

# **Responses to rail investment framework update June 2022 consultation**

- 1. Network Rail**
- 2. West Midlands Rail Executive**



## Introduction

Network Rail welcomes the opportunity to respond to the consultation published 30 June 2022 by the Office of Rail and Road (“ORR”) on updates to the Investment Framework. The Investment Framework sets out the ORR’s policy and guidelines on third-party investment in our railway network (the “Network”). We support and encourage investment in our Network, and we welcome clarification on the Investment Framework. We recognise that third-party investment in the Network is critical to enhancing the rail offering in Great Britain and presents opportunities to improve overall rail experience as well as facilitating important wider social developments.

Our response to this consultation is based on the current industry structure and mechanisms but we appreciate that a further review of the Investment Framework may be necessary, in due course, to take account of the changes to the rail industry with the creation of Great British Railways.

Our response follows the consultation questions set out in the ORR’s consultation document. Any specific chapter or paragraph references in our responses refers to the relevant chapters or paragraphs in the Investment Framework Consolidated Guidelines (Draft for Consultation) dated 16 June 2022.

Please note that we have limited our response to this consultation to matters of exception in the update to the Investment Framework. We recognise that the proposals would not change the majority of the underlying principles of the existing Investment Framework.

For any enquires on this response, please contact [redacted].

## Responses

Q1. Who are you responding as (an individual/for an organisation) and what is your role?

A1:

Respondent: Network Rail Infrastructure Limited (organisation), which is the licensed and regulated owner, operator, and Infrastructure Manager of the Network

Respondent contact: Dan Guiher (Head of Policy, Governance, & Frameworks)

Q2. Who uses the Investment Framework in your organisation? When and how is it used?

A2:

The Investment Framework sets out the policy and guidelines which govern how third parties can invest in the Network and establishes Network Rail's role in providing non-contestable and some contestable services to third parties investing in the Network. The Investment Framework underpins and permeates all of Network Rail's commercial transactions as the Infrastructure Manager and owner of the Network in relation to the provision of works and services to third parties.

Because of Network Rail's unique position as provider of non-contestable and some contestable works and services on the Network, the Investment Framework is used by various Network Rail functions (both at group and regional level), including: Corporate Commercial, Property, Legal, Finance, Sponsorship, Commercial (management), and Asset Protection.

The template agreements which have been put in place by Network Rail, and approved by the ORR, set out the terms under which Network Rail contracts with third parties to provide non-contestable and some contestable works and services. The templates are used by our Sponsorship, Commercial, and Asset Protection teams to engage with interested third parties, and the terms of each agreement are governed and assured by the Corporate Commercial and Legal teams during negotiation through to execution of the agreements to ensure that the policy and guidelines in the Investment Framework are appropriately applied and complied with on each individual transaction. Our Property teams deal with sale of land and shared value transactions.

The use of the Investment Framework by Network Rail is quotidian, and we enter into hundreds of these regulated, third-party agreements each year.

Q3. Are there gaps/missing information in the Investment Framework that you think need to be addressed as part of the update?

A3:

We have identified the following areas of the Investment Framework which we request the ORR to consider for amendment:

1. Chapter 3 (Network Rail's Role) paragraph 3.12: this paragraph mentions risk allocation under third party contracts. Network Rail, through consultation with the ORR, has published a document clearly setting out the allocation of risks between parties under the template agreements, including a risk matrix arranged by agreement type. We believe it would be beneficial to include a reference to this document here, which is published on the Network Rail website (link: <https://www.networkrail.co.uk/wp-content/uploads/2021/05/Default-Risk-Allocation-Table-third-party.pdf>).

2. Chapter 3 (Network Rail's Role) paragraph 3.13: the current Investment Framework explains that the suite of template agreements was originally designed to be utilised on schemes with a value of less than £50m. This detail has been excluded from the updated Investment Framework and we strongly recommend this be reinstated, along with the possibility that Network Rail and sophisticated promoters of larger schemes be able to agree more tailored arrangements to cope with particular risks on larger, more complex schemes (i.e. schemes in excess of £50m). This principle was integral to the design of the template suite and allows Network Rail and a third-party to agree fair and reasonable terms when delivering high value, complex schemes.
3. Chapter 6 (Investing at Stations and Depots) paragraph 6.5: the updated Investment Framework is silent on the requirement for the third-party funder to be responsible for any ongoing operating, maintenance, and renewal costs falling to Network Rail in excess of £50,000 per annum resulting from investment at stations and depots (to apply until the next periodic review when Network Rail would be funded for these ongoing costs). This principle is included for investment elsewhere on the Network (see paragraph 7.6) and should be set out in this chapter as well. We suggest including a paragraph here as at paragraph 7.6.

Q4. Is there any content in the Investment Framework that requires further clarification or better definition?

