



## **Competition Act 1998 guidance**

**Guidance on ORR's approach to  
the enforcement of the  
Competition Act 1998 in relation  
to the supply of services  
relating to railways**

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# Introduction

The Office of Rail and Road (**ORR**) is the independent safety and economic regulator of railways in Great Britain and monitor of Highways England. We are here to ensure the network operates safely, reliably and provides value for taxpayers and customers. We safeguard the public and the workforce by regulating the rail industry's health and safety performance. We hold Network Rail to account – and we require it to provide passengers with a punctual, reliable service. We make sure that train and freight operating companies have fair access to the rail network, and that the market is competitive and fair.

As part of this mandate, we have powers, in relation to the supply of services relating to railways, to enforce the prohibitions on agreements<sup>1</sup> that prevent, restrict or distort competition and on the abuse of a dominant position, contained in Chapters I and II of the Competition Act 1998 (the **Act**) and in Articles 101 and 102 of the Treaty on the Functioning of the European Union (**TFEU**). ORR exercises these powers concurrently with the Competition and Markets Authority (**CMA**)<sup>2</sup>.

We are part of the UK Competition Network (**UKCN**), a forum bringing together the CMA and UK sectoral regulators<sup>3</sup> to promote competition and assist in deterring anti-competitive behaviour in regulated sectors. We are also a designated National Competition Authority (**NCA**) within the European Competition Network (**ECN**)<sup>4</sup> for the purposes of exercising all of the powers and functions of a competition authority of a Member State of the European Union (**EU**)<sup>5</sup>.

## Purpose of this guidance

The purpose of this guidance is to provide advice and information about how we expect to exercise our concurrent power to enforce the competition prohibitions under the Act and

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<sup>1</sup> For the purposes of this guidance, reference to 'agreements' should be taken to include decisions taken in trade or other associations of undertakings, and/or concerted practices. See paragraphs 2.14 to 2.18, below

<sup>2</sup> Section 67(3) of the Railways Act 1993 (the **Railways Act**)

<sup>3</sup> The other sectoral regulators are CAA (Civil Aviation Authority), Ofcom (Office of Communications), Ofgem (the Gas and Electricity Markets Authority), Ofwat (the Water Services Regulation Authority), FCA (the Financial Conduct Authority), PSR (Payment Systems Regulator), and the Northern Ireland Authority for Utility Regulation. Monitor (the regulator of healthcare services in England), has concurrent competition powers but not a statutory duty to promote competition; Monitor is not a member of the UKCN but attends its meetings with an observer status

<sup>4</sup> Council Regulation 1/2003 on the implementation of the rules on competition laid down in Articles [101] and [102] of the Treaty, OJ L 1, 4.1.2003, p.1. (**Regulation 1/2003**) and the Commission Notice on cooperation within the Network of Competition Authorities, (OJ C 101, 27.4.2004, p. 43–53), set out the main principles of how the network functions

<sup>5</sup> The Competition Act 1998 and other Enactments (Amendment) Regulations 2004 (S.I. 2004 No.1261), paragraph 3(1)(b)

the TFEU and to give practical guidance on how the competition prohibitions may apply in the railways sector. In particular this guidance will provide information on:

- the scope of our jurisdiction to apply the competition prohibitions and how our relationship with the CMA will work in practice (Chapter 1);
- how we consider the competition prohibitions may apply in the railways sector and a number of particular considerations which businesses and individuals with an interest in this sector may wish to have regard to (Chapter 2);
- factors we will take into account when: prioritising our resources; determining whether to use our powers under the Act or alternative sector-specific tools which may be available to us to resolve issues in railways markets; and the inter-relationship of our sector-specific powers with competition law (Chapter 3);
- how we expect to conduct investigations under the Act, notably the procedures we will adopt and how we will engage with complainants and parties under investigation (Chapter 4); and
- the procedures we will follow in cases where we have issued a Statement of Objections and our approach to determining appropriate outcomes (Chapter 5).

This guidance supersedes and replaces the guidelines ‘Application to services relating to railways’<sup>6</sup>. It reflects changes in: EU competition law; sector-specific legislation and policy; case law; and our approach to competition enforcement in light of our evolving experience. It is intended to constitute general advice and information about the application of the competition prohibitions in the railways sector and explain our approach to enforcing the competition prohibitions<sup>7</sup>. We are currently producing separate related guidance on our approach to monitoring railways markets which will include information on how we will undertake our market investigation reference functions under Part 4 of the Enterprise Act 2002 (the **Enterprise Act**).

This guidance is not intended to be an exhaustive guide to the legal and economic framework for the application of the competition prohibitions to agreements and conduct. It is a complement, rather than a substitute, for relevant domestic or EU legislation, case law and guidance. The CMA alone has powers to make procedural rules, which we must follow when enforcing the competition prohibitions<sup>8</sup>. Only the CMA has powers to issue guidance on the specific areas of penalties and commitments; we must have regard to the CMA’s policy and guidance in these reserved areas. As a general principle, where the CMA’s

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<sup>6</sup> OFT430, Application to Services Relating to Railways, (October 2005)

<sup>7</sup> Published under ORR’s concurrent powers under section 52 of the Act

<sup>8</sup> Namely the Competition Act 1998 (Competition and Markets Authority’s Rules) Order 2014 (S.I. 2014 No.458) (the **CMA Rules**)

guidance is more detailed than our own in a material respect, we will consider its guidance in deciding how to proceed.

It is the responsibility of each business to self-assess its compliance with competition law. We recommend that businesses involved in the provision of services relating to railways have regard to this guidance (and, where appropriate, other more detailed guidance published by the CMA) in the course of reviewing their compliance with competition law. We will not endorse or approve any particular compliance programme or give pre-approval to specific agreements or practices.

# Chapter 1 – ORR’s powers and concurrency

## Summary

This Chapter explains the scope of ORR’s powers and how we expect concurrency with the CMA to work in practice.

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### A. ORR’s concurrent jurisdiction

- 1.1. ORR has all the powers of the CMA<sup>9</sup> to apply and enforce Articles 101 and 102 TFEU and the Act to deal with anti-competitive agreements or abuses of a dominant position where the relevant activities relate to the supply of services relating to railways in Great Britain<sup>10</sup>.
- 1.2. We will assess on a case by case basis whether a matter falls within our concurrent jurisdiction according to the subject matter to which the agreement or conduct relates rather than the identity of the undertakings involved<sup>11</sup>. Our jurisdiction is not limited to cases involving railway undertakings or directly related to railways infrastructure or rolling stock; for example, we have previously undertaken investigations in relation to the supply of grease for use in electric trackside lubricants<sup>12</sup> and in relation to the provision of real time train information.
- 1.3. The meaning of railway<sup>13</sup> includes tramways and also any transport system which uses another mode of guided transport but which is not a trolley vehicle system. This means that matters relating to or affecting infrastructure such as the London

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<sup>9</sup> With the exception of powers to enforce the criminal cartel offence in the Enterprise Act (see paragraphs 1.17 to 1.18, below)

<sup>10</sup> The term ‘services relating to railways’ is defined by section 67(3ZA) of the Railways Act as including:

- railway services (meaning the carriage of passengers and goods by railway and light maintenance, station and network services);
- the provision and maintenance of rolling stock;
- the development, maintenance or renewal of a network, station or light maintenance depot; and
- the development, provision or maintenance of information systems designed wholly or mainly for facilitating the provision of railway services

<sup>11</sup> CMA10, Regulated Industries: Guidance on concurrent application of competition law to regulated industries, (March 2014), <https://www.gov.uk/government/publications/guidance-on-concurrent-application-of-competition-law-to-regulated-industries>

<sup>12</sup> <http://orr.gov.uk/what-and-how-we-regulate/competition/competition-issues/competition-complaints-investigated/ntm-sales>

<sup>13</sup> Sections 81 and 82 of the Railways Act

Underground network, or heritage railways, would be likely to fall within our concurrent jurisdiction.

## Case study – services relating to railways

**In November 2009 we concluded an investigation into the provision of Real Time Train Information (RTTI)<sup>14</sup>. RTTI is a key input into many end applications including railway station departure boards and websites about travel by rail. In 2009, strong growth in the use of RTTI was being driven by the then relatively new range of travel ‘apps’ developed for mobile devices. We opened an investigation into this market following a complaint from a software developer arguing that it had been denied access to key RTTI inputs. RTTI is a ‘*service relating to railways*’ because it involves the development of information systems that are wholly designed for the provision of railway services.**

### i. ORR’s powers

1.4. Where a matter relates to *services relating to railways* we may:

- consider complaints about possible infringements of Articles 101 and/or 102 TFEU, and/or the Chapter I and/or Chapter II prohibitions in the Act;
- impose interim measures to prevent significant damage<sup>15</sup>;
- carry out investigations both in response to complaints and on our own initiative, including requiring the production of documents and information and searching premises<sup>16</sup>;
- impose financial penalties on undertakings, taking into account the statutory guidance on penalties issued by the CMA<sup>17</sup>;
- give and enforce directions to bring an infringement to an end<sup>18</sup>;

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<sup>14</sup> <http://orr.gov.uk/what-and-how-we-regulate/competition/competition-issues/competition-complaints-investigated/real-time-train-information>

<sup>15</sup> Section 35 of the Act

<sup>16</sup> Sections 26-29 of the Act

<sup>17</sup> CMA4, Administrative Penalties: Statement of Policy on the CMA’s Approach, (January 2014) [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/270245/CMA4\\_-\\_Admin\\_Penalties\\_Statement\\_of\\_Policy.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/270245/CMA4_-_Admin_Penalties_Statement_of_Policy.pdf)

<sup>18</sup> Sections 32 to 34 of the Act

- accept commitments that are binding on an undertaking <sup>19</sup>; and
- agree to settle a case where the business under investigation is prepared to admit that it has breached Article 101 and/or Article 102 of the TFEU, and/or the Chapter I prohibition and/or the Chapter II prohibition in the United Kingdom and to agree to a streamlined administrative procedure to govern the remainder of the investigation, in return for which ORR may agree to impose a reduced penalty on the business.

## ii. Conforming with European competition law

- 1.5. As a designated NCA, when enforcing national competition law in relation to agreements and/or conduct which may affect trade between Member States, we are required to also apply Articles 101 and 102<sup>20</sup>.
- 1.6. We may not prohibit an agreement or concerted practice under national competition law if it would not be prohibited under Article 101. This does not however prevent the application of stricter national law to an agreement if the national law being applied pursues an objective which is predominantly different from those pursued by Article 101.
- 1.7. National competition law is not limited to the application of the domestic competition prohibitions in the Act. We will, where necessary, assess on a case by case basis whether a particular matter constitutes the enforcement of national competition law. We note, and will have regard in our assessment, that when exercising our functions and powers under the Railways Act we have a number of different duties to promote a variety of objectives in the UK rail industry. Only one of those duties is the promotion of competition in the provision of railway services for the benefit of users of railway services. Other objectives include consumer protection, the environment, safety, financing and efficiency. We must, on any particular issue or case, make a judgment on the priority and balance to be achieved among these different objectives. Therefore, as a general principle, “the protection of competition in the market” may not be the predominant objective for us when exercising our powers and functions under the Railways Act.
- 1.8. We may apply national law in a way which is stricter than Article 102 in respect of unilateral conduct.
- 1.9. When applying and enforcing the prohibitions in Articles 101 and 102 we are bound by the fundamental principle of the primacy of EU law. We must therefore follow the

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<sup>19</sup> Section 31A of the Act

<sup>20</sup> Article 3(1) of Regulation 1/2003



case law of the European Courts<sup>21</sup> in interpreting the scope of the prohibitions in the TFEU. We must also ensure, in so far as it is possible, that any questions arising in relation to the application and enforcement of the prohibitions in the Act, are dealt with in a manner which is consistent with the treatment of corresponding questions arising in EU law<sup>22</sup>.

