that any amendments made under this regulation-making power must be genuinely consequential on provisions in the Bill. The DfT considers this power necessary in order to effect the reforms brought about by the Bill.

13. The Bill already includes a number of specific consequential changes as a consequence of the provisions in the Bill but it is possible that not all of the necessary consequential amendments have been identified in the Bill's preparation. The department considers that it would therefore be prudent for the Bill to contain a power to deal with these in secondary legislation and therefore considers it appropriate to include this power so that full effect can be given to the provisions of the Bill.

14. The powers will be exercisable only for specific limited purposes, that is, for the narrow purpose of making consequential provisions, that is, supplementary, incidental, transitional and saving provisions, as well as different provision for different purposes. As such, whilst a broad power, the department considers it is necessary, and appropriately limited.

Justification for the procedure

15. This power permits the amendment or revocation of primary legislation, meaning it is a "Henry VIII" power. As such it is considered appropriate that it is subject to the affirmative resolution procedure, insofar as the amendments relate to primary legislation, in order to ensure full and effective scrutiny of its use.

16. With respect to all other amendments, the power will be subject to the negative resolution procedure, as the limited impact of such changes means that there is less need for in-depth Parliamentary scrutiny.

## **DELEGATED POWER 5: Power to implement the Luxembourg Protocol**

### **Clause 15: Convention and Protocol relating to international interests in railway rolling stock**

*Power conferred on:* The Secretary of State for Transport

*Power exercisable:* Regulations made by Statutory Instrument

*Parliamentary Procedure:* Affirmative procedure

#### Context and Purpose

1. Clause 15 of the Bill makes provision for the implementation of the Convention on International Interests in Mobile Equipment (“the Convention”) signed at Cape Town on 16 November 2001 (as it relates to railways), and the Protocol to that Convention on matters specific to railway rolling stock signed in Luxembourg on 23 February 2007 (“the Protocol”). Clause 15 allows the Secretary of State to make regulations which implement the Convention and Protocol in the UK, so that the UK can ratify the Protocol (using the procedure in the Constitutional Reform and Governance Act 2010). Subsection 2 of clause 15 makes detailed provision in relation to the power and sets out particular provisions which may be made using that power.
2. The Convention allows for the creation and registration of international financial interests in three classes of mobile equipment; aircraft, railway rolling stock and space objects (a further Protocol relating to mining and agricultural equipment has since been signed). Given the nature of mobile equipment, it would be difficult for a person who had a financial interest in those objects to register those interests wherever that object may go, and thus there is a risk they would be unprotected in the event of insolvency or other default of the keeper of that instrument. Once the Convention and Protocol enter force (in relation to railways), an owner or lessor of that equipment would be able to register an international interest and have that recognised in the courts of State Parties to the Convention. This would allow them to take a place in the hierarchy of interests in the event of insolvency, as well as to access other remedies in the case of defaults short of insolvency events. The Protocol modifies the original Convention and makes specific provision for railway rolling stock.
3. The Convention and Protocol as regards railway rolling stock have been ratified by 4 signatory states (the required minimum) and is expected to enter into force in early 2024 (it is already in force for aircraft). In ratifying the Convention and Protocol, it is open to the UK to make declarations and reservations on how they propose to implement the Convention and Protocol in the UK. Subsection 3 of clause 15 requires the Secretary of State to consult before the regulations are made. The Secretary of State intends to consult in detail on the proposals to implement the Protocol, including consulting on whether the UK should make the declarations or set out the reservations which are available in the Convention and Protocol.
4. The power needs to cover the following in order to allow for the full implementation of the Convention and Protocol:
  - the creation and recognition of the international interest as a matter of both international and domestic law;
  - making provision for the creation and recognition of the International Registry, the Registrar and Supervisory Authority and the making by those bodies of administrative rules;
  - making provision to amend relevant legislation in relation to insolvency including potentially retained EU law (assimilated law) and primary legislation;

- making provision about the situation on defaults by the debtor/lessee on the contract they have with the owner of the equipment;
  - making consequential amendments relating to railway safety, the interaction between this Convention and others, and placing duties on the Office of Rail and Road; and
  - making provision to ensure that persons who interact with the International Registry cooperate and follow the regulations which govern the conduct of the Registry.
5. The power includes provision for the UK regulations to make ambulatory references to the regulations made by the Registry. The department considered it would be appropriate to make it clear that the regulations may make ambulatory provision about the regulations made by the Registry. Those procedural regulations may change from time to time once the UK implementation is completed and it is considered disproportionate to revise the UK regulations (with debates) each time those regulations may change. The department also wishes to ensure that there is explicit power to refer to these regulations to ensure it is clear that this is permitted in the UK regulations, without breaching the rules against legislative sub-delegation.