A4:

We request that the ORR consider the following areas of the Investment Framework for further clarification:

1. Chapter 3 (Network Rail's Role) paragraph 3.5: it would clarify the party roles and risk management / liabilities in third-party investment schemes to explicitly set out here the fact that Network Rail is not funded by Government to deliver or take any liabilities under third-party funded agreements, but that risks accepted by Network Rail are funded by the Risk Funds (see: Risk Funds, paragraph 3.19).
2. Chapter 3 (Network Rail's Role) paragraph 3.12: it would be useful here to state explicitly that the template agreements set out a clear process for change control, governance, and liability allocation and that use of the template suite should be encouraged.
3. Chapter 3 (Network Rail's Role) paragraph 3.28: it would be more efficient to include the option of further dispute resolution prior to escalation to the ORR in the event of a dispute in a scheme being governed through the network licence. We suggest "... if the investor cannot resolve an issue with Network Rail in the first instance, or subsequently through a mutually agreed alternative dispute resolution process, it can refer the matter to us." We note that alternative dispute resolution is provided for under paragraph 8.8 in respect of Property transactions.
4. Chapter 8 (Sale of Land or Rights to Land) paragraphs 8.1, 8.9, 8.10, and 8.11: it is our understanding that Network Rail's ability to transact using hypothecated gains as consideration had ceased with Network Rail's reclassification to the public sector in 2014. Please could you confirm the position on this matter?

Q5. If you are responsible for investing in the rail network, do you find the Investment Framework helpful? Please explain your answer?

A5:

Network Rail relies on the Investment Framework to set out clearly the ORR's policy and guidelines on third-party investment in the Network, and we recognise it as a critical document. We believe the transparency provided by the Investment Framework and products which flow from it (such as the template agreements and clarity on property shared value transactions) assist third party potential project promoters and investors in the Network to identify opportunities and develop business cases in relation to them.

Third-party investment into the Network would ultimately be frustrated in the absence of the Investment Framework by uncertainty, cost, delay, and complexity as every promoter sought individual bespoke terms with Network Rail. In addition, each transaction would have to set out and respond to the implications of the regulatory and public sector environment in which Network Rail operates. This would add significant time, cost, and resource to documenting transactions both for Network Rail and for third parties.

Network Rail strongly supports and endorses the Investment Framework, and the clarity and guidance that it provides.

Please see also our response to question 1 above.

Q6. What other information from ORR on Third-Party Investment would you find helpful?

A6:

We have not identified any further information at this time.

Q7. How does the proposed update to the Investment Framework impact on your business in terms of familiarisation and any changes to your internal processes?

A7:

Network Rail is very familiar with the Investment Framework, and we are cognisant that this proposed update to it retains many of the underlying principles of the existing Investment Framework. We welcome the clarity and amendments in the update to the Investment Framework which address the impact of Network Rail's reclassification to the public sector.

We do not anticipate any changes to our internal processes resulting from the proposed update to the Investment Framework.



Q8. Any other comments or suggestions on our draft update to the Investment Framework.

A8:

We welcome the restatement in Chapter 8 (Sale of Land or Rights to Land) confirming that Network Rail can reasonably seek shared value on applicable property transactions.

-- END --

West Midlands Rail Executive  
Response

# **Office of Rail and Road Investment Framework Update**

## **Consultation**

29 July 2022

## Overview: West Midlands Rail Executive (WMRE) Response to ORR Investment Framework Consultation

The West Midlands Rail Executive (see Appendix 1) welcomes the opportunity to comment on this consultation in respect of the ORR Investment Framework guidance.

WMRE plays a key role in the delivery of passenger rail services in the West Midlands, as specifier of services levels alongside the DfT, as a planning body for the future development of and investment in the West Midlands rail network, and as a specifier and deliverer of new stations and station enhancement projects for **West Midlands Combined Authority** (WMCA).

WMRE and its predecessor organisations (notably Centro and the West Midlands Integrated Transport Authority) has a long and successful history of working closely with the rail industry in respect of:

- rail contract management (from co-signatory status with DfT of Central Trains to the joint specification and management of the West Midlands Trains Franchise and current National Rail Contract)
- providing a more seamless joined-up approach to the management of the “whole railway” in the interests of customers through our ground-breaking “West Midlands Grand Railway Collaboration”
- developing long term strategic planning at both the regional and national level and has a proven track record of adding value to this process as a key regional industry partner
- developing and delivering new stations and major station enhancements



**I am responding on behalf of:**

**West Midlands Rail Executive  
16 Summer Lane,  
Birmingham  
B19 3SD**

West Midlands Rail Executive (WMRE) is a not-for-profit company, owned by local authorities, to act as rail authority for the region. This means we are democratically run and accountable to elected representatives. Our board of directors is chaired by the Mayor of the West Midlands Combined Authority, and has a voting representative from each of the partner authorities:

- Birmingham City Council
- Coventry City Council
- Dudley Metropolitan Borough Council
- Herefordshire Council
- Sandwell Metropolitan Borough Council
- Solihull Metropolitan Borough Council
- Shropshire Council
- Staffordshire County Council
- Telford and Wrekin Council
- Walsall Council
- Warwickshire County Council
- West Northamptonshire Council
- City of Wolverhampton Council
- Worcestershire County Council

Cheshire East Council and Stoke-on-Trent Council are affiliate, non-voting members.

