

Annette Egginton
Head of Competition and Consumer Policy
Railway Markets and Economics

Email: Annette.egginton@orr.gsi.gov.uk

18 January 2016



Dear Stakeholder

The Office of Rail and Road (**ORR**) is an enforcer of the prohibitions on anti-competitive behaviour in the Competition Act 1998 (the **Act**) and the Treaty on the Functioning of the European Union (**TFEU**) in relation to the provision of services relating to railways in Great Britain. These prohibitions relate to agreements that prevent, restrict or distort competition and to abuses of a dominant position. ORR enforces the competition prohibitions concurrently with the Competition and Markets Authority (the **CMA**).

The purpose of the letter is to draw your attention to our **consultation** on our proposed publication of updated guidance (the **Proposed Guidance**) regarding our approach to the enforcement of the competition prohibitions in the Act and in the TFEU and how we expect the competition prohibitions to apply in the railways sector. A copy of our Proposed Guidance is attached to this letter at **Annex 1**.

The consultation period begins on 18 January 2016 and will run until **14 March 2016**.

The Proposed Guidance, if and when adopted, will replace the existing guidelines, OFT430, Application to services relating to railways (October 2005)¹.

As you may be aware, we also have powers and duties to monitor markets², carry out market studies, and make market investigation references to the CMA³. Our functions regarding monitoring and the taking of action in relation to markets, is the subject of separate guidance which is in the process of being revised.

¹ <http://orr.gov.uk/what-and-how-we-regulate/competition/competition-issues>

² This and other functions relating to competition in railways markets are contained in the Railways Infrastructure (Access and Management) Regulations 2005. These regulations are likely to be replaced in the near future by regulations transposing Directive 2012/34/EU Establishing a single European railway area (Recast). The transposition of this directive was consulted on by the Department for Transport in March 2015: <https://www.gov.uk/government/consultations/recast-first-railway-package>

³ Under the Enterprise Act 2002 (the **Enterprise Act**)

Background

We are required by law to prepare and publish advice and information about the application of the competition prohibitions contained in the Act and the enforcement of those competition prohibitions⁴. The CMA has published extensive guidance on the general application of the competition prohibitions in the UK⁵. We consider it is important however as a concurrent competition authority to produce guidance which clearly and transparently sets out our proposed approach to enforcing the competition prohibitions. We also consider that the publication of guidance is an important opportunity to highlight how competition law might apply in areas specific to the railways sector.

Since the publication of our existing guidelines there have been significant developments in the framework for competition enforcement in the UK and in substantive competition law. Notably, the coming into force of the Enterprise and Regulatory Reform Act 2013 (**ERRA**), established the CMA and implemented changes to the concurrency arrangements between the CMA and sectoral regulators, including ORR.

We therefore consider it is appropriate to introduce updated guidance to reflect both the changes in the competition enforcement framework and to ensure that our guidance reflects developments in substantive competition law. We have also sought to capture our experience of enforcing the competition prohibitions in the railways sector, which has substantially increased since we published our existing guidelines, in the Proposed Guidance.

Content of the Proposed Guidance

The key purpose of the Proposed Guidance is to assist businesses and individuals operating in the railways sector to self-assess their compliance with competition law by giving practical advice on how we expect competition law might apply in this area. Through increasing deterrence and potentially the detection of illegal anti-competitive behaviour we consider that the publication of the Proposed Guidance will benefit consumers who will benefit from any increase in competition brought about by these impacts.

To this end we have provided a number of case studies and examples of how the principles of competition law may apply in the railways sector (for instance we have used a

⁴ Section 52(1) and (1A) of the Act

⁵ The relevant guidance and guidelines are available on the CMA's website:

<https://www.gov.uk/topic/competition/competition-act-cartels>. Our Proposed Guidance refers to specific CMA guidance/guidelines where appropriate

case study to show how the principles defining markets were used in the rail freight sector). We have addressed how competition law might apply in a number of areas specific to the rail sector, including:

- cooperation between TOCs and FOCs, notably in relation to pricing;
- franchising;
- the application of the services of general economic interest exclusion;
- the Public Transport Ticketing Block Exemption; and
- conduct subject to legal direction, either through legislation or licence requirements.

Another objective of the Proposed Guidance is to set out on how we propose to exercise our concurrent powers to enforce the competition prohibitions under the Act. This will give a greater degree of transparency and certainly to complainants and businesses under investigation by making clear what procedures and processes will be applied during the course of our competition investigations. We have designed our procedures with the aim of using our powers transparently, effectively, and efficiently.

The Proposed Guidance provides information on:

- the scope of our jurisdiction to apply the competition prohibitions and how our relationship with the CMA will work in practice;
- factors we will take into account when opening an investigation under the Act and how we will determine whether to use our powers under the Act or alternative sector specific tools which may be available to us to resolve issues in railway markets; and
- 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.

Because we exercise our powers to enforce the competition prohibitions concurrently with the CMA⁶ there will always be a question on who takes forward cases. The Proposed Guidance covers how we will work with the CMA during the conduct of a case and addresses practical issues such as how information will be shared between the respective organisations.