## B. How concurrency works in practice

1.10. Our functions under the Act are exercised concurrently with the CMA and with other sectoral regulators where their respective concurrent jurisdiction overlaps with our own. We will cooperate with the CMA and other sectoral regulators in the exercise of our concurrent functions, for the purpose of strengthening the competition framework and to ensure consistency of approach. There are rules on concurrency to which we and other sectoral regulators must adhere<sup>23</sup>. The CMA has published detailed guidance on how the concurrent application and enforcement of competition law works in practice<sup>24</sup>. The CMA and ORR have agreed a Memorandum of Understanding which sets out working arrangements between the two organisations in relation to the application and enforcement of the competition prohibitions in circumstances where there is concurrent jurisdiction<sup>25</sup>. These documents contain greater detail on the concurrent enforcement of the competition prohibitions and should be read in conjunction with this guidance.

### i. Case allocation

1.11. In all circumstances there will be an overlap between ORR and the CMA in terms of which authority should take forward a case. There may also be instances where there are overlaps between ORR and other sectoral regulators. As only one authority can exercise prescribed functions<sup>26</sup> in respect of a case at any moment in

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<sup>21</sup> Namely, the General Court and the European Court of Justice

<sup>22</sup> For more information on the operation of Regulation 1/2003 see OFT442, Modernisation, (December 2004), [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/284432/oft442.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284432/oft442.pdf)

<sup>23</sup> The Competition Act 1998 (Concurrency) Regulations 2014 SI 2014 No.536 (the **Concurrency Regulations**)

<sup>24</sup> CMA10

<sup>25</sup> Memorandum of Understanding between the Competition and Markets Authority and the Office of Rail Regulation: Concurrent competition powers, (May 2014), (the **Memorandum of Understanding**) [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/318909/MoU\\_-\\_CMA\\_and\\_the\\_ORR.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/318909/MoU_-_CMA_and_the_ORR.pdf)

<sup>26</sup> Prescribed functions are those functions in Part 1 of the Act which are, or would be, exercisable concurrently under Regulation 2 of the Concurrency Regulations. These include: the opening of a formal investigation pursuant to the Act, the withdrawal of an exclusion from the Chapter I prohibition in relation to an individual agreement, and the making of certain formal decisions including requiring that an infringement be brought to an end, ordering interim measures, accepting commitments by decision and imposing fines

time, cases must be allocated to one authority, and, where appropriate, transferred between concurrent authorities.

- 1.12. In determining case allocation the guiding principle to be applied is that a case will be allocated to the regulator that is better or best placed to exercise the concurrent competition enforcement powers<sup>27</sup>. We will endeavour to reach agreement on which authority will have jurisdiction to exercise its powers to enforce the competition prohibitions in respect of each particular case and will engage with the CMA and any other sectoral regulators in a spirit of constructiveness and cooperation. If agreement cannot be reached, the CMA may determine which relevant competition authority should exercise its concurrent power<sup>28</sup>.
- 1.13. The CMA may direct that a case in progress be transferred from ORR to the CMA, if it is satisfied that to do so would further the promotion of competition within any market or markets in the United Kingdom, for the benefit of consumers<sup>29</sup>.
- 1.14. Where Article 101 and/or Article 102 may apply, a case will also be subject to the case allocation principles for determining whether a UK NCA or a NCA from another Member State is best placed to act. The European Commission has the power to take over cases involving an alleged breach of Article 101 and/or Article 102 TFEU from NCAs by initiating proceedings. Further details on case allocation as between NCAs from different Member States are provided in guidance adopted by the CMA<sup>30</sup>.

## ii. Information sharing

- 1.15. We will share information with the CMA and other sectoral regulators for the purposes of general liaison and, in relation to specific cases where it is appropriate to do so, in order to facilitate the discharge of our functions under the Act. The procedures for sharing information with the CMA are set out in the Memorandum of Understanding<sup>31</sup>.
- 1.16. Prior to sharing any information with the CMA and other sectoral regulators we will have regard to the provisions in Part 9 of the Enterprise Act<sup>32</sup>.

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<sup>27</sup> CMA10 contains a list of factors relevant to determining which regulator is 'better or best placed' at paragraph 3.22

<sup>28</sup> Regulation 5 of the Concurrency Regulations

<sup>29</sup> Regulation 8 of the Concurrency Regulations; the CMA may only issue such a direction prior to a statement of objections being issued

<sup>30</sup> OFT442

<sup>31</sup> Paragraphs 37 to 48 of the Memorandum of Understanding

<sup>32</sup> Notably the considerations in section 244 of the Enterprise Act

### iii. Criminal cartels

- 1.17. The criminal cartel offence was created with the intention of criminalising and deterring behaviour by individuals leading to the most serious and damaging forms of anti-competitive agreements, namely ‘hard-core cartels’. In essence, a hard-core cartel is an agreement between competitors to fix prices, share markets, rig bids or limit output at the expense of the interests of customers and without any countervailing customer benefits. Typically, hard-core cartels are secret arrangements under which competitor businesses agree to coordinate their activity, usually in order to preserve or drive up prices<sup>33</sup>.
- 1.18. We do not have concurrent jurisdiction to prosecute the cartel offence. In the event that we uncover a suspected criminal cartel, we will refer the matter to the CMA.

### iv. Leniency

- 1.19. It is in the interest of the economy of the UK, and the European Union more generally, to have a policy of granting lenient treatment to undertakings which inform competition law enforcement authorities of cartel activities and which then cooperate with those authorities. It is the often secret nature of cartel activities which justifies such a policy. The interests of customers and consumers in ensuring that such activities are detected and prohibited outweigh the policy objectives of imposing financial penalties on those undertakings which participate in cartel activities but which cooperate to a significant degree with competition authorities.
- 1.20. Further information on the types of lenient treatment which may be available to businesses and the conditions which must be met to secure those benefits, are set out in guidance published by the OFT and adopted by the CMA<sup>34</sup>.
- 1.21. We would suggest that initial applications for leniency markers in cases involving the railways sector be made to the CMA in accordance with its published leniency process and procedure<sup>35</sup>. The CMA is the only authority empowered to grant a no-action letter with respect to prosecutions under the criminal cartel offence and, for that reason, generally administers the grant of markers (in collaboration with sectoral regulators where relevant). We will consider ourselves bound by the type

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<sup>33</sup> See CMA9, Cartel Offence Prosecution Guidance, (March 2014)

<sup>34</sup> See OFT 423, OFT's guidance as to the appropriate amount of a penalty, (September 2012) <https://www.gov.uk/government/publications/appropriate-ca98-penalty-calculation>, and OFT1495, Applications for leniency and no-action in cartel cases, (July 2013) <https://www.gov.uk/government/publications/leniency-and-no-action-applications-in-cartel-cases>. *In the event that we are initially approached by a leniency applicant, we will direct the applicant, in the first instance, to the CMA*

<sup>35</sup> OFT1495

of any marker granted by the CMA, subject to the conditions of leniency continuing to be met. However, the ORR will be responsible for deciding the amount of any leniency discount ultimately granted in cases which have been allocated to it for enforcement under the Act.

- 1.22. In leniency cases in the railways sector, leniency information given to the CMA may be passed to us if the case is allocated to ORR for enforcement under the Act. We will use leniency information passed to us only for the purposes of enforcing the Act unless the leniency applicant agrees otherwise.
- 1.23. In considering immunity from, or applying any reduction in, financial penalties under the Act, we will follow the CMA's guidance and policy<sup>36</sup>, though as noted at paragraph 1.21 above, we cannot grant a no-action letter with respect to prosecutions under the criminal cartel offence .

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<sup>36</sup> OFT423

# Chapter 2 – Application in a railway context

## Summary

This Chapter describes how the competition prohibitions may apply in the context of the railway sector and how this is likely to affect our approach to enforcing the competition prohibitions.

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### A. The Competition Act 1998 and Articles 101 and 102 of the Treaty on the Functioning of the European Union

- 2.1. For the purposes of this guidance, a competition infringement is a breach of any of the competition prohibitions contained in the Act or the TFEU. The UK prohibition in Chapter I of the Act is equivalent to the EU prohibition in Article 101 TFEU. The UK prohibition in Chapter II of the Act is equivalent to the EU prohibition in Article 102 TFEU.
- 2.2. This chapter first sets out principles applicable across all of the prohibitions, before providing guidance on how each of the prohibitions may apply in the railways sector.

#### i. Undertakings

- 2.3. The competition prohibitions apply only to agreements between *undertakings*, and, abuses committed by dominant *undertakings* respectively.
- 2.4. The term ‘undertaking’ is a broad concept which may, in the particular circumstances of each case, refer to any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed. The term may therefore include: companies; firms; businesses; partnerships; individuals operating as sole traders; associations of undertakings (including trade associations); non-profit making organisations; and (in some circumstances) public entities that offer goods or services in a given market<sup>37</sup>. Key participants within the rail industry including train operating companies but also fully or partly publicly owned players such as Network Rail, TfL, and others, are likely to be viewed as undertakings for most of their activities.
- 2.5. Organisations with separate legal personalities (for instance distinct limited companies) may be considered to be part of one and the same undertaking if they

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<sup>37</sup> For further guidance on the application of competition law to the activities of public bodies see OFT 1389, *Public Bodies and Competition Law: A guide to the application of the Competition Act 1998*, (December 2011) <https://www.gov.uk/government/publications/public-bodies-and-competition-law>

are found to form a 'single economic unit'. A parent company may be part of the same undertaking as a subsidiary if the parent exercises a decisive influence over the subsidiary<sup>38</sup>. Companies in the same corporate group will often be considered to constitute a single undertaking.

- 2.6. In the railways context, holding companies which exercise decisive influence over subsidiary companies that (for example) have been specifically incorporated to undertake defined activities, such as a rail franchise, should be aware that they may be held liable for the actions of the subsidiary.
- 2.7. It is for businesses to self-assess the extent to which they form part of the same undertaking with other legal entities.

## **ii. Market definition**

- 2.8. To assess the application of the competition prohibitions, it will generally be necessary for us to define a relevant market or markets. Defining a relevant market is not an end in itself; rather, it provides a framework for competition analysis. Defining the market is generally a key step in identifying the competitive constraints acting on a supplier of a given product or service and analysing the effects of agreements or conduct. Markets are defined in terms of the products or services involved, geographical scope and, in some cases, the time period in which they are sold.
- 2.9. In broad terms, defining markets involves an analysis of the extent to which identified products or services are substitutable, for example by reason of their characteristics, prices or intended use. 'Demand-side substitution' takes place when consumers switch from one product to another in response to a change in the relative prices of goods. Supply side substitution refers to suppliers switching production facilities in order to expand the range of goods that they sell. Where an identified product or service is readily interchangeable with another, it is likely to be considered to be within the same market. On the other hand where a product or service is not interchangeable or interchangeable only to a limited extent, it is likely to constitute a separate market. For example in relation to rail passenger transport, customers utilising railway services at peak times may not view rail travel during off peak times as a viable substitute for rail travel at peak times (because using off peak services would mean passengers would not get to work on time). Rail travel at peak times will constitute a separate market to rail travel at off peak times if customers with fixed preferences regarding time of travel are sufficiently numerous.

