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Dear Stakeholder

Office of Rail and Road's (ORR's) conclusions on the consultation on its guidance regarding its approach to the enforcement of the competition prohibitions in the CA98 and TFEU

We are grateful for responses to the consultation (the **Consultation**) on our *Draft Guidance on ORR's approach to the enforcement of the Competition Act 1998 in relation to the supply of services relating to railways* (the **Draft Guidance**).

We have today published our final guidance; this is available on our website[1].

This letter sets out how we have taken responses to the Consultation into account. Following the Consultation, we have made a number of amendments to the Draft Guidance, which are listed in a table at Annex A[2]. We have also updated the guidance to reflect progress made in relation to Voluntary Redress Schemes (see below).

The Consultation

On 18 January 2016 we opened the Consultation on the proposed publication of updated guidance regarding ORR's approach to the enforcement of the competition prohibitions in the Competition Act 1998 (the **Act**) and the equivalent provisions in the Treaty on the Functioning of the European Union (**TFEU**). The Consultation closed on 14 March 2016[3].

We received responses from Transport for London (**TfL**) and Network Rail. These responses are available on our website[4].

[1] http://www.orr.gov.uk/__data/assets/pdf_file/0019/21367/competition-act-guidance.pdf
[2] Some additional minor changes have been made in light of further internal review, to correct typographical errors, update referencing and to improve readability of the document
[3] One respondent requested a three day extension to this deadline; this was granted
[4] [Link to the closed consultation page]

Each respondent raised a number of points which we address in turn. We received two representations which we consider to be outside of the scope of the current consultation[5].

Responses to the consultation

Notion of undertaking

Network Rail commented on an example, (relevant to the rail industry), of what might constitute a single undertaking for the purposes of competition law (paragraph 2.6). Network Rail represented that it is sometimes beneficial to the industry as a whole for a holding company to exercise influence over subsidiary companies, for example to prevent two or more subsidiaries presenting competing applications for the use of the same capacity to the infrastructure manager. Network Rail expressed concern as to whether such an activity would be considered as an ‘at first glance’ presumption of anti-competitive behaviour.

We note Network Rail’s representation. However, we consider that the example provided in the Draft Guidance is an accurate reflection of competition law, that is, a holding company exercising decisive influence over one or more subsidiaries is likely to form part of the same undertaking as those subsidiaries for the purposes of competition law. We consider that this is a helpful illustration to businesses in the railway sector of the scope of potential liability for the actions of subsidiary companies; it does not reflect a policy statement on the part of ORR which goes beyond the actual application of competition law. We also highlight that this paragraph does not relate to behaviour considered to be anti-competitive; rather, it seeks to explain what competition law applies to, namely ‘economic undertakings’ rather than individual companies or businesses.

We therefore do not consider that the example provided at paragraph 2.6 of the Draft Guidance requires amendment.

Complaints about franchise services

Network Rail suggested that the number of participants in a franchise competition should be one of the factors which ORR takes into account when considering complaints about services which fall within a franchise package (for example passenger rail fares) (paragraph 2.55).

[5] These representations, together with our reasons as to why we consider they fall outside the scope of this consultation, are set out at Annex B

We agree with this representation and have amended the content of paragraph 2.55 accordingly.

Essential facilities, excessive pricing and legal direction

TfL stated that further clarity and/or additional guidance would be welcomed in relation to a number of matters set out in the Draft Guidance, namely:

- the meaning of an ‘essential facility’ in the context of the rail sector (paragraph 2.41);
- elaboration of the types of conduct likely to be considered abusive in the UK rail industry, for example what the legal and economic test is for determining whether pricing is excessive (paragraph 2.41); and
- further guidance on the concept of ‘legal direction’, notably clarification of the terms ‘autonomy’ and ‘scope for residual competition’. In particular, further guidance was sought on the application of the concept in the context of charging frameworks (paragraphs 2.50 to 2.52).

We note that the key purpose of the guidance is to provide practical guidance on how the competition prohibitions apply in the railways sector; the guidance is intended to cover the general application of competition law, rather than relate to specific points of law or matters relevant to particular cases. As stated in the introduction to the Draft Guidance it 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 to, rather than a substitute for, relevant domestic or EU legislation, case law and guidance.

We therefore consider that there is a balance to be struck as to the level of detail and prescription on particular issues set out in the guidance. There is also a need, in our view, to balance the level of complexity in the guidance in order to ensure its practicality for industry stakeholders.

In light of these objectives, we take the view, having carefully considered TfL’s representations, that the level of detail in the Draft Guidance on the specific issues raised is reasonable and appropriate. We therefore do not consider that amendments are required to paragraph 2.41 or paragraphs 2.50 to 2.52.

