

**Consultation draft:
ORR's approach to
reviewing markets**

June 2009



OFFICE OF RAIL REGULATION

Contents

| | | |
|-----------|--|-----------|
| 1. | Introduction to the consultation..... | 1 |
| 1. | Introduction to the guidance | 5 |
| 2. | Why we study markets | 7 |
| 3. | How we select markets to study..... | 9 |
| | Sources | 9 |
| | Choosing which suggestions to progress | 9 |
| 4. | How we carry out market studies and the range of outcomes | 13 |
| | Our market studies programme | 14 |
| | Three-stage approach | 14 |
| | Research studies | 15 |
| | Public studies | 16 |
| | Remedies study..... | 19 |
| | Handling information..... | 20 |
| | Annex A: The statutory framework..... | 23 |
| | Introduction..... | 23 |
| | The Railways Act 1993..... | 23 |
| | The Enterprise Act 2002..... | 24 |
| | European legislation | 25 |
| | Annex B: Market study proposal form | 27 |
| | Annex C: List of consultees | 29 |
| | Annex D: Consultation criteria..... | 31 |

1. Introduction to the consultation

1.1 The current version of the guide to *ORR's approach to reviewing markets* was issued in April 2006¹. After three years, we now want to update the guide in line with experience in conducting market studies in order to:

- align our approach to keeping markets under review with the principles set out in our corporate strategy 2009-2014² in general and by including an insert to the first of our prioritisation criteria to reference consumer disbenefit;
- incorporate the criteria that we use to decide which markets to prioritise for study³; and
- to reflect the lessons learned, for example, we have increased the time we have allowed for the three stages of market studies, in the light of experience. In particular, we have allowed up to six months rather than three months for a second stage public study. This is necessary to give time for a 12-week public consultation.

1.2 The revised guide does not introduce new policies or procedures. The purpose of the consultation is therefore to gather views to help us ensure the clarity and usefulness of the revised guide. This consultation seeks views from all those who have an interest in ORR's market studies, such as rail companies, governmental organisations and bodies representing passengers' and freight-users' interests. In particular we are interested in responses to the following questions:

- Is the guide sufficiently comprehensive for your purposes? If not, what other aspect of our market studies programme or level of detail would you like to see included?

¹ Currently available at: <http://www.rail-reg.gov.uk/upload/pdf/282.pdf>

² We published our 2009-14 corporate strategy in December 2008 following a public consultation. The strategy is available at: <http://www.rail-reg.gov.uk/upload/pdf/388.pdf>

³ We introduced our market study prioritisation criteria in September 2007 following a public consultation. The conclusions are available at: http://www.rail-reg.gov.uk/upload/pdf/candp-conc_mkt-stdy_pri_crit.pdf

- Do you agree that interpreting our criteria in line with our strategic themes will help us prioritise the most important areas to study, thereby helping to deliver our corporate strategy of promoting safety and value in Britain's railways? If not, what alternative would you prefer?
 - Is the three-stage approach clear? If not, what would make it easier to follow?
 - Are the new names for and descriptions of the three stages clear, that is, are they sufficiently reflective of what each stage is designed to achieve?
 - Will you use this guide? If not, why not and in what way could we make the guide more useful for you?
- 1.3 We would also like to take this opportunity to ask for suggestions for markets to study during 2010-11. If you would like to propose a market for study, please use the form at Annex B to describe it to us.
- 1.4 If you have any questions regarding the content of the revised guide, please contact Chris Dodds, competition and consumer policy manager on 020 7282 2144 or at Chris.Dodds@orr.gsi.gov.uk. Responses and suggestions for markets to study are welcome by close on **2 September 2009** via email or post to Philip Willcox at:
- Philip Willcox
Competition and consumer policy support
Office of Rail Regulation
One Kemble Street
London
WC2B 4AN
- Email: Philip.Willcox@orr.gsi.gov.uk
- 1.5 We cannot guarantee that responses to our consultation received after this deadline will be taken into account. When responding, please state whether you are responding as an individual or representing the views of an organisation. If responding on behalf of a larger organisation please make it clear who the organisation represents, and where applicable, how the views of members were assembled.
- 1.6 In your response, you should make it clear if you want us to keep all or part of your response confidential. Otherwise we will make it available in our library and on our website and may quote from it. If you want us to keep your

response confidential, please provide a statement summarising your response (leaving out the confidential information) that we can treat as a non-confidential response. We may also publish your name in future documents or on our website, unless you tell us that you do not want us to do so.

