

## Renationalisation—the railway

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Public Law analysis: As part of a series on the continued debate around renationalisation, Darren Fodey and Tammy Samuel, both rail partners at Stephenson Harwood LLP discuss the Williams Rail Review and the prospect of renationalising the railway.

### What is the context for the discussions around renationalisation of the railway?

There are regular calls to renationalise the railway—from politicians, the press and also the public. Quite often, people forget that a large part of the railway is already effectively nationalised—Network Rail being an arm's length body of government and the Department for Transport (DfT) essentially specifying and managing all rail franchises. In fact, it is not clear what 'nationalisation' would actually entail that goes beyond what is already in place. A ['root and branch' review](#) of the railway is currently underway by Keith Williams, Chairman of the John Lewis Partnership. Might that result in renationalisation? And if it does, what could renationalisation look like?

Williams himself has refused to 'rule out' renationalising the railway. However, the terms of reference for the Review require Williams to 'reflect...the direction set by the DfT's Strategic Vision for Rail' which, not unsurprisingly, is committed to publicly specified, private operation. The Strategic Vision recognises the need for the public and private sectors to work more closely together in partnership for the benefit of customers—perhaps why the Chairman of the John Lewis Partnership was selected to lead the Review?

### What are the main arguments for and against renationalising the railway and other forms of public transport?

Often those who argue for renationalisation hark back to the days of British Rail when track and train were managed by the same organisation. On privatisation, a previously integrated system was blown apart into many different elements, with contractual and regulatory structures put into place to bring the many organisations back together again.

Undoubtedly, a key advantage of a nationalised system would be to bring those entities back closer together. This could lead to better working between different parts of the industry, a more joined up approach and decisions taken for the 'greater good' of the industry. It has also been argued that it would prevent unnecessary time and energy of the industry parties fighting against each other and minimise the blame culture.

In reality, a nationalised railway was not necessarily the panacea that may be remembered. British Rail was funded cyclically with no certainty from year to year (or political cycle) of how it would be funded and by how much. This led to under investment in the industry which has largely been reversed by privatisation.

It is a widely held belief that train operators take value out of the system by demanding high returns—money that could be used to be put back into a nationalised system. Again, the industry needs to be careful of this. Train operators actually do not make large returns (often taking a margin in the low single figures) and in return they are expected to make huge investments and take risks.

Finally, what would nationalisation look like? As noted above, we already have a nationalised Network Rail and further nationalisation could be achieved relatively easily for train operations. There will still be a large element of the industry in private hands that it may be more difficult (and/or expensive) to bring back into public hands, such as rolling stock owners, maintainers and freight operations. So it may not be possible to get the completely integrated approach nor to have no private sector involvement.

Although there are advantages for nationalisation, these should not be considered without weighing the potential issues and limitations of such an approach.

## What is the scope and driving force behind the Williams Rail Review? Will nationalisation be discussed?

Reviews of the railway come along with surprising regularity—with [McNulty](#), [Brown](#), [Shaw](#) and [Bowe](#) all preparing weighty tomes over the past decade. Lip service is often paid to those reviews, but actual change is sometimes harder to spot. The [Williams Rail Review](#) is the next in a long line—with a [scope](#) considerably broader than those before.

Passengers and other users of the railway are to be placed at its heart. This follows on from a number of issues in recent years—the failure (again) of the East Coast franchise, falling passenger numbers and increasing dissatisfaction with the railway, perhaps most obviously seen with the timetables collapsing in May 2018. Issues being considered by the Review include:

- what is the best model(s) to provide rail services? Where should those decisions be taken? How should those decisions prioritise the competing interests of passengers and taxpayers?
- what happens when things go wrong? Who is accountable? How should rail industry bodies work together?
- how can the railway be made more financially sustainable and cost-effective? How should the balance between risk and reward be divided when it comes to the operation of rail services?
- how should the fares system be reformed to offer good value for the farepayer whilst respecting the cost to the taxpayer?
- how can industrial relations be improved to reduce disruption? How can the reliability of the railway be improved? How can innovation be encouraged?

## What are the key legal issues under review?

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Many of the issues being considered by the Williams Review are commercial and structural, although they clearly have legal implications. In a [speech](#) on 16 July 2019, Williams promised ‘radical’ reform ‘comparable in some areas to the scale of change seen at privatisation’.

Depending on how radical the proposals are, they may need changes to legislation, such as the [Railways Act 1993](#) and [Railways Act 2005](#). Of course, these sit within a wider body of European railway law, although the UK led the way in Europe, so many of those European principles are consistent.