Prioritisation criteria

TfL requested further clarity on:

- the extent to which ORR will weigh up the strength of the economic evidence as against the legal risks, specifically in cases of alleged abusive excessive pricing; and
- case studies to illustrate how prioritisation criteria might be applied to give more clarity as to when ORR or the CMA would take jurisdiction (paragraphs 3.3 to 3.6).

Our prioritisation principles apply across a number of ORR's functions; they are not limited to enforcement action under the Act. We consider that the Draft Guidance accurately sets out how our prioritisation criteria will be applied specifically in the context of enforcement under the Act; namely they are applied on a case-by-case basis taking into account the specific facts of each case. As stated in the Draft Guidance at paragraph 3.3, 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. In light of the objectives of the guidance, as outlined above, we do not consider it is appropriate to give more specific detail as to how our prioritisation principles might be applied in particular cases, or types of case, such as those involving allegations of excessive pricing.

We consider that the Draft Guidance sets out how our prioritisation principles will take into account whether ORR is 'best placed' to take forward a particular competition case. We note that the Draft Guidance outlines the arrangements and policy considerations with regards to case allocation at paragraphs 1.11 to 1.14. We therefore consider that the Draft Guidance provides an appropriate level of practical guidance and information on the principles of case allocation and our prioritisation principles respectively.

For these reasons we therefore do not consider that changes are required to address TfL's representations on this issue.

Use of information gathered under the sector specific powers and choice of tool

TfL requested further clarification about whether ORR may use information gathered for the purpose of approving track or station access charges to investigate a possible breach of competition law (paragraphs 4.28 to 4.31). TfL also raised a question as to what tool would take priority as between ORR's sector specific powers and competition law.

We note that that the Draft Guidance:

- outlines the legal position in this area and the considerations to which ORR must have regard when using information gathered under the Railways Act 1993 for the purposes of enforcing competition law: addresses issues regarding prioritisation,

choice of tool and the inter-relationship of competition law and sector specific powers; and

- and addresses how ORR's different functions and duties inter-relate with each other and which tool will be used to address particular issues. In particular the Draft Guidance addresses how ORR will apply the competition 'primacy' duty introduced by the Enterprise and Regulatory Reform Act 2013[6].

We consider that the Guidance already covers all of the areas raised within TfL's representation and is sufficiently clear in this regard.

Complaints

TfL represented that the Draft Guidance was unclear about the format and manner in which complaints can be made to ORR. TfL made reference to confusion as between a formal and informal complaints process (paragraphs 4.6 to 4.9).

Our view is that the Draft Guidance makes no distinction between formal and informal complaints. We consider that TfL may have confused the concept of 'formal complainant status' in paragraph 4.9, which is a status granted to certain complainants who wish to take a formal part in the administrative procedure, with the process for making complaints. We have reviewed the content of the Draft Guidance to determine whether there is any ambiguity in this regard. Upon consideration, we consider that there is no such ambiguity, however, for the purposes of clarity we make clear in this letter that we make no distinction between formal and informal complaints.

Interim measures

TfL raised a number of queries in relation to interim measures (paragraphs 4.39 to 4.41), namely:

- whether they can be imposed before any investigation formally starts;
- who can apply for interim measures and how much information is 'sufficient' for them to be granted; and
- the application of interim measures in the context of the imposition of excessive track or station access charges by owners of infrastructure essential to future downstream rail transport services.

[6] Schedule 14, paragraphs 11-14

We have reviewed the Draft Guidance and consider that it would be appropriate, in response to TfL's representation, to make absolutely clear that in order to impose interim measures an investigation must have begun under section 25 of the Act[7]. We have amended the guidance accordingly at paragraph 4.39.

ORR considers, again in light of the objectives of the guidance set out above, that it would not be appropriate to set out the application of the interim measures regime when applied to particular types or categories of cases. We consider that the current content of the Draft Guidance appropriately balances the level of specificity and complexity in order to ensure that the guidance is a practical guide to stakeholders in the rail sector. As stated in paragraph 4.41of the Draft Guidance '*Each application will be assessed on a case by case basis'* and the criteria that will be adopted when assessing an application is also outlined in the Draft Guidance.

In relation to the level of information required to submit a successful application, we consider that the level of prescription in the Draft Guidance is appropriate. Applicants should provide as much information and evidence as possible to demonstrate their case for interim measures.

Case allocation in cartel cases

TfL noted that the majority of cartel cases are likely to involve a leniency applicant or a criminal cartel element such that the majority (if not all) cases would be more appropriately investigated by the CMA. TfL therefore stated that they would welcome further explanation as to what types of Chapter I (of the Act) cases may be initiated and conducted by ORR.