- 1.7 A list of organisations/stakeholders that we have sent this consultation to is included in Annex C. If you have any suggestions of others who may wish to be involved in the consultation process please let us know.
- 1.8 This consultation has been produced in accordance with the principles of the Better Regulation Executive's *Code of Practice on Consultation* which are replicated at Annex D. If you consider that this consultation does not comply with the criteria or have comments about the **consultation process** please contact Ken Young, director of external affairs on 020 7282 3732 or Ken.Young@orr.gsi.gov.uk.
- 1.9 Copies of this document are available on our website: www.rail-reg.gov.uk or from our library.
- 1.10 After the consultation has closed, we will publish on our website a summary of responses and a revised guide which takes into account those responses.

1. Introduction to the guidance

- 1.1 This is a guide to our approach to reviewing markets. It sets out why we study markets, how we prioritise markets to study, the way we conduct market studies and describes the range of possible outcomes. Annexes set out our legal powers and provide a form for stakeholders to use to suggest markets for us to study.
- 1.2 This guide will be of most interest to individuals and organisations involved in funding, operating, using and representing users of railways in Great Britain.
- 1.3 Please note that this is not legal advice and does not substitute for a reading of the relevant law. Neither does it deal directly with:
- our powers to investigate complaints under the Competition Act 1998 (Competition Act). It should, therefore, be read in conjunction with the Competition Act guidelines (OFT430) *Application to services relating to railways*⁴; or
 - our powers as a designated enforcer of some consumer protection legislation under Part 8 of the Enterprise Act 2002 (Enterprise Act).
- 1.4 This document replaces our earlier guide to *ORR's approach to reviewing markets* which we published in 2006 and incorporates our market study prioritisation criteria which we published in 2007. We may revise and reissue this guide in the light of experience and other developments in law and practice.

⁴ Also published on our website and entitled ORR Competition Act Guideline, *Application to services relating to railways*, Office of Rail Regulation, August 2005. <http://www.rail-reg.gov.uk/upload/pdf/247.pdf>

2. Why we study markets

- 2.1 ORR promotes safety and value in Britain's railways. We have duties to keep rail markets under review and to collect information about railway services. Where necessary we will take appropriate measures where markets are not working to the benefit of users or funders. These duties support our functions as a concurrent competition authority for services related to railways and as combined safety and economic regulator. See Annex A for more detail about the statutory framework.
- 2.2 Our corporate strategy makes it clear that we believe that the best way in which we can contribute to achievement of our vision for the industry is (amongst other things) to:
- promote, where possible, effective market mechanisms and competition, because these are more likely to be responsive to the changing needs of rail users and more likely to lead to better outcomes than purely administrative mechanisms;
 - use our powers to apply effective regulation where market mechanisms do not work or are unlikely to work; ... [and]
 - promote true partnership in the industry, particularly between Network Rail and its train operator customers and its suppliers. In many cases alignment of incentives and market mechanisms will lead to such partnership; we can add most value where such mechanisms are not working effectively...⁵.
- 2.3 A key focus for us, therefore, will be to continue to keep a close eye on railway markets to ensure that they are working effectively and efficiently for the benefit of users and funders (including the taxpayer) and most importantly to ensure that our regulatory response remains fit for purpose and focused in on the right areas. In our corporate strategy, under the chapter on delivery, we

⁵ Paragraph 9, Chapter 1, *Promoting safety and value in Britain's railways: our strategy for 2009-14*, ORR, December 2008

state that: the use of market studies to enable us to identify how well markets are working is an example of how we identify priorities⁶.

- 2.4 Our commitment to keeping markets under review is demonstrated in our programme of market studies which aims to review the workings of all the significant markets associated with the railway sector over time. Market studies can cover particular practices across a range of suppliers or services as well as looking at particular economic markets. We might, for example, look at the impact that certain regulations have on the functioning of a railway market and similarly whether government intervention (including ORR's actions) is helping or otherwise the competitive process.
- 2.5 Market studies can, therefore, be examinations into the causes of why particular markets are not working well, leading to proposals as to how they might be made to work better. We also aim to keep up to date in a general sense with how rail markets are working. We therefore also carry out market studies to improve and update our knowledge of markets or practices, including developing markets, so that our approach to regulation remains responsive and proportionate to current market conditions and is targeted at the right areas.