In addition, WMRE also undertakes the rail responsibilities of Transport for West Midlands (TfWM), on behalf of the West Midlands Combined Authority (WMCA).

A key focus of TfWM as the statutory transport authority for the metropolitan area is the development and promotion of an integrated transport system to drive modal shift and support decarbonisation and the health of the region's citizens. Rail is a fundamental component of the West Midlands integrated transport system.

WMRE works with the Department for Transport, Network Rail and other organisations. Our role is to:

- specify and manage the West Midlands Railway train service contract
- upgrade train stations and build new ones on behalf of Transport for West Midlands and other partners
- support improvements for passenger and freight train services
- plan future network improvements in the region

## Consultation Response

The West Midlands Rail Programme is WMRE's capital programme which is currently delivering c.£215m investment in new and upgraded rail stations across the West Midlands. Around 2/3 of the total programme funding has been secured from outside the rail industry and we therefore have a significant amount of experience in working with non-rail investors in the delivery of rail projects. Indeed a critical part of our work is bringing forward schemes which could not otherwise be delivered by mobilising a range of investors and supporters from beyond the rail industry.

The Programme is built on a partnership including Network Rail and West Midlands Trains, and is focussed on delivery through collaboration, including with the Office for Rail and Road. Our formal contractual relationship with Network Rail is managed through Asset Protection Agreements and we have negotiated amendments to the existing templates with Network Rail to better reflect the nature of the projects in delivery.

Given our strong relations with industry partners and our ongoing experience in the delivery of third party schemes, we would be happy to contribute to case studies which may help illustrate some of the points raised in the guidance.

We note that the focus of this consultation is on the clarity and comprehensiveness of the Investment Framework, and that comments are not invited on the policy framework as part of this consultation.

Nevertheless we do consider that consideration should be given in future to whether there are wider structural considerations which put at risk the industry's ability to attract third party investment. We note that, with the development of Great British Railways, an opportunity exists to revisit these more fundamental questions.

### **Q3: Are there gaps / missing information in the Investment Framework that you think need to be addressed as part of the update?**

**Section 4** of this document refers to the application of Part G of the Network Code with regard to the station change and network change procedures.

We agree that it is of paramount importance that changes to the network infrastructure are appropriately governed. From engagement with non-rail partners we know that these processes are a source of some confusion, particularly given the space that exists for variance in interpretation. We therefore consider that it would be helpful to set out, in this guidance or elsewhere, some abridged guidance on the Network Change and Station Change processes which sets out the kind of information that should be supplied and the broad timing in which these processes should be implemented.

One particular challenge associated with these processes is the lack of clear timescales associated with certain steps. We have seen, for example, with the Network Change processes that consultees can effectively put the process on hold by raising objections and then not engaging further with attempts to resolve concerns. In the longer term, steps to give greater certainty over timescales and dispute resolution would be welcome.

**Q4: Is there other content in the Investment Framework that requires further clarification or better definition?**

**Section 3 paras 3.19 – 3.21** deal with the Network Rail Risk funds. Further clarification in this document on how the funds are used, the arrangements for transparency and reporting, and the circumstances in which they may be drawn down would be welcome.

**Section 7 Paras 7.9-7.14** deal with the Rebate Mechanism. As the rebate mechanism currently applies specifically to track enhancements, this falls outside most of the work of the West Midlands Rail Programme. Nevertheless, the principle of ‘free riders’ also applies to certain station investments. As we note elsewhere in this response, there remains concern that third parties, particularly in the public sector, find themselves funding rail investments to deliver wider public benefit without securing any long term asset or other financial benefit.

We would strongly advocate considering whether the principle of compensating investors for ‘free rider’ benefits should be expanded beyond track investments. Similarly we would also advocate revisiting the approach to eligibility for rebates so that, for example, they can form part of a wider funding package to bring schemes forward.

**Section 8 Paras 8.9 – 8.11** address the use of hypothecated gain. Our experience in dealing with hypothecated gain deeds is that they may be artificially constrained beyond the requirements of ORR through local negotiation and local priorities. Unduly constricting terms may actually have a deterrent event on using hypothecated gain to deliver benefits to the rail industry.. Greater clarity over their negotiation and how such deeds can be discharged would be welcome. In particular we consider that the inherent value of intellectual property should be considered as part of the discharge of hypothecated gain – this would allow such funding to be used to ‘pump prime’ more ambitious development for example through the development of detailed designs.

