



Open access monitoring: ORR's plans to monitor the impact of, and response to, open access

Update paper

27 March 2019

Contents

Summary	3
1. Introduction	4
About ORR	4
ORR's work on open access	4
This update document	6
2. Monitoring framework	7
Purpose	7
Framework	7
What we plan to monitor	10
3. Existing regulatory provisions	12
The Network Code	12
The network licence	13
Competition law	14
Access, Management and Licensing Regulations	15
4. Next steps	16

Summary

1. In December 2018, we published a document setting out the purpose and scope of the Office of Rail and Road's ("**ORR's**") plans to monitor the impact of, and response to, open access over time. This is something we committed to doing in our 2018/19 business plan, as part of a wider package of work that ORR is undertaking in the area of open access.
2. This document provides an update on what we propose to monitor, the reasons for choosing certain metrics, and how we plan to monitor them in practice. We will monitor a range of quantitative and qualitative metrics including fares; station usage; passenger satisfaction and information about the rolling stock market.
3. Our monitoring framework has been informed by recent stakeholder engagement with a range of market participants – including franchised TOCs, aspirant and existing open access operators ("**OAOs**"), and Network Rail.
4. This document also highlights, in relation to open access, ORR's different powers, including those under competition law, and industry's obligations under its own licences.
5. We expect that our monitoring framework will enable ORR to better understand the impact that open access competition has on market outcomes, and the challenges that OAOs face in first trying to access the network, and then succeeding once in the market. We also expect it to act as an indicator of how well the market is functioning from a competition and regulatory compliance perspective.
6. We welcome comments and ideas from interested parties on the monitoring framework set out in this document.

1. Introduction

- 1.1 This document sets out an update on ORR’s plans to **monitor the impact of, and response to, open access competition**.¹ It sets out what we plan to monitor on an ongoing basis, why, and how. It also highlights the powers that ORR has, as well as industry’s obligations under its own licences, in relation to open access.
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About ORR

- 1.2 ORR is the independent economic and safety regulator for the railways in Great Britain (“**GB**”), and the monitor of performance and efficiency for England’s motorways and trunk roads. As the designated sectoral regulator for rail, we keep the provision of railway services under review² and monitor the competitive situation in rail services markets.³ Additionally, ORR is a designated national competition authority with powers held concurrently with the Competition and Markets Authority (“**CMA**”) to apply competition law in markets relating to the supply of services relating to railways.⁴
- 1.3 ORR has strategic objectives which include ensuring better rail customer service and value for money from the railway.⁵ ORR also has a wide range of statutory duties, as set out mainly in section 4 of the Railways Act 1993 (“**the Act**”).⁶
- 1.4 ORR’s duties to “*promote competition in the provision of railway services for the benefit of users of railway services*”, and to “*have regard to the funds available to the Secretary of State for the purposes of his functions in relation to railways or railways service*” are of particular relevance to this work. Hence, while ORR supports on-rail competition, it must weigh and strike the appropriate balance between its duties – as it does in exercising any of its functions.

ORR’s work on open access

- 1.5 OAOs play an important role in promoting competition on the railway. We consider that the dynamic created by on-rail competition delivers demonstrable benefits to passengers; provides comparators to inform franchising decisions; and, better holds Network Rail to account in its role of identifying and allocating capacity.

¹ http://orr.gov.uk/data/assets/pdf_file/0006/27465/orr-business-plan-2018-19.pdf

² Section 69(1) of the Act

³ Regulation 34 of the Railways Access, Management and Licensing of Railway Undertakings Regulations 2016

