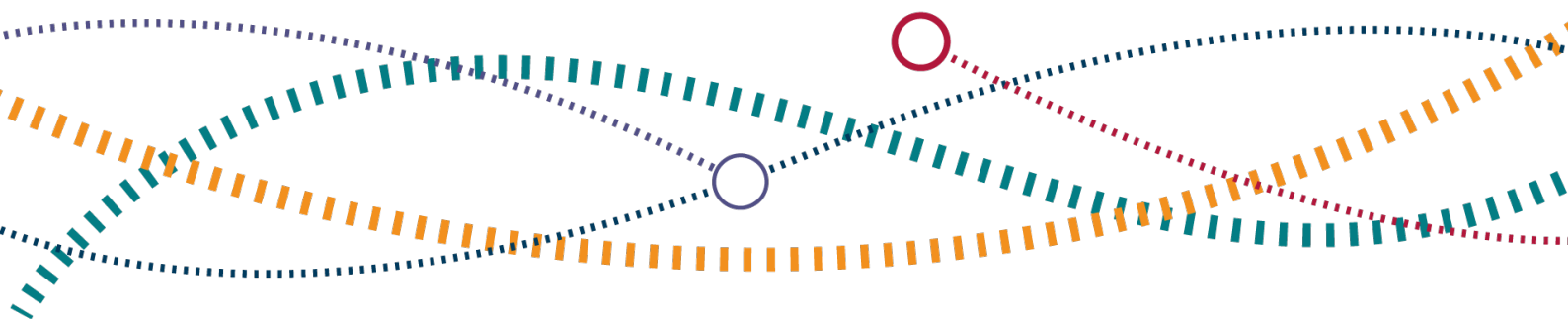




# **Investigation under section 25 of the Competition Act 1998 in respect of the rules for membership of the RACF**

**Notice of intention to accept  
commitments and invitation to  
comment**

27 January 2022



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# 1. Introduction

- 1.1 On 12 March 2021, the Office of Rail and Road (**ORR**) opened an investigation (the **Investigation**) into the conduct of the Railway Assessment Centre Forum (**RACF**), specifically whether its rules of membership infringed the prohibition in Chapter I of the Competition Act 1998 (the **Act**). ORR's key competition concern is that RACF's processes for admitting prospective new members may have imposed barriers to entry to the market for the provision of train driver psychometric testing services in Great Britain (**GB**).
- 1.2 The Chapter I prohibition prohibits agreements and concerted practices between undertakings and decisions by associations of undertakings which may affect trade within the UK and have as their object or effect the prevention, restriction or distortion of competition within the UK.
- 1.3 On 22 November 2021, the 13 members of RACF, namely Govia Thameslink Railway Limited, DB Cargo (UK) Limited, Occupational Psychology Centre Limited, Rail Operations Group, Northern Rail, South Western Railway, Greater Anglia Rail, West Midlands Trains Limited, Scotrail Railways Limited, Great Western Railway, South Eastern Railway Limited; Translink, and Transport for Wales offered commitments to ORR, as set out in Schedule 1 of this document, for the purpose of addressing the competition concerns arising from the conduct being investigated.
- 1.4 ORR hereby gives notice (the '**Notice**')<sup>1</sup> that it proposes to accept the commitments offered by RACF to address ORR's competition concerns.
- 1.5 The text of the proposed commitments is summarised below and is set out in further detail in Schedule 1 to this Notice.

## Invitation to comment

- 1.6 ORR invites interested parties to provide comments on the proposed commitments. We will take comments into account before making a final decision on whether to accept the commitments.
- 1.7 This Notice provides summary information on the Investigation, specifically the key characteristics of the market and of RACF, and ORR's competition concerns. It then summarises the commitments offered by RACF and sets out why ORR

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<sup>1</sup> Pursuant to paragraph 2 of Schedule 6A to the Act.

provisionally considers that the proposed commitments address the competition concerns and that acceptance of commitments is appropriate in this case.

- 1.8 Details on how to make comments on the proposed commitments offered by RACF are provided at the end of this document. ORR has allowed 25 working days for interested parties to make comments, accordingly the closing date for comment is **3 March 2022 by 5pm**.

# 2. ORR's Investigation

## The Investigation

- 2.1 In July 2020, a potential new entrant in the provision of train driver psychometric assessment approached ORR in relation to the conduct of RACF, specifically in relation to the absence of a formal application process or procedure to seek membership and an apparent lack of objective standards to become a member. ORR subsequently, took a number of actions, including meeting with and requesting information from different market participants.
- 2.2 On 12 March 2021, ORR informed RACF that it had opened a formal investigation under the Act, having determined that it had reasonable grounds at that stage to suspect that RACF had infringed the provisions set out in Chapter I of the Act (the Chapter I prohibition) in relation to rules pertaining to membership of RACF in the UK.<sup>2</sup>
- 2.3 In particular, ORR had taken the decision that it had reasonable grounds for suspecting that RACF's rules of membership infringe the Chapter I prohibition, in that they constitute a decision of an association of undertakings which has as its object or effect the prevention, restriction or distortion of competition in relation to the provision of train driver psychometric assessments in the UK. This is because, as of March 2021 when ORR opened this Investigation:
- (a) RACF membership appeared to be essential to entry to the market for the provision of train driver psychometric testing services in GB. The train companies who are the buyers of these services appeared to view RACF membership as a prerequisite. RACF controls access to certain key training materials and a national database of train driver testing results.
  - (b) RACF membership was not based on objective, transparent publicly available criteria. ORR was concerned that this hindered new entry by making the application process less certain and protracted.

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<sup>2</sup> Subject to the possibility of exemption pursuant to section 9, section 2 of the Act prohibits agreements between undertakings, decisions by associations of undertakings or concerted practices which —

- (a) may affect trade within the United Kingdom, and
- (b) have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom.

- (c) Prospective members of RACF had to submit a “business plan”, to include key information including the purpose of setting up an assessment centre; the number and credentials of assessors; details of the premises to be used; and the security measures that would be in place for storage of testing materials, results and equipment. Every member of RACF was required to vote on business plans. ORR was concerned that the information required might be competitively sensitive information and had the potential to hinder new entry by giving rise to concerns on the part of potential entrants about RACF members having access to their commercially sensitive information (see 4.4(b) below);
- (d) The requirement to have a “mentor” was not properly explained; there were no criteria by which mentors would “assess” new assessment centres; and there was no guarantee that a new member would be assigned a mentor. ORR was concerned that this requirement could hinder new entry by creating unnecessary uncertainty and delay (see paragraph 4.4(c) below); and
- (e) RACF membership applications were decided on by actual or potential competitors of applicants. ORR was concerned that there was a risk of discrimination against potential entrants since existing members decide on membership applications (see paragraph 4.4(d) below).

2.4 In the course of its Investigation, ORR took steps to gather evidence from RACF and Rail Safety and Standards Board (RSSB). These steps included sending two formal notices on 12 March 2021 and 22 October 2021 requiring documents and information under section 26 of the Act to RACF.

2.5 On 17 May 2021, ORR sent a summary of its competition concerns to RACF. Following discussions with ORR, RACF communicated an intention in principle to offer commitments under section 31A of the Act.

## The commitments offer

2.6 By way of background, section 31A of the Act provides that, for the purposes of addressing the competition concerns it has identified, ORR may accept from such person or persons concerned as it considers appropriate, commitments to take such action (or refrain from taking such action) as it considers appropriate. The Competition and Markets Authority’s (**CMA**) Procedural Guidance (the **Procedural Guidance**),<sup>3</sup> describes the circumstances in which it may be appropriate to

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<sup>3</sup> *Revised Guidance on the CMA’s investigation procedures in Competition Act 1998 cases (Revised CMA8,*

accept commitments and the process by which parties to an investigation may offer commitments to the CMA and other regulators. As ORR is governed by the Act, it follows the same investigation procedures as set out in the Procedural Guidance in accepting commitments from the parties.

- 2.7 In accordance with paragraph 10.21 of the Procedural Guidance, a business under investigation may offer commitments at any time during the course of the investigation until a decision on infringement is made, although ORR would be unlikely to accept commitments at a very late stage in the investigation and unlikely to consider it appropriate to accept commitments after the issue of a Statement of Objections. In this case, no decision on infringement has yet been made; commitments were offered at an early stage of this Investigation and before ORR had issued any Statement of Objections.
- 2.8 On 30 June 2021, following an agreement with its members, RACF submitted a draft commitments proposal. This submission was made by RACF without prejudice to its position that it has not infringed the Chapter I prohibition of the Act. Accordingly, and in line with paragraph 10.22 of the Procedural Guidance, ORR proceeded to discuss with RACF the scope of commitments which ORR considered would be necessary to address the competition concerns it had identified. Following discussions with ORR and two sets of revisions to an initial offer, RACF formally offered commitments to ORR on 22 November 2021.
- 2.9 The commitments being offered to ORR by RACF are set out in Schedule 1 of this Notice.
- 2.10 Having considered RACF's proposed commitments, and following a series of further discussions and minor amendments, ORR has reached a provisional view that they address its competition concerns, for the reasons set out in this Notice. Formal acceptance of the proposed commitments would result in ORR terminating its Investigation and not proceeding to a decision on whether or not the Chapter I Prohibition has been infringed.