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<sup>38</sup> This can apply, for example, to joint ventures and where the parent company has less than a 100% shareholding but still exercises decisive influence over the subsidiary

- 2.10. In cases involving transport markets, the definition of geographic and product markets are typically closely related as the geography in which a service is being delivered typically represents a key intrinsic element of the service's value.
- 2.11. There are a range of economic tools which may be used for the purposes of determining the substitutability of products and services. We will define the relevant market(s) for each individual case based on the particular facts of that case; in doing so we will follow the framework set out in guidance adopted by the CMA<sup>39</sup>. Typically in defining markets we will utilise the 'hypothetical monopolist' test, which involves assessing how customers (the demand side) and other suppliers (the supply side) would react to an attempt by a hypothetical monopolist to introduce a small but significant non-transitory increase in price (**SSNIP**) (usually 5% to 10%) to the product or service in question. Analysis of the hypothetical monopolist test will typically involve consideration of:
- the extent to which customers would switch to other products or services in response to a SSNIP, and how long that would take;
  - the extent to which alternative suppliers would start supplying the product or service in question in response to a SSNIP and how long this would take; and
  - the extent to which customers would switch to other suppliers in other areas in response to a SSNIP and the extent to which suppliers from other areas would start supplying the relevant product or service in the relevant geographic area.
- 2.12. We will also consider product characteristics in our definition of markets. For example, in a railway transport context, we may typically consider factors such as, for passenger services, journey purpose, and, for freight services, the relative merits of different modes of transport from a customer perspective.

## Case study

**In November 2006 we concluded an investigation into the market for coal haulage by rail<sup>40</sup>. In this investigation we had to carry out a market definition exercise. We concluded that, in Great Britain at the time, there was a national market for coal haulage by rail, distinct from other transport modes and from the haulage of other goods by rail. In order to reach this conclusion we examined factors such as: the**

<sup>39</sup> OFT403, Market Definition, (December 2004) <https://www.gov.uk/government/publications/market-definition>. We will also have regard to Commission Notice on the definition of the relevant market for the purposes of Community competition law (OJ C 372, 9.12.97, p5)

<sup>40</sup> [http://orr.gov.uk/\\_data/assets/pdf\\_file/0017/3527/ca98\\_decision\\_ews-dec06.pdf](http://orr.gov.uk/_data/assets/pdf_file/0017/3527/ca98_decision_ews-dec06.pdf)

**relative costs and service quality levels that it was possible to achieve using rail as opposed to road transport; and from a supply side perspective the speed and ease with which rail freight operators could procure network capacity and rolling stock.**

**Our conclusions rested on analysis that we carried out using evidence gathered from the companies involved using our powers of investigation.**

## **B. Agreements between undertakings – Chapter I and Article 101**

2.13. ORR may investigate where it has reasonable grounds to suspect there are agreements between undertakings<sup>41</sup> which have as their object or effect the appreciable prevention, restriction or distortion of competition. Article 101 applies to agreements that may affect trade between Member States of the EU<sup>42</sup>. The Chapter I prohibition applies to agreements which may affect trade within the United Kingdom.

### **i. Anti-competitive agreements**

2.14. Reference to ‘agreements’ includes informal co-operation falling short of a formal agreement<sup>43</sup>, concerted practices and decisions taken by associations of undertakings (often taking the form of trade associations).

2.15. In particular, these prohibitions apply to agreements which:

- directly or indirectly fix purchase or selling prices or any other trading conditions;

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<sup>41</sup> As noted above at paragraph 2.5, the Chapter I and Article 101 prohibitions do not apply to agreements between group companies which are part of a single undertaking

<sup>42</sup> In assessing whether or not an agreement may affect trade between Member States, we will have regard to the European Commission’s Notice – *Guidelines on the effect on trade concept contained in Articles 81[101] and 82[102] of the Treaty* (2004), OJ C 101, 27.4.2004, p.81. The Notice states that the concept of trade is not limited to traditional exchanges of goods and services across borders, rather it is a wider concept, covering all cross-border economic activity, including establishment

<sup>43</sup> General guidance on assessing whether agreements and concerted practices are anti-competitive is described in the OFT401, *Agreements and Concerted Practices* (December 2004)

<https://www.gov.uk/government/publications/agreements-and-concerted-practices-understanding-competition-law> . General guidance on the application of competition law to the activities of trade associations, professions and self-regulating bodies is set out in the OFT408, *Trade Associations, Professions and Self-Regulating Bodies* (December 2004)

<https://www.gov.uk/government/publications/trade-associations-and-professionalself-regulating-bodies-and-competition-law>



- limit or control production, markets, technical development or investment;
- share markets or sources of supply;
- apply dissimilar trading conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; or
- make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2.16. Examples of potentially anti-competitive agreements which may constitute infringements of the Chapter I prohibition and/or Article 101 that may arise in the railways sector include:

- **Agreements or conscious cooperation between companies not to compete for certain business, for example contracts, such as: passenger rail franchises; freight contracts; competitions to supply rolling stock; and contracts to supply Network Rail.**
- **Agreements regarding the setting of technical standards for the supply of products and services to Network Rail or train operators. Such agreements may lead to efficiencies by reducing costs, and/or raising quality or compatibility, but could be harmful overall where their principal overall effect is to limit competition, for example by raising entry barriers.**
- **Agreements between competing train operators or other industry participants about prices to be charged for certain products or services. Recognising the benefits of a national network, the rail industry currently encourages a degree of co-operation between train operating companies<sup>44</sup>, but the lawfulness of such agreements must still be considered on a case by case basis.**

2.17. Such agreements may also fall within the scope of the prohibitions if they are carried out in the context of discussions between members of a trade association or the agreement manifests itself in the form of a decision by a trade association to be recognised by its members.

2.18. This list is non-exhaustive and is only illustrative. We may apply the Chapter I prohibition and the Article 101 prohibition to other types of agreements which may

<sup>44</sup> A notable example of this is the UK's system of interoperable fares, whereby customers are able to buy a single ticket to complete a journey which includes services provided by more than one operator

restrict, distort or prevent competition to determine whether they constitute an infringement of competition law.

## ii. Exemptions to Chapter I and Article 101

2.19. An agreement may be exempt from the Chapter I and Article 101 prohibitions if it meets certain criteria, which are set out at section 9(1) of the Act and Article 101(3) TFEU respectively.

2.20. The criteria are that the agreement in question:

- contributes to improving production or distribution or promoting technical or economic progress;
- allows consumers a fair share of the resulting benefit;
- does not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; and
- does not afford the undertakings the possibility of eliminating competition in respect of a substantial part of the products or services in question.

2.21. We will not give pre-approval for a particular practice or agreement. It is for businesses to self-assess whether the agreement or arrangement in question is covered by this exemption; the European Commission has published guidance to assist businesses and their advisers for this purpose<sup>45</sup>.

## iii. Block exemptions

2.22. The Secretary of State may, by order, on a recommendation from us or the CMA, exempt categories of agreement from the Chapter I prohibition<sup>46</sup> where they fall within the criteria set out in section 9 of the Act (**UK Block Exemptions**). The European Council and the European Commission may make block exemption regulations which have the effect of exempting particular categories of agreements which are considered to satisfy the criteria set out in Article 101(3) (**EU Block Exemptions**).

2.23. It is for businesses to self-assess whether their conduct falls within either a UK or a EU Block Exemption.

## EU Block Exemptions – Council Regulation 169/2009

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<sup>45</sup> *Guidelines on the Application of Article 101(3) of the Treaty* (OJ C 101 27.04.2004, p.97)

<sup>46</sup> Under section 6 of the Act

- 2.24. Where an agreement falls within an EU Block Exemption it is not prohibited under Article 101 and it will also be exempt from the Chapter I prohibition<sup>47</sup>.
- 2.25. Of particular relevance to the railways sector<sup>48</sup> is Council Regulation 169/2009<sup>49</sup>. By the terms of this Regulation the prohibition in Article 101(1) does not apply to agreements in rail, road and inland waterways, the object or effect of which is to apply technical improvements or to achieve technical cooperation by means of:
- the standardisation of equipment, transport supplies, vehicles or fixed installations;
  - the exchange or pooling, for the purpose of operating transport services, of staff, equipment, vehicles or fixed installations;
  - the organisation and execution of successive, complementary, substitute or combined transport operations and the fixing and application of inclusive rates and conditions for such operations, including special competitive rates;
  - the use, for journeys by a single mode of transport, of the routes which are most rational from the operational point of view;
  - the coordination of transport timetables for connecting routes;
  - the grouping of single consignments; and
  - the establishment of uniform rules as to the structure of tariffs and their conditions of application provided such rules do not lay down transport rates and conditions.

### **UK Block Exemptions– public transport ticketing schemes**

- 2.26. An agreement which falls within the category of agreements specified in a UK Block Exemption order will be automatically exempt from the Chapter I prohibition.

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<sup>47</sup> Sections 10(1) and (2) of the Act provide that any agreement which benefits from an EU Block Exemption, or that would do so if it were to affect trade between Member States, will also be exempted from the domestic Chapter I prohibition

<sup>48</sup> Other EU Block Exemptions which may be applicable in the railways sector include: Commission Regulation (EC) No 2658/2000 on the application of Article 101(3) of the Treaty to categories of specialisation agreements (OJ, L 304, 5.12.2000 p.3); Commission Regulation (EC) No 2659/2000 on the application of Article 101(3) of the Treaty to categories of research and development agreements (OJ L 304, 5.12.2000, p.7); Commission Regulation (EC) No 2790/1999 on the application of Article 101(3) of the Treaty to categories of vertical agreements and concerted practices (OJ L 336, 29.12.1999, p.21); and, Commission Regulation (EU) 316/2014 on the application of Article 101(3) of the TFEU to categories of technology transfer agreements (OJ L 93, 28.3.2014, p.17-23)

<sup>49</sup> Council Regulation 169/2009 applying rules of competition to transport by rail, road and inland waterways (OJ L 61, 5.3.2009, p.1)

- 2.27. The Competition Act 1998 (Public Transport Ticketing Schemes Block Exemption) Order (SI 2001 No 319) came into force on 1 March 2001 and was subsequently amended, most recently by the Competition Act 1998 (Public Transport Ticketing Schemes Block Exemption) (Amendment) Order 2011 (SI 2011 No. 227) that came into force on 28 February 2011. This domestic block exemption covers ticketing schemes that provide multi-operator travel cards, multi-operator individual tickets, through tickets and short and long distance add-on tickets for local travel on buses, trains, trams and domestic ferry services. The block exemption sets out a number of conditions which a ticketing scheme must satisfy in order to benefit from it.
- 2.28. The public transport ticketing schemes block exemption automatically exempts the agreements within its scope from Chapter I of the Act insofar as they meet certain specified conditions. It allows for public transport operators to enter into agreements to offer passengers tickets that they can use on the services of two or more operators. This normally increases the mobility of passengers and makes travel more flexible.
- 2.29. The public transport ticketing schemes block exemption is due to expire on 29 February 2016. The CMA has reviewed this exemption and recommended that the Secretary of State:
- simplify the definition of multi-operator travel cards to make it easier for businesses to apply;
  - change the block exemption to ensure that it allows for smart formats and products; and
  - renew the block exemption for a 10-year period until 28 February 2026 (up to now it has been renewed every 5 years) to give greater legal certainty to the industry.
- 2.30. The CMA is also proposing to issue revised guidance, to reflect the Secretary of State's final decision, to make a number of changes to the public transport ticketing schemes block exemption guidance<sup>50</sup> to clarify some areas which are thought to be unclear, and to update certain aspects of the guidance to take account of new formats and products that have emerged (such as the introduction of smart tickets).