#### Justification for taking the power

6. The DfT consider that this power is necessary for several linked reasons. Firstly, there is some flexibility within the Convention and Protocol around reservations and declarations on how each signatory State proposes to enact or enforce the provisions of the Convention. There has not, until the present time, been sufficient time to undertake consultation on those declarations and any reservations, because consultation efforts have been focussed on the Retained EU Law Act 2023.
7. Secondly, most of the provisions in the proposed regulations are technical and limited to proper implementation of the Convention. Ministers believe that most of the provisions are uncontroversial. Parliament will be given an opportunity to scrutinise the Convention and Protocol under the procedures in the Constitutional Reform and Governance Act 2010 before the UK Government ratifies the Treaty. It is normal practice, however, to ensure that everything is in place to implement the Treaty in question before the UK formally ratifies the agreement or Treaty (as at that point we consent to be bound by the provisions of that treaty). As there are still policy questions to answer, Ministers feel they would be unable to implement this in this Bill.
8. Thirdly, Ministers consider it a more efficient use of limited Parliamentary time to take a power to make regulations in this Bill than to bring forward a separate Bill in order to implement the Convention. Attempts have been made since 2017 to secure a Bill slot for this work, but without success. This Bill is, in the Ministers' view, the most appropriate vehicle for this power to be taken.
9. Work has been done to ensure that this power is not wider than necessary. The department considered the powers in section 102 of the Railways and Transport Safety Act 2003. Those powers were also to make regulations to implement the Convention on International Rail Transport (COTIF), together with its Appendices in UK law. Regulations were made in 2005 to implement COTIF and several of its Appendices. In particular, the DfT considered whether we needed provision to match everything in Schedule 6 of the 2003 Act. The DfT considered that a narrower power was sufficient in order to properly implement the Protocol.
10. In 2015 BEIS implemented the Convention and the "Aircraft Protocol" for the purposes of aircraft and airframes by regulations made under the European Communities Act 1972, having designated the Convention and Aircraft Protocol as EU Treaties for the purposes of section 1(3) of that Act. As those regulations were limited to the purposes of

implementing the Aircraft Protocol we are not able to use those regulations to implement the common parts of the Convention in relation to railway rolling stock. However, the department has also considered those regulations when formulating this power as we will need to make very similar provision in relation to the Luxembourg Protocol as BEIS did for the Aircraft Protocol. Considering those regulations, together with the 2003 Act, the department considers that there is justification for the breadth of the power as drafted, and that it is not wider than necessary.

#### Justification for the procedure

11. This will be a Henry VIII power, and it is proposed that it should be subject to the affirmative procedure (in keeping with the guidance issued by the Committee). It should be noted that this is the same as the Railways and Transport Safety Act 2003, which is also a Henry VIII power. It is clear that at least the Insolvency Act 2006 will need to be amended in these regulations.
12. Even though the amendments to primary legislation are likely to be minor and limited and form a small part of largely very technical regulations (the BEIS Regulations in relation to Aircraft were subject to the annulment procedure under section 2(2) of the European Communities Act 1972), the department considers that the affirmative procedure is appropriate for the proposed regulations. Therefore, Parliament will have an opportunity to scrutinise and debate.
13. A consultation requirement is included at subsection 3 of clause 15, prior to making the regulations. Ministers propose to undertake a consultation prior to making the regulations, as there are several areas where there are choices which the UK can make about how the Convention and Protocol are implemented. This includes choices around the making reservations or declarations when the UK ratifies the Convention and Protocol for the purposes of railway rolling stock.