## The products and the party under investigation

- 2.11 The focus of this Investigation is the provision of train driver psychometric testing. All potential train drivers must pass tests assessing their capacity to (for example) concentrate, which are critical to their ability to safely operate a train. Psychometric testing is a *de facto* requirement to obtain a train driver licence (see paragraph 3.1 below).

2.12 All the recruiting organisations within the rail industry use a national standard called RIS-3751-TOM, which was introduced by the RSSB in October 2013. This Rail Industry Standard provides requirements and guidance on the selection process for train driver candidates who will drive on the GB mainline network. It includes requirements and guidance for the standardised psychometric assessment of train driver candidates. In particular, RIS-3751-TOM provides the list of personal characteristics and psychometric tests train drivers need to undergo as part of their selection process.

## **RACF's constitution**

2.13 RACF is the only industry group of rail psychometric assessment centre representatives in the United Kingdom (UK). It was formed within British Rail in the early 1990s prior to rail privatisation. It is a voluntary body currently constituted by 13 members who together oversee 14 assessment centres. RACF is governed collegially by all its members and does not have a legal personality separate from that of its members. As a condition of membership, members are required to attend a certain number of meetings per year. RACF has historically met around 4 times annually. RACF is not discretely funded, its operating costs being borne by its members as needed. A significant cost that it incurs is the cost of the national database of train driver testing results. These costs are currently shared between members. Members are invoiced directly by an external company (rather than through RACF) for access to the database.

2.14 RACF operates within the UK and is made up of 13 members consisting of: some of GB's passenger and freight operating companies (TOCs and FOCs); and a standalone private company, The Occupational Psychology Centre Limited (OPC). RACF's full list of members is as follows:

- Govia Thameslink Railway Limited;
- DB Cargo (UK) Limited;
- The OPC;
- Rail Operations (UK) Limited;
- Northern Trains Limited (Northern Rail);
- First MTR South Western Trains Limited (South Western Railway);
- Abellio East Anglia Limited (Greater Anglia Rail);



- West Midlands Trains Limited;
- Scotrail Railways Limited;
- First Greater Western Limited (Great Western Railway);
- South Eastern Railway Limited;
- Northern Ireland Transport Holding Company (Translink);
- Transport for Wales;

2.15 RSSB acts as an advisor to the group but is not itself a member.

## RACF's activities

2.16 RACF explained that its core purpose is to promote best practice and consistency in relation to the psychometric assessment of prospective train drivers in the UK.<sup>4</sup> As such, it follows the RIS-3751-TOM standard and ensures that members adhere to agreed procedures.<sup>5</sup> It carries out oversight aimed at ensuring that assessment centres carry out psychometric assessments on prospective train drivers to levels that meet or exceed the industry's standard (i.e. RIS-3751-TOM). All testers follow Rail Industry Standards, for which responsibility lies with the RSSB. Managers of psychometric assessment centres are required to meet on a regular basis to assist the centres with the roll out of the best practices and procedures.

2.17 In addition to the role described at paragraph 2.16, RACF also appears to have a gatekeeping role in the psychometric assessment sector, for the following reasons:

- (a) It oversees all the psychometric assessment centres in the UK;
- (b) It acts as a depository of some requisite assessment materials (e.g. tests), and it organises training on how to carry out the assessments in line with the industry standard. Non-members don't have access to these materials or the training; and

<sup>4</sup> Note of meeting between RACF and ORR on 26 March 2021; and Rule 3.1.1 of RACF's rules of membership.

<sup>5</sup> RIS-3751-TOM defines RACF as follows: 'The Rail Assessment Centre Forum (RACF) is a group of assessment centre representatives who have undertaken to follow this standard and share good practice. Membership of this forum provides assurance that an assessment centre conducts the psychometric assessment process according to this standard.'

- (c) It maintains a national database, which contains a record of rail industry applicant names, addresses, dates of birth, national insurance numbers, results of the pre-assessment checks and the date and results of applicant recruitment assessments, including psychometric test results. This database is accessible to all its members. It contains raw scores for all candidates, which is important because driver candidates are only permitted to fail the assessment twice in a lifetime.

2.18 RACF also provides a discussion forum for its members where:

- (a) Members, through RACF, have the possibility to make decisions on the best practices and procedures of the industry that will influence the sector; and
- (b) Members, through RACF, have the possibility to share documentations, change key elements of the driver assessment process and amend paperwork accordingly or review procedures, without the knowledge of the other participants in the industry.<sup>6</sup>

## **RACF's other activities**

2.19 RACF's other activities include monitoring job applications and enquiries and sharing data with its members within the rail industry. It shares best practice in the industry by providing documentation and agreements to comply with the General Data Protection Regulation (GDPR). RACF also deals with answering queries from its members to ensure that best practice is adhered to.

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<sup>6</sup> RACF's response to ORR section 26 notice, dated 22 March 2021.

# 3. The relevant market

## Introduction

- 3.1 This section of the Notice sets out ORR’s preliminary view (preliminary in nature reflecting RACF’s offering of commitments early in the investigatory process) of the boundaries of the relevant market(s); and RACF’s position therein.
- 3.2 Given the early stage in the case, it has not been necessary for ORR to reach a conclusion on market definition . The purpose of this information is to provide context for section 4, which sets out a summary of ORR’s competition concerns.
- 3.3 The information in this section of this Notice was drawn from meetings held between ORR and key stakeholders including RACF and RSSB; an RSSB document dated July 2014 (‘the RSSB FAQ’); and an information request under section 26 of the Act that we sent by ORR to RACF on 22 October 2021.

## Relevant market

### The role of psychometric testing in the GB rail industry

- 3.4 The focus of this Investigation is the provision of train driver psychometric testing services. Across the wider economy, psychometric testing is widely used to test the skills, knowledge, and personalities of individuals. The investigation was concerned only with the testing that is used to assess prospective train driver candidates<sup>7</sup>. The use of such testing is a well-established practice within the UK rail industry dating back to the late 1980s. Comparable testing regimes exist in other jurisdictions, including member states of the European Union.
- 3.5 Around 4,000 prospective GB train drivers are subjected to psychometric testing in a typical year. This testing takes place at a total of 14 assessment centres, all of which are managed by RACF members.
- 3.6 The evidence gathered during this Investigation suggested that to date all psychometric testing for train drivers in GB has been administered by one of the RACF members, i.e. by one of the participating passenger or freight operators (albeit reliant on external providers for procuring test components and materials as noted below) or by a third-party company, namely OPC. Train operators without

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<sup>7</sup> The same set of psychometric tests are on occasion used to assess other railway employees or potential employees, but RACF told us that its understanding is that “*the vast majority of... tests are used for train drivers*”, RACF’s response to ORR’s section 26 notice dated 22 October 2021.

their own assessment centres are expected to procure assessments from an RACF member. DB Cargo and OPC, both members of RACF, appear to currently be the only commercial providers offering psychometric testing services outside their own organisations.

- 3.7 The psychometric testing undergone by candidates includes several components, such as: a “*traffic perception test*”, a “*visual test*”, and tests of “*two hand coordination*”, “*situational judgement*”, and “*written communication*”<sup>8</sup> <sup>9</sup>. Companies running testing centres must procure these components from a list of approved suppliers. RACF membership appears to be required in order to gain access to (i) the requisite assessment materials, (ii) training on how to carry out the assessments, and (iii) the national database of train driver testing results.<sup>10</sup>
- 3.8 Some testing materials can be accessed by potential testers without membership of RACF, including the ‘*Test User Occupational Ability*’<sup>11</sup> tests, and the software and equipment for computer based tests.<sup>12</sup> The suppliers of these materials are not RACF members<sup>13</sup>, and will supply to any buyers who are registered with the British Psychological Society (BPS) and have prerequisite qualifications<sup>14</sup>. Some individual tests such as the Group Bourdon and the ‘*Trainability for Rules and Procedures*’<sup>15</sup> are owned by members of RACF. These tests will only be released to members of RACF.<sup>16</sup>
- 3.9 As explained in paragraph 2.12 above, RIS-3751-TOM lists the psychometric tests train drivers need to undergo. Some of the listed tests are owned by RACF members (see paragraph 3.8 above). Consequently, a non-RACF member would not be able to provide psychometric assessments compliant with RIS-3751-TOM, which is a national standard recognised by the industry.
- 3.10 The facilities required to carry out psychometric testing services include suitable premises together with various items of computer equipment, such as computer

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<sup>8</sup> See, RIS-3751-TOM, Appendix A Driver Selection Criteria and Psychometric Tests.

<sup>9</sup> Although RACF told us that the test of written communication is now, “*generally no longer used (for the purpose of screening candidates)*” and is instead “*used as a... training tool for new drivers*”.

<sup>10</sup> Information received from stakeholder meetings.

<sup>11</sup> RACF’s document ‘RACF member required training and registration’.

<sup>12</sup> Example, ‘*Vienna Test System*’, computer tests is provided by Schufried,

<sup>13</sup> Examples of suppliers: Saville Assessment, Pearson Talent Lens and OPC

<sup>14</sup> People appointed to administer the psychometric assessment process are to hold a BPS qualification, also called BPS-TUO A.

<sup>15</sup> RACF document ‘RACF member required training and registration’.