### **Withdrawal of block exemptions**

- 2.31. We may withdraw the benefit of a EU Block Exemption in cases where the following conditions are met:

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<sup>50</sup> OFT439, Public transport ticketing schemes block exemption, (November 2006)

<https://www.gov.uk/government/publications/public-transport-ticketing-schemes-block-exemption>

- the territory of the UK or part of it, in the relevant case, has all the characteristics of a distinct geographic market; and
- the agreements in question have effects that are incompatible with Article 101(3) TFEU in the territory of the UK.

2.32. No later than 30 days prior to adopting a decision withdrawing the benefit of a EU Block Exemption we will inform the European Commission<sup>51</sup>.

2.33. We may also, in certain circumstances, withdraw the benefits of a UK Block Exemption. For example, we may withdraw the benefit of the Public Transport Ticketing Services block exemption in relation to a particular agreement if we are satisfied it does not meet the statutory exemption criteria, notwithstanding the fact that it would otherwise meet the conditions of the block exemption itself. Before taking this step, we must give notice in writing of our proposal and consider any representations made.

#### **iv. Appreciable effect on trade between Member States, or, competition**

2.34. In order for Article 101(1) to be applicable the agreement in question must affect trade between Member States, or, competition to an appreciable extent. In assessing whether or not an agreement has an appreciable effect on competition or trade between Member States we will have regard to the European Commission's *Notice on agreements of minor importance*<sup>52</sup> which sets out, using specified market share thresholds, the Commission's views as to what is and is not an appreciable restriction of competition under Article 101.

2.35. If an agreement has as its object<sup>53</sup> the prevention, restriction or distortion of competition it will, by its nature, have an appreciable effect on competition<sup>54</sup>.

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<sup>51</sup> Article 11(4) of Regulation 1/2003

<sup>52</sup> OJ C 291, 30.8.2014, p. 1–4 (commonly referred to as the *De Minimis* Notice)

<sup>53</sup> In assessing whether an agreement has as its object the prevention, restriction or distortion of competition, we will look at the objective meaning and purpose of the agreement in its economic context. If the object of an agreement is the prevention, restriction or distortion of competition, it is not necessary to show that it also has an anti-competitive effect in order to establish an infringement

<sup>54</sup> Case C-226/11 *Expedia* [2012] ECR I-000, in particular paragraphs 35, 36 and 37

## C. Abuse of a dominant position – Chapter II and Article 102

2.36. Chapter II of the Act and Article 102 TFEU prohibit conduct by one or more undertakings which amounts to an abuse of a dominant position in a market. Article 102 applies to conduct within the EU or in a substantial part of it in so far as it may affect trade between Member States of the EU<sup>55</sup>. The Chapter II prohibition applies if the dominant position is held within the whole or part of the UK and the conduct in question may affect trade within the whole or part of the UK.

### i. Dominance

2.37. In order to contravene the prohibitions in Chapter II and Article 102 an undertaking or undertakings must first be found to be dominant or collectively dominant<sup>56</sup> in a market.

2.38. A dominant market position is defined as a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition from being maintained in the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately its consumers<sup>57</sup>. Central to the determination of whether an undertaking is in a dominant position in a market is an assessment of its market power. In assessing whether an undertaking enjoys a dominant position we will have regard to guidance adopted by the CMA<sup>58</sup> and guidance issued by the European Commission<sup>59</sup>.

2.39. A non-exhaustive list of factors that we will take into account when assessing dominance under Chapter II or Article 102 includes:

- the presence of existing competitors;
- the likelihood of potential competitors entering the market;

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<sup>55</sup> In assessing whether conduct has an appreciable effect on trade between Member States we will take the same approach as outlined for Chapter I/Article 101(1), see footnote 45, above

<sup>56</sup> The concept of collective or 'joint' dominance was first defined in cases T-66,77 and 78/89 *Società Italiana Vetro v Commission* (Italian Flat Glass) [1992] ECR II-1403, [1992] 5 CMLR 302. Further guidance on the concept of collective dominance is set out in OFT415 *Assessment of Market Power* (December 2004) <https://www.gov.uk/government/publications/assessment-of-market-power> paragraphs 2.13 to 2.16

<sup>57</sup> Case 27/76 *United Brands v Commission* [1978] ECR 207, [1978] 1 CMLR 429

<sup>58</sup> OFT415

<sup>59</sup> Commission Communication: Guidance on the Commission's enforcement priorities in applying Article [102] of the EC Treaty to abusive exclusionary conduct by dominant undertakings (2009/C45/02) (OJ C 45, 24.2.2009 p.7) (the **Commission's Article 102 Enforcement Priorities Guidance**), paragraphs 9 to 18

- whether countervailing buyer power exists;
- barriers to entry; and
- the market share of the undertaking(s) over a period of time. There are no specified market share thresholds for dominance under Chapter II or Article 102, although the European Court has stated that dominance can be presumed, in the absence of evidence to the contrary, if an undertaking has a market share persistently above 50%<sup>60</sup>.

## ii. Abuse

2.40. In general terms, conduct may be abusive when it is directly exploitative of customers (for example through the charging of excessive prices) or where it has an adverse effect on the competitive process (for example conduct which raises barriers to entry or increases competitors' costs).

2.41. Examples of conduct within the railways sector which could potentially constitute an abuse of a dominant position include:

- **Owners of facilities that are essential to operating a downstream rail transport service, denying downstream competitors access to their facilities without justification, or charging excessive or discriminatory prices for those competitors to use those facilities. Similar issues may exist where firms have access to essential non-physical inputs, such as data or information.**
- **A dominant firm that is vertically integrated and controls an essential upstream input may be able to eliminate downstream competition by creating a 'margin squeeze' between downstream retail prices and costs, where the latter includes the cost of procuring the essential upstream input.**
- **Railway undertakings in a dominant position boycotting certain suppliers, as a result of, for instance, ancillary matters unrelated to the service being tendered for.**
- **Pricing practices by rail freight operators that limit rivals' ability to compete. Competition on prices (alongside quality, choice, etc.) is generally a sign of a market working well and of consumer benefits, but in certain circumstances low pricing and discounting, when exercised by firms with substantial market power, may be anti-competitive. One key example of anti-competitive pricing is 'predatory pricing', whereby a dominant firm sets very low prices with the**

<sup>60</sup> Case C62/86 *AKZO Chemie BV v Commission* [1991], ECR I-3359.

**aim of driving its competitors out of the market. Other examples include certain types of rebate schemes.**

2.42. An undertaking can also contravene Chapter II or Article 102 where it is dominant in one market but the abuse takes place in a separate related market. An example of this in a railway context could be a dominant supplier of specialist railway equipment tying in a purchaser (perhaps by means of warranty conditions which are not objectively justifiable) to long-term maintenance services or products, thereby preventing other suppliers of those services or products from competing effectively in the market.

### **iii. Exemptions from Chapter II/Article 102**

2.43. There is no legal exemption regime specific to Chapter II or Article 102. Conduct which is otherwise anti-competitive may however be subject to the general exclusions from the competition prohibitions (see below). It is also a defence for the dominant undertaking to show that its conduct is objectively justified. A dominant undertaking may achieve this by demonstrating that its conduct is objectively necessary or by demonstrating that its conduct produces substantial efficiencies which outweigh any anti-competitive effects on consumers<sup>61</sup>.

2.44. Of particular interest in the railway context is that anti-competitive conduct may, in certain circumstances, be considered objectively necessary for health and safety reasons related to the nature of the product or service in question. We will draw upon our significant knowledge of health and safety in the railways sector in determining the merits of such arguments.

## **D. General exceptions to the competition prohibitions**

2.45. In addition to the exemptions noted above there are a number of general exclusions/exemptions from the competition prohibitions which apply regardless of the category of conduct. It is for businesses to self-assess whether conduct is excluded from the application of the competition prohibitions or whether conduct which may otherwise infringe the competition prohibitions may nonetheless benefit from the application of an exclusion/exemption.

### **i. Services of general economic interest**

2.46. Conduct which is carried out by undertakings entrusted (by a public authority)<sup>62</sup> with the operation of services of general economic interest (**SGEI**) or which have the

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<sup>61</sup> See the Commission's Article 102 Enforcement Priorities Guidance, paragraphs 28 to 31

<sup>62</sup> In order for a matter to be 'entrusted' with the operation of services of a general economic interest, there must have been an act of a public authority



character of monopolies producing revenue for the State are excluded from the application of the competition prohibitions insofar as the application of those prohibitions<sup>63</sup> would obstruct the performance, in law or fact, of the such particular tasks assigned to the undertaking<sup>64</sup>.

- 2.47. It is ultimately for businesses to self-assess whether their conduct, which may otherwise be prohibited, benefits from the SGEI exclusion.
- 2.48. We consider that the legal threshold for establishing that the SGEI exclusion should apply is a high one. In considering any argument that the SGEI exclusion should apply, we will have regard to the guidelines adopted by the CMA<sup>65</sup>.
- 2.49. We note that this exclusion may be relevant in the franchised passenger rail transport sector, to the extent that transport services provided pursuant to a public service contract (i.e. franchise agreement) may, in certain circumstances, be classified as a SGEI<sup>66</sup>. When considering the application of the exclusion in this context, we will take into account the extent to which the relevant service is a specified part of the franchise agreement, the nature of the obligation placed on the franchisee by virtue of that agreement, the degree and nature of competition, and, the wider market structure. We will also consider on a case by case basis, the extent to which a franchisee has the character of a revenue producing monopoly and whether the application of the competition prohibitions would obstruct the tasks assigned to it.

## ii. Agreements and conduct which are subject to legal direction

- 2.50. In situations where national legislation or the legal framework created by such legislation requires undertakings to engage in certain conduct, and operates to entirely eliminate the possibility of competitive activity or autonomy on the part of the undertaking, the undertaking itself will not be in violation of the competition rules

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<sup>63</sup> The exclusion also dis-applies other rules contained in the European Treaties

<sup>64</sup> Article 106(2) TFEU

<sup>65</sup> OFT421, Services of a general economic interest exclusion, (December 2004)

<https://www.gov.uk/government/publications/services-of-general-economic-interest-exclusion>

<sup>66</sup> We will carefully consider the criteria set out in Case C-280/00 *Altmark* [2003] ECR I-7747, [2003] 3 CMLR 339 which considered that there was no ‘advantage’ by way of a state aid if compensation is paid to an undertaking to discharge public service obligations in the following circumstances: (i) the recipient of compensation must actually have clearly defined public service obligations to discharge; (ii) the basis of compensation must be established in advance in an objective and transparent manner; (iii) the compensation cannot exceed the costs incurred in discharging the public service obligation (and taking into account the relevant receipts and also a reasonable profit margin); and (iv) where there is no public procurement procedure, the level of compensation must be determined by comparison with what a typical undertaking might incur.

for carrying out the conduct required of it<sup>67</sup>. However, to the extent that an undertaking has any autonomy within a legal regime, or, in situations where there is some scope for residual competition, the competition prohibitions will apply to the undertaking's conduct.

- 2.51. Therefore undertakings remain responsible for ensuring that their conduct does not infringe the competition prohibitions, even in cases where there has been an approval of conduct under sector specific legislation by a regulator (for instance in relation to pricing practices). We will consider, when applying the competition prohibitions, the extent that the undertaking has a degree of discretion within the limits set by the regulator and/or has the ability to revert to the regulator for further authorisation<sup>68</sup>.
- 2.52. In the railway sector there are agreements entered into by railway undertakings to meet licence obligations or by virtue of directions pursuant to sections 16A, 17, 18, 19, 19A (and Schedule 4A), 22A and 22C of the Railways Act<sup>69</sup>. We consider that conduct carried out as a result of these agreements will only be excluded from the application of the competition prohibitions to the extent that such conduct engaged in by undertakings relates specifically to meeting legal requirements placed on them by such licence obligations or directions which can be met in no other way.