Our powers to enforce the competition prohibitions operate in parallel to a number of other regulatory functions and duties which we may utilise in discharging our duties as an

⁶ There may be circumstances where we exercise our powers concurrently with other sectoral regulators in situations where their respective concurrent jurisdiction overlaps with our own

economic regulator. 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. The Proposed Guidance addresses how these functions and duties interrelate with each other and how we will prioritise which tool we will use to address particular issues. In particular the Proposed Guidance addresses how we will apply the competition ‘primacy’ duty introduced by the ERRA⁷.

Key changes

Notwithstanding the technical nature of competition law, we have sought to prepare the Proposed Guidance with a view to making it easier to follow and more meaningful to the rail industry. As stated above, in order to achieve this we have utilised case studies and given practical examples of how competition law might apply in a number of scenarios relevant to the rail sector.

Updates in substantive competition law

We have updated the Proposed Guidance to reflect changes in broad substantive competition law issues, and enforcement approach in relation to: the definition of undertakings, the approach to market definition and in relation to the concept of an appreciable effect on trade between Member States or competition.

We have also updated the Proposed Guidance in the light of recent developments in case law and competition policy in relation to more specific competition law issues. We have sought to reflect how those changes may impact on the railways sector, in particular we have updated the Proposed Guidance to reflect the law in relation to conduct subject to legal direction.

The Concurrency regime

In Chapter I of the Proposed Guidance we have introduced a detailed explanation on how we expect concurrency with the CMA to work in practice in a number of areas (case allocation, information sharing, criminal cartels and leniency) in light of changes brought about since the implementation of the ERRA and the implementation of a Memorandum of Understanding between the CMA and ORR.

⁷ Schedule 14, paragraphs 11-14

Leniency

In Chapter 1 of the Proposed Guidance we suggest that potential leniency applicants should approach the CMA in the first instance and follow its published leniency procedure.

Block exemptions (ticketing block exemption)

At Chapter 2 we provide an update on the Public Transport Ticketing Schemes block exemption.

Franchises

At Chapter 2 we clarify the factors which we will take into account when considering complaints relating to services which fall within a franchise package.

Prioritisation criteria, the competition primacy duty and interaction between regulatory tools

In Chapter 3 of the Proposed Guidance we set out how we will prioritise competition enforcement cases and how we will have regard to the competition primacy duty when determining whether to use powers under the Act or use sector specific legislation. The purpose here is to ensure that ORR takes on the right cases, notably the cases which deliver best value for money for consumers, taxpayers and other users of the railway.

Changes in investigatory powers

At Chapter 4 of the proposed guidance we provide details of our investigatory powers which include the following changes introduced by ERRAs:

- administrative penalties for non-compliance with our information gathering powers;
- power to carry out compulsory interviews; and
- lower threshold for imposing interim measures.

Procedural changes

At Chapters 4 and 5 we set out our policy on the conduct of investigations. The processes and procedures outlined have been updated to have regard to the Competition Act 1998

(Competition and Market Authority's Rules) Order 2014⁸, and CMA guidance on its procedures which also now reflect recent changes in statute.

We have adopted a number of procedural steps which, in our view, will increase the level of transparency (for example, state of play meetings, naming parties to the investigation and publishing timetables).

Voluntary consumer redress schemes

At Chapter 5 we have set out our concurrent powers to approve voluntary redress schemes in the context of investigations under the Act and the TFEU. We clarify that, where ORR is deemed as best placed to deal with an application, it will follow the CMA's guidance on the approval of such schemes.

Consultation questions

In this consultation we are seeking views on the draft guidance contained at Annex 1. To this effect, we raise specific questions for consideration but would welcome any other representations you may have. The specific questions are

Q1: Do you agree with our proposals on how we will exercise our competition prohibition enforcement powers .

Q2: Do you have any other comments on the scope or content of the Proposed Guidance.

Q3: Are there any areas which you think would benefit from further clarity?

Impact on stakeholders and interested parties

This consultation will be of interest to all businesses (whether or not they are subject to ORR's regulation) who provide services relating to railways in Great Britain. This consultation may also be of interest to the users of railway services; consumers may be interested to learn more about how we will use our competition powers.

⁸ SI 2014/458

The review of the competition guidelines only clarifies existing obligations and, as mentioned above, results from a number of statutory and legislative changes. We take the view, therefore, that there will be no additional costs as a result of the guidelines themselves. We do not consider that the proposals raise any equality or diversity impacts.

How to respond to this consultation

Please ensure that your response reaches us on or before the closing date of 14 March 2016. If you would like further copies of this consultation document, it can be found at:

<http://orr.gov.uk/consultations/open-consultations/consultation-on-our-approach-to-the-enforcement-of-competition-law-in-the-railways-sector>

Please send your consultation responses to:

Ricardo Araujo

Competition and Consumer Policy
Office of Rail and Road
One Kemble Street
London
WC2B 4AN
Email: ricardo.araujo@orr.gsi.gov.uk

When responding, please state whether you are responding as an individual or representing the views of an organisation. If responding on behalf of a larger organisation, please make it clear who the organisation represents.

All responses will be published on ORR website unless marked as confidential⁹.

Yours sincerely,



Annette Egginton

Annex: Draft guidance on ORR's approach to the enforcement of the Competition Act 1998 in the rail sector.

⁹ Information provided in response to this consultation, may be subject to publication or disclosure in accordance with the Freedom of Information Act 2000 (FOIA) or the Environmental Information Regulations 2004. ORR will process your personal data in accordance with the Data Protection Act 1998 and in the majority of circumstances this will mean that your personal data will not be disclosed to third parties.