⁴ Section 67 of the Act

⁵ <http://orr.gov.uk/about-orr/what-we-do/our-strategy/our-strategic-objectives>

⁶ <https://www.legislation.gov.uk/ukpga/1993/43/contents>

- 1.6 The benefits to passengers were evidenced by the CMA in its 2016 report examining the scope for increasing competition in passenger rail services in GB. It found evidence that, despite their size,⁷ the two OAOs currently operating on the network – Hull Trains and Grand Central – competed on price; developed improvements to passenger service levels; and generated some growth in the market for rail travel overall.⁸
- 1.7 In May 2016, ORR accepted an application by FirstGroup to run five off-peak return services a day between London and Edinburgh from May 2021.⁹ While these services will not contribute a significant amount in passenger miles, ORR’s modelling produced an estimated Net Present Value for these services of £72m.¹⁰
- 1.8 Our aim as an economic regulator and a concurrent competition authority is to promote and protect competition by ensuring that OAOs enjoy a fair playing field – both in entering and operating in the market. Where we refer to ‘fair playing field’ throughout this document, it is acknowledged that OAOs make different contributions to network costs from franchised operators, and also face a different access regime. Taking that as given, ORR expects OAOs to be treated in a fair and non-discriminatory manner by market participants, including the infrastructure manager and franchised TOCs.
- 1.9 The work we are doing to develop a framework for monitoring the impact of, and response to, open access, is one aspect of a programme of work which marks a change in the regulatory and policy framework for existing and aspirant OAOs. In December 2018, ORR published two consultations:¹¹
- (a) A consultation on some implementation details for levying charges to recover fixed costs (through the **Infrastructure Cost Charge**) from some OAOs in Control Period 6.¹² While this represents an additional cost to some operators, changes to ORR’s access policy should increase the likelihood of affected services being granted access to the network. We published our conclusions on 21 March 2019.¹³

⁷ Non-franchised operators account for less than 1% of passenger miles in GB. See page 60, https://assets.publishing.service.gov.uk/media/56ddc41aed915d037600000d/Competition_in_passenger_rail_services_in_Great_Britain.pdf

⁸ <https://www.gov.uk/cma-cases/passenger-rail-services-competition-policy-project>

⁹ https://orr.gov.uk/_data/assets/pdf_file/0006/21885/2016-05-12-ecml-decision-letter.pdf

¹⁰ The Net Present Value is the value, in today’s money, of all current and future cash flows less the initial investment

¹¹ Both consultations closed on 14 January 2018 and ORR has considered all responses received from stakeholders

¹² Control Period 6 will run from 1 April 2019 to 31 March 2024

¹³ https://orr.gov.uk/_data/assets/pdf_file/0006/40677/pr18-consultation-on-open-access-infrastructure-cost-charges-implementation-conclusions.pdf

- (b) A consultation on ORR’s proposed guidance for the **Economic Equilibrium Test**, which we are required to implement under EU law. We have today published updated guidance to reflect the stakeholder feedback we received.¹⁴

This update document

- 1.10 Since December 2018 we have engaged with a wide range of stakeholders, including OAOs (both existing operators and aspirants); franchised TOCs; the Department for Transport (DfT); the System Operator (“**SO**”); and Network Rail route leads. We also engaged with other regulators to discuss their approach to ongoing market monitoring, and to learn from best practice.
- 1.11 The evidence and feedback gathered from this varied set of stakeholders has informed the design of our monitoring framework. The information that we intend to collect and monitor, and our aim in doing so, are detailed in **Chapter 2** of this document.
- 1.12 Our work has also highlighted the need to draw attention to the powers that ORR has, as well as industry’s obligations under its own licences, in relation to open access. ORR’s relevant powers, including under competition law, and industry participants’ licence obligations are set out in **Chapter 3** of this document.

¹⁴ See <https://orr.gov.uk/rail/consultations/policy-consultations-by-topic/access-and-licensing/consultation-on-orr-draft-guidance-on-the-economic-equilibrium-test>

2. Monitoring framework

- 2.1 In this chapter we set out the different aspects of our ongoing monitoring work, including what metrics and information we intend to monitor, why, and how. This has been informed by our engagement with stakeholders, and in particular through understanding the commercial propositions of, and challenges faced by, OAOs.
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Purpose