⁶ Paragraph 6, Chapter 5, *Promoting safety and value in Britain's railways: our strategy for 2009-14*, ORR, December 2008

3. How we select markets to study

Sources

- 3.1 We use a variety of sources from which to select possible markets for study. We have information available to us from our own activities, industry stakeholders, passenger representative organisations, government bodies and public sources. We will identify areas for study on our own initiative from these sources. We may also be prompted to carry out a research study by interest shown in a particular area at European level perhaps in the development of railway specific legislation or a supercomplaint under the Enterprise Act⁷.
- 3.2 In our work as regulator, information provided to us by market participants is very important. Our assessment of how markets are working has to be informed by the experience and knowledge of those operating within it (both suppliers and customers). We remain open, therefore, as to suggestions on what areas of the railway we should prioritise for review. Please use the form at Annex B to make any suggestions to us.

Choosing which suggestions to progress

- 3.3 We have a wide range of information available to us as to how rail markets are functioning, and a comprehensive set of powers to ensure that markets work effectively. There is a balance to be struck between how we use our resources to review and monitor rail markets and to carry out our other regulatory and competition activities during the course of a business year. There are also decisions to be made as to the means by which we can harness best value out of activities by, for example, focusing in on those areas where there is most risk of market failure.

⁷ Under section 205 of the Enterprise Act designated consumer bodies may make supercomplaints to sectoral regulators, where there are market features that may be harming consumers to a significant extent. A supercomplaint may be made to us in relation to the rail industry. We must respond to a supercomplaint within 90 days of receipt stating whether we will take action and if so what that action will be. There is a statutory duty obliging us to consider the complaint, but this does not extend to requiring us to take any action following that initial review. We would characterise this initial review as a research study, and can, therefore, confirm our duties under section 11 of the Enterprise Act would, in this instance, preclude the application of the criteria.

- 3.4 Consistent with this corporate approach we have adopted the following prioritisation criteria for selecting areas to review over the course of the business year:
- (a) The scale and significance of the possible problems, measured, for example, by market size or value or by the size of the potential detriment (with particular reference to the end user), their contribution to whole industry costs, and/or their significance to productivity and economic growth.
 - (b) The extent to which studying this market adds value to our other business priorities.
 - (c) The level of stakeholder (including public) concern about this market.
 - (d) The extent to which studying this market presents us with an opportunity to influence external policy.
 - (e) The extent to which knowledge of the market would progress our responsibilities to keep the supply of railway services under review and to fulfil our monitoring role under EU-driven legislation.
- 3.5 After conducting a short scoping exercise to enable us to effectively assess a suggestion, we score it against these five criteria. Potential research studies are rated on a scale with six different levels ranging from the highest priority (a rating of 'very high') through to the lowest priority (a rating of 'very low').
- 3.6 We base our assessment of the scale and significance of possible problems (criterion (a)) on such quantitative and qualitative evidence as is readily available in advance of a study being commenced. This research may make use of any information gathered via our other regulatory functions and other information publicly available. The evidence we use to rank alternative possibilities may include some or all of the following.
- The likely current value of markets in financial terms, together with any available intelligence on whether this value is growing or contracting over time.
 - The nature of the potential problems that have been identified. For example, we will tend to give a higher priority to a market study where there are features which could distort the competitive process and have a

direct impact on passenger or freight customers than one which was likely to be of modest benefit to industry stakeholders.

3.7 Our 2009-14 corporate strategy has seven key strategic themes for delivery⁸. These have particular relevance to the application of criterion (b) above. In considering the extent to which studying a given market adds value to our other business priorities, we will look at the extent to which a study of that market will support one or more of these strategic themes. Each theme is equally important. These themes are as follows:

- focus on the needs of passengers and freight customers, now and for the future;
- excellence in health and safety culture and risk control;
- excellence in asset management;
- improved industry planning and timely and efficient delivery of major projects;
- efficient use of capacity on the mainline network;
- development by the industry of the capabilities of its people; and
- high quality data and information for key decisions.

3.8 Please note that it is not necessary for all of the criteria to be met in order to prompt a study. In the absence of any competing priorities, for example, we would consider reviewing a market which met only one. Secondly, the criteria are not in any order of importance and the weight we assign to them in any particular circumstance will depend on a number of factors including the extent to which each criterion is met. For example, it is possible that there will be a set of issues where the level of stakeholder concern will lead us to reassess our business priorities under the programme. Similarly, an issue which has come under review at a European level might lead us to prioritise a market even though no concern has been raised domestically.