## E. Franchising

- 2.53. The franchise process is one where potential competitors compete to offer a range of services over a group of routes<sup>70</sup>. This process means that there is 'competition for the market' as opposed to significant levels of competition in the market. Potential franchisees need to assess their expectation of overall costs and revenues which they will be able to achieve. The Department will regulate certain fares by price caps or tariff baskets whilst leaving other fares unregulated, and will also specify service levels, for example frequency of trains on any given route.

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<sup>67</sup> *Commission and France v Ladbroke Racing* [1997] ECR I-6265, 4 [CMLR] 27

<sup>68</sup> *Deutsche Telekom v Commission* [2010] ECR I-09555

<sup>69</sup> Namely: section 16A (directions to provide, improve or develop railway facilities); sections 17,18 and 19 (directions to enter into access agreements or installation access contracts; section 19A and Schedule 4A (directions to amend access agreements following a review by ORR of access charges); and sections 22A and 22C (directions to amend an access agreement following an application by the beneficiary, or to give effect to conditions of a licence)

<sup>70</sup> The most common form of passenger rail franchises in Great Britain are contracts which the franchisee (rail transport operator) enters into with the Department for Transport (the **Department**) following a competitive tender process conducted by the Department. There are other forms of contracts entered into by way of competition 'for the market'. We will assess the application of competition law to each form of franchise process on a case by case basis

2.54. When considering competition complaints about services which fall within a franchise package (for example passenger rail fares), we will have regard to the fact that there has been competition for the market; however we will also consider the length of time that has passed since such competition took place and the extent to which the franchisee has exercised its discretion within the parameters set by the franchise agreement.

# Chapter 3 – Prioritisation, choice of tool, and relationship with sector specific regulation

## Summary

This Chapter sets out how we will prioritise competition enforcement cases and how we will determine whether to use powers under the Act or use sector specific legislation.

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### A. Introduction

- 3.1. Our competition enforcement powers operate in parallel to a number of other regulatory tools which we may utilise in discharging our duties as an economic regulator. These regulatory tools include:
- consumer law enforcement powers;
  - licensing powers (both in terms of modifications to licences and the enforcement of licence breaches);
  - regulation of access to services and facilities on the rail network, including track access and access to stations and light maintenance depots, through the approval of access agreements; and
  - setting the efficient price for delivery of performance and investment in the railways and monitoring and enforcing delivery of regulated outputs.
- 3.2. We have published separate guidance in relation to our licence enforcement functions<sup>71</sup> and our approach to regulating access to services and facilities on the rail network<sup>72</sup>.

### B. Prioritisation criteria

- 3.3. We apply prioritisation principles to help us focus our resource in a way that will deliver most value from our interventions. When applying the prioritisation principles in the context of discharging our concurrent functions under the Act, we will afford particular weight to prioritising the protection of consumers and other users of railway services. The weight attached to each of the criteria will also be influenced

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<sup>71</sup> Available at <http://orr.gov.uk/news-and-media/news-and-announcements/2015/rail-and-road-users-at-heart-of-orr-approach-to-enforcement>

<sup>72</sup> [The consultation document is going to be published in January/February 2016]

by our strategic priorities. Otherwise, the criteria below are not ordered by priority or significance.

3.4. Our prioritisation criteria are:

- **Strategic significance** – We will consider how our intervention will deliver outcomes which are in line with our strategic objectives; for example to secure value for money from the railway, for users and funders.
- **Is ORR better/best placed to act** – We will examine whether an investigation is best carried out by ORR. We work in partnership with a number of concurrent competition authorities, most notably through the UKCN. Consideration of this criterion will typically involve determining which regulator is better or best placed to investigate according to the factors set out in CMA10 (the concurrency guidance)<sup>73</sup>.
- **Impact** – An important consideration for us will be the likely impact of our intervention. Factors which we will take into consideration in measuring that impact include:
  - the actual or potential level of harm (which, depending on the circumstances, could be harm to passengers, taxpayers or other users of the railways);
  - evidence to suggest a systemic issue, rather than an isolated incident;
  - circumstances that suggest conduct that is recurrent and/or on-going;
  - whether the conduct in question is leading or could lead to inefficiencies in the market, either in terms of costs or end prices to consumers; and
  - the likely deterrent effect or any other beneficial effects, such as raised awareness amongst consumers. This impact can be in the market in question or in related markets.
- **Costs** – We will estimate the internal and external costs attached to our intervention. The internal costs will include any opportunity costs (for example, knock-on effects on ORR's current and future portfolio of strategic work). It is important that the costs of our intervention are proportionate to the impact that we are seeking.

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<sup>73</sup> Under the current domestic concurrency arrangements a case will be allocated to the regulator that is better/best placed to exercise the concurrent competition enforcement powers. The CMA10 contains a list of factors relevant to determining which regulator is 'better/best placed' at paragraph 3.22. Where Article 101 and/or Article 102 may apply, a case will also be subject to the case allocation principles for determining whether the United Kingdom NCA or a NCA from another Member State is best placed to act

- **Risks** – We will adopt a risk-based approach when assessing whether or not a matter constitutes a priority. The risks that we will consider include:
  - the probability of a successful outcome particularly in terms of better outcomes for taxpayers, passengers or other users of the railways; the legal risks, notably the strength of the evidence available or likely to become available during the investigation; and
  - the impact of our decisions on our reputation, since credibility plays an important role in the overall effectiveness of the regime.

3.5. The list of criteria set out above is not exhaustive and we may consider other factors where appropriate. We will keep our prioritisation assessment of any particular case under review.

3.6. If we decide not to open an investigation into a matter under the Act on prioritisation grounds, it would nonetheless remain open to the CMA, or any other regulator with concurrent jurisdiction in relation to the matter in question, to take action under the Act, following consultation with us.

## C. Choice of tool

3.7. Anti-competitive agreements or abusive conduct in the railways sector may breach conditions or requirements in licence agreements, or may give rise to grounds for us to take action under one, or a range of, our sector specific regulatory powers. There are therefore many conceivable circumstances in which we could proceed to address problems or issues that have come to our attention either by way of our powers under the Act or by using our sector specific tools.

3.8. In certain circumstances we are required to give ‘primacy’ to pursuing enforcement action under the Act. This ‘primacy’ duty stipulates that we must, before taking action under our sector specific powers (such as making a final order or confirming a provisional order for the purpose of securing compliance with a licence condition or requirement), consider whether it would be more appropriate to proceed under the Act. We must not make a final order or make or confirm a provisional order if we consider it would be more appropriate to proceed under the Act<sup>74</sup>.

3.9. In practice we will, at an early stage, both in relation to licensing and other matters, determine on a case by case basis which tool is most appropriate to deal with the particular issues being raised. The appropriateness of the tool being utilised to

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<sup>74</sup> Sections 55(5A) and (5AA) of the Railways Act

address a particular issue will be kept under review at regular stages in enforcement cases.

- 3.10. The overriding principle is that we will seek to use the most effective, efficient and expeditious solution where an issue is found to exist. In order to make this assessment we will have regard to our prioritisation criteria with particular consideration of:
- the resource and timing implications of the tool being used;
  - the potential outcomes which may be achieved; and
  - any other advantages or disadvantages between using particular tools, for example potential deterrent effect and establishing case precedent.

## **i. Procedure**

- 3.11. We will endeavour to keep interested parties informed of what powers we are using in relation to on-going investigations. If we decide midway through an investigation to investigate under different powers, we will write to all parties involved and explain our reasons for switching between powers.
- 3.12. We will inform the CMA of all cases which we could have taken under the Act, even if ultimately we decide to deal with the case under sector specific legislation.

## **D. Inter-relationship with sector specific regulation**

### **i. Safety**

- 3.13. Alongside our economic functions we also regulate health and safety for the entire mainline rail network in Great Britain, as well as the London Underground, light rail, trams and the heritage sector. As well as giving advice to the industry, we also have a range of formal enforcement powers given to us under the Health and Safety at Work etc. Act 1974<sup>75</sup>.
- 3.14. In cases raising issues relating to safety, for instance where compliance with health and safety law is raised as a possible justification for otherwise anti-competitive conduct, we will draw upon our expertise of enforcing health and safety law in a railway context.
- 3.15. In considering arguments that otherwise anti-competitive conduct is justified on health and safety grounds, we will take into account that it is usually for public authorities to set and enforce public health and safety standards. It is not the task of

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<sup>75</sup> <http://orr.gov.uk/what-and-how-we-regulate/health-and-safety/health-and-safety-enforcement>

undertakings to take steps on their own initiative to exclude products or services which they regard, rightly or wrongly, as dangerous or inferior to their own or alternatives<sup>76</sup>.

## ii. EU Railway Packages

- 3.16. The European Commission has recognised that differing frameworks and technical and operational standards across Member States can create barriers to competitive entry, which can frustrate the policy of liberalisation of rail markets in the EU. It has therefore enacted a number of railways packages which have been transposed into UK law to establish sector specific tools aimed at liberalising railway markets and harmonising standards across Member States<sup>77</sup>.
- 3.17. An example of a measure adopted under the railways packages is Directive 2012/34/EU (the **Directive**)<sup>78</sup> which has the objective of strengthening further the governance of railway infrastructure, thereby enhancing the competitiveness of the railways sector vis-à-vis other modes of transport. When implemented into UK law<sup>79</sup> the Directive will give us powers (exercisable on our own initiative) to monitor the competitive situation in rail services markets and control arrangements for access to rail infrastructure and services. Guidance on our approach to monitoring markets is being produced separately<sup>80</sup>. We are also preparing guidance in relation to how we will discharge our functions in relation to access to infrastructure<sup>81</sup>.

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<sup>76</sup> The Commission's Article 102 Enforcement Priorities Guidance paragraph 29; *Hilti v Commission* [1991] ECR II-1439 paragraphs 118-119

<sup>77</sup> For more information, see [http://ec.europa.eu/transport/modes/rail/market/index\\_en.htm](http://ec.europa.eu/transport/modes/rail/market/index_en.htm)

<sup>78</sup> Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area (recast) (OJ L 343, 14.12.2012, p.32)

<sup>79</sup> The Department is currently consulting on the transposition of the Directive into UK law <https://www.gov.uk/government/consultations/recast-first-railway-package>

<sup>80</sup> [To be consulted upon in early 2016]

<sup>81</sup> [We expect to publish the final version of the guidance in March 2016]



# Chapter 4 – Conduct of an investigation

## Summary

This Chapter sets out how we expect to conduct investigations under the Act, and explains the possible outcomes of investigations.

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### A. Introduction

4.1. In conducting investigations under the Act we are required to follow the procedural rules set out in the CMA Rules. We will also have regard to the CMA's guidance on investigation procedures<sup>82</sup>. This guidance is intended to be a supplement to those documents and explain our particular approach to conducting investigations under the Act.

#### i. Transparency and proportionate use of powers

- 4.2. We aim to exercise our functions in a transparent manner. As such we aim to ensure that appropriate information is provided on our decision making process and that we are open and accessible to affected stakeholders. This applies throughout the course of any investigation which we undertake. Interested parties are encouraged to make representations to us at appropriate times during the course of investigations and otherwise engage with us so as to assist our decision making in cases.
- 4.3. We are committed to carrying out our investigations and making decisions in a procedurally fair, transparent and proportionate manner.

#### ii. The Procedural Officer

4.4. Parties who are aggrieved by any procedural step we take during our investigations have recourse to a procedural complaints process. Such complaints are determined by a Procedural Officer<sup>83</sup>.