- 2.2 ORR wants to ensure that the right conditions are created for competition to be fostered through the presence of OAOs. This includes promoting new competition and protecting existing competition on the network.
- 2.3 We expect our monitoring framework to provide evidence of the impact that the rivalry OAOs introduce has on market performance and passenger outcomes over time. We also expect our monitoring framework to expose some of the challenges that OAOs face in trying to access the network, and then in succeeding once operational. We note that these challenges are distinct from those experienced by franchisees. Finally, we expect this work to act as an indicator of how well the market is functioning from a competition and regulatory compliance perspective, informing how ORR applies its different powers.
- 2.4 While our monitoring work will not be determinative, the output of our open access monitoring work, combined with ORR's other regulatory activities, may point to further work being required in order to establish whether it is necessary to intervene in the market. Even if no interventions are needed, the transparency of market outcomes (where appropriate) should make clear to industry what we expect of them; bolster confidence; and promote a fair playing field for train operators.
- 2.5 We will keep our monitoring framework under review, both in terms of the metrics that we monitor and our approach, to ensure any findings we draw from it remain relevant in helping to meet our objectives, and are as robust as possible.

Framework

- 2.6 Based on information and feedback from the stakeholders we have engaged through our work, we have identified a number of metrics that we intend to monitor over time to track changes in market outcomes and behaviours, and to identify trends.

2.7 These metrics will tell us about:

(a) Market performance/ outcomes

- We will monitor metrics such as service quality and fares to analyse the impact that competition from OAOs has on different passenger outcomes. Passenger outcomes are also affected by the level of investment in the network and we will, as part of our wider monitoring in this area, make reference to Network Rail spend.
- Moreover, we will look at what happens to wider market outcomes – including demand for rail services – to assess whether open access competition appears to drive growth in overall rail travel.

(b) Market conduct

- We will monitor the behaviour of market participants, including changes to pricing strategies and requests for changes to track access rights which appear to correspond to entry or expansion by an OAO(s).
- This will help inform how ORR applies its different powers – including those under competition law – and how it monitors compliance with industry participants' licence obligations, in relation to open access.

(c) Features of the market which may restrict open access

- We will monitor features of the market which may make it difficult for OAOs to enter the market, or to grow once established. For example, we will seek to better understand what affects: the availability of rolling stock around the time of entry; access to service facilities such as stations; and timetabling considerations and outcomes.

2.8 We intend to gather and collate a mixture of qualitative and quantitative information from a range of sources.

2.9 ORR already collects, or has access to, a substantial amount of quantitative data, including (but not limited to) information on average yields of all train operating companies, including OAOs, and Network Rail spend. ORR will also gather some new data, for example, on fares for specific services, which are publicly available. The quantitative data that ORR will monitor will be gathered and collated at different intervals, depending upon the data source. We expect to produce an annual summary of key statistics and/or commentary relating to the impact of, and response to, open access.

- 2.10 In addition, we intend to have an open line of engagement with industry, providing affected businesses with the opportunity to raise concerns that may not necessarily be identified from the data alone. We are proposing to hold a roundtable discussion with aspirant and established OAOs on a six-monthly basis. This engagement has been welcomed by a number of stakeholders we have spoken to during the course of our work.
- 2.11 We do not propose to set targets for any of the metrics that we plan to monitor; they will provide an evidence base that will help us to evaluate how competition affects market outcomes, and how well the market is functioning for OAOs.
- 2.12 ORR's monitoring framework will likely evolve over time, for example, to reflect changes in the nature of issues arising, or trends identified. We will also be considering, in the medium-term, more sophisticated analytical tools which could help us to determine causality in a way that just examining changes and trends in the data won't. However, we expect that our current proposals of combining data analysis with stakeholder engagement will help to provide a useful initial indicator of areas in which further work may be needed to determine whether a breach of competition law and/or industry participants' obligations under its own licences, has occurred.
- 2.13 The table below sets out in more detail what we plan to monitor, the aim in monitoring each metric, and how we plan to do this in practice.