⁸ Paragraph 20, Chapter 3, *Promoting safety and value in Britain's railways: our strategy for 2009-14*, ORR, December 2008

3.9 We normally pursue enforcement action rather than conducting a market study where we have reasonable grounds to suspect:

- a breach of the competition act;
- a breach of a licence or other regulatory provision; or
- a breach of consumer law.

It is also possible that during the course of a market study evidence of a breach may come to light which leads to enforcement action. Possible outcomes of each stage of markets are discussed in more detail in the next section.

4. How we carry out market studies and the range of outcomes

- 4.1 In this section we cover our market studies programme, our three-stage approach to managing studies, the potential outcomes of each stage and some key points about information handling.
- 4.2 Before describing our approach, we note that other bodies also carry out work to keep markets under review. These bodies include the Office of Fair Trading (OFT), sectoral regulators with concurrent powers, the Competition Commission (CC) and the European Commission. We liaise with concurrent regulators and the European Commission to ensure that our work does not duplicate theirs.
- 4.3 The European Commission may decide to conduct an inquiry into a particular sector of the economy or into particular types of agreements across various sectors, "where the trend of trade between Member States, the rigidity of prices or other circumstances suggest that competition may be restricted or distorted within the common market"⁹. Examples include the Pharmacy Sector Inquiry and the Energy Sector Inquiry. These Inquiries tend to last around 16 months from inception to final report and include stakeholder consultation. Outcomes from Sector Inquiries may include: pursuing individual cases under competition rules - Article 81/82 cases, informing the European Commission's view in merger cases and/or changing the regulatory framework.
- 4.4 Market studies should not be confused with the market investigations carried out by the CC or sector inquiries carried out by the European Commission as described above. On reference, the CC will conduct a detailed public investigation and reach its own conclusions about the market. The CC has the power to impose remedies that go beyond those available to us, for example structural remedies. Further details of the UK market investigation regime and remedies available to the CC are available on the CC's website¹⁰.
- 4.5 Our market studies are more usually much smaller scale projects.

⁹ Article 17 (1) of Regulation (EC) No 1/2003

¹⁰ This can be found at: www.competition-commission.org.uk

Our market studies programme

- 4.6 We manage each market study as an individual project within an overarching programme. This enables us to steer our series of studies in a way which collectively supports our aim of underpinning focused and effective regulation. It also helps us to efficiently and effectively manage individual studies. Our programme and project management systems are informed by best practice and scaled to the task at hand.

Three-stage approach

- 4.7 Our approach has three stages. These are:

- an initial diagnostic **research study** (usually lasting up to three months), in which we will gather information in-house, from our own records, governmental and public sources to assess how a market is functioning and whether there appear to be market problems that warrant further attention;
- a more detailed consultative **public study** (usually lasting up to six months), including consultation with external stakeholders, in which we make a fuller assessment of any concerns identified during the research study; and
- a concluding **remedies study** (usually lasting up to twelve months), including further engagement and appropriate public consultation with external stakeholders in which we reach a view on the appropriate remedies for market problems, we would use this stage, for example, to develop undertakings in lieu of a market investigation reference.

- 4.8 A market study could, as was seen in our scrutiny of the rolling stock leasing market, lead us to make a reference to the Competition Commission, but this is by no means the only potential outcome. We could, alternatively take a view that the market is operating perfectly well, indeed so well that it would be appropriate to step back from regulation.

- 4.9 We typically start at the research study stage, progressing to the public study stage only if we identify issues that warrant further attention. If, following a public study, we decide that there are problems for which we are best placed to determine the remedy, we can progress to a remedies study.

Research studies

- 4.10 Research studies serve as a knowledge-gathering exercise; as a diagnostic tool. This stage does not represent a burden on business but on the contrary is used to help us decide whether it would be proportionate to progress to the next stage which will inevitably need industry input.
- 4.11 This may take up to three months, but can be shorter, for example, if we receive a well-researched compelling submission that would mean we could reach a conclusion (such as progressing to the next stage) in a matter of weeks.
- 4.12 Our research studies aim to harness and consolidate all readily available information in order to take a view as to whether there are issues which would merit a further look. As an economic and safety regulator for the railways we have a significant amount of information and knowledge in-house, gathered during the normal course of our daily interaction with the industry. We also make use of information that is already in the public domain or held by other government departments or official sources.
- 4.13 At this stage, we will not normally seek information from market participants, in order to limit the burden on industry. However, where a suggestion is made by an industry party (for example, using our suggestion form) we may consider it necessary to contact that party to explore the matter they have raised to ensure we fully understand it. Where they are keen to take part, we may decide to informally obtain background information from external parties. We are conscious however that involving one party may necessitate involving others to provide a balanced perspective. We therefore reach a considered decision at the start of a research study as to the most effective and efficient method for conducting the study given the subject under review. It is entirely possible that only industry participants could provide us with the information we need to come to a robust view. We expect such contact to be, however, rare.
- 4.14 A research study may conclude that:
- there are no identifiable competition concerns and no further action is required at that time;