<sup>16</sup> ORR’s email exchange with a potential entrant, 18 June 2020.

hardware and software and computer based tests (some of it generic, other specialist to train driver testing), and also the desks, stationery, and other materials that are required in order for candidates to complete paper-based tests.<sup>17</sup>

## Implications for market definition and RACF's position within the market

- 3.11 The buyers of train driver psychometric testing are GB's passenger and freight train operating companies.
- 3.12 Psychometric testing of the sort described in the previous subsection of this document appears to be at least a *de facto* requirement for employment as a UK train driver. An information request response submitted by RACF said that, *"...while the psychometric assessment process is not mandatory, in practice all newly qualified train drivers that the RACF is aware of will have undergone the psychometric assessment process as it has become the common standard used by the industry."*<sup>18</sup>
- 3.13 Passenger trains on the GB mainline will be primarily driver operated for the foreseeable future<sup>19</sup>, which means that, in order to run mainline passenger train services in GB, TOCs must procure or self-supply psychometric testing services. Psychometric testing is therefore an essential input to the running of both passenger and freight operations in GB. The key question for market definition<sup>20</sup> is whether there is sufficient scope for demand- and or supply-side substitution such that a hypothetical monopolist of the particular set of tests that is currently administered by RACF members would be prevented from sustaining prices a small but significant amount above competitive levels as a result of competitive pressures.
- 3.14 As noted above, the available evidence suggests that that to date all psychometric testing for train drivers in GB has been administered by RACF members. The Investigation found evidence suggesting that TOCs who are

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<sup>17</sup> Note of meeting between RACF and ORR on 26 March 2021.

<sup>18</sup> RACF's response to ORR's section 26 notice dated 22 October 2021

<sup>19</sup> See ORR, 'Goal-setting Principles for Railway Health and Safety: Additional factors to be considered for operation of passenger trains in GOA4, Unattended Train Operation configuration', January 2022.

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[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/284423/of\\_t403.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284423/of_t403.pdf)

seeking to procure psychometric testing services are not prepared to contract with potential testing suppliers who are not RACF members, even where such suppliers have offered to undercut the prices of incumbent suppliers. Train operators' willingness to work with these suppliers appears to be conditional on their first obtaining RACF membership.<sup>21</sup>

- 3.15 An information request response submitted by RACF suggested that it was not aware of any other organisations within GB which duplicated the activities of RACF. RACF was not aware of any other organisations (outside of RACF) active in the provision of psychometric testing services either. On this basis, the Investigation proceeded on the basis that RACF is the only industry group of psychometric assessment centre representatives in GB and its members between them provide all train driver psychometric testing in GB.
- 3.16 An information request response submitted by RACF stated that it would technically be possible for an organisation to set up an assessment centre without RACF membership, subject to compliance with current safety standards<sup>22</sup> and regulatory clearance, although RACF noted that, "*...without being a member of the RACF (or an equivalent if one existed) such organisation would not have access to support and mentoring by existing assessment centres, which helps to support adherence to the industry standard.*"<sup>23</sup> Further, as mentioned in paragraphs 3.6-3.9, it appears that membership of RACF is necessary in order to access the assessment materials required to conduct assessments to the RIS-3751-TOM standard as well as the national database.
- 3.17 In the light of the above information, Our Investigation has reached a preliminary view that the relevant product market for the purpose of this Investigation is no wider than the provision of train driver psychometric testing services.
- 3.18 ORR's preliminary view is that the relevant geographic market for the provision of train driver psychometric testing services is GB. Our Investigation found no evidence of instances whereby GB suppliers have offered psychometric testing services outside of GB, or of any reasons why the domestic need for RACF membership would be any less applicable to hypothetical entry by suppliers from outside GB.

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<sup>21</sup> Stakeholder meeting of 13 August 2020.

<sup>22</sup> RIS-3751-TOM

<sup>23</sup> RACF's response to ORR's section 26 notice dated 22 October 2021.

- 3.19 Membership of RACF appears to be in practice essential for the provision of such services.
- 3.20 RACF appears to act as gateway to enter the market for the provision of train driver psychometric testing services in GB, therefore the lack of objective rules of membership represents a barrier to entry. However, the early offer of commitments that ORR received from RACF means that this Investigation did not need to reach a definite conclusion on either the precise boundaries of the relevant market or on the strength of the barriers that other actual or potential suppliers of comparable services would face if they attempted to enter the market without RACF membership.

## 4. ORR's competition concerns

- 4.1 This section sets out ORR's competition concerns arising from certain of RACF's rules of membership.
- 4.2 ORR's preliminary view is that certain aspects of RACF's unpublished rules of membership constitute a decision<sup>24</sup> of an association of undertakings<sup>25</sup> which may have the object or effect of restricting or distorting competition in relation to the provision of train driver psychometric assessments.
- 4.3 As set out in section 3 of this Notice, membership of RACF appears in practice to be essential for any party wishing to provide train driver psychometric assessments.<sup>26</sup> ORR's concern is that RACF's current rules appear to have the effect of hindering new entry. This protects incumbent members at the expense of entry by new market participants and therefore, ultimately, value for money within the sector. Discussions held between ORR and market participants during August 2020 provided tangible evidence that RACF's rules had the potential to prevent entry by suppliers who were unable to enter in a timely fashion despite being willing and able to undercut the incumbents' prices.
- 4.4 ORR's specific concerns are set out below.
- (a) The rules of and processes (including timescales) around RACF's rules of membership are, by virtue of their being unpublished, not transparent.
- (i) This opacity deters potential market participants from entering this market as they are unaware of how to apply and what is required of them; and
- (ii) The lack of clarity and of public commitment to ways of working with applicants creates a clear risk of delay, if the existing members, on whom potential entrants are dependent for successful application, do not treat new applications and enquiries as a priority. This risk appears

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<sup>24</sup> For the purposes of the Chapter I prohibition, the rules constitute a decision by an association of undertakings: RACF being an industry group made up of its members who are undertakings as they engage in economic activity.

<sup>25</sup> For the purposes of the Chapter I prohibition, RACF is an association of undertakings. Each of its members is active on one or more markets. The RACF is a "self-standing entity with ongoing existence" (SEL Imperial v BSI, [2010] EWHC 854 (Ch), paragraph 41). It is irrelevant that it does not conduct economic activity of its own, or that it is a loose-knit organisation.

<sup>26</sup> See paragraphs 3.15 and 3.16 on the importance of RACF in the relevant market.



to have been borne by the experience of market participants to date.

- (b) RACF's requirement for prospective members to produce a business plan, without any explanation for such a requirement or any statement of the minimum objectively verifiable standards which such a plan must meet, has the potential to hinder new entry, by adding to the overall timescales of entry and by giving rise to concerns on the part of potential entrants about incumbents having access to their commercially sensitive information.
- (c) RACF's requirement for new members to have a mentor is not properly explained, and gives rise to potential competition concerns where a mentor is an actual or potential competitor of a prospective new member. Mentors are selected from a pool of representatives of existing RACF members; and RACF members are TOCs, FOCS and OPC (as described paragraph 2.14). During the Investigation we were made aware of specific concerns about the willingness of incumbent suppliers to co-operate with potential entrants over issues such as training<sup>27</sup>. Specifically:
  - (i) It appears that having a mentor is important in order for potential competitors to access essential training courses for the purposes of acting as an assessment centre, but RACF offers no guarantee that prospective members will be allocated a mentor, risking delay to market entry;
  - (ii) The available evidence suggests that mentors have a role in assessing the quality of the centres run by prospective members' assessment centres, but that there are no transparent criteria by which such assessments are conducted. This gives rise to potential issues analogous to the wider issues associated with the lack of transparency of RACF's rules and processes, particularly where there is a reliance on existing members who may not view new applications as a priority; and
  - (iii) A closely related point is that we were told that, in the event that their assessment finds gaps in a prospective member's capabilities, mentors may recommend unspecified further training and guidance and a further action plan, but that such recommendations appear to be at the

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<sup>27</sup> Minute of meeting with a market participant dated 13 August 2020.

mentor's discretion, there being no published criteria or guidance in this respect.

- (d) Finally, as noted above there is a risk of discrimination against potential competitors in cases where actual or potential competitors play a role in deciding on membership applications. A key point related to this is that under the existing rules, there appears to be no established route for appeal in cases where an application has been rejected, which again risks elongating timescales and acting as a deterrent .

4.5 Based on all of these factors ORR's preliminary view is that RACF's rules as a whole have the effect of distorting competition in the relevant market by imposing significant barriers to entry on new market participants.

# 5. The commitments offered by RACF

## Introduction

5.1 For the purpose of addressing ORR's competition concerns as summarised in the previous section 4, RACF has offered commitments, based on a new published set of rules of membership, which are provided in the Annex 1 to this Notice.

## RACF's proposed commitments

5.2 RACF has offered commitments as follows (see also Schedule 1), with the stated purpose of addressing ORR's competition concerns:

- (a) To adopt and publish rules of membership in the form agreed in draft by ORR;
- (b) For a period of five years from the date of this commitments document, to notify ORR of any changes made to the rules and/or the policies referred to within the rules;
- (c) To make the rules of membership publicly available on RACF's website within 28 days of being first implemented by RACF; and
- (d) To retain information on membership applications and decisions for a period of 3 years following each application and decision and to provide such information to ORR on reasonable request and on reasonable notice (and in accordance with Data Protection Laws); and
- (e) To include on RACF's website an explanatory note explaining what the rules are intended to achieve.

