

Rail Delivery Group

Response to:

ORR's Approach to Monitoring and Reviewing Markets

Date : 12 October 2016

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Organisation: Rail Delivery Group
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Business representative organisation

Introduction: The Rail Delivery Group (RDG) was established in May 2011. It brings together Network Rail and passenger and freight train operating companies to lead and enable improvements in the railway. The purpose of the RDG is to enable Network Rail and passenger and freight train operating companies to succeed by delivering better services for their customers. Ultimately this benefits taxpayers and the economy. We aim to meet the needs of:

- Our Members, by enabling them to deliver better outcomes for customers and the country;
- Government and regulators, by developing strategy, informing policy and confronting difficult decisions on choices, and
- Rail and non-rail users, by improving customer experience and building public trust.

RDG is pleased to be able to respond to this consultation. The response addresses the four questions contained in the covering letter in turn.

Q1: Do you agree with our proposals on how we will carry out our functions of monitoring and reviewing markets?

The update of the Guidance is welcomed and represents a clearer outline of ORR's procedures with regards to markets than the previous version. RDG agrees with the proposals as set out for the more formal stages of monitoring and reviewing markets (Market Reviews, Studies, Investigations) but believes that more is required in the Guidance around the early stages of monitoring competition issues.

The functions as outlined in paragraphs 2.1-2.6 are described in the guidance as 'reactive' in the early stages, an approach that seems to contrast some other regulatory bodies¹. As one of ORR's duties is the promotion of competition, it should be expected that the ORR's approach is more proactive from the start of the monitoring process, rather than waiting for issues to present themselves. Potential market issues may not be immediately obvious and it would be useful if the Guidance outlined further ways that the ORR can ensure it is on the front foot in identifying such issues.

In addition, in the monitoring/ research stages, the list of information sources by which ORR gains intelligence and understanding of markets could benefit from additional scope and focus; a more systematic approach to data collection that goes beyond 'business as usual' functions could make the monitoring stage more effective.

¹ For example, Ofgem's State of the Market Assessment; Ofwat household market review - Lessons from the energy sector.

It is not clear from the Guidance the level of obligation that would be required of industry in the research phase where such participation is voluntary (with the exception of Network Rail where this is required as part of its licence). RDG agrees that minimum burden on stakeholders should be imposed at this stage. However, it would also be helpful if the Guidance clarified the prioritisation of the use of datasets that, where possible, would minimise the requirement for industry support, such as utilisation of ORR's access to MOIRA and LENNON.

We welcome the recognition in Section 2.17 that there may be circumstances where other authorities are better placed to implement ORR's recommendations. It would be helpful to clarify whether ORR's powers would in turn extend to these authorities.

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

The covering letter to the consultation states that the Guidance will outline "how and in what circumstances, [ORR] intends to use its powers" to: "make directions to correct market distortion and to undertake market studies and make market investigation references to the Competition and Markets Authority".

RDG believes the Guidance to be clear in outlining the criteria under which ORR will escalate market studies and investigations. However, this is only one part of the equation. The Guidance could go further in outlining more clearly examples of areas which ORR might identify competition concerns. There is explicit recognition of access to applicants in the guidance (for example paras 2.5 and 4.7) but more information is needed on other areas. In particular, it would be helpful if the ORR outlined how it is active in ensuring that broader industry structures and processes don't cause distortion in competition between market participants to the detriment of end users (passengers and freight customers). An expanded (but not necessarily exhaustive) list of priority areas for potential competition concerns would provide clearer guidance for anyone looking to make suggestions under Annex C, as well as providing a better signal to the industry around ORR's attention to its statutory duty to promote competition.

The document outlines that there are a number of bodies responsible for competition issues. As such, there are also elements of competition within rail that may fall outside of ORR's jurisdiction. From a 'process' point of view, the Memorandum of Understanding between ORR and the CMA explains the relationship and division of labour between the two bodies. However from a 'content' perspective it would be useful for the Guidance to elaborate any division of responsibilities, in particular around 'for market' competition (as opposed to in market competition). Clarity on this would be helpful in assuring the industry that there is not an overlap, nor gaps, in the overall approach to monitoring and reviewing competition issues, and better signpost where concerns are raised.

Paragraphs 2.10 and 2.17 refer to ORR's options to progress to an investigation under the Competition Act, which is covered by a separate Guidance which was updated earlier this year. Given the overlap between the two, it may be more helpful to have one broader document that covers both areas. Regardless, it would be beneficial to have greater clarity in the document(s) around how ORR selects the most appropriate regulatory tools, and under which legislation.

Under paragraph 3.10, RDG believes that it is also important that under the Market Study consultation process, stakeholders should have the opportunity to comment on the scope and issue(s) identified, in addition to the criteria and methodology. This is particularly relevant where the stakeholder in question is a direct focus of the market study.

Section 4 could benefit from further clarity around whether directions to correct discrimination against access to the rail network Access and Management Regulations could be made in respect of ORR itself, given that ORR is responsible for directions to enter into access agreements.

Overall, RDG recognises that there are a lot of complex overlaps with regards to markets and competition, and would support rationalisation of processes and responsibilities wherever possible.

Q3: Do you have any comments in relation to our interpretation of the Access and Management Regulations, and in particular:

- our responsibility to monitor the competitive situation in the rail services markets under Regulation 34; and

- the circumstances in which we envisage we would use the power to make directions under Regulation 34(3)?

RDG has no comments on this question.

Q4: Are there any areas which you think would benefit from further clarity?

Paragraph 1.5 highlights that there are other bodies that review markets, in particular ORR has a relationship with CMA as a concurrent regulator. The Guidance could make clearer that for formal market reviews or investigations that the CMA does possess the power² to decide whether ORR should lead on a case (whilst recognising the relationship as outlined in the MoU will generally lead to a more collaborative approach), which may or may not have been preceded by the escalation processes outlined in the Guidance.

Paragraph 4.3 outlines that ORR has the power to enforce decisions with penalties including fines, where a party fails to comply with a given direction. RDG welcomes the confirmation that powers to issue penalties will be used consecutively, rather than concurrently, with regards to the issuance of directions.

The prioritisation criteria in Annex A is welcomed, in particular RDG recognises the importance of acting proportionately and being mindful of risks in taking forward any intervention. Building upon this, proportionality should also have regard for the likely level of input required from the industry, which may be more relevant for dictating the manner of intervention. Full scale market investigations can pose significant burdens upon investigated parties which is not without cost. It is also important that alongside consideration of ORR's reputation, that the risks (and potential benefits) to the reputation of the industry from any intervention should also be part of the criteria. As highlighted in footnote 61, the prioritisation criteria does not apply where there is a 'duty to take action'. It would be helpful to explain further why this is the case, and what regard if any might be taken to certain aspects of the prioritisation criteria.

For enquiries regarding this consultation response, please contact:

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² As outlined in Annex B:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/212285/CMA1_-_Towards_the_CMA.pdf