

Alliancing: ORR policy statement

February 2020

Version control

This document replaces the previous alliancing policy statement, published in March 2012. Changes in this document relevant to the previous version include:

- Updated context on alliancing noting actual examples of alliancing;
- Updated references to legislation where applicable;
- Recognising the changes that have occurred to Network Rail's organisation over time;
- Removing references to the Route-level Efficiency Benefit Sharing mechanism (REBS), which has been discontinued in CP6; and
- Reflecting our wider competition role, in particular our monitoring of the response to open access.

However, our policy position towards alliancing remains unchanged.

Introducing alliancing

1. The term 'alliance' is used to describe a range of different relationships between an infrastructure manager (such as Network Rail¹) and operators². The common factor in an alliance is that an infrastructure manager 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. For the purposes of the Railways (Access, Management and Licensing of Railway Undertakings) Regulations 2016 (as amended)³ (AMR), alliances are categorised as 'cooperation agreements'⁴. Alliances as discussed in this document do not involve the creation of new legal entities such as formal joint ventures.
2. If parties are considering entering into an alliance or a similar arrangement, those parties should discuss their plans with us. We welcome early discussions with prospective alliance partners and can help to inform their plans. We have a formal role in both supervising the conclusion, and monitoring the operation of, cooperation agreements.

¹ In this document we focus primarily on Network Rail as it is the largest infrastructure manager in the British rail industry. However the principles set out in this policy apply to other infrastructure managers.

² The term 'alliance' is also sometimes used to describe relationships between Network Rail and its suppliers – for clarity, this policy statement is only focused on the commercial relationship between Network Rail and train operators.

³ The Railways (Access, Management and Licensing of Railway Undertakings) (Amendment) Regulations 2019, which came into force on 11 February 2019, implemented in domestic law the provisions of Directive (EU) 2016/2370 (the so called 'Market Pillar Directive'). They set out some transitory amendments to the AMR 2016, that will apply until the 31 December 2020. In particular, these include new independence and impartiality requirements for infrastructure managers and some provisions about cooperation agreements and the role of the regulatory body.

⁴ Further detail on cooperation agreements is set out in the AMR. See regulation 8B(7) and 34(2)(d).

3. While we recognise that individual alliances will have different aims and plans, and may be structured in different ways, it is important to set out the key principles that need to be followed as well as the circumstances in which we will need to be 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.
4. The rail industry will continue to evolve and we may issue further policy statements or revise this statement in the future to address such changes. For example, we are working with the affected parties on the transfer of ownership of the Core Valley Lines to the Welsh Government, and the contracting out of joint management of infrastructure and operations to Keolis-Amey. These arrangements are different to alliancing as discussed in this policy statement, although there are some areas of similarity.

Our key principles around alliancing

5. Alliances are co-operation agreements as defined in the AMR. Regulation 8B(7) provides that: *“Subject to supervision by the Office of Rail and Road, an infrastructure manager may conclude cooperation agreements with one or more railway undertakings provided that these are non-discriminatory and concluded with a view to delivering benefits to customers such as reduced costs or improved performance on the part of the network covered by the agreement”*.
6. We promote good stakeholder engagement by Network Rail, and encourage collaborative working with the wider industry. Therefore we support the concept of alliances and welcome their potential to add value in the rail sector, delivering benefits for the parties involved, as well as the potential to add value for rail users and taxpayers.
7. While we support the concept of alliances, we need to ensure that adequate safeguards exist for those operating outside of an alliance. Our key principles are that alliance parties must ensure that they:
 - comply with all legal requirements;
 - treat other parties in a non-discriminatory manner; and
 - act transparently.
8. Under the AMR (Regulation 34(2)(d)), as part of our monitoring of the rail services markets, we have a legal duty to *“assess, and monitor the execution of any cooperation agreements concluded between an infrastructure manager and one or more railway undertakings and, where justified, may advise that a cooperation agreement should be terminated”*.

Legal requirements

9. In developing an alliance's form and structure, alliance parties must consider how they will continue to comply with all relevant legislation, including:
 - **the Railways Act 1993;**
 - **the Railways (Access, Management and Licensing of Railway Undertakings) Regulations 2016⁵ (as amended);**
 - **the Health and Safety at Work etc Act 1974** and other safety legislation; and
 - **the Competition Act 1998 and the Enterprise Act 2002.**
10. Alliance parties must also continue to comply with their individual obligations under licences, safety certificates and other authorisations already in place, as well as access contracts and the Network Code.
11. The responsibility for compliance with safety, regulatory, competition and other legislation is a matter for the individual alliance parties. An alliance arrangement does not change either partners' pre-existing legal obligations (e.g. Train Operating Companies franchise obligations or Network Rail's statutory or licence obligations).