# 6. ORR's assessment of the proposed commitments

## Introduction

- 6.1 For the reasons set out below, ORR has reached the provisional view that its competition concerns would be addressed by the proposed commitments, once implemented. Formal acceptance of the proposed commitments would result in ORR terminating the Investigation and not proceeding to a decision on whether the Chapter I Prohibition has been infringed.
- 6.2 A decision by ORR accepting commitments would not constitute a statement as to whether RACF infringed competition law.

## The statutory framework and Procedural Guidance

- 6.3 Pursuant to section 31A of the Act, for the purposes of addressing the competition concerns it has identified, ORR may accept from such person (or persons) concerned as it considers appropriate, commitments to take such action (or refrain from taking such action) as it considers appropriate.
- 6.4 The Procedural Guidance states that ORR is likely to consider it appropriate to accept commitments only in cases where: (a) the competition concerns are readily identifiable; (b) the competition concerns are addressed by the commitments offered; and (c) the proposed commitments are capable of being implemented effectively and, if necessary, within a short period of time.<sup>28</sup>
- 6.5 However, ORR will not accept commitments where compliance with such commitments and their effectiveness would be difficult to discern or where ORR considers that not to complete the relevant aspect of its investigation and make a decision would undermine deterrence.<sup>29</sup>

## Assessment

- 6.6 As explained in section 4 above, RACF's conduct has given rise to competition concerns due to foreclosure of the market to new entrants.

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<sup>28</sup> Procedural Guidance, paragraph 10.18.

<sup>29</sup> Procedural Guidance, November 2020, paragraph 10.20.

6.7 ORR has reached the provisional view that the proposed commitments, once implemented, would address its competition concerns. Taking each concern in turn, ORR's provisional views are as follows:

- (a) *Rules of membership not based on objective, transparent, publicly available criteria* – RACF has drawn up a list of amended rules of membership which will be publicly available on its website. Critical to the effectiveness of the proposed new rules relative to their predecessor is that they will be published on RACF's website. The requirements that new applicants have to fulfil (rule 9 of the rules of membership) are clear and, in the event of dispute, can be referred for independent adjudication. This addresses ORR's concern that there was not a level playing field for applicants because they were previously unaware of how to apply and what was required of them.
- (b) *Requirement to produce a business plan* – RACF's proposed rules of membership do not include a requirement to produce a business plan. RACF included a rule (Rule 9.1) that provides a list of requirements that applicants need to provide with their applications. ORR has reviewed the list of requirements and is satisfied that the information requirements are proportionate and mitigate the risks around applicants having to share competitively sensitive information with competitors or potential competitors. This also obviates the risk that applicants are put off from applying due to concerns about the sharing of such information.
- (c) *Requirement to have a mentor* – RACF's proposed rules of membership contain specific timescales within which a mentor will be made available, thereby addressing ORR concern that uncertainty over mentoring timescales can impose a significant barrier to entry. Further, to the extent that a mentor's role involves assessment of a probationary member, it will be done against objectively verifiable standards and the outcome of such assessment can be appealed by the probationary member in the event that the probationary member disagrees with the assessment: ORR's view is that that this addresses ORR's concerns that the mentorship requirements allowed for bias against applicants, and that these new rules reduce the barriers to entry which were created by the previous requirements.
- (d) *Risk of discrimination against potential competitors* – RACF's proposed rules of membership include scope for appeals to an independent party where a member is dissatisfied with decisions of RACF, including in relation to admittance to full membership, the costs of which will be covered by RACF in the event of a successful appeal. This addresses the concerns that the

previous requirements allowed for discrimination against potential competitors in the market.

- 6.8 In ORR's view, the proposed commitments are capable of being implemented effectively and within a short period of time.
- 6.9 Furthermore, given the straightforward nature of the proposed commitments, compliance will not be difficult to ascertain and monitor. Any new potential entrant will also be able to inform ORR if there are issues relating to compliance with the commitments.
- 6.10 ORR's view is that accepting commitments in this case would not undermine deterrence. The proposed commitments, once implemented, would entail significant pro-competitive amendments to RACF's rules of membership and operations, injecting transparency and objectivity into the membership process.
- 6.11 ORR's action in pursuing this investigation and accepting these commitments will send a strong signal to other trade associations within the rail sector, deterring them from implementing the same or similar rules or practices that protect their members from competition.
- 6.12 By accepting the proposed commitments early on in its investigation, ORR would be able to resolve its competition concerns quickly, providing certainty to new potential entrants and the industry.
- 6.13 Accepting the proposed commitments would not preclude ORR from taking further enforcement action in relation to any further suspected breaches of competition law concerning the provision of psychometric assessment services in the UK.

# 7. ORR's intentions and invitation to comment

- 7.1 In light of the above, ORR provisionally considers that the proposed commitments, as set out in Schedule 1, are sufficient to address its competition concerns. Therefore, ORR intends to accept the proposed commitments by means of a formal commitments decision.
- 7.2 As required by section 31A(5) and paragraph 2(2) of Schedule 6A of the Act, ORR now invites interested third parties to make representations on the proposed commitments and will take such representations into account before making its final decision whether to accept the proposed commitments.

## Invitation to comment

- 7.3 As noted above, ORR has not reached a final view on the matter of the commitments and invites all interested parties to submit observations and evidence in order to assist ORR in its final assessment of the proposed commitments.
- 7.4 Any person wishing to comment on the proposed commitments should submit written representations to Loic Laude at [Loic.Laude@orr.gov.uk](mailto:Loic.Laude@orr.gov.uk) by 3 March 2022 by 5pm.
- 7.5 ORR is interested to hear from anyone wishing to comment on the Proposed commitments. Any non-disclosure agreement a party may have in place with RACF should not prevent them from responding to this consultation. How ORR handles confidential information is set out in paragraph 7.8 below.
- 7.6 ORR is particularly interested to hear any views on whether the proposed commitments, as set out in Schedule 1, are sufficient to address the competition concerns set out in section 4.
- 7.7 In any representations to ORR on the proposed commitments, please refer as far as possible to the relevant heading(s) and/or paragraph(s) within the Proposed commitments.

## Confidentiality

- 7.8 ORR does not intend to publish the responses to the consultation with any commitments decision or notice to provisionally accept any modified commitments. However, the information contained in the responses may be used or summarised on an anonymous basis in these documents.
- 7.9 In the event that the proposed commitments are not accepted and ORR is considering disclosing the information (such as in or with a statement of objections), it will revert to the provider of that information to obtain representations on confidentiality. ORR will then consider those representations before deciding whether the information should be disclosed under Part 9 of the Enterprise Act 2002.



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# Schedule 1: The commitments offered by RACF

## 1. INTRODUCTION

1.1. On 12 March 2021, ORR commenced an investigation under section 25 of the Act in relation to the in relation to rules pertaining to membership of RACF in the UK.

1.2. In order to address ORR's competition concerns, RACF hereby offers Commitments under section 31A of the Act.

1.3. Consistent with sections 31A and 31B of the Act, the Commitments are offered on the basis that if ORR accepts the Commitments in accordance with section 31A(2) of the Act, it shall not continue the investigation, make a decision within the meaning of section 31(2) of the Act, or give a direction under section 35 of the Act.

1.4. The offering of the Commitments by RACF does not constitute an admission of any wrongdoing by it and nothing in these Commitments may be construed as implying that RACF agrees with any concerns identified by ORR in its investigation, including in a Commitments Decision. RACF has not been the subject of any infringement decision or statement of objections in respect of the investigation

## 2. DEFINITIONS

2.1. For the purposes of these Commitments, the following definitions apply:

**“Act”** means the Competition Act 1998;

**“Commitments”** means the commitments given by RACF pursuant to section 31A of the Act;

**“Commitments Decision”** means a formal decision by ORR under section 31A of the Act to accept Commitments, such that section 31B of the Act applies;

**“Data Protection Laws”** means all applicable data protection and privacy legislation in force from time to time in the UK including without limitation the UK GDPR; the Data Protection Act 2018 (and regulations made thereunder) (**DPA 2018**); and the Privacy and Electronic Communications Regulations 2003 (SI 2003/2426) as amended.

**“Effective Date”** means the date on which ORR notifies RACF of a Commitments Decision;

**“ORR”** means the Office of Rail and Road

**“Purpose of the Commitments”** has the meaning given in paragraph 3.1;

**“Rules”** means RACF’s new rules of membership

**“RSSB”** means the Rail Safety & Standards Board;

**“Working Day”** means any day other than a Saturday, Sunday or any other day that is a public holiday in England

### 3. THE COMMITMENTS

3.1. The “Purpose of the Commitments” is to address ORR’s concerns that, without sufficient regulatory scrutiny and oversight, RACF’s rules of membership infringe the Chapter I prohibition in that they constitute a decision of an association of undertakings which has as its object or effect the prevention, restriction or distortion of competition in relation to the provision of train driver psychometric assessments in the UK.

3.2 RACF will:

- a. adopt the Rules in the form agreed in draft by ORR (see Annex 1);
- b. for a period of 5 (five) years from the date of this Commitments document, to notify ORR of any changes made to the Rules and/or the policies referred to within the Rules;
- c. make the Rules of membership publicly available on RACF's website within 28 days of being first implemented by RACF; and
- d. retain information on membership applications and decisions for a period of 3 (three) years following each application and decision and provide such information to ORR on reasonable request and on reasonable notice (and in accordance with Data Protection Laws).
- e. to include on RACF’s website an explanatory explaining what the Rules are intended to achieve.