## **PART B**

*In this part are listed powers that the department does not regard as new delegated powers because they are not rightly described as being of a legislative character.*

**POWER 1: To enable the Secretary of State to issue to the IRB directions (which will be binding) and guidance (to which the IRB must have regard).**

### **Clause 1, 4C: Directions and Guidance**

*Power conferred on:* The Secretary of State for Transport

*Power exercisable by:* Directions and guidance issued to the IRB

*Parliamentary Procedure:* None

### **Context and Purpose**

1. There are already powers concerning directions and guidance within the Railways Act 1993. The Bill has the effect of rescoping them so they are included in this memorandum for completeness.
2. Clause 1 empowers the Secretary of State to issue directions and guidance to the IRB on the manner in which it exercises its functions. The IRB must comply with such directions and have regard to such guidance. Directions and guidance must be published.
3. These powers are akin to those held by the Secretary of State to issue directions and guidance to a strategic highways company under the Infrastructure Act 2015.
4. *Power to direct*  
The Secretary of State already has powers to give directions. Section 144 of the Railways Act 1993 makes such directions binding, provides for them to be enforced via civil proceedings, and requires them to be in writing. The Act specifies when directions may be used, including in cases of emergencies and to protect assets and associated persons from acts of violence. New section 4C rescopes the power to direct to encompass all the IRB's functions.
5. *Power to issue guidance*  
While the Secretary of State frequently issues guidance to the rail industry today, the Secretary of State does not hold an explicit power to issue guidance and guidance is not defined in the Railways Act 1993. The Secretary of State does hold the power to issue guidance to the ORR and while this would provide some indirect power for the Secretary of State to influence the IRB, the DfT does not consider this sufficient. New section 4C, therefore, provides the Secretary of State with an explicit power to issue guidance to the IRB.

### **Justification for taking the power**

6. The Bill has been designed to provide the Secretary of State with powers to hold the IRB to account. The DfT considers the new powers appropriate, necessary and proportionate given that the Secretary of State will retain overall responsibility for the railway network and services, and ultimately will be responsible to Parliament for the outcomes achieved by the IRB.
7. The powers to direct and to issue guidance to the IRB provide the Secretary of State with the mechanisms to influence the behaviour of the new body and ensure the IRB delivers against its obligations as set out in primary legislation and the licence. These powers

enable the Secretary of State to clarify policy priorities and set requirements on the IRB as required, with the distinction that directions are mandatory. As examples, directions and guidance could be issued on areas including multi-modal policy, fares policy and the specification and management of Passenger Service Contracts (PSCs).

8. The DfT has considered whether these powers could be achieved through alternative means, including use of shareholder powers and licence conditions but concluded that directions and guidance powers should be used alongside other governance mechanisms to hold the IRB to account. Regarding shareholder powers, while it may be possible for the Secretary of State to use this position to achieve a similar level of control over the company, the DfT considers that explicit powers of direction and guidance over the IRB provides more overt and transparent mechanisms for exercising control where appropriate. Regarding licence conditions, the IRB licence does not give the Secretary of State the required flexibility to respond to emerging priorities and provide additional clarity and certainty of direction to the IRB as required. The DfT considers it appropriate that the Secretary of State has more flexible, complementary mechanisms, in addition to the licence, to hold the IRB to account.
9. *Use of the power to direct*  
The DfT expects the Secretary of State to use this power to direct the IRB on how to implement policy, on how to act in an emergency, to exercise a function in a different way or to stop exercising it. It is envisaged that the Secretary of State may issue “standing” directions upon designation of the IRB to accompany the licence. The Secretary of State may also issue directions from time to time to address issues that arise during the operation of the railway.
10. *Use of the power to issue guidance*  
The DfT expects that the power to issue guidance will be used more frequently than the power to direct. Guidance will provide a strong indication of the Secretary of State’s views whilst maintaining the IRB’s independence as the body principally responsible for the management of its railway network and franchised services. Through guidance, the Secretary of State can provide clarity and steers on the IRB’s functions and behaviour.
11. *Safeguards on use of the powers*  
The Bill requires the Secretary of State to publish all directions and guidance issued. This ensures transparency and the DfT considers this an appropriate safeguard on the use of the powers. The Bill also specifies that the Secretary of State may issue directions and guidance to the IRB ‘*about the manner in which it is to exercise its functions*’. This means that Directions and guidance cannot be used to direct the IRB to undertake additional functions; these powers can only be used to set out how existing functions should be carried out.
12. A key principle of the policy is that directions and guidance will not be used to supersede or modify the IRB’s obligations under its licence, or conditions of funding. Further, Directions and Guidance will need to be consistent with government Guidance such as Managing Public Money. The Secretary of State may choose to consult when issuing them, depending on the nature of the topic. The ORR already has the ability to publish a statement on any Secretary of State-issued Directions.

