

2 May 2008

Dear Stakeholder

Review of obstacles to third party investment

1. Over the last few years, there have been a number of important developments aimed at facilitating investment in the railway by addressing barriers to the delivery of efficient investment. However, concerns continue to be raised with us regarding aspects of the arrangements for third party investment and this is an area that we have said we will keep under review.
2. We are now seeking feedback from promoters and funders of third party investments on how the investment process is operating and whether there remain barriers to efficient investment and suggestions as to how these barriers can be overcome.

The purpose of this consultation

3. In October 2005, we published our policy framework for investments¹, followed in March 2006 by our investment guidelines². Since then, Network Rail has also published, as part of its Code of Practice for its dealings with dependent persons, its guide "*Investing in the Network*"³, which explains the process a third party should follow and what it can expect from Network Rail. In addition, improvements to the template contracts for third party investment and on-going improvements in Network Rail processes continue.
4. The aim of this consultation is to help us to understand to what extent there remain issues that cannot be addressed by the industry alone and will therefore require some

¹ Policy framework for investments: Conclusions, October 2005, <http://www.rail-reg.gov.uk/upload/pdf/255.pdf>

² Policy Framework for investments: Guidelines on implementation arrangements & processes, March 2006, <http://www.rail-reg.gov.uk/upload/pdf/277.pdf>

³ http://www.networkrail.co.uk/documents/3802_Section13AccompanyingMaterial.pdf

intervention by ORR. While we have been asked to intervene where specific problems have arisen, we want to determine whether the problems are systematic and require more general regulatory intervention. In broad terms, we ask stakeholders to provide commentary, based on specific examples, on what their experience of investing in the railways has been in terms of project delivery and processes.

5. We are inviting stakeholders to provide information, preferably broken down by specific elements of a project, on what went well and what less well and what impact any project 'failures' had on timescales and costs, including abandonment of projects and appetite for future investments. We are also asking for views on how any perceived weaknesses/failures in project delivery could be addressed, including any role that ORR should play in facilitating/ensuring delivery of efficient investment in the railways for the future. The attached Annex sets out the sort of detail that we ask that you provide in relation to each project.

6. This consultation is not confined to stakeholders' relationships with Network Rail, however, there are particular elements of that relationship which we understand have led to continuing dissatisfaction amongst project partners. We, therefore, ask specific questions about Network Rail's role in projects in order to assess the significance of what we are being told and whether there is a case for action at this time.

7. Although we would welcome any views that stakeholders have, we would particularly like to hear stakeholder views on the effectiveness of:

- (a) the process for third party investment, including the various approvals processes including landlords consents, the time taken by Network Rail to progress projects through the GRIP stage, and the role of ORR (for instance in approving changes);
- (b) Network Rail's attitude to encouraging investment and resolution of issues. Concerns have been raised with us that Network Rail's attitude to investment is excessively risk averse, with individuals seeking to present obstacles to progress and apparently not incentivised to encourage third party funding of enhancements (this includes an unwillingness sometimes to negotiate bespoke risk allocation provisions different from the default provisions in the investment template contracts); and
- (c) the organisational structure of Network Rail. Some stakeholders have expressed frustration about the number of individuals involved in sign-off, making 'ownership' of problems in the process confused.

8. Network Rail's guide, '*Investing in the Network*', sets out the services that Network Rail provides⁴. These include both contestable and non-contestable services. While services related to asset protection are generally considered to be non-contestable, other services, such as project development, design management and implementation are contestable and may be provided by Network Rail or another party.

9. We said in our investment framework that third party promoters should have the option to carry out schemes themselves because competition is a more effective spur to improved performance than regulation alone. We therefore said that Network Rail must not use its monopoly position to require third parties to buy contestable services from it and that we would monitor Network Rail's behaviour in this area⁵.

10. We ask for feedback from stakeholders on their approach to the procurement of contestable services and what factors have influenced their procurement decisions. For example, what impact, if any, Network Rail's planning processes have had on the choice of service provider.

Next steps

11. We invite your comments on the issues outlined above and the detail asked for in the attached Annex, together with any other information that you think may be relevant, by **25 July 2008**.

12. Please send your responses in electronic format (or if not possible, in hard-copy format) to Nick Wortley at:

Nick Wortley
Competition Executive
Office of Rail Regulation
One Kemble Street
London WC2B 4AN

E-mail: nicholas.wortley@orr.gsi.gov.uk
Phone: 020 7282 3984

13. Please contact Nick Wortley if you want to discuss any points we have raised in this letter.

⁴ Appendix D, http://www.networkrail.co.uk/documents/3802_Section13AccompanyingMaterial.pdf

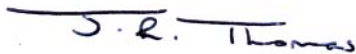
⁵ Policy Framework for investments: conclusions, October 2005, paragraph 2.17, <http://www.rail-reg.gov.uk/upload/pdf/255.pdf>

14. In your response, you should make it clear if you want us to keep all, or part of your response, confidential. Otherwise it may be shared with Network Rail and is expected that it will be made available in our library and on our website and we may quote from it. If you want us to keep your response confidential, please provide a statement summarising your response (leaving out the confidential information) that we can treat as a non-confidential response. We may also publish your name in future documents or on our website, unless you tell us that you do not want us to do so.

15. You can find copies of this document in our library and on our website (www.rail-reg.gov.uk).

16. We intend to publish our findings in the autumn.

Yours sincerely

A handwritten signature in blue ink that reads "J. R. Thomas". The signature is written in a cursive style with a horizontal line above the first part of the name.

John Thomas

Annex A

General questions as to the nature of the project

- (a) What was the nature of the project (e.g. station enhancement, car park, etc)?
- (b) When did the project take place and what was its duration? It would be helpful if you could separate, for the purposes of this question, the planning from implementation stage.
- (c) Where was the location of the project?
- (d) Who were the main parties involved?
- (e) What was the size of the project (e.g. by reference to its total cost)?
- (f) What type of contract was employed (e.g. Asset Protection Agreement, etc.)?

In circumstances where Network Rail provided the service

- (a) What elements of the project did Network Rail deliver?
- (b) Stakeholders have consistently expressed concern that they would like the opportunity to use suppliers other than Network Rail to deliver some types of schemes (e.g. stations, including car parks)⁶. Did you consider service suppliers other than Network Rail and what factors eventually influenced your choice of service provider?

Your experience of the project

- (a) In broad terms do you consider the project to have been a success, did it, for example, perform to timescales and projected costs. Would you consider it (or elements of it) to be a model for future projects or did the project experience have an adverse impact on how you would view future opportunities to invest in the railways and if so in what way?

⁶ In our Annual review of Network Rail Investment Activity for 2005-06⁶, we support competition in the delivery of enhancement schemes.

- (b) More specifically please identify (by, for example, the 'stage' of the project (where relevant by GRIP stage)) and describe those elements which in your view:
- (i) worked well; and those which
 - (ii) performed poorly,

providing in relation to each element information on:

- (i) the reasons for the success or failure including identifying the parties and/or processes involved;
 - (ii) what you would have liked to/would have done differently including any remedial action you were prevented from taking;
 - (iii) precisely how the identified problems affected the project by way, of impact on timetable, costs, etc. Quantitative data (illustrative or actual) would be helpful; and
 - (iv) what you think the solution to the problem(s) which you have identified might be.
- (c) If you have experience of Network Rail's new fast track arrangements, have they improved significantly the ease and timeliness of getting small scale enhancements done? Are there still weaknesses which remain and how can these be overcome?