We consider that notwithstanding the CMA's powers to prosecute the criminal cartel offence and the fact that it is best placed to deal with leniency applications in the first instance, there is still significant scope, (pursuant to the case allocation principles as outlined in paragraphs 1.11 to 1.14 of the Draft Guidance), for the CMA and ORR to agree that the latter is best placed to take enforcement under the Act. This allocation will be determined on a case by case basis. We consider that this is suitably set out in the Draft Guidance and no amendments are required to address this point.

Voluntary Redress Schemes

As stated in the Draft Guidance at paragraphs 5.29 to 5.32 both ORR and the CMA have the power to approve voluntary redress schemes. As stated in the Draft Guidance ORR

[7] Section 35(1) of the Act

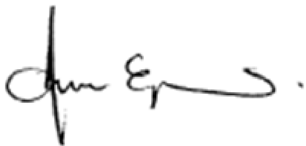
will follow the CMA's guidance on the approval of such schemes. We have updated the guidance to reflect the fact that ORR, as with all of its functions under the Act, will apply its prioritisation principles[8] when exercising its discretion as to whether or not to consider applications for voluntary redress schemes. The guidance also outlines the agreed position on the allocation of responsibility between authorities in relation to the consideration of schemes, and signposts which authority should be approached in the first instance by parties proposing such schemes, in a number of different contexts.

Conclusions

As stated above, we are grateful for the representations received by stakeholders in relation to the Draft Guidance. These representations have resulted in a number of amendments which we consider improve our final publication both in terms of clarity and practicality.

If you wish to discuss this guidance further, or have any other questions about the application of competition law in the railways sector, please do not hesitate to contact us using the details on this letter or our website.

Yours sincerely,



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[8] Rather than those of the CMA or any other concurrent competition authorities

Annex A – Table of Amendments to Draft Guidance

This table sets out the most relevant amendments to the Draft Guidance

Chapter	Paragraph	Change
Introduction	4	*'our approach to monitoring railways markets'* amended to *'our approach to monitoring and reviewing markets'.*
1	1.7	'*whether a particular matter constitutes the enforcement of national competition law*' amended to '*whether a particular matter has as its objective the enforcement of national competition law or whether the objective pursued is predominantly different from those pursued by Article 101'.*
2	2.27	'*and the Competition Act 1998 (Public Transport Ticketing Schemes Block Exemption) (Amendment) Order 2016'* added.
2	2.29	Paragraph deleted.
2	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'* amended to '*The CMA is proposing to issue revised guidance, to reflect amendments made to the block exemption*'.
3	3.8	*'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)'* amended to ' *This 'primacy duty' stipulates that we must before making a final order or confirming a provisional order for the purpose of securing compliance with a licence condition or requirement…*'
4	4.39	*'We have the power to require a party to comply with temporary directions, called 'interim measures', at any time during the investigation where we consider it necessary…'* amended to *'We have the power to require a party to comply with temporary directions, called 'interim measures' where an investigation has started but not yet concluded and we consider it necessary…'*
5	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'* amended to '*In cases relating to the provision of services relating*

		to railways, where there is no pre-existing investigation, a person (which may include more than one undertaking applying jointly) who has infringed competition law may apply to ORR or the CMA'
5	5.32	New paragraph. '*Where potential applications for approval of a scheme relate to a pre-existing decision of ORR or to an on-going ORR investigation, applications for approval should be made to ORR. Similarly, where proposed schemes relate to a pre-existing decision or to an on-going investigation of another UK competition authority, applications should be made to that authority.'*
5	5.33	New paragraph. '*If a potential scheme relates to a pre-existing decision of the European Commission:* ▪ *where the product or service concerns the supply of services relating to railways, applicants should apply for approval to ORR in the first instance.* ▪ *where the product or service does not concern the supply of services relating to railways and does not relate to an industry over which another regulator has concurrent powers only the CMA will have jurisdiction to consider scheme approval and applications should be made to the CMA.'*
5	5.34	New paragraph. '*Applications received by the CMA may be transferred to ORR and applications received by ORR may be transferred to either the CMA or another regulator, where appropriate. Any such transfer shall have regard to the Concurrency Regulations and other relevant rules.'*

Annex B – Representations we consider to be outside of the scope of the current consultation

The following representations are considered to be outside of the scope of the current consultation.

ORR's concurrent powers to enforce competition law

Network Rail submitted that there would be merit in undertaking a review as to whether or not ORR should have concurrent powers to enforce competition powers given the CMA's broader, cross sectoral experience.

We consider that this point is outside the scope of the consultation.

Ticketing Block Exemption

TfL made a number of representations in relation to the retention of the Ticketing Block Exemption[9]. Whilst the Draft Guidance makes reference to the Ticketing Block Exemption, explaining its core provisions and relevance to the railways sector, it is not concerned with the merits of the renewal, or otherwise, of the exemption. This is a matter being dealt with separately by the CMA.

[9] Competition Act 1998 (Public Transport Ticketing Schemes Block Exemption) Order (SI 2001 No 319)