#### Justification for the procedure

13. The DfT considers the requirement for the Secretary of State to publish directions and guidance issued to the IRB sufficient and does not propose Parliamentary scrutiny.

14. Directions and guidance currently issued by the Secretary of State are not subject to Parliamentary scrutiny, and the DfT considers this approach proportionate.
15. These powers have been designed as complementary mechanisms to the IRB licence. The IRB licence, akin to licences in other regulated sectors, is not subject to Parliamentary scrutiny but will be subject to public consultation and will be published. The DfT considers it appropriate to adopt a similar approach regarding directions and guidance; namely requiring the Secretary of State to publish directions and guidance issued to the IRB. However, directions and guidance will not be subject to public consultation as these mechanisms provide a more direct vehicle for the Secretary of State to set expectations and requirements on the IRB. The department expects the Secretary of State will choose to consult relevant parties on matters where appropriate, but this is not a statutory requirement.



**POWER 2: To create of a statutory power for ORR to levy a fee on GBR to replace the current Network Rail licence fee, to fund ORR's non-safety functions that are not already covered by other funding streams.**

**Clause 1, 4D: Levy**

*Power conferred on:* Office of Rail and Road

*Power exercisable by:* Statutory Levy

*Parliamentary Procedure:* None

Context and Purpose

1. This provision will give the ORR the statutory power to levy a fee on the IRB. This will replace the Network Rail licence fee, which funds the majority of ORR's non-safety functions. The purpose of this power is to ensure the ORR continues to have an independent funding stream.
2. The ORR does have several smaller funding streams: for instance, the ORR's Roads costs are covered by a grant agreed by DfT, the costs of ORR's health and safety regulation are raised through a statutory levy, and ORR recovers some costs directly from other infrastructure managers such as Eurotunnel and the Core Valley Lines. However, the vast majority of ORR's funding for its economic regulation activities are recovered through the licence fee on Network Rail, as permitted by the Railways Act 1993.
3. The ORR does not consult Network Rail, or DfT, on the licence fee; this is an important principle in guaranteeing regulatory independence. The ORR sets the fee through its annual business planning process whereby the ORR agrees its overall income cap with His Majesty's Treasury (HMT) (subject to scrutiny) but chooses how to split this between safety and economic regulation functions.
4. Although the Network Rail licence was originally granted by the Secretary of State, the ORR has the sole power to modify and enforce the licence. This means that ORR has a guaranteed funding stream from Network Rail, as other parties cannot modify the licence. However, through the Bill, the Secretary of State will be responsible for issuing the IRB licence and able to modify the licence for the IRB.
5. Theoretically, this means that ORR's funding for non-safety railway regulation could be discontinued or that ORR could be dependent on Secretary of State choosing to include a condition in the IRB licence that requires payment of fees to the ORR.
6. In practice, it is highly unlikely that the Secretary of State would use the new powers to issue and modify the licence to remove the ORR's funding stream. However, this arrangement does create a risk that the ORR is no longer perceived to be truly independent of Secretary of State.
7. In order to mitigate this risk, preserve the ORR's independence, and alleviate concerns that government could unilaterally affect the ORR's funding, we propose to provide the ORR with the statutory power to levy a fee on the IRB. This fee will cover the costs of the ORR's non-safety functions, which are currently funded from the Network Rail licence fee. The ORR already has similar powers to raise levies to fund its safety activities, and its regulation of some other networks.

