

Alliancing: ORR policy statement

Introduction

1. Network Rail has announced that it plans to form a number of 'alliances' with train operators with the aim of delivering a better service for passengers and freight users at lower overall cost.
2. The term 'alliances' is currently being used to describe a wide range of different relationships from project-based partnerships through to potentially long-term and comprehensive commercial arrangements covering a wide range of activities carried out by Network Rail routes and train operators. The common factor is that Network Rail and a train operator reach agreement to work together more closely and share the benefits of doing so, within the framework of their existing individual accountabilities and responsibilities. As currently being discussed, alliances do not involve the creation of new legal entities such as formal joint ventures.
3. We support the concept of alliances and welcome their potential to add value in the rail sector, delivering benefits not only for the parties involved but also for rail users and taxpayers. We will help prospective alliance partners develop their plans and we welcome discussions - the earlier we are involved in these the better we will be able to help.
4. We will need to ensure that adequate safeguards exist for those outside an alliance. Alliance parties will need to deal with safety, legal, regulatory and commercial issues - and transparency will be important to demonstrate how the concerns of others are addressed.
5. Although we recognise that individual alliances will have different aims and plans, and be structured in different ways, we believe it is important to set out our views on the key principles and on where we think we may become involved. Network Rail and its prospective alliancing partners can then move forward with greater certainty and we can provide assurance to other stakeholders that their legitimate interests will be properly protected.
6. There are likely to be further industry reform initiatives, such as on infrastructure concessions, and we may issue further policy statements in the future to address these.

Key principles

Legal compliance

7. In developing an alliance's form and structure, alliance parties should consider how they will continue to comply with (most notably) the Railways Act 1993 and the Access & Management Regulations 2005 (which, for example, require separation between infrastructure management and transport operations), the Health and Safety at Work etc Act and other safety legislation, the Competition Act 1998 and the Enterprise Act 2002. They will also need to continue to comply with their obligations under licences, safety certificates and other authorisations already in place, as well as access contracts and the Network Code.

8. The responsibility for compliance with safety, regulatory, competition and other legislation is a matter for the individual alliance parties. Network Rail's entry into an alliance will not lessen its or its partners' current obligations.

Non-discrimination

9. It is important that Network Rail treats all train operators fairly in:

- negotiating and agreeing alliances; and
- the operation of alliances.

10. The company's network licence already prohibits it from unduly discriminating when carrying out its network-related activities (except with our consent). This does not mean that Network Rail must treat everyone in the same way - but there must be a good reason why it is treating them differently. In addition the Network Code contains a number of requirements designed to secure fair treatment.

11. We are therefore asking Network Rail to publish a policy statement setting out the principles it will adopt in negotiating and agreeing alliances with train operators. We recognise that different train operators serve diverse markets and not all alliances will be the same. We also recognise that the development of alliances is an evolutionary process and Network Rail may want to test particular approaches before rolling them out more generally. It will be important for Network Rail to justify any differences in operators' treatment.

12. In terms of the **operation of the network**:

- Network Rail's 'system operator' responsibilities are fundamental (for example strategic capacity planning, requests for track access and capacity allocation, coordinating requirements for engineering access, producing the national timetable and short term changes to it, and the operation of the network as a whole). They must be carried out in a way that is consistent with the licence and Network Code obligations; and
- in the day to day operation, and in the maintenance, renewal and enhancement of the network, Network Rail will ensure fair treatment of all operators on the network, whether or not they are in alliances, reflecting in particular the requirements of the Network Code.

13. These are important principles and we will take action to preserve them if and where required. Should we conclude that Network Rail's central system operator role is at risk, train operators have remedies through the Network Code and we can address this through the network licence. A complaint brought to us on grounds of discrimination could be considered under a range of tools available to us - not only under licences, but also the Access and Management Regulations and competition law, depending on the circumstances of the case.

Transparency

14. Industry stakeholders are accustomed to the existing contractual and commercial arrangements, over which we have a high level of visibility.