**Q.6: What other information from ORR on Third Party Investment would you find helpful?**

On a number of projects, we have noted a propensity for scope creep where investment projects are undertaken alongside existing assets. For example, we have examples of additional works being required to assets which would not otherwise be deemed life expired or in the scope of the project, simply because of another project being on site. This opportunistic approach to expanding the scope of projects to deal with longstanding renewals issues acts as a deterrent to investment both by driving cost and contributing to wider uncertainty.

We recognise the importance of taking opportunities to improve safety and passenger experience, and where these challenges are addressed collaboratively between partners we have seen real success. We consider that a clearer position from ORR could help to shape expectations about what investors should expect in this area, and what demands might be considered unreasonable.

We also note that there is little in the Investment Framework concerning alternative models of asset ownership once works are complete. Again, from our own experience we know that expectation that any third party delivered enhancements will remain in the long term

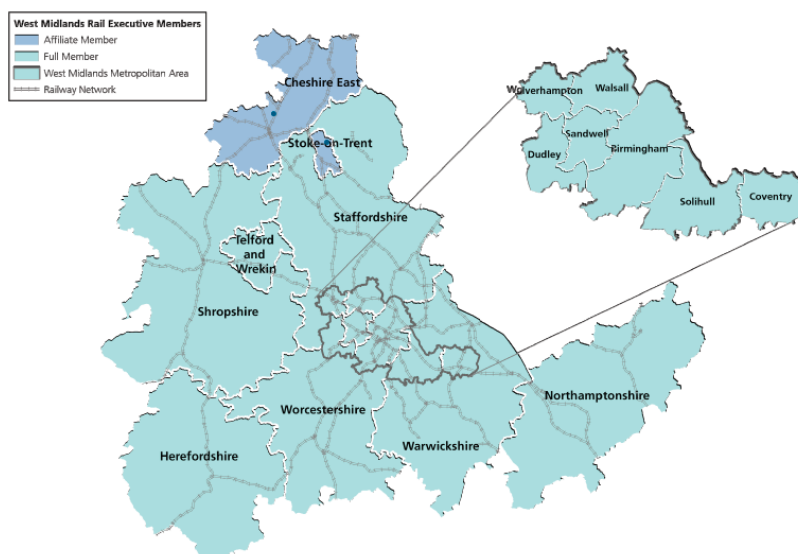
ownership of the rail industry has a stifling effect on potential funders' willingness to invest. ORR could consider whether it would be appropriate to produce complementary guidance on the options for the ownership of third-party delivered assets to help shape this debate in future.

As noted above, the inclusion of case studies or best practice examples to illustrate some of the key considerations set out in the document may be valuable, particularly in helping non-rail investors understand the practical implications of the measures set out in this document. We would welcome the opportunity to contribute

## Appendix 1: About West Midlands Rail Executive

The **West Midlands Rail Executive** was initially established to address the imbalance in regional influence over our regional rail network through the creation of a credible, democratically accountable body which had the authority to act for the wider West Midlands and the in-house expertise necessary to work alongside the Department for Transport in specifying and managing the contract for our local “West Midlands Railway” train services.

WMRE membership includes 14 local transport authorities (plus the West Midlands Combined Authority for which WMRE undertakes the majority of rail responsibilities on behalf of Transport for West Midlands) with each local authority having a seat on the WMRE Board. Two further local transport authorities also sit on the Board as non-voting “affiliate” members.



*WMRE Partner Authorities*

With a population of 6.47 million, an economy worth £128 billion each year, 3.2 million jobs and a key UK international airport, the West Midlands is thriving, vital to Britain’s prosperity, and growing. By 2032 there will be 900,000 more people and 450,000 new jobs. Further major growth is anticipated in the 2030s and 2040s.

Our West Midlands rail network plays a vital role in supporting this regional economy, connecting businesses with their customers and suppliers and providing convenient access to employment, education, healthcare, retail outlets, leisure facilities and numerous other services for hundreds of thousands of West Midlanders every day.

The region’s unique position at the heart of national transport network provides unrivalled long distance connectivity to the UK’s other core cities and the construction of the new HS2 rail line will provide long term capacity for growth. HS2 will also deliver a step-change in our inter-city connectivity, slashing journey times between the West Midlands region and London, Nottingham and Manchester (and ideally in future Yorkshire and North East England).

### This Consultation Response

This consultation response represents the broad collective view of the West Midlands Rail Executive. However, individual WMRE partner authorities may also express their own specific perspectives in response to this consultation.