Justification for taking the power

8. The Bill will provide a new statutory power to the ORR to levy a fee on the IRB in order to cover the costs of the ORR's functions which are currently funded from the Network Rail licence fee. The levy will provide the ORR with a legally guaranteed funding source that

the regulator can rely on independently of Secretary of State. It also provides the ORR with a stable, predictable funding stream that enables it to plan and carry out its activities effectively and efficiently.

9. There are no known difficulties with the proposed new statutory power. The ORR already raises its funding for its safety activities via a statutory levy, as well as the costs for its regulation of HS1, and this new legislative provision would provide an equivalent power for the ORR to raise its fees from the IRB for economic regulation.
10. With the ORR's functions and funding both guaranteed in statute, this mechanism would provide a clear statement of the ORR's independence. The Plan for Rail affirms the importance of the ORR's independence given the ORR has a key role to promote trust and confidence in the IRB among the public, stakeholders, ministers and third-party businesses which use and invest in the railway. Funding decisions should therefore be kept separate from organisations that have a vested interest in ORR's decisions.
11. There will be no change in the way the value of the ORR's funding is determined when this power comes into effect. The total value of funding for all railway functions will still be agreed with HMT, independent of other parties (including those who will be paying) during each spending review exercise. The ORR will then determine the split between its safety/non-safety functions through its own business planning and budgeting exercise. Only the mechanism by which the ORR administers and levies the fee will change (moving from a power derived from licence to one in statute).
12. There are no impacts on other parts of rail – the statutory levy on the IRB only replaces the current Network Rail licence fee. It does not affect any other sources of the ORR's funding, including its Highways funding.
13. The new levy does not affect the ORR's external accountability (ORR remains accountable to Parliament for the proper discharge of its statutory functions) and is consistent with Cabinet Office guidance and HMT's Managing Public Money principles.

#### Justification for the procedure

14. N/A. This power does not require a Statutory Instrument. This power gives ORR the ability to issue a levy on the IRB via a notice.

### **POWER 3: To enable the Secretary of State to issue and modify the IRB's licence.**

#### **Schedule 1: Licensing of the IRB**

*Power conferred on:* The Secretary of State for Transport

*Power exercisable by:* Issuing and/or modifying of the IRB Licence

*Parliamentary Procedure:* None

#### Context and Purpose

1. Schedule 1 to the Bill makes amendments to Part 1 of the Railways Act 1993 relating to the licensing of the IRB. The Bill broadly replicates the Secretary of State's existing power to issue a licence; however, there are some distinctions.
2. This is not a delegated power because the power to issue and modify the licence is not legislative in nature. However, given the intended scope of the licence and its essential role in the functioning of the IRB, it has been included in this memorandum for completeness.
3. *Power to issue the IRB licence*  
New subsection 1A amends section 8 of the Railways Act 1993 so that only the Secretary of State has the power to grant a licence to the IRB. This removes the ORR's ability to issue a licence to the IRB. The ORR will continue to be able to issue the IRB with other types of licences and will retain their existing powers to issue licences to other rail bodies under a general authority given by the Secretary of State under section 8(1)(b) ("the General Authority").
4. *Power to amend the IRB licence*  
New section 12A allows the Secretary of State to amend the conditions of the IRB's licence. It specifies the steps the Secretary of State must take prior to modifying the licence. These include requirements for the Secretary of State to give notice before making modifications to the licence, to set out why modifications are proposed, and to provide at least 28 days (from the date of publication of the notice) for interested parties to make representations or objections to the proposed modifications. The Secretary of State will not need to obtain the IRB's consent to make any changes under section 12A. The ORR will continue to be able to amend the IRB's licence with the consent of the IRB.