Non-discrimination

12. It is important that Network Rail treats all train operators fairly in:
 - negotiating and agreeing alliances; and
 - the operation of the network.
13. Non-discrimination is an essential principle in Network Rail's relationships with operators, and is set out in:
 - legislation, most notably the AMR which requires Network Rail to act in a non-discriminatory manner in carrying out its functions – this includes day-to-day operational areas such as traffic management and maintenance planning;
 - Network Rail's network licence (Licence Condition 20) which prohibits it from unduly discriminating between persons when carrying out its Licensed Activities and any other function contemplated by the licence; and
 - the Network Code (which forms part of the contractual arrangements between train operators and Network Rail) which contains a number of requirements designed to secure fair treatment of operators.
14. The AMR also includes specific requirements to guarantee the independence of the 'essential functions' - charging and capacity allocation (in particular timetabling). These activities must be carried out in a way that is consistent

⁵ ORR's guidance on The Railways (Access, Management and Licensing of Railway Undertakings) Regulations 2016 - Access to infrastructure and service facilities, infrastructure managers, and making an appeal can be found [here](#).

with all legislative, licence and Network Code obligations, and independently of operators or any alliances.

15. Non-discrimination does not mean that Network Rail must treat everyone in the same way - but it must have a legitimate reason why it is treating any parties differently. Network Rail must ensure fair treatment of all operators on the network in the day-to-day operation, and in the maintenance, renewal and enhancement of the network. If an alliance were to affect conditions for access to railway infrastructure, the details would need to be included in Network Rail's network statement⁶.
16. These are important principles and we will take action to preserve them if and when required. If operators believe they are being unduly discriminated against, they have remedies through the Network Code, and ultimately through appeal to us⁷. We can consider any complaints of undue discrimination that are brought to us using a range of tools - not only under licences, but also under the AMR and competition law, depending on the circumstances of the case.
17. In particular, we note that there may be the potential for minority operators (potentially including freight or national passenger operators) in an area where an alliance is in place to experience undue discrimination. Alliancing arrangements should not lead to the interests of these minority operators being neglected.
18. Similarly, because open access operators are typically minority operators on the routes where they operate, we note that they may face particular risks of discrimination from alliances. As part of our wider statutory duty to promote competition⁸, ORR monitors the impact of, and response to, open access⁹. We will predominantly do this through industry engagement, and through monitoring outcomes on a number of measures including timetabling and infrastructure investment. This will help us to detect whether there is a difference in outcomes for different types of operators as a result of their treatment by Network Rail and/or other industry participants.

Transparency

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

⁶ The Network Statement is intended to fulfil the requirements of the AMR 2016 and EU Recast Directive 2012/34/EU. 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. Network Rail's latest Network statement is available - <https://www.networkrail.co.uk/industry-commercial-partners/information-operating-companies/network-statement/>

⁷ Regulation 32 of the AMR enshrines the right of operators to make appeals to the regulatory body.

⁸ <https://orr.gov.uk/rail/promoting-competition>

⁹ https://orr.gov.uk/_data/assets/pdf_file/0007/40795/competition-work-on-open-access-update-document-2019-03-27.pdf

Alliancing may well introduce ways of working and delivering outputs that differ from established industry practices and processes. We consider it essential that any bilaterally agreed changes should be made clear to third parties - not least because such changes could affect them, and they may also wish to benefit from such arrangements.

20. The alliance partners will continue to be subject to separate reporting requirements. Furthermore, the Network Licence requires Network Rail to report on its expenditure and income through regulatory accounts (Licence Condition 8). These accounts capture Network Rail's efficiency savings and Network Rail will need to identify any efficiency gains resulting from alliances. In particular, there must be transparency to provide confidence that Network Rail is effectively managing public money, and that it is not worsening its financial position to the benefit of operators.
21. Although we would expect that some financial data and other sensitive information will 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. This would provide further visibility of the alliance arrangements.

Management of risks associated with change

22. Depending on the nature of the alliance, its establishment may involve significant change. Any risks associated with those changes will need to be managed appropriately. Safety and other regulatory obligations must be complied with at all times, and we will need to have sufficient information about the process to be satisfied that risks are being managed appropriately.

ORR's formal involvement

23. As set out in the legislation, ORR has a formal role to "*assess, and monitor the execution of any cooperation agreements concluded between an infrastructure manager and one or more railway undertakings and, where justified, may advise that a cooperation agreement should be terminated*¹⁰".
24. We welcome early discussion to help parties identify issues if they are considering entering into an alliance, and would seek to support parties in addressing any regulatory questions they may have. Where the alliance parties believe they will need our approval before operations begin, 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.
25. Our involvement on safety matters will continue as now. We may have a formal involvement where an alliance brings about changes in the

¹⁰ See regulation 34(2)(d) of the AMR.

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.

26. Some other examples of where our formal approval might be needed include:
 - under certain licence conditions (for example, Network Rail would 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 contract had been amended to reflect them and approved by us.
27. If something were to require our formal approval, we would publish the details of the request, our decision and our reasoning (subject to the constraints on us publishing commercially sensitive information). This would provide further visibility of the arrangements for third parties.
28. We would encourage parties to contact us at an early stage to check how our timetable for approvals fits with the arrangements they wish to put in place. In the first instance, please contact us at contact.cct@orr.gov.uk.
29. As set out in the legislation, we will monitor the execution of alliances as part of our broader monitoring. In particular, we will consider any issues or concerns raised by third parties, but we may also take action where we identify concerns arising from the operation of an alliance. In particular, we may take action where an alliance is breaching the principles set out in this document.
30. We would take an escalatory approach to any actions. This may involve providing clarification letters or additional guidance in the first instance to help inform the parties, but potentially may culminate in using our powers under licences to issue enforcement orders, or making use of legal powers under railway or competition law if considered necessary.



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