- there are no identifiable competition concerns and this will inform, or prompt a review of, our regulatory approach;
- there are concerns which merit a more detailed look by progressing to the next stage;
- we may find grounds to suspect that there has been a breach of the prohibitions within Competition Act and choose to investigate using our powers under that legislation; or
- similarly, there may be matters capable of resolution under sector specific or consumer law powers.

4.15 We aim to be as transparent as possible in publicising the occurrence of market studies and we will set out in our business plan the areas we intend to prioritise for study during the period. We will also as a general rule publish summaries of our research studies on our website¹¹. These summaries provide an opportunity to comment and to provide further information and intelligence in circumstances where a conclusion is not consistent with the experience of industry participants.

Public studies

- 4.16 During this stage (which will usually take up to six months) we aim to make a fuller assessment of any concerns identified during the research study including, where relevant, reaching a firmer view on market definition. We generally do this by asking for information (informally) from key market players. The overarching principle we follow during a public study is to reach a decision as quickly as possible so as to limit the perception of risk and uncertainty in the industry.
- 4.17 We expect normally to publicise the fact that we have entered into a second stage market study and depending on the scale of the market, we are likely to invite third parties to register their interest. In some circumstances the existence of commercial sensitivities may weigh against making the study public at this stage. We therefore reserve the right not to publicise a study if this is the case. More usually, there are clear countervailing benefits of

¹¹ <http://www.rail-reg.gov.uk/server/show/ConWebDoc.9564>

providing opportunities for others to demonstrate a relevant interest in the market concerned and to involve all potential stakeholders.

- 4.18 When announcing a study, we issue a press notice and publish terms of reference for the study including its scope and projected timescales. In cases where such an announcement could be market sensitive it is initially made to the Stock Market via the Regulatory News Service (RNS).
- 4.19 During the course of the public study, we gather information from market participants and other key parties, for example other public bodies and consumer groups. We may do so either through questionnaires or market research telephone surveys. Where appropriate, we may also hold industry-wide seminars, meetings and/or interviews. We may also commission research from consultants; for example, we may require specific railway technical expertise and advice.
- 4.20 We would normally expect to consult publicly during this stage. We would do so both as a requirement of statute (where we are considering making a market investigation reference) and also as a matter of policy, before adopting any of the other outcomes below, including concluding on a clean bill of health. Through these consultations, stakeholders will be given the opportunity to comment on matters such as the criteria being used to assess competition in the particular market(s) under review and on our proposed methodology.
- 4.21 There are a number of potential outcomes from a public study including:
- a clean bill of health and no further action is required at this time;
 - a clean bill of health and this will inform, or prompt a review of, our regulatory approach;
 - we have grounds to suspect that any feature, or combination of features, of the market under scrutiny prevents, restricts or distorts competition.
 - We may progress directly to a reference to the CC or decide we have sufficient information available to us to accept undertakings in lieu; or

- in order to assist in accepting undertakings in lieu¹², we may then progress to a remedies study (which can include the exercise of formal powers of investigation¹³).
- we find grounds to suspect that there has been a breach of the prohibitions within the Competition Act and choose to investigate using our powers under that legislation, similarly there may be matters capable of resolution under sector specific or consumer law powers;
- we have identified issues which could be more effectively dealt with elsewhere, for example, under franchise arrangements. We could, in this circumstance, write a report to relevant franchising authorities including recommendations as to how competition concerns could be met within the franchise or alternatively recommend that franchising authorities take certain matters into account when re-letting the franchise; or
- a detailed report may be made to the Government in circumstances where a significant issue or a pattern of behaviour has been identified for which a remedy is not available under our powers or within the franchise and the matter is one which would not qualify for a referral to the CC. This report may, for example, include recommendations for changes to laws or regulations, which may, in their current form, be creating abnormal conditions of competition.