#### Justification for taking the power

5. Although the Secretary of State could issue the licence under current legislation, the Bill will give the Secretary of State the power to amend the IRB licence from time to time and change the relationship with the Competition and Markets Authority (CMA) for this type of body. The Bill creates a specific category of body (the IRB) which will have a specific type of network licence and will not be exempt from having a licence in future.
6. *Power to issue the IRB licence*  
To deliver the policy, there needs to be a clear line of accountability between the IRB and the Secretary of State. The DfT therefore consider it appropriate and necessary for the Secretary of State to issue the IRB licence and to restrict this power to the Secretary of State alone.
7. The requirement for the IRB's licence to be granted by the Secretary of State could in theory be achieved through a change to the General Authority and a surrender of the current Network Rail network licence with the agreement of the ORR under section 8(6) of the Railways Act 1993. However, an amendment to the General Authority will not be

sufficient to deliver the desired policy because it neither gives the Secretary of State the power to amend the licence from time to time, nor removes the ability of the ORR to refer a matter to the CMA. The Bill also includes additional requirements on the content of the IRB licence.

8. *Power to amend the licence*

The Bill gives the Secretary of State the power to amend the IRB licence from time to time, removing the requirement for the consent of the licence holder. Instead, the Secretary of State will consider representations and/or objections from the licensee and other interested parties through public consultation on the licence. The DfT considers a change in legislation a more transparent way of effecting change.

9. In the current system, only the ORR has the power to modify licences, and only by consent of the licence holder, or through referral to the CMA. This reflects the common arrangement at the time of privatisation when most railway companies would be private entities and having an independent, impartial, and consistent regulator able to modify licences would give confidence to investors and markets. The legal process for modifying licences is set out in sections 12 - 16 of the Railways Act 1993.
10. To fulfil our policy objectives, the DfT considers it necessary to extend the power to modify the IRB's licence to the Secretary of State. This will facilitate the Secretary of State's role as issuer of the licence and ensure that the line of accountability from the IRB to the Secretary of State is clear. In extending this power to the Secretary of State, the requirement to give notice and publicly consult on the licence, to allow interested parties and the wider public to express their opinion before making amendments to the licence will be retained.
11. The ORR will retain powers to make modifications to the IRB licence where it has relevant technical expertise, subject to consent by the licence holder.
12. The DfT considers it necessary and appropriate to disable the power of the CMA from being able to modify the IRB licence. As the Secretary of State will be the authority on whether the terms of the IRB licence are in the public interest and will be able to directly amend the IRB licence, the CMA's separate supervisory role is being removed.

Justification for the procedure

13. Existing powers to issue and amend the licence under section 8 and 12 of the Railways Act 1993 are not subject to parliamentary scrutiny. The department does not consider that this approach needs to change. The process for issuing and amending the IRB licence will ensure the appropriate level of transparency by requiring the Secretary of State to communicate publicly their intent to modify the licence and specify the reasons. It will also allow interested parties to opine through a broad public consultation.

## **PART C**

*In this part are listed powers that the department does not regard as new delegated powers because they are modifications of existing powers (arguably legislative in nature) that are necessary and consequential upon the creation of the IRB.*

**DELEGATED POWER AMENDMENT 1: To give the IRB (where the IRB is the appropriate national authority), instead of the Secretary of State, the power to make a scheme for the transfer of relevant franchise assets at the end of a franchise period from the old franchisee to certain specified individuals.**

### **Clause 2, Schedule 2: Franchising and related matters**

*Power conferred on:* The IRB, the Welsh Ministers, the Scottish Ministers

*Power exercisable by:* A Scheme for transfer

*Parliamentary Procedure:* None

### **Context and Purpose**

1. The extant power in section 12 of the Railways Act 2005 affords the appropriate national authority with the power to make transfer schemes at or after the end of a franchise period. This allows for the transfer of “relevant franchise assets” from the outgoing franchise company to:
  - a. the Secretary of State;
  - b. the Welsh Ministers
  - c. the Scottish Ministers;
  - d. a company wholly owned by either the Secretary of State, the Welsh Ministers or the Scottish Ministers;
  - e. a company jointly owned by the Secretary of State and the Scottish Ministers;
  - f. a company jointly owned by the Secretary of State and the Welsh Ministers;
  - g. a franchise company.
2. The provisions of Schedule 2 and 10 of the Railways Act 2005 govern these transfer schemes.
3. The “relevant franchise assets” are property, rights and liabilities which, immediately before the end of the franchise period (which is ending or has ended), will be or were designated as franchise assets for the purposes of the franchise agreement. The section 12 power is therefore used to facilitate the transfer of relevant franchise assets to the new operator to ensure a smooth handover and continuity of services.
4. As the IRB is assuming certain franchising functions in place of the Secretary of State, the IRB will also be assuming the Secretary of State’s power to make such transfer schemes under section 12 of the Railways Act 2005. Accordingly, clause 2 and Schedule 2 paragraph 35 and 47(6) of the Bill make a consequential amendment to provide that the IRB, in place of the Secretary of State, can make such transfer schemes.
5. This does not strictly constitute a new delegated power as it is a power that already exists for the Secretary of State, but as it will now be exercisable by the IRB in place of the Secretary of State, it has been included in this memorandum for completeness.