What we plan to monitor

Category	Measure	Aim	How
Quality measures	1. Complaints	- To explore what impact (if any) on-rail competition has on passenger outcomes.	This data is already collected by ORR; Transport Focus; and/or Department for Transport. We will collate this data and publish an annual summary.
	2. Compensation	- More specifically, to explore whether passenger outcomes vary between OAOs and TOCs operating on the same route; and between TOCs on routes facing competition and TOCs on routes with no competition. ¹⁵	
	3. Passenger satisfaction		
	4. Punctuality/performance		
Fares/ Average yield	5. Fares <ul style="list-style-type: none"> - Fare levels - Fare types 	<ul style="list-style-type: none"> - To explore the extent to which fares vary between TOCs and OAOs on the same routes; and between TOCs on routes facing competition and TOCs on routes with no competition. - To identify, to the extent possible, any price response by TOCs to entry and/or expansion by OAOs. 	ORR has access to average yield data through LENNON. ¹⁶ We will collate and compare this data and publish a summary of any trends identified. ¹⁷ To examine the dynamic response, we will consider using publicly available data on fares to capture snapshots of the relevant parts of the network where there may be a potential impact from open access.
Demand/ growth	6. Station demand	<ul style="list-style-type: none"> - To improve our understanding of the impact of the presence of OAOs on total demand for rail services. 	ORR has access to data on tickets sold, and station usage. This data will be used to examine trends and changes in demand for rail services where OAOs exist by, for example, using the national average as a comparator.
	7. Variations to access rights	<ul style="list-style-type: none"> - To explore whether TOCs respond to entry and/or expansion by OAOs through 	The access and licensing team within ORR will maintain a log of access applications, including

¹⁵ In this context, we use 'competition' to mean competition from other train operators, not with, for example, other modes of transport such as bus or air (for long distance journeys)

¹⁶ Latest Earnings Network Nationally Over Night; the industry ticketing and revenue database

¹⁷ ORR notes the sensitivity of the data and any published statistics will consider the appropriate level of disaggregation for any publication

		seeking to change existing, or acquire new, access rights.	their timing and rights applied for. We may also consider whether any different information should be collected from TOCs as part of the application process.
Access and timetabling	8. Timetabling outcomes	<ul style="list-style-type: none"> - To explore whether TOCs respond to entry and/or expansion by OAOs through seeking to change existing, or acquire new services in the timetable. - To assess the extent to which there are differences in timetabling rights and outcomes (for example, differences in holding times at stations) for OAOs compared with TOCs. 	ORR will engage with OAOs on a six-monthly basis to understand whether they have faced any issues in relation to timetabling. Should issues be raised, we will engage with Network Rail, and in particular, the SO, to obtain further evidence.
Network Rail spend	9. Investment/ enhancement spend	<ul style="list-style-type: none"> - To explore whether there are differences in Network Rail infrastructure spend on routes that are affected by competition from OAOs, and those that are not. 	ORR will explore with Network Rail what data it can provide on investment/ enhancement spend. ORR expects to collate this information alongside the other metrics.
Rolling stock	10. Rolling stock	<ul style="list-style-type: none"> - To explore whether industry demand for rolling stock changes around the time that an OAO is seeking to enter. - To consider whether rolling stock requirements in franchise contracts are affected by entry and/or expansion by OAOs 	Through half-yearly meetings with OAOs, ORR will seek to establish what changes have been observed in demand and availability for rolling stock. ¹⁸ ORR will also consider how to engage with the Department for Transport and TOCs to identify changes to rolling stock requirements. We will also consider whether, and how, to engage with rolling stock manufacturers.
Service facilities	11. Service facility access for OAOs	<ul style="list-style-type: none"> - To explore whether the terms of access to service facilities (including stations) for OAOs, as defined by the lead operator, are fair, and how they change over time. 	Through half-yearly meetings with OAOs, ORR will seek feedback on any changes to access to service facilities.

¹⁸ ORR is also currently in discussion with operators about what data could be monitored on rolling stock

3. Existing regulatory provisions

- 3.1 In the context of open access, ORR has formal powers – including those under competition law. Industry also has obligations under its own licences, with which ORR monitors compliance. ORR will intervene, either informally or under its different powers, where the conduct of industry participants threatens to compromise any operator on the network from enjoying a fair playing field.
- 3.2 ORR has relevant functions under the Act and the Railways (Access, Management and Licensing of Railway Undertakings) Regulations 2016 (“**AMR**”). In particular, unless an exemption applies a train operator may only enter into a contract with a facility owner (such as Network Rail) for the use of that facility following ORR’s approval and direction.¹⁹ ORR also has the power to determine disputes around access where parties have not come to an agreement.²⁰ This chapter reminds industry – specifically, franchised TOCs and Network Rail – of some other relevant regulatory provisions in the context of open access.