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<sup>82</sup> CMA8, Competition Act 1998 Guidance on the CMA's investigation procedures in Competition Act 1998 cases, (March 2014) <https://www.gov.uk/government/publications/guidance-on-the-cmas-investigation-procedures-in-competition-act-1998-cases>

<sup>83</sup> To be appointed as and when necessary. The identity of the Procedural Officer will be communicated to relevant parties as soon as possible after an appointment is made. CMA Rules, Rule 8; see also CMA8, Chapter 15

## B. Opening an investigation

- 4.5. In order to open an investigation we must have reasonable grounds for suspecting that at least one of the competition prohibitions is being infringed, or has been infringed at some time in the past<sup>84</sup> (the ‘**Reasonable Suspicion**’ test).
- 4.6. We may launch an investigation under the Act in response to a complaint made or information supplied by a customer, a competitor, a party to a possible infringement (for example a leniency applicant), or another third party (for example, a whistleblower). Details of how to make a complaint about a possible infringement of the competition prohibitions are set out on our website<sup>85</sup>.
- 4.7. We may also decide to investigate a possible breach on our own initiative, for example following a market review or other research undertaken by us.
- 4.8. Designated consumer bodies<sup>86</sup> may make ‘super-complaints’ to sectoral regulators, where there are or appear to be market features that may be significantly harming consumers. A super-complaint may be made to us in relation to the rail industry. We will have 90 calendar days to respond to a super-complainant stating whether we will take action and what that action is likely to be. Only designated consumer bodies can make a super-complaint<sup>87</sup>.

### i. Formal complainant status

- 4.9. We will grant formal complainant status to any person who has submitted a written, reasoned, complaint to us and whose interests are likely to be materially affected by the subject matter of the complaint. Formal complainants will have the opportunity to be involved in key stages of the case and, where appropriate, will be kept updated in writing and orally about the status of the investigation.
- 4.10. Individuals who make complaints but do not wish to have formal complainant status should inform us of this in writing. We will typically withdraw formal complainant status in response to such requests.

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<sup>84</sup> Section 25 of the Act

<sup>85</sup> <http://orr.gov.uk/what-and-how-we-regulate/competition/competition-issues/how-to-complain-under-competition-law>

<sup>86</sup> Entities designated as consumer bodies include: the Consumer Association; National Consumer Council; Citizens Advice; Energywatch; Consumer Council for Water; Postwatch; CAMRA and General Consumer Council for Northern Ireland

<sup>87</sup> Further guidance on super-complaints is available in OFT514, Super-complaints, (July 2003) <https://www.gov.uk/government/publications/how-consumer-bodies-can-make-super-complaints>

## ii. Initial enquiry phase

- 4.11. In appropriate cases we may undertake an ‘initial enquiry phase’ in order to determine whether the threshold for opening an investigation is met. Any resources dedicated to an initial enquiry phase will be proportionate and commensurate with our continued assessment of the merits of the case and its likelihood of ultimately constituting an administrative priority for ORR<sup>88</sup>.
- 4.12. The initial enquiry phase may include engaging further with complainants, and, where there is minimal risk of any future investigation being jeopardised, may involve engaging with third parties and the party(ies) who may have committed an infringement. We may make informal requests for information at this stage; however, as our formal information powers under the Act are not engaged prior to the opening of an investigation, parties are not required by law to respond to our requests.
- 4.13. Where there is more than a minimal risk of any prospective investigation being jeopardised, for example where we would expect to utilise our powers to conduct a site inspection in order to obtain evidence which otherwise might be destroyed or difficult to obtain, we will not engage in any initial enquiries with third parties or the party(ies) who may have committed an infringement.

## iii. Informing the CMA and the European Commission

- 4.14. If we determine, in relation to any matter, that the Reasonable Suspicion test is met, we will inform the CMA within 7 workings days in order to commence the case allocation procedure. We will inform the CMA of each case which we consider meets the threshold for opening an investigation.
- 4.15. We will inform the European Commission if we open an investigation involving the application of Article 101 and/or Article 102 TFEU<sup>89</sup>. If we have already opened an investigation, the European Commission will consult us before exercising its power to take over the investigation<sup>90</sup>.

## vi. Communication with parties

- 4.16. If we decide to open an investigation under the Act, we will generally send the businesses under investigation a case initiation letter setting out brief details of the conduct which we are investigating, the relevant legislation, our indicative proposed timescale, and our relevant contact details.

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<sup>88</sup> See ‘Prioritisation Criteria’ above

<sup>89</sup> Article 11(3) of Regulation 1/2003

<sup>90</sup> Article 11(6) of Regulation 1/2003

## v. Warning letters

4.17. In some cases we may consider it appropriate to deal with suspected infringements of competition law which do not constitute an administrative priority for ORR by issuing a warning letter. A warning letter will set out, amongst other things, that we have been made aware of a possible breach of competition law and although we are not currently minded to pursue an investigation at that stage, we may do so in future if we receive further evidence of a suspected infringement or if our prioritisation assessment changes.

## C. The case team and decision making

4.18. We will assemble a case team to conduct the investigation, which is likely to consist of a case officer, lawyers, economists and others with the necessary expertise from across ORR, depending on the issues raised by the matter being investigated. For example, in cases involving access issues or those raising issues about safety we may include specialists from those areas of ORR within the case team, or ensure that the case team draws upon their experience as appropriate.

4.19. Each case team will always include a Senior Responsible Officer (**SRO**), the identity of whom will be notified to the parties as soon as practicable. During the course of the investigation, the SRO will have the responsibility of taking decisions in relation to whether:

- there is sufficient evidence to issue a Statement of Objections;
- to close the case on the grounds of administrative priorities;
- to make an interim measures direction;
- to accept commitments offered by a party under investigation; and
- the case is appropriate for settlement.

## D. Keeping parties informed

### i. Publishing a timetable

4.20. We will publish indicative timetables for on-going investigations on our website. We will update case timetables where changes occur during the course of investigations. We will also, where possible and subject to the confidential nature of cases, provide broad details of the nature of the case under investigation.

## ii. Communication with parties

- 4.21. The amount and frequency of communications with the party under investigation will vary depending on a number of factors, including the number of parties under investigation, the extent to which they co-operate with us and the complexity of the conduct under investigation.
- 4.22. Typically we will, as a minimum, hold ‘state of play’ meetings at appropriate points with each party under investigation. The proposed estimated dates of state of play meetings will be included on our published timetables. The first state of play meeting will usually take place soon after an investigation is opened.
- 4.23. State of play meetings are an opportunity for those being investigated to meet with the case team and the SRO. In state of play meetings we will keep each party informed of the stage the investigation has reached and provide information on the next steps in the investigation and proposed timings. We will provide as much information as possible to parties under investigation as is appropriate, bearing in mind any restrictions due to confidentiality and market sensitivity. We will endeavour, where it is appropriate to do so, to appraise parties of our preliminary thinking in relation to key aspects of the matter being investigated.
- 4.24. In addition to state of play meetings, we will provide, as appropriate, additional updates to parties under investigation either by telephone or in writing.

## iii. Communication with complainants

- 4.25. Complainants will not, as a matter of course, be offered formal state of play meetings. We would expect however to provide regular updates to complainants either by telephone or in writing where it is appropriate to do so.

# E. Information gathering and sharing

## i. Information gathering powers under the Act

- 4.26. Once we have opened an investigation under the Act<sup>91</sup> we have a number of formal information gathering powers. Further detail on our information gathering powers is set out in the CMA’s guidance<sup>92</sup>. In summary, under the Act our information gathering powers include that we:

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<sup>91</sup> Under section 25 of the Act

<sup>92</sup> See CMA 8, Chapters 6 and 7 and OFT404, Powers of investigation, (December 2004)  
<https://www.gov.uk/government/publications/cma-powers-of-investigation-of-anti-competitive-behaviour>

- can issue requests for information and documents (commonly referred to as section 26 notices);
- can conduct compulsory interviews with any individual connected to a business under investigation; and
- have the power to enter business and domestic premises, require the production of documents and take copies of documents. Such entry may be either with or (for business premises) without a warrant. If we have received a warrant, we may search for and seize documents.

4.27. The CMA's guidance describes the limits on its information gathering powers under the Act<sup>93</sup>. These limits also apply to us. As such we:

- cannot require the production or disclosure of privileged communications; and
- cannot force a business to provide answers that would require an admission that it has infringed the law.

## **ii. Use of information gathered under the sector specific powers**

4.28. There may be circumstances in which information gathered using our sector specific powers may be utilised for the purposes of enforcing the competition prohibitions; though once we have launched an investigation under the Act (or transferred a case for enforcement under the Act), we would expect to use our powers under the Act.

4.29. Our information gathering powers under sector specific legislation are primarily contained in the Railways Act, or are otherwise governed by its provisions. There are restrictions on the disclosure by ORR of information it has obtained under or by virtue of the Railways Act and which relates to the affairs of a business or an individual unless consent for such disclosure has been obtained from that business or individual. However, the Railways Act<sup>94</sup> does permit disclosure for the purpose of facilitating the carrying out by ORR of any of its functions under the Railways Act and the Transport Act 2000, including our concurrent competition powers. Therefore we can use or disclose information gathered under the Railways Act to facilitate our functions under the Act.

4.30. Similarly, Part 9 of the Enterprise Act restricts disclosure of information which has been obtained under the Act<sup>95</sup> if such information relates to the affairs of any

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<sup>93</sup> See CMA 8, Chapter 7

<sup>94</sup> Section 145(2) of the Railways Act

<sup>95</sup> Sections 237 and 238 of the Enterprise Act

individual or to any business of an undertaking, unless a relevant statutory gateway is available – for example, the individual or business concerned gives its consent<sup>96</sup> or the disclosure is made for the purpose of facilitating the performance of any function ORR has by virtue of any enactment<sup>97</sup>. It is possible for information obtained by us in the course of an investigation under the Act to be disclosed by us to facilitate our regulatory functions under the Railways Act<sup>98</sup>.

4.31. Before making any such disclosure, we must have regard to three considerations<sup>99</sup>:

- the need to exclude from disclosure (so far as practicable) any information whose disclosure we think is contrary to the public interest;
- the need to exclude from disclosure (so far as practicable):
  - commercial information the disclosure of which we think might significantly harm the legitimate business interests of the undertaking to which it relates; or
  - information relating to the private affairs of an individual the disclosure of which we think might significantly harm the individual's interests; and
- the extent to which the disclosure of the information is necessary for the purpose for which we are permitted to make the disclosure.

### iii. Freedom of Information Act

4.32. The Freedom of Information Act 2000 (**FOIA**) gives any person the right to request non-published information from us, as a public authority. We, as an organisation, are committed to openness and transparency; however, we recognise that we will obtain information in the context of competition investigations that should not be widely disclosed, or in some circumstances not disclosed at all.

4.33. Where information obtained by us in the course of investigations made under the Act falls within the prohibition on disclosure contained in Part 9 of the Enterprise Act, such information would be exempt from disclosure under section 44 of the FOIA. This provides that where the disclosure of information is “*prohibited by*

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<sup>96</sup> Sections 239(3) and (4) of the Enterprise Act

<sup>97</sup> Section 241(1) of Enterprise Act

<sup>98</sup> Under Schedule 15 of the Enterprise Act, which lists both the Act and the Railways Act as enactments conferring functions

<sup>99</sup> Section 244 of the Enterprise Act

*another enactment*<sup>100</sup> it is considered exempt information for the purposes of the FOIA<sup>100</sup>.