### **Justification for taking the power**

6. It is not possible to know at this stage what property rights and liabilities may need to be transferred to affect the transfer of the functions. In addition, transfer schemes would be

technical and bespoke in nature. It is therefore appropriate that this is done through a transfer scheme.

7. In such situations, it may also be necessary to act urgently to ensure that there is continuity in the provision of services in the transfer of provision at the end of a franchise to a new operator.
8. Section 12(4) of the Railways Act 2005 provides that the use of the power will be subject to consultation with every person to whom relevant assets would be transferred under the proposed scheme, and subject to the provisions of Schedule 2 of the Railways Act 2005 (which contains detailed provisions as to how schemes are made and protections for third parties) and Schedule 10 of the Railways Act 2005 (which contains taxation provisions relating to Transfer Schemes).

#### Justification for the procedure

9. The power is not subject to any parliamentary procedure. The schemes will contain detailed references to property, potentially commercially sensitive information and rights and liabilities such as lists of contracts and as such are not appropriate for Parliamentary consideration.
10. Furthermore, Schedule 2 of the Railways Act 2005 lays down the parameters governing the transfer schemes, outlining technical provisions including what the schemes can cover. In the DfT's view these parameters render additional Parliamentary oversight unnecessary. Further protections will be provided by the fact that the IRB will be subject Secretary of State oversight through the IRB governance regime created by the Bill.

**DELEGATED POWER AMENDMENT 2: To give the appropriate national authority the power to make a scheme for the transfer to certain specified individuals of relevant service agreement assets at or after the end of services agreement entered into in accordance with Section 30 of the Railways Act 1993.**

**Clause 2 and Schedule 2, paragraph 35: Franchising and related matters**

*Power conferred on:* The IRB, Welsh Ministers and Scottish Ministers.

*Power exercisable by:* A Scheme for transfer.

*Parliamentary Procedure:* None.

Context and Purpose

1. Section 12 of the Railways Act 2005 (discussed above) only applies at the end of a franchise agreement, and not in circumstances where passenger services have been provided under a services agreement entered into in accordance with section 30 of the Railways Act 1993. Services provided under section 30 of the Railways Act 1993 are distinct from those provided under section 12 of the Railways Act 2005 because these are not provided at or after the end of a 'franchise' but rather, operated in the absence of a franchise. A transfer scheme may nonetheless be necessary to allow a new operator to provide services when the operator of last resort ceases providing services. To meet this additional need, Clause 2 and Schedule 2, paragraph 35 of this Bill contain a new delegated power which constitutes a rescoping of the existing section 12 power in order to address this deficiency.
2. Under this rescoped power, Clause 2 and paragraph 35 of Schedule 2, amend the Railways Act 2005 to confer on the appropriate national authority the power to make transfer schemes when services are being provided or have been provided by an operator of last resort.
3. This does not strictly constitute a new delegated legislative power as it is effectively an extension of the Section 12 Railways Act 2005 power that already exists for appropriate national authorities (as amended by paragraph 34 of Schedule 2 discussed above). However, it has been included in this memorandum for completeness.

