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By email

Dear Ricardo

Consultation on ORR's approach to the enforcement of competition law in the railways sector

Network Rail welcomes the opportunity to respond to the consultation issued by the Office of Rail & Road (ORR) on 18 January 2016, regarding ORR's approach to the enforcement of competition law in the railways sector. No part of this response is confidential and we are content for it to be published in full.

We note that DfT is currently undertaking a review of ORR's role and responsibilities. It is conceivable that the outcome of this review may result in an examination of ORR's competition law powers and consequently ORR's relationship with the Competition and Markets Authority (CMA). As such, the outcome of this review may result in the need to make further changes to the guidance that ORR is currently consulting on.

Notwithstanding this, Network Rail recognises that ORR is required by law to prepare and publish advice and information about the application of the competition prohibitions contained in the Railway Act 1993 and the enforcement of those prohibitions. We comment on the proposed updated guidance below.

As an aside to the immediate consultation, we believe that there could be merit in undertaking a more fundamental review as regards whether ORR should continue to share concurrent powers with the CMA in enforcing competition law. The review could consider whether there is a case for transferring accountability for investigating competition and consumer issues to CMA on the basis that CMA has broader, cross sectoral experience.

In relation to the scope and content of the proposed guidance, Network Rail has no substantive comments to make, save for the following points:

At paragraph 2.6, ORR's guidance states that:

"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."

We would observe that it may sometimes be beneficial to the industry as a whole for a holding company to exercise such decisive influence over subsidiary companies, for example to prevent two or more of its subsidiaries presenting competing applications for the use of the same capacity to the infrastructure manager. It would be a concern if such activity would be considered prima facie evidence of anti-competitive behaviour.

In relation to franchising, ORR guidelines state (at paragraph 2.53) that "[the franchising] process means that there is 'competition for the market' as opposed to significant levels of competition in the market."

Paragraph 2.54 goes on to state that:

"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."

We believe that an additional relevant factor to consider might be the number of participants in the franchise competition. It could be the case that a competition with fewer participants might be a less rigorous one.

Please do not hesitate to contact me should you wish to discuss any of the representations set out in this letter in more detail.

Yours sincerely

Jon Haskins
Head of Regulatory Compliance & Reporting