15. Alliancing may well introduce ways of working and delivering that are different from established industry practice and processes. As such we consider it essential that any bilaterally agreed changes should be made clear to third parties - not least

because it could affect them, and they may also wish to benefit from such arrangements.

16. If an alliance were to affect conditions for access to railway infrastructure, the details would need to be included in Network Rail's network statement¹. Network Rail would increase transparency generally by explaining alliance principles or features in the network statement, or by providing a reference in it to where individual arrangements are available. Although we would expect that some financial information and other sensitive information would be redacted when published to preserve commercial confidentiality, other contract information such as tariffs or new codes of practice, for example, should be published wherever possible. As regulator, we will ensure that prices are as transparent as possible.

17. Of course, if something were to require our formal approval, we would publish the details of Network Rail's request, our decision and our reasoning, as we do now, subject to the constraints on us publishing commercially sensitive information. This would provide further visibility of the arrangements.

Benefit sharing and reporting

18. We already have a national efficiency benefit sharing mechanism in place for control period 4 (which runs from 2009-14). In our December 2011 incentives consultation², we proposed a new route-level efficiency benefit sharing mechanism for control period 5 (lasting from 2014-19) that would provide a way for Network Rail to share local efficiencies with train operators and support greater cooperation to drive down costs. As part of our review for CP5, we will consider how efficiency savings arising from alliancing are shared and accounted for in this proposed benefit sharing mechanism.

19. The network licence requires Network Rail to report on its expenditure and income for its network operations through regulatory accounts and these are disaggregated to the route-level. The accounts capture Network Rail's efficiency savings and the company will need to include efficiency gains resulting from alliances. We expect these to be identifiable.

20. The alliance partners will also continue to be subject to separate statutory reporting requirements.

Management of risks associated with change

21. Depending on the nature of the alliance, its establishment may involve significant change and the risks associated with it will need to be managed. As noted above, safety and other regulatory obligations will not be affected, and we will want to be satisfied that risks to these are being managed.

¹ The Network Statement is intended to fulfil the requirements of the Railways Infrastructure (Access and Management) Regulations 2005 and EU Directive 2001/14/EC. It aims to provide all current and potential train operators wishing to operate train services on Network Rail's infrastructure with a single source of relevant information on a fair and non-discriminatory basis.

² See rail-reg.gov.uk/pr13/PDF/pr13-first-consultation-incentives_141211.pdf

ORR's formal involvement

22. Alliancing is a new type of industry initiative and we welcome early discussion to help parties identify issues if this is needed. Where the alliance parties believe they will need our approval before operations start, we would expect to be informed at an early stage and consulted before the detailed arrangements are finalised. This would enable us to confirm any formal role we may have - but we would not expect to be consulted on all proposals as a matter of course.

23. Our involvement on safety matters will continue as now. We may have a formal involvement where an alliance brings about changes in the responsibility, nature or scale of operations, in which case the implications for Network Rail's safety authorisation or a train operator's safety certificate must be properly identified and handled.

24. It is possible that alliance arrangements may not require our formal approval. But where approval is needed, we expect this to be identified clearly by the parties in advance and our usual policies and procedures followed for obtaining such approvals. Our formal approval might be needed:

- under certain licence conditions (for example, Network Rail may need approval in advance under its network licence if an alliance involved the disposal of land or it taking an interest in rolling stock); or
- if an alliance would effectively amend or replace any arrangements which are, or should be, included in an access contract. For example, if there were to be a charge (or charging arrangement) in an access contract which the parties sought to change through the alliance, any such changes would not be legally enforceable unless the terms in the previous contract had been amended to reflect them and approved by us.

25. We already have arrangements and processes in place for dealing with these types of request; currently we do not see any need to amend them to accommodate alliancing-related referrals. Parties should contact us at an early stage to check how our timetable for approvals fits with the arrangements they wish to put in place.