Making a market investigation reference

4.22 In considering whether to make a reference to the CC, we apply our Railways Act section 4 public interest duties and take into account a number of factors including:

- the nature and significance of the competition problems that we believe exist in the market concerned;
- whether a market investigation reference would be a proportionate response to the scale of the competition problems identified;

¹² under section 154 of the Enterprise Act

¹³ set out at section 174 of the Enterprise Act

- whether it would be possible to accept commitments/undertakings in lieu of a market investigation reference (see below);
- whether we, as an alternative to the CC, have the regulatory powers to fully address the concerns identified; and/or
- whether appropriate remedies are likely to be available to the CC or in the absence of appropriate remedies whether a CC report might provide a useful alternative contribution.

4.23 The Enterprise Act obliges us to consult people whose interests are likely to be substantially affected before making a decision about whether or not to make a market investigation reference. As noted above, we would usually expect to consult as a matter of policy before concluding a public study and that consultation will generally be public.

Remedies study

4.24 Once we have decided to progress to a remedies study, for example, to assist in accepting undertakings in lieu of a market investigation reference, we set out and publish the terms of reference for the remedies study including its scope and projected timescales. In cases where such an announcement could be market sensitive it will initially be made to the Stock Market via the Regulatory News Service (RNS). At this stage stakeholders will be given further opportunity to comment on matters such as the criteria being used to assess competition in the particular market(s) under review and on our proposed methodology. This stage is public and may take up to twelve months to complete.

4.25 We will gather information using a similar wide range of means and sources as for a public study. The difference is the time available and the scope for use of formal information gathering powers¹⁴ which enable us to give notice to any person requiring him to give evidence to us.

4.26 Section 154 of the Enterprise Act gives us the power to accept undertakings in lieu of a reference to the CC. In exercising this power, we must have regard to the need to achieve as comprehensive a solution, as is reasonable and practicable, to any adverse effects on competition identified (and any

¹⁴ using our powers of investigation under section 174 of the Enterprise Act

detrimental effects on consumers so far as they result or may be expected to result from such adverse effects). We may also have regard, as appropriate, to the effect of the undertakings on any relevant customer benefits¹⁵ arising from a feature or features of the markets concerned.

- 4.27 The Enterprise Act obliges us to consult people whose interests are likely to be substantially affected before making a decision about whether or not to accept undertakings. As noted above, we would usually expect to consult as a matter of policy before concluding a public study and that consultation will generally be public.
- 4.28 The final remedies study report will set out our conclusions including, where appropriate, a discussion of options, the final recommendations and a timetable for implementation of recommendations.

Handling information

- 4.29 The Freedom of Information Act 2000 (FOIA) gives any person the right to request non-published information from us. This is known as “the right to know”. We are committed to openness and transparency. However, we recognise that we will obtain information in the context of market studies and competition investigations that should not be widely disclosed. There are certain exemptions from the FOIA that could be relevant to information held by us through the exercise of our functions.
- 4.30 Part 9 of the Enterprise Act restricts our ability to disclose information we receive in the course of our work. In particular, the Enterprise Act contains a general prohibition against the disclosure of information that relates to the affairs of a business or individual, unless disclosure is otherwise permitted (for example where the parties have given their consent). It is a criminal offence to disclose information in breach of those provisions.
- 4.31 Section 145(1) of the Railways Act restricts the disclosure by ORR of information it has obtained under or by virtue of the Railways Act. However, section 145(2) of the Railways Act allows disclosure for the purpose of facilitating our carrying out any of our functions under the Railways Act, the

¹⁵ Including greater innovation or greater choice, for more detail on such factors please refer to *Market Investigation References: Competition Commission Guidelines*, paragraphs 4.26 to 4.38.

Transport Act 2000 and the Railways Act 2005, including our concurrent competition powers. Therefore, we can use or disclose information gathered under the Railways Act to facilitate our Enterprise Act functions. Any disclosure in breach of section 145 is a criminal offence.

- 4.32 Where information we have obtained in the course of investigations falls within the prohibition of disclosure contained in section 145 of the Railways Act or Part 9 of the Enterprise Act, it would be exempt from disclosure under section 44 of the FOIA. There also exemptions, for example, for information would prejudice any civil proceedings (including competition or consumer proceedings) if disclosed.

Annex A: The statutory framework

Introduction

1. The statutory framework for keeping British rail markets under review is governed by the Railways Act 1993 and the Enterprise Act 2002 and the Railways Infrastructure (Access and Management) Regulations 2005¹⁶ which transposed and implemented the requirements of the First Package of EU Rail Directives¹⁷ and parts of the Second Package¹⁸. This framework implicitly recognises that knowledge of markets assists us in exercising our functions and enables us to develop proportionate and evidence based regulatory policy.