4.34. We might also seek to rely on other absolute or qualified exemptions contained within the FOIA, including:

- section 31(1)(g), which allows us to withhold information if we consider that disclosure would, or would be likely to, prejudice our ability to exercise our statutory functions for the purposes set out at section 31(2) of the FOIA. This is a qualified exemption and is subject to a test of whether, in all the circumstances, the public interest in maintaining the exemption outweighs the public interest in disclosing the information; and
- section 32 of the FOIA, which provides an absolute exemption where the requested information is held by a public authority in a document placed in the custody of a person conducting an inquiry, for the purposes of that inquiry.

#### **iv. Exchange of information and restrictions on use of information**

4.35. As a designated NCA we are required to carry out our EU competition law functions in close cooperation with our European competition partners<sup>101</sup>. We may, for instance, share confidential information with the European Commission and NCAs of other Member States<sup>102</sup>. Prior to sharing any information in accordance with this obligation we will have regard to the provisions in Part 9 of the Enterprise Act<sup>103</sup>.

4.36. NCAs of Member States, when applying Articles 101 and 102, are permitted to provide each other with, and use in evidence, any matter of fact or law (including confidential information)<sup>104</sup>. The information may only be used as evidence in the

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<sup>100</sup> To benefit from the section 44 exemption in FOIA, information must fall within the general prohibition on disclosure in section 237 of the Enterprise Act. To fall within the prohibition information must be specified information, namely it came to a public authority pursuant to a number of prescribed functions (including enforcement of the Act). Such specified information must also relate to the affairs of a living individual or the business of an undertaking which remains in existence

<sup>101</sup> Article 11(1) of Regulation 1/2003

<sup>102</sup> Article 12(1) and (2) of Regulation 1/2003. Information shared under this provision may only be used by the recipient NCA for the purposes of applying the EU competition prohibitions. However if national competition law is applied in parallel to the EU prohibitions, and does not lead to a different outcome, the information may also be used for the purposes of applying national competition laws. Further guidance on the operation of information sharing within the ECN is set out in the Commission Notice on cooperation within the Network of Competition Authorities (OJ 2004 C 101 p.3)

<sup>103</sup> Notably the considerations in section 244 of the Enterprise Act

<sup>104</sup> Article 12 of Regulation 1/2003



application of Articles 101 or 102 TFEU<sup>105</sup> and in respect of the specific investigation for which it was collected by the original NCA. Information gathered from another member of the ECN during the course of an investigation under the Act enjoys a similar degree of protection and therefore should not be used for any other purpose.

- 4.37. The exchange of information between ORR and the CMA is permitted both for the purpose of determining who has jurisdiction to exercise functions under the Act<sup>106</sup> in relation to a case under the Act and/or EU law, and generally for the purpose of facilitating the performance by us of our concurrent competition functions<sup>107</sup>.

## v. Penalties for non-compliance

- 4.38. We may impose penalties if parties fail to comply with our information gathering powers without reasonable excuse<sup>108</sup>. In determining whether to proceed, we will follow the CMA's policy on administrative penalties<sup>109</sup>. In addition, it is a criminal offence to provide false or misleading information, or to destroy, falsify or conceal documents (subject to certain statutory conditions<sup>110</sup>).

## F. Interim measures

- 4.39. We have the power<sup>111</sup> to require a party to comply with temporary directions, called 'interim measures', at any time during the investigation where we consider it necessary to act urgently either to prevent significant damage to a person or category of persons, or in order to protect the public interest.
- 4.40. We can impose interim measures on our own initiative or in response to a request to do so. If a person wishes to make an interim measures application, they should contact the case team leader and provide sufficient information to demonstrate the need for interim measures.

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<sup>105</sup> Or national competition law, subject to the criteria at footnote 104 above

<sup>106</sup> Namely, Part 1 functions which are any functions under the Act which are or would be exercisable concurrently (see the definition in regulation 2 of the Concurrency Regulations).

<sup>107</sup> Regulation 3 and 9 of the Concurrency Regulations; CMA10 paragraphs 3.41 to 3.62; and, the Memorandum of Understanding paragraphs 37 to 48

<sup>108</sup> Section 40A of the Act

<sup>109</sup> CMA4, Administrative Penalties: Statement of Policy on the CMA's approach, (January 2014) <https://www.gov.uk/government/publications/administrative-penalties-statement-of-policy-on-the-cmas-approach>

<sup>110</sup> Sections 43 and 44 of the Act

<sup>111</sup> Section 35 of the Act

- 4.41. In considering an application for interim measures we will follow the procedure outlined in the CMA's guidance<sup>112</sup> which outlines rights for representations to be made by applicants and the party against whom an interim measure is sought. Each application will be assessed on a case by case basis, with determinations made by the SRO. In determining whether or not to impose interim measures in any particular case we will seek to ensure that:
- any interim measures are imposed only where specific conduct or behaviour is identified which we consider is causing or is likely to cause significant damage<sup>113</sup> to a particular person or category of person, or is likely to be contrary to the public interest; and
  - any interim measures prevent, limit or remedy the significant damage identified by ORR and are proportionate to address any significant damage which is being caused or is likely to be caused.

## **G. Possible outcomes following investigations**

4.42. There are a number of possible outcomes which may arise following an investigation. Each of these possible outcomes is addressed below.

### **i. Issue a statement of objections**

- 4.43. If the SRO reaches the provisional view that the conduct under investigation amounts to an infringement of competition law, the SRO can decide to issue a Statement of Objections to each business under investigation.
- 4.44. We will generally follow the CMA's approach in relation to the issue of a Statement of Objections<sup>114</sup>. We will normally announce the issue of a Statement of Objections on our website and on the Regulatory News Service. However depending on the circumstances of the case and any market sensitivities, we may vary the extent of publication or decide not to announce the issue of the Statement of Objections.
- 4.45. The Statement of Objections sets out our provisional view based on our legal and economic assessment of the case. It also sets out our proposed next steps, and gives the business under investigation an opportunity to know the full case against it and to respond formally in writing and orally. The processes to be followed and

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<sup>112</sup> CMA8, Chapter 8

<sup>113</sup> We consider damage may include actual or potential: financial loss; restrictions on obtaining supplies; or, loss of goodwill. Damage will be significant where a particular person or category of persons is or is likely to be restricted in their ability to compete effectively in the market(s). such that this is causing or is likely to cause significant damage to their commercial position

<sup>114</sup> CMA8 Chapter 11

possible outcomes following a Statement of Objections are set out in Chapter 5, below.

## **ii. Closing a case on the grounds of administrative priorities**

- 4.46. At any time before or after issuing a Statement of Objections, the SRO may decide that a formal investigation no longer merits the continued allocation of resources. At regular intervals throughout an investigation the merits of continuing the case will be assessed against our prioritisation principles.
- 4.47. If the SRO decides that a case no longer constitutes an administrative priority, we will inform the business under investigation as well as any formal complainants in writing and set out our reasons for not taking forward the investigation. We will give formal complainants an opportunity, usually within two to four weeks, to submit representations and any additional information. Businesses under investigation will also be allowed the same time frame to submit representations.
- 4.48. After considering any representations and further evidence received, the SRO will reach a view on whether to close the case. If the SRO decides to close the case on the grounds of administrative priorities, we will inform the business under investigation. In appropriate cases we may issue a warning letter stating that although we are not minded to pursue the investigation further at the current time, we may pursue an investigation in the future. We will always reserve the right to keep our prioritisation decisions under review.
- 4.49. A decision to de-prioritise a case by us is not binding on other competition authorities (e.g. the CMA and the European Commission). Other competition authorities with the necessary jurisdiction may wish to undertake an investigation in relation to a matter otherwise deprioritised by us.

## **iii. Issuing a no grounds for action decision**

- 4.50. If the SRO considers that there is insufficient evidence of a competition law infringement the SRO may issue a decision that there are no grounds for action. In such a case, we will provide a non-confidential provisional version of our proposed 'non-infringement' decision to any formal complainant(s). We will invite representations from any formal complainants within a time frame of two to four weeks. We will consider any representations made before proceeding to make a non-infringement decision or not.

## **iv. Accepting commitments on future conduct**

- 4.51. The SRO may accept commitments from one or more businesses for the purposes of addressing the competition concerns that we are investigating in a particular

case<sup>115</sup>. Commitments may be offered at any time during a case<sup>116</sup>; however, the SRO is less likely to exercise their discretion to accept commitments the further a case has progressed.

- 4.52. Commitments constitute binding promises from a business in relation to its future conduct. We will follow the CMA's guidance on the circumstances in which it is appropriate to accept commitments<sup>117</sup>.
- 4.53. If the SRO accepts commitments we will discontinue our investigation and we cannot make a final decision or give a direction<sup>118</sup>. However, we can continue the investigation, make a decision or give a direction if we have reasonable grounds:
- to believe that there has been a material change of circumstances since the commitments were accepted;
  - to suspect a business has not adhered to the commitments it has accepted; or
  - to suspect that the information that led us to accept the commitments was incomplete, false, or misleading in a material particular.
- 4.54. We will give notice of any proposal to accept commitments and allow at least eleven working days for interested parties to give their views on the proposed commitments. Where appropriate, we will have a meeting with each business that offered commitments to inform them of the general nature of responses received. If necessary we will indicate whether we consider that changes are required to the commitments before we would consider accepting them. If the parties offering commitments offer material modifications to the proposed commitments, we will allow interested third parties a further period of at least six working days in which to comment on the modified commitments.
- 4.55. The SRO will make the decision as to whether to accept commitments. Once accepted we will publish the commitments, and a decision explaining our reasons for accepting commitments, on our website.

## **v. Informing the CMA and the European Commission**

- 4.56. We will share a draft notice, decision or copy of commitments with the CMA and any other competition authority with concurrent jurisdiction prior to:

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<sup>115</sup> Section 31A of the Act

<sup>116</sup> Once a case has formally begun, but before any infringement decision has been made

<sup>117</sup> See OFT407 paragraphs 4.1 to 4.28; and, CMA8 paragraphs 10.15 to 10.23

<sup>118</sup> Section 31B(2) of the Act (giving a direction would include ordering interim measures)

- issuing a Statement of Objections;
- making a decision or publishing a notice of intention to accept commitments;
- issuing an infringement decision;
- issuing a non-infringement decision; or
- making any decision not to proceed with an investigation (including on administrative priority grounds<sup>119</sup>).

4.57. We will allow concurrent regulators ten working days to provide comments on the relevant documents shared with them. We will take into account any comments provided before reaching any final determination.

4.58. We will also, no less than 30 days before the adoption of a decision accepting commitments, inform the European Commission and provide sufficient information for the European Commission to assess the case<sup>120</sup>. We will take into account any comments provided by the European Commission before making any final determination.

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<sup>119</sup> The full list of scenarios in which we would share a draft with concurrent competition authorities is set out at Regulation 9 of the Concurrency Regulations

<sup>120</sup> Article 11(4) of Regulation 1/2003

# Chapter 5 – After a Statement of Objections

## Summary

This Chapter sets out the procedure we will follow in cases where we have issued a Statement of Objections and our approach to determining appropriate outcomes.

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### A. Right to reply

5.1. Businesses who receive a Statement of Objections have the opportunity to exercise their rights of defence (otherwise known as the ‘right to reply’). The stages in this process and the approach we will take to allow parties to exercise this right are set out below.

#### i. Appointment of a case decision group

5.2. The right to reply involves the opportunity to make oral and written representations to a case decision group (**CDG**). This group consists of at least two expert individuals who were not part of the original case team, to be appointed by ORR’s Board on a case by case basis<sup>121</sup>. The role of the CDG is to scrutinise the case as set out in the Statement of Objections and to carefully consider and take into account any representations made by businesses alleged to have infringed/be infringing the competition prohibitions. Parties will be informed of the identities of CDG members when they are appointed.

