

Annex

E. MIR test

E1. This annex sets out the factors we have regard to when making the decision on MIR.

Legal Threshold for an MIR

E2. This is set out in the Enterprise Act 2002, Section 131. ORR may make an MIR to the CMA where 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”

CMA guidance on MIRs

E3. CMA guidance on making MIRs is set out in [OFT511 - Market investigation references \(publishing.service.gov.uk\)](#)

E4. An MIR should only be made where it passes the criteria in the Enterprise Act and meets all of the below criteria:

- it would not be more appropriate to deal with the competition issues identified by applying CA98 or using other powers available to the OFT or, where appropriate, to sectoral regulators
- it would not be more appropriate to address the problem identified by means of undertakings in lieu of a reference
- the scale of the suspected problem, in terms of its adverse effect on competition, is such that a reference would be an appropriate response to it
- there is a reasonable chance that appropriate remedies will be available.

E5. ORRs' own guidance on market monitoring states that we will take into account the following factors before deciding whether to make an MIR:

- the nature and significance of the competition problems that we believe exist in the market(s) concerned;
- whether a MIR would be a proportionate response to the scale of the competition problems identified;
- whether it would be possible to accept commitments/undertakings in lieu of a MIR;
- whether appropriate remedies are likely to be available to the CMA, or in the absence of appropriate remedies, whether a CMA report might provide a useful alternative contribution.

ORR Statutory Duties

E6. Under section 4 Railways Act 1993, ORR has general statutory duties that it must apply in making a MIR. We consider the following duties to be particularly relevant:

- Promoting improvements in railway service performance;
- Protecting interests of users of railway services;
- Promoting the use of the railway network in GB for the carriage of passengers and goods, and the development of that railway network, to the greatest extent that it considers economically practicable;
- Contributing to the achievement of sustainable development;
- Contributing to the development of an integrated system of transport of passengers and goods;
- Promoting efficiency and economy on the part of persons providing railway services;
- Promoting competition in the provision of railway services for the benefit of users of railway services; and
- Enabling persons providing railway services to plan the future of their businesses with a reasonable degree of assurance.