Transport for London

Transport for London
Rail and Underground

Ricardo Araujo,
Competition and Consumer Policy,
Office of Rail and Road,
One Kemble Street,
London,
WC2B 4AN.

14th March 2016

Dear Ricardo,

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

This letter sets out TfL's responses to the questions raised in the ORR's consultation on their approach to the enforcement of competition law in the railways sector. TfL is content for its responses to be published and shared with third parties.

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

TfL considers that it is important that the Ticketing Block Exemption is retained as proposed. TfL itself does not need to rely on the Block Exemption since it is under a legal obligation to enter into the relevant ticketing agreements by virtue of mayoral directions under the GLA Act. However, the National Rail train companies that operate in London rely on the exemption to permit their unfettered participation in respect of joint integrated ticketing arrangements such as the Travelcard scheme. National Rail services form a key part of the transport network in London so their continued participation in such schemes is critical if the simplicity and convenience that they offer customers is to be retained. TfL therefore supports the proposal to extend the Exemption period to 10 years, given that the competition issues are unlikely to change over this period. The extension of the Exemption gives greater legal certainty to TfL and its partners which is welcome. TfL has previously responded to the Competition and Market Authority's (CMA's) consultation on this matter stating the view given above. TfL requests that the ORR confirms when the CMA is due to issue the revised guidance relating to this matter.

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

TfL has no comment to make in response to this question.

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

There are areas where TfL considers that further clarity could be provided in the draft guidance that the ORR has set out. These are detailed below.

Abusive conduct in the rail industry

TfL notes the example given in paragraph 2.41 that potentially abusive conduct in the UK rail industry includes "*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.*" TfL would welcome further:

- Clarification/additional guidance on the meaning of an "essential facility" in the context of the rail sector;
- Elaboration on the types of conduct that are likely to be considered abusive in the UK rail industry. For instance, what is the legal and/or economic test for determining whether pricing is "excessive"?

Legal direction

TfL wishes to understand more about the implications of excusing from the scope of competition law those undertakings subject to “legal direction”, where such undertakings may otherwise potentially be in breach of the competition rules (paragraphs 2.50 and 2.52). TfL’s key concerns are detailed below:

- The owner of facilities essential to operating a downstream rail transport service may seek to levy excessive track or station access charges, either where legislation requires such charges to be approved by the ORR, or the charging framework is required to be established by the ORR. That owner may argue either that: (1) the ORR's direction to charge 'excessive prices'; or (2) the establishment of a charging framework by the ORR which permits “excessive prices”, entirely eliminates the possibility of competitive activity or autonomy by the owner, potentially enabling the owner to escape complaints under Chapter II;
- TfL welcomes the ORR's discussion of this area but seeks further clarification of the terms “autonomy” and “scope for residual competition”. Such owners must remain responsible for their conduct – "*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)." (emphasis added). Does "*pricing practices*" include abusive, excessive track or station access charges?;

- Regarding the reference to *Deutsche Telekom v Commission*, TfL would be grateful for further clarification of/additional guidance on the meaning of 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*." This could be particularly relevant in the context of the ORR establishing a charging framework under regulation 12(1) of The Railways Infrastructure (Access and Management) Regulations 2005 ("the Regulations").

Prioritisation criteria

In relation to the ORR's prioritisation criteria, TfL notes the risks weighed by the ORR, including the legal risks and the strength of the evidence. In this regard, TfL requests that the ORR elaborates on the following items:

- The extent to which the ORR will weigh up the strength of the economic evidence, as against the legal risks, specifically in cases of alleged abusive excessive pricing;
- Case studies illustrating how it would apply its prioritisation criteria in order to give more clarity as to when the ORR or the CMA would likely take jurisdiction.

Information gathering

TfL notes that the ORR may use information gathered under the Railways Act and other provisions for its concurrent competition powers (paragraphs 4.29 and 4.30). Where the ORR has gathered such information to approve track or station access charges, can the ORR then use that information to investigate allegations of abusive, excessive pricing under Chapter II under a separate competition investigation? Or will any such concerns be addressed in respect of any review of track or station access charges or other procedural areas? Generally, the ORR appears to make decisions on charging and access in accordance with its Railways Act duties or under the Regulations. It is unclear whether the ORR considers whether this fulfils their duties under the Competition Act or whether Competition Act issues are considered as part of the ORR's Railways Act/Regulations functions. Which takes priority?

Format for bringing complaints

In relation to a complaint lodged with the ORR, the format and manner in which such complaints may be brought is unclear. The ORR website states that "*there is no set format for making a complaint under the Competition Act 1998*" yet the ORR makes reference to a formal and informal complaint

process (paragraphs 4.6 and 4.9). TfL considers that:

- Guidance is needed on what will be considered to be a "formal" or "informal" complaint, the process, and to what extent the complaint and identity of the complainant is kept confidential under either approach;
- The steps and timescales for bringing a complaint ought to be made clear, as well as whether a written decision explaining a refusal to take a complaint forward will be issued by the ORR;
- It is also unclear whether a competition complaint raised under different procedures (e.g. when the ORR is reviewing track access or station charges or establishing a charging framework) will be dealt with under that procedure or not?

Imposition of interim measures

TfL welcomes the ORR's ability to impose interim measures (paragraphs 4.39 and 4.41). TfL requests confirmation of the following:

- Please can the ORR confirm whether it can do so before any investigation formally starts and not just during that investigation, particularly where no case team leader may yet be in place?;
- Can such directions stop the imposition of abusive, excessive track or station access charges by an owner of facilities essential to future downstream rail transport services? It is unclear who may request such interim measures and how much information will be “sufficient” for them to be granted;
- TfL notes that interim measures may be granted where 'significant damage' is likely/potential, i.e. may occur in the future rather than the past/present. Please can the ORR confirm whether this includes abusive, excessive track or station access charges to be levied on future rail services?

Allocation of cases to ORR

TfL would welcome from the ORR an explanation as to what types of Chapter I cases may be initiated and conducted by the ORR. The majority of cartel cases are likely to involve a leniency applicant or a criminal cartel element (especially since the removal of the dishonesty threshold) such that the majority (if not all) cartel cases would fall to be more appropriately investigated by the CMA. The ORR recognises that it has no power to prosecute the criminal cartel offence and that initial applications for leniency markets should be made to the CMA as it is the only authority empowered to grant no-action letters (paragraphs 1.17-1.23).

Yours sincerely,

Alan Smart,
Principal Planner – Rail Development,
Rail and Underground Transport Planning, Transport for London.