## 4. VARIATION OR SUPERSESSON

4.1 RACF may offer a variation or substitution of the Commitments as envisaged by section 31A(3) of the Act.

## 5. EFFECT OF INVALIDITY

5.1 Should any provision of these Commitments be contrary to law or invalid or unenforceable for any reason, RACF will continue to observe the remaining provisions, which shall remain valid and enforceable.

# Annex 1: RACF's Rules of Membership



## RACF Rules of Membership

## DRAFT

# RULES OF MEMBERSHIP OF RAIL ASSESSMENT CENTRE FORUM

## 1. DEFINITIONS AND INTERPRETATION

1.1 In these Rules of Membership, unless the context otherwise requires:

1.1.1 **Approved Mentor** means a representative of a Full Member who:

(1) has at least two (2) years' experience of managing a psychometric assessment centre or centres; and

(2) has the competencies required for that role under the RACF Audit Policy;

1.1.2 **BPS** means the British Psychological Society;

1.1.3 **Candidate Privacy Notice** means the RACF candidate privacy notice which can be obtained from the Secretary by Members on request (as varied, superseded or updated from time to time in accordance with these Rules);

1.1.4 **Chairperson** means the chairperson of the RACF from time to time, whose role is further described in Rule 16.15.1;

1.1.5 **Compliance Officer** means the compliance officer of the RACF from time to time, whose role is further described in Rule 16.15.3;

1.1.6 **Confidential Information** means the confidential or proprietary information relating to the business, assets, affairs, customers, clients, suppliers or plans of a Member;

1.1.7 **Controller to Processor Agreement** means the data processing agreement between RACF and the Database Provider, a copy of which can be obtained from the Secretary by Members on request;

1.1.8 **Data Protection Law** means all applicable data protection and privacy legislation in force from time to time in the UK including without limitation the UK GDPR; the Data Protection Act 2018 (and regulations made thereunder) (**DPA 2018**); and the Privacy and Electronic Communications Regulations 2003 (SI 2003/2426) as amended;

1.1.9 **Data Sharing Agreement** means the data sharing agreement entered into by the Members which governs the sharing of personal data between the Members, a copy of which can be obtained from the Secretary by Members on request;

1.1.10 **Database** means the Traincrew Register Database, which contains information relating to prospective train drivers, and in particular contains information in relation to the psychometric assessments of such prospective train drivers, and is hosted by the Database Provider;

1.1.11 **Database Provider** means the third party that hosts the Database from time to time;

- 1.1.12 **Executive Committee** means the executive committee of RACF constituted accordance with Rule 16;
- 1.1.13 **Extranet** means the extranet maintained by the RSSB and available <https://catalogues.rssb.co.uk/extranet>;
- 1.1.14 **Full Member** means a Member having Full Service Membership;
- 1.1.15 **Full Service Membership** means the category of Membership described at Rule 8.1.1;
- 1.1.16 **Joint Controllers** has the meaning given to it in Data Protection Law;
- 1.1.17 **Member** means a member of the RACF from time to time (and **Members** shall be construed accordingly);
- 1.1.18 **Membership** means membership of the RACF;
- 1.1.19 **Membership Criteria** means the RACF's Membership criteria as set out in Rule 8;
- 1.1.20 **Mentoring** means:
- (1) the provision and recording of guidance, oversight and training prior to the first psychometric assessments conducted by the Probationary Member; and then on a regular basis during the remaining period of the Probationary Member's Probationary Membership;
  - (2) the attending of assessments in person for the first three (3) days during which psychometric assessments are conducted by the Probationary Member in order to assist with the provision of assessments and provide oversight and guidance;
  - (3) carrying out of an audit within the first three (3) months of the Probationary Member's Probationary Membership for the purposes of ensuring that assessments are carried out to the National Standard;
  - (4) to the extent identified during the initial audit by an Approved Mentor (acting reasonably) as necessary, carrying out of any further audits during the remaining period of the Probationary Member's Probationary Membership; and
  - (5) the providing of confirmation to the Secretary of the RACF that the relevant Probationary Member has met the National Standard,
- in each case:
- (i) by an Approved Mentor (which in relation to Rules 1.1.20(c) and (d) shall (where possible) be a separate Approved Mentor to the primary Approved Mentor allocated to the relevant Probationary Member in accordance with Rule 7.2.2);
  - (ii) in accordance with the RACF Audit Policy and RACF Required Training Policy, as applicable; and
  - (iii) acting under and in accordance with the guidance and instruction of the RACF Mentoring Sub-Group,
- for the purposes of confirming that psychometric assessments are being conducted to levels that meet or exceed the National Standard (and **Mentored** shall be construed accordingly);

- 1.1.21 **National Standard** means the RIS-3751-TOM Issue 3, Rail Industry Standard for Train Driver Selection;
- 1.1.22 **ORR** means the Office of Rail and Road or any other authority or government department to which its functions are transferred
- 1.1.23 **Probationary Member** means a Member having Probationary Membership;
- 1.1.24 **Probationary Membership** means the category of Membership described at Rule 8.2;
- 1.1.25 **RACF** means the Rail Assessment Centre Forum, an unincorporated association consisting of its members from time to time;
- 1.1.26 **RACF Audit Policy** means RACF's internal policy setting out the audit obligations for its Members, obtainable from the Secretary on request by Members (as varied, superseded or updated from time to time);
- 1.1.27 **RACF Database Access Policy** means RACF's internal policy governing Member access, maintenance and population of the Database, obtainable from the Secretary on request by Members (as varied, superseded or updated from time to time);
- 1.1.28 **RACF Mentoring Sub-Group** means the sub-group appointed by the Executive Committee from time to time to maintain and update the RACF Required Training Policy and provide support, instruction and guidance to those Full Service Members providing Mentoring;
- 1.1.29 **RACF Required Training Policy** means RACF's internal policy setting out the training requirements of Members, obtainable from the Secretary on request by Members (as varied, superseded or updated from time to time);
- 1.1.30 **RACF Website** means the website with the following address: <https://racf.uk/>;
- 1.1.31 **Rule** means any individual rule comprising part of these Rules;
- 1.1.32 **Rules** means these Rules of Membership (as varied, superseded or updated from time to time);
- 1.1.33 **Secretary** means the secretary of the RACF from time to time, whose role is further described in Rule 16.15.2;
- 1.1.34 **Test Results** means all documents (in whatever form and whether in hard copy or stored digitally) recording test results (such as score sheets and test papers) excluding the contents of the Database;
- 1.1.35 **Train Driver Procedures Manual** means the RACF train drivers procedures manual, available on the Extranet; and
- 1.1.36 **UK GDPR** has the meaning given to it in section 3(10) (as supplemented by section 205(4)) of the Data Protection Act 2018.
- 1.2 Headings in these Rules are used for convenience only and shall not affect the construction or interpretation of these Rules.
- 1.3 Unless expressly provided otherwise, a reference to a statute or statutory provision shall include any subordinate legislation from time to time made under that statute or statutory provision.

- 1.4 Any word following the terms "including", "include", "in particular", "for example" or any similar expression shall be construed as illustrative and shall not limit the sense of the words preceding those terms.
- 1.5 References to communication "in writing" shall include communication by email.
- 1.6 References to a document shall, unless expressly provided otherwise, include that document as amended, updated and/or replaced from time to time.

## **2. NAME AND STATUS**

- 2.1 The association governed by these Rules is known as the **Rail Assessment Centre Forum or RACF**.
- 2.2 The RACF is a not for profit unincorporated association comprised of the Members.

## **3. OBJECTS AND PURPOSE OF RACF**

- 3.1 The RACF exists for the purposes of:
- 3.1.1 promoting best practice and consistency in relation to the psychometric assessment of prospective train drivers in the United Kingdom, thereby contributing to ensuring the safety and safe operation of trains on the rail network in the United Kingdom;
  - 3.1.2 providing a forum for discussions between its Members concerning best practice in relation to the psychometric assessment of prospective train drivers;
  - 3.1.3 confirm that Members' assessment centres conduct psychometric assessments on prospective train drivers to levels that meet or exceed the National Standard; and
  - 3.1.4 maintaining, updating and sharing of relevant information relating to the psychometric assessment of prospective train drivers between Members including in relation to the Database.
- 3.2 The RACF will carry out its functions in a transparent and non-discriminatory way and, to the extent appropriate having regard to the commercial sensitivity of information, shall encourage and foster co-operation between rail industry parties to achieve the purposes of the RACF.

## **4. CONTACTING THE RACF**

- 4.1 The RACF can be contacted by email at [contact@racf.uk](mailto:contact@racf.uk), or at such other email address as the Executive Committee from time to time decides (at an Executive Committee meeting and in accordance with Rule 16.19.4) and communicates via the RACF Website.

## **5. STATUS AND AMENDMENT OF THESE RULES OF MEMBERSHIP**

- 5.1 These Rules set out the basis of Membership of the RACF.
- 5.2 Any Member may propose an amendment to the Rules. Proposed amendments to these Rules must be submitted in writing by the relevant Member to the Secretary, who will include the proposal in the next Members' Meeting. Any amendment to these Rules will require at least seventy-five per cent (75%) of the Members present at the relevant Members' Meeting (whether in person or by proxy) to have voted in favour of such change.