The Railways Act 1993

2. Section 69 of the Railways Act 1993 provides that we must, so far as it appears practicable from time to time, keep under review the provision of "railway services"¹⁹ in Great Britain and elsewhere. We must also (again so far as it appears practicable from time to time) collect information, with respect to the provision of those services, in order to facilitate the exercise of our functions under Part 1 of the Railways Act 1993.
3. Our functions include approving agreements for access by operators to track, stations and light maintenance depots and issuing licences to operators of railway assets. We also have a number of public interest duties to balance in the performance of our functions. These are primarily set out at section 4 of the Railways Act 1993, those of particular relevance to our market studies programme include:

¹⁶ SI 2005 No. 3049

¹⁷ Directives 2001/12/EC, 2001/13/EC and 2001/14/EC - 'First Rail Package'

¹⁸ In particular we refer here to Directive 2004/51/EC, which opens up the domestic freight market to competition in each Member State

¹⁹ Section 82 of the Railways Act defines railway services as: services for carriage of passengers, carriage of goods by railway, light maintenance services, station services and network services.

- to promote efficiency and economy on the part of persons providing railway services;
- to protect the interests of users of railway services; and
- to promote competition in the provision of railway services for the benefit of users of railway services.

The Enterprise Act 2002

4. We have a concurrent power with the OFT to make a reference to the Competition Commission (CC), under Part 4 of the Enterprise Act, if we have:

“reasonable grounds for suspecting that any feature, or combination of features, of a market in the United Kingdom for goods or services prevents, restricts or distorts competition in connection with the supply or acquisition of any goods or services in the United Kingdom or a part of the United Kingdom”.

5. The Enterprise Act defines a “feature” of a market as:
 - the structure of the market concerned or any aspect of that structure;
 - any conduct (whether or not in the market concerned) of one or more than one person who supplies or acquires goods or services; or
 - any conduct relating to the market concerned of customers of any person who supplies or acquires goods or services. Conduct is described in the Enterprise Act as including “any failure to act (whether or not intentional) and any other unintentional conduct”.
6. Market investigation references focus on the functioning of a market as a whole, whereas the Competition Act deals with abuses arising from the conduct of a one or more firms within a market. However, if the work revealed that the true mischief is associated with structural features, it may still be appropriate to make a reference to the CC.
7. Concurrent jurisdiction under the Enterprise Act goes wider than the definition of railway services in section 82 of the Railways Act and includes services such as the leasing or maintenance of rolling stock as provided by the rolling stock companies (ROSCOs), the supply of goods and services to Network

Rail, and the provision and purchase of goods and services to, or by, London Underground Limited (LUL).

European legislation

8. The First Package of EU Rail Directives opened up access to the international rail freight market and provides a transparent regulatory regime for the allocation of capacity and charges for access to the rail infrastructure across the EU. The Second Rail Package, and in particular Directive 2004/51/EC, opened up the domestic freight market to competition in each Member State.
9. Article 10(7) of Directive 2001/12 on the development of the Community's railways, requires the regulatory body established under Directive 2001/14²⁰ to monitor competition in rail markets and further on the basis of a complaint or, where appropriate, on our own initiative, to take appropriate measures to correct undesirable developments in these markets.
10. The Railways Infrastructure (Access and Management) Regulations 2005 (the Access and Management Regulations) which transpose and implement a number of the requirements of the First Package of EU Rail Directives and parts of the Second Package²¹ came into force on 28 November 2005²².
11. Regulation 30 of the Access and Management Regulations provides us with three interlinking roles of:
 - monitoring competition;
 - dealing with complaints from aggrieved parties; and
 - whether on our own initiative or as a result of a complaint taking appropriate measures to correct undesirable developments.

²⁰ Article 30 (2001/14/EC) requires Member States to appoint a regulatory body, independent of the Infrastructure Manager, as a charging body, an allocation body and to whom applicants may lodge an appeal if they feel unfairly treated, discriminated against or in any other way aggrieved.