5.3. The CDG may receive advice and assistance from the original case team but will make its determination independently.

#### ii. Access to the file

5.4. After issuing a Statement of Objections to a business we will give it a reasonable opportunity (typically six to eight weeks) to inspect the disclosable documents which we have on our case file and which relate to the matters referred to within the Statement of Objections. We will follow the CMA’s guidance in relation to access to the file<sup>122</sup>. We will exclude from disclosure certain confidential information and internal documents. We may also exclude routine administrative documents from the file, for example correspondence setting up meetings.

5.5. We will comply with the provisions in Part 9 of the Enterprise Act 2002 when considering what information is confidential and/or whether it is appropriate for such

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<sup>121</sup> CMA Rules, Rules 3(2) and (3)

<sup>122</sup> CMA8, Chapter 11

information to be disclosed for the purposes of facilitating our functions under the Act. We consider<sup>123</sup> that confidential information is:

- commercial information, disclosure of which might significantly harm the legitimate business interests of the undertaking to which it relates;
- information relating to the private affairs of an individual, disclosure of which might significantly harm the individual's interests; or
- information, the disclosure of which would be contrary to the public interest.

5.6. In order for us to determine what information is confidential, it is our policy to request that third parties who provide information to us indicate which parts of that information they consider to be confidential, in line with the above criteria. We have discretion, even where third parties have claimed confidentiality, to disclose such information if we consider that it is necessary to do so in the exercise of our powers under the Act. Requests to restrict disclosure of confidential information should therefore be supported by reasoned arguments as to what harm would ensue from its disclosure and why.

5.7. We will consider representations on confidentiality from affected parties and assess the merits of each case put before us, following the procedure in the CMA Rules<sup>124</sup>. If we propose to disclose confidential information provided by a person, we will inform that person of the proposed disclosure and give them a reasonable opportunity to make representations on the proposed action. We will typically not accept blanket requests for confidentiality (i.e. confidentiality over an entire document, or part of it) and may request that parties specifically redact parts of documents which they consider to be confidential.

5.8. Depending on the nature of the information to be disclosed, we may make use of electronic disclosure techniques, or, where appropriate, utilise data rooms to effect access to file. The arrangements for disclosure of information will be assessed on a case by case basis.

### **iii. Written representations**

5.9. Recipients of a Statement of Objections will have an opportunity to make written representations. We would expect to give parties between eight to twelve weeks to respond to the Statement of Objections, depending upon the complexity of the

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<sup>123</sup> See Enterprise Act 2002 section 244

<sup>124</sup> CMA Rules, Rule 7

case. We will ask for a confidential and a non-confidential version of their representations<sup>125</sup>.

- 5.10. We may give formal complainants and third parties, who may be able to assist with the CDG's assessment of the case, an opportunity to submit written representations. In order to facilitate that process we will provide them with a non-confidential version of the Statement of Objections or the particular part on which we are seeking their representations, not usually including annexed documents. Any documents disclosed in this regard should be used solely for the purpose of providing representations to us and should not be disclosed to other third parties.

#### **iv. Oral hearings**

- 5.11. The CDG will invite the parties under investigation to attend an oral hearing to discuss the matters set out in the Statement of Objections. If appropriate, formal complainants may also be invited to attend and make representations at oral hearings. Hearings will be attended by members of the case team as well as the CDG.
- 5.12. The hearing will be conducted by a duly appointed Procedural Officer.
- 5.13. We will agree with the party under investigation an agenda for any oral hearing in which it is involved in advance of the hearing. The party under investigation will have an opportunity to highlight to the CDG directly any issues of importance to its case, and to clarify the detail set out in its written representations. Although it is helpful to us if the party under investigation answers the questions raised in the oral hearing, there is no obligation to do so and it is possible to respond to questions in writing following the hearing. A transcript of the hearing will be taken.
- 5.14. Following the oral hearing, the Procedural Officer will report to the CDG indicating any procedural issues that have been brought to the attention of the Procedural Officer during the investigation and an assessment of the fairness of the procedure followed during the oral hearing<sup>126</sup>.

### **C. Steps following oral hearings**

- 5.15. Following an oral hearing, the CDG will consider the Statement of Objections and the representations which have been submitted in writing and orally. It may then take any or all of the steps set out below.

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<sup>125</sup> See paragraph 5.6, above, for the principles we will apply

<sup>126</sup> CMA Rules, Rules 6(6) and (7)



## **i. Letter of Facts**

5.16. If the CDG receives new evidence supporting the objections contained in the Statement of Objections, and the CDG intends to rely on it to establish an infringement, it will put the new evidence to the addressee of the Statement of Objections in a 'Letter of Facts' and allow time for it to respond.

## **ii. Supplementary Statement of Objections**

5.17. If the CDG receives new information in response to the Statement of Objections which indicates that there is evidence of a different suspected infringement from that set out in the Statement of Objections, or that there is a material change in the alleged infringement, the CDG will issue a 'Supplementary Statement of Objections' setting out the new facts on which it proposes to rely, and giving the addressee an opportunity to respond in writing and orally, and to inspect the new documents<sup>127</sup>.

## **iii. Draft penalty statement**

5.18. If the CDG is considering reaching an infringement decision and imposing a financial penalty on a party, it will provide that party with a draft penalty statement<sup>128</sup>, which will set out the key aspects relevant to the calculation of the proposed penalty, based on the information available to it at the time. Parties will be given an opportunity to comment on the draft penalty statement in writing and to attend a further oral hearing with the CDG.

# **D. Possible decisions**

5.19. Following consideration of the Statement of Objections and the representations received, the CDG will decide to either issue an infringement decision or a decision that there are no grounds for action.

## **i. Infringement decision**

5.20. If the CDG issues an infringement decision, it will set out the facts on which it relies to prove the infringement and the action which it will take. It will also address the material representations made to us during the course of the investigation. The infringement decision may impose a financial penalty<sup>129</sup> and may issue directions to bring the infringement to an end<sup>130</sup>. If a party then fails to comply with our directions, we may seek a court order to enforce the directions<sup>131</sup>.

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<sup>127</sup> Subject to the considerations listed above in relation to access to the file

<sup>128</sup> CMA Rules, Rule 11

<sup>129</sup> Section 36 of the Act

<sup>130</sup> Sections 32-33 of the Act

5.21. We would normally issue a press announcement regarding an infringement decision and make an announcement on the Regulatory News Service. We will also publish a summary and a non-confidential version of the infringement decision.

## **ii. No grounds for action**

5.22. If the CDG does not find sufficient evidence of a breach of competition law, it will consult any formal complainant. Following any such consultation, the CDG may decide to close the case.

5.23. We would expect to follow the same procedure as for issuing an infringement decision, in terms of publication and announcements.

## **E. Sanctions for infringement**

### **i. Penalties**

5.24. If we find an infringement of competition law we may impose a penalty on the infringing undertaking(s). The infringement decision will explain how the CDG decided on the appropriate level of penalty, having taken into account our statutory obligations in fixing a financial penalty<sup>132</sup> and the parties' written and oral representations on the draft penalty calculation.

5.25. We will follow the CMA's penalty guidance when setting the amount of a penalty<sup>133</sup>.

### **ii. Settlements**

5.26. In the context of enforcement cases under the Act, settlement is the process whereby a business under investigation is prepared to admit that it has infringed competition law and confirms that it accepts that a streamlined 'right to reply' procedure will govern the remainder of the investigation of that business's conduct in return for a reduction in its financial penalty.

5.27. We will retain a broad discretion in determining which cases are appropriate for settlement. Businesses do not have a right to settle in any given case. We will follow the CMA's guidance in relation to: determining which cases are appropriate for settlement; the procedure to be followed in settlement cases; and calculating

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<sup>131</sup> Section 34 of the Act

<sup>132</sup> Section 36(7A) of the Act

<sup>133</sup> OFT 423, OFT's guidance as to the appropriate amount of a penalty, (September 2012)  
<https://www.gov.uk/government/publications/appropriate-ca98-penalty-calculation>

discounts from financial penalties/granting immunity from sanctions such as competition disqualification orders<sup>134</sup>.

5.28. A party wishing to settle will have to admit liability in relation to the nature, scope and duration of its infringement, immediately cease the infringing behaviour and refrain from engaging in the same or similar infringing behaviour. A party wishing to settle will also have to accept that there will be a streamlined administrative process for the remainder of the investigation, including streamlined access to file arrangements and a streamlined process for making representations. A settling party will have to accept that there will be an infringement decision against it, and that such a decision will remain final and binding<sup>135</sup>.

### iii. Voluntary redress schemes

5.29. Both we and the CMA are empowered to approve certain voluntary redress schemes<sup>136</sup>.

5.30. Approved voluntary redress schemes are a form of alternative dispute resolution. Where a business offers a redress scheme, those affected by the infringement are able to claim compensation through such a scheme without the need to pursue litigation in the courts.

5.31. In cases relating to the provision of services relating to railways, a person (which may include more than one undertaking applying jointly) who has infringed competition law may apply to ORR or the CMA for approval of a voluntary redress scheme. When either authority proposes to exercise these powers, pursuant to the Concurrency Regulations, it shall liaise with the other authority as appropriate.

5.32. Where ORR is deemed to be best placed to deal with an application for approval of a voluntary redress scheme (under the Concurrency Regulations and the Concurrency Guidance) it will follow the CMA's guidance on the approval of such schemes<sup>137</sup>.

### iv. Directions

5.33. If we have made a decision that one of the competition prohibitions has been infringed, we may impose directions on the infringing parties which we consider are

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<sup>134</sup> CMA8, Chapter 14

<sup>135</sup> Unless the party concerned appeals the decision successfully

<sup>136</sup> Competition Act 1998 (Redress Scheme) Regulations 2015, (S.I. 2015, No.1587)

<sup>137</sup> CMA40, Guidance on the approval of voluntary redress schemes for infringements of competition law, (14 August 2015) <https://www.gov.uk/government/publications/approval-of-redress-schemes-for-competition-law-infringements>

appropriate to bring the infringement to an end. If a party subject to directions fails to comply with them, we may apply to the court for an order requiring the relevant party to make good their default.

## **v. Competition disqualification orders**

- 5.34. We can make an application to the court for a competition disqualification order to be made against any director of a company which we have found to be in breach of competition law<sup>138</sup>. Such an order will be made by the court if it finds that the conduct of the director in connection with that breach against whom the order is sought makes him unfit to be concerned in the management of a company.
- 5.35. Before making such an application, we will give notice to the director concerned and give that person an opportunity to make representations<sup>139</sup>.

## **vi. Informing the CMA and the European Commission**

- 5.36. We will share a draft copy of any proposed infringement decision with any other competition authority with concurrent jurisdiction prior to finalising the decision. We will allow concurrent regulators 10 working days to provide comments on the draft infringement decision shared with them. We will take into account any comments provided before reaching any final determination.
- 5.37. We will also, no less than 30 days before the adoption of a decision requiring that an infringement be brought to an end, inform the European Commission and provide sufficient information for the European Commission to assess the case<sup>140</sup>. We will take into account any comments provided by the European Commission before making any final determination.

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<sup>138</sup> Section 9A(10) of the Company Directors Disqualification Act 1986 (CDDA 1986), see OFT510, Director disqualification orders in competition cases (June 2010)

<https://www.gov.uk/government/publications/competition-disqualification-orders>

<sup>139</sup> Section 9C of CDDA 1986

<sup>140</sup> Article 11(4) of Regulation 1/2003



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