## 6. POLICIES AND THEIR AMENDMENT

- 6.1 The RACF shall have, and make available to Members and applicants for Membership, the following policies:
- 6.1.1 RACF Audit Policy;
  - 6.1.2 RACF Database Access Policy; and
  - 6.1.3 RACF Required Training Policy.
- 6.2 Subject to Rule 6.3, the Executive Committee and any Member shall be free to propose further policies or amendments to any existing policies and such proposals shall be discussed and voted upon at the next Members' Meeting. Any such proposals may be approved by a simple majority vote of the Members present at the relevant Members' Meeting (whether in person or by proxy).
- 6.3 Where such a proposal is made by a Member, they shall submit that proposal in writing to the Secretary. If the proposal is received less than 1 week prior to the date of the next Members' Meeting, then the proposal shall not be considered at that meeting but at the following Members' Meeting.

## 7. TYPES OF MEMBERSHIP

- 7.1 Membership shall be available to those entities meeting the Membership Criteria for the category of Membership to which they wish to belong.
- 7.2 The RACF has the following categories of Membership, each of which has the benefits set out in relation to it in this Rule:

7.2.1 **Full Service Membership:** Full Service Members:

- (1) shall (subject to any conditions and restrictions set out in the RACF Database Access Policy in relation to Full Service Members) have the right to use and access the Database; and
- (2) may attend all RACF Members' Meetings (as defined at Rule 16.1) and (subject to payment of any applicable charge) RACF events.

Detail on the requirements for Full Service Membership is set out in the Membership Criteria.

7.2.2 **Probationary Membership:** Probationary Members:

- (1) shall (subject to any conditions or restrictions set out in the RACF Database Access Policy in relation to Probationary Members) have the right to use and access the Database; and
- (2) may attend all RACF Members' Meetings and (subject to payment of any applicable charge) RACF events.

Probationary Members shall be appointed an Approved Mentor within six (6) weeks of being granted Probationary Membership by the Executive Committee in accordance with Rule 9.2, and this Approved Mentor shall support the Probationary Member through the various training and audit requirements set out in the RACF Training Policy. Detail on the requirements for Probationary Membership is set out in the Membership Criteria.

7.3 Successful applicants for Probationary Membership shall (subject to their continuing compliance with these Rules) be granted such Membership for two years from the date of their admission in accordance with Rule 9.2.

## 8. MEMBERSHIP CRITERIA

8.1 The Membership Criteria for each of the categories of Membership set out in Rule 7.2 is as follows:

8.1.1 **Full Service Membership:** Full Service Members shall:

- (1) be organisations that have had in operation for at least two years, and continue to operate, an assessment centre or centres providing the full range of psychometric assessments of prospective train drivers set out in the National Standard;
- (2) provide such assessments to levels that meet or exceed the National Standard;
- (3) have staff that are qualified (to the relevant levels set out in the RACF Training Policy) and therefore able to provide psychometric assessments to the National Standard;
- (4) have premises and security measures that are considered suitable (in accordance with the requirements set out in the "Housekeeping" provisions of Appendix A of the RACF Audit Policy) to enable the provision of psychometric assessments, and the storage of testing materials and equipment and Test Results, to the standards required by these Rules;
- (5) have access to the Extranet;
- (6) have the BPS "TUO-A" qualification;
- (7) be on the BPS "RQTU Register";
- (8) have RSSB "MMI" certification; and
- (9) have an ORR registration number.

8.2 **Probationary Membership:** Probationary Members shall:

- (1) be organisations that wish, and can demonstrate that they are able, to establish an assessment centre or centres providing all of the psychometric assessments of prospective train drivers set out in the National Standard;
- (2) provide such assessments to levels that meet or exceed the National Standard;
- (3) have staff that are willing to commit to become qualified (to the relevant levels set out in the RACF Training Policy) and therefore able to provide psychometric assessments to the National Standard;
- (4) have premises and security measures that meet the requirements set out in the "Housekeeping" provisions of Appendix A of the RACF Audit Policy, to enable the provision of psychometric assessments, and the storage of testing materials and equipment and Test Results, to the standards required by these Rules; and
- (5) have access to the Extranet.

## **9. MEMBERSHIP**

### ***New Members***

- 9.1 Every application for Membership shall be made in writing to the Secretary and shall include the following elements:
- 9.1.1 a description of the applicant's business or proposed business (as applicable and excluding any commercial sensitive information);
  - 9.1.2 the number of assessments that the applicant envisages conducting in any year;
  - 9.1.3 details of the proposed manager for the assessment centre(s) or proposed assessment centre(s), including the manager's qualifications;
  - 9.1.4 the number of assessors within the staff to be retained by the Member, including the necessary qualifications they hold or will hold;
  - 9.1.5 details of the proposed premises for the assessment centre(s) or proposed assessment centre(s);
  - 9.1.6 details of the security measures in place or to be put in place for storage of testing materials and equipment and Test Results;
  - 9.1.7 proposed timescales for setting up any proposed assessment centre(s);
  - 9.1.8 confirmation that the applicant will:
    - (1) enter into and comply with the Data Sharing Agreement;
    - (2) comply with the RACF Database Access Policy; and
    - (3) use and publish a privacy notice substantially in the form of the Candidate Privacy Notice; and
  - 9.1.9 confirmation that the applicant has read these Rules, the RACF Audit Policy, the RACF Database Access Policy and the RACF Required Training Policy and understands that Membership is on the basis of those documents and remains at all times conditional on continuing compliance with them.
- 9.2 The Executive Committee will approve or reject each application for Membership, and determine the appropriate category of Membership, strictly in accordance with the Membership Criteria.
- 9.3 Membership approval or rejection will be communicated in writing by the Secretary to the applicant within forty-eight (48) calendar days of the date on which the application for Membership was received by the RACF and within five (5) calendar days of the date on which the decision is made.
- 9.4 If the application for Membership is rejected the Secretary shall provide written reasons for the decision. Applicants may request that the decision of the Executive Committee is reviewed in accordance with Rule 18.
- 9.5 When an applicant's Membership application is approved in accordance with Rules 9.2 or 18.4, the applicant shall be admitted to the relevant category of Membership.

## **10. MEMBER OBLIGATIONS**

10.1 All Members shall, at all times:

- 10.1.1 comply with these Rules (and in no case will ignorance of a Rule be an excuse for a breach thereof or for a failure to comply therewith);
- 10.1.2 comply with the RACF Audit Policy;
- 10.1.3 ensure that assessment days are run at least four (4) times per calendar year;
- 10.1.4 appoint a designated assessment centre manager with at least two (2) years' experience of managing or working at an appropriate level within a psychometric assessment centre and whose details shall be shared with the RACF;
- 10.1.5 if they are a Full Member, where requested by the Executive Committee, to work closely with a Probationary Member for the purposes set out in Rule 11.1;
- 10.1.6 assist with ensuring information contributed, including into the Database, is up to date and accurate;
- 10.1.7 safely and securely retain all Test Results for a period of at least two years following the date of the test to which they relate;
- 10.1.8 only use Confidential Information received from other Members and applicants for Membership for and in pursuance of the purposes of the RACF as set out in Rule 3.1 and to the extent necessary for those purposes;
- 10.1.9 not disclose any Confidential Information received from other Members and applicants for Membership, other than to other Members in accordance with the purposes of the RACF as set out in Rule 3.1 and to the extent necessary for those purposes;
- 10.1.10 comply with Data Protection Law;
- 10.1.11 not behave in any manner which will bring the RACF (or any Member) into disrepute or otherwise damage its reputation or standing;
- 10.1.12 attend no less than half of the RACF events / meetings held during each calendar year;
- 10.1.13 keep confidential all non-public details of testing materials and equipment knowledge of which would provide an applicant for assessment with an unfair advantage;
- 10.1.14 submit to such audits as are required by the RACF Audit Policy;
- 10.1.15 ensure that all their assessors are registered with the ORR and the BPS;
- 10.1.16 ensure that all their assessors undertake and complete, all necessary training as set out in the RACF Required Training Policy (including where required in order to achieve Full Service Membership); and
- 10.1.17 provide a standard of service at their assessment centre(s) that meets industry best practice and the standards set by the documents referenced at Rule 13.1.

10.2 Members shall notify the Secretary in writing as soon as reasonably practicable of:

- 10.2.1 their postal and email addresses for written communications and any change of such addresses, and
- 10.2.2 any circumstances affecting their continuing eligibility for the category of Membership to which they belong.

10.3 Members shall promptly pay any contributions or fees reasonably stipulated by the Executive Committee, including but not limited to the annual Database maintenance fee.

## **11. PROBATIONARY MEMBERS**

11.1 In addition to the obligations of all Members in Rule 10, all Probationary Members shall be Mentored by an Approved Mentor or Approved Mentors.

11.2 If a Probationary Member refuses to accept Mentoring in accordance with Rule 11.1 and (following their being notified of the failing by the RACF) the Probationary Member does not rectify the failing within a reasonable period (not exceeding one (1) calendar month), then the Executive Committee may terminate their Membership with immediate effect by simple majority vote.

11.3 After a period of two years, provided the Probationary Member meets the Full Service Membership criteria as set out in Rule 8.1.1, the Probationary Member will automatically be granted Full Service Membership.

## **12. RESIGNATION**

12.1 A Member shall give no less than three (3) months' notice of its intention to resign their Membership, such notice to be made in writing to the Secretary. The notice period shall commence upon date of receipt of such notice by the Secretary.