Justification for taking the power

4. It is not possible to know at this stage what property rights and liabilities may need to be transferred to effect the transfer of the functions. In addition, transfer schemes would be technical and bespoke in nature. It is therefore appropriate that this is done through a transfer scheme.
5. In such situations, it may also be necessary to act urgently to ensure that there is continuity in the provision of services in the transfer of provision at the end of services agreement.
6. By virtue of Schedule 2, subsection 35 of this Bill, section 12A(3) will be inserted into the Railways Act 2005. This will provide that the use of the power will be subject to consultation with every person to whom relevant assets would be transferred under the proposed scheme, and subject to the provisions of Schedule 2 of the Railways Act 2005 (which contains detailed provisions as to how schemes are made and protections for third parties) and Schedule 10 of the Railways Act 2005 (which contains taxation provisions relating to Transfer Schemes).

### Justification for the procedure

7. The power is not subject to any parliamentary procedure. The schemes will contain detailed references to property, potentially commercially sensitive information and rights and liabilities such as lists of contracts and as such are not appropriate for Parliamentary consideration.
8. Furthermore, Schedule 2 of the Railways Act 2005 lays down the parameters governing the transfer schemes, outlining technical provisions including what the schemes can cover. In the department's view, these parameters render additional Parliamentary oversight unnecessary. Further protections will be provided by the fact that the IRB will be subject Secretary of State oversight through the IRB governance regime created by the Bill.



**DELEGATED POWER AMENDMENT 3: To require the Secretary of State to publish a policy statement about how they consider the IRB should exercise its power in decisions about a franchisee under a franchise agreements.**

**Paragraph 5 of Schedule 2: Franchising and related matters**

*Power conferred on:* The Secretary of State

*Power exercisable by:* Publishing a Policy Statement

*Parliamentary Procedure:* Laid before Parliament

Context and Purpose

1. Clause 2 and paragraph 5 of schedule 2 of the Bill will amend section 26 of the Railways Act 1993 to require the Secretary of State to publish a policy statement about how the Secretary of State considers the IRB should exercise its power under section 26(1) of the Railways Act 1993 (as will be amended by this Bill). It will also require the IRB to have regard to the Secretary of State's statement of policy in deciding whether to select the person who is to be the franchisee under a franchise agreement by means of an invitation to tender and whom so to select.
2. This does not strictly constitute a new delegated legislative power as it is amending a power that already exists for the Secretary of State, but it has been included in this memorandum for completeness on the basis that it is arguably legislative in character.

Justification for taking the power

3. The IRB will be taking over the Secretary of State's franchising functions under the Railways Act 1993. Therefore, the Bill updates the Railways Act 1993 to reflect this transfer of functions.

Justification for the procedure

4. The extant power requires the policy statement to be laid before Parliament and provides that before preparing, altering or replacing a statement of policy, the person issuing the policy must undertake such consultations as they consider appropriate. The Bill does not change this position. Therefore, there is an opportunity for challenge and redress and parliamentary scrutiny.

**DELEGATED POWER AMENDMENT 4: To add the IRB to the lists of persons required to publish a statement of policy with respect to the imposition of penalties and to require the IRB to have regard to its policy statement.**

**Paragraph 13 of Schedule 2: Franchising and related matters**

*Power conferred on:* The IRB

*Power exercisable by:* Publishing a Policy Statement

*Parliamentary Procedure:* None

Context and Purpose

1. The Bill provides that the IRB will take over certain of the Secretary of State's enforcement powers under the Railways Act 1993 that relate to franchising. This reflects the fact that the IRB is taking over the Secretary of State's franchising authority functions. Therefore, it is necessary to update section 57B of the Railways Act 1993 to ensure that IRB is required to publish a policy statement explaining how it will exercise its Railways Act 1993 power to impose penalties and determine its amount.

Justification for taking the power

2. The Bill updates existing statutory provisions to ensure that they are consistent with the new statutory regime.
3. Therefore, this power does not strictly constitute a new delegated power as it is extending to the IRB a power to issue policy statements that already exists for other entities with the power to issue penalties under the Railways Act 1993, but it has been included in this memorandum for completeness.

Justification for the procedure

4. The Bill updates existing statutory provisions to ensure that they are consistent with the new statutory regime and therefore follows the existing procedure outlined in the Railways Act 1993. These existing procedures include: first, an obligation to undertake appropriate consultation when preparing, altering or replacing a statement of policy; and second, a requirement for the statement of policy to be published in the manner that appears most suitable for bringing it to the attention of those likely to be affected by it.