The Network Code

- 3.3 The Network Code²¹ is a set of contractual rules incorporated by reference into, and therefore forms part of, each bilateral track access agreement between Network Rail and all train operators. It covers areas such as developing the timetable, managing operational disruption and resolving contractual disputes.
- 3.4 In order to operate open access rail services, commercial operators require access to the network and reasonable input to timetabling processes. Capacity on GB’s congested railways is finite, particularly around certain busy areas of the Network – notably routes in and out of London stations.
- 3.5 Part D of the Network Code contains the rules and procedure for Network Rail to establish a timetable for the Network. Under Part D of the Network Code: “[*Network Rail’s*] objective shall be to share capacity on the Network for the safe carriage of passengers and goods in the most efficient and economical manner in the overall interest of current and prospective users and providers of railway services...”.²²

¹⁹ Section 18 of the Act

²⁰ Section 17 of the Act and regulation 32 of the AMR

²¹ <https://www.networkrail.co.uk/industry-commercial-partners/information-operating-companies/network-code/>

²² Condition D4.6.1 of the Network Code

- 3.6 In achieving this objective, Network Rail has to apply specified considerations.²³ In relation to all of Network Rail’s timetabling decisions, “*When applying the Considerations, Network Rail must consider which of them is or are relevant to the particular circumstances and apply those... so as to reach a decision which is fair and is not unduly discriminatory as between any individual affected Timetable Participants or as between any individual affected Timetable Participants and Network Rail...*”.²⁴ Under the provisions of the Network Code, Network Rail therefore has an obligation to treat stakeholders fairly and in a non-discriminatory way in relation to timetabling requests.
- 3.7 The Network Code contains provisions for a train operator dissatisfied with a decision on timetabling,²⁵ to refer the matter to a Timetabling Panel. Part M of the Network Code also provides the process by which a party can appeal the decisions of the Timetabling Panel to the ORR for determination.
- 3.8 Part J of the Network Code contains rules and procedures relating to certain access rights matters and a train operator or Network Rail may refer disputes on some of these matters for Access Disputes Adjudication, again with a further right of appeal to ORR.

The network licence

- 3.9 Network Rail operates under a network licence. The licence contains a set of conditions under which Network Rail must operate. As the operator and owner of the national rail infrastructure, it has a key role to play in railway safety and improving railway performance and efficiency. The network licence is a key tool that ORR has for holding Network Rail to account.
- 3.10 Following a review of the network licence in connection with the recent PR18 price control, changes to the licence conditions will take effect on 1 April 2019.²⁶ As well as setting out the obligations on Network Rail, a number of obligations are allocated to Network Rail’s routes and the SO to better reflect their day-to-day responsibilities in Network Rail’s business structure.
- 3.11 Condition 1 of the updated network licence sets out a number of Core Duties on Network Rail and (in performing their own functions) the routes and the SO and these include in particular the “*Network Management Duty*” and the “*Stakeholder*

²³ Contained at Condition D4.6.2 (a) – (k) of the Network Code

²⁴ Condition D4.6.3 of the Network Code

²⁵ Set out in Condition D5.1 of the Network Code

²⁶ <https://orr.gov.uk/rail/consultations/policy-consultations-by-topic/economic-regulation/statutory-consultation-on-proposed-changes-to-network-rails-network-licence>

Engagement Duty". The Network Management Duty²⁷ sets out Network Rail's core obligation to secure the operation, maintenance, renewal and enhancement of the network in order to satisfy the reasonable requirements of its customers and funders. Condition 1.4 states that "*In complying with the Network Management Duty, the licence holder shall in particular ensure that it duly takes into account the interests of all classes of passenger operator and freight operator*".