From a legal perspective, delivery of value for money for the taxpayer and the farepayer will be key, as is typically the case in public contracts. Reducing the role of government will also mean taking it closer to passengers, and accountability to passengers will be essential. In part, this may be through devolution to local bodies, perhaps even elected bodies close to those served by railway services.

The level of flexibility given to franchisees will also be part of the Review. While the original intention may have been to give franchisees flexibility to generate revenue and serve their passengers, micromanagement has often prevented that. Innovation and a willingness to embrace opportunities, with a franchise agreement that is equally innovative and flexible, will be a legal issue to address.

It will take some time to implement the proposals of the review. To date, with some exceptions, franchise competitions have stagnated, with direct awards being used to cover the gap. It will be important to get the momentum back into the industry while offering a biddable proposition. A well-planned timetable offering bidders certainty of opportunity will allow investment in bid teams—a lesson not to be forgotten from previous reviews.

## Are there any lessons learned from the renationalisation of the East Coast line?

Of course, there has been some public running and management of the East Coast line at various times since privatisation. The franchising system and transfer of risk to the private sector has clearly not worked on this line and it is perceived that public management and ownership has reaped some real benefits. Could the East Coast line model work on other lines?

There are some characteristics of the East Coast line that make it a particularly difficult franchise to let to the private sector. Much of the line is dominated by leisure travel, which is in part unpredictable and subject to changes linked to the performance of the economy. Bidders for the franchise have sometimes been accused of being over optimistic and bidding too high a premium for the service, or perhaps the government has been too focussed on returns rather than quality and robustness of services. Either way, running this service at various times as a public run service has generally been very successful.

The franchise model is not the same on other lines. Can a heavy commuter service into and out of London be treated the same as a leisure and business travel service up the East or West Coast? How about a subsidised service carrying people around rural Wales or the North of England? Would they all benefit from some form of public ownership and/or operation?

It is important to work out why East Coast has worked with the model that is used in public ownership and consider whether the same would apply on other franchises, and whether the same benefits could still be achieved in private ownership if some aspects of the public service were adopted (eg a focus on service rather than profit). Only then can we fully appreciate whether it is public or private operation that leads to benefits or whether it is a difference in management approach and incentivisation.

## Why is the rail sector being reviewed now? Has anything changed in the industry or in the government's strategy?

There are a number of reasons driving the Williams Review, including falling passenger numbers (and confidence), high profile events affecting the railway and the need for the sector to re-engage with their customers. It has also been reported that a number of franchises are in financial difficulty, East Coast has been taken back into public hands through the operator of last resort. There is a need to be seen by passengers (and voters) to be tackling issues affecting the industry. There is also a need for reform to the franchising system, over time more and more risk has been passed to the private sector, which is unsustainable.

## What are the emerging trends highlighted by the Review?

There have been many hundreds of submissions to the Review already—and only a small number of those have been made public by respondents. It is clear that there is appetite for change within the industry and Williams has already stated that the government should not be responsible for managing railways. Of course, with the railways being partly publicly funded, there will remain a role for the government, but less frontline and hands on.

Emerging trends include:

- devolution—decisions being taken closer to those affected by them, with more powers for local authorities in specifying and then managing franchises
- no 'one size fits all', with different approaches being required to different service types and needs of the populations served
- greater focus on the passenger and ensuring they are at the heart of decisions being made.

- revisiting the balance of risk and reward in franchise agreements and considering who is truly best placed to assume particular risks
- independent management of the railway by a body able to make decisions in the best interests of the industry as a whole

## What are the next steps?

The outcome of the Williams Review will be in the form of a government White Paper with proposals for reform. This is expected to be published in autumn 2019, subject to competing priorities in government.

If we were to take an educated guess at some of the recommendations of the Review, we think the following headlines might feature:

- fundamental review of the ticketing arrangements so they are more transparent to passengers and offer better value for money
- closer working between Network Rail and the train operators, perhaps by way of deeper Alliances
- ensuring decisions are made closer to (and accountable to) the passenger, this may involve further devolution of services and potentially infrastructure (London being a good starting point)
- responsibility for franchising to be moved away from the DfT to an arm's length body of government (where not devolved to local bodies) with a degree of rebalancing of risks between public and private bodies

Any structural reform is likely also to require legislation. With Labour and the Conservatives opposed in terms of railway policy, it may be a struggle to get legislation through Parliament, particularly with such a narrow government majority.

*Interviewed by Aslak Ringhus.*

*The views expressed by our Legal Analysis interviewees are not necessarily those of the proprietor.*

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