²¹ In particular we refer here to Directive 2004/51/EC, which opens up the domestic freight market to competition in each Member State

²² The Railway (Licensing of Railway Undertakings) Regulations 2005 (SI 2005/3050), transposes Directive 95/18/EC as amended by 2001/13/EC and 2004/49/EC

12. The scope of the EU Directives is wider than the railway otherwise regulated within Great Britain. To reflect this, the Regulations ensure that our appeal role (including that under regulation 30) extends to facilities otherwise exempt from the Railways Act by way of *The Railways (Class and Miscellaneous Exemptions) Order 1994*. We are also, for the purpose of the Access and Management Regulations, the regulatory body for the Channel Tunnel Rail Link (CTRL) and we have with concurrent competition powers over the CTRL under the Competition Act and the Enterprise Act. Our jurisdiction does not extend to the Channel Tunnel or to shuttle services.
13. The Directives, which are aimed at liberalising rail markets specifically, recognise that there may be barriers to access and/or entry that have a significant impact on railway undertakings and potentially the number of competitors able to thrive or enter into rail markets, but which may have little or no economic effect on downstream markets, particularly where the passenger or good is able to travel by another mode. For example, a railway undertaking may require access to a specific rail terminal in order to make his rail service economically viable, but the rail terminal may not be considered an essential facility in competition law terms where the end customer can actually choose a number of other substitute services including a number of road-based alternatives. We therefore consider there is a key difference between our duty to monitor competition under regulation 30 (Article 10.7) and our concurrent competition powers.
14. The range of powers available to us under the Railways Act, the Access and Management Regulations and as a concurrent competition and consumer authority, are sufficiently wide to enable us to fulfil the specific responsibilities given to us by way of regulation 30. However, if a novel situation arose that did not fall within the scope of our powers, we would consider at that time, whether there would be benefit to publishing or submitting a report to Government and/or the European Commission.
15. Regulation 31 of the Regulations provides us with information gathering powers, to assist us with the responsibilities within the Regulations. We recognise, however, that within the UK context there is already a significant measure of ex-ante regulation of the railways, and as a consequence there is a broad range of information already available to it. We normally exercise these particular information gathering powers only in the light of an appeal or a complaint.

Annex B: Market study proposal form

| Office of Rail Regulation market study proposal form | |
|---|--|
| Name Organisation Contact details | Please state whether you would like your or your organisations' identity kept confidential. |
| Proposed market for study | This need not be an economic market defined according to competition law. It could be an area of the British rail sector. |
| Description of problems | Please set out the problems and how they are likely to lead to significant harm to consumers (passengers or freight customers) |
| Market importance | Please explain why this is an important area for us to look at, with reference to our prioritisation criteria in our guide to <i>ORR's approach to reviewing markets</i> . Please be as specific as possible and include details such market turnover or the significance of the service/product to the rail sector and views on where this would fit within ORR's strategic themes. |
| Supporting information | Please either attach the evidence you have to support this proposal, or provide your sources if these are easily accessible, such as internet hyperlinks to reference documents. |
| Further assistance | Please state the level of further assistance that you or your organisation would be able offer us if we prioritise your proposal for study. |
| <p>Please note that we normally assess and identify areas to study on an annual basis, to inform corporate planning for the forthcoming business year. This means your proposal will usually be assessed alongside other proposals in the Autumn for study from the following Spring.</p> | |

Annex C: List of consultees

Angel Trains Limited
Association of Train Operating Companies
Civil Aviation Authority
Competition Commission
Department for Transport
Department for Business, Innovation and Skills
European Commission, Director General Competition
Freight train operating companies
HSBC Rail (UK) Limited
London Travelwatch
Merseytravel
NERA Economic Consulting
Network Rail
Northern Ireland Authority for Utility Regulation
Office of Communications
Office of Fair Trading
Office of Gas and Electricity Markets
Oxera
Passenger Focus
Porterbrook Leasing Company Limited
Railfreight Group
The Rail Industry Association
The Law Commission
The Law Society
The Law Society of Scotland
The Postal Services Commission
Train operating companies
Transport *for* London
Transport Scotland
Water Services Regulation Authority
Welsh Assembly Government

Annex D: Consultation criteria

Public bodies are required to perform consultations in accordance with the following seven criteria wherever possible:

Criterion 1: When to consult

Formal consultation should take place at a stage when there is scope to influence the policy outcome.

Criterion 2: Duration of consultation exercises

Consultations should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible.

Criterion 3: Clarity of scope and impact

Consultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposals.

Criterion 4: Accessibility of consultation exercises

Consultation exercises should be designed to be accessible to, and clearly targeted at, those people the exercise is intended to reach.

Criterion 5: The burden of consultation

Keeping the burden of consultation to a minimum is essential if consultations are to be effective and if consultees' buy-in to the process is to be obtained.

Criterion 6: Responsiveness of consultation exercises

Consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation.

Criterion 7: Capacity to consult

Officials running consultations should seek guidance in how to run an effective consultation exercise and share what they have learned from the experience.