12.2 Upon resignation, the resigning Member shall return or destroy all assessment materials obtained in their capacity as a Member.

12.3 The resigning Member agrees to submit to an audit, to be carried out by the Executive Committee (or any agent or external auditor appointed by the Executive Committee) and in accordance with the RACF Audit Policy, for the purposes of ensuring that all assessments undertaken have been carried out to the standards required by RACF as set out in these Rules, to enable an orderly handover of any tasks that following the resigning Member's resignation will need to be undertaken by other Members and as otherwise required by the RACF Audit Policy.

## **13. DISCIPLINE, SUSPENSION AND EXPULSION**

13.1 Where a Member or its assessors: (a) materially fails to comply; or (b) repeatedly fails to comply in such a manner as to reasonably justify the opinion that the Member's conduct is inconsistent with it having the intention or ability to comply with such requirements, with:

- 13.1.1 these Rules;
- 13.1.2 the National Standard;
- 13.1.3 the Data Sharing Agreement;
- 13.1.4 the Candidate Privacy Notice;
- 13.1.5 the Train Driver Procedures Manual;
- 13.1.6 the RACF Required Training Policy; and/or

13.1.7 the RACF Audit Policy (and any audit carried out pursuant to it),

the Executive Committee shall provide written notice to the relevant Member of their failure and may take a range of further action, as detailed in Rule 13.2.

13.2 Where a Member is in breach of the requirements referenced in Rule 13.1, the Executive Committee shall (provided that it acts reasonably and proportionately) have the power to take a range of actions, including:

13.2.1 requiring the breaching Member to undertake such additional training and assessments within a specific timeframe as is required to remove any breach and ensure the Member is able to meet the National Standard;

13.2.2 requiring the breaching Member to undertake additional audits (to be conducted in accordance with the RACF Audit Policy) within a specific timeframe;

13.2.3 suspension or withdrawal of access to the Database with immediate effect;

13.2.4 notification to the Office of Rail and Road of the breaching Member's non-compliance; and

13.2.5 where the Member has failed to remedy its breach within a reasonable time period (to be no later than thirty (30) calendar days from the date the Member was notified of the breach pursuant to Rule 13.1), termination of Membership with immediate effect.

13.3 Where the Executive Committee reasonably suspects that a Member may be in breach of these Rules, the Executive Committee shall have the power to take a range of actions including suspension of Membership pending investigation into the potential breach and/or requiring a Member's representative to cease to hold office as a member of the Executive Committee pending investigation into the Member's alleged breach. Members shall co-operate with the Executive Committee including by providing copies of documents and/or other information reasonably required by the Executive Committee on request.

13.4 The decisions of the Executive Committee taken pursuant to this Rule 13 may be challenged by a Member through the procedure set out in Rule 18.

## **14. LIABILITY**

14.1 Nothing in these Rules shall exclude any Member's liability for:

14.1.1 liabilities arising in connection with the Database and/or any breach of Rule 15;

14.1.2 death or personal injury caused by its negligence, or the negligence of its employees, agents or subcontractors (as applicable);

14.1.3 fraud or fraudulent misrepresentation; and

14.1.4 any matter in respect of which it would be unlawful for a Member to exclude or restrict its liability.

14.2 Subject to Rule 14.1, the liability of Members shall be limited in any calendar year to a value equal to the amounts they are required to contribute to the RACF during such calendar year.

## **15. THE DATABASE**

15.1 All Members shall agree to and are subject to the terms of the Data Sharing Agreement and the Controller to Processor Agreement. Where a Member fails to sign and return a copy of the Data

Sharing Agreement and/or the Controller to Processor Agreement, but continues to use the Database, that Member shall be deemed to have agreed to the Data Sharing Agreement and Controller to Processor Agreement, and shall be bound by their terms.

15.2 All Members shall take reasonable steps to ensure that the Database is maintained in accordance with the Data Sharing Agreement and the RACF Database Access Policy.

15.3 All Members shall meet their obligations under Data Protection Law in their capacity as Joint Controllers in relation to the Database.

15.4 Any proposed changes to the structure, management or hosting of the Database must be submitted to the Secretary, who will include the proposal in the agenda of the next Members' Meeting. Any changes must be approved by a simple majority of the Members present at the relevant Members' Meeting (whether in person or by proxy).

## **16. GOVERNANCE**

### ***Members' Meetings***

16.1 RAFC shall have the following Members' Meetings, open to all Members:

16.1.1 an annual general meeting to be held once in any calendar year, which may be attended virtually or in person. At the annual general meeting the members of the Executive Committee will be elected; and

16.1.2 extraordinary general meetings, to be convened by the Executive Committee upon:

(1) written request signed by no less than twenty per cent (20%) of Members; or

(2) where the Executive Committee decides (at an Executive Committee meeting and in accordance with Rule 16.19.4) that the holding of an extraordinary general meeting is necessary or beneficial,

together, the **Members' Meetings**.

16.2 Written notice of Members' Meetings shall be given by the Chairperson or Secretary (as relevant) no less than one month in advance and must include:

16.2.1 the proposed date and time;

16.2.2 the physical location or virtual dial-in details; and

16.2.3 the agenda for the meeting (which, if it is the annual general meeting, shall include the election of members of the Executive Committee).

16.3 Unless represented by a proxy, Members should be represented at Members' Meetings by their assessment centre manager, a senior member of management or an appropriately qualified delegate.

16.4 At a Members' Meeting, unless a quorum is participating, no proposal is to be voted on except a proposal to call another Members' Meeting.

16.5 The quorum for a Members' Meeting may be fixed from time to time by a decision of the Members. Unless it is so fixed, the quorum for a Members' Meeting is five. For the purposes of assessing whether a quorum is present, each individual attending (regarding of whether they are empowered to cast proxy votes) shall only count once.

- 16.6 The Chairperson will chair Members' Meetings.
- 16.7 In the event that the Chairperson is unable to attend a Members' Meeting (for example due to their resignation or removal under Rule 16.18, illness, incapacity or death), the Executive Committee (or, in the Executive Committee's absence, the Members) may appoint a representative of a Member to fulfil the role that would have been undertaken by the Chairperson at the Members' Meeting.
- 16.8 Every Member is entitled to vote at a Members' Meeting in person (including virtually) or by proxy, provided that where a proxy is appointed the appointment is in writing and notified to the Secretary before the commencement of the Members' Meeting.
- 16.9 Subject to Rules 5.2 and 16.18.2, and provided that the relevant Members' Meeting is quorate, proposals heard during the Members' Meetings can be approved or rejected by a simple majority of the Members present (whether in person or by proxy).
- 16.10 If the number of votes for and against a proposal are equal, the Chairperson has a casting vote.
- 16.11 If a proposed decision of a Members' Meeting is concerned with a matter in relation to which a Member has a conflict of interest, that Member's representative is not to be counted as participating in the decision-making process for voting purposes. Where that person is the Chairperson, then another Member shall be appointed by the Members' Meeting to fulfil the Chairperson's role in relation to the proceedings of the Members' Meeting addressing that matter.
- 16.12 Rule 16.11 shall not apply where:
- 16.12.1 a proposal to disapply Rule 16.11 is passed by Members in a Members' Meeting (in relation to which the conflicted Member shall not be permitted to vote); or
  - 16.12.2 the Member's interest cannot be reasonably regarded as likely to give rise to a conflict of interest.
- 16.13 The Secretary shall keep minutes, inclusive of the names of the attending Members and their representatives, for all Members' Meeting in such form as may from time to time be decided by the Executive Committee. Minutes signed (including by way of electronic signature) by the Chairperson shall be evidence of the proceedings and be filed (electronically or in hard copy) for future reference by the Secretary.

#### ***Executive Committee Governance***

- 16.14 The Executive Committee shall have no less than three members and no more than five members. The Executive Committee members shall at all times include the Chairperson, the Secretary and the Compliance Officer, and no person can occupy more than one of those roles at any time. The Executive Committee may, but does not have to, also include up to two Additional Executive Members. Each member of the Executive Committee shall represent one of the Members of the RACF, and no Member of the RACF shall have more than one representative on the Executive Committee at any time.
- 16.15 **Composition of the Executive Committee:**
- 16.15.1 **Chairperson:** The Chairperson shall hold the post of RACF chairperson for no longer than two (2) years unless reappointed by a further vote at a Members' Meeting, and shall:
    - (1) be responsible for chairing the meetings of the Executive Committee and Members' Meetings; and
    - (2) be the primary point of contact for Rail Delivery Group and any other relevant organisations regarding the activities of the RACF.



16.15.2 **Secretary:** The Secretary shall hold the post of RACF secretary for no longer than two (2) years unless reappointed by a further vote at a Members' Meeting, and shall:

- (1) be responsible for taking the minutes of each meeting of the Executive Committee and each Members' Meeting, and for distributing the minutes following each meeting;
- (2) collate and agree items for each Members' Meeting agenda and the Executive Committee meetings agenda;
- (3) distribute copies of the agenda to all Members prior to each Members' Meeting;
- (4) arrange the venue and dial in details for each Members' Meeting;
- (5) receive and handle resignation requests from existing Members; and
- (6) receive and handle any review or appeal requests concerning unsuccessful applications for Membership.