- 3.12 The Stakeholder Engagement Duty²⁸ requires that Network Rail shall ensure that it "*treats Stakeholders in ways appropriate to their reasonable requirements in their capacity as Stakeholders*". It also requires in particular that, to the greatest extent reasonably practical, stakeholder engagement is effective, inclusive, well-governed and transparent.
- 3.13 A further licence condition states that, "*The licence holder shall not in its Licensed Activities, or in carrying out any other function contemplated by this licence, unduly discriminate between particular persons or between any classes or descriptions of person.*"²⁹
- 3.14 The licence also requires that the routes and the SO shall "*cooperate with any Potential Provider, or Potential Funder or appropriate franchising authority so as to identify ways in which its reasonable requirements in respect of the allocation of capacity on the Network may be satisfied.*"³⁰
- 3.15 The licence also requires Network Rail to ensure that capacity allocation and timetabling decisions are made transparently and impartially (including ensuring that there is no undue discrimination).³¹
- 3.16 ORR monitors and enforces compliance with the network licence.

Competition law

- 3.17 ORR is a designated national competition authority with powers held concurrently with the CMA to apply competition law in markets relating to the supply of services relating to railways.³²
- 3.18 Chapter I of the Competition Act 1998 prohibits any agreement or concerted practice which has the object or effect of preventing, restricting or distorting competition in the

²⁷ Conditions 1.1 to 1.4 of the network licence

²⁸ Conditions 1.7 to 1.8 of the updated network licence

²⁹ Condition 20 of the updated network licence

³⁰ Conditions 6.11 and 7.11 of the updated network licence

³¹ Conditions 5.10 and 7.13 of the updated network licence

³² Section 67 of the Act

UK. Chapter II of the Competition Act prohibits the abuse of a dominant market position in the UK.

3.19 ORR has extensive powers to investigate companies believed to be involved in anti-competitive activities. We have published guidance on our approach to the enforcement of the Competition Act 1998 in relation to the supply of services relating to railways. We encourage all market participants to familiarise themselves with this guidance.³³

3.20 In the context of open access specifically, we might be concerned if, for example, we were to find that:

- (a) Franchised TOCs were making access applications to ORR merely to ensure that another operator is prevented from competing in the first place, or is ‘squeezed out’ of the market after entering. ORR considers that such decision-making could be construed as anti-competitive rather than genuine commercial behaviour driven by revenue-maximising incentives.
- (b) Pricing strategies were not based on genuine commercial rationale. We recognise that price competition is an inevitable and rational response of an incumbent operator to direct on-rail rivalry – indeed, this is a welcome benefit of such competition. While a pricing strategy based on maximising yields is highly likely to be legitimate, commercial decision making or conduct which is designed with the aim of foreclosing a competitor, such as reducing fares below the profit-maximising level, could be construed as anti-competitive.
- (c) An operator took action with the object or effect of unreasonably blocking or obstructing access by OAOs to suitable rolling stock and/or service facilities, such as stations and depots, and sales facilities.

Access, Management and Licensing Regulations

3.21 Regulation 32 of the AMR provides for an aggrieved access applicant to bring an appeal “if it believes it has been *unfairly treated, discriminated against or is in any other way aggrieved*” in relation to specific matters, which include matters relating to access to services and charges levied.

3.22 ORR also has enforcement powers under the AMR. Regulation 34 of the AMR requires ORR to monitor the competitive situation in the rail services market. This duty sits alongside our monitoring responsibilities under the Act and competition law (see above).

³³ https://orr.gov.uk/data/assets/pdf_file/0019/21367/competition-act-guidance.pdf

4. Next steps

- 4.1 We welcome comments and ideas from interested parties on the monitoring framework set out in this document. In particular, we welcome any views on the metrics we plan to monitor, including whether there is anything missing from our proposed framework or whether there are particular areas within the framework that we should focus on.
- 4.2 Please send any comments to beth.tasker@orr.gov.uk by 22 May 2019.
- 4.3 We intend to commence our monitoring activities later this year. As noted above, we will be keeping our monitoring framework under review, both in terms of the metrics that we monitor, and our approach. In particular, we will continue to consider ways in which we might develop our approach to analysing the information we gather, to ensure any findings we draw from it are as robust as possible.
- 4.4 We will also be engaging with stakeholders, namely aspirant and existing OAOs, at roughly six-month intervals, to gather feedback on market developments and any concerns that they may have. We expect to hold our first open access industry round-table in autumn 2019. Again, we welcome comments from interested parties on the format and content of ongoing stakeholder engagement.



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