16.15.3 **Compliance Officer:** The Compliance Officer shall hold the post of Compliance Officer for no longer than two (2) years unless reappointed by a further vote at a Members' Meeting, and shall:

- (1) be the primary point of contact for the Database Provider with regards to any proposed amendments to the Database or the methods of recording data;
- (2) facilitate and assist Members with registration of additional usernames in relation to the Database, or any amendments to existing users of the Database;
- (3) notify the Executive Committee of changes to assessors engaged at Member's assessment centres; and
- (4) maintain a central register of qualified assessors of prospective train drivers.

16.15.4 **Additional Executive Members:** The Additional Executive Members, if any, shall hold the post of Additional Executive Member for no longer than two (2) years unless reappointed by a further vote at a Members' Meeting, and shall provide advice to the Executive Committee on matters falling within their areas of expertise.

## 16.16 Conflicts of Interest

16.16.1 If a proposed decision of the Executive Committee is concerned with a matter in relation to which a member of the Executive Committee has a conflict of interest, that member of the Executive Committee shall not participate in the relevant proceedings of the Executive Committee and shall not vote in any decision-making process, and is not to be counted as participating in the decision-making process for voting purposes.

16.16.2 Rule 16.16.1 shall not apply where:

- (1) a proposal to disapply Rule 16.16.1 is passed by a vote of the other members of the Executive Committee (in relation to which the conflicted member of the Executive Committee shall not be permitted to vote); or
- (2) the Members' interests cannot be reasonably regarded as likely to give rise to a conflict of interest.

## 16.17 Election of the members of the Executive Committee

16.17.1 The members of the Executive Committee shall be elected by the Members during a Members' Meeting (or, where the election concerns the replacement of members of the Executive Committee that have resigned or been removed, in an extraordinary general meeting) in accordance with Rule 16.

16.17.2 Executive Committee Members may be re-elected for consecutive terms.

#### **16.18 Resignation or Removal of Executive Committee Members**

16.18.1 Where an Executive Committee Member wishes to resign from their role on the Executive Committee, they shall give no less than three (3) months' notice of their intention to resign, such notice to be made in writing to the Secretary (or, where the resigning member is the Secretary, to the Chairperson). The notice period shall commence upon date of receipt of such notice by the Secretary or Chairperson (as relevant).

16.18.2 A Member may request that a member of the Executive Committee is removed from their role where such Executive Committee member's conduct has fallen short of the standards reasonably expected of them. This request will be included as a proposal, and voted upon, at a Members' Meeting in accordance with Rule 16 save that in order for the vote to be passed at least seventy-five per cent (75%) of Members present at the relevant Members' Meeting (whether in person or by proxy) must vote in favour. Where the vote is passed, an election will be held to appoint a replacement member of the Executive Committee (and other representatives of the Member whose previous representative was removed from office may stand in that election), and such election will be managed in accordance with Rule 16.17.

#### **16.19 Executive Committee Meetings and Decisions**

16.19.1 The following matters require Member approval (at a Members' Meeting) and cannot be decided by the Executive Committee:

- (1) any changes to the Rules;
- (2) any proposed financial commitments or transactions above £3,000 in value, or with particularly onerous terms;
- (3) any sale or disposal of material assets of RACF; and
- (4) election or removal of Executive Committee Members.

16.19.2 Meetings of the Executive Committee shall be held at least 2 times in any calendar year, and may be attended virtually or in person. Members of the Executive Committee may not appoint proxies to attend Executive Committee meetings on their behalf.

16.19.3 The Chairperson may call a meeting of the Executive Committee by giving at least one (1) week's notice of the meeting to the members of the Executive Committee. Such notice must be provided in writing.

16.19.4 Proposals heard during Executive Committee meetings can be approved or rejected by a simple majority, so long as the relevant meeting is quorate.

16.19.5 No less than 3 Executive Committee members must be present in order for an Executive Committee meeting to be quorate. Where for whatever reason an Executive Committee member is unable to participate (for example due to their resignation or removal under Rule 16.18, illness, incapacity or death), the Executive Committee may co-opt, on a meeting-by-meeting basis, a representative of a Member onto the Executive Committee to fulfil the role of the absent member.

- 16.19.6 If the number of votes for and against a proposal are equal, the Chairperson has a casting vote.
- 16.19.7 The preceding provisions of this Rule 16.19 shall not apply in relation to decisions regarding applications for, or to change category of, Membership, which shall be made strictly in accordance with the Membership Criteria.
- 16.19.8 The time limits for decision making by the Executive Committee set out in Rules 9.3, 18.3 and 19.3 shall be extended by a reasonable period of time where events, circumstances or causes beyond the RACF's reasonable control (including, but not limited to, (a) those associated with any epidemic or pandemic or (b) any directions of a government or regulator) make such time limits impossible or impractical to meet.
- 16.19.9 Minutes, inclusive of the names of the attending Executive Committee members, shall be kept for all Executive Committee meetings in such form as may from time to time be decided by the Executive Committee. Minutes signed by the Chairperson shall be evidence of the proceedings and be filed (electronically or in hard copy) for future reference by the Secretary.
- 16.20 Members of the Executive Committee will be entitled to claim reasonable expenses provided that they are incurred solely in the performance of the relevant Executive Committee role and are approved by the Executive Committee by a simple majority vote (where possible in advance).

## **17. DELEGATION OF AUTHORITY**

- 17.1 Subject to Rule 16.19.1 the Chairperson (and provided that the Executive Committee has voted to approve, or shall vote to ratify, the proposed commitment), has the right to enter into agreements and other arrangements that legally bind the RACF and all of its Members.

## **18. REVIEW AND APPEAL PROCESS IN RELATION TO DECISIONS OF THE EXECUTIVE COMMITTEE**

- 18.1 Where a decision by the Executive Committee is made in relation to an application for Membership, or a Member (as appropriate) under Rule 9 (Membership), Rule 11.2 (termination of Probationary Membership) and Rule 13 (Discipline, Suspension and Expulsion), the applicant or Member in respect of whom the decision is made shall have the right to request a review of the decision.
- 18.2 Any request for a review of a decision of the Executive Committee shall be made in writing to the Secretary within forty-eight (48) calendar days of the date on which the Secretary sent notification of the decision to the relevant Member or applicant. The relevant Member or applicant must provide full written grounds for their request for review and (where relevant) supporting evidence.
- 18.3 The Executive Committee, plus the representatives of two additional Members that are not represented on the Executive Committee, shall consider any request for review submitted pursuant to Rule 18.2 within forty-eight (48) calendar days of the RACF's receipt of the written review documentation, and shall decide whether to change their decision. The Secretary will communicate the outcome of the review, along with an explanation of the decision, in writing to the relevant Member or applicant within fourteen (14) calendar days of the date on which the Executive Committee made its decision.
- 18.4 When an applicant's Membership application is approved following a review, the applicant shall be admitted to the relevant category of Membership.
- 18.5 Where a Member or applicant's request for review is rejected, the Member or applicant will have a final right of appeal to an independent barrister. Such barrister shall be selected by agreement between the Executive Committee and the appealing Member or applicant or, where the parties cannot so agree, be appointed by the President of the Law Society. Such barrister shall have a

minimum of 7 (seven) years standing as a barrister and shall not have advised, acted for or been instructed by the RACF, the Members, or by the appealing Member or applicant in the last two (2) years.

- 18.6 The independent barrister's decision shall be final and binding on the Executive Committee and his or her decision shall be communicated within twenty-eight (28) calendar days of the date on which the appeal was referred to him or her.
- 18.7 The appealing Member or applicant shall bear its own costs arising in relation to any appeal brought under this Rule 18 unless the appealing Member or applicant is successful, in which case the costs of the appeal will be borne by the RACF.
- 18.8 Any costs incurred by the RACF in relation to any appeal brought under this Rule 18 shall be shared equally between the Members (excluding the appealing Member where relevant).

## **19. MEMBER COMPLAINTS PROCEDURE**

- 19.1 Other than reviews or appeals regarding Executive Committee decisions (as dealt with pursuant to Rule 18), all other Member complaints or disputes shall be dealt with in accordance with this Rule 19.
- 19.2 All complaints shall be made in writing to the Secretary. The relevant Member must provide full written grounds for their complaint and (where relevant) supporting evidence.
- 19.3 The Executive Committee shall consider any complaint made pursuant to Rule 19.2 within forty-eight (48) calendar days of the RACF's receipt of such complaint. The Secretary will communicate the Executive Committee's decision in relation to the complaint, along with an explanation of the decision, in writing to the relevant Member within fourteen (14) calendar days of the date on which the Executive Committee made its decision.
- 19.4 Where a Member is not satisfied with the decision of the Executive Committee in relation to their complaint, the Member will have a final right of appeal to an independent barrister. Such barrister shall be selected by agreement between the Executive Committee and the appealing Member or, where the parties cannot so agree, be appointed by the President of the Law Society. Such barrister shall have a minimum of 7 (seven) years standing as a barrister and shall not have advised, acted for or been instructed by the RACF, the Members, or by the appealing Member in the last two (2) years.
- 19.5 The independent barrister's decision shall be final and binding on the Executive Committee and his or her decision shall be communicated within twenty-eight (28) calendar days of the date on which the appeal was referred to him or her.
- 19.6 The complaining Member shall bear its own costs arising in relation to any complaint brought under this Rule 19 unless the complaining Member is successful, in which case the costs of the complaint will be borne by the RACF.
- 19.7 Any costs incurred by the RACF in accordance with this Rule 19 shall be shared equally between the Members (excluding the complaining Member).